

LEGAL AFFAIRS

**Using an Expert Witness in a
Music Copyright Case**

by Judith Greenberg Finell

Most lawyers recognize the need for an expert witness to testify at the trial of a music copyright case. To be of greatest value to the lawyer's case, however, the music expert's participation should not begin on the eve of trial nor as the discovery deadline nears. Rather, the same musical analysis that the expert would do to prepare to testify at trial can assist the lawyer at each stage of a music copyright case. Since the legal and musical issues are usually intertwined, close collaboration with an

expert can help the lawyer build the most effective case or defense, starting even before the complaint is filed.

I. Pre-Complaint Evaluation

A client's belief that a musical work infringes the client's copyright is not objective and may not be accurate. Many gifted, successful composers and songwriters, particularly in popular music, are not schooled in music theory or analysis. Therefore, they cannot always reliably evaluate the degree or significance of the similarities between the compositions involved. An expert's opinion before an action is filed can save the lawyer or client from imposition of sanctions.

In deciding whether to file a lawsuit, an expert can determine how strong a musical case the plaintiff has, target any weak spots, and advise the lawyer on how best to present the musical issues. The expert's opinion

should be derived from a thorough analysis of the plaintiff's and defendant's music, a complete comparison of every element in the two pieces, and a quantitative description of the degree of similarity between them. This analysis will be the basis for all future action in the case.

A. Analysis and Comparison Process

When I am asked for an opinion as to the relationship between two or more pieces of music, I follow a certain methodology that I have developed:

1. Transcription/Transposition

a. Listen to the recordings provided or else play the music myself on a keyboard by reading the score if no recording is available.

b. Transcribe the music I have heard if no comprehensive sheet music is available.

c. Transpose all music to be compared into the same key.

2. Analysis/Comparison

I compare all key musical elements, the most essential one being the melody:

a. Melody is defined as a succession of musical tones combining pitch and rhythm. I compare melodies for similarities and differences in pitch, note sequence and rhythmic patterns. If a large percentage of the same pitches are the same rhythmically, and occur in the same sequence, then I consider the melodies to be substantially similar.

b. Harmony is defined as the relationship between chords and melody, as well as the ongoing sequence of chords within a piece of music. A "chord" results from the simultaneous playing of several pitches, while the succession of several chords constitutes a "chord progression." Harmony supports the melody and is often determined by it. Pieces of music can have very different melodies, but the same chord progressions. If similar or identical chord progressions at issue are also found supporting other obviously unrelated melodies, then the importance of their similarity alone is diminished. In popular and commercial music, certain chord progressions recur often, and by themselves do not indicate identity of pieces of music. With a strikingly similar melody, however, the same chord progression suggests possible plagiarism.

c. Structure in music defines the overall organization of a musical piece. Most popular pieces are organized in a two-part structure of verse and chorus, often followed by a closing section called a "coda." Thousands of pieces of popular music share the same structure. By itself, sharing a common structure does not establish copying. However, if a very unusual structure exists, this is cause for further examination. Within the larger structure of a piece of music, there is also a substructure which is defined by the organization of the musical phrases into measures. In vocal music, these phrases are often determined by the lyrics. By itself, a similar substructure does not determine a similar-sounding piece of music, unless the substructure is unique.

d. Accompaniment lines, both in melody and instrumentation, support the main melody line, which is usually carried by a vocalist or instrumental soloist. If the

accompaniment lines re very similar in melody, then this is further evidence of copying. In addition to similar melodies, if the accompaniment is orchestrated for the same instruments, this is further support for the plaintiff's position.

e. Style of composition/genre is important to determine, because it may be contributing to the overall impression of sameness or difference in two pieces of music. Sometimes, two pieces of music are different in melody and harmony, but they sound alike because of their style. Sometimes they are different, but both fit into the same genre. Conversely, sometimes music that has been copied is disguised by changing from the original style (rock to jazz, for example) or arrangement.

B. Expert Opinion and Report

After thoroughly analyzing the music, the expert should provide the lawyer with information and opinions on the following:

1. What musical elements are similar and to what degree are they alike?
2. How important are the similar elements in causing perceived similarity between the pieces?
3. What is the significance of the similar elements to the musical composition as a whole?
4. Are the similarities obvious or subtle?
5. What elements are dissimilar, and are they more important to the underlying compositions than are the similar portions?

6. What other musical factors could have an influence on the similarities between the pieces?

a. Prior art, such as earlier pieces of music with passages that are similar or identical to the relevant portions of the music at issue.

b. Musical composition traditions, such as basic popular song form in which a chorus and verse section alternate.

c. Standardized musical formulas or procedures, such as the I - IV - V(7) - I chord progression that composers have used for centuries.

II. Commencement of the Action

A. Assisting the Plaintiff

The expert's report covering the subjects listed above should be the basis for the allegations of the complaint. The report should provide the plaintiff's lawyer with information on the most obvious and important musical similarities at issue, and should also warn against reliance upon musically insignificant similarities. The expert's report should indicate the extent of original material in the compositions at issue and where appropriate should discuss relevant prior art.

In framing the complaint, an expert can assist the lawyer in expressing the musical relationships as clearly as possible, using musical terminology properly and effectively, and placing the issues in context. For example, the expert can quantify the amount of similar or identical material (e.g., "In measures 6-10, 50 out of 70 notes are the same"). In defining the significance to the plaintiff's composition of the allegedly copied material, the expert can identify similar musical functions when appropriate

(e.g., "Both songs use the identical melody to set the words of the title" or "Both songs have the identical hook"). Also, an expert can point out unusual compositional procedures that the two songs share (e.g., "Both pieces use a strikingly similar main melodic theme immediately followed by a retrograde [backward reading] of that theme").

The expert's report will also assist the plaintiff's lawyer in deciding whether to move for a preliminary injunction, particularly in evaluating the likelihood of success on the merits.

B. Assisting the Defendant

A defendant who has just been served with process in a copyright infringement action may not be the most dispassionate or reliable evaluator of the merits of the claim. A music expert, based on a comprehensive

analysis of the two pieces of music, followed by a detailed comparison of any similar elements, should be able to advise defendant's counsel on all of the musical issues.

The expert's role here is to define the substance of the claim and to identify any weaknesses in the defendant's position, especially where similarity appears obvious and easily demonstrated to a lay person. The expert for the defense should address many of the same questions as did the expert for the plaintiff, but from a different perspective:

1. Are the similarities between the plaintiff's and defendant's pieces that the plaintiff has identified accurate? Are they musically significant?
2. What is the most problematic area? Are there unique musical elements that are strikingly similar?

3. Would the allegedly infringing work be recognizable without the similar elements, or could it stand on its own?

4. How original were the similar elements in the plaintiff's music?

a. Did prior art or standard compositional procedures govern the musical elements that are similar?

b. Are the similar elements common within a musical genre?

c. Do the similar elements function the same way? For example, is one a bass instrumental line, and the other a soprano vocal line?

5. What method of musical analysis will best demonstrate the dissimilarities?

6. Are the similarities obvious or difficult to perceive by a lay person?

7. What are the strongest musical arguments that could be made to cast doubt on possible copying?
 - a. For example, are there musical passages from earlier times that are more similar to the plaintiff's or defendant's music than the parties' compositions are to one another?

 - b. Are there academic treatises or composition instructional manuals that establish a formula that both compositions are following?

c. Are the compositions sharing musical ideas rather than expression and substantial content? Here, the expert can provide suggestions as to the best ways to communicate this to a lay person, using non-musical analogies and illustrations to make the arguments accessible and persuasive.

C. Advocacy Challenges -- Recurring Issues

There are several types of issues that I have found to occur frequently:

1. When two pieces of music that are very similar share related material that is simple or short, attorneys for the plaintiffs and defendants face certain challenges:

a. The plaintiff needs to show that his music is unique and distinctive regardless of its brevity or simplicity.

Showing examples of other well-known music with short, recognizable themes would be helpful here. A good example of a highly distinctive, short, simple melody is the signature theme from Beethoven's Fifth Symphony : G - G - G - Eb. There is no question that this melody is original and unique, yet it consists of three repeated pitches out of a total of four notes. From this theme an entire symphony was built. Most people would also recognize as distinctive NBC's three-note musical "logo": A - F - D, which are simply the three notes of an inverted D major chord.

I have worked on various matters addressing this problem. In one case, the main contents of the plaintiff's and defendant's music were virtually identical, but built on a very simple melody of two alternating notes. In working with the plaintiffs' attorney, I was able to show examples of very simple, familiar melodies in which pitch, rhythm, harmony, and structure combined to make

easily identifiable music. Since the melody itself was so simple, it was important that all the secondary elements be included since they contributed to the overall perception of sameness.

b. In these kinds of cases, the defendant tries to undermine the originality of the plaintiff's music by bringing in prior art that relates closely to the music at hand or that has possibly influenced either or both of the compositions. The defendant may also attempt to dismiss the initial musical material as so simple that it was not original.

I have worked on several cases of this sort with varying solutions. In one case, working for the defendants, we were able to discredit the plaintiff's claim of originality by finding musical examples of the identical melody from the 12th century through present day.

2. Sometimes, similarity results from a shared common root, rather than from copying. In working with an attorney for the defendant, the main theme or "hook" of defendant's song shared four notes out of the total five-note melody. This melody repeated often throughout both pieces. The resemblance was supported by the fact that both occurred in the same functional portion of the music (the chorus section) and both were the songs' title melody. However, the defendant had never heard the plaintiff's song, which was not commercially released. In working with the attorneys for the defendant, I observed that both songs were modal, and seemed to be related to more primitive ethnic folk music. I traced them to an African tribal chant. We were also able to find modern links to this chant on commercially released albums.

3. Mistaken Identity

I am often shown a piece of music by an attorney whose client is a composer who is positive that his music has been copied, but the composer is wrong. The reasons for his misperception may include:

a. Common lyrics or subject matter

In one case, a composer wanted to file a suit because he heard his identical lyrics and structure in a popular song. His attorneys hired me to confirm the relationship between the two songs so as not to file a frivolous claim. Upon analysis and comparison, I found that the underlying musical elements -- melody, harmony, and rhythmic patterns -- were quite different. It was only the use of very similar lyrics and structure that made the two songs sound so alike, and without these lyrics, no musical relationship would have been apparent. The attorneys advised their client to drop the matter. In other

cases, when lyrics alone have been at issue, or after my musical comparison determined them to be so, I have referred the attorneys to a language or poetry expert.

b. Extra-musical factors

Sometimes, extra-musical factors mislead a listener into believing that music has been copied. If two recordings have had the same producer, a similar arrangement, similar electronic sounds, or are sung by a similar vocalist, then the recordings may sound alike. When I am asked for an opinion in these cases, I strip away the external factors and examine the underlying melody, harmony, rhythmic patterns, and musical structure. If these are basically different, but the style of sound or composition is related, the matter falls within the realm of similar ideas, not expression.

III. Substantive Motions

The expert's analysis will be a factor in the lawyer's consideration of whether to move for a preliminary injunction (for the plaintiff) or for summary judgment (for either party).

The opponent's expert should thoroughly analyze the musical aspects of the moving party's papers. The expert should point out any errors of musical fact, faulty analysis, misuse of musical authorities, and the like in the movant's papers, as well as assist in formulating counterarguments. Sometimes musical terminology is misused or incorrectly defined -- but very authoritatively -- by the movant's papers in a way that can lead to false conclusions. For example, if the moving papers describe two pieces as having identical melodies when the two melodies sound quite different, something is wrong. Most likely, only a partial definition of melody has been

applied. Perhaps the expert for the plaintiff has looked at melody as merely a succession of pitches without considering the rhythm or duration of each pitch. Since melodic character is determined by both pitch and rhythm, pointing out identity in one of these two elements and omitting mention of the other can give a false and distorted impression of similarity.

Sometimes the opposing documents indicate that the expert who helped prepare them is inappropriate for the matter at hand. This suspicion arises when the documents are overly general or stress unimportant musical similarities. Musical education today is highly specialized, and it is entirely possible to engage an expert who is a respected virtuoso performer with little or no training in musical analysis, theory, and history. Similarly, a musical theorist or composer may analyze two pieces in depth, but without considering prior art or practical copyright issues.

As expert for the defendant in one case, I found that the plaintiff's expert was a successful jazz performer. He described the musical relationships from a jazz perspective and he viewed the creative roles of composer and performer as intermingled, as they often are in improvisatory jazz. The music at hand was not jazz so this approach was inappropriate. It clouded the description of the origination of the various similar elements at issue, as did his lack of background in technical musical analysis. The lawyers with whom I was working discredited his testimony.

In addition to preparing material for the expert's own affidavit, the expert for either side may be asked to review drafts of the brief and any other affidavits to be submitted. The expert would be looking for errors of musical fact, analysis, or terminology as well as assisting the lawyer in presenting the musical issues as clearly and persuasively as possible.

IV. Discovery

Starting with the expert's analysis of the music that was done at the onset of the case, the expert can assist the lawyer throughout discovery.

A. Depositions

An expert can assist in preparing to question opposing fact witnesses as well as the opposing expert. In taking the deposition of the opposing composer, the expert can suggest questions that explore the creative process and stylistic influences that may have had an impact on the musical compositions at hand. In preparing to examine the opposing expert, the examining lawyer's expert can point out factual errors, analytical mistakes, faulty premises, and opinions not supported by fact or accepted theory in the other side's pleadings, expert reports,

interrogatory answers, and other written materials. The expert can also obtain the opposing expert's writings and analyze them, together with any available testimony and reports from prior cases, for inconsistent positions. The expert may also suggest recognized texts to use in examining the opposing expert.

1. Some deposition questions for the opposing composer could include:

- a. How does he define his style of composition?
- b. Is the piece at issue stylistically consistent with his own earlier compositions?
- c. In what way does he record his ideas: into a tape recorder, at the piano, or through a copyist?

d. Does he read music, transposing instruments, and clefs?

e. What is his music educational background? This will help determine his abilities to copy or be copied, originality, and prior influences.

2. Some questions to ask the opposing expert could include:

a. What is his preferred method of musical analysis (e.g., Schenkerian or traditional)?

b. What methodology has he used to analyze and compare the particular music at hand? Why, if at all, does it differ from his normally preferred method of analysis?

c. What is his prior experience with music of this genre?

d. In what musical era has he specialized?

If your expert says that the opposing expert has pointed out common material as being strikingly similar, you can confront this. For example, if an expert says that the pieces are similar partly because they are both in 4/4 meter, a question would be: "Is there another name for 4/4 meter?" This would elicit the answer that 4/4 is called "common time," and notated as such, because it is the most common musical meter.

B. Interrogatories

An expert can help the lawyer frame interrogatories and interrogatory answers on the technical musical

issues in the case. For example, if the initial complaint is very general in pointing out that two pieces of music are similar, it would be helpful for the defendant to ask, "Exactly what are the elements of similarity between these two pieces, giving measure numbers, pitch names, musical examples and chord names?" If the defendant is relying upon prior art, the plaintiff should discover the exact titles and editions, the specific musical material being cited as prior art, the measure numbers or specific recorded passages on which defendant relies, and the defendant's position regarding the degree of similarity between prior art and the music at hand (number of notes, etc.).

In addition, the answers to the customary expert interrogatories will usually be adapted from the expert's report.

C. Document Discovery

An expert can suggest important documents to request from the opposing party, such as earlier pieces of music by the same composer, prior sketches and other versions of the opposing party's musical composition at issue, and significant pieces of music or recordings that influenced the other composer's style.

V. Trial Preparation and Trial

In preparing to present the direct case at trial, the expert will work with the lawyer on the expert's own testimony. Here, it is most important that the expert be able to explain the key musical issues and concepts in a way that the trier of fact will understand, using analogies and musical examples to illustrate important points.

The specific questions for the expert's direct testimony should be carefully planned based on the facts and

issues in each case. The following are a few typical, general examples of questions.

The lawyer for the plaintiff could ask the expert for his side:

- A. "To what degree are these two pieces similar?"
- B. "What percentage of Musical Piece B (defendant's music) contains material also found in Musical Piece A (plaintiff's music)?"
- C. "Is the material that Pieces A and B share common?"
- D. "How do you conclude that two pieces sound alike?"

The lawyer for the defendant could ask the expert for his side:

A. "Can you explain, based on musical theory and practice, why Musical Pieces A and B sound somewhat alike?"

B. "Are other pieces that share this same genre similarly alike as are Pieces A and B?"

C. "Are there musical pieces written prior to Piece A that are more similar to Piece A than is Piece B?"

D. "Is the element (chord progression, structure, harmony, or rhythmic patterns) that Musical Pieces A and B share unique? Please trace this element back to earlier eras in other music."

E. "Do two pieces that share identical chord progressions (or key, modalities, or accompaniment) always share the same melody?"

The expert should also assist the lawyer in selecting the musical examples to be played at the trial. The expert should advise on how each example should be presented for maximum impact, either in a recording or live performance. I often use an electronic keyboard to illustrate musical definitions and examples.

Similarly, the expert can also assist the lawyer in presenting the opening statement, closing argument, and other witnesses' testimony in ways that will make it easy for laymen to grasp the relevant musical concepts. Music listening is so transient an experience and music analysis too technical for the layman to follow. Therefore, the expert must use teaching techniques that communicate to those who do not know the language of music. I have found the following tools most helpful for non-musicians:

A. Analogies from outside of music in more concrete disciplines like literature and visual art.

For example, when you are explaining the significance and function of two similar sections of music, it is important that the jury be able to understand musical structure and thus accept your conclusions. While a juror may not understand the definition of musical structure, he can understand that a play is comprised of an introduction, several acts containing various scenes, followed by an epilogue.

B. Graphic displays from both within and without the musical arena help the listener retain and accept descriptions more easily.

I find that charts and graphs displaying musical relationships hold the listener's attention better than verbal

descriptions alone and also make musical terminology more accessible. For example, while someone may not grasp the concept of a musical arrangement, he can easily understand the relationship between two paintings on display that are the same except for different colorations, medium, or texture.

In addition to analogies and visual aids, the expert can help the lawyer frame his opening statement and closing argument by preparing an outline of the key musical issues and relationships. The expert can also be sure that his own musical examples and illustrations support and coincide with the lawyer's planned overview.

Before trial, the expert should also assist the lawyer in preparing to cross-examine the opposing fact witnesses and expert, in much the same ways discussed above in connection with depositions. In addition, the expert should carefully analyze the other side's trial testimony,

pointing out errors and how to confront them on cross-examination. The expert should:

A. Point out any technical inconsistencies between earlier testimony and documents provided by the other witnesses on the same side.

B. Point out contradictions between conclusions drawn by the musical expert witnesses on either side and the outcome implied by the facts.

C. Point out any distinctions between the opposing composer's testimony regarding the facts, and his method of composition, level of musical training, and his areas of inspiration and musical influence.

Especially important here is to identify anything in the opposing expert's testimony that might mislead the jury

if not corrected. Perhaps the opposing expert has oversimplified the musical relationships, misstated or misdiagnosed facts, or used analogies that, if extended, are wrong. An expert should be able to identify and provide clear ways of dealing with such situations on cross-examination.

In one case, the plaintiff was a well-known songwriter-performer who claimed that a television commercial infringed the copyright on one of his songs. Both songs at issue were "talking" country-western songs in which the singer told a rambling cowboy story in rhythmic narrative style. There was very little singing at all. The plaintiff's expert testified that two songs of the same genre with similar rhythmic patterns but different melodies were the same. He projected a chart to superimpose the rhythm of each, concluding that they were 80% identical. I showed the attorney for the defendant how two nursery rhymes with 100% identical rhythmic patterns

were obviously different from each other because of their distinct melodies and harmonies. The opposing expert had drawn a false, but persuasive analogy. During cross-examination, the defendant's attorney confronted the opposing expert with my example. The expert had to retract his statement, and finally, the entire foundation for his position in the case. The judge ruled in our favor.

VI. Conclusion

The expert should work closely with the lawyer in each step of the case. Most important is to build a solid foundation of musical analysis, relevant comparisons, and a distinct viewpoint as to the relationship between the musical compositions at hand. Early on, the expert must identify any weaknesses in the client's position, especially any areas of musical argument with which the expert does not agree. Identifying difficulties and

contradictions early will make the expert less vulnerable later when testifying on key points.

Judith Greenberg Finell is a musicologist and the President of Judith Finell MusicServices Inc., a consulting firm in New York City that advises attorneys, composers, advertising, entertainment, recording, publishing, and computer firms on matters involving music and copyright. Ms. Finell has served as an expert witness and consultant in various litigations involving copyright infringement in New York, California, Nashville, and Miami. An earlier version of this article appeared in the New York Law Journal, May 1990.

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[ELR 12:4:3]

RECENT CASES

NBC prevails in libel action brought by performer Wayne Newton

A Federal Court of Appeals in California has reversed a judgment awarding \$5.3 million to entertainer Wayne Newton in his libel action against National Broadcasting Company, Inc. (see ELR 10:11:21; 9:9:10).

On October 6, 1980, the NBC Nightly News broadcast a three and one-half minute story called "Wayne Newton and the Law." The report referred to telephone calls made to Newton's house by Guido Penosi, an organized crime figure, and mentioned that a "mob boss" had told associates that he had become a hidden partner in a deal to buy the Aladdin Hotel in Las Vegas, a project with which Newton was involved.

Newton claimed that the October 6th broadcast and two subsequent broadcasts concerning a grand jury investigation of East Coast "mob money" investments either falsely stated or conveyed the false impression that "the Mafia and mob sources" helped Newton buy the Aladdin Hotel in exchange for a hidden share of the hotel and that the entertainer, while under oath, deceived Nevada state gaming authorities about his relationship with organized crime.

A Federal District Court denied NBC's motion for summary judgment and denied a motion for a change of venue.

After trial, the jury returned a special verdict finding NBC and three of its journalists liable for defaming Newton. The jury awarded Newton more than \$19 million in compensatory and punitive damages; about \$3.5 million in prejudgment interest was added to the award.

In response to NBC's motion for judgment notwithstanding the verdict, the court upheld the verdict of liability and the award of damages for pain and suffering and punitive damages. The court set aside the verdict on the jury's award of about \$9 million for Newton's claims of lost past and future income; set aside the award of \$5 million for damage to Newton's reputation; and directed Newton to accept \$225,000 for physical and mental injury, \$50,000 as presumed damages to reputation, and \$5 million in punitive damages or there would be a new trial on all issues. The court also ruled that if Newton did not file the remittitur, the new trial would be held in the Central District of California. Newton agreed to accept the reduced damage award.

Federal Court of Appeals Judge William A. Norris first noted that Newton conceded public figure status for purposes of the case and that the court assumed, without deciding, that the broadcasts in issue recounted facts,

rather than opinion, and that at least one of the factual statements was false. After reviewing the evidence with the "searching care required to protect First Amendment values," the court concluded that Newton did not prove actual malice with convincing clarity.

Judge Norris carefully considered the appropriate standard for reviewing a jury's finding of actual malice, given the special deference accorded jury credibility determinations and given the fundamental First Amendment values at stake in public figure defamation cases. Among the factors cited by the court as potentially relevant to the jury's credibility determinations was Newton's status as a "revered figure" in Las Vegas, whose fellow citizens apparently celebrate Wayne Newton Day and have named a major boulevard in his honor. It was noted that the jurors awarded Newton \$5 million in damages to reputation - the award "shocked the conscience" of the District Court because the court

determined that Newton's "outstanding reputation" had been unharmed by the broadcast.

Judge Norris then stated that it was necessary to present in detail the evidence on the actual malice issue, and focused on three categories of evidence: "Newton's involvement with the Mafia, Newton's testimony before Nevada state gaming authorities, and the federal investigation of the Gambino family's efforts to enter the Las Vegas casino business." The evidence, concluded the court, did not prove constitutional malice with convincing clarity.

The District Court had upheld the jury's liability verdict because the "clear and inescapable impression" made by the broadcast was that Newton called upon organized crime figures to help finance the acquisition of the Aladdin Hotel, and that the Mafia obtained a hidden interest in the hotel. The court concluded that NBC should have foreseen that the broadcast would leave the impression

that organized crime had financed Newton's purchase of the Aladdin and that NBC's failure to so foresee showed a reckless disregard for the truth.

Judge Norris stated that the District Court erred in ruling that an interpretation of the broadcast that "should have been foreseen" by NBC could give rise to liability. Essentially, the District Court's approach would permit liability to be imposed not only for what was said, noted Judge Norris, but also for what was not intended to be said.

Judge Norris held that the credibility of a journalist's source is a separate inquiry from the credibility of the journalist him/herself, and that a "heightened review" would apply to evidence concerning a publisher's decision to rely upon information provided by a particular source. NBC and its journalists were not reckless in disregarding the source of information about purported threats to Newton, stated the court.

In all, the court, on the basis of its independent examination of the record, found almost no evidence of actual malice and therefore reversed the judgment of the District Court.

Newton v. National Broadcasting Company, Inc., Case No.CV-88-5848 (9th Cir., Aug. 30, 1990) [ELR 12:4:10]

Breach of contract claims against Sylvester Stallone and MGM/UA arising from submission of treatment for "Rocky IV" are dismissed

In April 1989, a Federal District Court in California dismissed Timothy Anderson's copyright infringement claims against Sylvester Stallone and other parties involved in the production and distribution of the film

"Rocky IV" (ELR 11:2:8). Judge William D. Keller recently rejected Anderson's remaining claims.

Anderson wrote a treatment, crediting Stallone as co-author, for "Rocky IV;" the proposed film focused on the core characters created by Stallone in the prior Rocky films. In October 1982, Anderson met Freddie Fields, then president of MGM/UA. Judge Keller described the circumstances of the meeting, during which Anderson signed a release. In May 1983, Anderson described his proposal to Stallone. Rocky IV was released in November 1985; Anderson did not collaborate on the project.

In finding that there was no implied contract between Anderson and MGM/UA, Judge Keller pointed out that the release indicated that the studio did not intend to accept the treatment under any conditions whatsoever. And Anderson "expressed no understanding that he had entered into a contract with MGM/UA..."

A breach of implied contract claim against Stallone also was denied, for Anderson did not condition disclosure of his idea to Stallone in any way - he brought it to him "to solicit his endorsement, not to make a sale," stated Judge Keller.

The court then found that there was no express contract between Anderson and MGM/UA. The subject matter of any such contract was not apparent from a statement by Freddie Fields concerning "big bucks for Tim," for, stated Judge Keller, one could infer from the words an agreement to pay for disclosure, to pay for use, or a contract to refrain from use but to pay upon use. In all, "the imposition of any agreement would bear

jury could reasonably find a single, manifest assent from the words "big bucks for Tim," and summary judgment was granted accordingly.

Judge Keller disagreed with the claim that the release was an invalid adhesive contract. Anderson considered the release carefully with the assistance of two additional experienced attorneys. Releases enable studios to review voluminous idea submissions, and are designed "to preclude exactly this type of suit in exactly this type of situation. They do and it does."

Anderson's remaining claims were based on the existence of a valid contract; the dismissal of the contract claims eliminated the contract-based tort causes of action, stated the court. However, Judge Keller pointed out that each such cause of action was appropriately dismissed on independent grounds.

With respect to the claim of tortious breach of the implied covenant of good faith and fair dealing, the court noted that the requisite "special relationship" between the parties did not exist. And there was no evidence showing bad faith denial of the existence of a contract.

Anderson's fraud claim, as described by the court, was based on a theory that MGM/UA negotiated with him over the idea for a sequel to force Stallone to come to terms with the studio for Rocky IV and that the studio did not intend to enter into a contract with him. Again, there was no evidence that the studio made a promise which it had no intention of keeping (even ignoring such issues as whether an agreement actually was made or whether the two stories were substantially similar).

Also rejected was a claim of civil conspiracy between MGM/UA and Stallone to breach the contract between the studio and Anderson concerning the use of his treatment. Breach of contract is not a tortious or legally wrongful act and cannot sustain a civil conspiracy claim, observed the court, nor did any other alleged wrongful acts provide support for a conspiracy claim.

Anderson v. Stallone, Case 87-0592 (C.D.Ca., May 17, 1990) [ELR 12:4:11]

Producer of "The Stuff" prevails in copyright infringement action brought by special effects company

When a factory explosion created by Effects Associates for the film "The Stuff" did not ignite writer-producer-director Larry Cohen's fire, Cohen used the footage in the film but refused to pay Effects the balance due, about \$8,000.

Effects sued Cohen and New World Entertainment, the distributor of the film, for copyright infringement. A Federal District Court initially dismissed the action, holding that it was a contract dispute and did not arise

under federal law. A Federal Court of Appeals reversed and remanded the matter (ELR 9:2:19).

On remand, the District Court granted summary judgment to the Cohen parties on the copyright infringement claim, holding that Effects had granted the producer an implied license to use the footage; the court dismissed Effects' pendent state law claims.

Federal Court of Appeals Judge Alex Kozinski has upheld the District Court's decision. The court noted that under section 204 of the Copyright Act of 1976, a purported transfer of copyright ownership must be in writing. It was not disputed that Effects owned the copyright in the special effects footage used in "The Stuff," and that Cohen used the footage without written authorization.

The court then pointed out that section 101 of the Copyright Act, while broadly defining transfers of ownership, expressly removes from the scope of section 204

a "nonexclusive license." According to Nimmer on Copyright, stated Judge Kozinski, "[a] nonexclusive license may be granted orally, or may even be implied from conduct."

Cohen claimed that Effect's conduct created an implied license to use the footage in issue, and relied upon *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984; ELR 6:4:10), a case involving the allegedly unauthorized use of an article in a book on pickup trucks. The court agreed with Cohen that Oddo controlled the instant proceeding. Effects created a work at Cohen's request and expected Cohen to distribute the work. If Effects did not at the same time convey a license to use the footage in the film, the company's contribution to the film would have been "of minimal value," observed the court. However, Cohen paid Effects almost \$56,000 for seven special effects sequences.

Judge Kozinski concluded that Effects impliedly granted non-exclusive licenses to Cohen and his production company to incorporate the footage in "The Stuff" and to New World to distribute the film; affirmed the decision granting summary judgment to the Cohen parties; and reminded Effects of its causes of action under state law, and of its remaining rights in the special effects footage.

Effects Associates, Inc. v. Cohen, Case No. 88- 6455 (9th Cir., July 20, 1990) [ELR 12:4:12]

Copyright owners obtain affirmance of \$4 million statutory damage award for licensee's failure to comply with compulsory licensing provisions of Copyright Act

Peer International Corporation and other copyright owners issued licenses, through The Harry Fox Agency, to Pausa Records granting Pausa the right to manufacture, distribute and sell certain copyrighted nondramatic musical compositions. The licenses incorporated the rights and remedies provided by the Copyright Act of 1976.

As described by Federal Court of Appeals Judge Edward Leavy, Pausa, beginning in 1980, failed to pay royalties as required by the licenses and section 115(c)(4) of the Act. After the agency gave notice to Pausa, the licenses automatically terminated as of December 26, 1984. Pausa nevertheless continued to manufacture and distribute some of the copyrighted works.

In response to an action for copyright infringement brought by Peer on behalf of itself and "several hundred similarly situated copyright owners," a Federal District

Court in California granted summary judgment to the Peer parties and awarded the statutory maximum of \$50,000 for each "willful" infringement for a total of \$4 million in damages based on eighty incidents in which Pausa sold the copyrighted works after the license termination.

Judge Leavy agreed with the District Court that a letter sent to Pausa by the agency on December 26, 1984 constituted an effective revocation of the licenses. The court rejected Pausa's claim that there was a triable issue of fact as to the Peer parties intention to revoke the licenses at issue. The fact that the agency issued other licenses to Pausa after December 1984 did not raise a question of fact concerning the parties' intent to revoke the licenses specified in the December 1984 letter, noted the court, nor did the agency's deposit into an escrow account of a \$5,000 payment by Pausa thirty days after December 26th - Pausa did not show that the \$5,000

represented payment on royalties due under the terminated licenses as opposed to payment on other nonrevoked licenses.

The court also agreed that the infringements were willful, finding that "Pausa's conduct in ignoring the revocation was unreasonable, and that its further use of the ... copyrighted works thereafter was willful as a matter of law within the meaning of section 504(c)(2)." And the District Court did not abuse its discretion in awarding \$4 million in statutory damages, stated Judge Leavy.

The Peer parties claimed that the District Court erred in holding that Pausa's failure to pay pre-termination royalties did not constitute infringement. It was argued that any pre-termination manufacture or distribution activities by Pausa for which no royalty payment was received within a specified thirty day period constituted retroactive acts of infringement within section 115(c)(5). Although describing the argument as "plausible," the

court found it inapplicable where, as in the instant matter, the parties negotiated their own licenses which varied from the statutory scheme. The copyright owners authorized Pausa's use for the term of the license. Thus, concluded the court, the pre-termination use did not amount to infringement, and the Peer parties were not entitled to additional statutory damages because "the failure to pay royalties under a private license agreement is not an act of infringement within the meaning of section 115(c)(5)."

Peer International Corporation v. Pausa Records, Inc.,
Case Nos. 88-6752, 89-55068 (9th Cir., July 30, 1990)
[ELR 12:4:12]

Judgment obtained by BMI in copyright infringement action is ruled nondischargeable in bankruptcy

A Bankruptcy Court in Louisiana has granted summary judgment to BMI in a proceeding involving John J. Elms, Jr. and has ruled nondischargeable the debt represented by an April 1989 judgment in the amount of \$308,000, and by the award of costs and fees in the amount of about \$54,000.

The proceeding arose from BMI's action against Elms' company, Xanthas, Inc., for copyright infringement (see ELR 10:11:15); the action was stayed against Elms, who had declared bankruptcy. Eventually, a Federal District Court entered a final judgment against Xanthas for willful infringement of forty-four copyrighted musical compositions; Elms was found jointly and severally liable with Xanthas.

Bankruptcy Court Judge T.H. Kingsmill, Jr. noted that Elms had admitted that he was aware of the obligation to pay jukebox registration fees; that Elms had the ability to supervise the infringing activity of Xanthas; and that elms gained a financial benefit from the acts of infringement to the detriment of BMI.

Broadcast Music, Inc. v. John J. Elms, Jr., Bankruptcy No. 87-03936 (Bankruptcy Ct., E.D.La., Jan. 19, 1990) [ELR 12:4:13]

Federal District Court rejects, based on lack of jurisdiction, appeal of Bankruptcy Court order concerning \$35 million offer to purchase assets of the DeLaurentiis Entertainment Group

A Federal District Court in California has rejected an appeal from a Bankruptcy Court order involving the assets of the DeLaurentiis Entertainment Group on the ground that the District Court lacked jurisdiction in the matter.

In August 1989, the Bankruptcy Court determined that Comfinance's offer to purchase the assets of the DeLaurentiis Entertainment Group was a competing offer, and also ordered Comfinance to deliver \$35 million, in trust, to a creditors committee pending further orders by the court.

Comfinance asked the District Court to find that the company properly withdrew its offer prior to any valid acceptance.

Judge Terry J. Hatter, Jr. stated that the Bankruptcy Court's order was not a final order in that it did not conclusively determine any aspect of the dispute between Comfinance and the creditors committee, and did not

affect a substantive right of the company or the DeLaurentiis Entertainment Group estate; the order only required Comfinance to place \$35 million in trust. Furthermore, it did not appear to the court that the order would cause Comfinance irreparable harm. The matter therefore was remanded to the Bankruptcy Court.

In re DeLaurentiis Entertainment Group, Inc. v. Official Committee of Creditors Holding Unsecured Claims of DeLaurentiis Entertainment Group, Inc., Case No. CV 89-6443 (C.D.Ca., May 21, 1990) [ELR 12:4:13]

Joni Mitchell and "America" musicians will receive refund of sales taxes assessed upon transfer of master tapes under recording contracts, rules California appellate court

Singer Joni Mitchell and two members of the recording group "America," Gerald Beckley and Lee Bunnell, were entitled to a refund totalling about \$1 million for sales taxes and penalties paid to the state, a California appellate court has ruled.

In upholding a lower court decision, the appellate court panel briefly described the recording agreements signed by Mitchell and by Beckley and Bunnell. The artists were required to provide a specified number of master tapes to their respective record companies. Master tapes, stated the court, "are made by mixing down a multiple-track magnetic tape recording of the words and music of the artist into a two-track, one-quarter inch magnetic recording tape; the tape is used to make an acetate master, from which records are manufactured."

During the early 1970s, the State Board of Equalization began assessing sales tax against companies and artists based upon the transfer of master tapes. The

Board viewed the artists as the owners of the master tapes because raw materials were charged to the artists' accounts, the masters were not in existence when the contracts were executed, and the contracts referred to completed products. Thus, for the Board, the agreements in issue were sales contracts, not agreements for personal services.

Judge Donald Gates, however, observed that the artists had agreed to provide their exclusive personal services directly to the record companies, and that the companies would own all master recordings and exclusive use of the artists' performances, names, and likenesses. The fact that the contracts may have characterized the artists as independent contractors and referred to the "delivery" of master tapes did not mean that the companies' acquisition of the master tapes constituted a sale for "a master tape can be used as a measure of quantity of work, as

well as a necessary component in the creation of records."

The panel distinguished the cases cited by the Board, noting that *Simplicity Pattern Co. v. State Bd. of Equalization*, 27 Cal.3d 900 (1980; ELR 2:11:5) involved the transfer of master recordings as part of a simultaneous transfer of the assets of an ongoing business, and not incidental to the performance of any service. And in *A&M Records v. State Bd. of Equalization*, 204 Cal.App.3d 358 (1988; ELR 10:5:9), the record company contracted for the ownership rights to master tapes from companies owned by the recording artist. In *Capitol Records, Inc. v. State Bd. of Equalization*, 158 Cal.App.3d 582 (1984; ELR 6:9:11), record companies both purchased pre-existing master tapes and financed the production of master tapes by independent production companies, which contracted directly with the recording artists.

In the instant matter, the artists agreed to provide their services to record companies, and the trial court reasonably concluded that those performances were the "true objects" of the contracts, concluded the court.

The case was remanded to the trial court for a determination of the correct amount of pre-judgment interest, but the trial court did not err in failing to assess post-judgment interest on the entire amount of the judgment.

It should be noted that the court determined that its decision did not warrant publication since "the basic issue ... was effectively eliminated by the enactment of section 6362.5 of the Revenue and Taxation Code in 1975."

Mitchell v. State Board of Equalization, Case No.B036082 (Ca.Ct.App., May 11, 1990) [ELR 12:4:14]

Theater owner may proceed with antitrust action in state court because claims do not invoke federal subject matter jurisdiction

Redwood Theatres, a motion picture exhibitor with theaters in Northern California, may proceed in state court with an antitrust action against Festival Enterprises, a competing exhibitor, and several film distributors, a Federal Court of Appeals has ruled.

Redwood initially filed an action in a California trial court, alleging the violation, from 1985 to 1988, of the state's Cartwright Act. The Festival parties removed the case to a Federal District Court; the court denied a motion to remand.

Federal Court of Appeals Chief Judge Goodwin, in hearing the interlocutory appeal, agreed with Redwood's argument that the District Court improperly recharacterized the company's claim as federal in nature; found that

federal subject matter was not present; and reversed the District Court's ruling.

Redwood claimed that Paramount Pictures had entered into an "unwritten agreement" with Festival, whereby Paramount licensed substantially all of its first-run product to the Festival theaters in Northern California, including Modesto, where the Redwood and Festival theaters directly compete with each other.

In 1985, Redwood had sued the Festival parties in a California trial court alleging Cartwright Act violations in connection with films licensed between 1981-1985. The court dismissed the action, but an appellate court remanded the case for trial on the ground that the complaint, if proved, presented a triable issue of an unreasonable restraint of trade under the Cartwright Act (ELR 9:12:12; 10:7:16). The Festival parties subsequently petitioned for removal of the action to federal court.

Judge Goodwin noted that federal question jurisdiction is improper "unless a federal claim appears on the face of a well-pleaded complaint." However, under the "artful pleading" doctrine, a court, under exceptional circumstances, may recharacterize a claim as federal if the particular conduct complained of is governed exclusively by federal law.

All of Redwood's claims involved alleged violations of California's antitrust law. Nevertheless, the Festival parties, although not claiming that the Sherman Act totally preempted the Cartwright Act, argued that the motion picture industry requires national uniformity of antitrust law, such that restraints upon the industry's interstate activities would fall within the jurisdiction of federal courts.

Judge Goodwin noted that the United States Supreme Court has consistently held that Congress did not intend the federal antitrust laws to displace state antitrust

remedies; that state antitrust laws "retain vitality" in dealing with matters which significantly affect local interests; and that the California courts have held that the Cartwright Act applies to transactions in interstate commerce.

The court next distinguished the decision in *TOC, Inc. v. United Artists Theatre Circuit*, 631 F.Supp. 832 (N.D.Ca. 1986; ELR 8:4:19), upon which the District Court relied. In *TOC*, several independent theater owners claimed that competing distributors and exhibitors were engaged in an unreasonable restraint of trade. The matter was removed to federal court and the court denied *TOC's* motion to remand, finding that subjecting the competing parties "to the possibility of non-uniform state antitrust regulations would be inconsistent with the court's constitutional duty to strike down impermissible burdens on interstate commerce."

Judge Goodwin, after pointing out that the decision in TOC never was appealed and "appears never to have been cited in a subsequent, published case," disapproved of the holding in TOC.

The court cited *Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408 (S.D. Ohio 1980; ELR 1:13:3) as a case which upheld against a commerce clause challenge state regulation of motion picture licensing practices "far more intrusive and idiosyncratic than the possible outcome of a California court's interpretation of the Cartwright Act, informed by federal precedents," and further stated that the Festival parties did not explain how the application of the Act's provisions barring unreasonable restraints of trade threatened to impose an impermissible burden on interstate commerce, "especially when such conduct is also illegal under federal law."

The court concluded by noting that California courts "are perfectly capable" of handling commerce clause challenges to state antitrust laws, and that given the strong bias against permitting removal where a party has chosen to proceed solely on state law grounds, the District Court erred in denying Redwood's motion to remand.

Redwood Theatres, Inc. v. Festival Enterprises, Inc.,
Case No.89-15638 (9th Cir., July 11, 1990) [ELR
12:4:14]

Comic book publisher loses claims alleging that printer violated Robinson-Patman Act and Illinois consumer protection statute, but prevails on common law fraud claim; court remands issue of damages for recalculation

First Comics, Inc., a small comic book publisher, hired World Color Press, Inc. as its printer. First Comics believed that it was paying the same price for printing as larger comic book publishers, such as Marvel Comics Group, paid to World Color. However, in 1984, First Comics discovered that World Color's charge of 11.1 cents per copy was 4.3 cents more per copy than the price charged to Marvel Comics. When World Color refused to extend credit or a refund to First Comics, the publisher switched printers; the new printer used a more expensive offset process.

First Comics sued World Color, alleging, in part, that the company violated section 2(a) of the Robinson-Patman Act. A Federal District Court jury rejected First Comics' Robinson-Patman Act claim and a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, but awarded the company damages in the

amount of about \$407,000; the court reduced the damage award by about \$236,000.

Federal Court of Appeals Judge Cummings noted that section 2(a) of the Robinson-Patman Act makes it "unlawful for any person ... to discriminate in price between different purchasers of commodities..." The parties agreed that comic books were commodities within the meaning of the Act, but World Color argued that it did not sell any commodities to First Comics, but rather merely performed the service of printing for a fee.

Judge Cummings found that the dominant nature of the transaction between the parties was one for services. First Comics, stated the court, was not buying the comics themselves, or paper, ink, and staples; the company purchased World Color's letterpress method and "process of transposing and multiplying images." The most important ingredient in producing the comic books, the color separations, were provided by First Comics. In all,

the transaction was for printing even though it involved the purchase of supplies, and the Robinson-Patman Act therefore did not apply.

In turning to First Comics' cause of action alleging the violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, the court found that it was likely that the Illinois Supreme Court would adopt a line of reasoning requiring a showing of consumer injury in order to prevail under the Act. First Comics, however, did not prove that World Color's pricing scheme directly injured consumers or that consumers suffered indirect injury through stifled competition. There was sufficient evidence to support the jury's decision that World Color's alleged misconduct did not injure consumers.

Judge Cummings concluded by agreeing with the District Court's reduction of the damages awarded on the common law fraud claim, stating that there was no basis to justify the jury's award of about \$236,000 in

consequential damages. Judge Cummings then found that the damage award should have been reduced further by the amount of outstanding printing charges and freight costs which First Comics had not paid to World Color. The matter of damages was remanded to the District Court for recalculation.

First Comics, Inc. v. World Color Press, Inc., 884 F.2d 1033 (7th Cir. 1989) [ELR 12:4:15]

Studio hair stylist's claims against Universal City Studios upon termination of employment are preempted by federal labor law

Section 301(a) of the Labor-Management Relations Act preempted Mari Bloom's action against Universal

City Studios, Inc., a Federal District Court in California has ruled.

Universal City Studios, or its division, Universal Television, employed Bloom as the assistant head hair stylist on the television series "Let's Get Mom." Bloom claimed that on April 15, 1989, Randy Cordray, a representative of the series, orally guaranteed her employment until August 25, 1989. Bloom worked from May 1st until May 15th when the studio terminated Bloom because the series was canceled.

Bloom sued the Universal parties alleging breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with economic advantage, misrepresentation, and unfair business practices in violation of section 17200 of the California Business and Professions Code. Universal argued that neither Bloom nor Make-up Artists and Hair Stylists Local No. 706 submitted Bloom's claim to grievance or demanded

arbitration and thus had not exhausted her administrative remedies under the applicable August 1988 collective bargaining agreement.

Judge Robert C. Bonner first noted that Bloom's position was covered by a collective bargaining agreement, notwithstanding the fact that the agreement was unsigned, and that section 301(a) therefore preempted Bloom's action against the Universal parties. Given the collective bargaining agreement, Bloom's claims were preempted, ruled Judge Bonner, who therefore granted summary judgment to the Universal parties although denying a request for Rule 11 sanctions; the court denied Bloom's motion to remand the action to state court.

Bloom v. Universal City Studios, Inc., 734 F.Supp. 1553 (C.D. Cal. 1990) [ELR 12:4:16]

Federal Court of Appeals remands educational radio station employees' retaliatory discharge claim against licensee, but upholds rejection of employees' First Amendment claims

Brian Schneider and Thomas Cosgrove were employees of WQCS, an educational radio station licensed to the Board of Trustees of Indian River Community College in Fort Pierce, Florida. In March, 1982, Herman Heise, the president of the college advised the radio station staff not to report on a controversial local real estate project. Later in the year, Heise ordered the staff not to present any coverage of the local elections; Heise stated that such coverage would be inappropriate because the college had an interest in the election and several candidates were connected with the school. Nevertheless, WQCS aired news stories about the development and

about the local elections. In 1983, the college terminated Schneider and Cosgrove's positions with WQCS.

A Federal District Court stated that, even assuming that the dismissal of Schneider and Cosgrove was based on programming decisions which were contrary to the directives of their employer, the college was entitled to summary judgment (ELR 10:8:13).

Federal Court of Appeals Judge Hill noted that the college trustees possessed sole programming discretion; that the station was not operated as a "public access" broadcaster; and that the trustees' control of the news programming at WQCS could not have curtailed the First Amendment rights of Schneider and Cosgrove.

Even if the court were to find that Schneider and Cosgrove had First Amendment rights in the operation of WQCS, the complained-of incidents were insufficient to show any policy on the part of the trustees which interfered with those rights. The number of incidents was

small, and each involved distinct considerations, observed the court.

Judge Hill determined, however, that there was sufficient evidence to preclude summary judgment with respect to Schneider and Cosgrove's claim that their dismissal was based on their exercise of First Amendment rights. The issues of whether the dismissal was in retaliation for the exercise of constitutional rights and whether the school was justified in dismissing the employees must be determined by the District Court on remand.

The court concluded by rejecting Schneider and Cosgrove's claim that their positions at the school gave rise to a property right entitling them to due process - the employees had no contract or statutory grant entitling them to continued employment with the school, and there was no "mutually explicit understanding" concerning such an expectation of continued employment.

Senior Federal District Court Judge Daniel H. Thomas, sitting by designation, would have affirmed the District Court's decision.

Schneider v. Indian River Community College Foundation, Inc., 875 F.2d 1537 (11th Cir. 1989) [ELR 12:4:16]

PGA may not enforce ban on U-groove golf clubs

A Federal District Court in Arizona has ruled that nine professional golfers were entitled to a preliminary injunction preventing the PGA Tour from prohibiting the use of U-groove irons in Tour-sanctioned events. The court found, in part, that a hearing on the merits was required as to whether U-grooves impart more spin to a ball than V-grooves under certain conditions, and

whether or not U-shaped grooves have changed the nature of the game of golf.

Judge Paul Rosenblatt, in granting the injunction pending trial, stated that not only did the players have a reasonable possibility of success on the merits, but that the players would be irreparably harmed "if they are forced to abandon their PING EYE2 clubs and use different clubs in that they would have a competitive disadvantage due to playing with clubs to which they were unaccustomed and in which they had no confidence. This would adversely affect their physical and mental capacity to play the game and to compete to the best of their ability."

The manufacturer of the PING EYE2 U-groove clubs, Karsten Manufacturing, also would incur irreparable harm in the absence of an injunction, stated the court. Judge Rosenblatt stated that the court would not substitute its judgment for the judgment of the sports

governing body if a rule was reasonable, without self-interest or self-dealing among the decision-makers, and where those affected had some opportunity for input into the decision-making process. But the balance of hardships in this case was in favor of the golfers and the manufacturer of the U-groove clubs, and a preliminary injunction would preserve the status quo which has permitted the use of U-groove clubs in Tour-sanctioned events since 1984.

According to news reports, in late December 1989, a Federal Court of Appeals, in response to the PGA Tour's emergency request to block enforcement of the preliminary injunction, refused to reinstate the Tour's ban on the U-groove clubs.

In January 1990, the District Court considered several procedural arguments raised in a related antitrust lawsuit brought by Karsten Manufacturing against the United States Golf Association and other parties. The court

declined to exercise jurisdiction over the Royal and Ancient Golf Club of St. Andrews and certain of its officers, finding that Karsten did not establish that the Scottish parties purposefully availed themselves of the privilege of conducting activities in Arizona, and that, in all, the exercise of jurisdiction "would not comport with due process."

Gilder v. PGA Tour, Inc., 727 F.Supp. 1333 (D.Ariz. 1989); Karsten Manufacturing Corporation v. United States Golf Association, 728 F.Supp. 1429 (D.Ariz. 1990) [ELR 12:4:17]

Briefly Noted:

Copyright Infringement/Computer Animation.

A Federal District Court in New York has ruled that an employee of Digital Effects, Inc. was the creator of a work entitled "Japan Fly-By," both as a computer software data base and as a computer animated film. David Geshwind claimed that he owned the copyright in Japan Fly-By, and sued various parties for copyright infringement; those parties brought claims against Digital based on an indemnity agreement. The court found that although Geshwind may have suggested changes in certain details of the work, he did not create the piece. And even if Digital was not the sole creator of Japan Fly-By, stated Judge Patterson, the animation was a joint work of Digital and Geshwind. Thus, Digital was entitled to grant permission to the alleged infringers to use the work in issue.

Geshwind v. Garrick, 734 F.Supp. 644 (S.D.N.Y. 1990)
[ELR 12:4:18]

Contracts.

A New York trial court has granted summary judgment to Mars Production Corp. in an action involving the licensing of certain R-rated films. U.S. Media Corp., under non-exclusive distribution contracts, licensed three films to Showtime/The Movie Channel. The court ordered U.S. Media to pay Mars \$24,000, pursuant to the contracts; refused to determine the rights to an additional \$10,000 payment which U.S. Media assigned to a company which was not a party to the action; ordered U.S. Media to return all cassettes covered by expired contracts; and refused to grant summary judgment to Mars on certain counterclaims raised by U.S. Media.

Mars Production Corp. v. U.S. Media Corp., New York Law Journal, p. 22, co. 5 (N.Y. Cnty., Mar 13, 1990) [ELR 12:4:18]

Tax/Sports Stadium.

When the Minnesota legislature created the Metropolitan Sports Facilities Commission, the legislature exempted the Commission's real and personal property from taxation. The Commission owns and operates the Hubert H. Humphrey Metrodome in Minneapolis; the two major users of the facility are the Minnesota Vikings Football Club and the Minnesota Twins. In 1983, Minneapolis attempted to assess certain space in the Metrodome, such as a locker room area, office space and private spectator boxes, leased by the Commission to the sports teams. In 1985, the legislature expressly

provided that the property leased to the Vikings and the Twins was tax exempt. Nevertheless, the city assessor claimed that the Twins were liable for taxes totalling about \$75,000 for 1986 and 1987; the Vikings were assessed a total of almost \$425,000 for the two years.

The state Tax Court ruled that the 1985 exemption statute exempted the leased property from real estate taxation, and found that Hennepin County lacked standing to challenge the constitutionality of the statute.

The Minnesota Supreme Court has ruled that the county had standing, noting, in part, that the subject matter of the legislation was important to members of the public, as was the operation and management of the Metrodome facility.

Metropolitan Sports Facilities Commission v. County of Hennepin, 451 N.W.2d 319 (Minn. 1990) [ELR 12:4:18]

Counsel Fees/Student Athlete.

When Elizabeth Balsley was barred from trying out for her school's football team, Balsley filed a complaint with the New Jersey Commissioner of Education charging the school board with unlawful discrimination. A consent order was entered allowing Balsley to participate on the football team. Balsley then applied for counsel fees and costs amounting to about \$10,000.

An appellate court held that the Commissioner of Education, although not authorized to award counsel fees under the state's education laws, had the authority to award such fees pursuant to the state's Law Against Discrimination. The New Jersey Supreme Court has reversed the appellate court's decision and remanded the matter to the Office of Administrative Law for an initial

determination concerning Balsley's claim for counsel fees. The initial decision then would be subject to review by the Director of the Division on Civil Rights under the state's Law Against Discrimination.

Balsley v North Hunterdon Regional School District Board of Education, 568 A.2d 895 (N.J. 1990) [ELR 12:4:18]

IN THE NEWS

IATSE members ratify new three year film and television contract with AMPTP

The members of the Hollywood locals of the International Alliance of Theatrical Stage Employees have voted to ratify a three year film and television contract

with the Alliance of Motion Picture and Television Producers. The union also ratified a new two year supplemental videotape contract.

According to news reports, the contract, which is retroactive to August 1, 1990, provides for a four percent wage increase in each year of the three year term. There are no reductions in health benefits although producer contributions to the union's health plan have been reduced.

The contract further provides for a fifteen percent increase in pension benefits for active employees retroactive to January 1, 1990 and for a five percent increase for active and retired members effective January 1, 1991. Other provisions set unspecified limits on loan-out companies and provide for the addition of Martin Luther King's birthday as a paid holiday if the Directors Guild or the Screen Actors Guild receive the holiday in their next contracts.

To encourage filming in the Western states, the union also agreed to prorate management residual payments to the pension and health and welfare funds on feature films that do fifty-one percent of their filming outside the 13 Western states, with the understanding that the remaining forty-nine percent of filming would occur in the Western states.

The videotape contract sets a four percent increase for each of the two years of the contract. Some videotape producers will receive a discount on certain salary minimums under the union's basic contract.

Local 706, the Make-up & Hair Stylists local, voted to reject the contract, primarily because of a provision whereby producers may hire make-up artists and hair-stylists on location rather than bringing Local 706 members from Hollywood. [Sept. 1990] [ELR 12:4:19]

NABET Local 15 votes to merge into IATSE

The members of the National Association of Broadcast Employees and Technicians, Local 15, have voted to merge into the International Alliance of Theatrical Stage Employees.

Local 15 was the East Coast film local of NABET. In early 1990, NABET threatened to revoke the charter of Local 15 because, according to news reports, the local allegedly was engaging in unauthorized merger negotiations with other unions. Local 15, citing disputes with NABET over jurisdictional, financial and political issues, unsuccessfully sought a preliminary injunction to stop the proposed revocation. [Sept. 1990] [ELR 12:4:19]

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