RECENT CASES

Renewal interest in "Good Golly Miss Molly" copyright passed to co-author's daughters, rather than assignee, upon co-author's death before commencement of the renewal term

A Federal District Court in California has ruled that Robert A. Blackwell's renewal interest in the copyright of the song "Good Golly Miss Molly" passed to his daughters after his death, and that Blackwell's daughters effectively assigned their interest to John Marascalco.

In 1956, when Marascalco and Blackwell co-wrote the song, Blackwell was employed by Specialty Records, doing business as Venice Music. Judge Terry J. Hatter, Jr. noted that the writers, in exchange for royalties, assigned their copyright interest in the song, including "any and all renewals of copyright" to Venice, and Venice registered the song with the Copyright Office on January 22, 1957. In October 1959, Blackwell assigned his royalties back to Venice. In 1973, Venice assigned its interest in the song to Argosy Ventures; Argosy, in turn, assigned its interest to Fantasy, Inc.

On January 18, 1985, Marascalco renewed the song's copyright in his name and Blackwell's name. Two months later, Blackwell died; Blackwell's death occurred during the twenty-eighth year of the original term of the song's copyright. In March, 1986, Blackwell's daughters, who inherited their father's estate, assigned their interests in the song's copyright to Marascalco in exchange for royalties.

When Fantasy refused to recognize Marascalco as the assignee of Blackwell's interest, Marascalco sought a declaratory judgment.

Judge Hatter first considered Fantasy's argument that Blackwell co-wrote the song "within the course and scope of his employment with Venice," and that the song was a "work made for hire." The copyright, along with renewal rights, of a work made for hire, is owned by the employer. Thus, Fantasy would own the renewal interest as Venice's successor in interest.

The court found that Blackwell co-wrote the song as an independent contractor. It was noted that Blackwell assigned the copyright interest pursuant to a standard songwriters contract, and that the contract did not refer to the song as a work made for hire. Furthermore, stated Judge Hatter, "if Blackwell had written the song in the scope of his employment, he would have had nothing to assign, and the Contract, as it relates to him, would have been meaningless."

The court also cited the 1957 registration application in which Venice listed Blackwell and Marascalco as the authors of the song. Fantasy did not provide sufficient evidence to rebut the presumption that Blackwell was an author of the song.

In turning to the issue of when an author's copyright renewal interest vests, the court pointed out that under the 1909 Copyright Act, Marascalco and Blackwell's original copyright term expired on January 22, 1985, with the renewal period - the one year period prior to the copyright's expiration during which time the copyright can be renewed - extending from January 22, 1984 to January 22, 1985. However, after the enactment of section 305 of the 1976 Act, the renewal period ran from December 31, 1984 through December 31, 1985. Although Blackwell died during the renewal period, Marascalco already had effected a renewal registration in both authors' names.

Judge Hatter then referred to the principle that an author may assign his/her copyright's renewal interest at any time during the copyright's original term. However, until the renewal interest vests, the assignee has only an expectancy interest.

Marascalco argued that the renewal interest did not vest until the beginning of the renewal term - in this case, January 1, 1986 - and that since Blackwell was not alive on that date, the renewal rights passed to Blackwell's daughters, and then to Marascalco, by assignment.

Fantasy argued that the renewal rights vested on the date Marascalco registered for renewal - January 18, 1985 - and that since Blackwell was alive at the time, the renewal interest vested in Fantasy.

Judge Hatter, adverting to the longstanding interest of Congress in protecting the rights of authors and their families via the renewal term and to the United States Supreme Court's decision in Stewart v. Abend, 110 S.Ct. 1750 (1990)(ELR 12:1:12), concluded that a copyright's renewal interest does not vest until the commencement of the copyright's renewal term. Prior to the commencement of the renewal term, an assignee takes an expectancy interest, and if the author does not survive to the renewal term, the assignment "automatically extinguishes, and the second chance to control and benefit from the...work belongs to his successors."

Fantasy's expectancy interest did not vest; Blackwell's renewal interest in the song's copyright passed to his daughters; and Marascalco obtained an effective assignment, stated the court.

It should be noted that the case of Frederick Music Company v. Sickler, 708 F.Supp. 587 (S.D.N.Y. 1989; ELR 11:3:14) reached the opposite conclusion in finding that Jimmy Forrest, a co-author of the song "Night Train," obtained and assigned a renewal copyright in the song although he did not survive into the renewal term.

Marascalco v. Fantasy, Inc., Case No. CV 88-675 (C.D.Ca., Oct. 16, 1990) [ELR 12:9:3]

Aerosmith prevails in infringement claim brought by owner of service mark "Pump"

A Federal District Court in Massachusetts has granted the rock group Aerosmith's motion for summary judgment in a service mark infringement action brought by Pump, Inc. The musical group "Pump" sought to prevent the use of the mark in connection with the distribution of Aerosmith's album entitled "Pump."

The court noted that Pump, which first performed in 1987, appeared primarily at concerts at various New England high schools; the group, comprised of body-builders, released two single records promoting an antidrug message, but was inactive from mid-1988 until late 1989.

Aerosmith released the album "Pump" in September 1989; as of March 1990, the album already had sold over 1.8 million copies in the United States.

Judge Young pointed out that Pump's "best argument" would be reverse confusion, i.e., that anyone who hears of the group Pump or buys a Pump record would think that the group was sponsored by or affiliated with Aerosmith, but stated that "whether the confusion alleged by [Pump, Inc.] is forward or reverse, likelihood of confusion must still be established."

Upon reviewing the likelihood of confusion factors, the court noted that Aerosmith did not use Pump, Inc.'s registered logo; that the album cover in no way referred to body-building; and that the two marks were used in different contexts and with different visual displays. The presence of the Aerosmith logo in conjunction with the

"Pump" name seemed to the court "to render any similarity between the marks inconsequential." However, Judge Young, considering the evidence in a light most favorable to Pump, Inc., declined, for purposes of the likelihood of confusion review, to state that the two "Pump" marks were dissimilar, although the similarity was "tenuous, based solely on the use of the same word," and, alone, did not require a finding of likelihood of confusion.

The parties' goods and services were similar, stated Judge Young, as were their channels of trade and advertising and the prospective purchasers of the groups' products. But there was "not a shred of evidence" that anyone unaffiliated with Pump, Inc. was confused by the appearance of the Aerosmith album, or that anyone ever bought the Aerosmith album thinking that it came from the group Pump.

Furthermore, it was not shown that Aerosmith intentionally appropriated the mark "Pump." In all, given the additional factor that the mark was "extremely weak," the court concluded that Aerosmith was entitled to summary judgment on the service mark infringement claim.

Judge Young also granted Aerosmith's motion for summary judgment on Pump, Inc.'s unfair competition claim and various claims under Massachusetts law.

Pump, Inc. v. Collins Management, Inc., 746 F.Supp. 1159 (D.Mass. 1990) [ELR 12:9:4]

Musician alleging imitation of his drumming performances on Boston album loses trademark infringement claim

During the early 1970s, musician James Masdea joined a rock band with Donald T. Scholz. The band, Mother's Milk, recorded demo tapes containing songs written by Scholz.

In the mid-1970s, when Scholz was about to audition for CBS Records, Masdea was asked to leave Mother's Milk; Masdea did so, although apparently unwillingly, according to Senior Federal District Court Judge Caffrey. Mother's Milk subsequently changed its name to Boston, signed a recording contract with CBS, and released an album.

The first Boston album was comprised of songs from the demo tapes. Masdea played the drums for one song on the Boston album. On the remaining songs, new band member Sid Hashian played the drums. The album credited Masdea for his work on the song, and credited Hashian for all the remaining drumming performances.

Masdea, among other claims, alleged that the Boston parties used the demo tapes in preparing the album, and that such use constituted false designation of origin in violation of the Lanham Act.

In granting the Boston parties' motion for summary judgment, the court noted that there was no evidence of a Lanham Act violation. Masdea admitted that the cover of the first Boston album did not contain any misrepresentations or false designations. Although Masdea claimed that Hashian imitated Masdea's drumming performances on the demo tapes, Judge Caffrey stated that "the mere imitation of a performance, without more, is insufficient to claim trade name infringement under the Lanham Act."

It was further noted that Masdea did not respond to the summary judgment motion of the Boston parties, and admitted to the court that no Lanham Act violation existed.

Judge Caffrey declined to exercise pendent jurisdiction over Masdea's remaining state claims, and remanded the matter to state court.

Masdea v. Scholz, 742 F.Supp. 713 (D.Mass. 1990) [ELR 12:9:4]

Infant actor may disaffirm personal management contract, but remains liable for commissions due

In 1984, when soap opera actor Andrew M. Kavovit was twelve years old, he and his parents signed a two year contract with Scott Eden Management whereby the actor agreed to pay the personal management company a fifteen percent commission on his gross compensation. The contract, which was extended to February 1989, provided that with respect to contracts entered into by

Kavovit during the term of the management contract, Scott Eden would be entitled to a commission "from the residuals or royalties of such contracts, the full term of such contracts, including all extensions or renewals thereof, notwithstanding the earlier termination of this [contract.]"

In 1986, Kavovit signed an agency contract with the Andreadis Agency, a licensed agent selected by Scott Eden in accordance with industry requirements; the agent was entitled to an additional ten percent commission. In 1987, Kavovit joined the television show "As The World Turns." According to news reports, Kavovit's 1989 contract with the show provided that he be paid a minimum of $88,400.

One week before the contract with Scott Eden was due to end, the actor notified the company that he disaffirmed the contract on the ground of infancy.

When Scott Eden sued Kavovit, New York trial court Judge Matthew F. Coppola first noted that an infant's contract is voidable and the infant has the absolute right to disaffirm. However, a "corollary" to the main rule generally has provided that after disaffirmance, "the infant is not entitled to be put in a position superior to such a one as he would have occupied if he had never entered into his voidable agreement."

Judge Coppola pointed out that the work a personal manager does for and with his client is "preparatory to the performance contract." Once a performance contract has been signed, the personal manager is entitled to his percentage fee, subject only to the condition that the client performs and earns his fee. When the client signs a performance contract, continued the court, "it is with the understanding that the gross amount to be paid is not solely for him. It is the expectation of all parties...that 15 percent of that gross amount belongs to the personal manager. To the extent that the performer obtains that 15 percent for himself, he is unjustly enriched."

Kavovit was not entitled to use the privilege of infancy "as a sword rather than a shield," stated the court, particularly since if an infant may rescind a management contract immediately after a performance contract is signed, yet retain the benefits of the contract, "no reputable manager will expend any efforts on behalf of an infant."

In adjusting the equities to prevent unjust enrichment, the court granted summary judgment to Scott Eden and ordered Kavovit to continue to pay all commissions to which the company would be entitled under the contract. Kavovit also must provide Scott Eden with periodic statements regarding the actor's income and the sources of such income.

Judge Coppola concluded by noting that Kavovit cited a statute which was irrelevant to the determination of the case. Kavovit apparently considered section 35.03 of the state's Arts and Cultural Affairs Law as a bar to the action since the term of the contract, including options to extend, exceeded a three year time period. Section 35.03 calls for judicial approval of infants' contracts in order to avoid later disaffirmance; no such contract may be approved if it extends for a period of more than three years, whether by option or otherwise. The purpose of the statute was to limit the infant's right to disaffirm, stated the court; if there was no judicial approval, for whatever reason, the statute would have no effect on the infant's contract or upon his right to disaffirm.

Scott Eden Management v. Kavovit, New York Law Journal, p. 33, col. 2 (Westchester Cnty., Dec. 26, 1990) [ELR 12:9:5]

United States Supreme Court rejects appeal in dispute between National Football League and Players Association over free agency

The United States Supreme Court has declined to review a Federal Court of Appeals decision dismissing an antitrust action brought by the National Football League Players Association (which has since given up its role as the players' bargaining agent) against the National Football League.

In 1977, as described by Judge John R. Gibson, the League and the Players Association entered into a collective bargaining agreement. The agreement's First Refusal/Compensation system provided that a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer. If the original team decided not to match the offer, the team would receive compensation from the new team in the form of additional draft choices. The system, as substantially modified, was incorporated into the 1982 collective bargaining agreement.

When the 1982 agreement expired in August 1987, negotiations on a successor agreement were unsuccessful. A player strike, in September-October 1987, failed to produce a new agreement, and the Players Association then filed an antitrust action challenging the League's continued adherence to the expired 1982 agreement.

A Federal District Court held, after a series of proceedings (ELR 10:4:15; 10:9:17; 11:6:16), that the parties reached a bargaining impasse on the issue of free agency as of June 17, 1988 and that the labor exemption from the antitrust laws with respect to that issue had terminated. But the court declined to issue a temporary injunction barring the League's football clubs from continuing to adhere to the terms of the 1982 Agreement on veteran free agent salaries and movement among clubs (reasoning that it lacked jurisdiction to grant injunctive relief in a labor dispute governed by the Norris-LaGuardia Act), and granted the League permission to appeal.

On appeal, Judge Gibson first noted that the parties agreed that the terms of the 1977 and 1982 agreements establishing the First Refusal/Compensation system primarily affected only the parties in the collective bargaining relationship; concerned a mandatory subject of collective bargaining; and were the product of bona fide, arms'-length bargaining. The nonstatutory exemption to the antitrust laws thus precluded an antitrust challenge to the player restraints while the agreements were in effect.

After reviewing relevant case law, Judge Gibson declared that the League and the Players Association had not yet reached the point in negotiations where it would be appropriate to permit an action under the Sherman

Act. The District Court's impasse standard, by treating a lawful stage of the collective bargaining process as misconduct by the League, would conflict with federal labor laws "that establish the collective bargaining process, under the supervision of the National Labor Relations Board, as the method for resolution of labor disputes,"

to pursue an action for treble damages under the Sherman Act would improperly upset the careful balance established by Congress through the labor law, particularly since after a collective bargaining agreement has expired, a "comprehensive array of remedies" are available to management and union.

Although rejecting the Players Association's antitrust claim, the court emphasized that its holding did not mean that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws, and did not mean that restraints on player services can never offend the Sherman Act. For the court, the nonstatutory labor exemption serves to protect "agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws."

The court refused "to look into the future and pick a termination point for the labor exemption," but stated that "as long as there is a possibility that proceedings may be commenced before the [National Labor Relations] Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies." The decision of the District Court was reversed.

In dissent, Senior Judge Gerald W. Heaney stated that the court's decision "permits the owners to violate the antitrust laws indefinitely." Judge Heaney would have found that permission to file an interlocutory appeal was granted "improvidently" since the District Court had not yet determined whether the parties had reached an impasse on the college draft issue. According to Judge Heaney, the college draft was an essential element of the package of player restraints.

Judge Heaney agreed with the District Court's finding that the exemption ended when the parties reached an impasse in negotiations, and observed that the majority opinion would discourage collective bargaining, and served to remove the players' rights under the antitrust laws from the bargaining table. "There must be a point," concluded Judge Heaney, "at which the validity of the package of player restraints can be tested without the union resorting to a strike or terminating its collective bargaining rights. In my view, impasse is the appropriate point at which to do this."

Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989) [ELR 12:9:5]

United States Supreme Court declines to review decision rejecting former CIA agent's claim in dispute over agency's prepublication review of manuscript

In October 1990, the United States Supreme Court refused to consider an appeal by Frank Snepp III, a former agent for the Central Intelligence Agency, concerning the agency's prepublication review of certain of his writings.

As an agent, Snepp had signed an employment agreement requiring him, either during or after the term of his employment, to submit to the agency, for prepublication review, all writings relating to the CIA. Snepp resigned from the agency in 1976; in 1977, he published a book about the United States' involvement in Vietnam, entitled "Decent Interval." Snepp had not submitted the book to the CIA for review prior to publication.

When the government sued Snepp, a Federal District Court found that the agreement was enforceable and that Snepp had violated the agreement. The District Court, although adverting to limits on the time and scope of the agency review, imposed, in this case, a constructive trust over profits from the book and ordered that Snepp be permanently enjoined from further breaching the terms of the secrecy agreement and his fiduciary duty to the CIA.

On appeal, Snepp argued that the prepublication review procedure constituted a prior restraint in violation of the First Amendment. The Court of Appeals affirmed the injunction, but reversed the imposition of a constructive trust.

In 1980, the United States Supreme Court, citing the compelling national security interests at stake and the

CIA's statutory duty to protect sensitive information against public disclosure, found the secrecy agreement reasonable; affirmed the injunction; and reinstated the constructive trust (ELR 1:20:1).

Snepp has since submitted 19 manuscripts to the CIA's prepublication review board for approval prior to publication. The parties agreed on the publication of 18 manuscripts. However, in November 1985, Snepp submitted a manuscript for a proposed television miniseries, entitled "Background:Lawcase Story," about Snepp's experiences in Vietnam. The board prohibited Snepp from using various locations and names.

Snepp responded that the review was late, that the conditions were vague, and that the restrictions were unwarranted because the board had cleared similar material in the past.

The board subsequently issued a list of eleven specific deletions as a condition to publication. The CIA reversed the board with respect to all but one deletion, but Snepp's television deal already had fallen through.

Snepp sued the government, alleging several causes of action, among which was the claim that the CIA should bear the burden of initiating judicial proceedings if the parties could not agree over deletions from a particular manuscript.

The District Court found that the CIA had acted reasonably and that Snepp did not show a sufficient need to modify the injunction.

The Court of Appeals held that the District Court did not abuse its discretion in declining to modify the injunction; the burden to seek an injunction remains with an author who claims that agency clearance was improperly withheld.

United States v. Snepp, 897 F.2d 138 (4th Cir. 1990) [ELR 12:9:6]

United States Supreme Court lets stand decision allowing assistant college basketball coach to proceed with libel action against Kentucky newspaper

The United States Supreme Court has let stand a Kentucky Supreme Court decision allowing assistant college basketball coach Reggie Warford to proceed with a libel action against the Lexington Herald-Leader Company.

In the fall of 1985, the Lexington Herald-Leader reported on recruiting improprieties allegedly committed by Warford when he was coaching at the University of Pittsburgh. The complained-of statement, which was reprinted in 1986 in a special publication under the heading "NCAA Reprint," implied that Warford's efforts to recruit a talented Kentucky high school basketball player involved an offer to "split some money with him."

Warford's denial of the allegation was printed in the October 1985 newspaper report, but the player's prompt retraction of his statement was not disclosed when the story appeared in the reprint. The reprint, which was distributed nationwide to college sports personnel, as well as to 100 newspapers, included the following statement: "Steve Miller, now at Western Kentucky, told the newspaper that Pitt assistant coach Reggie Warford offered him money."

The trial court initially found that Warford was not a public figure, but subsequently reversed this finding and declared Warford a public figure for the limited purpose of comment on his recruiting activities. The court then directed a verdict on behalf of the newspaper on the ground that insufficient evidence of actual malice had been presented to warrant the submission of the case to the jury.

Kentucky Supreme Court Judge Lambert found that the nationwide controversy regarding the recruitment of college athletes was not identified with the requisite specificity or particularity. A general public concern about recruiting violations was not sufficient to qualify Warford as a public figure, and there was no controversy existing at Pittsburgh over the issue.

The court then noted that Warford had not attained the prominence of a head coach or a professional athlete, and that his employment was not such that Warford accepted or assumed the risk of public scrutiny. Warford's recruiting activities at a "Division I NCAA school [were] not sufficient to accord public figure status."

After pointing out that Warford's access to the media for post-defamation rebuttal did not rise to the level of the regular and continuing access enjoyed by public figures, Judge Lambert concluded that Warford was a private figure at the time of the alleged defamation.

In turning to the issue of actual malice, the court expressed disagreement with the trial court's decision that the evidence would not support a reasonable jury finding that Warford had shown actual malice by clear and convincing evidence. On retrial, Warford, as a private figure, will be required to establish liability under the simple negligence standard. A showing of actual malice would be required for an award of punitive damages, and Judge Lambert held that the evidence could support a finding of actual malice on the basis that the newspaper parties "must have entertained serious doubts as to the truth of their published charge that [Warford] offered money to Steve Miller." It was noted that the reporters "made minimal efforts to verify Steve Miller's credibility;" did not contact the player's parents or coaches, or anyone at the University of Pittsburgh; and did not conduct an investigation prior to the Reprint, despite Warford's denials. The allegedly defamatory publication was sent to all of Warford's possible future employers in college basketball, observed the court, and the knowledge of potential harm should have heightened the newspaper's investigative efforts - "the fact that it did not may be considered as evidence of malice."

In addition to inadequately investigating the truthfulness of Miller's statement, the newspaper chose to place "the most potentially damaging" construction on a very ambiguous interview with Miller.

In all, the trial court erred in directing a verdict for the newspaper parties on the issue of actual malice. Upon retrial, if the evidence presented is substantially the same and the jury finds for Warford, stated the court, the issue of actual malice should be submitted.

Warford v. Lexington Herald-Leader Company, 789 S.W.2d 758 (Ky. 1990) [ELR 12:9:7]

Disc jockey Howard Stern loses motion for summary judgment in breach of contract action involving "900" telephone line; in separate proceeding, FCC imposes $6,000 fine on radio stations for broadcasting indecent material by Stern

A letter agreement between disc jockey Howard Stern and Carlin Communications required Carlin to provide the telephone lines, equipment, and technical engineering to set up a "900" telephone line on which Stern proposed to provide prerecorded messages accessible to the public for a fee. Carlin agreed to pay Stern on an increasing scale based upon the number of calls collected, with a monthly minimum. Stern agreed to provide at least one new message daily and to make himself available for commercials.

Stern eventually sued Carlin for breach of contract. A New York trial court first granted Stern's motion to amend his complaint to increase his damage claim. The court next considered Carlin's argument that the letter agreement did not contain a necessary condition to the parties' agreement; the alleged condition was that Stern agreed to advertise the telephone call-in line on his radio program.

Stern claimed that he sought to obtain the radio station's permission to perform "live" advertising for the "900" line, but denied that he was required to perform such advertising, and pointed out that the project continued for seven months without the live advertising.

The trial court found that the issues raised were not amenable to summary judgment.

In a separate matter, the Federal Communications Commission, in December 1990, imposed a fine totalling $6,000 on New York radio station WXRK-FM and two sister stations that simulcast an indecent comedy routine by Stern. The material was included in a morning broadcast on December 16, 1988.

Stern v. Carlin Communications, Inc., New York Law Journal, p. 26, col. 3 (Nov. 26, 1990) [ELR 12:9:8]

Publisher prevails in defamation claim based on statement purportedly linking former New York Times reporter to CIA activities in Iran in 1953

In the book entitled "Presidents' Secret Wars: CIA and Pentagon Covert Operations Since World War II," author John Prados described the events which brought the Shah of Iran to power in 1953. Prados referred to an incident in which then New York Times reporter Kennett Love allegedly provided significant information to pro-Shah armed forces.

Love sued William Morrow and Company, the publisher of Prados' book, claiming that the suggestion that Love actively and knowingly aided a covert operation conducted by the CIA constituted libel.

A New York trial court has found that the complained-of language was capable of bearing a defamatory meaning with respect to Love's professional reputation, but that William Morrow did not act in a grossly irresponsible manner in publishing the statement.

Judge Luciano noted that Prados apparently relied on a 1960 term paper written by Love. Love argued that the allegedly libelous language was not supported by the text of the term paper. The court, upon comparing the statements, found that the challenged language "does not wander from the source material to any actionable degree," and that it was not grossly irresponsible for the author and publisher to report "the particular, admitted, role played by ...Love in the ascension of the Shah of

Iran to power in 1953." Although the nature of source material must be considered in determining whether it may have been grossly irresponsible for a publisher to rely upon such a source, Love did not demonstrate that gross irresponsibility was present in the instant case.

The court proceeded to find that not only was William Morrow not grossly irresponsible in publishing the complained-of passage, but that since Love agreed that his own statements were accurate, and since the published statement was true in substance, Love's action also was barred by the defense of truth.

William Morrow also was entitled to rely upon the abilities of Prados, an expert in the field of foreign intelligence.

The publisher raised the defense of collateral estoppel, noting that Love had brought a libel action against Jonathan Kwitny based on Kwitny's book about the events in Teheran in 1953. The book, "Endless Enemies," indicated that Love took "an activist role" in those events and strongly suggested, according to Judge Luciano, that Love did so in some connection with the CIA.

Federal District Court Judge Richard Owen granted summary judgment to the Kwitny parties, finding that the book was a fair account of the facts as set forth by Love himself.

Judge Luciano declined to find Love's action was subject to a collateral estoppel defense, stating that "a defamation action involves inquiry into much more than the truth of a disputed fact. Since the conduct of the writer was at issue in that case, as was the import of the complained of language, truth need not have been established to warrant dismissal of the complaint." A prior determination that language concerning an event was not actionable did not necessarily control a subsequent action involving "different language, in another context, authored by some other individual, who may have had access to different sources."

Furthermore, a final order had not yet been issued by Judge Owen. Thus, observed Judge Luciano, the application of the doctrine of collateral estoppel to the instant case was an academic question, and the motion to dismiss on this ground was denied.

It should be noted that Love also brought a copyright infringement claim against Kwitny. In 1989, Federal District Court Judge Michael B. Mukasey found that Kwitny's use of extensive material from an unpublished, non-fiction manuscript written by Love constituted copyright infringement rather than fair use (Love v. Kwitny, 706 F.Supp. 1123 (S.D.N.Y. 1989; ELR 11:3:14).

Love v. William Morrow and Company, Inc., New York Law Journal, p.27, col. 1 (N.Y.Cnty, July 20, 1990) [ELR 12:9:8]

Author and publisher of "In the Spirit of Crazy Horse" again prevail in libel action brought by former Governor of South Dakota

The Supreme Court of South Dakota has affirmed a trial court decision (ELR 11:4:15) granting summary judgment to Peter Matthiessen and Viking Press, the author and publisher of "In the Spirit of Crazy Horse," in a libel action brought by William Janklow, the former attorney general and governor of South Dakota.

Janklow claimed that the book alleged that he engaged in rape, drunk driving and other reckless conduct.

The court noted that there was ample support for each of the challenged statements. Although the writer and publisher may have had knowledge of potentially libelous statements, they also knew that the statements were based on adequate evidence, stated the court. Janklow was a public official at the time the book was published and failed to meet the burden of proving actual malice by clear and convincing evidence. Furthermore, the majority of the complained-of statements seemed to be protected opinions.

Judge Henderson, in dissent, stated that genuine issues of material fact were present which warranted a jury trial. Judge Henderson noted that several of Matthiessen's sources had "long histories of crime and violence," and that Janklow, as a former Attorney General, may have prosecuted those individuals. It appeared to the dissent that there was considerable circumstantial evidence of actual malice, particularly since the author and publisher apparently did not read certain documents in the public record, did not attempt to contact Janklow, and published a work in which "the general tenor of almost every reference to Janklow is hostile and portrays Janklow in the worst possible light."

The South Dakota Constitution provides for a right to a trial by jury to determine the facts and the law under the direction of the court in a libel case, and Judge Henderson would have found that Janklow presented a genuine issue for trial as to whether Matthiessen and Viking acted with actual malice in publishing "In the Spirit of Crazy Horse."

According to news reports, Janklow has decided not to appeal the court's decision to the United States Supreme Court.

Janklow v. Viking Press, 459 N.W.2d 415 (S.D. 1990) [ELR 12:9:9]

Glamour magazine obtains ruling that defamation action brought by Eric Foretich is time-barred, but court orders discovery as to alleged republication of article on child custody dispute

The November 1988 issue of Glamour magazine included an article concerning the highly-publicized custody dispute between Eric Foretich and his former wife, Elizabeth Morgan.

Foretich sued the magazine, alleging causes of action for defamation and invasion of privacy. Subsequently, Foretich sought to add Hilary Foretich as a party in the action.

A Federal District Court in the District of Columbia has found that it was not just or appropriate to add

Hilary Foretich to the action. Eric Foretich was not Hilary's custodian, and did not produce any authority indicating that a non-custodial parent may sue as "next friend."

The court then found that Virginia law would apply to the case, and that Virginia law does not recognize a false light cause of action.

Turning to the defamation claim, the Glamour parties argued that the applicable one year statute of limitations would bar the claim, since the November 1988 issue of the magazine was on sale by October 12, 1988, at the latest, and Foretich filed his original complaint on October 16, 1989. The court granted partial summary judgment on limitations grounds as to the original publication of the article.

Judge Gesell proceeded to consider Foretich's assertion that the article, in a separate distribution apart from the initial publication, was used by a group known as

Friends of Elizabeth Morgan, with the permission of Glamour, "to facilitate the creation of a negative image of Dr. Foretich..." Foretich's allegation raised the issue of whether a new publication of the text occurred, and whether such publication would generate a new cause of action against one or more of the Glamour parties. If any of the Glamour parties, stated Judge Gesell, consented to the use or distribution of the November 1988 article, the limitations period for an action against such parties might be extended to one year beyond such use. The court declared that it did not have sufficient information concerning the time and manner in which the Friends of Elizabeth Morgan purportedly distributed the article and whether Glamour authorized the distribution, and therefore denied the motion for summary judgment as to the alleged republication.

Foretich also claimed that certain material printed in Glamour's January 1989 and December 1989 issues was defamatory, and those claims remained "viable," stated the court.

Foretich v. Glamour, 741 F.Supp. 247 (D.D.C. 1990) [ELR 12:9:10]

Taxpayer obtains reversal of ruling denying deductions for limited partnership investment in the film "Heartbeat"

In December 1979, John Evans purchased an interest in a limited partnership which was formed for the purpose of owning and exploiting the film "Heartbeat," starring Nick Nolte, Sissy Spacek, and John Heard.

As described by Federal Court of Appeals Judge Beam, the parties associated with the production of the film and with the organization of the partnership were well-qualified. Judge Beam also noted that the purchase price for the film - about $4.4 million - did not exceed the production costs, including both the interest paid on production loans up to the closing date of the sale, and a fifteen percent allowance for the overhead of the seller, Orion Pictures Company. The partnership paid $300,000 in cash; executed two promissory notes for the balance of the purchase price; and was required to pay Orion specific contingent amounts based on the film's gross receipts.

The partnership also executed a distribution agreement with Orion, and incurred certain advertising and marketing strategy fees, separate from the distribution fees.

The partnership offered twelve full-unit limited partnership interests. Each limited partner invested a total of $142,500, which was payable in specified installments, and each limited partner was required to assume personal liability for his or her ratable share of the recourse purchase note to Orion and the recourse marketing loan.

In its 1979 tax return, Heartbeat Associates claimed deductions of $1.25 million for advertising costs and distribution fees. In its 1980 income tax return, Heartbeat reported as income the amounts of gross receipts applied to the payments to Orion and to the company's bank. Depreciation expenses were listed at about $2.2 million. For investment tax credit purposes, Heartbeat claimed a qualified investment equal to the sum of the $300,000 in cash and the $2 million recourse note paid to Orion.

The Commissioner of Internal Revenue assessed deficiencies against Evans in the amounts of about $4,000, $4,6000, $8,000 and $8,400 for the years 1977, 1978, 1979 and 1980, respectively.

The tax court determined that Heartbeat Associates was not engaged in an activity for profit, and also imposed a penalty interest rate against the taxpayers for a "tax-motivated transaction."

Judge Beam, in reversing the tax court's decision, observed that the court apparently found that the general partners did not properly evaluate Heartbeat's profit potential when the partnership purchased the film. But Judge Beam concluded that the positive factors which indicated a "proper profit motive" outweighed any negative factors. In particular, the determination that the partners could not have had a bona fide belief that Heartbeat would realize sufficient gross receipts to produce a profit was "clearly erroneous."

The court cited the following factors: the operation of Heartbeat Associates in a business-like manner and with the maintenance of complete and accurate records; the expertise and experience of the general partners, the actors, the director, the producers, and the distributor; the time and effort of the general partners in negotiating complicated loan transactions and distribution agreements; the fact that the distribution arrangements conformed with industry standards; the success of the general partners in similar film ventures engaged in for profit; the purchase price of the film; the opportunity for the partnership to earn "a substantial ultimate profit in this highly speculative ...venture;" the adequacy of the capitalization of the partnership; and the lack of hobby or recreational aspects to the ownership and promotion of Heartbeat.

Evans v. Commissioner of Internal Revenue, 908 F.2d 369 (8th Cir. 1990) [ELR 12:9:10]

United Artists' claim for charitable contribution deduction upon donating nitrate-base film negatives to Library of Congress is denied

In 1969, United Artists Corporation transferred to the Library of Congress certain rights in original film negatives of motion pictures on nitrate-base film. The company permitted the Library to convert the nitrate film to safety film which then would become the physical property of the Library.

The Commissioner of Internal Revenue disallowed United Artists' claim for a charitable contribution deduction in the amount of about $10 million.

A Claims Court decision affirming the disallowance has been upheld by a Federal Court of Appeals.

The Claims Court had noted that the cost of converting the nitrate negatives to safety film was over $1 million; United Artists did not assume any of the costs although the company retained the right, to the exclusion of other members of the public, to obtain access to the Library's safety film for commercial purposes in perpetuity. The Claims Court also pointed out that the nitrate films as physical property had no fair market value in November 1969. Relying on the principle that when a donation is made with the expectation of receiving a substantial benefit in return, the Claims Court found that no charitable contribution was made.

Judge Nies noted the general rule that a purported gift is at least presumptively negated by the receipt of a substantial benefit in return. Contrary to United Artists' argument, the court did not have to determine the comparable dollar values for the respective benefits received by each party.

United Artists contended that the only benefit received by the company was relief from storage and insurance for the nitrate film, and that this benefit was negligible.

Judge Nies agreed, however, with the Claims Court's finding that as part of the transaction, the Library agreed to make preservation copies of United Artists' motion pictures and agreed that the company would have an exclusive right of access to the converted material. The fact that the films were available only to United Artists, and that other parties were excluded even after the company's copyrights expired, placed the company "in a unique position, one far different from the public at large." United Artists received a "substantial benefit," concluded the court, in exchange for the benefits received by the Library, thus raising a presumption that there was no charitable contribution.

Judge Nies concluded by finding that United Artists did not establish the facts necessary to receive a partial deduction.

Transamerica Corporation v. United States, 902 F.2d 1540 (Fed.Cir. 1990) [ELR 12:9:11]

Reassessment of Twentieth Century Fox's real estate holdings upon company's 1981 acquisition is upheld

In 1981, a group of investors including Marvin Davis acquired Twentieth Century Fox Film Corporation; the investors formed three shell corporations in order to effect the acquisition.

The County and the City of Los Angeles subsequently reassessed the real property owned by Fox and by a subsidiary.

A trial court decision rejecting Fox's claim for a tax refund has been upheld by a California appellate court.

Presiding Judge Arleigh M. Woods noted that Fox conceded that as a result of the June 1981 transaction, Fox

Film became a wholly-owned subsidiary of the shell corporation known as TCF Intermediate Company. Under state law, such acquisition constituted a change of ownership of Fox's real property holdings so as to require the reassessment.

The court denied Fox's argument that the investors who created Intermediate, rather than the company, acquired Fox, and that since no one investor owned a greater than fifty percent interest, no change of ownership had occurred. (In a footnote comment, the court observed that Fox did not question the validity of the shell corporations, or argue that the corporations were merely alter egos of the investors.)

Twentieth Century Fox Film Corporation v. County of Los Angeles, 273 Cal.Rptr. 76 (Ca.Ct.App. 1990) [ELR 12:9:11]

Pre-settlement rulings in James "Buster" Douglas-Don King litigation are published

The details of the dispute between heavyweight champion James "Buster" Douglas and promoter Don King, and the July 1990 settlement of the lawsuits filed by the parties have been reported at ELR 12:6:9.

In a decision issued in May 1990, as amended in August 1990, Federal District Court Judge Sweet, in a lengthy opinion, discussed, among other issues, the validity and enforceability of Don King Productions' contract with Douglas, and denied the various parties' motions for summary judgment on the breach of contract claim. Judge Sweet stated that Douglas was entitled to an opportunity to prove at trial that Don King Productions materially breached its duties of good faith dealing under the contract, or "perhaps even fiduciary duties which it may have violated by actively and willfully interfering in Douglas' ascension to the title." And Don King was entitled to attempt to establish that King "did not endeavor or intend to interfere with Douglas' victory, or its recognition by the governing bodies...or perhaps, that he acted consistently with expected and prevailing standards in professional boxing promotion."

The court also denied a motion by Golden Nugget, Inc. and The Mirage Casino-Hotel for summary judgment dismissing Don King Productions' claim for tortious interference with contract.

In a separate decision issued in June 1990, Judge Sweet granted Don King Productions' motion for partial summary judgment striking the Douglas parties' affirmative defense of unconscionability and dismissing their counterclaims for slander and intentional infliction of emotional distress.

And in a third opinion, issued in July 1990, the court, after granting a motion for reargument of its choice of law determination, left undisturbed the prior ruling that the parties' contractual choice of law provision would be honored absent a showing that New York lacked a substantial relationship to the parties or the transaction, or that Nevada had the most significant contact with the parties. New York law also would govern all issues of contract validity, legality and enforceability for purposes of the tortious interference claim, concluded Judge Sweet.

Don King Productions, Inc. v. Douglas, 742 F.Supp. 741; 742 F.Supp. 778; 742 F.Supp. 786 (S.D.N.Y. 1990) [ELR 12:9:12]

Former San Diego Chargers player may bring medical malpractice claim against team doctor and player's wife may proceed with loss of consortium claim, rules California appellate court

In August 1986, when John Hendy injured his right knee while playing football for the San Diego Chargers, Hendy consulted the team doctor, Gary Losse. In May 1987, Losse advised Hendy to continue playing football. Soon after, while playing in a training session, Hendy again injured his knee. About one week later, Losse advised Hendy to continue to play football.

In September 1987, the Chargers terminated Hendy's employment. A doctor who was not employed by the team informed Hendy that Losse failed to properly diagnose and treat the player's condition and caused Hendy's injuries.

Hendy sued the Chargers and Losse in a California trial court, alleging, among other claims, negligent hiring and retention of a team doctor without the necessary knowledge and skill to properly care for Hendy's condition, and both intentional and negligent misrepresentation regarding Hendy's condition.

The team petitioned to remove the lawsuit to a Federal District Court, claiming that the causes of action were subject to the terms of the National Football League Players Association Collective Bargaining Agreement and therefore were preempted by section 301 of the Labor Management Relations Act.

The court granted the Chargers' motion to dismiss the above-noted claims on the ground that the Hendys had failed to exhaust their contractual remedy through the grievance process provided for in Hendy's contract with the Chargers. Judge J. Lawrence Irving granted the Hendys' motion to remand the remaining causes of action-a medical malpractice claim against Losse and Wanda Hendy's loss of consortium claim against Losse and the Chargers- to state court.

Upon remand, the trial court sustained the demurrers of Losse and the Chargers and dismissed the Hendys' complaint.

A California appellate court has ruled that Hendy may proceed with his malpractice claim against Losse. Acting Presiding Judge William L. Todd agreed that the Act, with certain narrow exceptions, provides the exclusive remedy for injuries arising within the course of employment. (A footnote comment pointed out that for the purpose of the appeal, the court would assume that Losse's medical advice to Hendy to continue to play football caused injury to the player). When the conditions of compensation exist, an injured worker's exclusive remedy would be the compensation available under the Act, and those conditions exist when the injury "arises out of and in the course of employment and is proximately caused by the employment."

However, one exception to the exclusivity of the workers' compensation remedy arises when an employer bears two separate relationships to the employee, each giving rise to separate legal obligations. Under the dual capacity theory, the employer may be subject to liability for damages arising from the relationship distinct from that of employer and employee. California courts, stated Judge Todd, have "long recognized that doctors in the employ of companies may operate in the dual capacity of co-employee and physician and have held they are not shielded from malpractice actions by reason of their co-employee status."

Losse was not only an employee of the Chargers, observed the court, but also was Hendy's treating physician and, as such, was charged with the obligations arising in a doctor-patient relationship, for "Hendy's need for protection from medical malpractice [was] neither more nor less than that of others who [were] not employees of the Chargers."

Judge Todd concluded that the dual capacity theory remains a viable theory notwithstanding its partial legislative repudiation in 1982, and that the theory provided a basis for the Hendys to avoid the exclusivity provisions of the Act with respect to co-employee Losse.

The court rejected the Hendys' allegation, as an alternative theory of liability, that Losse fraudulently concealed the player's injury; declared that Losse's demurrer as to the loss of consortium cause of action was improperly granted; and stated that Wanda Hendy's cause of action may be joined with Hendy's case in the player's grievance proceeding against the Chargers.

In denying Losse's petition for rehearing, the court modified its opinion by adding to a footnote concerning the joinder of the loss of consortium claim, as follows:

"Should the federal proceedings result in the retransfer of John Hendy's injury claim to the superior court for adjudication, the superior court may again entertain Wanda Hendy's companion loss of consortium claim in that proceeding. In such event, this opinion does not foreclose any defenses raised in this appeal but not considered by this court."

It also should be pointed out that the Hendys argued, for the first time on appeal, that Losse was an independent contractor to the Chargers, and not an employee. Judge Todd, in a footnote, commented that this was an inappropriate contention because no facts had been presented to the trial court to support the theory of independent contractor liability.

Hendy v. Losse, 274 Cal.Rptr. 31 (Ca.Ct.App. 1990); Case No. D010557 (Ca.Ct.App., Nov. 1, 1990) [ELR 12:9:12]

Court's decision to vacate order restraining distribution of book about Israeli intelligence service is published

The appellate court decision (ELR 12:5:20) allowing St. Martin's Press to proceed with the distribution of the book "By Way of Deception" has been published.

The Israeli government had obtained a trial court order barring the publication of the book, co-written by a former agent of the Mossad intelligence service, pending a judicial review of the government's request for a preliminary injunction.

In its memorandum decision, the court found that the Israeli government's claim that the safety of its intelligence agents was endangered by the publication and distribution of the book was not sufficiently supported, and that the government did not overcome the heavy presumption against a prior restraint on publication. It also was noted that in view of the distribution of the book to about 1500 wholesalers and to book reviewers of major media outlets, any grant of injunctive relief would be ineffective.

State of Israel v. St. Martin's Press, 560 N.Y.S.2d 450 (N.Y.App. 1990) [ELR 12:9:13]

Broadcaster obtains conditional access to videotapes of state correctional facility inmates

The operator of a television station in Buffalo, New York sought to obtain all videotapes taken in the course of a 1988 prisoners' uprising in the special housing unit at Coxsackie Correctional Facility. The request was denied on the ground that the material was exempt from disclosure under the Freedom of Information Law because such disclosure would interfere with the criminal investigation of the uprising and with possible criminal prosecutions of the inmates involved. The Department of Correctional Services also denied Buffalo Broadcasting's request for all videotapes taken at Attica Correctional Facility during 1987 and 1988.

The trial court partially granted the broadcaster's petition to compel the disclosure of the Coxsackie videotapes by directing the release of copies of the tapes after the correctional officials edited the material to redact those portions which might interfere with criminal prosecutions, invade an inmate's expectation of privacy, or create safety concerns. The court required the officials to provide a description of any excised material sufficient to allow the court to determine the applicability of the exemption without an in camera viewing of the tapes.

With respect to the Attica videotapes, the court also granted the broadcaster's narrowed-down request, subject to redaction of any portions showing inmates engaged in various private activities, again requiring the correctional officials to provide written descriptions of such portions for court review.

A New York appellate court has affirmed the trial court's decision, although finding that the court too narrowly restricted the application of the statute's personal privacy exemption. Judge Levine stated that the correctional officials would be entitled to redact those portions of the tapes portraying inmates "in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in...personal hardship to the subject party'" (omission by the court). And there may be portions of the tapes which, if publicly disclosed, would present danger to the personal safety of inmates or the facility staff. The court therefore modified the judgment to provide that the correctional officials, as with the Coxsackie tapes, may redact the portions of the Attica tapes disclosure of which would invade an inmate's expectation of privacy or create serious safety concerns; the officials must provide the court with a description of the redacted portions sufficient to allow the court to determine the applicability of the exemption.

Buffalo Broadcasting Company, Inc. v. New York State Department of Correctional Services, 552 N.Y.S.2d 712 (N.Y.App. 1990) [ELR 12:9:13]

United Press obtains preliminary injunction preventing Reuters Ltd. from terminating supply of foreign news photographs

In 1985, Reuters Ltd. agreed to provide United Press International with foreign photographs for United Press to sell to its United States subscribers, and United Press agreed to provide Reuters with United States photographs to distribute outside the United States.

When various disputes arose, United Press sought an injunction to prevent Reuters from discontinuing the transmission of photographs. A Federal District Court in New York denied the motion for a preliminary injunction on the ground that United Press had failed to establish a likelihood of irreparable harm.

A Federal Court of Appeals has reversed the District Court's ruling, citing a "key argument raised by UPI - one not discussed by the district court" that "terminating the delivery of a unique product to a distributor whose customers expect and rely on the distributor for a continuous supply of that product almost inevitably creates irreparable damage to the good will of the distributor."

Judge Richard J. Cardamone pointed out that "news and pictures are the lifeblood of the wire service industry so that interrupting the flow of pictures even briefly threatens a wire service company's continued viability." United Press testified that upon the expiration of a three month arrangement to obtain foreign photographs from France Presse, United Press might not have a source of such photographs, and therefore might lose most of its photograph service subscribers. For Judge Cardamone, even the speculative loss of France Presse's services might cause immediate irreparable harm to United Press's good will, and such an injury would be "nearly impossible to value."

Allowing United Press to continue to distribute Reuters photographs pending the outcome of the litigation between the parties would maintain the status quo. United Press had presented sufficient evidence to show serious questions going to the merits of the action and a balance of hardships in its favor, and the court, accordingly, remanded the matter to the District Court with directions to issue the preliminary injunction.

Reuters Limited v. United Press International, Inc., 903 F.2d 904 (2d Cir. 1990) [ELR 12:9:14]

Florida artist loses replevin action against restaurant holding paintings as security for loans to artist's consignment agent

In 1986 and 1987, artist Zois Shuttie consigned a total of sixteen paintings to John Guggenheim, the operator of an art gallery in South Miami, Florida. The terms of the consignment were oral, except for three, single sentence sheets not otherwise described by a Florida court.

Guggenheim arranged to have the paintings displayed at the Festa Restaurant, and to pay Festa a twenty percent commission if any works were sold. The paintings were installed at the restaurant on November 29, 1987; no sales took place.

Festa, in reliance on Guggenheim's "asserted and apparent" ownership of the paintings and the fact that the restaurant actually possessed the paintings for security, loaned Guggenheim a total of $25,000.

Guggenheim, in March 1988, "unexplainedly" departed the Dade County, Florida area.

Shuttie eventually brought a replevin action against Festa, seeking the return of the paintings. Festa argued that it possessed a security interest in the works based on Guggenheim's apparent and declared, albeit misstated, ownership. Festa also noted that the paintings did not display any notice that the works were being sold subject to a contract of consignment and that Shuttie retained title in the works.

The trial court observed that Shuttie not only failed to comply with the statutory notice provisions, but that Festa might not have loaned Guggenheim any money if Shuttie had promptly acted upon acquiring knowledge that the agent was violating the artist's trust and the consignment terms; the court entered judgment for Festa.

A Florida appellate court has held that as a matter of law "when an artist fails to avail himself of the provisions of the Artist's Consignment Act...and places in commerce paintings of art with no notation as to ownership thereon, an innocent third party who takes a security position in these paintings has a superior possessory interest, vis-a-vis the artist under the long established principle of law that as between two innocent parties, the one that created the situation causing the loss, will not be held to have a superior position to the completely innocent party...;" the judgment on behalf of Festa was affirmed accordingly.

Shuttie v. Festa Restaurant, Inc., 566 S.2d 554 (Fla. App. 1990) [ELR 12:9:14]

General Mills is bound by agreement to act as last-resort ticket purchaser for Minnesota Viking football games

In order to guarantee all Minnesotans would have the opportunity to watch a local professional football team's home games on television when ninety percent of the tickets were sold, the state legislature required the Metropolitan Sports Facilities Commission to enter into a twenty year agreement with a last-resort ticket purchaser. The purchaser would buy all unsold tickets to a professional game seventy-two hours before the game whenever more than ninety percent of the tickets had been sold 120 hours before the game. Such an agreement would insure that a game otherwise only ninety percent sold out would be telecast in all of Minnesota despite the National Football League's 100 percent sell-out policy.

In August 1979, General Mills entered into a twenty year ticket purchase agreement with the Commission. The agreement limited General Mills' total obligation to $1.5 million for the purchase of tickets during the term of the agreement; the company received various concessions and the Vikings agreed to share in the ticket purchase costs incurred by General Mills.

In 1984, the legislature repealed the television guarantee statute. General Mills argued that the repeal nullified the contract. The issue of the company's obligation to purchase tickets was not raised again until the Vikings' 1989-1990 season when more than ninety percent of the tickets were sold prior to the first and second home games, but it was unlikely that the remaining tickets would be sold by the seventy-two hour deadline. General Mills stated that the company would not continue to buy the remaining tickets.

In response to the Commission's lawsuit against General Mills, the trial court ruled that the agreement still was valid.

On appeal, General Mills argued that the repeal of the relevant statute meant that a condition precedent to the company's obligation did not exist, and that the company's obligation thus did not arise. The court, however, noted that the agreement "clearly contemplated and provided for a conditional repeal" of the statute; pointed out that General Mills continued to accept the benefits of the agreement and to treat the agreement as effective; and upheld the trial court's decision.

Judge Foley, in dissent, viewed the legislature's repeal as an attempt to force a contractual position on the Commission and General Mills. But General Mills, as a private corporation was entitled to the freedom to contract under the due process clauses of the Minnesota and United States Constitutions. The legislature's attempt to enforce the ticket purchase agreement was not necessary to protect the public interest and interfered with freedom of contract in violation of General Mills' due process rights. General Mills offered evidence that the company's understanding at the time it entered the contract was that its consent was required to continue the agreement upon repeal of the statute. Judge Foley would have held that the conditional repeal of the statute was unconstitutional, and would have directed the trial court to find that General Mills' consent was necessary for the agreement's continued effectiveness upon repeal.

Metropolitan Sports Facilities Commission v. General Mills, Inc., 460 N.W.2d 625 (Minn.App. 1990) [ELR 12:9:15]

Courts in Florida and Virginia grant cable companies access to utility easements; Virginia court denies access to condominimum common areas

A Federal Court of Appeals in Florida has affirmed a District Court decision granting Centel Cable Television's request for a permanent injunction guaranteeing access to utility easements in St. Lucie West, a mixed-use development then being constructed in Southern

Florida. The District Court, among other findings, determined that the developer denied access to Centel in violation of the Cable Act.

The Court of Appeals found that Centel had an implied right of action under section 621(a) of the Cable Communications Policy Act of 1984 against a private developer who attempted to block the construction of a cable system through easements dedicated to compatible uses, that the Cable Act did not violate the Takings Clause of the Fifth Amendment, and that the District Court's findings as to Centel's claim of irreparable injury were not clearly erroneous.

Senior Court of Appeals Judge Henley, although concurring in the opinion, noted, in part, that the developer had not granted any utility easements when the Cable Act became law, expressed concern over the case law relied upon by the majority on the takings issue, and suggested a rehearing en banc to consider the issue.

In a separate proceeding, a Michigan appellate court affirmed a trial court decision granting summary judgment to Diamond Lake Area Cable TV Company in an action brought by certain property owners. When the cable company attached its wires to a utility company's poles, the property owners (whose predecessors in interest granted the easement to the utility company) brought a lawsuit alleging, in part, trespass.

Presiding Judge Murphy, citing section 621(a)(2) of the Cable Act, found that the language of the statute, as well as its legislative history and judicial interpretation, revealed "a clear intent by Congress to grant franchised cable television companies a federal right to use any 'easements dedicated to compatible uses,' whether public or private."

The court referred to the unpublished District Court decision in Centel Cable (the affirmance of which is discussed above), noting that in holding that the cable company had a right of access to both the public and the private utility easements, the District Court stated that easements need not be "publicly" dedicated in order to be "dedicated" to compatible uses within the meaning of the statute.

In all, concluded Judge Murphy, the cable company had a right of access to the easements dedicated to a compatible use held by the utility company over the property owners' land. It also was noted that Congress included a provision for just compensation of property owners for any damages caused by cable companies when installing, constructing, or operating their facilities and that the provision sufficiently addressed the taking issue. The property owners did not show how the cable company's use of the easement would materially increase the burden on their property, and without such an additional burden, there was no taking of property.

In a third related decision, a Federal District Court in Maryland has ruled that Media General Cable was not entitled to install its cable wires in compatible easements in the Sequoyah Condominium's common areas. Sequoyah contained 1,018 individual units consisting of three building types. The unit owners, via a governing council, entered an exclusive contract with the operator of a satellite master antenna television system.

Media General, noting the four "compatible" easements at Sequoyah, claimed a right of access to the development's common areas under section 621(a)(2) of the Cable Act.

The court stated that the easements to which Media General sought access were conveyances between or among private parties and were neither "public rights-of-way" nor "dedicated" easements and held that the company therefore was not entitled to access to Sequoyah under the Act. The placement of the cable system via the four easements at Sequoyah would be a taking per se, declared Judge Ellis, for the "placement of cable or conduit in or along an easement is plainly a physical occupation of the easement space." To the extent the easements at Sequoyah were private property, Media General's construction of its system through those easements under the Act would constitute a taking for which just compensation would be required.

Centel Cable Television Company of Florida v. Thos. J. White Development Corporation, 902 F.2d 905 (11th Cir. 1990); Mumaugh v. Diamond Lake Area Cable TV Company, 456 N.W.2d 425 (Mich.App. 1990); Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F.Supp. 903 (E.D.Va. 1990) [ELR 12:9:15]

Briefly Noted:

Wrongful Termination/Football Coach.

A Federal District Court in the District of Columbia has rejected Bobby A. Frazier's claims against the University of the District of Columbia in connection with Frazier's termination as head football coach for the school.

The court noted that Frazier was an at-will employee, and, as such, could be discharged at any time; stated that Frazier had no property interest in his job and thus was not entitled to a pretermination hearing; and rejected causes of action for wrongful discharge and breach of contract.

Frazier v. University of the District of Columbia, 742 F.Supp. 28 (D.D.C. 1990) [ELR 12:9:16]

Hockey Spectator Injury.

A Pennsylvania appellate court has upheld a trial court decision granting summary judgment to the Philadelphia Flyers in an action brought by a spectator who was struck by a hockey puck while attending a Flyers game. The spectator claimed that he had not assumed the risk of being struck because he intentionally obtained a seat two rows behind the protective plexiglass near center ice. Judge Cercone stated that "the omnipresent specter of a deflected Mario Lemieux missile whizzing towards spectators seated at center ice is as inherent to the sport of hockey as the unnerving probability of a Von Hayes rocket flying towards patrons sitting in first base box seats is to a baseball game." The team owed no duty to protect spectators from risks inherent to the sport, and the risk of being struck by a hockey puck, even for an individual sitting behind plexiglass, was "common, frequent and expected," concluded the court.

Pestalozzi v. Philadelphia Flyers Ltd., 576 A.2d 72 (Pa. App. 1990) [ELR 12:9:16]

Waiver/Auto Race Mechanic.

A New York appellate court has upheld a trial court decision granting a motion for summary judgment sought by race car driver Robert Krollage, the operators of the Islip Speedway, and the National Association for Stock Car Auto Racing in an action brought by the survivors of Francis V. Cervoni. Cervoni died as a result of injuries he sustained when struck by a race car driven by Krollage; the car went out of control during a race.

Cervoni was struck while working as a car mechanic in the "pit area" located on the infield of the track.

The court noted that when Cervoni applied to NASCAR for membership and a license, he signed an agreement limiting the association's liability to certain benefits, and that following the tragic accident, the association paid $17,500 to Cervoni's beneficiary.

The court next upheld the validity of the waiver Cervoni signed on the day of the race. Cervoni was not a patron of the racetrack, and did not quality as a "user" of the track within the provisions of a statute which voids certain waivers. Cervoni acknowledged the hazards of his work and indicated that he was familiar with the track and "its inherent risks."

Lago v. Krollage, 554 N.Y.S.2d 633 (N.Y.App. 1990) [ELR 12:9:17]

School Athletics.

A Kentucky appellate court has upheld a trial court decision dismissing a complaint alleging that a high school athlete was wrongfully prevented from participating in interscholastic wrestling because of his failure to maintain a satisfactory grade average. The athlete had no property or liberty interest in participating in extracurricular activities; the school authorities did not violate any substantive federal or state constitutional right; and the policy was reasonable and "without arbitrariness," concluded the court.

Thompson v. Fayette County Public Schools, 786 S.W.2d 879 (Ky.App. 1990) [ELR 12:9:17]

Artist Dwelling Law.

New York's Multiple Dwelling Law provides accommodations with respect to joint living-work space for individuals who are regularly engaged in the fine arts and who are certified either by the City Department of Cultural Affairs or the State Council on the Arts. The city agency, upon finding that a photographer's application included exhibitions that were not professionally curated and book cover photographs that the agency determined were commercial work rather than fine art, denied the application for artist's certification. In 1985, a New York trial court remanded the matter to the agency for further hearings and the adoption of formal guidelines (ELR 7:3:16).

The agency subsequently adopted regulations which, as described by a trial court judge, provided, in part, that to be considered regularly engaged in the arts, a person must be engaged in an art form which demonstrates "a substantial element of independent aesthetic judgment and the artist must establish commitment to the arts...and documentation establishing the artist's credentials, including samples of published work, scores of recordings, photographs, or printing."

The photographer submitted a portfolio of photographs but did not submit any additional materials or an updated resume. The agency denied the application on the basis that the photographer's work was commercial in nature.

The court dismissed the petition seeking to reverse the agency's determination, noting that the photographer did not establish any evidence of professional recognition of his work via publications or exhibitions. The agency's action in denying the petition was not arbitrary or capricious, stated the court, and served to insure that the limited supply of housing available under the Multiple

Dwelling Law would be set aside for the arts community.

Marhoffer v. City of New York, New York Law Journal, p. 22, col. 1 (N.Y.Cnty., Oct. 31, 1990) [ELR 12:9:17]

Contracts/Damages.

A Federal Court of Appeals has upheld a District Court decision in an action involving a contract between International Art Galleries, Inc. and Kinder-Harris, Inc.

Kinder-Harris agreed to design and market a new line of art work to be produced by International Art. A Kinder-Harris official apparently stated to the president of International Art that "we'll guarantee a million dollars in sales in the first year, and we have a deal." When

Kinder-Harris stopped displaying the art, International Art sued for breach of contract and obtained a jury verdict for about $220,000; the District Court reduced the award to about $185,000.

The court found that International Art submitted specific, detailed estimates of its damages. Furthermore, a jury could have reasonably believed that the parties had contracted for more than one year and was entitled to decide the time period for assessing damages. And the District Court did not err in reducing the verdict in order to take into account a mistake in the commission rate.

International Art Galleries, Inc. v. Kinder-Harris, Inc., 907 F.2d 864 (8th Cir. 1990) [ELR 12:9:17]

Trademark Infringement.

Western Publishing Company, the publisher of the "Little Golden Books" products, was not entitled to a preliminary injunction in a trademark infringement action involving Rose Art Industries' drawing toy "Magnetic GoldenSlate," a Federal Court of Appeals has ruled.

In affirming the District Court decision, Judge Thomas J. Meskill found that Western did not demonstrate the requisite likelihood of consumer confusion. Judge Meskill referred to the fact that Western did not use the word "Golden" simply as a description of color; that Rose Art used the phrase "Magnetic GoldenSlate" as a "prominent, boldly lettered advertising label for one particular magnetic drawing slate that indisputably contains a gold colored screen;" that Western was not marketing a competing product; and that there was no evidence of actual consumer confusion.

Western Publishing Company, Inc. v. Rose Art Industries, Inc., 910 F.2d 57 (2d Cir. 1990) [ELR 12:9:18]

Copyright/Costs.

In a decision reported at ELR 12:2:3, a Federal Court of Appeals affirmed a District Court decision finding that a 1984 episode of the CBS television series "Simon and Simon" did not infringe the writings of Jay Robert Nash.

A Federal District Court, citing section 505 of the Copyright Act, has awarded CBS costs in the amount of about $12,000. The court questioned whether the prevailing party in a copyright case would be entitled to costs only as a matter of the court's discretion and not as of right. However, assuming that the matter was discretionary and that the award would depend on whether a party had presented a close question of law or fact, the court found that Nash "failed to present anything approaching a close question on the issue of infringement, which was the principal issue in the case."

Nash v. CBS, Inc., Case No. 86C00511 (N.D.Ill., October 11, 1990) [ELR 12:9:18]

Defamation.

Radio station WCCC-FM disc jockeys Joseph E. Schlosser, also known as "Sebastian," and Diane Novak broadcast a weekly feature called "Berate the Brides;" during the segment the disc jockeys asked listeners to call and name a "dog of the week" selected from newspaper photographs of recent brides. In July 1988, Sebastian stated, in referring to the photograph of Cynthia

F. Murray, that she was "too ugly to even rate" and that she had won the "dog of the week" prize consisting of certain pet supplies. Novak also made various derogatory comments.

When Murray and her husband sued the disc jockeys and other parties associated with the radio station, a Connecticut trial court denied the radio parties' motion to strike the cause of action for defamation. Judge Corrigan noted that the words used by Sebastian and Novak were not opinions, but statements of conclusions; the sole context of the program was "to ridicule someone for the purported amusement of their audience."

The court also refused to strike the cause of action for intentional infliction of emotional distress, stating that it was difficult to believe that the disc jockeys did not intend to subject Murray to emotional distress that would have caused the injuries alleged. "If it was not so intended," remarked Judge Corrigan, Sebastian and

Novak "would have had to have been coldly insensitive not to realize their conduct involved such an unreasonable risk."

Murray v. Schlosser, 574 A.2d 1339 (Superior Ct. of Conn. 1990) [ELR 12:9:18]

Copyright Infringement/Music.

A Federal District Court in Pennsylvania has ordered Salvatore Venezia, the owner of The Vineyards in Bethlehem, Pennsylvania, to pay statutory damages totalling $5,000 to ASCAP, as well as costs and attorneys' fees, for the unlicensed performance of five copyrighted musical compositions. In entering the default judgment, the court also enjoined Venezia from performing the copyrighted works unless and until the parties enter a licensing agreement.

A & N Music v. Venezia, 733 F.Supp. 959 (E.D.Pa. 1990) [ELR 12:9:18]

Rock Concert Patron Injury.

The Supreme Court of South Carolina has upheld the entry of judgment on a jury verdict awarding $12,000 to Thomas Martin in an action against Greenville Memorial Auditorium under the state's Tort Claims Act. Martin sought damages for injuries received as a result of his being struck by a glass bottle which was thrown by an unknown third party from the auditorium's balcony during a rock concert by the group "Loverboy." Martin claimed that the auditorium was negligent in adequately securing and maintaining the premises during the concert and that this negligence created a reasonably foreseeable risk that a third party might commit a criminal act.

The court noted that the auditorium employed only fourteen security guards to control the 6,000 patrons; that there was no reserved seating on the main floor of the auditorium; that Martin testified that he did not see any apparent effort by security personnel to stop "the drinking, smoking, pushing, or shoving;" and that the auditorium's security director's testimony indicated that he was "on notice" that patrons of the auditorium consumed alcohol during various events.

Chief Judge Gregory, in dissent, noted that the auditorium had posted signs prohibiting patrons from carrying glass containers into the concert. Security personnel at the entrance were instructed to investigate any suspicious packages. Judge Gregory also observed that balcony patrons were seated in individual seats; that four security officers were present in the balcony; and that there was no evidence of any crowd disturbance in the balcony. In Judge Gregory's opinion, there was no evidence that Martin's injury was "the natural and probable consequence" of the auditorium's alleged negligence in securing the premises, and the dissent would have reversed the trial court's denial of a directed verdict on the issue of liability.

Greenville Memorial Auditorium v. Martin, 391 S.E.2d 546 (S.Car. 1990) [ELR 12:9:18]

Labor Relations/Opera Company.

In April 1990, the New York State Labor Relations Board entered an order which adopted the report of an administrative law judge concerning the Bel Canto Opera Co., Inc. The report found that Bel Canto, a non-profit corporation, had engaged in an unfair labor practice by refusing to recognize or bargain collectively with the Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO, as the exclusive bargaining representative of the musicians employed by Bel Canto. Bel Canto had argued that the actual employer of the musicians was the individual conductor hired for the purpose of directing the orchestra for each score during several rehearsals and performances; according to Bel Canto, the conductor was an independent contractor.

In applying the "right to control" test, the administrative law judge noted that the conductor selected the musicians and designated their working conditions. But Bel Canto maintained overall control through the musical director and artistic director appointed by the company's

Board of Trustees; Bel Canto also selected the work to be performed and paid the musicians.

A New York trial court has granted the Board's motion for a decree enforcing the order.

In re New York State Labor Relations Board (Bel Canto Opera Co., Inc.), New York Law Journal, p. 22, col. 3 (Dec. 27, 1990) [ELR 12:9:19]

Copyright Infringement/"Theodore Bear."

A Federal District Court in New York has granted Recycled Paper Products a preliminary injunction barring Pat Fashions Industries, Inc. from distributing maternity shirts displaying the allegedly infringing likeness of Recycled's copyrighted "Theodore Bear" teddy bear. The court found that Pat Fashions had access to Recycled's work, and that the "look and feel" of the bears involved were substantially similar.

Recycled Paper Products, Inc. v. Pat Fashions Industries, Inc., 731 F.Supp. 624 (S.D.N.Y. 1990) [ELR 12:9:19]

Magazine Tax.

A Florida trial court found unconstitutional a statute imposing a sales tax on the retail sales of secular magazines while exempting from tax the retail sales of newspapers. Upon certification from an appellate court, the Florida Supreme Court noted that the statute treated some periodicals protected by the First Amendment less favorably than other periodicals, and that the state did not show a compelling interest in maintaining the differential taxation. The court therefore affirmed the ruling that the statute unconstitutionally differentiated between magazines and newspapers, burdening First Amendment rights.

However, the court concluded that the correct response would be to eliminate the exemption. The portion of the trial court's order which held that the appropriate remedy was to strike the tax imposed on magazines was reversed accordingly.

Department of Revenue v. Magazine Publishers of America, Inc., 565 S.2d 1304 (Fla. 1990) [ELR 12:9:19]

Damages/Aretha Franklin Matter.

The opinion in Elvin Associates v. Franklin, which was reported at ELR 10:12:9, has been published. The published opinion includes the court's ruling on the damages available to Ashton Springer, the principal of Elvin Associates, for performer Aretha Franklin's failure to appear for rehearsals of the proposed Broadway musical "Sing Mahalia Sing."

Magistrate Nina Gershon recommended that Springer, whose recovery was based on a theory of promissory estoppel, be awarded out of pocket expenditures totaling about $50,000 and various unpaid debits totaling about $180,000.

Federal District Court Judge Whitman Knapp accepted the magistrate's recommendation, except for a debt allegedy due to Tait Towers Lighting; this amount, about $12,500, was excluded from the damage award.

Elvin Associates v. Franklin, 735 F.Supp. 1177 (S.D.N.Y. 1990) [ELR 12:9:19]

IN THE NEWS

Home Box Office and Broadcast Music, Inc. reach interim license agreement

It has been reported that Broadcast Music, Inc. has negotiated a new performing rights license agreement with Home Box Office. The agreement, retroactive to February 1, 1990, and extending through 1992, provides that Home Box Office will pay an interim annual license fee of $.15 per subscriber, pending a ruling by a Federal District Court in Washington, D.C. on the dual licensing of cable television. Dual licensing would require both programmers and local cable system operators to compensate copyright holders.

BMI had filed a copyright infringement action against HBO in December 1989, and in January 1990, the ATC cable system sued BMI; the parties have agreed to drop these two lawsuits. Under the interim agreement, BMI's affiliated composers and copyright holders will receive compensation, for the performance of their works, from HBO, Cinemax and the Comedy Channel. [Feb. 1991] [ELR 12:9:20]

Former Paramount executive Gordon Weaver is sentenced to six month house arrest and $100,000 fine upon pleading guilty to charge of filing false income tax return

Gordon Weaver, a former Paramount Pictures executive, has received a suspended sentence of three years in jail, six months of house detention, and a $100,000 fine for receiving kickbacks of cash and property totalling about $70,000.

It has been reported that Weaver entered a guilty plea in a Federal District Court in New York to a charge that he filed a false income tax return for 1983, in which he failed to report the cash and property purportedly received from companies doing business with the studio. [Feb. 1991] [ELR 12:9:20]

Art gallery may continue to distribute prints displaying Hard Rock Cafe trademark

The Hard Rock Cafe Licensing Corp. may not prevent an art gallery from distributing prints containing the Hard Rock Cafe trademark, a Federal District Court in California has ruled.

In lifting a temporary restraining order and refusing to issue a preliminary injunction against Martin Lawrence Limited Editions Inc, Judge J. Spencer Letts, according to news reports, acknowledged the strength of the Hard Rock trademark, but found no indication of consumer confusion about whether the Hard Rock Cafe was the source of the Hiromichi Yamagata prints. It was noted that copies of the print, a limited edition serigraph entitled "Snowy Night Swing," were not sold at the Hard Rock Cafe restaurants, and that the $3800 works were much more expensive than other Hard Rock merchandise. [Feb. 1991] [ELR 12:9:20]

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