RECENT CASES

ABC ordered to produce shooting script for proposed television movie about Vietnam war prisoner in connection with preliminary injunction hearing in copyright infringement action brought by co-author of book about same prisoner

The 1983 book "Conversations With the Enemy: The Story of PFC Robert Garwood," concerned the experiences of a prisoner of war in Vietnam who returned to the United States in 1979. Garwood was court-martialled and, in 1981, was convicted of collaborating with the enemy and assaulting a prisoner of war. When the co-author of the book (otherwise unidentified) learned that ABC planned to broadcast a made-for-television movie about Garwood, the co-author sued the broadcaster alleging various claims.

The parties reached an understanding that the District Court would conduct a hearing on or before November 15, 1990 to consider whether to issue a preliminary injunction with respect to the proposed broadcast of the movie, and entered stipulations providing that ABC would not broadcast the movie prior to January 1, 1991, and providing for expedited discovery.

The District Court, in October 1990, issued an order directing ABC to provide to the co-author a copy of the "shooting script."

In response to ABC's petition for mandamus, a Federal Court of Appeals found that the production of the shooting script during discovery would promote the First Amendment interests of ABC and the public and was not an improper prior restraint. Judge Birch observed that when the District Court compares the shooting script with the copyrighted book, the court might enter an injunction barring the broadcast only of specific material which might infringe the copyright owner's protected manner of expression. In Judge Birch's view, this approach would accommodate the rights of the copyright owner, ABC's First Amendment rights, and the rights of the public; ABC's petition for mandamus relief was denied accordingly.

In re Capital Cities/ABC, Inc., 918 F.2d 140 (11th Cir. 1990) [ELR 12:11:3]

Actions seeking to bar distribution of the film "The Last Temptation of Christ" are dismissed

Veda Nayak sought to enjoin the distribution of the film "The Last Temptation of Christ," claiming that the film was a defamatory interpretation of the life of Jesus Christ which infringed on Nayak's constitutional right to freedom of worship and religion.

A Federal Court of Appeals in Texas has affirmed a District Court decision dismissing Nayak's complaint.

The court found that a trial of the religious issues raised would violate the First Amendment. Determining the "correct" interpretation of the life of Christ was not a justiciable question before a federal court, stated Chief Judge Clark.

In a separate proceeding, three individuals in Pennsylvania also sought to bar the distribution of the film. A trial court dismissed the action, and an appellate court, citing the First Amendment, upheld the dismissal in an opinion not yet available to the Entertainment Law Reporter.

In late 1990, the United States Supreme Court let stand the lower court ruling.

Nayak v. MCA, Inc., 911 F.2d 1082 (5th Cir. 1990) [ELR 12:11:3]

Business agent's wrongful termination claim against Screen Extras Guild is preempted by federal law, rules California Supreme Court

The Screen Extras Guild employed Barbara Smith as a business agent from 1978 until she was discharged in 1986. Smith, who was not a member of the guild, filed and settled claims and grievances by guild members against the studios, and granted waivers of certain terms of the collective bargaining agreement between the guild and the studios.

Smith sued the guild for wrongful discharge in breach of the covenant of good faith and fair dealing.

The trial court denied the guild's motion for summary judgment on the ground that the Labor-Management Reporting and Disclosure Act preempted Smith's claims. An appellate court denied writ review. The California Supreme Court then granted Smith's petition for review and transferred the matter to the appellate court with directions to issue an alternative writ. The appellate court again denied the petition for a writ of mandate.

The California Supreme Court granted review, and, in a 4-3 ruling, has reversed the appellate court action.

Judge Panelli declared that the Labor Management Act preempted Smith's action against the guild for wrongful discharge because "to allow such actions to be brought by former confidential or policymaking employees of labor unions would be inconsistent with the objectives of the [Act] and with the strong federal policy favoring union democracy that it embodies."

Smith argued that the Act did not apply because her discharge by the guild's board was based on her alleged incompetence and dishonesty, and not on the basis of her disagreement with the policy goals of the elected officials of the guild.

However, in the court's view, allowing even "garden-variety" wrongful termination actions to proceed from the discharge of appointed union business agents by elected union officials would implicate the union democracy concerns of the Act. Attempting to separate terminations for policy reasons and the so-called "garden-variety" terminations would involve highly subjective determinations, observed Judge Panelli. As the business agent, Smith, for many guild members was (emphasis by the court) the guild, the chief representative of guild policies.

The Act and the supremacy clause preempted Smith's wrongful discharge action, concluded the court, as well as Smith's claim against the national executive secretary of the union alleging infliction of emotional distress and defamation, for "these claims are simply Smith's wrongful termination claim in other garb." The matter was remanded to the appellate court with directions to issue a writ of mandate directing the trial court to enter summary judgment for the guild.

Judge Eagleson, with whom Judge Broussard concurred in dissent, noted that California's law of wrongful termination was not inconsistent with the Labor Management Acts' goals; that the Act did not expressly preempt state law suits for wrongful discharge by a union employee; and that the Act responded to antidemocratic abuses by union leaders against the membership, not the relationship between elected union officials and appointed employees of the union. Judge Eagleson would have affirmed the judgment of the appellate court.

Judge Arabian's lengthy dissent questioned whether Congress intended to preempt state regulation of conduct which the Act did not even purport to regulate, and whether the preservation of union democracy (cited by the majority) should provide union leadership "with an unfettered license to dismiss union employees." Judge Arabian pointed out that Smith's state law causes of action did not threaten any federal interest in union democracy or any other national interest embodied in the Act. Smith was not a member of the union, noted Judge Arabian, and there was no unfair labor practice or other concern within the jurisdiction of the National Labor Relations Board with which Smith's action might interfere. The state law claims could be resolved without referring to any matters governed by the Act, and, in all, Smith's action did not interfere with any conduct the Act was designed to protect. Since the termination was not based on union policies or any other interest related to union democracy, there was no basis for a finding of federal preemption, concluded Judge Arabian.

Screen Extras Guild, Inc. v. Superior Court of Los Angeles County, 275 Cal.Rptr. 395 (Cal. 1990) [ELR 12:11:3]

Writer may not prevent London production of musical show based on life of Dr. Martin Luther King, Jr.

A Federal District Court in New York has refused to issue a preliminary injunction in a dispute over the rights to produce a musical show based on the life of Dr. Martin Luther King, Jr.

Writer John Briley claimed that composer Richard Blackford and other parties intentionally interfered with

Briley's contractual relationship with the estate of Dr. King. Judge Pierre N. Leval found that it was unlikely that Briley could establish an interest in such a contract.

Briley claimed that upon the effective dissolution of a partnership known as the Martin Luther King Company, the property of the dissolved company, including certain rights under an exclusivity agreement with the estate, were to be distributed to Trevone Productions. Trevone was Briley's loan-out corporation.

The Martin Luther King Company purportedly obtained its rights via an assignment from Blackford. But Briley did not show, according to Judge Leval, that such an assignment occurred, and it seemed to the court, on the record presented, that Blackford did not assign any contract rights to the partnership.

Even assuming that there existed "a fair question for litigation," Briley did not show that the balance of hardships favored his position. Judge Leval commented that granting an injunction would present "far more serious" hardships for the Blackford parties, whose affidavits indicated expenses of about $2.5 million on developing the London production of "King." The London production apparently did not use Briley's lyrics or material from his book. And a preliminary injunction issued as the play began previews "would effectively destroy the production permanently. It is most unlikely that a production company could hold together its cast, crew, and theatre awaiting the conduct and disposition of final trial on the merits."

Judge Leval noted that the decision denying preliminary injunctive relief was reached without a determination of the Blackford parties' arguments concerning the personal and subject matter jurisdiction of the court.

In a ruling issued in August 1990, Judge Leval mentioned that the production of "King" opened in London in April, 1990, but closed in mid-May, 1990. Shortly before the play opened in London, Coretta Scott King, the executor of Dr. King's estate, withdrew her approval of the show.

Turning to the Blackford parties' jurisdictional contentions, Judge Leval agreed that Briley's complaint did not allege that an act of copyright infringement with respect to the play, occurred in the United States. However, the court granted Briley's request to amend the complaint to plead such a predicate act.

The court also found that Briley's claim to own the copyright to the book and lyrics, as a separate, copyrighted work, and the claim that the Blackford parties infringed this right, were sufficient to raise a question under the Copyright Act. Although the evidence may support the argument that Briley only held a copyright in a work of collaboration jointly owned with Blackford, an actionable infringement based on the book and lyrics was alleged; the Blackford parties' motion to dismiss the copyright claim was denied, as was the motion to transfer for forum nonconveniens.

It was noted that Blackford purposefully transacted business in New York related to the King production, including negotiating and executing various production and financing agreements, signing the exclusivity agreement with the estate, and writing part of the music for the production. Judge Leval concluded that Blackford's activities were "more than sufficient" to subject the composer to personal jurisdiction.

Briley v. Blackford, 1990 U.S.Dist. LEXIS 3037 (S.D.N.Y., Mar. 21, 1990); 1990 U.S.Dist. LEXIS 10967 (S.D.N.Y., Aug. 21, 1990) [ELR 12:11:4]

Biographer's use of published and unpublished material by author Richard Wright is fair use

In 1988, Warner Books, Inc. published "Richard Wright Daemonic Genius," a biography written by Dr. Margaret Walker. A copyright infringement action brought by Wright's widow focused on certain unpublished letters Wright sent to Walker during the late 1930s, as well as material from the late author's journals and passages from published works.

Federal Court of Appeals Judge John M. Walker, sitting by (apt) designation, conducted an analysis of Warner's fair use defense. Judge Walker first noted that Walker's book was a work of criticism and scholarship; that Walker made limited use of previously published works; and that the use of Wright's creative expression demonstrated the author's creativity and "help[ed] provide substance to her literary critique of an artist..." "It would be hard to imagine," continued the court," reading a piece of literary criticism that could not quote even the relatively minimal passages quoted by Walker. A critic does not make her arguments or observations in a vacuum, and could not hope to persuade a reader of the correctness of her perceptions without reference to the very works at issue."

The court then noted that a Yale University library had purchased the right "to use the Wright Archive;" that the right presumably extended to unpublished material; and that the university restricted access to only one manuscript not at issue in the instant proceeding. The university was "free to share Wright's work with interested scholars," concluded the court.

It also was found significant that Walker paraphrased, rather than directly quoted, Wright's work; that the paraphrasing "by and large involve[d] straightforward factual reportage;" and that a right to privacy issue was not involved.

In reviewing the unpublished letters from Wright to Walker, the court determined that Walker used the letters, again, not to recreate Wright's creative expression, but simply to establish facts necessary to the biography. In a footnote comment, Judge Walker cautioned that the court did not accept the biographer's argument that by sending the letters, Wright necessarily "published" them, or "at least diminished his claim to monopoly rights by voluntarily making his work available to others." It seemed to Judge Walker that sending a letter to a friend is presumptively a private matter.

The fair use factor focusing on the volume and nature of the material used favored the Warner parties, as did the "effect on the market" factor, in part because Wright did not present evidence of harm to any potential market.

Judge Walker observed that Wright had not been "entirely consistent" in her actions - Ellen Wright had made available to an authorized biographer certain letters written by Walker to Richard Wright without seeking Walker's permission to use the letters.

The court concluded that the use of the published and unpublished passages at issue in the case was protected fair use.

Wright also claimed that Walker's use of the late author's works breached a purported contract between Walker and Yale University, and that Wright was a third party beneficiary of the contract. The contract at issue was a form providing that permission to examine manuscripts was not an authorization to publish them; applicants agreed to comply with the relevant rules including the restriction that Yale University Library manuscripts were not to be published in whole or in part unless such publication was specifically authorized. Assuming that

Walker signed the form, Judge Walker concluded that the biographer's decision to paraphrase facts included in the Wright papers was "not tantamount" to publishing those materials, as that term was used by the university. Walker, again, did not quote lengthy passages from Wright's papers and did not adopt his creative expression. It did not appear to the court that the university planned to restrict fair use by biographers. Assuming, without deciding, that Ellen Wright's rights were coextensive with those of the university, Walker's motion for summary judgment on the third party beneficiary claim was granted because Yale did not have a contractual right to preclude Walker's use of the writings at issue.

The court also dismissed without prejudice a cause of action for libel for lack of jurisdiction.

Wright v. Warner Books, Inc., 748 F.Supp. 105 (S.D.N.Y. 1990) [ELR 12:11:5]

Court denies summary judgment to biographer of James Agee on claim that certain unpublished material is in the public domain

Victor Kramer sought to use about seventeen unpublished pieces by James Agee in a book about the late author. Kramer claimed that the manuscripts were in the public domain, pointing out that the trustee of the James Agee Trust had not restricted a 1964 sale of certain Agee manuscripts and documents. A research library at the University of Texas had purchased the Agee works from a bookseller, and Kramer, along with other scholars, had access to the material. Kramer's l969 doctoral dissertation, published with the permission of the trust, included selections from Agee's manuscripts. According to Kramer, the trustee had lost standing to challenge the biographer's use of Agee's work.

A Federal District Court in New York has rejected Kramer's motion for partial summary judgment. Judge Conboy declined to infer that the Agee selections which Kramer proposed to use included the same text as the items sold to the university in 1964, "much of it in a fragmentary and incomplete state..."

The court also pointed out that the absence of a fully integrated contract of sale meant that the court could not interpret the intention of the parties without recourse to extrinsic evidence. And the director of the university library apparently stated that the library did not intend to purchase, and did not receive, any of the incorporeal rights in the manuscripts. Furthermore, the trust, the library and Kramer all had proceeded, for more than twenty years, "upon the assumption that the Trust had indeed retained incorporeal property rights in the manuscripts."

Based upon the record before the court, Judge Conboy found that the access given to scholars was insufficient to establish a general publication of the manuscripts in issue. The court questioned the extent of access to the particular documents Kramer proposed to use, and the use of those documents by other scholars. It also was noted that only eight of the items Kramer sought to publish were included on the list of documents appearing in the 1969 dissertation; without the full text of the documents in issue and the full text of the dissertation, the record would not support a grant of partial summary judgment.

Judge Conboy concluded by observing that the record was "pervaded by generalizations, imprecise descriptions of the contested materials, and a most unfortunate proclivity on the part of [Kramer] to refer to the subject of this lawsuit as a single entity, that is, the Agee materials, collectively." The court would have "no confidence" in a ruling that would declare that "the materials" fell into the public domain in 1969.

Kramer v. Newman, 749 F.Supp. 542 (S.D.N.Y.1990) [ELR 12:11:6]

Songwriter's disposition of copyright renewal interests in testamentary trust is upheld

During the period 1925 through 1931, Dave Dreyer co-wrote, among other works, the songs "Me and My Shadow," "Wabash Moon," "There's a Rainbow Round My Shoulder," "Back in Your Own Backyard," and "Cecilia." Dreyer assigned his copyrights in the songs to Bourne's predecessor in interest, Irving Berlin, Inc. In

1951, Dreyer assigned the renewal terms of the copyrights to Bourne.

Dreyer died on March 2, 1967; he was survived by his widow Anna, his son Lewis, and his daughter Marie Dreyer Rothblum. Under Dreyer's will, which set up a testamentary trust for his music assets, Anna Dreyer received a certain portion of the net income from copyright and renewal rights, with the remaining income divided among Lewis Dreyer, Marie Rothblum, and Dreyer's mistress, Mynna Granat.

In 1972, Lewis Dreyer died. In April 1981, Anna Dreyer, Marie Rothblum, Steven Dreyer and Dean Dreyer (Lewis's sons) sent Bourne notices of termination. In 1984, Anna Dreyer died. In 1988, Steven and Dean Dreyer assigned their rights in the songs to Larry Spier, Inc. In 1989, Dean Dreyer died. In May 1990, Marie Rothblum also assigned her rights in the songs to Spier.

ASCAP and the Songwriters Guild have been distributing one-third of the royalty income to Mynna Granat, one-third to Marie Rothblum, one-sixth to Steven Dreyer and one-sixth for the benefit of the son of Dean Dreyer.

When Spier brought a copyright infringement action against Bourne, the company argued that the provisions for terminating a copyright under section 304(c) of the Copyright Act of 1976 did not apply to the "copyrights, renewal copyrights and extensions thereof and publishing contracts" which formed the corpus of Dave Dreyer's testamentary trust. Spier claimed that since Dreyer assigned the renewal terms of the copyrights to Bourne by separate contracts prior to Dreyer's death, and not in his will, the writer's heirs were entitled to utilize the statutory termination procedures.

It appeared to Federal District Court Judge Haight that Bourne's approach was "more consistent" with the congressional intent underlying the termination provision, as well as with Dreyer's intent. Judge Haight found it significant that the "music assets" comprising Dreyer's trust included publishing contracts, and concluded that the provisions of Dreyer's will served to exempt the copyrights, renewal copyrights, and publishing copyrights from the scope of section 304(c). Dreyer's natural heirs had no power to terminate the copyrights in issue; their purported assignments to Spier were "nullities;" and Bourne was entitled to summary judgment.

Larry Spier, Inc. v. Bourne Co., 750 F.Supp. 648 (S.D.N.Y. 1990) [ELR 12:11:6]

Dispute between exclusive licensee and copyright owner of "As Tears Go By" is not amenable to summary judgment

Sometime prior to September 1, 1964, as described by Federal District Court Judge Sand, Mick Jagger, Keith Richards and Andrew Oldham composed the song "As Tears Go By," and assigned the copyright to Forward Music, Ltd. Forward then granted Essex Music, Inc. certain exclusive rights, in specified territories, including the United States and Canada, to use and license the use of the song. Essex authorized the Harry Fox Agency to license the use of the song, and to collect royalties for such use, in the United States.

In 1970, ABKCO Music and Records became the owner of all of Forward's assets, including the copyright to "As Tears Go By." In 1975, ABKCO obtained a license from the Harry Fox Agency to use the song in the United States. When Allen Klein, the president of ABKCO, learned that the company was paying mechanical royalties to Essex, Klein notified Essex that there would be no such payments in the future. In 1984, ABKCO again obtained a license under the compulsory license provisions of the Copyright Act to distribute recordings of the song in the United States.

In 1990, Essex notified ABKCO that the compulsory license to use the song would be terminated for nonpayment of royalties. Subsequently, Essex sued ABKCO alleging copyright infringement and the violation of section 43(a) of the Lanham Act.

Judge Sand first found that under the Copyright Act of 1978, Essex, as an exclusive licensee, had the right to institute an action for copyright infringement, and that there was "no merit" to ABKCO's claim that the company, as the copyright owner, could not be subject to a copyright infringement claim.

ABKCO's argument that the failure to pay royalties amounted to a breach of contract and did not provide the basis for a copyright infringement claim, also was rejected.

However, the court denied Essex's motion for summary judgment because issues of fact were raised concerning a 1966 contract between an affiliate of Forward and a company called Essex Music, Ltd. There was sufficient doubt, stated Judge Sand, about Essex Music's association with Essex Music, Ltd., the signatory to the 1966 agreement, for a reasonable factfinder to conclude that the relevant parties intended the 1966 agreement to supersede the 1964 agreement.

The conduct of the parties after 1966 also raised factual issues sufficient to preclude summary judgment.

Judge Sand concluded by denying Essex's motion for a preliminary injunction since the company did not demonstrate that it would suffer irreparable harm without such relief.

Essex Music, Inc. v. ABKCO Music and Records, Inc., 743 F.Supp. 237 (S.D.N.Y. 1990) [ELR 12:11:7]

Alexander Scourby's estate, rather than church foundation, holds copyright in Bible narrations, rules Florida District Court; jury verdicts awarding damages on trademark infringement and breach of contract claims are upheld

The late actor Alexander Scourby narrated the King James Version of the Old and New Testaments for the Episcopal Radio TV Foundation. Scourby agreed to do the narration for a reduced fee, apparently understanding that the nonprofit foundation did not intend to engage in the commercial distribution of the tapes.

In 1982, the foundation granted Christian Duplications International a license to use the narrations; the company's tapes contained the notation "Authorized Alexander Scourby's Latest Narration."

Scourby, prior to his death in 1985, signed an exclusive recording contract with Neva, Inc. When Neva learned that the foundation had transferred its rights to a profit making venture in exchange for the right to receive a royalty on sales, the company brought various claims against Christian Duplications and the foundation.

A Federal District Court jury assessed damages against Christian Duplications of about $1 million on the unfair competition claim alleged by Neva and Scourby's estate, and the jury awarded the Neva parties damages of about $225,000 against a company called International Cassette Corporation.

With respect to the Neva parties' claim of unauthorized publication of name under Florida law, the jury awarded compensatory damages against Christian Duplications of about $75,000 and punitive damages of $50,000. Damages were assessed against other parties in various amounts, including an award of compensatory damages of $100 and punitive damages of $1.00 against the foundation.

The jury also found in favor of the Neva parties on a breach of contract claim against the foundation and awarded $172,000 as compensatory damages.

Judge Fawsett, in considering issues not decided by the jury, denied the Neva parties' application to increase the amount of damages awarded under section 1117(a) of the Lanham Act, refused an application for prejudgment interest, and held that the circumstances of the case justified an award of attorneys' fees as to the Lanham Act claim.

In turning to the issues raised under the Copyright Act of 1909, the court found that the evidence at trial showed that Scourby, as the party who turned into a tangible expression the idea of recording the Bible, was the author of the narrations.

The foundation's claim to copyright ownership, based on the work for hire doctrine, was rejected. Although the narrations were created at the insistence and expense of the foundation, the Neva parties demonstrated that the parties intended that Scourby would own the copyright in the sound recordings. It was noted that Scourby received reduced fees for creating the work and that a union waiver was granted for Scourby to do the narration pursuant to the understanding that the foundation's use of the narrations would be limited. Judge Fawsett stated that the license to use the narrations would be restricted to the foundation's own nonprofit activities, "with emphasis to the blind and physically handicapped," and that the foundation had no right to resell, sublicense, or assign its rights in the license.

Judge Fawsett next rejected the foundation's claim of joint authorship - there was "neither a preconcerted common design nor a joint laboring. There was no evidence that the parties intended that their contributions be merged so as to create a joint work."

Christian Duplications argued that the narrations were in the public domain because the tapes were published without a copyright notice in Scourby's name. The foundation placed its copyright, "Catacomb Cassettes," on the tapes. Judge Fawsett, citing Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970), found that the publication of the narrations with the foundation's copyright protected Scourby's copyright from being "injected into the public domain."

The court granted the Neva parties' request for various types of relief in addition to damages, including a permanent injunction under the Lanham Act barring the Christian Duplications parties from using the Scourby name, the phrase "Authorized Alexander Scourby's Latest Narration," and any other reference to Scourby for purposes of trade or for any commercial or advertising purpose.

Judge Fawsett concluded by denying motions by the foundation and Christian Duplications for directed verdicts and by refusing to reduce the damages awarded by the jury.

Neva, Inc. v. Christian Duplications International, Inc., 743 F.Supp. 1533 (M.D.Fla. 1990) [ELR 12:11:7]

Country music songwriter fails to show substantial similarity of allegedly infringing work

Damon Black composed the song "The Jukebox" sometime in 1985. In December 1986, Black recorded the song at a "demo" session in a recording studio in Nashville. Vern Gosdin and Buddy Cannon were present at the session. When Gosdin requested a tape of the session, Cannon, who worked at the studio, told Black that he would give Gosdin a tape. Several months later, CBS Records released a recording of Gosdin singing the song "Set 'Em Up Joe."

Black claimed that "Set 'Em Up Joe" infringed his copyrighted song, and sued various parties.

For purposes of their motion for summary judgment, Dean Dillon, Larry Butler Music Co. and Kim Espy, doing business as Hear No Evil and Duck Soup Music Group, conceded that Black owned the copyright in "The Jukebox." However, Dillon claimed that he, Cannon and two other parties composed "Set 'Em Up Joe" in November 1986.

A Federal District Court in Tennessee first found that Black presented evidence from which a jury could infer that the allegedly infringing song was composed after Gosdin and Cannon had access to Black's work.

In turning to the issue of substantial similarity, the court noted that the elements common to both songs included "a jukebox, a bar, a jilted lover, his emotional dependency on a particular country music song, and the perception of this man by those around him." The subject matter of the songs was so common in country songs as to constitute one of the genre's "stock" themes, observed Chief Judge Wiseman.

Furthermore, some similarity of expression necessarily resulted from the choice of a frequently used setting or situation - the use of jukeboxes in country music songs about unrequited love was not sufficiently unique to warrant copyright protection.

The court noted that the works differed in the words and lyrical structures used to convey the common elements of the songs, in the reference to different legendary country music singers, and in the placement of such references in the structure of the chorus of the songs.

No substantial similarity was found between the allegedly infringing song and copyrightable elements of Black's work and the court granted summary judgment to the above-noted parties.

Black v. Gosdin, 740 F.Supp. 1288 (M.D.Tenn. 1990) [ELR 12:11:8]

Johnny Carson's former wife may not receive increase in support payments, rules New York trial court

When Johnny Carson and his former wife Joan were divorced, the parties agreed that Carson's maintenance payments would terminate upon the former wife's remarriage.

In 1970, the agreement was modified. Carson agreed to make payments totalling about $770,000, to be paid over a period of years; the payments would continue during any remarriage. Mrs. Carson remarried in May 1970, about fifteen days after the modification was signed, but subsequently was divorced.

A New York trial court has rejected Joan Carson's request for an increase in maintenance payments. Judge Phyllis Gangel-Jacob noted that but for the 1970 modification, Mrs. Carson would not be entitled as a matter of law to any support whatsoever "under the terms of the agreement, the provisions of the Domestic Relations Law or on any other basis in law or equity." The court could not enlarge the amount of post-remarriage maintenance set forth in the 1970 modification "even if the former wife were totally without funds and about to become a public charge." In the instant case, Joan Carson had cash assets of almost $400,000; her income was limited to the earned income on those assets plus the $13,500 in annual maintenance from Carson.

Carson v. Carson, New York Law Journal, p. 24, col. 4 (N.Y. Cnty., Jan. 18, 1991) [ELR 12:11:9]

Copyright infringement claim not covered by bodily injury and property damage insurance policy

In 1985, Alaska Northwest Publishing Co. claimed that a portion of its publication, "The Milepost," was copied by Scott Graber's publication, "Travel Guide." Graber notified his insurance company, State Farm Fire and Casualty Company, and asked whether it would provide a defense or coverage of the lawsuit; the company did not respond. Graber subsequently settled the lawsuit by paying $40,000 to Alaska Northwest.

State Farm stated that the claim did not fall within the coverage of the policy, denied coverage, and later cancelled the policy.

In response to Graber's action alleging damages as a result of the refusal to offer a defense or coverage, a Montana trial court granted the State Farm parties' motion for summary judgment. The court found that no coverage existed because there was no damage to "tangible" property.

The Montana Supreme Court has affirmed the trial court decision. It was noted that the policy referred to damages for which Graber might be liable to pay "because of bodily injury, property damage or personal injury caused by an occurrence to which this insurance applies." Alaska Northwest had alleged only economic loss, not direct physical injury to its tangible property, "The Milepost." The trial court therefore correctly concluded that Alaska Northwest's claims did not constitute property damage, or loss of the use of tangible property, and that State Farm did not have a duty to defend.

Graber v. State Farm Fire and Casualty Company, 797 P.2d 214 (Mont. 1990) [ELR 12:11:9]

Illinois appellate court upholds dismissal of libel action against publisher of "Dick Tracy" comic strip

In May 1987, the "Dick Tracy" comic strip began a new "escapade" featuring the music industry. The series focused on the activities of a company called Flipside, Inc. In one episode, Dick Tracy commented that: "Flipside, Inc., a so-called independent promotion outfit, is using bribery to get radio air play for certain records.

But the special prosecutor had a key witness who can help us shut down this payola train." The comic strip also referred to Flipside's activities in selling counterfeit records and cutouts. After various complications and nefarious deeds by villainous parties, Dick Tracy prevailed.

Flip Side, Inc., an Illinois corporation engaged in the record business, brought a libel action against the Chicago Tribune Co., Tribune Media Services, Inc., the copyright holder of the comic strip, and other parties. A trial court decision dismissing the complaint has been affirmed by an Illinois appellate court.

The court first noted that the entire episode and not just an "isolated artistic square" would provide the context for determining the existence or nonexistence of an actionable libel.

Judge Rizzi then stated that it was readily apparent that the Flipside episode was "all fanciful adventure" and did not purport to be factual. The court found it impossible to believe that a reader would not have understood that the episode was pure fiction, given that the "weird characters, villainous bravado and hyperbole, rhetorical rhymes, crime syndicate, mob figures, mysterious deaths, murders, criminal schemes, and character names that relate to the physical or personality attributes of the characters [were] all classic Dick Tracy. No reader would reasonably conclude that these references to characters, businesses, places and events [were] factual."

The court observed that Dick Tracy is published on the comic strip pages of the Chicago Tribune, "where levity exists and not reality;" the location of the comic strip supported the conclusion that the characters, businesses, places and events in the Flipside episode had no more reality than those in the "Pruneface" or "Flattop" episodes of Dick Tracy.

The similarity of names and businesses between Flip Side, Inc. and the comic strip Flipside was not of itself sufficient to meet the requirement that the episode would be reasonably understood as describing actual facts about Flip Side, Inc. or about certain company employees.

In all, the comic strip was not capable of defamatory meaning, and the trial court correctly dismissed the complaint.

Flip Side Inc. v. Chicago Tribune Company, 564 N.E.2d 1244 (Ill. App.1 Dist. 1990) [ELR 12:11:9]

Tennis player's defamation action is dismissed because fellow club members were protected by qualified privilege under common interest doctrine

Michael Brockman, during tournament tennis matches with Jim Frank, purportedly engaged in verbal abuse. Frank complained about this conduct to executives of the private East Hampton Tennis Club. Melanie Tucker, who had played tennis matches with Brockman's wife, complained that Brockman, as a spectator, "engaged in unsportsmanlike conduct."

Brockman sued Frank and Tucker for defamation, claiming that as a result of the allegedly false complaints, he was barred from competing in club tournaments, was "blackballed" from membership in another tennis club, and lost business and customers.

A New York trial court has granted Frank and Tucker's motions for summary judgment. With respect to the defamation claim, Judge David B. Saxe cited the protection of a qualified privilege under the common interest doctrine. It was observed that the sportsmanlike conduct of fellow tennis club members was a matter of substantial concern to the members of the club and that the complained-of statements regarding Brockman's conduct allegedly were made to club executives and members.

Brockman did not demonstrate "malice, or personal spite, ill will, or culpable recklessness" on the part of Frank or Tucker so as to preclude the application of the privilege.

Brockman's cause of action alleging that he was portrayed in a false light by Frank and Tucker's remarks also was dismissed. The court noted that such an action was not recognized in the state, and went on to point out that the challenged remarks did not constitute highly offensive publicity.

Brockman v. Frank, New York Law Journal, p. 22, col. 2 (N.Y.Cnty., Jan. 25, 1991) [ELR 12:11:10]

New York Court of Appeals, on federal and state grounds, affirms decision granting summary judgment to editor of medical journal in action arising from publication of allegedly libelous letter

The New York Court of Appeals, on the United States Supreme Court's remand of a libel action for further consideration in light of Milkovich v. Lorain Journal Co., 497 U.S.-- (1990; ELR 12:2:8), has affirmed the determination that summary judgment was properly granted to the publisher of the challenged statement; the Court of Appeals based its decision on independent state constitutional grounds as well as the federal review directed by the Supreme Court.

As described by Judge Judith S. Kaye, the action arose out of a letter to the editor published in the Journal of Medical Primatology in December 1983. The letter was written by Dr. Shirley McGreal, the chairwoman of the

International Primate Protection League. Dr. J. Moor-Jankowski, a professor of medical research at New York University School of Medicine, co-founded and edited the Journal. McGreal's letter criticized a plan by Immuno A.G., a multinational medical products corporation, to establish a facility in Sierra Leone, West Africa, for hepatitis research using chimpanzees.

Moor-Jankowski wrote an Editorial Note prefacing the letter. The note identified McGreal as the chairwoman of the League, and stated that the letter had been submitted to Immuno for comment. Immuno advised the editor that the statements in the letter were inaccurate, unfair and reckless, and requested documentation of the charges raised. After referring Immuno to McGreal for the requested documentation and extending Immuno's time to respond to the letter, the Journal published the letter.

An appellate court reversed a trial court ruling and granted Moor-Jankowski's motion to dismiss the complaint. The court found that the McGreal letter constituted protected opinion; to the extent there were statements of a factual nature, the appellate court concluded that Immuno did not present evidence of falsity.

The Court of Appeals has once again affirmed the appellate court decision. Judge Kaye first considered whether the challenged expression "would reasonably appear to state or imply assertions of objective fact." In so doing, a court must consider not only the literal words of challenged statements, but "the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person." Upon reviewing Milkovich, Judge Kaye concluded that "it appears that the following balance has been struck between First Amendment protection for media defendants and protection for individual reputation: except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provably false fact will likely be actionable."

In the instant case, noted the court, to the extent that the McGreal letter contained defamatory factual statements about Immuno, the statements would be actionable if false. Judge Kaye emphasized that the court has not held that any assertions of verifiable fact in the McGreal letter were "trumped" by their context, and therefore automatically and categorically protected as opinion. And the court has not held that all letters to the editor are absolutely immune from defamation actions, or that there is a wholesale exemption for anything that might be labeled "opinion."

However, continued Judge Kaye, a party bringing a libel claim has the burden of showing the falsity of factual assertions. The Court of Appeals had concluded, based on the appellate court's thorough review of the factual assertions in issue, that Immuno did not meet that burden and had raised no triable issue as to the falsity of any of the threshold facts set forth by McGreal.

Without restating the appellate court's extensive findings, Judge Kaye proceeded to apply Milkovich to the "core libel" of the letter, and concluded, again, that on the factual record, summary judgment was properly granted.

The court next conducted a state law analysis, and also concluded, on this separate and independent ground, that the complaint was correctly dismissed. The free speech guarantee of the New York State Constitution declares, in part, that "[e]very citizen may freely speak, write and publish...sentiments on all subjects." Judge Kaye cited the state's "own exceptional history and rich tradition" with respect to the issue of the liberty of the press. In addition to New York's constitutional text and history, the state's common law calls for reviewing published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole.

The court therefore began its analysis with the content of the whole communication, its tone and apparent purpose - "a clear and familiar standard that in our view properly balances the interests involved." Judge Kaye pointed out that letters to the editor are not published "on the authority of the newspaper or journal." In this case, Moor-Jankowski's note alerted readers to approach the letter with care; generally, any damage to reputation caused by a letter to the editor would depend on "its inherent persuasiveness and the credibility of the writer, not on the belief that it is true because it appears in a particular publication."

Furthermore, the Journal of Medical Primatology was directed to a very specialized group of readers, and the prefatory note called the particular attention of those sophisticated readers to the circumstances surrounding the letter, and the comments of Immuno's attorneys. The letter involved a matter of public controversy, and in all, would lead the average reader of the journal to view the letter as an expression of opinion rather than a statement of fact, even though the language was serious and restrained.

For the court, reviewing the content of the whole communication, its tone and apparent purpose "better balances the value at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances..."

Immuno characterized as one core premise of the letter the statement that the company might release to the wild, chimpanzees possibly carrying hepatitis, as there was no way to determine whether an animal was definitely not a carrier of the disease. The core premise both expressed and implied statements of fact that, if shown to be false (which they were not), would be actionable, stated Judge Kaye. Isolating challenged speech in this manner and extracting express and implied factual statements, without knowing the context "may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context."

The average reader of the journal would not have viewed the letter in issue as conveying actual facts about Immuno, and would have understood that McGreal was voicing "no more than a highly partisan point of view," stated the court, concluding by emphasizing the necessity of taking into account the full context of challenged speech.

Judge Richard D. Simons' concurring opinion agreed that summary judgment was proper on federal grounds, but stated that the majority's interpretation of Milkovich was "far more constricted than the Supreme Court intended," and questioned the reasoning with respect to the independent state grounds analysis. "Context is not controlling in this case...under either the majority's narrow view of Milkovich or our State rules," declared Judge Simons. For Judge Simons, the majority's grant of summary judgment on federal grounds, based on a narrow view of Milkovich in which context is not controlling, was inconsistent with the discussion on state law, in which context becomes critical, leaving "both grounds for the decision suspect and seriously impair[ing] the credibility of the Court's analysis."

Judge Simons further observed that the reliance on state law in this case would unnecessarily preclude Supreme Court review of a federal question, and that resting the decision on dual grounds also violated "established rules of judicial restraint." Judge Simons therefore concurred for affirmance solely on the ground that Immuno's claims were not actionable under the holding in Milkovich v. Lorain Journal Co.

Judge Vito J. Titone also concurred in the majority's conclusion, but would have decided the case solely by referring to New York law, in particular, common law defamation principles. Under those principles, the statements in McGreal's letter were not actionable since the statement did not constitute express or implied assertion of fact.

Judge Stewart F. Hancock Jr.'s concurring opinion agreed with Judge Simons that the matter was properly resolved under Milkovich without addressing the issue of context. Were a discussion of context warranted, Judge Hancock would have held that nothing in Milkovich suggested that the Supreme Court had altered its attitude toward the context question. It appeared to Judge Hancock that context will continue to be a factor of "undiminished significance." Judge Hancock concluded by stating that affirmance should have been based solely on the ground that Immuno had no cause of action under federal law.

Immuno, A.G. v. Moor-Jankowski, New York Law Journal, p. 21, col. 3 (N.Y., Jan. 18, 1991) [ELR 12:11:10]

New York City Transit Authority ban on use of amplifiers in subway system does not violate rights of street musicians

The New York City Transit Authority, in setting guidelines for expressive activities conducted in the subway system, banned the use of amplifiers on subway platforms. All other musical performances were restricted to a noise level not to exceed 85 decibels when measured from five feet away.

Several street musicians sought a preliminary injunction restraining the enforcement of the amplifier ban, claiming that the ban impaired their ability to perform their music.

A Federal District Court decision granting the preliminary injunction has been reversed.

The musicians had argued that amplified music was not "merely music that is made louder by an electronic device;... it is a different kind of music." The amplifier ban thus would eliminate from the subway platforms a "separate musical medium."

Federal Court of Appeals Judge Meskill found that the object of the amplifier ban was to eliminate excessive noise on subway platforms. The ban was contentneutral, had a "substantial and laudable goal," and forwarded significant public safety concerns. The District Court erred, stated Judge Meskill, in improperly relying on the perceived availability of a less restrictive alternative to the amplifier ban, i.e., the use of decibel meters. However, such an analysis was not relevant in reviewing a time, place or manner regulation.

Furthermore, the District Court imposed "an excessively exacting standard" in concluding that the amplifier ban was broader than necessary to achieve the goal of noise reduction. The court apparently found it significant that the Transit Authority did not show that every musician using an amplifier exceeded 85 decibels. But Judge Meskill noted that under the experimental guidelines, transit officials had determined that amplified music "routinely" exceeded the limits of the noise regulations.

The District Court's conclusion that the amplifier ban was not narrowly tailored because it had a substantial effect on the quality of the musicians' performances also was "misdirected."

Judge Meskill concluded by referring to the "ample alternative channels" available to street musicians, and by upholding the amplifier ban as a reasonable time, place or manner regulation.

Carew-Reid v. Metropolitan Transportation Authority, 903 F.2d 914 (2d Cir. 1990) [ELR 12:11:12]

Court refuses to enjoin application of NCAA bylaws restricting eligibility of college football players who entered professional draft

Braxston Banks, who played football for the University of Notre Dame during the 1986-1988 seasons, entered the 1990 National Football League draft; Banks was represented by an attorney in his dealings with League teams. Although Banks was not chosen in the draft, he was deemed a professional under the rules of the National Collegiate Athletic Association and was ineligible to continue to play amateur intercollegiate football. Banks' claim that the eligibility rules violated section 1 of the Sherman Act has been rejected by a Federal District Court in Indiana.

Judge Miller declined to issue a preliminary injunction barring the NCAA from taking any action to enforce, or to encourage any of its members to enforce, the challenged bylaws. The court rejected the NCAA's argument that the antitrust laws did not apply to NCAA regulations concerning eligibility. However, Judge Miller noted that the record did not indicate that the price the

National Football League pays for incoming athletes was affected by the bylaws; it did not appear that the flow of players to the League was so restricted as to raise prices; and there was little support for the argument that the "no agent" and "no draft" bylaws injured competition within the market.

Even if it were assumed that Banks made or could make a showing that the NCAA possessed market power within the meaning of antitrust analysis, the rule of reason would require the athlete to prove that the challenged bylaws' harmful effects on competition outweighed any beneficial effect on competition. Judge Miller commented that the bylaws were intended to preserve the amateur nature of intercollegiate football; that the NCAA demonstrated significant procompetitive effects of the bylaws; and that Banks did not show a reasonable likelihood of success on his claim that the

NCAA's regulations restrained trade in violation of section 1 of the Sherman Act.

In a separate proceeding, a Federal District Court in Tennessee refused to grant former college football player Bradford Gaines' motion for a preliminary injunction seeking to bar the enforcement of the NCAA eligibility rules.

Gaines played football for Vanderbilt University during the period 1986-1989. In March 1990, Gaines declared himself eligible for the National Football League draft. He attended a "scouting combine" in April, but was not selected by any team in the draft.
As a result of the NCAA rules, Gaines was ineligible to continue playing football at Vanderbilt.

In finding that Gaines did not show a substantial likelihood of success on the merits of his unlawful monopolization claim, the court first determined that the challenged rules were not subject to antitrust analysis.

Chief Judge Wiseman adverted to the court's comment in Banks (above) that it was "unwilling to rely on a single district court opinion...for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility." However, Judge Wiseman referred to several opinions in support of the court's conclusion that Section 2 of the Sherman Act did not apply to the NCAA's eligibility rules.

Notwithstanding the above, the court proceeded to assume that the antitrust laws would apply to the eligibility rules. Even given this assumption, stated Judge Wiseman, the NCAA established a legitimate business reason justifying the enforcement of the rules. It was noted that in Banks, the court upheld the challenged rules under the rule of reason, which was developed specifically in claims involving section 1 of the Sherman Act. However, the focus on the reasonableness of a restraint on competition overlapped with the section 2 test for "willfulness," stated the court. Judge Wiseman agreed with the findings of the Banks court that the "no-agent" and "no-draft" rules had primarily procompetitive effects "in that they promote the integrity and quality of college football and preserve the distinct 'product' of major college football as an amateur sport."

In all, the rules were "overwhelmingly" procompetitive, justified by legitimate business reasons, and did not have any unreasonably exclusionary or anticompetitive effect. In view of the above, the court denied Gaines' application for a preliminary injunction.

Banks v. National Collegiate Athletic Association, 746 F.Supp. 850 (N.D.Ind. 1990); Gaines v. National Collegiate Athletic Association, 746 F.Supp. 738 (M.D.Tenn. 1990) [ELR 12:11:13]

Advertising agency may proceed with antitrust tying claim against Nissan Motors arising from new local advertising program

Faulkner Advertising created and placed print, radio and television advertising for local Nissan dealer associations. In 1987, the agency received about $35 million in advertising revenues from about forty local Nissan dealer associations.

In 1988, Nissan announced a new "local market advertising" plan; the company increased the wholesale prices of its cars and trucks in order to pay for both increased advertising at the national level and new advertising to be developed by Nissan and its national advertising agency for use at the regional and local levels. Nissan also ceased financial support for the advertising activities of the local dealer associations. In turn, many associations ended their business relationship with Faulkner.

Faulkner sued Nissan, alleging that the company was engaged in an unlawful tying arrangement, and had tortiously interfered with the agency's business relationships with the dealer groups. A Federal District Court's decision granting Nissan's motion to dismiss has been reversed.

Federal Court of Appeals Chief Judge Ervin noted that a tying arrangement is an agreement whereby a seller conditions the sale of one product or service upon the buyer's purchase of a second product or service. Nissan argued that it was engaged in selling a single product; Faulkner claimed that Nissan was selling two linked products - vehicles and advertising.

The court observed that there was "little doubt" that the sale of Nissan cars and trucks under the new local market advertising program caused "an adverse competitive impact in what previously was an independent market for advertising services." It was "apparent" that

Nissan was engaged in selling a tied product; that Faulkner's claim was sufficient to withstand a motion to dismiss; and that the case should have been permitted to go to trial to resolve the question of whether the tying arrangement was illegal.

The agency's state claim of tortious interference was remanded along with the federal antitrust claim.

In dissent, Judge K.K. Hall stated that a manufacturer who has increased its advertising budget and included the increased cost in the price of its only product did not engage in conduct prohibited by the antitrust laws. Judge Hall found Faulkner's factual assertions "woefully inadequate" to establish an illegal tying arrangement, pointing out that dealers purchase only a single product; that the price of each car reflected Nissan's internal overhead; that Nissan did not promise dealers any local market advertising expenditures; and that including manufacturer expenses in product prices is not tying - "it is commerce."

Even if there were two separate products sold to the dealers and the purchase of one were conditioned on the purchase of the other, the arrangement would not necessarily be unlawful, commented Judge Hall. Nissan sought to concentrate advertising in weak markets, expressed dissatisfaction with the merit of local advertising in some markets, and, in choosing an advertising agency, reflected "competition on the merits in advertising."

If Nissan is precluded from choosing advertising agencies, an agency such as Faulkner's might be shielded from competition, "no matter how mediocre Nissan may consider Faulkner's efforts." Judge Hall, stating the view that the company's program was not a contract in restraint of trade, would have affirmed the District Court's dismissal of Faulkner's claim.

Faulkner Advertising Associates, Inc. v. Nissan Motor Corporation, 905 F.2d 769 (4th Cir. 1990) [ELR 12:11:13]

Georgia statute regulating display of material "harmful to minors" is upheld

In 1984, Georgia adopted a statute regulating the distribution and display of sexually explicit materials deemed "harmful to minors." Several associations of booksellers, publishers, periodical distributors, college bookstores, and retailers challenged the constitutionality of the statute.

After a series of proceedings, a Federal District Court ruled the entire statute invalid.

In reversing the District Court's decision, the Court of Appeals, after careful review, found that the statute, in various respects, was not overbroad. The court pointed out that placing the relatively small amount of reading material subject to the statute behind blinder racks would only slightly burden adult access to such material - the burden was "constitutionally insignificant." And it was found that the use of such racks did not impose a substantially overbroad regulation on the display of protected material.

The statute exempted from its provisions public libraries, including school and university libraries. The library exemption, stated the court, would preserve the accessibility to minors, for purely educational purposes, of material with "serious literary, artistic, political, or scientific value." The fact that the state chose not to exempt all noncommercial entities was "of no consequence," declared Senior Judge Hill, so long as the exemption chosen had, as in this case, a rational basis.

Judge Hill concluded by finding that the exemption for the display of materials harmful to minors at libraries served the same interests as the exemption for distribution and was "rationally related to making material covered by the Act available in an atmosphere free of commercial pressure and generally available for educational purposes."

Chief District Judge Pointer, sitting by designation, concurred in the decision that the library exemption was constitutional, but dissented from that part of the decision upholding the display proscriptions. Judge Pointer did not believe that the statute was "readily susceptible" to the interpretation approved by the majority.

American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990) [ELR 12:11:14]

Indiana Supreme Court upholds Indianapolis cable television franchise fee

The City of Indianapolis, in granting cable television franchises to private companies, required the companies to pay an annual franchise fee equal to three percent of gross accrued revenues from cable television operations.

Robert Schloss, a cable subscriber, claimed that the franchise fees exceeded the amount a local government may charge under Indiana law, in that the amount collected would be greater than the cost of regulating the franchises. In addition to seeking declaratory and injunctive relief, Schloss requested compensation for the portion of the allegedly excessive franchise fees that the cable companies passed on to him.

The trial court's conclusion that Schloss had no standing was affirmed by an Indiana appellate court.

The Indiana Supreme Court first found that Schloss had standing to sue since he was an individual customer who would suffer direct injury as a result of excessive franchise fees, and because he possessed a stake in the outcome of the litigation.

The court then found that Indiana law did not apply to the city's cable television franchise fee. The city's authority to accept franchise fees from the cable companies arose from its power to enter into contracts, and not from the power to issue licenses and charge fees tied to regulatory costs, stated Chief Judge Shepard. It was noted that when a cable company agreed to pay the fee, the company and the city entered a valid contract. Indianapolis and county ordinances limited the fee to three percent of gross accrued revenues; the Cable Act Communications Policy Act sets a national "cap" of five percent of gross revenues. The Indiana statute was "simply inapplicable," concluded Judge Shepard in vacating the opinion of the appellate court and affirming the judgment of the trial court dismissing Schloss's claim.

Schloss v. City of Indianapolis, 553 N.E.2d 1204 (Ind. 1990) [ELR 12:11:15]

California State Bar Court recommends suspension of video company's in-house lawyer who formed corporation which licensed home computer rights to arcade games owned by his employer, without revealing his conflict of interest

In 1983-1984, when Robert Daniel Crane was employed as a house counsel by SEGA Corporation, an affiliate of Paramount Pictures, Crane proposed that the company should license its arcade games for use in the home computer market. When SEGA rejected the suggestion, Crane formed a corporation known as Universal Licensing, Inc. Without revealing that Universal was his own company, Crane submitted a proposal from Universal to SEGA to license certain games. SEGA agreed to license the game "Zaxxon" to Universal in return for a guaranteed minimum compensation of $10,000, with a $5,000 down payment against future royalties of six percent.

Universal sublicensed the game to Synapse Software, Inc., and received an advance of $50,000 against a per unit royalty of sixteen percent for the sublicense. Crane did not inform SEGA of the financial terms of the sublicense. When Crane received the advance payment, he paid SEGA the $5,000 advance owed to SEGA by Universal. Brian David DePew (who was employed as an associate in a Los Angeles law firm) signed the sublicense agreement with Synapse on behalf of Universal.

Crane, without informing SEGA, subsequently amended the SEGA-Universal license to include the game "Super Zaxxon."

Crane left his job at SEGA on January 14, 1984. Some time later, Crane, on behalf of Universal, agreed to sub-license Super Zaxxon to Human Engineered Software Corporation. Crane did not tell the software company that SEGA was unaware of his connection with Universal, or that no one at SEGA apart from himself had been aware of or approved the sublicense of Super Zaxxon to Human Engineered Software. Crane received a $25,000 advance royalty payment from the software company.

Eventually, Crane and DePew entered into a settlement agreement with SEGA and Paramount. Crane agreed to pay SEGA the funds remaining in Universal's account, as well as additional sums, and DePew paid over to

SEGA the $3,500 he received from Crane in payment for his services to Universal. SEGA agreed to pay $200,000 to Human Engineered Software in exchange for its agreement to withhold Super Zaxxon from the market for a specified time period so that Synapse could have priority in attempting to market Zaxxon. In October 1984, Paramount's senior counsel filed a complaint with the State Bar; the Bar did not file the notice to show cause in the matter until February 1988.

Retired Judge Harry T. Shafer, sitting as referee over a hearing in the matter, recommended that Crane receive an actual suspension of three years as part of a longer stayed suspension. It also was recommended that DePew, who had become a partner in his law firm, receive an actual suspension of two months, also as part of a longer stayed suspension.

The State Bar Court reduced the recommended suspension for Crane to two years and for DePew to forty-five days.

The court, in a lengthy opinion, first noted that the findings that Crane and DePew violated section 6103 of the Business and Professions Code, and that Crane violated section 6068(a) were invalid. The court also found that Crane and DePew were not culpable of violating section 6068(d) on any of the charges; the section appeared to be directed at attorneys "who make misrepresentations to a tribunal in seeking to further a client's interests," and did not apply to the proceeding before the court.

The court concluded that Crane violated section 6106 of the Business and Professions Code by failing to disclose to SEGA his ownership of Universal and its inability to carry out its obligations as a licensee. Crane also violated former rule 5-101 "by causing a licensing agreement to be entered into between his client-employer SEGA and his wholly owned company...by which Crane knowingly acquired a pecuniary interest adverse to SEGA without disclosing his ownership interest in Universal or its incapacity to fulfill the terms of the license agreement or his negotiations for sublicensing by Universal on more profitable terms." The true identity of the licensee was a material fact which Crane had a fiduciary duty to disclose, stated the court.

Crane also violated section 6106 by willfully deceiving the sublicensee into believing that Universal had the right to sublicense Zaxxon before any permission was obtained from SEGA to do so; by deceptively using a pseudonym in dealing with Synapse and with SEGA; and by arranging for DePew to appear to be working for Universal so as to conceal the lack of any Universal employees. The examiner, however, failed to prove that SEGA was defrauded into approving the sublicense without having its financial terms disclosed; SEGA agreed to approve the sublicense without knowing its terms.

Crane committed other acts of dishonesty in violation of section 6106, stated the court, by backdating the documentation of the $5,000 down payment to SEGA; by deceiving Human Engineered Software into believing Universal had SEGA's authorization to add Super Zaxxon to the license; and by using pseudonyms in various documents. There was no conspiracy to defraud, concluded the court, in affirming the violation of section 6106 and former rule 5-101.

The court then found that DePew "must have been aware that Crane had concealed his connection with Universal from SEGA," and that DePew violated section 6106.

The examiner did not prove that Crane or DePew violated sections 6068(a), 6068(c), 6068(d) or 6103, or any violation of rule 5-102(B).

The mitigating factors cited by the court included DePew's respected career in the years prior to and after the incident in issue, and his community service; Crane's agreement to make restitution of his profits to SEGA; Crane's subsequent work record as in-house counsel for an airline; the State Bar's unexplained delay in bringing the proceeding; DePew's voluntary restitution to SEGA of $3,500 received from Crane for his services to Universal; the attorneys' remorse for their misconduct; and the prompt settlement with the parties involved.

It should be mentioned that the finding that the parties violated former rule 5-104, which prohibits the payment of clients' expenses also was stricken since the violation of this rule was not charged in the notice against the parties. It appeared that the referee must have intended to find a violation of former rule 5-101 (business transactions with client), instead of 5-104, but the decision of the referee otherwise failed to find Crane culpable of violating former rule 5-101, "even though Crane's obvious violation of this rule constitutes the very heart of his misconduct."

The referee had found that both parties had violated former rule 5-102(a) prohibiting the representation of clients with conflicting interests. The violation of this rule was not charged nor proven as to DePew, and it was "beyond dispute" that DePew's only attorney-client relationship was with Crane and Universal, which did not have conflicting interests. The finding therefore was stricken as to DePew, and also as to Crane because there was no indication of how Crane's alleged misconduct fell within the scope of rule 5-102(a).

In the Matter of Robert Daniel Crane and Brian David DePew, Cal. St. Bar Ct., Nos. 84-0-14252, 84-0-14253 (L.A.Daily Appellate Report, Aug. 15, 1990) [ELR 12:11:15]

Briefly Noted:

Trademark License.

Marvel Entertainment Group and the Young Astronaut Council entered a modification agreement to settle and terminate certain prior licensing and agency agreements between the parties. A Federal District Court in New York has found that Marvel was entitled to receive a total of about $130,000 on the promotional projects the company arranged with McDonald's Corp. on behalf of the Council.

The Council also had designated Pepsi as its official soft drink, and received a $250,000 guarantee from the company; the Council did disclose this information in the modification agreement. The court stated that "there was a deliberate attempt to mislead Marvel as to the nature of the relationship with Pepsi and to withhold monies received." Judge Robert L. Carter held that Pepsi's payment to the Council of about $520,000 was subject to Marvel's ten percent "fee allocation," and awarded Marvel about $52,000 on the Pepsi claim.

Marvel also was awarded a ten percent fee, amounting to $4,000, on the settlement of a licensing contract between Quaker and the Council since the Council received the payment on a contract made while Marvel was the council's exclusive agent. The court concluded by denying Marvel any allocation on an agreement between the Council and Coleco; by granting Marvel attorneys' fees pursuant to the modification agreement; and by noting that the above-awarded amounts were in addition to the $75,000 previously awarded Marvel as fixed compensation payments required under the modification agreement.

Marvel Entertainment Group, Inc. v. Young Astronaut Council, 747 F.Supp. 945 (S.D.N.Y. 1990) [ELR 12:11:16]

Models.

Click Model Management represented Rachel Williams under a written management agreement. In 1987, Williams left Click and joined Ford Models, Inc., a competing agency. Click claimed that Christy Turlington, another model, tortiously interfered with Click's agreement with Williams.

A New York trial court entered summary judgment for Turlington. In affirming the court's decision, an appellate court, assuming for purpose of the appeal that the agreement was in fact breached, noted that Click did not present sufficient evidence to raise a factual question as to whether Turlington intentionally procured the breach of the agreement. Turlington, at one point, stated to Williams: "You ought to come over to Ford." And Turlington mentioned to a Ford employee that Williams was interested in speaking with someone at Ford. But such activities did not indicate Turlington's intention to procure a breach of the management agreement.

The court concluded that "the most that can be said is that [Turlington] intended to accommodate her friend, who was already clearly dissatisfied with Click's services."

Click Model Management, Inc. v. Williams, 561 N.Y.S.2d 781 (N.Y.App. 1990) [ELR 12:11:17]

Copyright Infringement/Jukeboxes.

A Federal District Court in Kansas has ordered Nick A. MacAluso, doing business as M and L Vending and Amusement Company, to pay Broadcast Music, Inc. statutory damages of $10,500 for the unauthorized use of copyrighted musical compositions. The court also awarded BMI costs and attorneys' fees in the amount of about $3,500, but denied injunctive relief.

Judge G.T. Van Bebber noted that BMI's claim arose from the alleged unauthorized public performance of seven copyrighted songs on a juke box at Flo's Polka Dot Lounge in Kansas City, Missouri. M and L was the alleged owner of the juke box. There was no genuine issue of fact as to M and L's liability and the court, accordingly, granted summary judgment to BMI.

With respect to damages, Judge Van Bebber found that M and L's failure to pay compulsory registration fees was "knowing and deliberate," and that an award between two and three times the amount of the unpaid compulsory fees would effect the general purposes of the Copyright Act.

Broadcast Music, Inc. v. MacAluso, Case No. 90-2066-V (D.Kans., Dec.18, 1990) [ELR 12:11:17]

Racial Discrimination.

In 1988, a Federal District Court in New York dismissed David Gibson's action alleging that American Broadcasting Companies violated Title VII of the Civil

Rights Act (ELR 10:8:13). A Federal Court of Appeals reversed the grant of summary judgment and remanded the matter.

Upon remand, Judge Sweet noted that Gibson, who has been an on-air correspondent with the contemporary network of ABC Radio News since 1976, claimed that ABC, on the basis of race, denied Gibson weekends off during his term of employment.

ABC argued that the network assigned the weakest correspondents to the least listened-to shifts, and that Gibson was evaluated as one of the weakest of the contemporary network correspondents. The court found that ABC's reasons for scheduling work assignments were not "pretextual." Many causcasian correspondents received weekend assignments during the relevant time period, and "only those correspondents who were initially regarded highly and/or who regularly worked drive shifts were excluded from weekend assignments."

Gibson's schedule may have been unfair, commented the court, in terms of seniority and "equitable assignment of an unpleasant duty," but it was not shown that work schedules were based on race as opposed to the network's business determinations.

Gibson v. American Broadcasting Companies, Inc., 747 F.Supp. 961 (S.D.N.Y. 1990) [ELR 12:11:17]

Jai-Alai.

A Florida appellate court has reversed a trial court decision entering a permanent injunction in a dispute involving striking jai-alai players. A temporary injunction will remain in effect pending the court's ruling on certain motions.

In a separate opinion, the appellate court reversed a trial court order of contempt finding the International Jai-Alai Players Association in contempt, and imposing a $5,000 fine, for violating a 1988 restraining order. The union had engaged in a strike of the Melbourne Jai-Alai Fronton in 1988-1989.

The appellate court noted that "generally speaking, a union is not liable for the unsanctioned acts of its members," and found that Sports Palace, Inc., the owner of the fronton, did not present direct evidence to prove that the union "ratified, instigated, encouraged or condoned" various acts of harassment engaged in by certain strikers. The union's constructive knowledge of a public record, i.e., the police reports filed by the victims of the alleged harassment, was an insufficient basis to sustain a criminal contempt order.

International Jai-Alai Players Association v. Dania Jai-Alai Division of the Aragon Group, Inc., 563 S.2d 1117; International Jai-Alai Players Association v. Sports Palace, Inc., 564 S.2d 281 (Fla. App. 1990) [ELR 12:11:17]

Baseball Spectator Injury.

When Dominica Hering attended a night baseball game at Yankee Stadium on June 2, 1983, Hering was injured as a result of an alleged assault by an allegedly intoxicated spectator. Private security guards were present in the stadium under a collective bargaining agreement between River Operating Company, a subsidiary of the New York Yankees and the Special Officers & Guards Union. River, the employer of the assigned union members, had the exclusive authority to manage, direct and supervise their activities.

Hering claimed that the guards did not attempt to prevent the alleged incident, and sued various parties. A New York trial court denied the union's motion for summary judgment.

An appellate court has reversed the trial court's decision. It was noted that the union's obligation, to supply its members to work as security guards at the stadium, was only intended to benefit River, and not third persons who were not parties to the contract. The union owed no duty to Hering; there were no material triable issues of fact; and the court therefore granted the union's motion for summary judgment.

Hering v. New York Yankees, 560 N.Y.S.2d 455 (N.Y.App. 1990) [ELR 12:11:18]

Meese Commission.

In 1986, Playboy Enterprises and other corporations obtained an injunction restraining the Attorney General's Commission on Pornography from releasing a "blacklist" or taking any other action to censor or to suppress the distribution of various periodicals, including Playboy Magazine (ELR 8:8:8).

The Commission eventually published a final report without naming any of the corporations and without referring to the "blacklist" controversy.

A Federal District Court in Washington, D.C. has ruled that the Playboy parties' claim for injunctive relief and for declaratory relief was moot, and that the members of the Commission were entitled to qualified immunity with respect to the parties' damage claims. Judge John Garrett Penn pointed out, in part, that to allow damages against the Commission members "would be to discourage citizen participation in the future...a decision allowing damages would no doubt chill inquiry of this nature - thus depriving other citizens of the First Amendment rights to speak out and be heard on such sensitive subjects." The Playboy parties' claims were dismissed accordingly.

Playboy Enterprises, Inc. v. Meese, 746 F.Supp. 154 (D.D.C. 1990) [ELR 12:11:18]

Securities Law.

In a decision issued in December 1989, but only recently published, an Ohio appellate court has affirmed a trial court decision dismissing an investor's federal securities law claims against Lorimar Motion Picture Management, Inc. The claim that the management of the limited partnership did not intend to follow certain procedures set forth in the prospectus was not sufficient to convert a breach of fiduciary duty claim into a federal securities violation.

The court also found that "reasonable minds," upon reading the prospectus, would conclude that the challenged Advisory Committee procedures were sufficiently disclosed, that the Advisory Committee procedures could be bypassed, and that the disclosures were not false.

Although agreeing with the investor that the cause of action for breach of fiduciary duty was properly brought as a direct action, and that the trial court erred in finding that the cause of action was derivative, the appellate court concluded by affirming the trial court's findings dismissing the action on the basis of forum non conveniens and dismissing the complaint against certain individual parties for lack of personal jurisdiction.

Galloway v. Lorimar Motion Picture Management, Inc., 562 N.E.2d 949 (Ohio App. 1989) [ELR 12:11:18]

IN THE NEWS

Arsenio Hall prevails in two defamation actions brought by former NAACP official

In 1988, Willis Edwards, the former president of the Beverly Hills-Hollywood chapter of the NAACP, accused Arsenio Hall of failing to employ blacks on "The Arsenio Hall Show;" Hall stated that the show employed a "significant number of blacks."

Hall then claimed, according to news reports, that Edwards sought a $40,000 donation to the NAACP to settle the parties' dispute. And in a November 1989 Rolling

Stone interview, Hall apparently referred to Edwards as an "extortionist" and a "black tennis shoe pimp."

Edwards subsequently sued Hall for slander and libel with respect to the comments published in Rolling Stone.

Los Angeles Superior Court Judge David Yaffe has granted Hall's motion for summary judgment on the ground that Hall's statements constituted protected opinion, and that the purported accusation of the crime of extortion was privileged under section 47(2) of the Civil Code.

Certain of Hall's comments about Edwards also were published in the Los Angeles Sentinel newspaper and broadcast by KACE radio. Edwards filed a separate $10 million slander action against Hall challenging these comments.

In early 1990, Los Angeles Superior Court Judge Ernest George Williams granted Hall's motion for summary judgment.

Judge Yaffe and Judge Williams did not issue written opinions. [April 1991] [ELR 12:11:19]

Ruling that actor William Hurt did not have common law marriage with dancer Sandra Jennings is upheld

In 1989, a New York trial court ruled that actor William Hurt was not the common law husband of former dancer Sandra Jennings (ELR 11:9:16).

The state Court of Appeals has refused to hear Jennings' appeal of an appellate court decision upholding the trial court ruling. It has been reported that the court issued a two sentence statement denying Jennings' request for a hearing. [April 1991] [ELR 12:11:19]

DEPARTMENTS

Book Notes:

Agents of Opportunity: Sports Agents and Corruption in Collegiate Sports, by Kenneth L. Shropshire

Published by University of Pennsylvania Press, Philadelphia. The book explores the history of the sports-agent industry, the development of college sports, and the rules and laws to regulate them. Recommendations for reform are offered as well as a look at the future of the business. Mr. Shropshire is an assistant professor of Legal Studies at the Wharton School of the University of

Pennsylvania and a practicing attorney. 176 pages including the Association of Representatives of Professional Athletes Code of Ethics, summaries of selected state statutes, a discussion draft of Federal Sports-Agent Legislation and a TACTRUST Agreement. $24.95

Guide To The Acquisition of Rights

Published by the Association of the Bar of the City of New York, 42 West 44th Street, New York, NY 10036. This 20-page free guide examines rights which must be acquired to produce a movie, play, television production, home video presentation, or any other entertainment production. A copy may be obtained by calling (212) 382-6750.
[ELR 12:11:21]

In the Law Reviews:

1990 Entertainment, Publishing and the Arts Handbook, edited by John David Viera and Robert Thorne with Consulting Editor Stephen F. Breimer, published by Clark Boardman Company, Ltd., New York, New York. This eighth volume in an annual series contains the following articles:

A Primer of Selected Copyright Concerns in Motion Picture Practice by Peter A. Levitan

Clearing the Copyright Heirs: Renewal-Term Rights Assignments in the Wake of Stewart v. Abend by Maarten Kooij

"Lonesome Dove" and the Electronic Rights Revolution in Book Publishing by Jonathan L. Kirsch

Pop Soundtrack Music for Film by Mark Halloran and Thomas A. White

Musicians, Their Representatives, and the Agreements Between Them by Luaine L. Quast

Dialing for Dollars: The Use of Music in 900-Number Telephone Programming by Linda A. Newmark

There Ain't No Business in the Middle(Almost) by Peter J. Dekom

Japanese Investment in the Film Business in the 1990's by Tomohiro Tohyama

Film and Television Title Clearance Problems: At Issue is the Likelihood of Confusion by J. Michael Cleary

Financing Film and Television Productions by Bruce St. J Lilliston

Uncertain Renewal Conditions in the Cable Industry in the Mid to Late 1970s by Daniel L. Brenner

The Special Problems of Docudramas: No Shortcuts in the Clearance Process by Ted F. Gerdes

Look What They've Done to My Song by Jonathan L. Kirsch

Trademark Registration and the Rocker by Beverly and Philip Green

Litigation Concerning Entertainment Industry Contracts in the Decade Ahead by Angel Gomez, III

International Tax Planning for Artists in the Entertainment Industry by Bruce M. Stiglitz

Bankruptcy and Contractual Relations in the Entertainment Industry-
an Overview by Leslie A. Cohen and David L. Neale

Intellectual Property Protection: Licensee Can `Reject a Rejection' by David A. Gerber

Proposed Statutory Amendment to Laws Regulating Employment Agencies in New York by Thomas F. Lane, 14 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 379 (1990)

A Glance Over the Amendments to Canada's Copyright Law by Victor Nabhan, 14 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 397 (1990)

Fighting Films: A First Amendment Analysis of Censorship of Violent Motion Pictures by Suzanne Rosencrans, 14 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 451 (1990)

The Writer's Guild of America Strike of 1988: A Question of Respect- An Addendum by Andrew S. Larner, 14 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 475 (1990)

Recent Developments in Commercial Speech Doctrine by Roxanne Hovland and Ronald E. Taylor, 12 Communications and the Law 3 (1990)

Home Satellite Television Viewers' Rights Revisited by Sheila B. Mangel, 12 Communications and the Law 15 (1990)

Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption, 104 Harvard Law Review 874 (1991)

Copyright, Computer Software, and Work Made for Hire, 89 Michigan Law Review 661 (1990)

Race, Rap and the Community Standards Test of Obscenity: The Community of Culture by Steven I. Friedland, 15 Nova Law Review 119 (1991)

Obscenity, Music and the First Amendment: Was the Crew 2 Lively? by Emily Campbell, 15 Nova Law Review 159 (1991)

Essay: Too Live a Crew by Bruce Rogow, 15 Nova Law Review 241 (1991)

The Question of Copyright: Pitfalls and Pots of Gold by Ellis J. Freedman, 130 Trusts and Estates 73 (1991)

Copyrights and Copyremedies: Unfair Use and Injunctions by Honorable James L. Oakes, 18 Hofstra Law Review 983 (1990)

Tuning into Cable Television's First Amendment Rights by Jane A. Strachan, 11 University of Bridgeport Law Review 69 (1990)

Copyright Ownership of Commissioned Computer Software in Light of Current Developments in the Work Made for Hire Doctrine by Michael B. McNeil, 24 Indiana Law Review 135 (1990)

To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting by Rocio de Lourdes Cordoba, 42 Hastings Law Journal 635 (1991)

Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects by Tom G. Palmer, 13 Harvard Journal of Law & Public Policy 817 (1990)

Patents, Copyrights, and Trademarks: Property or Monopoly? by Roger E. Meiners & Robert J. Staaf, 13 Harvard Journal of Law & Public Policy 911 (1990)

European Regulation of Transborder Television by C.A. Giffard, 27 California Western Law Review 159 (1990-91)

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Regulation of Dial-A-Porn is a Tough Call: Sable Communications of California, Inc. v. FCC by Paul L. Dunn, 16 Ohio Northern University Law Review 717 (1989)

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Do Sports Really Make Money for the University? by Barbara R. Bergmann, 77 Academe: Bulletin of the American Association of University Professors 28 (1991)

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Freedom of Expression: Who Decides What Is To Be Published? by David L. Lange, 1 Entertainment Law Review 199 (1990)

"It Used to Be Like That-Now It Goes Like This': Rights in Performances under the Copyright, Designs and Patents Act 1988 by Peter Groves, 1 Entertainment Law Review 202 (1990)

Game Show Rights Contracts: Winners and Losers by Robert I. Freedman and Robert C. Harris, 1 Entertainment Law Review 209 (1990)

Setting Up a Visual Artists' Collection Agency in Australia by Colin Golvan, 1 Entertainment Law Review 215 (1990)

Everything You always Wanted to Know About Movie Antitrust (But Were Afraid to Ask) by David B. Winn, 1 Entertainment Law Review 219 (1990)

Tax Shelter Film Financing Part 2 by Larry Chrisfield, 1 Entertainment Law Review 225 (1990)

The Unlawful Decoding of Encrypted Television Signals and the Protection of Authors and Producers of Audio-visual Works by Andre Chaubeau, 12 Copyright: Monthly Review of the World Intellectual Property Organization 367 (1990)
[ELR 12:11:21]