

## RECENT CASES

### **Court upholds dismissal of defamation action against Andy Rooney**

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to commentator Andy Rooney and CBS Inc. in a defamation action brought by Unelko Corporation.

Rooney, as described at ELR 11:9:13, discussed Unelko's product, "Rain-X," during the April 17 and May 8, 1988 broadcasts of the CBS television program "60 Minutes." Rooney stated that the windshield cleaning product "didn't work." The District Court found that the statement was protected as opinion and that Unelko failed to raise a triable issue of fact as to whether any of Rooney's statements were false and defamatory.

Judge Arthur Alarcon, applying the analysis required by *Milkovich v. Lorain Journal Co.* (U.S., June 21, 1990; ELR 12:2:8), first noted that Rooney's statement was not presented in "loose, figurative, or hyperbolic language." Furthermore, the humorous and satirical nature of Rooney's segment of the program "[did] not negate the impression that he was making a factual assertion about Rain-X's performance when applied to his vehicles." It appeared to Judge Alarcon that the challenged statement "was capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness," and was not shielded from liability under the standard established in *Milkovich*.

However, the court proceeded to find that Rooney's comment involved a matter of public concern, and that a reasonable jury could not find that Unelko met its

burden of proving the falsity of the comment by a preponderance of the evidence.

Unelko's claims for product disparagement and for tortious interference with business relationships also were properly dismissed, concluded the court.

Unelko Corp. v. Rooney, Case No. 89-15751 (9th Cir., Aug. 24, 1990) [ELR 12:6:3]

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**USA Today and Star Magazine's use of "New Kids on the Block" name and photos to promote reader surveys via 900 number is protected newsgathering activity**

A Federal District Court in California has granted summary judgment to Gannett Satellite Information Network, Inc., doing business as USA Today, and News

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America Publishing , Inc., doing business as Star Magazine, in a trademark infringement and misappropriation action brought by "New Kids on the Block."

The March 6, 1990 issue of Star Magazine included two articles, with photographs, about the New Kids group. One article asked "Now which kid is the sexiest?" and referred readers to a 900 number; the charge for such telephone calls was 95 cents per minute. As described by Judge William J. Rea, the magazine then solicited individuals who called the number to participate in a separate 900 number service known as "Star Magazine's entertainment trivia game." The magazine did not publish the results of the "poll," purportedly due to the lawsuit filed by the group.

In February 1990, USA Today announced that it would conduct a survey on the New Kids in connection with a review of the group's Disney Channel concert and a story regarding the introduction of the New Kids doll

collection. The February 7th survey asked "Who's the Best on the Block?," provided a 900 number to call, and stated that the results would be published in the newspaper; callers were charged 50 cents per minute. The February 9th issue of USA Today featured the results of the survey.

The New Kids claimed that the publications disseminated false or misleading information to the public which was likely to cause confusion with respect to the relationship between the group and the 900 number services. It was pointed out that the New Kids maintain two 900 number telephone "hotlines." The group argued that the publications set up the numbers as a commercial, profit-oriented venture, that the "surveys" were disguised advertisements for the sale of a commercial product, and that the use of the 900 number, rather than an 800 number, misappropriated the publicity rights of the group members.

The court first agreed with the publications that the applicable standard in considering the trademark infringement claim was the test announced in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989; ELR 11:2:5; 11:9:20). The *Rogers* court adopted a balancing test whereby the Lanham Act would apply to artistic works only when the public interest in avoiding consumer confusion would outweigh the public interest in free expression. With respect to an allegedly misleading title, the balance would not support the application of the Lanham Act unless the title had "no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." Although *Rogers* concerned First Amendment values in the context of artistic expression (the film "Ginger and Fred"), Judge Rea declared that "the First Amendment plays the same central role regarding news gathering and dissemination."

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Thus, a Lanham Act claim would require a showing that the publications "explicitly and falsely denoted authorship, sponsorship, or endorsement by the New Kids or explicitly misled as to content."

The publications contended that the use of the New Kids trademark was related to news gathering and dissemination. Judge Rea rejected the group's theory of implicit endorsement, stating that the risk that some people might think that the New Kids implicitly endorsed or sponsored the publications' 900 number services was outweighed by the danger of restricting news gathering and dissemination. The First Amendment therefore provided immunity to USA Today and Star Magazine on the federal and state trademark infringement claims, and the court granted summary judgment to the publications accordingly.

In turning to the misappropriation claim, the court again pointed out that the use of the group's name

occurred while the publications were gathering information. Although characterizing as an "interesting issue" the argument that 900 number services may be considered a commercial enterprise distinguishable from the commercial enterprise of publishing a magazine or newspaper, Judge Rea nevertheless found that the use of the group's name was descriptive and related to news gathering.

The court declined to apply *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), to the instant case since the publications' use of the group's name did not present a substantial threat to the economic value of the New Kids' name. If the publications provided 900 number services with no relation to any proposed article or continued running the service past the time of the publication of the article, commented Judge Rea, the New Kids then might establish that the use of the group name was not related to a protected



First Amendment activity and constituted commercial exploitation. However, in a footnote the court noted Star Magazine's attempt to solicit callers for a separate 900 number service and stated that the magazine's activity still was within the "broad scope of constitutional protection afforded to First Amendment activities."

No, alas, the court did not report the results of the surveys.

New Kids on the Block v. News America Publishing, Inc., Case No. 90-1378 (C.D.Ca., Sept. 7, 1990) [ELR 12:6:3]

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**Jim Bouton may not recover additional royalties on sales of "Big League Chew" based on oral modification of license agreement**

In 1979, Jim Bouton Corporation, owned by former major league baseball players Jim Bouton and Rob Nelson, filed a trademark application for "Big League Chew," shredded bubble gum packaged in a pouch. Amurol Product Company, a wholly-owned subsidiary of Wm. Wrigley, Jr. Company entered into a licensing agreement with JBC whereby JBC was to receive royalties on Amurol's sale of Big League Chew.

In 1984, Bouton refused to consent to a promotional campaign for the gum. JBC subsequently agreed to relinquish advertising approval rights under the licensing agreement in return for a flat five percent royalty, rather than a sliding scale royalty, on all sales of Big League Chew. An Amurol executive also agreed to stop marketing any other shredded bubble gum that would compete with Big League Chew, although the company fortunately would continue to sell its "Buckaroo Chew" and

"Popeye" products. Amurol sent Bouton a mailgram confirming the discussion.

A Federal District Court found that the mailgram sufficiently memorialized the oral agreement of the parties.

A Federal Court of Appeals has reversed the District Court's decision. Judge Ellsworth A. Van Graafeiland pointed out that the original licensing agreement was a lengthy and carefully prepared document. In the court's view, the parties could not have intended that the brief mailgram and a response letter would constitute a legally enforceable modification of the agreement. Extensive negotiations took place after the mailgram was sent; the mailgram did not refer to the amended royalty provisions; and the parties often referred to a forthcoming "acceptable writing," noted the court. Bouton and Amurol failed to reach an agreement concerning the modification of the licensing agreement.

The licensing agreement provided that its terms could only be waived or modified by a writing; the writing requirement was not met; there was no binding modification; and JBC was not entitled to any recovery, concluded the court.

Jim Bouton Corporation v. Wm. Wrigley Jr. Company,  
902 F.2d 1074 (2d Cir. 1990) [ELR 12:6:4]

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**Copyrighted material quoted in unauthorized biography of L. Ron Hubbard qualifies as fair use**

A Federal Court of Appeals in New York has reversed a District Court decision granting New Era Publications an injunction preventing Carol Publishing Group from issuing an unauthorized biography of the late L. Ron Hubbard. The biography, "A Piece of Blue Sky:

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Scientology, Dianetics and L.Ron Hubbard Exposed," was written by Jonathan Caven-Atack. Caven-Atack, who was a member of Hubbard's Church of Scientology, eventually became disillusioned with Hubbard's teachings.

Caven-Atack quoted widely from Hubbard's writings in presenting "a highly unflattering portrait of Hubbard as a thoroughgoing charlatan who lied relentlessly about his accomplishments."

New Era, the exclusive licensee of Hubbard's works claimed that the biography infringed the company's copyrights.

The District Court found that New Era was entitled to a permanent injunction against the publication of the biography in its then- manuscript form, and entered judgment, listing 103 infringing passages taken from 43 published works.

Judge Wilfred Feinberg found that all four factors listed in section 107 of the Copyright Act favored Carol Publishing, and that the use of the quoted material was a fair use.

Judge Feinberg first observed that the author used Hubbard's works to "enrich" the biography and did not unnecessarily appropriate Hubbard's literary expression. Furthermore, "even passages used for their expression are intended to convey the author's perception of Hubbard's hypocrisy and pomposity, qualities that may best (or only) be revealed through direct quotation."

The second fair use factor, the nature of the copyrighted work, also favored Carol Publishing because the works from which Caven-Atack quoted all had been published; generally, the scope of fair use is greater with respect to factual than non-factual works. It appeared to Judge Feinberg that the quoted works were more properly viewed as factual or informational.

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The court then found that the biography used only a small percentage of Hubbard's works; that the use was not qualitatively unfair; and that it was unlikely that potential customers for the authorized favorable (emphasis by the court) biography of Hubbard in the future would be deterred from buying such a book because Caven-Atack's biography quoted from Hubbard's works. Furthermore, even if the book ultimately harmed the sales of the authorized biography, such potential harm would not result from unfair infringement, stated the court, but rather "from a convincing work that effectively criticizes Hubbard, the very type of work that the Copyright Act was designed to protect and encourage."

Judge Feinberg did not agree that the decision in *New Era Publications International v. Henry Holt and Co.*, 695 F.Supp. 1493 (S.D.N.Y. 1988), aff'd, 873 F.2d 576 (2d Cir. 1989), petition for reh'g denied, 884 F.2d 659 (2d Cir.1989), cert. denied, 110 S.Ct. 1168 (1990); ELR

11:11:15; 11:5:10) required a different result. It was observed that the panel in *New Era* did not address the point that a critical biography serves a different function than does an authorized, favorable biography, and that injury to the potential market for the favorable biography by the publication of the unfavorable biography would not affect the application of the fourth fair use factor. And while *New Era* involved the publication of previously unpublished material, *Caven-Atack's* book involved published works and would not, declared Judge Feinberg, divert any sources of economic profit that would otherwise go to the authorized biography.

There were no additional factors suggesting unfairness, concluded the court, in holding that the fair use defense was available to Carol Publishing.

The court agreed with the District Court's finding that the copyright had expired in a work entitled *HCO Manual of Justice*.



New Era Publications International v. Carol Publishing Group, 904 F.2d 152 (2d Cir. 1990) [ELR 12:6:5]

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**Reporter Nicholas Pileggi may assert New York's Shield Law in defamation action arising from "The Mob and The Machine" magazine article, but may not introduce evidence from protected sources**

The May 5, 1986 issue of New York Magazine contained an article entitled "The Mob and The Machine," written by Nicholas Pileggi. In the article, which discussed the purported relationship between organized crime and New York City government operations, Pileggi stated that an individual known as Dominick Santiago "led a remarkable double life, one that in itself epitomizes the close connections between the mob and

the machine." According to Pileggi, Santiago was Carlo Gambino's godson, "ran trucking companies suspected of mob infiltration ... served as president of Independent Local 3108 of the Brotherhood of Carpenters ... [and] was arrested, indicted, and given a six-month federal court sentence in 1975 for embezzling \$500,000 in pension funds." Pileggi claimed that Santiago, under the name Nick Sands, became a Democratic state committeeman, was appointed to the Public Development Corporation, became a school board member and raised funds for political candidates.

On May 8, 1980, recounted Pileggi, two men opened fire on Santiago/Sands as he left his home... He was hit nine times, but he survived... Today, agents are trying to figure out why so little was done to investigate the matter."

Sands sued Pileggi and the publisher of New York magazine for defamation, claiming that he was not Carlo

Gambino's godson, that in 1967 he legally changed his name from Dominick Santiago to Nicholas Sands, and that he did not lead a "double life." Although it was true that he was convicted of various offenses in 1975, Sands stated that the amount of money involved was significantly lower than \$500,000.

Sands' complaint also alleged that when the article was published, a Pennsylvania community rescinded its \$3.1 million public works contract with Sands' construction firm.

In response to extensive interrogatories served by Sands, Pileggi cited New York's Shield Law - Civil Rights Law section 79-h - and the "material prepared for litigation" rule.

The trial court denied Sands' motion to compel Pileggi to answer the interrogatories.

On appeal, Judge Betty Weinberg Ellerin noted that the Shield Law provides that a professional journalist may

not be held in contempt for refusing or failing to disclose any news or the source of any such news coming into the journalist's possession in the course of gathering or obtaining news for publication or for public dissemination. The protection of the statute has been extended by the courts only to confidential source's or information obtained during the news gathering process. The pre-publication information sought by Sands was "directly within the Shield Law's ambit of protection," stated the court.

However, the Shield Law does not provide complete immunity to journalists for refusing to disclose a source. Judge Ellerin declared that the appropriate remedy to accommodate the interests of the parties would be a protective order preventing Pileggi and the magazine "from using as a sword the information which they are shielding from disclosure." Pileggi would be precluded from introducing into evidence confidential information

obtained prior to the publication of the article, unless such information had been disclosed to Sands at least ten days prior to trial.

With respect to the material and information obtained by Pileggi after the publication of the article, Judge Ellerin found that the information sought was prepared for litigation. But Sands did establish a "substantial need" for a copy of the police report regarding the May 1980 shooting, and the court ordered Pileggi to make a copy of the report available to Sands, if Pileggi had a copy, or summary, of any such report.

The court did not agree with Pileggi's assertion that the United States and New York State Constitutions provided a basis for denying disclosure of any post publication information. Judge Ellerin next rejected Sands' argument that the Shield Law did not apply to the information Pileggi obtained for purposes of the instant litigation, in particular, to statements made by Sands to

unspecified third parties. The court observed that "realistically, the relationship which an investigative reporter in a specialized area, such as Pileggi, develops with his confidential sources is a continuing ongoing relationship dependent on mutual trust and reliability which facilitates the reporter's ability to accumulate significant information for ultimate dissemination to the public. While a different situation may prevail in the case of other types of newsgatherers or communicators, it can hardly be gainsaid that to force a reporter in Pileggi's position to disclose his confidential sources or information, for whatever purpose, would be to impair, in some measure, the effectiveness of his future undercover investigative reporting activities."

The trial court's order therefore was upheld, as modified.

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Sands v. News America Publishing Inc., New York Law Journal, p. 21, col. 3 (N.Y.App.) [ELR 12:6:6]

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**Glamour magazine obtains summary judgment in breach of contract action brought by source of information for article about sex abuse by therapists**

The September 1988 issue of Glamour Magazine contained an article about sexual abuse by therapists. Jill Ruzicka's experience as a victim of sexual abuse was discussed in the article. Ruzicka agreed to be interviewed by Claudia Dreifus, the author of the article, upon the condition that she would not be identified or identifiable. Dreifus, although referring to Ruzicka as "Jill Lundquist," also stated in the article that "Lundquist" was a Minneapolis attorney who had served on a

state task force which helped draft a statute criminalizing therapist-patient sex.

Ruzicka filed an action against the publisher of Glamour and Dreifus, alleging, among other claims, breach of contract, fraudulent misrepresentation, and invasion of privacy.

A Federal District Court in Minnesota, in analyzing the question of whether actions for the breach of a reporter-source agreement implicate the First Amendment, first found that for the purposes of state action, there was "no meaningful difference" between Ruzicka's contract action and an action for defamation. Judge MacLaughlin stated that the use of the courts to enforce a reporter-source agreement "inherently affects the exercise of free speech and press."

The court then found that the Glamour parties did not waive their First Amendment rights by entering the contract. Dreifus allegedly agreed not to identify Ruzicka or



make her "identifiable." Ruzicka was not identified, and "just what will make a private figure identifiable depends on the information known by that person's friends and acquaintances." To the extent there was an agreement not to make Ruzicka identifiable, stated the court, the agreement was too vague to constitute a waiver of the Glamour parties's First Amendment rights to publish. The agreement, again, would have had to specify the information which was not to be published in order for the waiver to be effective.

Judge MacLaughlin next pointed out that confidential sources "are a regular, indeed an essential, component of news gathering." The breach of reporter-source agreements may cause significant damage to the sources, noted the court. In order to accommodate the rights of the free press with common contractual rights, the court concluded that a party seeking to enforce a reporter-source agreement must at least prove specific,

unambiguous terms, and provide clear and convincing proof that the agreement was breached. "To force media defendants to litigate the meaning of ambiguous terms and subject them to damage awards premised on contracts reasonably susceptible to more than one interpretation will impermissibly chill the exercise of First Amendment rights," stated the court.

Ruzicka did not specify the information which would threaten her anonymity, except for asking Dreifus not to mention one of Ruzicka's previous jobs; Dreifus complied with this request, and the use of other facts provided by Ruzicka did not constitute clear and convincing evidence that the Glamour parties breached their agreement.

The court also granted summary judgment to the Glamour parties on the causes of action for fraudulent misrepresentation, intentional infliction of emotional distress, unjust enrichment, and invasion of privacy.

Ruzicka v. Conde Nast Publications, 733 F.Supp. 1289  
(D.Minn. 1990) [ELR 12:6:7]

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### **Scientist's libel action against Indiana television station and newspaper is dismissed**

In April 1986, television station WNDU in South Bend, Indiana, broadcast a story stating that Miles Laboratories had charged Eppie Chang, one of its scientists, with stealing trade secrets. The reporter, citing a confidential source, claimed that Chang was offered \$1 million by a company in Taiwan for information about Miles' glucometer, a device used to test for sugar in blood.

Assuming, for purposes of the action, that the statements concerning the \$1 million offer were false, a

Federal District Court granted summary judgment to the various media parties on the ground that Chang did not establish by clear and convincing evidence that the statements were made with actual malice.

A Federal Court of Appeals has upheld the District Court's decision. Judge Easterbrook noted that an Indiana appellate court had held that even private figures must establish actual malice if the challenged statements related to an issue of public concern. Although the state law was in the minority, Judge Easterbrook stated that the court would follow the principles set forth by the appellate court.

After reviewing the evidence, the court agreed that the record would not permit a jury to find by clear and convincing evidence that the media parties knew that what they reported was not true, or strongly suspected that it was untrue yet were recklessly indifferent to this suspicion. Miles had filed a complaint against Chang, but the

complaint did not mention the \$1 million amount or a glucometer (the parties subsequently settled the lawsuit.) WNDU, accordingly, broadcast a "correction" of its story, and also fired the reporter for violating the station's policy by broadcasting information provided by a source whose identity was unknown, without telling the station's news director the limits of the reporter's knowledge.

The court stated that it was not clear whether Indiana would consider libelous an allegation that a party was offered money for trade secrets. In any event, the fact that the WNDU reporter did not confirm all the information received from the confidential source did not show reckless indifference to the truth; the reporter attempted to verify the claims and it appeared that the source had inside knowledge and was relaying this knowledge accurately. "Just as police need not pursue all leads before pouncing ... " stated Judge Easterbrook, "reporters need

not keep calling additional sources on pain of damages." The reporter's tactics may have been "questionable," but Indiana "does not use the law of libel to enforce journalistic ethics," observed Judge Easterbrook.

The facts that the reporter's notes relating to the story were missing might have supported an inference of malice, but the source of the story did not remain anonymous. Rather, the source testified that he told the reporter everything the reporter said he did; thus, any inference from the missing notes could not supply clear and convincing evidence of malice.

There was a republication of the allegedly libelous statement in a newspaper article; Chang did not show that the newspaper reporter acted with actual malice in republishing the information contained in the television broadcast.

Chang v. Michiana Telecasting Corp., 900 F.2d 1085  
(7th Cir. 1990) [ELR 12:6:7]

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**State of New York, not executors of Elvis Presley estate or concert promoter, is entitled to unrefunded ticket proceeds from canceled concert**

In *Presley v. City of Memphis* (see ELR 12:2:8) concert promoter Jerry Weintraub, doing business as Management 111, along with other parties involved with the estate of Elvis Presley, unsuccessfully sought to recover the unrefunded ticket proceeds from two Elvis Presley concerts which had been scheduled for August 27 and 28, 1977 at the Mid-South Coliseum. Presley died on August 16, 1977. A Tennessee appellate court found that the State was entitled to the fund, less any

reasonable expenses incurred by the coliseum in maintaining the fund.

A Nassau County trial court recently issued a similar ruling in ordering unrefunded ticket proceeds turned over to the State of New York's abandoned property fund.

Management III had agreed to pay Nassau County \$30,000 for the use of the Nassau Coliseum for an Elvis Presley concert that was scheduled for August 22, 1977. The contract, among other provisions, contained a liquidated damages clause which stated that in the event the concert was canceled, the coliseum would be entitled to \$5,000.

In 1983, the Presley parties filed an action seeking unrefunded ticket proceeds amounting to about \$86,000, arguing that the county no longer had a reason to hold onto the funds since the six year statutory period in



which the ticket holders could demand a refund based on a contract theory had expired.

Judge Eli Wager rejected the Presley parties' claims, including the argument that they were equitably entitled to the proceeds because of the "memorabilia" value of the tickets. The ticket holders purchased their tickets with the intent of being admitted into an Elvis Presley concert, noted the court - "it was not their intent to purchase a piece of paper with 'memorabilia' value." Although it was unlikely that any of the ticket holders would apply to the State's Abandoned Property Law fund for reimbursement, state law required that the fund be retained and made available to the ticket holders upon request at any future time.

In all, the Presley parties had no legal right to the funds held by Nassau County; the county's claim was limited to the sum of \$5,000; and the state's abandoned property fund was entitled to the balance of the proceeds.

Presley v. County of Nassau, New York Law Journal, p. 26, col. 3 (Nassau Cnty., Aug. 22, 1990) [ELR 12:6:8]

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**National Hockey League is not subject to jurisdiction in Rhode Island in player's action challenging free agency decision**

A Federal District Court decision (ELR 11:5:17) holding that the National Hockey League, a 21-member unincorporated association, was subject to jurisdiction in Rhode Island in an action brought by player John Clark Donatelli has been reversed by a Federal Court of Appeals.

Donatelli's lawsuit in a Rhode Island state court challenged the NHL's decision not to declare him a free agent, and the player draft. The action was removed to

the District Court, which found, in part, that Donatelli's action was unrelated to the NHL's contacts in Rhode Island. However, the court stated that the NHL, on the basis of the Boston Bruins' minimum contacts with the forum, was subject to the court's jurisdiction.

Federal Court of Appeals Judge Selya concluded that the NHL did not possess the constitutionally required minimum contacts with the forum state. The court rejected Donatelli's argument that professional sports leagues should be amenable to suit wherever any member club has established minimum contacts; found that the league's influence over individual members was "insubstantial;" and stated that none of the control exercised by the league substantially influenced the Bruins, or any other team, to maintain contacts within Rhode Island.

The Bruins, of their own accord, played only a single exhibition game in Rhode Island each year, and the

team, not the league, decided to advertise and seek ticket sales in Rhode Island, stated Judge Selya. The court did not find it significant that play-by-play accounts of games were telecast into Rhode Island. Although the league negotiated the master broadcasting contract, the teams retained the proceeds. The league had no "continuous and systematic general business contacts" with the forum, and the asserted cause of action was entirely unrelated to the telecasts.

Judge Selya observed that the Bruins "entered the Rhode Island market by their own choice and for their own benefit, not as the association's handmaiden," and, in all, declined to attribute the Bruins' contacts to the NHL. In response to the question certified by the District Court, the court stated that "an unincorporated association which does not itself conduct significant activities in, or enjoy affiliating circumstances with, a state cannot be subject to the general personal

jurisdiction of the state's courts on the basis of a member's contacts within the state unless the member carries on the in-forum activities under the association's substantial influence."

Donatelli v. National Hockey League, 893 F.2d 459 (1st Cir. 1990) [ELR 12:6:9]

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### **Heavyweight champion James "Buster" Douglas and promoter Don King settle lawsuits**

In July 1990, according to news reports, heavyweight boxing champion James "Buster" Douglas and promoter Don King settled various lawsuits. King apparently will receive a cash payment in an undisclosed amount, but will not be Douglas' promoter for the boxer's as yet

unscheduled title defense. However, King will promote an unspecified number of Douglas' future fights.

The dispute between Douglas and King occurred after the February 10, 1990 boxing match between then-heavyweight champion Michael Tyson and Douglas. King questioned Douglas' victory and allegedly sought to have the decision in favor of Douglas invalidated by the World Boxing Association and World Boxing Council. However, all three international boxing federations recognized Douglas as the winner of the bout and as the reigning heavyweight champion of the world.

Sometime prior to the title fight, as described by Federal District Court Judge Sweet, Don King Productions had agreed with Trump Plaza Associates to hold a match between Tyson and Evander Holyfield on June 18, 1990 in Atlantic City, New Jersey at the Trump Plaza. After Douglas defeated Tyson, King and Trump agreed instead to use that date for a rematch between

Douglas and Tyson at Trump Plaza. King purportedly had the authority to enter into such an agreement on the basis of a December 1988 exclusive promotional contract with Douglas.

Douglas and his manager, John P. Johnson, at some point after the Tokyo fight, decided that they no longer were bound by the exclusivity provision of the promotional agreement and contacted other parties about promoting Douglas' next fight. On February 21, 1990, Douglas and Johnson signed a contract whereby the Mirage Hotel in Las Vegas agreed to promote two fights featuring Douglas; the contract was conditioned upon Douglas and Johnson receiving a release or waiver from King of any promotional rights, or obtaining a final judgment from a Nevada state court or a federal court confirming that the exclusivity provision of the contract was void and unenforceable.

The bell rang, and various lawsuits erupted in Nevada and New York. In a ruling issued on April 4, 1990, Judge Sweet found that the court possessed personal jurisdiction over Douglas and Johnson and denied their motion to dismiss King's action for breach of the promotion and bout contracts. The court noted that the principal performance required of Douglas did not take place in New York, that Douglas and Johnson did not execute the contracts in New York, and that the acts constituting the alleged breach apparently occurred outside the state. Nevertheless, stated Judge Sweet, "in other respects" Johnson and Douglas conducted activity in New York pursuant to the contracts so as to avail themselves of New York law. The activities cited by the court included New York appearances by Douglas under the publicity provision of the promotional contract; two meetings in New York with King; telephone and mail contact in connection with negotiating the contract; and

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the inclusion in the final contract of a New York choice of law provision. Most significant for the court was the "fully contemplated performance" by King in New York of duties under the contract for the benefit of Douglas. The court found, however, that Trump Plaza did not establish personal jurisdiction over Douglas and Johnson on the tortious interference claim, and dismissed Trump Plaza's action.

Judge Sweet declined to transfer the action to a Federal District Court in Nevada.

In a decision issued on April 9, 1990, a Federal District Court in Nevada issued a ruling holding that the only parties with "a legally recognizable personal stake" in the declaratory judgment proceeding before the court were Douglas and Johnson; the Mirage had no standing to seek to declare the contract between Douglas and King unenforceable. A judgment declaring the validity of the contract between Douglas and the Mirage was not

yet ripe, stated Judge McKibben, for the contract was speculative and might never come into existence.

Judge McKibben concluded by finding it inappropriate to decide a claim based on negligent or intentional acts in a declaratory judgment action. The Mirage lacked standing to seek declaratory relief and the court, accordingly, granted King's motion to dismiss the Mirage as a party.

Don King Productions, Inc. v. Douglas, 735 F.Supp. 522 (S.D.N.Y. 1990); Douglas v. Don King Productions, Inc., 736 F.Supp. 223 (D.Nev. 1990) [ELR 12:6:9]

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**Nevada Supreme Court remands dispute over scope of Caesars Palace insurance coverage for injuries incurred by patron of heavyweight boxing match**

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On June 11, 1982, a heavyweight championship boxing match took place between Larry Holmes and Gerry Cooney; the match was held in a temporary arena set up in the parking lot of Caesars Palace Hotel in Las Vegas. The fight was produced by Caesars, Don King Productions and Tiffany, Inc.

At the time of the fight, Caesars was insured under a general liability policy issued by Ambassador Insurance Company, and a special event policy issued by National Union Fire Insurance Company. King/Tiffany obtained the National Union policy, and Caesars was listed as an additional insured. The policy stated, in part, "It is hereby understood ... that Caesars World, Inc. and Caesars Palace, Inc ... are added as additional named insureds, but only with respect to liability arising out of operations performed for such insured, by or on behalf of the named insured."

Charles Arnoult attended the fight. As the fight patrons were leaving the match, there was a crowd stampede, and Arnoult was seriously injured. Arnoult filed a personal injury action against Caesars and recovered a judgment against the hotel. National Union declined to defend Caesars, claiming that because the incident occurred inside the hotel, Arnoult's injuries were not within the scope of coverage provided by the policy.

Caesars sued National Union seeking indemnification for the cost of defending the personal injury action and for paying the judgment. The trial court ruled that because Arnoult was injured by the "flow of fight patrons," his injuries were covered under the "arising out of operations" language of the National Union policy.

The Nevada Supreme Court has reversed the trial court's ruling, stating that "when an ambiguity exists in an insurance policy, the court should consider not merely the language, but also the intent of the parties,

the subject matter of the policy, the circumstances surrounding its issuance, and the policy should be construed to effectuate the reasonable expectations of the insured." The scope of coverage was ambiguous and the trial court erred in disregarding Caesars' intent and in not granting National Union's motion to compel discovery in order to ascertain that intent, declared the court.

The court further suggested the trial court, on remand, consider industry custom and usage in the connection with special events insurance.

National Union Fire Insurance Company v. Caesars Palace Hotel and Casino, 792 P.2d 1129 (Nev. 1990) [ELR 12:6:10]

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**Hollywood Park race track wins new trial in wrongful discharge action brought by parimutuel clerk**

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Thomas Laury Fidler began working for the Hollywood Park Race Track in 1963. In April 1979, Fidler's union went on strike. The race track asked several employees to work as assistant mutuel managers; the employees received a letter stating, in part, that the industry intended "to continue their normal circuit of employment in the non-union management positions." Fidler accepted the position and resigned from the union.

Subsequently, according to Fidler, Hollywood Park demoted him, fired and then rehired him, froze his pay, and then cut his salary. In April 1983, Fidler left his job and sued Hollywood Park for constructive wrongful discharge, alleging, as described by California appellate court Presiding Judge Lester W. Roth, that the race track breached its promise not to discharge him without good cause by forcing him to submit to intolerable working conditions which caused his resignation.

A Los Angeles trial court jury found that an employment contract existed between Fidler and Hollywood Park; that the race track had breached the contract; and that Fidler was entitled to damages of about \$348,000. The jury also awarded Fidler \$100,000 upon finding that Hollywood Park breached the implied covenant of good faith and fair dealing. In response to the jury's finding that Hollywood Park acted with oppression, fraud or malice, the trial court judge, acting pursuant to the stipulation of the parties, set punitive damages at \$450,000.

The appellate court noted that the trial was conducted in the summer of 1988. In December 1988, the California Supreme Court decided the case of *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, and held that "as the implied covenant of good faith and fair dealing arises out of the contract itself, the breach of the covenant in the context of an employment situation gives rise only to contract damages; tort remedies are not available."

Thus, neither compensatory damages for emotional distress nor punitive damages are recoverable in a wrongful discharge action, stated Judge Roth. In May 1989, the California Supreme Court, in *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, held that *Foley* would be given full retroactive effect "as to all cases not yet final on January 30, 1989, the date that decision became final." Since the appeal in the instant matter was pending on January 30, 1989, *Foley's* holding would apply.

In view of *Foley* and *Newman*, Judge Roth reversed the award of punitive damages and the award for breach of the implied covenant of good faith and fair dealing. And given the "sharp evidentiary disputes" present in the case, Judge Roth remanded the matter for a new trial on all of *Fidler's* claims.

*Fidler v. Hollywood Park Operating Company*, Case No.B038280 (Ca.Ct.App., Sep. 5, 1990) [ELR 12:6:11]

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## **Texas school district properly assigned high school athletic director additional teaching responsibilities**

Joseph Trevino was employed by a Texas school district as athletic director/head football coach. During the 1988-1989 school year, the district, due to a financial crisis, asked Trevino to teach two history classes per day, work as athletic director during three periods a day and begin coaching at 3:30 p.m. Trevino was scheduled to receive a large pay increase.

Trevino, claiming that the district was threatening to breach his contract by assigning him additional duties and that the reassignment provision in his contract was a contract of adhesion, sought injunctive relief.

A Texas appellate court has affirmed a trial court decision refusing to grant a temporary injunction. The court

noted that Trevino was not reassigned under his contract, but was assigned additional authorized duties.

Trevino v. Board of Trustees of West Oso Independent School District, 783 S.W.2d 806 (Tex.App. 1990) [ELR 12:6:11]

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**Advertising sales agent may pursue claim to enforce right of first refusal to purchase interest in broadcasting joint venture**

Media America, a sales agent for advertising time and space, entered an agreement in April 1989 to be the exclusive national sales agent for Financial News Network's Business Radio Network, a joint venture between Financial News Network and Starstream Communications. Media America claimed that Starstream

granted the company a right of first refusal to purchase Starstream's fifty percent interest in the joint venture. In November 1989, Media America made an offer to purchase the Starstream interest; the offer was declined.

Media America sued the joint venture parties alleging various causes of action and sought to prevent the parties from negotiating to sell Starstream's interest to another party.

A New York trial court noted that the grant of a right of first refusal was incorporated in an agreement covering the terms of the sales representation of the joint venture, and that questions of fact were present as to whether Starstream had authorization from Financial News Network to grant the right in issue to Media America. It appeared to Judge Baer that Media America was permitted to rely to its detriment on the acting partner's assertion of authority and "should have its day in

court to prove that there was a valid agreement granting it a right of first refusal."

The court dismissed Media America's causes of action alleging tortious interference with contract and fraudulent misrepresentation.

Media America, Inc. v. Financial News Networks, Inc.,  
New York Law Journal, p. 18, col. 3 (N.Y.Cnty., July  
27, 1990) [ELR 12:6:11]

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**Distributor of "Dungeons & Dragons" game is not  
liable in wrongful death action arising from player's  
suicide**

A Federal Court of Appeals in Kentucky has affirmed, on different grounds, a District Court decision (ELR 12:1:18) granting summary judgment to TSR, Inc., the

manufacturer of the game "Dungeons & Dragons" in a wrongful death action brought by Sheila Watters. Watters had claimed that the game so dominated the mind of her late son, Johnny Burnett, that he was driven to suicide.

In upholding the judgment, the Court of Appeals did not find it necessary to decide whether the First and Fourteenth Amendments would preclude the imposition of liability, but rather determined that Kentucky law would not permit Watters to recover damages.

Watters had claimed that TSR violated its duty of ordinary care by distributing Dungeons & Dragons literature to "mentally fragile persons," and that the company failed to warn that the "possible consequences" of playing the game might include "loss of control of the mental processes." Judge David A. Nelson stated that to submit the case to a jury on either theory "would be to stretch the concepts of foreseeability and ordinary care to

lengths that would deprive them of all normal meaning." Watters did not raise an issue of fact on the question of whether TSR knew of some danger that made the tragic suicide foreseeable. The content of the game did not give TSR reason to foresee that players of the game would become more susceptible to murder or suicide than non-players, stated the court, and the imaginary world portrayed in the game materials did not appear to be "a world in which people kill themselves or engage in acts of wanton cruelty toward other people."

In Judge Nelson's view, the Kentucky courts most likely would avoid the constitutional issue raised and would decide that Watters did not raise a justiciable issue as to TSR's breach of a duty to warn and would find that Burnett's suicide was a "superseding cause" of the young man's death.

Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990)  
[ELR 12:6:12]

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### **Copyright Office must review refusal to register copyright for Atari's "Breakout" video game**

In 1987, the Copyright Office refused to register a copyright in Atari Games Corporation's audiovisual game "Breakout" on the ground that the game did not contain sufficient original visual or musical authorship.

A Federal District Court entered summary judgment for the United States Register of Copyrights, noting (according to Federal Court of Appeals Judge Ruth Bader Ginsburg) that Breakout presented a "rare" instance of "expressive value so slight as to be insufficient for copyright purposes."

Judge Ginsburg held that the Copyright Office "did not intelligibly account for its ruling," vacated the District Court's judgment, and remanded the case to the court with instructions to return the matter to the Copyright Office for further consideration.

The court questioned the Register's failure to consider the video game as a whole, rather than emphasizing the non-copyrightability of the work's several parts; stated that the standard of creativity used by the Copyright Office in determining whether to register Breakout was unclear; and pointed out that the "cryptic character" of the ruling created uncertainty as to whether the ruling was consistent with other rulings by the Copyright Office and the courts.

Judge Silberman concurred in the court's judgment remanding the case to the Register of Copyrights for an explanation of the standard used to deny registration, but expressed the view that the majority opinion might



be " misinterpreted so as to confine improperly the Register's discretion on remand." It appeared to Judge Silberman that the Copyright Office might be using a different standard to determine the copyrightability of video games than it uses for other works; although the Copyright Office may be entitled to do so, it must explain what those standards are (if they are different) and how the standards are applied. Such an interpretation by the Copyright Office then would be reviewed by the court using a reasonableness standard or an abuse of discretion standard, notwithstanding whether the Register's interpretation was consistent with court rulings or scholarly analysis. "If improperly read," cautioned Judge Silberman," the majority opinion might have the effect of causing the Copyright Office to register virtually any offering."

Atari Games Corporation v. Oman, 888 F.2d 878  
(D.C.Cir. 1989) [ELR 12:6:12]

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**Preliminary injunction preventing Nintendo from bringing patent infringement claims against retailers of compatible video games is vacated**

Tengen, Inc., a wholly owned subsidiary of Atari Games Corporation, obtained a license from Nintendo of America, Inc. and Nintendo Co., Ltd. to develop game software for the Nintendo Entertainment System. Nintendo reserved the right to approve the games developed by Tengen and to manufacture the game cartridges. Nintendo then would sell the completed cartridges to Tengen for distribution. Tengen developed the games "Pac-Man," "Gauntlet," and "RBI Baseball."

In December 1988, Atari, without obtaining a license from Nintendo, began to manufacture and sell its own Nintendo compatible cartridges which were able to circumvent the Nintendo Entertainment System security system.

Atari also sued Nintendo claiming that the company improperly used its patented security system and greater market share to monopolize the home video game market. According to Atari, Nintendo threatened to file patent infringement actions against retailers who continued to sell unauthorized Nintendo-compatible game cartridges.

Nintendo then sued Atari, alleging, among other claims, patent and trademark infringement and RICO charges.

A Federal District Court granted Atari's motion for a preliminary injunction preventing Nintendo from bringing contributory infringement actions against retailers

and purchasers of Atari's Nintendo-compatible cartridges. The court similarly bound Atari and Tengen with respect to Nintendo customers.

A Federal Court of Appeals for the Federal Circuit has vacated and remanded the District Court's decision. Federal District Court Judge Charles R. Norgle, sitting by designation, noted that the fact that a patent is obtained does not wholly insulate the patent owner from the anti-trust laws, but that there is "a fine line between actions protecting the legitimate interests of a patent owner and antitrust law violations."

In the instant case, the factual basis was insufficient to support the findings necessary to grant a preliminary injunction, stated the court. The District Court specifically -refused to find that Nintendo was proceeding in bad faith with its patent enforcement, and there were no factual findings concerning the relationship between Nintendo's licensing agreement and the antitrust laws.

Judge Norgle pointed out that the court's decision was not a determination of whether an injunction ultimately would be warranted.

Atari Games Corporation v. Nintendo of America, Inc.  
897 F.2d 1572 (Fedl.Cir. 1990) [ELR 12:6:13]

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**Federal Communications Commission revokes license of Chicago television station after appellate court notes decrease in licensee's non-entertainment programming and allegations concerning obscene broadcasts**

When Video 44, the operator of station WSNS-TV in Chicago, Illinois, sought to renew its broadcast license, an Administrative Law Judge conducted the initial comparative renewal hearing between Video 44 and Monroe

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Communications Corporation. The judge noted that during the 1979-1982 license term, Video 44 gradually converted the station to a subscription television service. By the end of the license term, the company essentially closed down its local production facilities. The administrative law judge, citing the apparently permanent decline in non-entertainment programming to about five hours per week, concluded that Video 44 was not entitled to a renewal expectancy and awarded the broadcast license to Monroe.

The Federal Communications Commission's Review Board reversed the administrative law judge. The Board concluded that Video 44, on the basis of its non-entertainment programming throughout the previous license term, taken as a whole, was entitled to a renewal expectancy, and that such renewal expectancy was sufficient to outweigh the advantage Monroe may have had

with respect to diversification and integration. The Commission agreed with the Review Board.

A Federal Court of Appeals in Washington, D.C. has reversed the Commission's ruling, finding it arbitrary and capricious. The Commission should have focused on Video 44's performance after the broadcaster became a nearly full time subscription television service, stated Judge Sentelle. The purpose of the renewal expectancy analysis is to predict a broadcaster's likely future performance based on its past programming; the Commission arbitrarily minimized the significance of, in the court's view, the "most probative" portion of Video 44's previous license term. It appeared to Judge Sentelle that there was a "strong downward trend" in Video 44's responsiveness to community needs in the form of news and non-entertainment programming.

Monroe also had objected to allegedly sexually-oriented and violent programming broadcast by Video

44. The Commission ultimately declined to consider Monroe's objections. Judge Sentelle found that the Commission acted arbitrarily in departing from its prior policies and announcing that it would refuse to consider allegations of obscenity in renewal expectancy evaluations.

Judge Sentelle directed the Commission, on remand, to reconsider the decrease in Video 44's non-entertainment programming, and to either consider the evidence, offered by Monroe and in citizen complaints, of obscene broadcasts by the station, or to better justify its refusal to do so.

Judge Silberman concurred in the court's opinion, commenting on the fact that the Commission "appears to act as if incumbency and the renewal expectancy were a property interest - which it is not (emphasis by Judge Silberman)."



In September 1990, the FCC revoked Video 44's license; the company, according to news reports, plans to appeal the Commission's decision.

Monroe Communications Corporation v. Federal Communications Commission, 900 F. 2d 351 (D.C.Cir. 1990) [ELR 12:6:13]

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**Opera singer's celebrity status is not marital asset subject to distribution in divorce, rules New York court**

Performer Frederica von Stade's "celebrity status" and/or "enhanced career status" was not a marital asset subject to equitable distribution in her divorce from voice coach Peter Elkus, a New York trial court has ruled.

Elkus claimed that when the parties married, von Stade was just beginning her career and that his activities on the singer's behalf increased von Stade's renown as an opera singer.

Judge Walter M. Schackman has rejected Elkus' claim. It was noted that in *Golub v. Golub*, 139 Misc.2d 440 (ELR 9:12:5), the court, although holding that there was no rational basis upon which to distinguish between a degree, license or other special skill that generates substantial income, did not make an award based on Marisa Berenson's acting and modeling career since there was no proof as to its value. In *Getz v. Getz*, (ELR 10:12:11), the court also made no award for celebrity status and stated that to the extent the musician's celebrity status had measurable value, such value would be reflected in royalty distributions.

It was pointed out that both parties enjoyed a substantial life style;" that Elkus would further benefit by

sharing the proceeds of the sale of the family home as well as other assets; that Elkus was not a "discarded spouse;" and that he "reaped the rewards" of his association with von Stade.

Judge Schackman stated that the court may decide to compensate Elkus on the basis of his claim that he deferred the development of his own earning potential, but in so doing, would focus on Elkus' needs rather than on "a more nebulous valuation of his wife's career." And Elkus' contributions to von Stade's career, if proved at trial, would be considered in deciding other issues in the case.

Elkus v. Elkus, New York Law Journal, p. 23, col. 4  
(N.Y.Cnty., Sep. 27, 1990) [ELR 12:6:14]

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## **Court orders use of "intended audience" test rather than "ordinary observer" test in evaluating substantial similarity between two arrangements of a spiritual**

In 1980, Gilbert M. Martin composed an arrangement of the spiritual "Ezekiel Saw De Wheel," and granted Hinshaw Music the exclusive rights to publish and distribute the arrangement.

When William L. Dawson, the holder of a copyright in another arrangement of the work, filed an infringement action, a Federal District Court ruled on behalf of Martin and Hinshaw. Although finding that there were substantial similarities between the arrangements with respect to a certain "unique patterns" the court held that Dawson had not shown that the expression of ideas in Martin's work was substantially similar to the expression of ideas in Dawson's work. As an ordinary lay observer

(emphasis by Federal Court of Appeals Judge Murnaghan), presented only with the sheet music of the arrangements, the court stated that it could not find that the two works were substantially similar.

On appeal, Judge Murnaghan focused on the ordinary observer test, citing *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), as the source of modern theory regarding the test. The *Arnstein* court, consistent with an economic incentive view of copyright law, sought to determine whether an alleged infringer wrongfully used material which would be "pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed..." The reaction of the lay listener was relevant in ascertaining the effect of an alleged infringer's work on the copyright holder's market.

The court pointed out that *Arnstein* involved a popular musical work, and that the court "appropriately" perceived lay listeners and the audience for the work to be

the same. In Judge Murnaghan's view, Arnstein requires that "where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended audience would be the relevant inquiry. In light of the copyright laws' purpose of protecting a creator's market, we think it sensible to embrace Arnstein's command that the ultimate comparison of the works at issue be oriented towards the works' intended audience."

The suggested reading of Arnstein, stated the court, would be compatible with the decision in *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). Krofft set forth an intrinsic test, based on the response of the ordinary reasonable person, for determining substantial similarity in the expression of ideas. In most cases, the general lay public fairly represents a work's intended audience. However, the Krofft court was dealing with a product directed at children and, according to Judge Murnaghan, believed that the

perspective of that audience was relevant in conducting the ordinary observer test.

Thus, stated Judge Murnaghan, "when conducting the second prong of the substantial similarity inquiry, a district court must consider the nature of the intended audience of the [copyright holder's] work. If, as will most often be the case, the lay public fairly represents the intended audience, the court should apply the lay observer formulation of the ordinary observer test. However, if the intended audience is more narrow in that it possesses specialized expertise, relevant to the purchasing decision, that lay people would lack, the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar."

Judge Murnaghan suggested that courts should be "hesitant" to find that the lay public does not fairly represent a work's intended audience, and such a finding

would be warranted only where the intended audience possessed "specialized expertise." Such expertise, declared the court, would go beyond mere differences in taste and would "rise to the level of the possession of knowledge that the lay public lacks." Although cautioning against the use of labels, the court designated its test as the "intended audience" test, again emphasizing that courts should use the test to ascertain the effect of the allegedly infringing work on the creator's market.

The matter was remanded in order to allow the District Court to consider whether the audience for Dawson's work possessed specialized expertise that the lay public would lack, and whether the lay public fairly represented the intended audience of Dawson's arrangement. Judge Murnaghan noted that Dawson's work was a spiritual arrangement, not a popular recording, and stated that it would "suspect that the distinction may



have implications for the determination of the intended audience of Dawson's work."

The fact that Dawson did not enter into evidence recordings of performances of the two arrangements was warranted because Dawson sold sheet music to choral directors, not recordings.

The court declined to remand with instructions that the District Court define an audience distinct from the ordinary lay observer. Rather, the matter was remanded with instructions that the District Court determine whether the definition of a distinct audience would be appropriate in this case; if so, the court would most likely require additional evidence to determine whether members of the intended audience would find the arrangements to be substantially similar.

Dawson v. Hinshaw Music Inc., 905 F.2d 731 (4th Cir. 1990) [ELR 12:6:15]

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**California Supreme Court rules that shield law protects nonparty newspaper from contempt for refusing to provide unpublished photographs to party in civil action**

The California Supreme Court has ruled that the state's shield law provides a newspaper publisher with immunity from contempt for refusing to comply with a civil subpoena seeking unpublished photographs of a car accident.

As set forth at ELR 10:5:17, the matter before the court arose in 1984 when a photographer for the Santa Barbara News-Press, which is owned by the New York Times Co., took photographs of the accident scene; the newspaper published two of the photographs.

Jerome and Joyce Sortomme filed a product liability action against Volkswagen of America, Inc. and a negligent highway design claim against the State of California. Volkswagen served the News-Press with a subpoena for "all photographs, negatives, notes, [and] letters" relating to the accident.

The trial court quashed the subpoena, but ordered the newspaper to compare the unpublished accident photographs with photographs that had been taken by police officials to determine if the newspaper photographs contained any information not revealed by the official photographs. The newspaper, although informing Volkswagen that the unpublished photographs contained "pertinent" information, concluded that the photographs were not of considerable additional value and refused to provide copies to Volkswagen. Volkswagen moved to compel production.

The trial court found that the News-Press held only a qualified privilege under Article 1, section 2, subdivision (b) of the California Constitution and section 1070 of the Evidence Code, and sought to review the photographs in camera in order to determine whether the claim of privilege was outweighed by Volkswagen's right to discover relevant information.

An appellate court issued a writ of mandate directing the trial court to set aside its previous order and enter a new order denying Volkswagen's motion to compel; the court held that the shield law provides "absolute protection to nonparty journalists in civil litigation from being compelled to disclose unpublished information."

California Supreme Court Judge David Eagleson first found "premature" the newspaper's petition to the appellate court at a time when the trial court had not yet ruled on whether the failure to produce the photographs constituted contempt. Citing *Delaney v. Superior Court*, 50

Cal.3d 785 (1990; ELR 12:3:15), the court emphasized that the shield law provides only an immunity from contempt, not a privilege, and that "there is nothing from which to seek relief until a newsperson has been adjudged in contempt." The appellate court therefore erred by granting relief before the newsperson was held in contempt. (It should be noted that the court chose to use the term "newsperson" for "convenience" to refer to all the categories of persons identified in the shield law.)

The court cautioned that to avoid confining a newsperson under a judgment of contempt that may subsequently be set aside, "a trial court should stay its judgment of contempt to allow the contemner newsperson sufficient time in which to seek writ relief if the trial court believes there is any colorable argument the newsperson can make against the contempt adjudication." If the trial court declines to issue a stay, a

reviewing court should do so pending its decision as to issuing an extraordinary writ.

Judge Eagleson, notwithstanding the above, proceeded to consider the merits of the instant case. In light of *De-laney*, stated the court, the unpublished photographs "clearly" were within the scope of the shield law. And there was "nothing in the shield law's language or history to suggest the immunity from contempt is qualified such that it can be overcome by a showing of need for unpublished information within the scope of the shield law." Given that the photographs were taken by a non-party newsperson in a public place and were sought in a "typical" personal injury action for damages, the court did not find any federal or state constitutional right of Volkswagen sufficient to overcome the newspaper's claim of immunity.

With respect to the issue of sanctions other than contempt, Judge Eagleson noted that other sanctions are

available when the newsperson is a party to the action in which he/she is resisting discovery. The same principle would apply to nonparty newspersons, stated the court, although observing that the applicable monetary sanctions - a maximum \$500 forfeiture plus actual damages, recoverable only in an independent civil action - would not be effective "as a practical matter." Contrary to the argument of the News-Press, such sanctions would be unlikely to frustrate the purpose of the shield law. The shield law thus would not preclude an award of sanctions under section 1992 of the Code of Civil Procedure, and Volkswagen was entitled to bring an independent civil action seeking to recover any allowable sanctions and damages.

Judge Mosk concurred in those parts of the court's decision holding that a newsperson's constitutional immunity prevails over any asserted interests of civil litigants in compelling discovery, and that the immunity does not

apply to sanctions other than contempt. Judge Mosk did not agree that a newsperson may not seek to obtain review of the constitutional immunity issue before being held in contempt.

Judge Mosk would have held that a newsperson may seek such review when the threat of contempt is imminent; when there are strong policy interests in early adjudication; and when all the issues necessary for an appellate court to decide the writ petition have been litigated in a lower court. The suggested procedure would not involve a change in the state's writ system, in Judge Mosk's view, for the exception would apply only in situations presenting "the unique timing problems" raised by a claim of constitutional immunity from contempt.

Judge Mosk commented that precontempt adjudication would accomplish the protective purpose of preventing newspersons who invoke the shield law from serving



any jail time; that when a motion to compel production of a newsperson's documents has been granted or the newsperson's motion to quash a subpoena has been denied, the newsperson faces a definite threat of being held in contempt; and that if a factual record in a particular case was insufficient, the appellate court could deny the writ petition on that basis in that particular case.

Furthermore, stated Judge Mosk, a newsperson's claim to protect unpublished information and confidential sources may be based both on the shield law and on a qualified First Amendment privilege. The majority's decision would mean that a newsperson who seeks the protection of both the shield immunity and the First Amendment privilege will be able to seek precontempt writ relief on the privilege claim, and, if that relief is denied, return with a post-contempt writ petition based on the constitutional immunity claim. Stating that a

newsperson "should not be required to await writ review until he has suffered the humiliation of being held in contempt by a judge and a bailiff has placed him in handcuffs and led him off to jail," Judge Mosk thus would permit precontempt writ review in determining the applicability of the shield law.

In a footnote comment, the majority responded to Judge Mosk's concerns by pointing out that in the instant case, the News-Press relied on the shield law, that no First Amendment issue was before the court, and that it was unnecessary to decide whether unpublished information obtained in confidence would be subject to a qualified privilege under the First Amendment.

The New York Times Company v. The Superior Court of Santa Barbara, Case No. S006709 (Ca., Sep. 27, 1990) [ELR 12:6:16]

## **Briefly Noted:**

### **Art/Marital Interest.**

A New York trial court has awarded Elizabeth Kustura a half-interest in forty oil paintings created by artist Jozo Kustura during the parties' marriage. Acting Judge Martin Schneier, although noting that Elizabeth Kustura made no financial contributions to the marriage and that her contributions to the creation and sale of the artwork were minimal, nevertheless recognized that a party's contributions "as a full-time parent and homemaker are worthy of full consideration in determining the appropriate distribution of the marital property," particularly in the instant case due to Jozo Kustura's demanding work schedule.

Elizabeth Kustura did not meet her burden of establishing the value of the forty paintings, but the court

proceeded to award her twenty paintings - a fifty percent equitable interest in the marital asset; the court did not state which paintings each party would receive.

Kustura v. Kustura, New York Law Journal, p. 25, col. 2 (Kings Cnty., Aug. 22, 1990) [ELR 12:6:17]

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### **Jurisdiction/Cartoon Distribution.**

A Federal Court of Appeals in New York has dismissed for want of appellate jurisdiction a contract dispute between Arp Films and Marvel Entertainment Group, Inc. As briefly described in the per curiam opinion, the parties entered into a distribution contract in September 1976, forming a new company, known as Amerex, to distribute cartoons owned by Marvel; the parties agreed to divide the revenues.

The court noted that Marvel and Arp entered into the contract, in part, in order to resolve then-pending litigation between them (see ELR 8:11:17). However, further disputes ensued, and Arp eventually claimed that Marvel licensed films to third parties in violation of the contract.

The District Court granted partial summary judgment to Marvel, ruling that the Arp parties had materially breached the contract by continuing to distribute works while refusing to submit the required reports and payments to Marvel. The court also found that the contract terminated in September 1987, and referred certain accounting issues to a magistrate.

The appeal was ruled premature because the issues pending before the magistrate went far beyond "simple ministerial tasks relating to computation of damages;" questions of law were raised which might require rulings

by the District Court. The judgment of the District Court therefore was not a final decision.

Arp Films, Inc. v. Marvel Entertainment Group, Inc.,  
905 F.2d 687 (2d Cir. 1990) [ELR 12:6:17]

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### **Copyright Infringement/"Pikl'd Pig."**

William Wallace, Jr. created a ceramic figurine of a sow drinking from a jug of moonshine liquor; the first copies of the sculpture, which was known as the "Pikl'd Pig," were sold in March 1980 and bore a copyright notice.

In 1984, Belinda Dean purchased Wallace's molds for casting figurines and his copyrights in certain works. Wallace assisted Dean in preparing a new master mold,

and Dean then began distributing figurines of the redesigned pig.

In the late 1980s, Dean sued Ben T. Burrows for allegedly selling unauthorized copies of various figurines, including the Pikl'd Pig. A Federal District Court in Tennessee (in a decision issued in February 1989 but only recently published) first found that Dean held a valid copyright in the sculpture. Judge Jordan then determined that there was insufficient proof of a conspiracy between Burrows and another party so as to impose joint and several liability for copyright infringement. Upon finding that Burrows was liable for willful infringement of Dean's copyright, the court assessed statutory damages of \$50,000 and entered a default judgment in this amount against Burrows; the court also awarded Dean her attorneys fees and costs against Burrows in the amount of about \$35,000. A silk purse indeed.

Dean v. Burrows, 732 F.Supp. 816 (E.D.Tenn. 1989)  
[ELR 12:6:18]

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### **National Geographic Royalty Claim.**

In 1984, the National Geographic Society granted International Media Associates the exclusive distribution rights to certain films. National Geographic eventually sued International Media for breach of contract, claiming that the distributor failed to pay about \$140,000 in royalties. A Federal District Court in the District of Columbia has granted summary judgment to National Geographic with respect to the claim for royalties. However, the court declined to enter final judgment, citing International Media's counterclaim seeking to set off money allegedly due from the publisher.



National Geographic Society v. International Media Associates, Inc., 732 F.Supp. 4 (D.D.C. 1990) [ELR 12:6:18]

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## **Libel.**

A Federal District Court in Wisconsin has ruled that Dr. George Schwartz and Health Press did not libel Modem Products, Inc. or its product, Spike, in a book entitled "In Bad Taste The MSG Syndrome." Modem Products alleged that the book cover was defamatory because it included a picture of Spike among various "junk foods" underneath the title of the book. Senior District Judge Myron L. Gordon stated that a reasonable jury could find that the book cover conveyed a defamatory meaning "by construing the words and the picture as a message that the pictured products are unhealthy

because they contribute to a health condition known as MSG Syndrome. Modern Products was not a public figure, and a jury must determine the question of whether Dr. Schwartz and Health Press were negligent in publishing the alleged defamation, concluded the court.

Judge Gordon granted the publisher's motion for summary judgment with respect to Modern Products' claim of product disparagement.

Modern Products, Inc. v. Schwartz, 734 F.Supp. 362 (E.D.Wisc. 1990) [ELR 12:6:18]

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### **Horse Racing/License Suspension.**

The track judges at Roosevelt Raceway found that Michael LaChance's driving performance during the second quarter of a race held on September 27, 1987 "tended to

slow down the field excessively." The New York State Racing and Wagering Board subsequently confirmed the recommendation of an eight day suspension. A New York appellate court has granted LaChance's petition seeking to annul the Board's determination. The court noted that a racetrack judge agreed that LaChance exercised his best efforts to win the race, that it was good strategy to allow the horse to "take a breather" in the second quarter of the race, that the four drivers following LaChance during the first half of the race were not prevented from pulling out and passing, and that the other drivers did not object to LaChance's performance during the race. The evidence did not show that LaChance engaged in any action in violation of the Board's rules.

LaChance v. Corbisiero, 553 N.Y.S.2d 387 (N.Y.App. 1990) [ELR 12:6:18]

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## **Horse Racing/License Suspension.**

In August 1987, the New York State Racing and Wagering Board notified Rejean Daigneault that his harness racing license was suspended for eight days for excessively slowing the field during a race at Roosevelt Raceway on August 5th. Daigneault's horse, Cherokee Express, won the race by about three lengths. A hearing officer found that Daigneault set an excessively slow pace in the early quarters of the race, and recommended confirming the eight day suspension; the Racing Board confirmed the hearing officer's findings.

A New York appellate court has found that the decision of the Racing Board was not based upon substantial evidence and was arbitrary and capricious. The court noted, in particular, that Cherokee Express maintained a

solid length lead over the trailing horses, and stated that Daigneault "did nothing which either assisted or impeded any other driver from winning the race." The court therefore granted Daigneault's petition seeking to annul the Board's order confirming his suspension.

Daigneault v. Corbisiero, 550 N.Y.S.2d 290 (N.Y.App. 1990) [ELR 12:6:19]

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### **Horse Racing/Trainer Exclusion.**

Yonkers Racing Corporation did not violate the Fourteenth Amendment due process rights of George Hades, a driver, trainer, and owner of standardbred horses, by refusing to allow Hades to work at Yonkers, a Federal District Court in New York has ruled. In granting Yonkers' motion to dismiss Hades' claim

under 42 U.S.C. section 1983, Judge Goettel noted that the New York State Racing and Wagering Board had suspended Hades' New York license from January 1989 to July 1989; the Board determined that Hades had signaled a patron of the racetrack to bet on a horse other than the one Hades was riding. The Board reinstated Hades' license, but Yonkers denied Hades' request for reinstatement of his racing privileges and excluded him from even entering the grounds as a patron. The racetrack stated that the exclusion was based on Hades' past racing performances and his involvement in litigation over the ownership of horses.

The court found that Hades failed to establish state action either under the "close nexus" or "symbiotic relationship" tests. The fact that the privately owned racetrack was "heavily regulated" and operated under a state license did not transpose its decisions into state action. Judge Goettel also pointed out that the Board had

reserved Yonkers' common law right to exclude anyone from the track unless such exclusion were based on race, creed, color, or national origin; that Hedges still could work at any other racetrack in New York; and that the exclusion was based on Yonkers' "own business judgment" and did not involve state officials. In the absence of a showing of state action, the court denied Hedges' motion for a preliminary injunction.

Hedges v. Yonkers Racing Corporation, 733 F.Supp. 686 (S.D.N.Y.1990) [ELR 12:6:19]

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### **Basketball Referee Malpractice Claim.**

Dr. Richard Blum conducted the yearly physical for Donald Murphy, a referee for the National Basketball Association. Dr. Blum advised the supervisor of NBA

officials of his findings, including an abnormal result during Murphy's exercise stress test. During the next basketball season, Murphy suffered cardiac arrest and no longer could referee.

When Murphy sued Dr. Blum for malpractice, a New York trial court dismissed the complaint for failure to state a cause of action. An appellate court has affirmed the trial court's ruling, noting that because the doctor was retained by the NBA solely for the purpose of advising the league whether Murphy would be physically capable of performing his duties as referee and not to treat or advise Murphy, there was no patient-doctor relationship.

Murphy v. Blum, 554 N.Y.S. 2d 640 (N.Y.App. 1990)  
[ELR 12:6:19]

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## **Previously Reported:**

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: *Delaney v. Superior Court of Los Angeles County*, 789 P.2d 934 (12:3:15); *Khan v. Newsweek, Inc.*, 554 N.Y.S.2d 119 (12:2:11); *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (12:2:8); *United States v. Syufy Enterprises*, 903 F.2d 659 (12:1:12); *Weiner v. Doubleday & Company, Inc.*, 550 N.Y.S.2d 251, 549 N.E.2d 453 (11:12:12); *Daniel Wilson Productions, Inc. v. Time-Life Films, Inc.*, 736 F.Supp. 40 (12:1:14). [ELR 12:6:19]

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## **IN THE NEWS**

**Florida jury acquits rap group 2 Live Crew of obscenity charges; separate jury earlier had found store owner guilty of obscenity for selling group's album "As Nasty As They Wanna Be"**

A Florida trial court jury has found the members of the rap group 2 Live Crew not guilty of obscenity charges brought in connection with a nightclub concert performance by the group.

During the concert, 2 Live Crew performed four songs from the album "As Nasty As They Wanna Be." In August 1990, a Federal District court in Florida ruled that the album was legally obscene (ELR 12.3:4).

In early October 1990, a Florida jury found record store owner Charles Freeman guilty on a misdemeanor charge of obscenity for selling the album. [Nov. 1990] [ELR 12:6:20]

## **Los Angeles court upholds arbitrator's decision dismissing claim concerning story idea for "Superman IV" film**

In the most recent of a series of court proceedings (ELR 10:11:20; 9:2:21), a Los Angeles trial court judge has upheld arbitrator David Nimmer's decision rejecting Barry Taff and Kenneth Stoller's claim that actor Christopher Reeve used their story idea, without authorization, for the 1987 film "Superman IV: The Quest for Peace."

It has been reported that the arbitrator found that Taff and Stoller did not present evidence to support their claims.

Taff and Stoller argued that the court erred in ordering the parties to arbitrate; apparently refused to participate in the arbitration proceeding, and plan to appeal the decision. [Nov. 1990] [ELR 12:6:20]

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## **Rodney Dangerfield obtains \$725,000 jury verdict in action against Caesars Palace**

A Federal District Court jury in Las Vegas has awarded Rodney Dangerfield \$725,000 in the comedian's lawsuit against Caesars Palace.

Dangerfield claimed that he missed five performances in March 1988 because his eyes were burned in a steam bath accident at the hotel. The jury found that Caesars was contractually obligated to pay Dangerfield for the missed performances because the injury should have excused him from performing. The damage award consisted of \$225,000 for the missed performances and another \$500,000 for pain and suffering.

The jury also rejected a countersuit filed by Caesars. [Nov. 1990] [ELR 12:6:20]

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**Bill limiting television commercials during programs for children becomes law without President Bush's signature**

A bill limiting advertisements on television programs for children has become law without President Bush's signature.

The bill limits commercials during such programs, both on over-the-air and cable television stations, to twelve minutes per hour during the week and ten and one-half minutes per hour on weekends. And broadcasters seeking license renewal will have to show that they are meeting the educational needs of children. [Nov. 1990] [ELR 12:6:20]

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## **NFL Commissioner fines Bengals' coach about \$30,000 for excluding female reporter from team locker room**

National Football League Commissioner Paul Tagliabue has imposed a fine of about \$30,000 on Cincinnati Bengals' coach Sam Wyche for excluding a female reporter from the Bengals' locker room. After the Bengals completed a game in Seattle, Wyche arranged to have the team's quarterback meet with the reporter for an interview outside the locker room. However, NFL policy provides for equal postgame media access to team locker rooms. [Nov. 1990] [ELR 12:6:21]

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## **Federal Communications Commission fines three Florida radio stations for noncompliance with equal employment opportunity guidelines**

The Federal Communications Commission although concluding that license revocation was not warranted, has fined three radio stations in Florida for not complying with equal employment opportunity guidelines.

The Commission imposed a \$15,000 fine on Naples station WNOG-AM/WCVU-FM and gave the station a three year, rather than a seven year renewal period. It was found that the station had no minorities among its 31 full-time employees and had not employed any minority workers since 1983.

A \$5,000 fine was imposed on Daytona Beach station WNDB-AM/WWLTV-FM, and Tallahassee station WYNN-AM/WTNT-FM received a \$2,000 fine.

It has been reported that the Commission also imposed stricter reporting conditions on three other radio stations with respect to the stations' efforts to attract minorities. [Nov. 1990] [ELR 12:6:21]

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**Art gallery is acquitted on obscenity charges arising from exhibition of Robert Mapplethorpe photographs**

A Cincinnati trial court jury has acquitted the Contemporary Art Center and gallery director Dennis Barrie of misdemeanor charges of pandering obscenity and using children in nudity-related material. The charges arose from the gallery's exhibit of sexually graphic photographs by Robert Mapplethorpe. The prosecution argued that the photographs lacked artistic value. [Nov. 1990] [ELR 12:6:21]

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## **Nursing homes and film distributors agree on proposal for exhibiting videocassette films**

Nursing homes will not be required to obtain a license in order to exhibit videocassette movies to residents, according to an agreement reached between major film companies and nursing home associations.

Under the agreement, which took effect in August 1990, a nursing home, upon making a \$10 contribution to a charitable organization designated by a film distributor, will obtain a non-exclusive license. Nursing homes may not make a direct charge for the performance or display of the copyrighted work. And the performance must occur in a common area or living room, and may not be further transmitted by closed circuit television or other means. Licenses will remain in effect until January 1, 2001.

The agreement, according to news reports, defines "nursing home" as "a group home that provides long-term health or health-related care and services to individuals on a regular basis and serves as a residence for such individuals." The agreement does not extend to a hospital wing used for long-term health care for the elderly if the remaining areas of the hospital are used for short-term patients or for out-patient treatment. If the nursing home is located on the grounds of a hospital, retirement community, or other facility, the agreement would cover performances or displays in the nursing home in a common area serving the home's residents. [Nov. 1990] [ELR 12:6:21]

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## DEPARTMENTS

### **In the Law Reviews:**

Welcome to the Nineties, *Bindrim v. Mitchell*: Now Drop Dead by Robert Asa Crook, 12 Comm/Ent, Hastings Communications and Entertainment Law Journal 517 (1990)

When a Promise Is Not a Promise: the Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources by Kathryn M. Kase, 12 Comm/Ent, Hastings Communications and Entertainment Law Journal 565 (1990)

My Life, My Story, Right? Fashioning Life Story Rights in the Motion Picture Industry by Michelle E. Lentzner, 12 Comm/Ent, Hastings Communications and Entertainment Law Journal 627 (1990)

Columbia University School of Law and Volunteer Lawyers for the Arts have published Volume 14, Number 2 of Columbia-VLA Journal of Law & the Arts with the following articles:

The Continuing Process of Refining and Adapting Copyright Principles by Leo J. Raskind, 14 Columbia-VLA Journal of Law & the Arts 125 (1990)

Counseling Artists in the Acquisition and Use of New York City Cooperative Housing by Joseph R. Egan and Melissa A. Clark, 14 Columbia-VLA Journal of Law & the Arts 165 (1990)

Authors' Rights and Bankruptcy: A Roundtable Discussion on Authors' Rights and Remedies in the Context of Publishers' Bankruptcies, 14 Columbia-VLA Journal of Law & the Arts 189 (1990)

Spycatcher, Ex-Spies and Publication: A Comparison of Two Governments' Responses to the Release of Confidential Information by Gillian M. Lusins, 14 Columbia-VLA Journal of Law & the Arts 233 (1990)

(Re)Productive Rights: Copyright and the Postmodern Artist by Elizabeth H. Wang, 14 Columbia-VLA Journal of Law & the Arts 261 (1990)

Brothels in the Marketplace of Ideas: Defining Commercial Speech by Marc S. Charisse, 12 Communications and the Law 3 (1990) (published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880)

Ancillary Uses of Collective Works by Nicholas J. Jollymore, 12 Communications and the Law 21 (1990) (for address, see above)

Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton by Edward Hardy Lewis, 68 North Carolina Law Review 1295 (1990)

Arkansas Writers' Project v. Ragland: The Limits of Content Discrimination Analysis by Laura V. Farthing, 78 The Georgetown Law Journal 1949 (1990)

The Congressional Response to the Supreme Court's Treatment of Dial-A-Porn by Cindy L. Petersen, 78 The Georgetown Law Journal 2025 (1990)

"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement by Alan Latman, 90 Columbia Law Review 1187 (1990)

The Likeness Monster: Should the Right of Publicity Protect Against Imitation? by Christopher Pesce, 65 New York University Law Review 782 (1990)

Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, review of Paul Goldstein's Copyright: Principles, Law and Practice by Wendy J. Gordon, 57 University of Chicago Law Review 1009 (1990)

Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy, 76 Virginia Law Review 1409 (1990)

National Collegiate Athletic Association v. Tarkanian: The End of Judicial Review of the NCAA, 12 University of Hawaii Law Review 383 (1990)

Promoting Copyright in the Netherlands: An Example for Others? by H. Cohen Jehoram, 12 European Intellectual Property Review 267 (1990)

Television without Frontiers-Myth or Reality? by Ewald Orf, 12 European Intellectual Property Review 270 (1990)

Proprietary Rights in Character Merchandising Marks by Andrew Terry, 18 Australian Business Law Review 229 (1990)  
[ELR 12:6:22]