RECENT CASES

Judas Priest musical group found not liable in "suicide-by-subliminal-message" case

Judge Jerry Carr Whitehead, in reviewing the claims brought against the musical group Judas Priest in connection with the deaths of Raymond Belknap and James Vance, first emphasized that the sole issue before the court was whether purported subliminal messages on the album "Stained Class" caused the tragic deaths.

As described by the court, the album was made by recording the songs on 24 track tapes which were condensed to a two track tape, the two track tape then was used to make the record. Judge Whitehead stated that it would be "almost impossible" to discover the presence of subliminal messages on the record, rather than on the tapes. Nevertheless, although CBS provided the decedents' families with only one of the nine tapes used to create the "Stained Class" album, the Belknap/Vance parties apparently found "what were perceived to be subliminal commands on the record itself."

Judge Whitehead proceeded to find that the words "do it" were present several times on the song "Better by You, Better Than Me," and that the "do its" on the record were subliminal. An audio subliminal message would be "so faint as to be below the level of conscious awareness. " The sounds on the Judas Priest song were apparent only after their location was identified and alter the sounds were isolated and amplified - the sounds would not have been consciously discernable to the ordinary listener under normal listening conditions, stated the court.

Judge Whitehead then determined that the words "do it" were the result of a chance combination of sounds, and were not intentionally formed - the words were "a combination of the singer's exhalation of breath on one track and a 'leslie guitar' on another track." The court also noted that the four members of the band and two "support people" all denied the intentional insertion of any forward subliminal messages.

The Belknap/Vance parties claimed that the group used a process of spreading the sounds of the words over several tracks so that the sounds only would be heard when all of those tracks were played together. The court rejected this claim for several reasons, including that it was "inconceivable" to the court that in 1978 the group would believe that such a level of deception was necessary, and that it was questionable whether the equipment necessary to spread the sounds over the various tracks was available in 1978 at the studio where the song was recorded.

Judas Priest was not liable for subliminal commands which were inadvertently formed, concluded the court. Stating that the Vance/Belknap action was based, primarily, on an invasion of privacy theory, Judge Whitehead noted that the essence of the cause of action is an international (emphasis by the court) interference with another's interest in solitude or seclusion. The Vance/Belknap parties failed to show the requisite intent on the part of the group.

The court, although having decided the "threshold" issue against the Vance/Belknap parties, chose, given the prospect of appellate review, to set forth its decision on other issues relating to the case.

One such issue was whether the alleged subliminal messages were a cause of Belknap's suicide and Vance's attempted suicide (Vance died in 1988, due in part to injuries suffered in the suicide attempt). Judge Whitehead carefully reviewed the testimony of a psychologist called by the Vance/Belknap parties. One aspect of the testimony cited by the court was that a person must be predisposed to do a particular act before a subliminal message will have an effect on behavior. In the instant case, the psychologist testified that the deceased "had personality predispositions for suicide which were indicated by a propensity for violence, failures at school and employment problems." On the date of the shooting, Belknap and Vance also were "situationally predisposed" for suicide because of the use of alcohol and marijuana combined with the music. The subliminal command "do it," in the psychologist's view, may have created a "compulsion" towards doing what the youths already were predisposed to do, to commit suicide.

A psychologist called by the Judas Priest parties did not agree that subliminal stimuli can effect behavior and stated that there was no evidence to substantiate such a claim in the instant case.

The court expressed "surprise" at the lack of controlled experiments in the field and stated that the subject was "not a closed issue." However, based on the testimony presented, Judge Whitehead found that there was scientific evidence of the perception of subliminal stimuli at other than a conscious level. And there was factual support (in the testimony of a counselor) that the decedents subliminally perceived "do it" from the record. For purposes of whether the " commands" were perceived, stated Judge Whitehead, it was inconsequential whether they were entirely the product of a human voice or whether they were formed in conjunction with other sounds.

Notwithstanding the above, the court went on to conclude that the scientific research presented did not establish "that subliminal stimuli, even if perceived, may precipitate conduct of this magnitude," and that there existed other factors which explained the conduct of the decedents independent of the subliminal stimuli. In all, stated Judge Whitehead, a number of separate factors in combination with a precipitating factor caused the shootings, and there was insufficient information to determine, by a preponderance of the evidence, which of the factors were legal or proximate causes.

Judge Whitehead next considered whether the "Stained Class" album contained "backmasked" messages. Backmasking is the process of singing of stating words on a recording in such a way that when the recording is played backwards, the forward words create intelligible words or phrases in the reverse. The argument that the backmasked messages were present on the album was "forceful" and raised "grave suspicions" in the mind of the court. But Judge Whitehead acknowledged that the area of backmasked messages was one "where anyone including the Court could be easily led by the power of suggestion."

As in the area of forward subliminals, the Vance/Belknap parties would be required to show that any backmasked messages were created consciously and intentionally by the group members. The evidence showing that the alleged messages were not simply random and unrelated words and phrases, but were related to the content of the song in which they purportedly appeared, went "a long way towards proving the requisite intent," stated the court. However, in the absence of evidence that the singer's style had been altered in some way at the location of the messages in order to create the backmasking, the court held that the Vance/Belknap parties did not prove that backmasking took place on the album.

Judge Whitehead further found that there was no credible scientific evidence presented to show that a person can perceive a backmasked message either subliminally or supraliminally, or to show that a backmasked message can affect a person's conduct.

In concluding personal observations, Judge Whitehead expressed the view that the Vance/Belknap parties presented an arguable position, particularly given the dearth both of research in the area of subliminal messages and of financial resources, and commended the parties for initiating public discussion of a significant issue.

In a separate 18 page order granting the Vance/Belknap parties' request for sanctions, the court noted the importance of the twenty-four track tapes, and expressed "dismay" with CBS'S" limited" attempts to locate the tapes and to provide documentation of the use and access to the tapes. The court further observed that when the tape for the song "Better By You, Better Than Me" appeared, CBS "proceeded to place the integrity of the tape in doubt by allowing it to be extensively played and handled without representatives of [Vance/Belknap] present." CBS never produced any other twenty-four track tapes from the other songs on the "Stained Class" album.

Judge Whitehead found that the efforts of CBS to comply with the requested discovery were "at best a refusal to reasonably participate in discovery, and at worst, were a concealment of evidence." The court declared that CBS refused to properly comply with the orders regarding discovery and delayed discovery; that the defaults of CBS were not occasioned by trial counsel but were the failures of present and past in-house counsel of CBS; that Judas Priest appeared to have generally cooperated in the discovery process; that the failure of CBS to participate in discovery caused extreme expense to all of the parties and inconvenience to the court; and that CBS and Sony "are both corporations of great wealth, and imposition of an insignificant sanction may not operate to deter future conduct on their part." Judge

Whitehead did recall that the Vance/Belknap parties initially were not responsive to discovery requests, although they later "corrected their deficiencies."

In view of the above factors, the court found that the appropriate sanction, against CBS only, was $40,000. Noting that the amount might not seem sufficient, given the cited factors, the court stated that the primary reason for the limited award was that even if the tapes had been disclosed and subliminal messages were found, the court did not believe that the ultimate outcome of the trial would have been any different. The sanctions were imposed to deter any similar future conduct and to compensate the Vance/Belknap parties for expenses incurred due to the resultant delay.

Vance v. Judas Priest, Case No. 86-5844/86-3939 (Washoe Cnty., Aug. 24, 1990) [ELR 12:7:3]

Decision upholding constitutionality of New York's "Son of Sam" law is affirmed

A Federal Court of Appeals in New York has upheld the constitutionality of New York Executive Law section 632-a, known as the "Son of Sam" law.

The statute requires that the profits derived by a criminal from the exploitation of his/her crime be deposited in an escrow account maintained by the New York State Crime Victims Board; the Board preserves the funds in part, to satisfy any civil judgments recovered by the victims of the crimes. Criminals may recover any funds left uncollected in the escrow account after five years.

In 1981 (as described at ELR 11:11:13), Simon & Schuster, author Nicholas Pileggi, and "career criminal" Henry Hill entered a contract whereby Pileggi agreed to write a book about organized crime in New York City. The book, "Wiseguy: Life in a Mafia Family," was published in 1986. Soon after, the Victims Board determined that the book was subject to section 632-a, ordered Hill to turn over to the escrow account about $96,000 paid to Hill by the publisher, and ordered the publisher to transfer to the Board all payments due Hill.

Judge Roger J. Miner first found, contrary to the District Court (ELR I 1:11:13) that the statute imposed a direct, rather than an incidental, burden on speech. But the state has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization." Our society, declared the court, "rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime."

The state's general attachment provisions were too limited to fulfill the state's interest in compensating crime victims, and section 632-a was narrowly tailored to achieve the state's interest, noted the court. The statute would not eliminate a criminal's right to speak about a crime, and would not prevent all payments for the story of the crime. But when such payments, stated Judge Miner, have been derived from the notoriety of the criminal, and that notoriety "comes at the expense of a victim in need of compensation and restitution, the income so derived should be available to the victim."

Judge Jon O. Newman questioned whether the state was entitled to escrow only payments to criminals who write books, rather than escrowing for the benefit of crime victims all payments to criminals. The dissent further stated that it was clear that the application of the statute to individuals accused of a crime would "deter the writing of books by many innocent persons falsely accused of crime." And holding a publisher liable for any payments made to an author that later are determined to be covered by the statute, in the event that the author declines to turn over the payments to the Board, would make publishers "extremely reluctant," in Judge Newman's view, to issue advances for books even arguably within the scope of the statue.

The dissent observed that during the past eleven years, the statute produced just five escrow accounts, three of which involved the same criminal. Thus, "what little benefit to a handful of victims has thereby been achieved is more than offset by the royalties that would have been earned on books that were not published because of this statute. Such royalties would have been available for victim restitution under New York's existing restitution statute which is not confined to books, much less to books with specified content," stated Judge Newman. New York was entitled to enact a comprehensive statute providing for restitution to crime victims, but section 632-a was a content-based regulation of protected speech and violated the First Amendment, concluded Judge Newman, who noted that "Wiseguy" and its film adaptation, "Good Fellas," "may not be profound additions to public understanding of crime, but they are significant contributions." The evidence indicated that if the parties had observed the requirements of section 632-a when the book contract was negotiated, the book most likely would not have been written.

Simon & Schuster v. Fischetti, New York Law Journal, p. 21, col. 3 (2d Cir., Oct. 3, 1990) [ELR 12:7:5]

Author may proceed with breach of contract and copyright infringement claims against Simon & Schuster arising from alleged underpayment of royalties, but court dismisses RICO claim

In November 1982, Simon & Schuster published a book by Porter B. Williamson entitled "Patton's Principles, A Handbook For Managers Who Mean It!" One year later, Williamson sought to revoke Simon & Schuster's license to publish the book, and, in a subsequent lawsuit, the author set forth causes of action for copyright infringement, breach of contract, and the violation of the Racketeer Influenced and Corrupt Organizations Act.

A Federal District Court in New York has granted summary judgment to Simon & Schuster on the RICO claim. Judge Sand, citing Vista Co. v. Columbia Pictures Industries, Inc., 725 F.Supp. 1286 (S.D.N.Y.1989; ELR 11:11:8), stated that when a party "is also the RICO enterprise and a racketeering scheme is not the enterprise's sole purpose, investment of the proceeds from the pattern of racketeering for general operations is too attenuated a causal connection to satisfy Sections 1962(a) and 1964(c)."

Williamson claimed that his book was published as a trade edition, but that he received royalties based on the quality paperback edition royalty rate. Judge Sand found that Simon & Schuster did not establish, for purposes of the motion for summary judgment, either that the edition it published was not the "first edition in book form" or that the edition was "at less than the catalog retail price of the most recent trade edition." The publisher also did not establish !hat a "trade edition" is anything more than the first edition of a literary work in book form.

The court then denied the publisher's motion for summary judgment on Williamson's claim alleging that royalties were calculated from " special sales" of the book on the basis of a percentage of the net amounts received, rather than from the catalog retail price.

Judge Sand concluded by refusing to dismiss Williamson's cause of action for copyright infringement. The author alleged a fraudulent scheme to pay royalties based upon other than the suggested catalog retail price, to withhold from authors royalties for books returned by stores and resold, to deduct from royalties excessive noninterest bearing reserves, and to misclassify certain royalties due authors as being foreign sales. Simon & Schuster, observed the court, made no effort to demonstrate the absence of any issue of material fact with respect to the allegedly fraudulent misrepresentations or that it was entitled to judgment as a matter of law on these claims. If proven, Williamson's allegations of fraudulent misrepresentations would likely be sufficient to establish that the publisher substantially breached its contract. In this case, Williamson was entitled to revoke the publication rights and any publication by Simon & Schuster after November 1983 would constitute copyright infringement.

Williamson v. Simon & Schuster, 735 F.Supp. 565 (S.D.N.Y. 1990) [ELR 12:7:5]

NCAA may not require Stanford University to enforce drug testing program for student athletes

The National Collegiate Athletic Association's drug testing program violated the right of privacy of Stanford University student athletes, a California appellate court has ruled.

Acting President Judge Eugene M. Premo began his 56 page opinion by describing the background and operation of the NCAA's testing program which Jennifer Hill and J. Barry McKeever challenged under article 1, section 1 of the California Constitution.

Hill was co-captain of the Stanford women's soccer team in her senior year. McKeever was a linebacker on the Stanford football team, with one remaining year of NCAA eligibility. McKeever signed the NCAA's consent form for the 1986-1987 school year, and underwent drug testing in connection with his participation in the 1987 Gator Bowl. The NCAA requires student-athletes to sign consent forms at the beginning of each school year or face exclusion from intercollegiate athletic competition.

The Stanford athletes sought an injunction to prohibit the NCAA from enforcing the testing program against them in the 1987-1988 school year, alleging that the tests were "degrading, humiliating, and embarrassing," that the tests were incapable of measuring factors relevant to athletic performance, and that the program required no showing of individualized suspicion, probable cause or compelling necessity.

A Santa Clara trial court issued a permanent injunction prohibiting the NCAA from enforcing the drug testing program against Stanford or its students. The court concluded that the NCAA did not show that it had a compelling interest in the testing program based on evidence of actual use of each of the banned drugs by a significant number of the male and female athletes in each of the 26 NCAA sports. The NCAA also did not show that each of the categories of drugs had a performance-enhancing effect or that there was no less intrusive alternative.

On appeal, the court rejected the NCAA's argument that the California constitutional guarantee of privacy did not extend to the action of a voluntary, private association. Article 1, section 1 was intended to reach both governmental and nongovernmental conduct, stated the court. The section provides that "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." And the section requires the showing of a compelling interest before a party can invade a fundamental privacy right.

Judge Premo noted that the NCAA maintains a 58 page noninclusive list of banned prescription and over-the-counter drugs. The NCAA claimed that its rules prohibit the use of a banned substance "in preparation for or participation in an NCAA championship or certified postseason football contest." However, the trial court found that it was not the use of drugs nor even the use of banned drugs in preparation for or participation in a championship event that was forbidden, but that disqualification would occur only if the NCAA test yielded positive results.

The trial court, in "extensive and meticulously detailed findings," had determined that no women athletes in any sport had been declared ineligible under the NCAA testing program. In 1986-1987, less than one percent of the male students tested were declared ineligible; 31 of the 34 students were football players and 25 of those tested positive for anabolic steroids. In all, the survey results appeared to the trial court to support the finding that athletes do not use drugs any more than other students, "and, if anything, use drugs less during the athletic season." For Judge Premo, all of the evidence demonstrated that "there was no drug involvement in any sport except football, and that the problem related only to steroid use and involved a small minority of the football players."

Judge Premo next considered the accuracy of the laboratory test reports and test procedures before turning to the issue of whether the testing program invaded the athletes' privacy interests. It was noted that both the collection and testing of urine are included in the privacy interests protected by article 1, section 1, as are the rights to keep one's medical history private and to control one's own medical treatment.

Since the testing program invaded a protected constitutional interest, stated the court, the NCAA was required to show that the utility of the program outweighed the impairment of the athletes' constitutional rights. The trial court had found that there was no evidence that drug use in athletic competition was endangering the health and safety of student-athletes or that any college athlete had even been injured in competition as a result of drug use. Even if student-athletes were not drug free, it was "undisputed" that their drug use was no greater than that of other students and therefore there was no compelling need for drug testing of athletes based on their health. And there was no evidence that any student-athlete had ever injured anyone else as a result of drug use.

Apparently, most witnesses before the trial court agreed that the most serious substance abuse problem among college athletes and college students generally is alcohol. Except in the sport of rifle, the NCAA testing program does not ban the use of alcohol or test for it. The court then pointed out that the NCAA does not provide any counseling or rehabilitation assistance for athletes who are found to have a drug problem under the testing program.

With respect to the NCAA's claim that the drug testing program also was initiated to preserve fair and equitable competition, the trial court found that the evidence did not establish that any of the drugs on the banned list actually would enhance the performance of an athlete in the NCAA sports, and concluded that the NCAA did not establish a compelling need for drug testing of student-athletes. Judge Premo emphasized that the NCAA's testing program was not designed to and could not determine whether an athlete took a substance in preparation for or participation in an NCAA post-season competition, or whether the athlete's performance was affected by any of the banned substances. The court stated that "An athlete may be disqualified from an event even if that athlete does not enjoy any advantage in performance. Conversely, an athlete may have received a benefit from a drug such as a short-acting steroid, but still test negative on an NCAA drug test." The evidence showed that the drug testing was not a scientifically valid method of detecting or deterring drug use, and was not effective in reaching the NCAA's stated goals of "clean and equitable postseason competition and protecting the health and safety of student athletes."

The trial court also found that the NCAA did not meet its burden of showing that there were no less intrusive means available to further the stated goals. The NCAA did not adequately try drug education, noted Judge

Premo. During the years 1975-1985, the NCAA spent about $200,000 on drug education; the NCAA spent over $1 million on drug testing in the first year of the testing program. Furthermore, the NCAA did not adequately consider and use testing based on reasonable suspicion as an alternative to random testing or testing based on playing time. The NCAA's appeal process also was found inadequate.

Judge Premo concluded that substantial evidence supported the trial court's findings that whatever usefulness the drug testing program may have had did not "manifestly" outweigh the resulting impairment of the constitutional right of privacy. Therefore, the NCAA may not require Stanford student-athletes to "waive" their constitutional rights in order to receive the benefit of participation in intercollegiate athletics.

The trial court's decision did not violate the commerce clause of the United States Constitution, stated Judge

Premo. The NCAA claimed that the decision would serve to extend the reach of California law beyond the borders of the state and preclude the NCAA from establishing uniform rules to govern interstate athletic competitions. But the trial court found that the NCAA had held championships for eighty years without drug testing and that testing was not conducted at all of the championships. Furthermore, an injunction prohibiting the testing of Stanford athletes and prohibiting retaliation against Stanford would not affect commerce since the commercial arrangements for the competitions and games were not disturbed.

In this case, stated Judge Premo, the "local benefit" of enjoining the invasion of a fundamental and inalienable constitutional right was of paramount importance. And as the NCAA was a resident of California, the trial court stated that it had the authority to enter an injunction which would apply to the NCAA both inside and outside of California and prohibit drug testing of Stanford athletes wherever the tests might take place.

The trial court order awarding attorneys' fees to the athletes and to Stanford University was upheld.

Hill v. National Collegiate Athletic Association, Case No. H005079 (Ca.Ct.App., Sep. 25, 1990) [ELR 12:7:6]

Santa Cruz theater owner may present antitrust claims against competing exhibitors and film distributors at trial, rules Federal Court of Appeals in reversing lower court decision

The Movie 1 & 2, owned by Harold Snyder and his two sons, operated a two-screen theater in Santa Cruz, California. Snyder claimed that the theater's competitors, United Artists Communications and Nickelodeon, Inc., entered an illegal split agreement whereby United Artists monopolized the first run commercial film exhibition market and the Nickelodeon monopolized the first run art film exhibition market in Santa Cruz. Snyder claimed that nineteen film distributors participated in the exhibitors' allocation scheme and discriminated against The Movie in furtherance of the conspiracy.

A Federal Court of Appeals has reversed a District Court decision rejecting Snyder's antitrust claims (ELR 10:3:13).

Federal District Court Judge Rudi M. Brewster, sitting by designation, first found that the District Court erred in excluding from evidence certain statements purportedly made by a former licensing agent for Twentieth Century Fox and by the owner of the Nickelodeon.

With respect to Snyder's claims under section 1 of the Sherman Act, Judge Brewster found that the exhibitor presented "ample evidence" to rebut United Artists claim that its licensing decisions were based upon independent business judgment. There also was evidence before the court indicating that, for a time, certain distributors had refused to even receive bids from The Movie. The distributors, observed the court, cited no legitimate business justification for a refusal to even receive an exhibitor's bid, and such behavior "raises the inference that the distributors would not have licensed films to The Movie even if presented with consistent lucrative bids superior to those of the other exhibitors."

The court also pointed out that United Artists apparently received almost ninety-seven percent of all revenues from first-run commercial films shown-in Santa Cruz, reflecting an anticompetitive market situation. In this case, the distributors' refusal to even receive a new exhibitor's bids would tend to exclude the possibility of independent action, stated Judge Brewster, and at least raised an issue of fact as to the distributors' participation in the alleged conspiracy to restrain trade in the form of a group boycott of The Movie through split agreements. Judge Brewster again noted that the distributors licensed films without any bids at all, that bid negotiations excluded Snyder, and that there was evidence of bid-tipping and adjustments to licenses granted to United Artists.

Snyder also presented sufficient evidence to raise a question of fact as to United Artists' participation in an agreement in restraint of trade, stated Judge Brewster.

The District Court also erred in holding that a split agreement should be evaluated under the rule of reason. Citing Harkins Amusement Enterprises v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988), cert. denied, 109 S.Ct. 817 (1989); ELR 10:7:16; 9:12:11; 11:9:20), Judge Brewster stated that the court should have applied the illegal per se rule. The split agreement allegedly was used to restrict the entry of other exhibitors into the

Santa Cruz market. If proven, such conduct would cause antitrust injury in the form of a boycott, a conspiracy in restraint of trade. And in cases of group boycotts that directly or indirectly cut off necessary access to customers or suppliers, the per se rule would apply because the likelihood of antitrust injury is clear. On remand, declared Judge Brewster, the trial court should instruct the jury accordingly.

Snyder's section 2 monopoly claims were directed only against the exhibitor parties. It was alleged that United Artists attempted to monopolize and did monopolize, the first-run commercial film market in Santa Cruz. The high percentage of film exhibition revenues earned by United Artists and by Nickelodeon (with respect to first-run art film exhibition) at least raised an issue of fact as to United Artists' possession of monopoly power, particularly given the evidence of the company's power to exclude competition from the Santa Cruz market.

United Artists referred to the decision in United States v. Syufy, 903 F.2d 659 (ELR 12:1:12), in which the court noted that the absence of entry barriers in the market would be relevant to the issue of monopoly power. Judge Brewster found that the conflicting evidence on the issue meant that summary judgment was not appropriate.

Furthermore, the above-considered evidence also raised a question of fact as to whether United Artists "willfully acquired or maintained monopoly power by engaging in predatory or anti-competitive conduct designed to destroy competition."

Judge Brewster stated that there was sufficient evidence from which a trier of fact could conclude that The Movie suffered causal antitrust injury as a result of the exhibitors' alleged wrongful conduct in denying The Movie access to the film supply necessary to allow the theater to compete.

The District Court also erred in granting the motion for summary judgment on the conspiracy to monopolize claim under section 2 of the Sherman Act, and this claim, as well as the claims discussed above, were remanded for trial.

The Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245 (9th Cir. 1990) [ELR 12:7:8]

Arizona theater owner may proceed with certain antitrust claims against film distributors and exhibitors, but court's earlier decision bars other claims

The court in The Movie 1 & 2 (above) referred to the 1988 decision in Harkins Amusement Enterprises, Inc. v. General Cinema Corp. In late 1989 and early 1990, rulings were issued in a proceeding known as Harkins II.

In a decision by a Federal Court of Appeals in California, Judge Noonan noted that Harkins, the owner of several theaters in the Phoenix area, had sued a group of movie distributors and exhibitors for conspiracy to restrain trade and to monopolize in violation of sections 1 and 2 of the Sherman Act. The alleged violations purportedly occurred from September 1973 through September 1977.

The court had held that Harkins presented sufficient evidence to support its antitrust allegations of market splitting, bid rigging and circuit-wide deals by the distributors and exhibitors; reversed in part the District Court's decision granting summary judgment; and remanded the claims for trial. The court affirmed that part of the District Court decision granting summary judgment to the distributor/exhibitor parties on Harkins' claims of unreasonable clearances, discriminatory moveovers, illusory advances and/or guarantees, blind bidding and shared monopoly.

The instant proceeding was brought against the same parties as those in Harkins I as well as against additional parties. Harkins alleged conspiracy to restrain trade and attempted monopolization from September 1976 through September 1980.

Judge Noonan commented that prior to the Federal Court of Appeals' decision in Harkins 1, the District Court applied res judicata and collateral estoppel to bar all of Harkins' federal claims in Harkins II. Following the partial reversal of the District Court, Harkins and the distributor/exhibitor parties stipulated that the claims which were remanded for trial, i.e., those for market splitting, bid rigging, and circuit-wide deals, were not barred by res judicata or collateral estoppel.

When the distributor/exhibitor parties in Harkins II moved for summary judgment, the District Court granted the motion with respect to those claims previously rejected both by the District Court and by the Federal Court of Appeals.

The distributor/exhibitor parties also claimed that Harkins was completely prevented from further proceedings by the decision in Harkins I. It was noted that Harkins' new complaint alleged that a conspiracy was formed by September 1976. The distributor/ exhibitor parties pointed out that the decision in Harkins I had held that there was no conspiracy as to the five claims on which the court granted summary judgment. The distributor/exhibitor parties argued that Harkins' complaint charged them with a conspiracy within the time period of Harkins I, and that the court's prior ruling on the conspiracy issue would bar any such claim.

Federal Court of Appeals Judge Noonan, although stating that the complaint in Harkins II was "not a model of clarity," decided that it would be "over-technical" and contrary to the direction of the Federal Rules of Civil Procedure to rule on behalf of the distributor/exhibitors. The Harkins II complaint alleged new antitrust conduct subsequent to September 1977; the allegation that the distributor/exhibitor parties entered into conspiracies after the date of the Harkins I complaint was not considered in the Harkins I. The distributor/exhibitor parties "did not acquire immunity in perpetuity" from the antitrust laws on the basis of the Harkins I decision, stated Judge Noonan. Harkins was barred from raising a shared monopoly claim, but no other issue of fact or law would prevent the Harkins II proceeding.

According to news reports, Harkins has entered out-of-court settlements with Buena Vista, Paramount Pictures, Universal and Warner Bros.

In December 1989, Federal District Court Judge Charles L. Hardy denied a distributor motion to limit Harkins' damage claims to eight films released in the Phoenix market by the remaining distributor parties; Harkins had alleged that it was wrongfully excluded from competing for the exhibition of seventy-four films. The court apparently rejected the claim that the allegations against the settled companies should be excluded in considering the liability of the remaining parties.

In January 1990, Judge Hardy extended the doctrine of "residual conspiratorial liability" to the exhibitors remaining in the action. The court denied motions for partial summary judgment brought by American Multi-Cinema and by United Artists Theater Circuit. The exhibitors sought the dismissal of conspiracy claims involving Plitt Theaters (now Cineplex Odeon), Mann Theaters, and General Cinema; these exhibitors had entered out-of-court settlements with Harkins. Judge

Hardy also refused to limit the time period, with respect to Harkins' product- splitting claims, to the years 1975-1977.

Harkins Amusement Enterprises, Inc. v. Harry Nace Company, 890 F.2d 181 (9th Cir. 1989) [ELR 12:7:9]

ASCAP complied with consent decree during rate negotiations with commercial radio stations; court declines to set post-1990 license terms

In 1986, the American Society to Composers, Authors and Publishers entered a rate agreement with the "All-Industry Committee," the representative of about 2,000 commercial radio stations. The parties established blanket and per program license fees for the period January 1, 1983 through December 31, 1990. Most radio stations signed licenses incorporating the terms contained in the 1986 agreement. However, other stations continued to operate under license extension agreements; in June 1988, ASCAP terminated these agreements.

Subsequently, 205 radio stations applied to a Federal District Court in New York for a determination of reasonable fees. ASCAP noted that 139 of the stations had signed licenses containing the terms agreed upon by ASCAP and the All-Industry Committee, and argued that those stations were not entitled to seek a redetermination of the license fee.

Magistrate Dolinger rejected the stations' claim for rescission of the licenses based on fraud or misrepresentation.

In adopting the Magistrate's report, Judge William C. Conner found that ASCAP's conduct during the license negotiations did not violate any terms of the consent decree governing the organization. The court noted that "as the party authorized to bring an infringement action, ASCAP must be able to mention this legal option in good faith negotiations; otherwise it would be unfairly handicapped in obtaining for the artists it represents reasonable compensation for the performance of their works."

The Magistrate also had found that the court lacked jurisdiction over the applicants' request for a reasonable rate determination for a post-1990 license, citing the fact that the stations had not asked ASCAP for a license for the period beginning in 1991. Since the radio stations had not requested a license and did not negotiate with ASCAP, Judge Conner agreed that any action with respect to the period beginning in 1991 was "not yet ripe for court involvement."

United States v. American Society of Composers, Authors and Publishers, 739 F.Supp. 177 (S.D.N.Y. 1990) [ELR 12:7:10]

Delaware Supreme Court publishes opinion explaining basis for its ruling permitting Time Inc.'s merger with Warner Communications despite challenge by Paramount

The Supreme Court of Delaware, in March 1990, issued a written opinion setting forth the basis of the court's July 1989 decision to affirm a trial court ruling allowing Time Inc. to proceed with a tender offer for Warner Communications and barring Paramount Communications and Time shareholders from interfering with the merger (see ELR 11:3:19).

The Paramount parties argued that Paramount's June 7, 1989 "all-cash, all-shares, `fully negotiable' (though conditional) tender offer" for Time invoked certain duties on the part of Time's board of directors and that the board breached those duties in responding to Paramount's offer.

Judge Henry R. Horsey found that Time's board reasonably viewed Paramount's tender offer as a threat to the company; that the board's subsequent conduct was "reasonable and proportionate;" that the board's original merger plan was entitled to the protection of the business judgment rule; and that the trial court correctly declined to apply the business judgment rule to the revised Time-Warner transaction. Judge Horsey refused to find that the Time board's June decision that "Paramount's offer posed a threat to corporate policy and effectiveness" was lacking in good faith or dominated by motives of either entrenchment or self-interest. The evidence indicated that Time's failure to negotiate with Paramount was not uninformed. And directors "are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."

The court concluded by observing that although Time was required, as a result of Paramount's hostile offer, to incur a heavy debt to finance its acquisition of Warner, that fact alone did not render the board's decision unreasonable "so long as the directors could reasonably perceive the debt load not to be so injurious to the corporation as to jeopardize its well being."

Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1990) [ELR 12:7:10]

Tax Court must review disallowance of depreciation deductions in connection with limited partnerships' investments in films produced by Columbia Pictures

During the period from 1973 to 1975, Lester Persky and Richard Bright formed various partnerships for the purpose of investing in feature films. The partnerships agreed to purchase several films from Columbia Pictures and granted the exclusive distribution rights in the films to the studio.

Eventually, the partnerships sued Columbia, claiming, in part, that the studio breached its contractual and fiduciary duties by delaying or failing to report revenues earned by the films, charging improper costs and fees, and failing to credit the partnerships for revenues earned by the films. A Federal District Court in New York, in a decision issued in 1989 (ELR 11:11:8) allowed the partnerships to proceed with certain claims, but dismissed causes of action alleging fraud, negligence, copyright infringement, and tortious interference with economic relations, as well as a section 1962(a) RICO claim.

The Tax Court, in a separate proceeding, also considered the investment activities of the partnerships, and agreed with the Commissioner of Internal Revenue that the partnerships were not entitled to depreciation deductions for the films. The Tax Court determined that the partnerships had not actually acquired ownership of the films, but only contract rights to participate in the exploitation proceeds. And the Tax Court found that the nonrecourse notes used as part of the purchase price would be excluded from the taxpayers' depreciable basis and disregarded for tax purposes.

Federal District Court Judge Leval, sitting by designation, first affirmed the Tax Court's ruling that the taxpayers were not entitled to a depreciation deduction because the partnerships were not the owners of the films for tax purposes. The court justifiably found that Columbia exercised "complete dominion" over the films. The studio had the right to control advertising, distribution, and the date of the initial release of the films, and also obtained exclusive worldwide rights to the soundtracks, the right to possess and make copies of the negatives, and the distribution rights for pay television, cable, video cassettes and commercial television.

The Tax Court had found that the taxpayers were entitled to a depreciation deduction for the asset identified as "the right to a stream of payments generated by the motion pictures." However, the trial judge, in determining the basis of the asset for depreciation purposes, found that the purchase money notes were not a bona fide debt and did not represent a depreciable investment in the asset.

Judge Leval stated that further findings were necessary on the question of whether the debt represented by the notes was recognizable, both for inclusion in the depreciable basis of the taxpayers' asset and with respect to deducting interest payments.

Judge Leval pointed out that the Tax Court had emphasized that the notes were nonrecourse and were payable out of the exploitation proceeds received by Columbia. Although agreeing with the Tax Court that the nonrecourse nature of the purchase notes was a factor indicating that the debt may not have been genuine, this factor was not necessarily determinative. Judge Leval also would have considered whether there was a reasonable relationship between the amount of the debt and the fair market value of the securing asset, and whether there were incentives to the debtor to pay the debt out of personal assets.

After noting that the transaction in the instant matter was entered into in good faith and with a profit motive, Judge Leval adverted to the potential significance of the fact that Columbia was entitled to foreclose the interest of the partnerships if the notes were not fully paid after ten years. Thus, the failure to pay the note and the accrued interest by the maturity date would mean that the partnerships would lose the right to receive one hundred percent of the exploitation proceeds accruing after that date. In all, it was "critically important for the trial court to value the asset purchased, so as to compare its value at the time of purchase with the debt incurred as part of the purchase price," stated Judge Leval.

The court therefore affirmed the judgment of the Tax Court disallowing any depreciation of the films themselves, but vacated the portions of the court's ruling concerning the valuation of the depreciable basis of the "stream of payments" asset.

Judge Winter, in dissent, would have found that the transaction in question was structured as a loan solely to achieve tax benefits, and that the "loan" of $1.85 million was "without economic significance." Even if the loan possessed some value, any real value was only a small fraction of that amount, stated Judge Winter, who considered it "inconceivable" that a person "would stake $1.85 million for an option that will in reality have value only in extremely narrow circumstances 10 years hence." The $1.85 million loan was one part of a formula that determined the exercise price of an option and was not a debt, concluded Judge Winter.

Bailey v. Commissioner of Internal Revenue, 912 F.2d 44 (2d Cir. 1990) [ELR 12:7:11]

Partner obtains specific performance option agreement to purchase fellow partner's interest in Charlotte Hornets

George Shinn and Cy Bahakel entered a partnership agreement in June 1987 to form a venture which would own and operate the Charlotte Hornets basketball team. The partnership then agreed to grant to WCCB-TV certain rights to telecast and broadcast Hornets games; the television station was owned and operated by Bahakel.

In November 1987, Bahakel refused to make a required capital contribution of about $4.8 million. The partnership subsequently granted WCCB expanded broadcast rights, and also granted Shinn an option to purchase Bahakel's interest in the partnership at a stated value.

When Shinn, in April 1989, decided to exercise the purchase option, Bahakel refused to convey his interest.

In response to Shinn's action for specific performance, Bahakel claimed that he signed the partnership agreement only under duress after being "induced and coerced" by Shinn's purported misrepresentations and threats.

A trial court ruling in Shinn's favor has been affirmed by a North Carolina appellate court. The court noted that the pleadings established that the alleged duress arose from circumstances that existed only prior to the execution of the partnership agreement, which was several months before the parties entered into the letter agreement Shinn was seeking to enforce. The letter agreement reaffirmed the validity of the partnership agreement, and Bahakel failed to allege any circumstances which would allow the avoidance of the agreement under a theory of continuing duress."

George Shinn Sports, Inc. v. Bahakel Sports, Inc., 393 S.E.2d 580 (N.Car. App. 1990) [ELR 12:7:12]

Court refuses to dismiss assault charge against Morton Downey, Jr. for striking television show guest

The state of New Jersey may proceed to prosecute talk show host Morton Downey, Jr. for physical assault in connection with an altercation which occurred during the taping of Downey's weekly television program, a trial court has ruled.

In a decision issued in February 1988, but only recently published, the court described the events preceding the December 1987 incident in which Downey struck a guest speaker, Andrew Humm, in the face. Humm filed a complaint charging a simple assault, a disorderly persons offense. Downey moved to dismiss the complaint on the ground that the offense was de minimis.

Judge Humphreys stated that the offense charged was not trivial and that dismissing the prosecution "would run counter to basic principles of criminal law and the public interest." It was noted that a videotape of the program indicated that Downey acted "purposely and knowingly," and that from the beginning of the program, Downey had "insulted, berated and baited the guests whose views did not coincide with his." As described by Judge Humphreys, the atmosphere "was hyperintense and ... filled with hate and anger ... In that hot house setting it was not strange that violence erupted. [Downey] as provoker of that violence bears full responsibility. The show was his. Humm was an invited guest. [Downey] advanced on Humm and began the face to face verbal confrontation. [Downey] may not have liked Humm's statement, but that affords no justification for a physical attack ... What is not debatable is that television discussion shows must not be laced with violence and incitement to violence."

The court concluded by observing that a party's background has little value in determining whether a violent offense is trivial, for "a physical assault is a physical assault. It is not reduced to triviality by the fact that a person with a good background commits it."

State of New Jersey v. Downey, 574 A.2d 945 (N.J.Super. 1988) [ELR 12:7:12]

Minnesota Supreme Court rejects misrepresentation and breach of contract claims against newspapers arising from publication of identity of confidential source

In October 1982, Dan Cohen, who was involved in the Minnesota gubernatorial election campaign, approached reporters for two local newspapers and, according to

Minnesota Supreme Court Judge Simonett, stated: "I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents."

When the reporters promised to keep Cohen's identity anonymous, he turned over to them copies of two public court records concerning one of the candidates for lieutenant governor. However, the editors of the newspapers decided to identify Cohen as the source of the report.

On the same day as the newspaper articles were published, Cohen was fired by his employer. Subsequently, a columnist for one of the newspapers attacked Cohen for his "sleazy" tactics, and the newspaper published a critical editorial page cartoon.

When Cohen sued the newspapers for fraudulent misrepresentation and breach of contract, a trial court jury found liability on both claims and awarded Cohen $200,000 in compensatory damages jointly and severally against the newspapers. The jury awarded Cohen punitive damages of $250,000 against each publisher.

An appellate court found that misrepresentation was not shown as a matter of law and set aside the punitive damages award. The court upheld the award of compensatory damages.

The Minnesota Supreme Court first agreed with the appellate court that the trial court erred in not granting the publishers' motion for judgment notwithstanding the verdict on the misrepresentation claim, noting, in part, that the reporters intended to keep their promises to Cohen.

In turning to the breach of contract claim, Judge Simonett observed that in the "special milieu" of newsgathering, a source and a reporter are unlikely to believe that they are engaged in making a legally binding contract. The parties, in the court's view, understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. Thus, stated Judge Simonett, "contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship precluding necessary consideration of factors underlying that ethical relationship."

The court then rejected Cohen's promissory estoppel claim on the ground that enforcing a promise of confidentiality under this theory would violate the publishers' First Amendment rights. Although noting that there may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, as when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, this was not such a case; the judgment for Cohen therefore was reversed.

In dissent, Judge Yetka expressed the view that the news media should be compelled to keep their promises "like anyone else." The court's decision will discourage potential news sources, stated Judge Yetka, thereby denying the public important information about candidates for public office. Judge Yetka also found it "unconscionable to allow the press ... to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet ... to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable."

Judge Kelly, emphasizing that the reporters intended to keep their promise of confidentiality, questioned the court's decision to grant the publishers immunity from liability from an unmistakable breach of contract, "although any other corporate or private citizen of this state under similar circumstances would most certainly have been liable in damages for breach of contract." Judge Kelly also joined in Judge Yetka's dissent, noting the "perfidy" of the publishers who would seek to avoid liability "by trying to crawl under the aegis of the First Amendment, which [in Judge Kelly's opinion], has nothing to do with the case."

Cohen v. Cowles Media Company, 457 N.W.2d 199 (Minn. 1990) [ELR 12:7:13]

Confidential source fails to show publisher's gross irresponsibility in tortious breach of confidence claim

Louis Virelli claimed that a newspaper article entitled "Tormented by a Drug-Crazed Daughter" identified him as a source of information in violation of a reporter's promise of anonymity.

A New York trial court rejected Virelli's motion for permission to serve a third amended complaint setting forth a cause of action for tortious breach of confidence. The court found that Virelli did not sufficiently demonstrate that the publisher acted in a grossly irresponsible manner.

A New York appellate court has upheld the trial court's decision. The court noted that fictitious names were used in the article, and that the disclosure of identity, if any, arose out of the inclusion of allegedly identifying descriptions. The fact that about forty persons who either were acquainted with Virelli or his daughter, identified them as the subject of the article, proved "nothing other than that the alleged promise of anonymity was in fact breached, albeit inadvertently." Virelli did not establish that the publisher violated sound journalistic practices in preparing the article or that such practices were not followed. And there was no showing that the publisher should have doubted the reporter's trustworthiness.

Virelli v. Goodson-Todman Enterprises, Ltd., 558 N.Y.Supp.2d 314 (N.Y.App. 1990) [ELR 12:7:14]

Dispute over football player's obligation to pay commissions to deceased agent is remanded by Missouri court

In June 1977, Morris Rosenthal agreed to represent Shelby Jordan in negotiating contracts for Jordan's services as a professional football player. When Jordan signed with the New England Patriots, Rosenthal received ten percent of the player's annual salary. Rosenthal died in July 1978, and Jordan ceased making payments.

Rosenthal's widow sued Jordan, claiming that three player contracts signed by Jordan for the 1977-1978, 1978-1979 and 1979-1980 seasons had been negotiated by Rosenthal and that the decedent had performed his obligations under the agency contract before his death.

A judgment entered on a St. Louis trial court jury decision has been reversed by a Missouri appellate court.

The court found "prejudicially erroneous" the admission of evidence concerning Jordan's subjective expectations with respect to Rosenthal's services and evidence concerning the relationship of other players and their agents. However, in remanding the case for a new trial, the court stated that on retrial, it should be noted that neither the evidence nor the language of the agency contract supported the contention that the services to be performed by Rosenthal were completed upon the execution of the four player contracts in July, 1977, thus entitling Rosenthal to ten percent of the amount of each contract.

Rosenthal was entitled to ten percent of the compensation paid to Jordan "during the term of any con tract" which he negotiated as Jordan's representative. Although there was evidence from which a jury might find that Rosenthal rendered services in connection with the four one-year contracts, there was no evidence that Jordan was paid compensation pursuant to such contracts, except for the 1977-1978 season for which Rosenthal was paid ten per cent and for the 1978-1979 season, for which the agent was not paid. The original contracts for the years 1979-1980 and 1980-1981 were superseded by later contracts negotiated by Jordan and his wife; Rosenthal was not entitled to a commission on compensation paid to Jordan under contracts which Rosenthal did not negotiate.

Rosenthal v. Jordan, 783 S.W.2d 452 (Mo.App. 1990) [ELR 12:7:14]

City of St. Petersburg and Chicago White Sox violated Florida Public Records Act in denying media access to records of lease negotiations

During 1987 and 1988, the city of St. Petersburg, Florida and the Chisox Corporation and Chicago White Sox, Ltd. negotiated for the White Sox to play in the city's Florida Suncoast Dome. The White Sox requested that the negotiations be kept confidential.

When two newspaper reporters, citing the state's Public Records Act, requested from the city all records relating to any dealings with the White Sox, the city declined to produce any documents. City officials noted, in part that documents in the custody of the White Sox and its agents were not received by the city and thus were not public records. And the officials refused to acknowledge the existence of any documents in the possession of the White Sox which might be relevant to the reporters' inquiry. The reporters then sought documents from the White Sox; the club stated that it had not acted on behalf of the city, and that any documents in the club's possession were not public records.

The trial court concluded that the leases were public records, absolved the city of any liability in connection with its obligations under the Public Records Act, and ordered the White Sox to provide the St. Petersburg Times with copies of all leases and draft documents.

A Florida appellate court first noted that the issue of whether the lease documents were public records was moot, but that because the instant situation was "capable of repetition, while evading review," the court would consider the applicability of the Public Records Act.

The court affirmed the trial court's decision finding that certain handwritten notes were not public records. However, once officials "began actively inspecting, discussing and revising" the various documents, the city was required to demand delivery of the documents, the city was required to demand delivery of the documents. The city officials' actions were found inconsistent with the purpose of the Public Records Act, and the portion of the trial court order holding the city not liable for violating the statute was reversed.

The appellate court concluded by upholding the trial court's finding that the White Sox violated the statute by denying access to the draft leases, and by finding that the court properly assessed attorneys fees and costs.

Times Publishing Company, Inc. v. City of St. Petersburg, 558 S.2d 487 (Fla. App. 1990) [ELR 12:7:15]

Copyright Royalty Tribunal eliminates syndicated exclusivity surcharge for most cable systems

In 1988, the Federal Communications Commission reimposed syndicated television program exclusivity rules (ELR 10:2:17). The rules bar cable television companies from duplicating programs presented by local broadcasters holding exclusive contract rights. In 1989, a Federal Court of Appeals refused to reconsider the Commission's decision (ELR 11:12:4).

The Copyright Royalty Tribunal, in response to the Commission's action, has amended its rules by eliminating the syndicated exclusivity surcharge which was paid by cable systems in addition to the basic rates established in the Copyright Act. However, when a distant commercial VHF station places its Grade B contour over a cable system, the system will incur a surcharge at the same level as before.

The Tribunal acted pursuant to section 801(b)(2)(C) of the Copyright Act in finding that the syndicated exclusivity surcharge no longer was "reasonable" in light of the changes in the Commission's rules.

Adjustment of the Syndicated Exclusivity Surcharge, Copyright Royalty Tribunal (Aug. 16, 1990) [ELR 12:7:15]

Briefly Noted:

"The Cosby Show" Litigation.

A New York trial court has dismissed Hwesu Murray's remaining causes of action against the National Broadcasting Company with respect to Murray's claim that the television series "The Cosby Show" was based on a proposal Murray submitted to NBC. The causes of action for unfair competition, breach of duty of care and race discrimination arose out of the same set of facts previously presented by Murray in his federal court action (ELR 11:9:11; 10:7:8; 9:10:4). Judge Cohen stated that the claims "could have and should have" been raised in the federal court action, and noted that the federal court expressly rejected Murray's underlying premise that his proposal was property subject to legal protection under New York law.

Murray v. National Broadcasting Company, Inc., New York Law Journal, p. 18, col. 2 (N.Y.Cnty., Aug. 14, 1990) [ELR 12:7:16]

Royalty Claim.

A Federal District Court in Florida has refused to dismiss Grecia M. Korman's lawsuit against Julio Iglesias alleging the failure to pay royalties. The court found that Korman's fraud claim against Iglesias was not preempted by the Copyright Act. Korman did not argue that

Iglesias sought to infringe her copyright (in a work unidentified by the court), but that the performer falsely induced Korman to perform work for him that she would not otherwise have done.

Korman alleged that she and Iglesias were co-authors of the song in question. The court, noting that co-authors cannot infringe and that the Copyright Act does not include accounting or "any other device as a remedy between co-authors," concluded that Congress did not mean to preempt actions for civil theft by a co-author.

The court then denied Iglesias' motion to dismiss Korman's fraud and constructive trust claims as time barred, stating that a question of fact was raised as to whether Korman's longstanding knowledge that she was not receiving royalties constituted "facts which revealed fraud."

The court also rejected a statute of frauds defense, a claim of failure to join an indispensable party, and a motion to dismiss on grounds of forum non conveniens.

Korman v. Iglesias, 736 F.Supp. 261 (S.D.Fla. 1990) [ELR 12:7:16]

Anti-Dilution/"Kodak" Stage Name.

A Federal District Court in New York has granted Eastman Kodak Company's motion for a permanent injunction barring comedian D.B. Rakow from using the stage name "Kodak."

Judge Larimer found that the Kodak trademark is "perhaps one of the strongest and most distinctive trademarks in this country, if not in the world," and has acquired a secondary meaning in the mind of the public.

The court then stated that it was likely that the Kodak mark would be "tarnished" by Rakow's use of the mark; that the fact that the parties were not in direct competition did not preclude a finding of dilution; and that Rakow had agreed to stop using the name Kodak, but continued to do so with knowledge of the company's objections. Judge Larimer concluded that Kodak had demonstrated that Rakow's continued use of the name would dilute the company's trademark, and granted Kodak's motion for summary judgment on the anti-dilution cause of action.

Eastman Kodak Company v. D.B. Rakow, 739 F.Supp. 116 (W.D.N.Y. 1989) [ELR 12:7:16]

Copyright Infringement/"Mickey Mouse."

A Federal Court of Appeals has vacated, in part, a District Court decision (ELR 11:5:18) holding that an unlicensed souvenir distributor infringed Walt Disney Company's copyrighted cartoon characters. The District Court had awarded Disney statutory damages of $15,000 for each of six copyright infringements, and $20,000 in attorneys' fees.

Federal Court of Appeals Chief Judge Wald affirmed the award of attorneys' fees and the issuance of a permanent injunction barring future infringement of the Mickey and Minnie Mouse characters and all other Disney cartoon characters. But the court found that only two works were infringed, stating that "while Mickey and Minnie are certainly distinct, viable works with separate economic value and copyright lives of their own, we cannot say the same is true for all six of the Disney copyrights of Mickey and Minnie in various poses ... Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right." The matter therefore was remanded to the District Court for the redetermination of damages.

Walt Disney Company v. Powell, 897 F.2d 565 (D.C.Cir. 1990) [ELR 12:7:16]

Jackie Mason Paternity Matter.

During the course of Ginger Reiter's action for determination of paternity and child support against performer Jackie Mason, a Florida trial court entered a temporary injunction ordering Reiter, in part, not to defame or disparage Mason's character or reputation. A subsequent order "admonished" Reiter not to communicate with the news media concerning the paternity proceeding. At the conclusion of proceedings in the trial court, Reiter unsuccessfully moved to dissolve the injunctions.

A Florida appellate court has reversed the trial court's ruling, stating that the motion to dissolve should have been granted with respect to the initial injunction. And the trial court abused its discretion in extending the gag order beyond the conclusion of the case.

The court concluded by finding that Mason offered no "particularized justification" for maintaining the sealing of the trial court file - the substance of the material contained in the file apparently already was a matter of public record.

Reiter v. Mason, 563 S.2d 749 (Fla.App. 1990) [ELR 12:7:17]

Sony/Columbia Pictures Merger.

A Delaware Court of Chancery, in a decision issued in October 1989 but only recently published, denied a stockholder's motion for a preliminary injunction seeking to bar Sony USA Inc.'s merger with Columbia Pictures Entertainment, Inc.

Vice Chancellor Harnett found that Joseph Siegman did not show a reasonable probability that any violation of the Delaware Takeover Statute occurred as a result of Sony's tender offer for all of the shares of Columbia. Although Sony may have become an "interested stockholder" of Columbia on September 27, 1987, as that term was defined in the statute, the court found that the board of Columbia approved the transaction with Sony prior to the "time" that Sony became an interested stockholder. The three year limitation imposed by the statute on certain mergers therefore did not apply, and Siegman did not show that the statute required a vote by the stockholders of Columbia in the circumstances presented to the court.

Siegman v. Columbia Pictures Entertainment, Inc., 576 A.2d 625 (Del.Ch. 1989) [ELR 12:7:17]

Libel/Bernhard Goetz-William Kunstler Matter.

In April 1987, the Amsterdam News published a poem, purportedly written by attorney William Kunstler. The poem referred to the December 22, 1984 subway shooting incident involving Bernhard Goetz and four young black men. One of the four, Darrell Cabey, represented by Kunstler, filed a still pending civil action against Goetz.

Goetz sued Kunstler, Cabey and other parties, alleging, in part, a cause of action for defamation. A New York trial court has found that the claim was barred by the applicable one year statute of limitations.

Goetz also challenged a report of the shooting appearing in a book published by the Center for Constitutional Rights, Inc. Judge Shainswit stated that there was nothing in the excerpt on which to base a libel claim - there was no showing of falsity or actual malice.

The court also rejected Goetz's cause of action alleging the infliction of serious emotional distress - there was no showing that Kunstler and his colleague engaged in the extreme and outrageous conduct required to establish the claim.

A slander claim based on comments made by Kunstler and his colleague on certain television programs also was dismissed because Goetz did not specify the manner in which the complained-of comments were false.

Furthermore, the challenged remarks qualified as non-actionable opinion under the test set forth in Milkovich v. Lorain Journal Co., U.S.Sup.Ct, No. 89-645 (June 21, 1990).

Goetz v. Kunstler, New York Law Journal, p .23, col. 2 (N.Y.Cnty., July 23, 1990) [ELR 12:7:17]

Copyright Infringement/Comedy Routine.

David Goldenberg, a comedian who performs in Hebrew under the name Dudu Topaz, may not recover damages for the infringement of Goldenberg's video-taped performance of a comedy routine called "Plitot Peh" ("Slip of the Tongue").

A Federal District Court in New York pointed out that Goldenberg registered his copyright more than three months after the first use of the material and after the alleged infringement occurred. The video store did not profit from sales and rentals of the infringing videotape, and Goldenberg did not establish that the actual damages he claimed were caused by the infringing tapes.

Goldenberg v. Doe, 731 F.Supp. 1155 (E.D.N.Y. 1990) [ELR 12:7:17]

Contracts/Magazine Article.

Mark Goodman, a freelance writer claimed that in July 1989 he agreed to write an article about Robert Gottlieb, the editor of The New Yorker magazine; the article was to appear in Manhattan, inc. magazine. According to Goodman, Steven Florio, the president and chief executive officer of The New Yorker spoke with Clay Felker, the editor of Manhattan, inc., about the article. Florio expressed the view that Goodman had a conflict of interest because the writer's prior employment by Conde Nast Publications apparently was terminated over a salary dispute; Conde Nast and The New Yorker are owned by the Newhouse organization.

When Manhattan, inc. terminated his contract, Goodman brought an action alleging tortious interference with contractual obligations and slander per se.

A New York trial court has found that Florio's comments were made in the interest of protecting The New Yorker and its employees from a potentially "unfair" article; that any interference was not improper, but was incidental to the magazine's right to protect its name; and that the cause of action for tortious interference thus was insufficient.

The cause of action for slander per se also was dismissed because Florio's statement was an expression of an opinion and as such, "false or not, libelous or not," was constitutionally protected.

Goodman v. The New Yorker Magazine, New York Law Journal, p. 22, col. 2 (N.Y.Cnty., Aug. 22, 1990) [ELR 12:7:18]

Contracts/Video Rentals.

In September 1986, Commercial Movie Rental agreed to provide Larry Eagle, Inc., a convenience store operator, with video tape cassettes and video tape recorders for rental to the public. In October 1988, Eagle moved one of its stores to a new location. When Commercial's president visited the new location and noted that no video tapes were on display, he removed all of the company's tapes from the store. Eagle subsequently obtained a new supplier for video tapes. Commercial then removed its video tapes from the remaining Eagle stores.

A Federal District Court in Michigan has granted Eagle's motion for summary judgment in Commercial's action for breach of contract, seeking to recover the liquidated damages provided for in the parties' contract. The court agreed with Eagle that the contract was void for lack of mutuality in exempting Commercial from all liability for breaching its obligations. Commercial's promise to perform was "entirely illusory" because, under the contract, the company never could be held liable for the failure to perform those promises. The entire contract therefore was void for lack of consideration, and Eagle was entitled to judgment as a matter of law.

Commercial Movie Rental, Inc. v. Larry Eagle, Inc., 738 F.Supp. 227 (W.D.Mich. 1989) [ELR 12:7:18]

Antitrust/Concert Promotion.

A concert promoter known as Cellar Door claimed that a rental arrangement between the operator of two Detroit arenas and a competing promoter, known as Brass Ring, effectively precluded Cellar Door from competing with Brass Ring in the Detroit market.

In 1983, Cellar Door had brought an antitrust action against the arena operator and Brass Ring based on the same arrangement; the action was dismissed with prejudice by stipulation of the parties. In the instant action, Cellar Door complained of antitrust violations that allegedly occurred after the dismissal of the 1983 action.

A Federal Court of Appeals in Michigan has found that the Brass Ring parties' course of conduct could have given rise to more than one cause of action - each time the leasing arrangement precluded Cellar Door from competitively bidding for an event, Cellar Door may have accrued a cause of action. Those causes of action that purportedly arose after the 1983 dismissal therefore were not barred by res judicata, and the court reversed the District Court decision granting summary judgment in favor of the Brass Ring parties.

Cellar Door Productions, Inc. of Michigan v. Kay, 897 F.2d 1375 (6th Cir. 1990) [ELR 12:7:18]

Art.

Danae International claimed that it purchased the painting "Oedipus Rex and the Sphinx, after Ingres" from Sylvester Stallone, through Stallone's agent. Danae paid $2,070,000 for the Francis Bacon work.

Stallone claimed that he had revoked the agent's authority to sell the painting, and that he cashed Danae's check only when the agent misrepresented to him that the painting had been removed from a warehouse and transferred to Danae.

A New York trial court denied Danae's motion for a preliminary injunction seeking to bar Stallone from removing the painting from the state or disposing of it in any way.

An appellate court has reversed the trial court's ruling, finding that a preliminary injunction was "appropriate to maintain the status quo" pending further proceedings to determine the ownership issue.

Danae Art International, Inc. v. Stallone, 557 N.Y.S.2d 338 (N.Y.App. 1990) [ELR 12:7:18]

Art.

A painter identified only as Fetting claimed that thirty-one of his paintings were stolen from him in Berlin; Fetting, who alleged that Harald Suedkamp sold three of the paintings, sought to recover the proceeds of the sale and to prevent Suedkamp from selling any of the remaining works. Fetting did not accuse Suedkamp of the theft. Suedkamp responded that the paintings had not been stolen, but that even if the paintings were stolen, Fetting's remedy was to seek to recover the works from the current owner.

A New York trial court recently rejected, as barred by the statute of limitations, Suedkamp's motion for leave to present counterclaims alleging defamation. The defamatory statements consisted of the service of the complaint in the action before the court. It also appeared to the court that the counterclaims did not state causes of action.

Fetting v. Suedkamp, New York Law Journal, p. 22, col. 2 (N.Y.Cnty., Oct. 12, 1990) [ELR 12:7:19]

Art.

After Jean-Michael Basquiat died in August 1988, art dealer Vrej Baghoomian filed claims against the estate alleging that he had an exclusive right to sell Basquiat's art works, and that he had purchased about twenty works from the decedent.

Surrogate Renee R. Roth has ordered Baghoomian to comply with a subpoena for his personal and business financial records. Although Basquiat and the dealer had a business relationship lasting about one year, there was no written contract between the parties. Surrogate Roth also noted that there were no documents to support Baghoomian's claim of ownership of certain works - the examination of all of Baghoomian's bookkeeping and financial records was necessary to determine the use of checks purportedly cashed by Basquiat and the nature of the financial dealings between the dealer and the artist.

Estate of Jean-Michael Basquiat, New York Law Journal, p. 23, col. 1 (Surrogate's Ct., Oct. 12, 1990) [ELR 12:7:19]

Publishing Contract.

Pevensey Press, Ltd. granted Prentice-Hall, Inc. an exclusive license to publish a literary work entitled "Cambridge." In 1987, about four years after the contract was executed, Prentice-Hall made remainder sales of about 4,000 copies of the book to W.H. Smith Publishers, Inc. and sold about 900 copies to Outlet Book Co. Some time later, copies of the book appeared in bookstores in the United Kingdom; the license did not extend to sales in the United Kingdom.

A trial court noted that although the contract contained a geographic restriction on sales by Prentice-Hall, the contract did not require the company to impose a similar restriction, or any restriction, on resales by the publisher's vendees. Pevensey did not allege sales by Prentice-Hall in the restricted area.

A New York appellate court declined to include such a restrictive covenant in the parties' contract, and upheld the trial court decision dismissing Pevensey's complaint against the various publishers.

Pevensey Press, Ltd. v. Prentice-Hall, Inc., 555 N.Y.S. 2d 769 (N.Y. App. 1990) [ELR 12:7:19]

Libel.

A Federal District Court in South Carolina, in a decision issued in July 1989 but only recently published, has granted television station WSOC's motion for summary judgment in a libel action brought by Sunshine Sportswear & Electronics, Inc.

In November 1984, WSOC broadcast a consumer affairs story concerning reports of Sunshine's allegedly deceptive merchandising practices.

The court first found that South Carolina's Unfair Trade Practices Act did not extend to the complained-of conduct. Judge Perry then noted that the challenged statements were not constitutionally protected statements of opinion; that the Sunshine parties were public figures with regard to the controversy surrounding the broadcast; and that there was no evidence of actual malice on the part of WSOC or on the part of the sources relied upon by the station for its information.

In all, the broadcast presented an accurate representation of various charges concerning Sunshine's activities, and WSOC was protected by the privilege of neutral reportage.

Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc., 738 F.Supp. 1499 (D.S.C. 1989) [ELR 12:7:19]

Boston Celtics/Brian Shaw Matter.

In January 1990, as described by Federal Court of Appeals Chief Judge Breyer, Brian Shaw signed a contract with the Boston Celtics agreeing to cancel his commitment to play for an Italian basketball team so that he could play for the Celtics instead. When Shaw threatened to breach his contract with the Celtics, the team sought arbitration. The arbitrator ruled in favor of the team, and ordered Shaw to rescind his contract with Il Messaggero.

A Federal District Court ordered the enforcement of the arbitrator's decision, and issued a preliminary injunction barring Shaw from playing for any team other than the Celtics during the term of the contract.

A Federal Court of Appeals, in July 1990, upheld the District Court's decision. Judge Breyer, after noting that the Celtics agreed to pay Shaw a $450,000 signing bonus and more than $1 million per year in compensation, rejected Shaw's arguments concerning the lawfulness of the arbitration award. And the District Court acted "well within the scope of its lawful powers," concluded Judge Breyer.

Boston Celtics Limited Partnership v. Shaw, 908 F.2d 1041 (1st Cir. 1990) [ELR 12:7:19]

Racial Discrimination/School Football Coaches.

The Beaumont Independent School District employed Jerry Covington and Don Elliff as teachers and as assistant coaches of a high school varsity football team. In late 1988, the school district removed Covington and Elliff, the two non-black assistant varsity coaches with the least seniority at their campus, from varsity coaching and reassigned them to sophomore coaching; the district then assigned two black coaches to the varsity positions.

A Federal District Court in Texas found that the school district violated Covington and Elliff's rights to equal protection.

In a subsequent decision on damages, Federal District Court Judge Cobb then commented on the school district's "flagrant disregard of the law in its implementation of this racially discriminatory policy," and pointed out that the school district has been involved in litigation over issues involving racial discrimination for twenty-two years. Yet, stated the court, "all that litigation, all that expenditure of legal and judicial resources, all that effort at racial integration and equality, seems to have had as little impact on the policy making of the ... school board as whipping a mule with a feather. From time to time the mule may be irritated, but it stubbornly continues on the same path ... Only the future will reveal whether the [school district will change its direction. or whether a two-by- four between the eyes will be eventually required."

Covington v. Beaumont Independent School District, 738 F.Supp. 1041 (E.D.Tex. 1990) [ELR 12:7:20]

Age Discrimination.

In a decision issued in August 1989 (as modified on the denial of a rehearing in May 1990), a Colorado appellate court has remanded an age discrimination claim brought by Curtis A. Brown against the Denver Symphony Association.

The symphony employed Brown as a stage manager from 1973 until 1986 when Brown was fired for gross insubordination. The symphony apparently was dissatisfied with Brown's assistance to his union in a dispute concerning whether the collective bargaining agreement included complimentary breakfasts. Brown, then 54 years old, claimed that he was fired because of his age.

The court agreed with Brown that the instructions given by the court concerning the Age Discrimination in Employment Act did not properly state the law and also were inconsistent with each other. There was evidence that Brown was fired because of both age and insubordination, but the jury was not properly instructed on this issue, stated Judge Dubofsky.

On retrial, if the symphony presents evidence of mixed motivation for the firing, the jury should be instructed that the symphony was required to prove by a preponderance of the evidence that it would have made the same decision to fire Brown absent the discriminatory factor of age.

The court upheld the judgment on the jury verdict awarding Brown damages of about $5,700 on his breach of contract claim.

Brown v. Denver Symphony Association , 794 P.2d 1011 (Colo.App. 1989) [ELR 12:7:20]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Effects Associates, Inc. v. Cohen, 908 F.2d 555 (12:4:12); Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 557 N.Y.S.2d 851, 557 N.E.2d 87 (12:1:17); Peer International Corporation v. Pausa Records, Inc., 909 F.2d 1332 (12:4:12); Redwood Theatres, Inc. v. Festival Enterprises, Inc., 908 F.2d 477 (12:4:14); Skyywalker Records Inc. v. Navarro, 739 F.Supp. 578 (12:3:4).
[ELR 12:7:20]

IN THE NEWS

Talent agents and Screen Actors Guild modify agreement

The Association of Talent Agents and the Screen Actors Guild have modified their agent regulation agreement.

One of the modifications requires members of the Association and members of the National Association of Talent Representatives to post $10,000 performance guarantee bonds even if such bonds are not required by state law.

The parties also have agreed that if an actor obtains nonunion work, an agent must forfeit to the Guild any commission received from the actor. And even if the agent does not receive a commission, the Guild, in imposing discipline for nonunion work, will be allowed to include the commission in any fine which may be imposed.

Under the prior regulations, an actor was free to fire an agency with whom the actor had a written agreement if the agency failed to secure fifteen days of employment in a ninety-one day period. It has been reported that the new rules require the agency to secure ten, rather than fifteen days of work in the specified time. With respect to new clients, the agency would undertake to provide ten days' work within one hundred and fifty-one days under the initial one- year agreement with the client.

The parties also agreed that oral contracts will be honored as well as written contracts if the oral contracts are validated by client confirmation forms sent to the actor and the Guild; the actor's signature is not required.

The regulations had provided that if a client was represented a year or more on the basis of an oral agreement, an agency was limited to a one year follow up. The modifications grant agencies three year renewals upon request; a guild waiver is not required.

Other changes include the use of single contracts for theatrical and television representation, and establishing a seven-day turnover period for out-of-state checks. [Dec. 1990] [ELR 12:7:21]

Canadian cable operators will pay royalties to copyright owners

Canada's Copyright Board has announced that Canadian cable television companies, retroactive to January 1, 1990, will be required to pay royalties to copyright owners.

Cable companies with more than 6,000 subscribers will have to pay $8.40 (Canadian dollars) a year for each subscriber; companies with under 1,000 subscribers will pay a flat fee of $100; and the payments due from intermediate-size companies will be based on the number of subscribers.

It has been reported that the Copyright Collective of Canada, representing, in part, producers of United States motion pictures and syndicated television programs, will receive about fifty-seven percent of the royalties. The Canadian Retransmission Collective, comprised of non-United States producers and syndicators, will receive about thirteen percent of the royalties, and about twelve percent will be paid to the Canadian Retransmission Rights Association, which includes Canadian Broadcasting Corporation's French and English networks and CBS, NBC and ABC. About eighteen percent of the proceeds will go to privately held Canadian stations, independent television stations, professional sports leagues, holders of music copyrights, and United States television stations on the border with Canada.

The Copyright Board will require cable operators to apply for permission from the federal government to raise rates in order to avoid having the companies automatically impose the costs of the royalty payments to subscribers. Cable operators also will be obligated to make payments for radio signals; the payments should amount to about $300,000. [Dec. 1990] [ELR 12:7:21]

DEPARTMENTS

Book Notes:

Readings from Communications and the Law edited by The Honorable Theodore R. Kupferman

This collection of articles is divided into four volumes:
(1) Defamation: Libel and Slander

(2) Privacy and Publicity
(3) Censorship, Secrecy, Access, and Obscenity
(4) Advertising and Commercial Speech

The volumes are available as a set or separately at $45 for each of the first three and $35 for the fourth from the Meckler Corporation, 11 Ferry Lane West, Westport, CT 06880.

Film Superlist TM: Motion Pictures in the U.S. Public Domain 1950-1959 compiled by Walter E. Hurst and William Storm Hale

This oversized volume is the third in a series:

(1) 1894 to 1939 (57,000 films of which 33,000 are in the U.S. Public Domain-$250.)

(2) 1940 to 1949 (18,000 films of which about 5,000 are in the U.S. Public Domain-$250.)

(3) 1950 to 1959 (27,000 films of which over 5,000 are in the U.S. Public Domain-$500.)

The series is available from Seven Arts Press, Inc., 6253 Hollywood Blvd. #1100, Los Angeles, CA 90028-0649.

IEG Legal Guide to Sponsorship by Mary Hutchings Reed

Examining this heretofore uncharted legal territory, the Guide outlines how to Retain ownership of merchandising and TV rights; Protect proprietary value; Keep an event from being pirated; Control use of a logo; Deal with default; Build in accountability; and Protect participants and attendees. Ms. Reed is both a Chicago attorney and teaches law at Northwestern University.

The Guide is available for $159. from International Events Group, 213 W. Institute Place, Suite 303, Chicago, IL 60610.
[ELR 12:7:22]

In the Law Reviews:

Shattering Copyright Law: Will James Stewart's Rear Window Become A Pain in the Glass? by Barbara A. Allen and Susan R. Swift, 22 Pacific Law Journal 1 (1990)

The Right to Cable Royalties and the Divisibility of Copyright: Understanding the Interaction, 74 Minnesota Law Review 1137 (1990)

Copyright Law: Recent Developments by Margot Metzger, 1988 Annual Survey of American Law 1017 (1988)

To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law by Sharon A. Mattingly, 43 Vanderbilt Law Review 1637 (1990)