

BUSINESS AFFAIRS

Buchwald v. Paramount: Minding Hollywood's Business

By Douglas Kari

The decision in *Buchwald v. Paramount*¹ hit Hollywood like an earthquake, shaking the foundations of the major movie studios. Aftershocks were felt as far away as Wall Street, where entertainment stocks fell as the news spread.²

The decision, handed down last December by Los Angeles Superior Court Judge Harvey A. Schneider, proclaimed that the studio's formula for dividing net profits with stars and writers was "unconscionable."³ In the words of the judge, the decision meant that the net

profits formula, a feature in film industry contracts for at least 40 years,⁴ "no longer exists."⁵

But what also no longer exists under the judge's decision is the freedom of private parties to strike their own bargains. If the decision stands, it will mean that sophisticated business people are vulnerable to having their contracts reshaped to satisfy a judge's view of what is fair.

Buchwald Comes To Hollywood

It all began when Art Buchwald had a bright idea for a movie.⁶ Mr. Buchwald, a Pulitzer prize-winning commentator and author of more than two dozen books, writes a satirical column that appears in hundreds of newspapers nationwide.

Buchwald's idea centered around an African emperor who comes to America, is left destitute, and finds

himself living in the ghetto and working as a waiter. He meets a woman, marries her, and she becomes his queen. Buchwald transcribed his idea into a two-and-a-half page treatment which he titled "It's a Crude, Crude World."

In 1982, Buchwald enlisted his longtime friend Alain Bernheim to help sell the idea to a major Hollywood studio. Bernheim, formerly a literary and motion picture agent in Paris and New York, has produced a trio of films, Buddy Buddy, Yes, Giorgio, and Racing With The Moon.

Buchwald and Bernheim teamed up with Roger Davis, who was executive vice-president of the William Morris Agency. Back in 1982, the William Morris Agency was the most powerful literary and talent agency in the industry. In short, the prominent humorist and experienced producer were represented by the best agency in Hollywood.

The Bargain Is Struck

Paramount became interested in "It's a Crude, Crude World" as a possible vehicle for superstar Eddie Murphy. In late 1982, Paramount entered into option agreements with Buchwald and Bernheim so that it could explore developing the idea into a motion picture.⁷ The agreements provided that if Paramount made a movie "based upon" the idea, Paramount would pay Buchwald and Bernheim a combined total of roughly \$265,000 up front and at least 19 percent of the "net profits."⁸

Net profits is a term of art unique to the vocabulary of the motion picture industry. The rather complex definition⁹ provides allowances to the studio for such items as overhead and interest on its investment before any money flows to net profits participants.

Net profits does not mean -- and never has meant -- profits in the usual accounting sense.¹⁰ According to

Peter Dekom, a longtime movie dealmaker and name partner in Bloom, Dekom & Hergott, it is "common knowledge" in Hollywood that only a handful of films each year yield net profits. Even blockbusters like "Fatal Attraction," "Batman," and "Twins" did not pay out net profits as defined by the studios.¹¹

Davis in particular understood the peculiarities of the net profits formula.¹² He undoubtedly took the highly speculative nature of net profits compensation into account when negotiating with Paramount, which is probably why he demanded a quarter of a million dollars up front. There is every reason to believe that Davis struck the best bargain available for Bernheim and Buchwald.¹³

Paramount invested two years and approximately \$350,000 on developing scripts. Ultimately, Paramount dropped the idea.

Paramount Scores A Hit

In 1985, Eddie Murphy had an idea for a movie which came to be called "Coming to America." Although he would later insist that he conceived the story on his own,¹⁴ the plot bore a certain resemblance to Buchwald's "It's a Crude, Crude World." Mr. Murphy's story centered around a rich African prince who comes to America, is robbed of his possessions, and winds up living in the ghetto and working in a fast food restaurant. He meets a girl, falls in love, and she follows him to Africa to be his bride.

Paramount decided to make Murphy's story into a movie -- an enormous undertaking involving executives, agents, lawyers, accountants and clerical staff, to say nothing of the writers, cast and crew. Then there were the physical facilities, such as lots, sets, props, costumes, sound stages and cutting rooms. The film also

required a large commitment of advertising dollars. All told, Paramount invested approximately \$80 million to produce and promote "Coming to America" before a single ticket was sold.¹⁵

This investment did not, of course, guarantee success. The film vaults of Hollywood are morgues for big dollar flops like "One From the Heart," "Ishtar" and "Heaven's Gate."¹⁶ In the case of "Coming to America," however, the movie scored a hit, pulling in more than \$350 million in world-wide theatrical box office receipts.¹⁷

But It's My Movie

After Art Buchwald went to see "Coming to America," he left the theatre convinced that Paramount had used his idea. "It was an awful movie, but it was my awful movie," he is quoted as saying.¹⁸

Through television producer Danny Arnold, Buchwald met lawyer Pierce O'Donnell. Mr. O'Donnell reviewed the facts and decided that the case did not look promising as a copyright infringement claim.¹⁹ However, the language of the agreements -- that Paramount would pay if it made a movie "based upon" Buchwald's idea -- convinced him that Buchwald and Bernheim had a solid breach of contract case.²⁰

O'Donnell's strategic decision to pursue the case as a breach of contract meant that he had to be satisfied with contract-based damages. But he saw this side of the case as promising, an assessment that may well prove to be dead wrong.

According to the American Lawyer, O'Donnell estimated that the net profits would be in the range of \$25 million. Under the agreements, this would entitle his clients to \$5 million. Forty percent of that would yield \$2 million for O'Donnell and his law firm, and he estimated

that he could try the case for only \$500,000. On this basis, O'Donnell persuaded his firm to take the case on a contingency.²¹

Where Did The Profits Go?

Buchwald and Bernheim filed a breach of contract suit against Paramount in November 1988. In the liability phase of a bench trial in December 1989, the decision to pursue the case as a breach of contract proved sound. After a high profile trial in which the court was presented with testimony from Eddie Murphy, Murphy's friend Arsenio Hall, as well as Buchwald and a host of Hollywood insiders, Judge Schneider decided that "Coming to America" was indeed based upon Buchwald's "It's A Crude, Crude World."²²

But then the weakness of the damages side of the case revealed itself. In discovery for the next phase of trial,

Paramount's accountants demonstrated that "Coming to America" fell \$18 million short of producing any net profits as that term is contractually defined.²³ Buchwald and Bernheim were, under the agreements as written, entitled to recover only the \$265,000 in up-front money.

O'Donnell, upset at having spent approximately one million dollars to try the liability phase of the case²⁴ only to be told that his clients were entitled to 19 percent of nothing, assailed the net profits formula as "a cruel hoax."²⁵ In Phase II of the trial, he urged the court to declare the net profits formula unconscionable.²⁶

Paramount found itself having to defend the integrity of the bargain that Buchwald and Bernheim had sued to enforce. One argument the studio advanced was that the risky nature of the movie business dictated that the hits help finance the flops. Paramount contended that the enormous risk justified the net profits formula's generous balance in favor of the studio.²⁷

Judge Schneider, however, questioned whether the movie business really entailed a high degree of risk. He proposed to have a special master assess the profitability of Paramount's movie ventures.²⁸

This left Paramount in the awkward position of having to beat a retreat to protect its books from prying eyes. After a hearing in November 1990, the newspapers announced that Paramount had abandoned the risky business defense.²⁹ In his decision a few weeks later, Judge Schneider emphasized the significance of this event in his eyes.³⁰

The hoopla surrounding Paramount's retreat may have overshadowed the more fundamental argument: that where a successful writer and seasoned producer join forces with the most powerful agency in Hollywood, a court is in no position to remake the contract they negotiate with a studio. If we condemn the bargain they

strike as "unconscionable," we may as well scrap our free market system. This is as fair as it gets.

Shylock's Pound Of Flesh

Government policing of private bargains can be traced to ancient Rome, where harsh contracts abounded. Debtors sometimes pledged body parts as security, and the law enforced the deals unconditionally. Shylock could collect his pound of flesh.³¹

This view of the contract as sacred came to be a key element of Western legal systems.³² Today, the right to make private agreements, safe from government interference, is a treasured freedom.³³

Even in Rome, however, the law developed limitations on what bargains could be enforced. One limitation was the doctrine of *laesio enormis* or "large injury," which operated to relieve a landowner from a contract to sell if

the price was less than half the true value of the land. This afforded protection to peasants who, because of prevailing economic and social conditions, could often be coerced to sell their small holdings at give-away prices.³⁴

Safeguards of this nature expanded in the Middle Ages with the development of the "just price" doctrine to prevent speculation in the necessities of life.³⁵ By modern times, all Western legal systems included measures -- ranging from rent controls to consumer protection statutes -- designed to shield the disadvantaged from exploitation in the free market.³⁶ It is against this backdrop of government acting as protector of the weak that the unconscionability doctrine arose.

The Needy And Naive

Unconscionability emerged as a strong policing doctrine in Judge J. Skelly Wright's decision in *Williams v. Walker-Thomas Furniture Company*.³⁷ Mrs. Williams, impoverished and unsophisticated, bought a stereo on credit for \$515. The installment sale contract said that if she defaulted, the furniture company could repossess the stereo and all items which she had previously bought from the company on credit -- in her case, about \$1,800 worth of household goods. She defaulted, and the furniture company obtained a judgment for repossession.

Judge Wright's opinion remanded the case to the trial court for findings whether the contract was unconscionable. In doing so, he established what is now generally accepted as the two-prong analysis for unconscionability issues.³⁸

The first prong -- which has come to be called "procedural" -- focuses on the integrity of the contract formation process.³⁹ Professor Arthur Leff has characterized

this as an inquiry into whether there was "bargaining naughtiness."⁴⁰

The second prong -- called "substantive" -- focuses on the contract itself.⁴¹ As Professor Leff phrased it, the court looks to see whether there are "evils in the resulting contract."⁴²

The search for bargaining naughtiness involves a two-part factual inquiry.⁴³ The first question is whether there was unfair surprise -- like a harsh term hidden in fine print.⁴⁴ The second question is whether the balance of bargaining power was so one-sided as to be "oppressive."⁴⁵

Assessing whether the resulting contract contains evils is something far more indefinite.⁴⁶ Professor Leff has said that the outcome depends primarily on the emotional state of the court.⁴⁷ What guideposts do exist are in the form of platitudes. Substantive unconscionability is said to mean that the contract shocks the

conscience⁴⁸ or affronts a sense of dignity⁴⁹ or defies honest conduct.⁵⁰

Given the paternal flavor of the unconscionability doctrine, it comes as no surprise that most of the cases involve situations where equity cries for protection of the disadvantaged: the old, the young, the needy, the naive.⁵¹ The doctrine is rarely invoked in favor of a sophisticated business person, with a few notable exceptions.⁵² Judge Schneider may have created the biggest exception ever when he decided Phase II of the Buchwald trial.

Surprise, Surprise

On December 21, 1990, Judge Schneider issued his written decision blasting the net profits formula as unconscionable. Perhaps most remarkable of all were the grounds for his conclusion.

Addressing the issue of bargaining naughtiness, Judge Schneider found that Buchwald and Bernheim were not surprised by the net profits formula.⁵³ In other words, these saavy gentlemen and their shrewd agent knew exactly what they were getting into when they contracted with Paramount.

One might think that this would have ended the inquiry. If you offer something for sale, and accept highly contingent and speculative compensation knowing the ramifications, isn't that what the free market is all about?⁵⁴ Judge Schneider, however, applying the California Supreme Court's controversial decision in *Graham v. Scissor-Tail, Inc.*,⁵⁵ decided that the market in Hollywood is not truly free.

Graham involved a dispute between concert promoter Bill Graham and a corporation through which rock star Leon Russell sold his services. The parties signed an American Federation of Musicians standard contract for

Russell to play at four concerts. The contract had an arbitration clause stating that any dispute would be decided by union arbitrators.⁵⁶

One of the concerts lost money, and a dispute arose over who should bear the loss. Scissor-Tail moved to compel arbitration, and a union arbitrator decided the matter against Graham. When the award was confirmed, Graham appealed.⁵⁷

On the issue of bargaining naughtiness, the Court held that Graham -- an experienced promoter -- suffered no surprise on account of the arbitration provision. But the Court found oppression in the fact that the union had a monopoly over all significant musicians and required them to use its standard contract. Graham had no choice but to sign if he wanted to be in the concert business.⁵⁸ In essence, the market did not permit free bargaining.

Judge Schneider's decision in Phase II of Buchwald attempted to draw a parallel. He found that the Hollywood

studios adhered to the net profits formula in paying contingent compensation. A few people with sufficient "clout" (Eddie Murphy, for example) could get a cut of the gross proceeds, but Buchwald and Bernheim did not fall into this category. On that basis Judge Schneider concluded that their negotiations with Paramount did "not take place in a freely competitive market."⁵⁹

Surely his conclusion came as a surprise to the studios that have been engaging publicly in million-dollar bidding wars for screenplays.⁶⁰ The decision also made short shrift of Paramount's commitment to pay Buchwald and Bernheim \$265,000 up front -- a tidy sum for two and a half pages.⁶¹

Also, the film industry is not as confined as Judge Schneider apparently viewed it.⁶² Of the 330 movies newly released in 1982, only 137 came from the major Hollywood studios.⁶³ Buchwald and Bernheim might even have been able to make their own movie, albeit on

a smaller scale than "Coming to America."⁶⁴ The point is that there was no cartel forcing Buchwald and Bernheim to sign a net profits agreement if they ever wanted to see "It's a Crude, Crude World" on the silver screen.

Paramount may well have had the upper hand in negotiations, but unconscionability is not supposed to function as an equalizer.⁶⁵ It focuses only on the extremes: contracts that would leave any decent person with a profound sense of injustice.⁶⁶ Unconscionability certainly does not exist to bestow more "clout" on Buchwald and Bernheim than they have earned in the market.⁶⁷

Line Item Veto

Having found bargaining naughtiness in the Hollywood marketplace, Judge Schneider searched for evils in the net profits formula. He tagged seven clauses as substantively unconscionable.⁶⁸

Three of the clauses provided that Paramount would be credited for overhead before any net profits flowed to people like Buchwald and Bernheim. Judge Schneider -- with little explanation -- found it unconscionable that overhead was computed as a percentage of the gross, without regard to actual costs. He also objected to charging overhead on the money paid to Eddie Murphy.⁶⁹

The other four clauses concerned credits to Paramount for interest expense. Judge Schneider found it unconscionable that Paramount would charge interest on the overhead and on the money paid to Eddie Murphy. He also disliked Paramount's accounting practices, which operated to raise the interest expense. Finally, he objected that the net profits formula computed the interest at a high rate regardless of the actual cost of funds.⁷⁰

Judge Schneider then exercised a line item veto over the net profits formula, condemning seven clauses as

"unconscionable" and ordering a third phase of trial to assess damages calculated in some yet-to-be-decided manner.⁷¹ In doing this, Judge Schneider realized the fears of numerous scholars that the unconscionability doctrine might someday give courts an excuse to act as "roving commissions," reshaping contracts to suit their view of what is fair.⁷² As Paramount's lawyer, Chuck Diamond, phrased it, the Buchwald case has given rise to "a novel concept in Anglo-American jurisprudence: going to court to make a deal."⁷³

Set aside the fact that everyone likes to see the underdog triumph. The unconscionability doctrine simply has no place here. It doesn't shock the conscience that Buchwald and Bernheim may only get \$265,000 for their two and a half pages. It doesn't affront a sense of dignity even if Paramount gave itself generous allowances for overhead and interest. It doesn't defy honest

conduct to hold two sophisticated adults and their high-powered agent to the bargain that they made.

The Implications

Perhaps the Buchwald case was infected by a desire to achieve "litigation fairness." That is, it may have seemed an unjust result for Buchwald and Bernheim -- and especially their lawyer -- to have spent so much time and money to win the liability phase, only to find that the damages were \$265,000. Perhaps subjective notions of "profits" led to the conclusion that there ought well to be some when a movie brings in \$350 million. If the formula had been called a "participation break point," the result in Buchwald might have been different.

The implications are unsettling. We will lose a precious freedom, one upon which our system is based, if courts put themselves in a position to remake private

bargains. Deals should be dickered in the marketplace, not in the courtroom. Indeed, one of the ironies of the case is that it will probably result in less profit sharing in the movie business, not more.⁷⁴ Industry insider Peter Dekom reports that the major studios are considering doing away with profit sharing arrangements in most instances.

As for the future of the Buchwald case, Judge Schneider's decision awarding damages is expected sometime this fall. It is difficult to predict how much he will give Buchwald and Bernheim now that the net profits formula "no longer exists."⁷⁵ One thing is for certain: his decision about unconscionability is destined for the Court of Appeal, as well it should be.⁷⁶ Perhaps in that forum Buchwald and Bernheim will at last be told that they cannot abandon in the courtroom the bargain that they embraced in the marketplace.

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NOTES

1. Art Buchwald, et al. v. Paramount Pictures Corp., et al., Los Angeles County Superior Court No. C 0706083.

2. Investor's Daily, Dec. 26, 1990, at 3. See also L.A. Daily Journal, March 25, 1991, California Law Business, at 12.

3. 90 Daily Journal D.A.R. 14482 (Dec. 26, 1990).

4. Wall Street Journal, Jan. 9, 1991, at A-10.

5. 90 Daily Journal D.A.R. at 14488.

6. The author interviewed attorneys involved in this case about the facts, and also reviewed papers on file in the case. See also Christensen, Coming to Los Angeles, California Magazine, Feb. 1991, at 36; Los Angeles Times, Dec. 24, 1989, at B-1.

7. The contract with Bernheim actually involved his production company, Alma Productions, Inc. 90 Daily Journal D.A.R. at 14483.

8. Under the contracts, Buchwald was entitled to 1.5%, Bernheim to at least 17.5%. 90 Daily Journal D.A.R. at 14488. Bernheim was also obligated to provide producer services, but according to industry sources, as a practical matter it is unlikely that Bernheim would have been asked to provide such services for "Coming to America."

9. Paramount's net profits formula covered some 23 pages. 90 Daily Journal D.A.R. at 14483.

10. Rudell, Buchwald Case Affidavits and Net Profit, New York Law Journal, Sept. 28, 1990, at 4.

11. This was confirmed by industry sources. See also Rudell, *id.*

12. This was confirmed by industry sources. See also 90 Daily Journal D.A.R. at 14484 (finding that Bernheim was not surprised by the net profits provision).

13. 90 Daily Journal D.A.R. at 14486 (finding that Buchwald and Bernheim lacked the "clout" to get a better deal). See also Victory, Pierce O'Donnell Pans "Fatal Subtraction", American Lawyer, March 1991, at 43.

14. Murphy's deposition testimony -- he did not testify live at trial -- is discussed in the Los Angeles Times, Dec. 23, 1989, at B-2, and Dec. 24, 1989, at B-1.

15. Rudell, *supra* note 10.

16. Rudell, *supra* note 10, discusses the risks of the movie business. See also Wall Street Journal, *supra* note 4; Grover, Curtains For Tinseltown Accounting?, Business Week, Jan. 14, 1991, at 35.

17. Los Angeles Times, Jan. 9, 1990, at A-1.

18. Christensen, *supra* note 6.

19. Victory, *supra* note 13. Copyright requires proof of "substantial similarity." See M. Nimmer, Nimmer on Copyright, Section 1303 at 13-23 (1990); Sid & Marty

Krofft Tel. Prod. Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). This might have been difficult to prove. There are numerous cases where plot similarity did not equate to substantial similarity. See, e.g., O'Neill v. Dell Publishing Co., 630 F.2d 685 (1st Cir. 1980); Davis v. United Artists, Inc., 547 F. Supp. 722 (S.D.N.Y. 1982); Giangrosso v. CBS, Inc., 534 F. Supp. 472 (E.D.N.Y. 1982). Once the liability hurdle was overcome, however, the damages on a copyright infringement theory could have included any profits attributable to the infringement, not just net profits as defined by the studios. See 17 U.S.C. Section 504(b).

20. Victory, *supra* note 13. Under *Fink v. Goodson-Todman, Enterprises*, 9 Cal. App. 3d 996, 88 Cal. Rptr. 679 (1970), "based upon" means only that the gist of the stories are the same. This is far easier than proving

"substantial similarity" in a copyright claim. See *supra* note 19.

21. Victory, *supra* note 13.

22. 90 Daily Journal D.A.R. at 14482. See also Los Angeles Times, Jan. 9, 1990, at A-1.

23. This was confirmed by industry sources. See also Rudell, *supra* note 10.

24. Harris, Faces Behind the Figures, *Forbes*, Feb. 19, 1990, at 179. The case has now cost O'Donnell's law firm nearly \$2 million. Victory, *supra* note 13.

25. 90 Daily Journal D.A.R. at 14486.

26. *Id.* at 14482-83.

27. *Id.* at 14485.

28. *Id.* See also *Los Angeles Times*, Nov. 9, 1990 at D-4.

29. *Los Angeles Times*, *id.*; *Washington Post*, Nov. 9, 1990, at C-4. See also Ryan, *Paramount Does About Face In Buchwald Case*, *BPI Entertainment News Wire*, Nov. 8, 1990.

30. 90 *Daily Journal D.A.R.* at 14485.

31. Vener, *Unconscionable Terms and Penalty Clauses: A Review of Cases Under Article 2 of the Uniform Commercial Code*, *Commercial L.J.* 403 (Oct. 1984); Hahlo, *Unfair Contract Terms In Civil Law Systems*, 4 *Canadian Bus. L.J.* 429, 430 (1979-80).

32. Hahlo, *id.*, at 429.

33. See 14 S. Williston, *Contracts*, Section 1632 at 51 (3d ed. 1972). See also *Carlson v. Hamilton*, 8 Utah 2d 272, 332 P.2d 989 (1958).

34. Hahlo, *supra* note 31, at 431 (explaining that small-scale farmers were at the mercy of owners of the large latifundia).

35. *Id.* This church-developed doctrine also forbade lending money at interest.

36. *Id.* at 431-34 (examining the unconscionability doctrine in Denmark, Israel, Sweden, and Germany). See also Slawson, *Standard Form Contracts And Democratic Control of Lawmaking Power*, 84 *Harv. L. Rev.*

529 (Jan. 1981) (a consumer-oriented view of how the unconscionability doctrine should be applied in the United States.)

37. 350 F.2d 445 (D.C. Cir. 1965). See Note, Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts, 33 U.C.L.A. L. Rev. 940, 941 (1986). Justice Tobriner laid the groundwork in California in *Neal v. State Farm*, 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961). The unconscionability doctrine is now codified at Civil Code Section 1670.5 -- California's version of U.C.C. Section 2-302, but applicable to all contracts.

38. 350 F.2d at 449. See Williston, *supra* note 33, Section 1632A at 57-58. Most courts require both prongs to be present before they will condemn a

contract as unconscionable. Note, Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts, 35 Hastings L.J. 161, 164 (1983). See, e.g., *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976).

39. Leff, Unconscionability and the Code -- The Emperor's New Clause, 4 Penn. L. Rev. 485, 487 (1967). See also 90 Daily Journal D.A.R. at 14484; *A&M Produce Co. v. FMC Corporation*, 135 Cal. App. 3d 473, 486, 186 Cal. Rptr. 114 (1982).

40. Leff, *id.* For a provocative discussion about the validity of these "procedural" concerns, see Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 Virginia L. Rev. 1053 (1977).

41. Leff, *supra* note 39. See also 90 Daily Journal D.A.R. at 14484; A&M Produce Co., 135 Cal. App. 3d at 486 (1982).

42. Leff, *supra* note 39. See, e.g., *Gladden v. Cadillac Motor Car Division*, 83 N.J. 320, 416 A.2d 394 (1980) (limitation of remedies); *Von Lehr v. Astor Art Galleries*, 86 Misc. 2d 1, 380 N.Y.S. 2d 532 (1976) (gross overpricing); *Bogatz v. Case Catering Corp.*, 86 Misc. 2d 1052, 383 N.Y.S. 2d 535 (1976) (onerous cancellation clause); *Dean v. Universal C.I.T. Credit Corp.*, 114 N.J. Super. 132, 275 A.2d 154 (1971) (harsh repossession clause).

43. Spanogle, *Analyzing Unconscionability Problems*, 117 U. Pa. L. Rev. 931, 943-44 (1969); A&M Produce, 135 Cal. App. 3d at 486.

44. *Id.* See, e.g., *Siegelman v. Cunard White Star*, 221 F.2d 189, 208-10 (2d Cir. 1955).

45. *Spanogle*, *supra* note 43. Factors by which oppression should be evaluated include financial resources and stability of the parties, the degree of necessity, the relative expertise of the parties, and time pressures. Note, *supra* note 38, at 174. In California, an oppressive contract is also termed a "contract of adhesion." The adhesion doctrine is simply another approach to unconscionability. See *Roos*, *The Doctrine of Unconscionability: Alive And Well In California*, 9 Cal. W.L. Rev. 100 (1972).

46. Some commentators have argued that firmer guidelines are needed for substantive unconscionability. See, e.g., *Dugan*, *The Application of Substantive*

Unconscionability to Standard Contracts -- A Systematic Approach, 18 New Eng. L. Rev. 77 (1982).

47. Leff, *supra* note 39, at 516. One commentator has suggested that the definition appears to be "I know it when I see it." Vener, *supra* note 31, at 408 and n.32, citing the famous concurrence of Justice Stewart in a pornography case, *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

48. *Jacklich v. Baer*, 57 Cal. App. 2d 684, 693, 135 P.2d 179 (1943).

49. J. Calamari & J. Perillo, *The Law of Contracts* 325 (2d ed. 1977).

50. Hahlo, *supra* note 31, at 433 (citing Section 36 of the Contracts Act of Denmark). See also *Hume v.*

United States, 132 U.S. 406, 410, 10 S. Ct. 134, 33 L. Ed. 2d 393 (1889); *Earl of Chesterfield v. Jansen*, 28 Eng. Rep. 82 (Ch. 1751).

51. *Leff*, supra note 39, at 431-33; *Hahlo*, supra note 31, at 429. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E. 2d 144 (1971); *Bank of Ind., N.A. v. Holyfield*, 476 F. Supp. 104 (S.D. Miss. 1979); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *In re Friedman*, 64 A.D. 2d 70, 407 N.Y.S. 2d 999 (1978); *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E. 2d 13 (1974).

52. *Vener*, supra note 31, at 408. See also *Leff*, supra note 39, at 531-33. Two of California's most important cases, however, arise in a commercial context. See *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 171 Cal. Rptr.

604, 623 P.2d 165 (1981); A&M Produce Co., 135 Cal. App. 3d at 473.

53. 90 Daily Journal D.A.R. at 14484. The decision focused primarily on Bernheim's contract, *id.* at 14483, as he had the greater interest in net profits. The analysis, however, was apparently being applied to Buchwald's contract as well, which contained an identical net profits provision. See *id.* at 14488.

54. See *Printing and Numerical Registering Co. v. Samson*, L.R. 19 Eq. 462, 465 (1875) (an oft-cited statement of the sanctity of contracts in the free market system). See generally Leff, *Unconscionability and the Crowd -- Consumers and the Common Law Tradition*, 31 U. Pitt. L. Rev. 349 (1970).

55. 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (1981). Graham has been sharply criticized. See, e.g., Note, *Graham v. Scissor-Tail, Inc.: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 Cal. L. Rev. 1014 (1982).

56. 28 Cal. 3d at 813.

57. *Id.* at 814-16.

58. *Id.* at 818-19. See also *Allen v. Michigan Bell*, 18 Mich. App. 632, 171 N.W. 2d 689 (1969) (contractual limitation of liability for errors in yellow pages listing held unconscionable because no reasonable alternative to services was available).

59. 90 Daily Journal D.A.R. at 14486.

60. See, e.g., Los Angeles Times, Aug. 19, 1990, Magazine at 18.

61. Peter Dekom reports that this was a lucrative deal by industry standards in 1982. This indicator of bargaining strength by Buchwald and Bernheim is another factor weighing against unconscionability. See *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 711, 131 Cal. Rptr. 882 (1976).

62. Judge Schneider appeared to view the market as the major Hollywood studios. See 90 Daily Journal D.A.R. at 14483. It does not appear that he took into account the numerous independent filmmakers which competed in the marketplace in 1982.

63. Weekly Variety, Oct. 16, 1985.

64. "Long Time Companion" is an example of this sort of approach. The presence of such alternatives renders the unconscionability doctrine inapplicable. See *Walnut Creek Pipe Distrib., Inc. v. Gates Rubber Co.*, 228 Cal. App. 2d 810, 39 Cal. Rptr. 767, 815 (1964). For a more critical view of the reasonable choice principle, see *Slawson*, *Mass Contracts: Lawful Fraud in California*, 48 S. Cal. L. Rev. 1 (1974).

65. UCC Section 2-302 (codified in California at Civil Code Section 1670.5), Comment 1 (stating that it is not intended to disturb the allocation of risks due to superior bargaining power). See *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S. 2d 364 (1966) (stating that the unconscionability is not a doctrine designed to relieve a party of "the consequences of uneven bargaining positions or even simple old-fashioned bad bargains").

66. *Carlson v. Hamilton*, 339 P.2d at 989. Cases where arguably one-sided contracts were found not unconscionable include *In re Young's Estate*, 81 Misc. 2d 920, 367 N.Y.S. 2d 717 (1975) (limitation on royalties to author regardless of actual royalties earned); *Grantham v. General Telephone*, 191 Neb. 21, 213 N.W. 2d 439 (1973) (clause that phone company's assessment of damages would be final); *Lamoille Grain Co., Inc. v. St. Johnsbury & L.C. Railroad*, 135 Vt. 5, 369 A.2d 1389 (1976) (clause exculpating railroad from liability); *W. L. May Co., Inc. v. Philco Ford Corp.*, 273 Or. 701, 543 P.2d 283 (1975) (clause allowing manufacturer to repurchase goods sold to a distributor).

67. One commentator has observed that "[a]lmost every contract is 'one-sided' if the definition is that people with clout get better deals than others. Wall Street

Journal, *supra* note 4. See also 3 Corbin On Contracts, Section 559A at 329 (1991 Supp.) (stating that the bulk of contracts signed in this country and other Western nations are adhesive).

68. 90 Daily Journal D.A.R. at 14487.

69. *Id.*

70. *Id.*

71. *Id.*

72. See, e.g., Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293, 294 (1975).

73. Victory, *supra* note 13. A contract that has what may appear to be harsh terms may nonetheless be just

and reasonable in the marketplace. See, e.g., *Perry v. Bedford*, 238 Cal. App. 2d 6, 11-12, 47 Cal. Rptr. 461 (1965).

74. See *Grover*, supra note 16; *Wall Street Journal*, supra note 4.

75. 90 Daily Journal D.A.R. at 14488.

76. Judge Schneider has stated that he will not give Buchwald and Bernheim a windfall. 90 Daily Journal D.A.R. at 14488. Paramount filed a petition for writ of mandate in an attempt to derail Judge Schneider's unconscionability decision before the damages phase of trial. The Court of Appeal denied the petition, without comment, on April 24, 1991.

[ELR 12:12:3]

RECENT CASES

2 Live Crew's parody of "Oh, Pretty Woman" does not constitute copyright infringement

2 Live Crew did not infringe the copyrighted song "Oh, Pretty Woman," a Federal District Court in Tennessee has ruled.

Roy Orbison and William Dees co-wrote "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music.

In 1989, after unsuccessfully seeking a license from Acuff-Rose, 2 Live Crew released its version of the song; the compact disc cover and compact disc of "As Clean As They Wanna Be" credited Orbison, Dees and Acuff-Rose as the authors and publisher of "Oh, Pretty Woman."

Acuff-Rose's subsequent copyright infringement action claimed, in part, that 2 Live Crew's rendition of the song was inconsistent with good taste and would reduce the future value of the copyright.

Chief Judge Thomas A. Wiseman, in considering the group's fair use defense, first found that 2 Live Crew had created a comic parody of "Oh, Pretty Woman" - the theme, content and style of the works were different. Although "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original...the facts convincingly demonstrate that it is a parody," stated the court. The group substituted "shocking" lyrics for the original lyrics, and, in all, "derivatively demonstrate[d] how bland and banal the Orbison song seem[ed] to them." In a footnote comment, Judge Wiseman mentioned that the 2 Live Crew work was neither obscene nor pornographic, and that even if the work

included pornographic references, that would not necessarily preclude a finding of fair use.

The 2 Live Crew used the same drum beat and bass riff as the original to start its song, observed the court, but then quickly inserted a heavily distorted "scraper," indicating a "significant disparity in style." At the beginning of the parody, the first soloist used a different key than the chorus, and at four points during the parody, the group repeated Orbison's bass riff "over and over again, double the number of times on the original, until the riff begins to sound like [an] annoying scratch on a record."

Judge Wiseman proceeded to find that the nature-of-the copyrighted-work fair use factor would weigh in favor of Acuff-Rose.

With respect to the amount of quotation, Judge Wiseman stated that the 2 Live Crew version of the song copied the name of the song, key lyrics, the same guitar refrain, opening drum beat and melody and chorus.

Acuff-Rose argued that the group did not need to copy so much of the original in order to "conjure up" its memory. In rejecting this argument, the court, citing, among other cases, *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986; ELR 8:4:13) pointed out that parodies of songs require "more leeway" than other types of parodies. The group did not engage in virtually complete or verbatim copying, and given that the medium was a song, that the purpose was parody, and that the copying was relatively brief, 2 Live Crew did not appropriate any more from the original than was necessary to accomplish reasonably the "parodic purpose."

Judge Wiseman stated that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." The intended audience for the songs was entirely different, and Acuff-Rose did not present convincing evidence of any harm to any existing or potential market. The company still would be able to

record other versions of the original work and enter future licensing arrangements. 2 Live Crew's use of the copyrighted song was protected fair use, concluded the court, and Acuff-Rose's state law claims for tortious interference with contractual relations and interference with prospective business advantage were preempted by federal law.

Acuff-Rose Music v. Campbell, 754 F.Supp.1150 (M.D.Tenn.1991) [ELR 12:12:10]

Rhode Island town may not prohibit "2 Live Crew" concert

Atlantic Beach Casino, Inc. and M.J. Murphy, the owners of the Windjammer, a club in Misquamicut,

Rhode Island, scheduled the group 2 Live Crew to perform at the club on October 6, 1990.

The town council notified Murphy of a public hearing on September 4, 1990 regarding the 2 Live Crew performance. After the meeting, the council voted to refer the issue of obscenity to the Rhode Island Attorney General, and advised Murphy that the council was considering revoking the club's liquor and entertainment licenses. The council subsequently scheduled a show cause hearing for September 24th on the licenses.

A Federal District Court has found that the council's licensing system was "utterly devoid of standards," leaving the issuance and revocation of licenses to the unbridled discretion of the town council. There was an "overwhelming" likelihood that the club would succeed on its claim that the challenged ordinances were an unconstitutional prior restraint of expressive activity.

The club demonstrated immediate and irreparable harm and the council's asserted concerns for the public interest did not outweigh the harm to the club owner's First Amendment rights, concluded Senior Judge Pettine in enjoining the council from any further proceedings under the licensing ordinances, from revoking the club's license pursuant to the ordinances, or from otherwise prohibiting the scheduled concert.

Atlantic Beach Casino, Inc. v. Morenzoni, 749 F.Supp. 38 (D.R.I. 1990) [ELR 12:12:10]

Warner Bros. obtains increased statutory damages in copyright infringement action involving sale of "Batman" goods

Warner Bros. Inc., the owner of certain copyrights related to the comic book character "Batman," sued several retail stores for selling allegedly infringing merchandise. A Federal District Court in New York enjoined the stores from selling the merchandise and, finding that any infringement was innocent, awarded Warners statutory damages of \$200 against both consenting and defaulting retailers.

A Federal Court of Appeals, noting that the burden of proving an innocent infringement is on the alleged infringer and that the District Court "did not and could not" make any finding of innocence concerning the retailers who failed to appear, determined that the judgment against each defaulting retailer would have to be modified to increase the award of statutory damages to \$500.

The court upheld the damage award imposed on the retailers who participated in the trial. It was observed that

evidence was presented that there were no copyright notices on the infringing goods and that a customer would not be able to distinguish between licensed and unlicensed goods based on the style or quality of the art work. On the basis of this evidence and on the lack of business sophistication on the part of the retailers, the District Court properly concluded that the retailers were innocent infringers, and did not abuse its discretion in finding that a permanent injunction and statutory damages of \$200 were sufficient to deter future infringements and to protect Warner's rights.

Warner also had sued several flea market vendors. The court first found that the manner in which the company served the summons, complaint and order to show cause to the vendors was "excessive." Although Warner had not offered any evidence of infringement, the court nevertheless entered a permanent injunction barring the vendors from selling unlicensed Batman merchandise.

Warner's application for statutory damages was denied, but the company obtained damages of \$200 against each defaulting vendor.

The Court of Appeals affirmed the judgment entered against the vendors who consented to an injunction. Judge Roger J. Miner pointed out that the vendors' consent was conditioned on the court's assurance that no damages would be awarded, that Warner did not object to the arrangement, and that, as distinguished from the action against the retailers, no evidence of past infringement was offered. Consent to an injunction under such circumstances was not an admission of past wrongdoing, stated Judge Miner.

The court then modified the judgments entered against defaulting vendors to increase the award of statutory damages to \$500 against each vendor whose default was entered-Warner was not required to introduce evidence

of infringement against parties who never appeared in the action.

D.C. Comics Inc. v. Mini Gift Shop, 912 F.2d 29 (2d Cir. 1990) [ELR 12:12:11]

National Basketball Association rule reducing superstation telecasts is ruled unreasonable restraint of trade

Superstations, such as WTBS in Atlanta, WGN TV in Chicago and WWOR in New York, are independent, over-the-air television stations that broadcast in their local market areas and also are carried by cable systems to other parts of the country. WGN had entered a five year contract with the Chicago Bulls whereby the station obtained the right to telecast up to twenty-five games

each season. However, in 1990, the National Basketball Association's Board of Governors adopted a rule reducing to twenty the number of games each NBA team may license to superstations.

WGN and the owners of the Bulls claimed that NBA's action was a horizontal agreement among the teams to restrict output and to boycott superstations in violation of section 1 of the Sherman Act.

A Federal District Court in Chicago has ruled that the five game reduction in the number of superstation telecasts was an unreasonable restraint of trade, and entered a permanent injunction restraining the NBA from enforcing the twenty game rule.

Judge Hubert L. Will, in a lengthy opinion, first reviewed the structure of the NBA. It was noted that the twenty-seven professional basketball teams have entered agreements, not only concerning the rules of the game, but concerning collective bargaining with the players,

the college draft, group insurance, product licensing, and television contracts with the national networks. The NBA controls the logos and trademarks of all the teams, and all rights in the film footage of team games. The NBA, under an exemption from the antitrust laws granted by Congress, has sold broadcast rights, on behalf of all the teams, both to NBC and to Turner Network Television, a cable network; the share to each team from the combined rights fees was about \$6.8 million in the 1990-1991 season. The NBA teams, according to Judge Will, significantly rely on the volume of the shared revenues derived from the NBA's activities on their behalf.

Notwithstanding the above, the teams remain "very much separate entities," noted the court, and most teams earn more from regular season home game gate receipts and from rights fees from local broadcasters, than they receive in shared revenues.

Judge Will proceeded to consider the history of the NBA's television policies, noting that since 1979, the NBA has adopted a number of rules limiting local broadcasts and the independent rights of the teams to sell games, in order to maximize the value of the NBA's network broadcast contracts. In 1982, the NBA signed contracts with USA and ESPN for the 1982-1983 and 1983-1984 seasons; each cable operator obtained the rights to forty games each season plus playoff games. The ESPN contract was for games on Sunday nights, and the USA contract was for Thursday night games. The NBA then barred the teams from televising games over superstations on either of those nights. In 1985, the NBA reduced the number of superstation games available to a team each year from forty-one to twenty-five.

In contrast to the NBA, there are no superstation broadcasts of National Football League games, and Major League Baseball imposes a surcharge on

superstation broadcasts rather than limiting the number of games directly.

The NBA's television rules provide that each team may televise up to half (forty-one) of its regular season games, home or away, over any commercial over-the-air television station other than a superstation located in its "home territory." The teams keep one hundred percent of the revenues from the local home territory broadcasts. There are few limits on the number of games a team may televise over local cable, and the teams keep one hundred percent of the revenues from the local market cablecasts. However, revenues from "extended market" cablecasts are shared with the NBA.

Under the new rule, each team may televise up to twenty games on a superstation, but those games will reduce the number of games available for showing on another local over-the-air station. The teams may keep the revenues from their contracts with the superstations.

Royalty payments from cable operators which retransmit superstation games are distributed to the teams by the NBA; in 1990, the NBA received a distribution of almost \$4 million from the Copyright Royalty Tribunal.

The teams may not televise any game over-the-air, on cable, or on superstations opposite an NBC game and may not broadcast the same game carried by NBC at all, even on tape delay.

After reviewing the NBA's national network, national cable and regional cable contracts, the logistics of superstations, WGN's contract with the Bulls and television coverage of Bulls games in Chicago and nationwide, Judge Will considered the NBA's argument that the five game reduction was protected by the antitrust exemption for professional sports leagues created by the Sports Broadcasting Act, 15 U.S.C. sections 1291-1295.

Section 1291 of the statute provides that the antitrust laws shall not apply to "any joint agreement...by which

any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the right of such league's member clubs in the sponsored telecasting of...games..." The parties agreed that Bulls games on WGN were "sponsored telecasting." But the statute protected rights in sponsored telecasting that were transferred or sold by a league, emphasized the court; the exemption created by the statute did not cover the instant case. The Bulls, not the NBA, owned and licensed the rights to the games that were transferred to WGN.

The court rejected the contention that the rights sold to WGN were transferred by the NBA rather than the Bulls - the NBA did not have any ownership interest in the copyrights to the twenty-five Bulls games at issue and retained only limited authority to block the transfer. The Bulls might own the copyright to a particular game jointly with the opposing team, but either of two joint

owners may grant a non-exclusive license to the work to a third party, noted Judge Will, without permission of the other, subject to a duty to account for profits. Although the teams may have ceded to the NBA their rights in the twenty-two games scheduled for broadcast by NBC, this did not mean that they lost their copyrights in games which the NBA did not sell.

Judge Will reiterated that the Bulls and other teams still own and control the rights to the games not included in the NBA's contracts with NBC and TNT, and that the statute "unambiguously" protects only transfers of rights by a league, not a league's action to "prohibit the transfer" of rights. The purpose of the statute, as opposed to the purpose of the Sherman Act itself, was not to promote competition, noted the court, but to establish the legality of a practice, package sales to the networks, which tends to restrain competition. "The joint agreement by teams to prohibit any one of them from

transferring more than twenty games to a superstation was obviously not the same thing as a joint agreement effecting such a transfer," declared Judge Will, and the antitrust laws therefore applied.

Upon finding, after careful consideration, that WGN and the Bulls had suffered antitrust injury and had standing to sue, the court reviewed the manner in which the twenty game rule restrained trade. By allocating markets, the rule reduced competition among the teams and between the teams and the league, as well as between superstations and other television stations and networks. The rule placed an artificial limit on supply and reduced it below the level which would prevail in a market where the teams and the NBA were competing in the national market and each team was free to match demand with supply. Five less games on WGN and five less on WTBS meant that fewer games were available for advertisers and for fans, an effect in the national

market that was "sufficient by itself to raise antitrust concerns."

Furthermore, the five game reduction represented a concerted refusal, on the part of the NBA teams, to deal with superstitions. Judge Will observed that the refusal was "absolute," was a form of a group boycott, damaged competition in several areas, preempted market mechanisms by deciding for viewers, broadcasters and advertisers "that they do not need games that they are currently demanding," and was a significant restraint of trade.

Judge Will declined to find that the horizontal agreement between NBA teams to allocate the national market largely to the league was illegal per se. In applying the rule of reason, the court stated that most of the NBA's justifications for the superstition rule "must be rejected on principle." Maximizing revenues and "protecting the value" of individual team or NBA contracts

would not be legitimate justifications by themselves for restraining trade by limiting output, stated Judge Will, who pointed out that "We do it because it's more profitable" is not a defense under the Sherman Act.

The NBA claimed that the five game reduction served to promote competition in the market between the NBA's network packages and other network programming and between local NBA broadcasts by the teams and other local programming. But the NBA produced no evidence to support its argument. The court noted that no representative from any of the teams or from any local station testified that superstation broadcasts have damaged carriage, ratings or revenues. For Judge Will, the NBA's failure to put in any, "even crude," statistical evidence on the effects, if any, that superstations have on network ratings "leaves a critical hole in its case."

The five game reduction would reduce the availability of games and competition in order to raise the price of

the product in the future. The restraint was unreasonable and an injunction was entered accordingly.

Chicago Professional Sports Limited Partnership v. National Basketball Association, 754 F.Supp. 1336 (N.D.Ill. 1991) [ELR 12:12:11]

Public broadcaster's decision to limit televised debate to candidates of two major parties is upheld

Walker Chandler, the Libertarian candidate for lieutenant governor of Georgia, sued the Georgia Public Telecommunications Commission in an effort to enjoin the Commission from airing a political debate on November 2, 1990 between the Democratic and Republican candidates for lieutenant governor unless the public television broadcaster included Chandler as a debate participant.

The Libertarian candidate for governor sought a similar injunction against the broadcast of a debate between the Democratic and Republican candidates for governor. (The Commission offered the Libertarian candidates thirty minutes of air time on public television stations to present their views.)

A Federal District Court issued a temporary restraining order barring the televising of either debate unless the debates included the Libertarian candidates.

A Federal Court of Appeals has vacated the District Court's order and remanded the matter with instructions to dismiss the complaint.

The court first pointed out that the Commission, as a public television station, had an obligation to serve the public interest. However, contrary to the District Court's finding, the Commission's content-based decision to present debates between candidates of the major parties was "not viewpoint restrictive and [did] not violate the

First Amendment." A decision to air any show is necessarily content-based, stated the court; the Commission's decision to limit the debate to the two major party candidates promoted the broadcaster's function, was reasonable and was "not an effort to suppress expression merely because public officials oppose the speaker's views." The District Court therefore erred in basing its order on First Amendment grounds.

Also rejected was the District Court's finding that the Commission's actions violated the Equal Protection clause of the Fourteenth Amendment-the Commission's decisions had a rational basis.

The court observed that public television stations must comply with federal fairness and balance requirements, and stated that it was "unwilling" to establish a precedent that would require the stations to cease broadcasting controversial views upon important public issues unless that station included "a cacophony of differing

views on each subject." The candidates did not raise a substantial likelihood of success on the merits and injunctive relief was denied accordingly.

Judge Clark, in a lengthy dissent, would have found that the First Amendment forbids the state "from selectively choosing which qualified candidates can and cannot debate and further forbids the state from denying its citizens the opportunity of simultaneously viewing the candidates whose names will face them on the ballot. The uncensored right to speak and to hear go to the heart of governance..." Judge Clark noted that the director of the Commission had stated that the viewpoint of the Libertarians was "less valuable" than those of the Democrats and Republicans; that excluding certain candidates from a debate curtails access to ideas; and that the District Court's distinction between ballot-qualified and write-in candidates for determining access to the debate was justified. Stating that viewpoint discrimination

is unconstitutional in any forum, public or otherwise, Judge Clark would have affirmed the District Court.

Chandler v. Georgia Public Telecommunications Commission, 917 F.2d 486 (11th Cir. 1990) [ELR 12:12:13]

Soldier of Fortune Magazine loses motion for judgment notwithstanding the verdict in action involving "Gun for Hire" advertisement; son of murder victim accepts settlement after obtaining jury verdict awarding over \$12 million in damages

Richard Savage's advertisement in Soldier of Fortune magazine read: "GUN FOR HIRE: 37-year old professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Body guard, courier, and other special skills. All jobs considered..."

Bruce Gastwirth hired Savage to kill Richard Braun, Gastwirth's business associate. On August 26, 1985, Sean Trevor Doutre, who worked with Savage, killed Braun and wounded Braun's son Michael.

Michael and his older brother, Ian, sued the magazine and Gastwirth for the wrongful death of the boys' father.

A Federal District Court rejected the magazine's motion for summary judgment. Chief Judge Hobbs stated that "the likelihood and gravity of the possible harm from an advertisement which, on its face, implies that the advertiser is available to kill others is so great, and...the social utility of advertising criminal activity is so small, that imposing a duty on the publisher not to publish the ad is justified."

The court distinguished the case from those involving basically safe products which may have certain dangerous uses. And the wording of the advertisement was not so "facially innocuous" that the risk of murder was

unforeseeable as a matter of law. Although the language of the advertisement in issue did not explicitly offer criminal services, it appeared to Judge Hobbs that "the publisher could recognize the offer of criminal activity as readily as its readers obviously did." It thus would remain for a jury to determine the foreseeability of the criminal activity.

The magazine's argument that the First Amendment protected the publication of the advertisement also was rejected. First Amendment protection would not extend to advertising commercial activity which is itself illegal, observed the court. Again, although the advertisement did not contain an express offer to murder others, the language used was easily interpreted as such an offer.

The magazine requested that the court amend its order denying the motion for summary judgment to permit an interlocutory appeal to the Federal Court of Appeals, citing the "unusual" nature of the court's decision that

the magazine might be held liable despite the ambiguous language of the advertisement.

Judge Hobbs cautioned that the court's use of the word "ambiguous" to describe the advertisement in issue did not mean that the court believed that the offer of criminal activity was vague. It appeared "reasonably clear" from the advertisement's language that the advertiser was offering his services for criminal activity, stated the court; any ambiguity was in the offer to perform legitimate services. But the fact that this advertiser may have been available for legitimate services in addition to criminal activities did not eliminate the unreasonable risk of criminal activity, including murder, declared Judge Hobbs.

The court rejected the magazine's position that only an advertisement stating that an individual was "available to kill the victim of your choice" or "assassin available for hire, all jobs considered," would be sufficiently clear

to show a criminal intent. At the least, a trier of fact could find that the advertisement in issue should have put Soldier of Fortune on notice that it created an unreasonable risk that someone would be the victim of a criminal act, including murder.

In a footnote comment, the court distinguished the case from *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989; ELR 11:9:15). In *Eimann*, the court found that the challenged advertisement was "at most...facially innocuous," offering perhaps dangerous but nonetheless legal services. The advertisement before the court could not be classified as "facially innocuous," stated Judge Hobbs, and its criminal intent was not derived from the context in which it was printed.

The motion to certify an order for interlocutory appeal therefore was denied.

In December, 1990, a Federal District Court jury awarded Michael Braun \$10 million in punitive damages

and \$375,000 in compensatory damages for his personal injury claim, and an additional \$2 million in compensatory damages to Michael and Ian on the wrongful death claim.

Judge Hobbs denied Soldier of Fortune's motion for judgment notwithstanding the verdict, finding that the evidence fully supported the jury's determination that the negligent conduct of the magazine parties was the proximate cause of Richard Braun's death and Michael Braun's injuries.

The court next found that the damage award of \$2 million for the wrongful death claim and the compensatory damage award to Michael Braun were supported by the evidence. However, although evidence was presented to support a finding that the magazine parties acted with "an entire want of care so as to justify the imposition of punitive damages," the court found the \$10 million award excessive. Judge Hobbs stated that an award of

\$2 million not only would serve to deter the magazine parties and others from running similar advertisements, but would provide sufficient compensation for Michael Braun's "wounded feelings."

It has been reported that Michael Braun agreed to accept a \$7.6 million reduction in punitive damages to settle the matter.

Braun v. Soldier of Fortune Magazine, 749 F.Supp. 1083, 18 Med.L.Rptr. 1730 (M.D.Ala. 1990); 18 Med. L.Rptr. 1732 (M.D.Ala. 1991) [ELR 12:12:14]

National Geographic Society must comply with foreign licensing agreement with Vestron, Inc., rules United States Magistrate

In a decision issued in May 1990, but not published until recently, a Federal District Court in New York has granted Vestron Inc.'s motion for a preliminary injunction in a dispute over the videocassette rights for the National Geographic Society's television documentaries.

Under a 1985 agreement between the parties, National Geographic granted Vestron an exclusive license for domestic home video rights for the documentaries. In 1988, Vestron also received the right to distribute sixty videos in specified international markets; Vestron agreed to pay National Geographic \$1 million in annual installments of \$200,000, and royalties of seventeen percent of Vestron's gross receipts. And Vestron lowered its charge from \$13.75 to \$10.00 for the videocassettes purchased by the National Geographic for resale to its members.

In late 1989, National Geographic objected to Vestron's reliance on subdistributors in foreign

territories and eventually refused to deliver additional master tapes to Vestron.

Vestron sued National Geographic for breach of contract and sought a preliminary injunction barring the society from selling any rights for the territories covered by the parties' agreement and requiring National Geographic to supply the master tapes. United States Magistrate James C. Francis IV found that Vestron established irreparable injury. The magistrate, noting the company's obligation to supply the documentaries to subdistributors, and the "incalculable loss of revenues" on other titles, stated that there would be a "chain reaction of losses impossible to quantify both at any specific stage and in total."

National Geographic's early termination of Vestron's distribution activities with respect to the documentaries meant that it was impossible to project future sales on the basis of any past sales records, observed the

magistrate. Vestron and the society had agreed to a release schedule "designed to create sales momentum. Once that momentum [was] disrupted, it affect[ed] subsequent sales to an indeterminate extent," stated the magistrate. The uncertainty of monetary damages supported Vestron's claim of irreparable injury.

National Geographic's contention that Vestron fraudulently induced the society to enter the agreement was rejected. According to the society, Vestron falsely represented its financial ability and its intent to handle foreign distribution with a direct sales force, rather than by using subdistributors. It appeared to Magistrate Francis that Vestron would rebut the fraud claim, in part because the long-form agreement signed by the parties granted Vestron permission to use subdistributors.

The magistrate then observed that Vestron did not make any specific representations about the company's

financial status so as to warrant reasonable reliance by National Geographic.

Also rejected was National Geographic's argument that it was entitled to terminate the agreement because Vestron was insolvent. The magistrate found that the society's primary concern was whether Vestron would be unable to pay its debts; Vestron had not failed to meet its debt obligations and thus was likely to prevail on the question of whether the society was entitled to terminate the agreement under this provision.

The society further claimed that Vestron did not meet the contractual obligation to use its best efforts because the subdistribution agreements entered into by the company served to reduce the royalties payable to National Geographic. Again, the agreement permitted Vestron to use subdistributors, and excluded payments received by the subdistributors from gross receipts for purposes of calculating the royalties due to the society.

Other breaches cited by the society were not sufficiently material to justify rescission of the agreement, declared Magistrate Francis, and the agreement limited the society's remedies for the cited breaches to an action for damages and precluded rescission.

The magistrate therefore required National Geographic to supply Vestron with the masters for the programs due to be released on videocassette through December 1990, and enjoined the society from transferring any foreign rights which were the subject of the agreement. Vestron was required to post a bond of \$50,000.

Vestron, Inc. v. National Geographic Society, 750 F.Supp. 586 (S.D.N.Y. 1990) [ELR 12:12:15]

McDonald's Corporation again prevails in infringement action involving "Mac Tonight" character's man-in-the-moon mask

A Federal Court of Appeals has upheld a District Court ruling granting summary judgment to McDonald's Corporation in an action involving a "man-in-the-moon" mask (ELR 11:4:15).

Norbert Pasillas created a three dimensional crescent moon mask to be worn over a person's head. The face on the surface of the latex mask, as described by Federal Court of Appeals Judge Betty B. Fletcher, was that of "an elderly man with wrinkles on his brow and around his eyes, a bulbous nose, a rounded chin, and a closed mouth with thick, slightly pursed lips."

McDonald's, in 1986-1987, ran an advertising campaign featuring a character known as "Mac Tonight." The McDonald's mask also was a three-dimensional

white crescent moon worn over the head, with a face on its concave surface. But the mask had ears on the sides, depicted a "youthful, unwrinkled face" wearing sunglasses, a triangular nose, no chin, thin lips, and a broadly grinning, open mouth revealing the upper teeth.

Judge Fletcher first distinguished the decision in *Shaw v. Lindheim*, 908 F.2d 531 (9th Cir. 1990; ELR 12:5:10), cited by Pasillas, noting that the holding in *Shaw* was explicitly limited to literary works. And *Shaw* "recognized and distinguished a line of cases involving works whose idea and expression are inseparable."

The District Court had found that the similarities between the masks derived from the common idea of a mask depicting the man in the moon, and that apart from the non-protectible elements, the masks were "not at all alike." Judge Fletcher, again noting that the "total concept and feel" of the McDonald's mask were completely different from that of the Pasillas mask, upheld the

ruling granting summary judgment to McDonald's. The court rejected the company's request for sanctions.

Pasillas v. McDonald's Corporation, Case No. 89-55602 (9th Cir., Feb. 14, 1990) [ELR 12:12:16]

Movie theater discount admission prices for senior citizens and children do not violate California's Unruh Civil Rights Act

A movie theater's policy of offering discount ticket prices for patrons over sixty or under twelve years old did not violate the Unruh Civil Rights Act, a California appellate court has ruled.

The trial court had determined that the discounted admission fees did not constitute unreasonable, arbitrary or invidious discrimination by the theater.

California appellate court Judge Herbert L. Ashby noted that California Civil Code section 51 bars business establishments from "engaging in any form of arbitrary discrimination." In the proper situation, noted the court, the statute could be applicable to businesses which discriminate by offering price discounts to certain classes of individuals.

The theater claimed that the discount admission policy was adopted to promote the "family-oriented" nature of its business and to benefit groups with limited disposable income.

Setting different price rates for seniors and children in an amusement business did not "perpetuate irrational stereotypes," stated Judge Ashby, who pointed out that "without discount tickets, a family may never be able to afford and enjoy a baseball game, amusement parks, Disneyland, the zoo, museums, camp grounds, state

fairs, parks or a movie. Making these American pastimes affordable is beneficial to us all."

The evidence presented did not create a triable issue of fact and the trial court properly granted the theater owner's motion for summary judgment. Judge Ashby concluded by noting that "all members of society regardless of their sex, race, religion or national origin will, in the normal course of events, be members of each class entitled to the discount. This is neither arbitrary, discriminatory nor unfair. Families may continue to expect popcorn and discounts for seniors and children at the movies."

Starkman v. Mann Theatres Corporation, 2d Civil No. B047058 (Ca.Ct.App., Feb. 27, 1991) [ELR 12:12:16]

United States Supreme Court rules that use of telephone directory listings is not copyright infringement

The United States Supreme Court has ruled that Feist Publications' area-wide telephone directory did not infringe the directory compiled by Rural Telephone Service Company, a public utility providing telephone service to several communities in northwest Kansas.

When Rural refused to license its listings, Feist used the listings without consent - about 1,300 of the approximately 47,000 listings in Feist's 1983 directory were identical to the listings in Rural's 1982-1983 white pages.

A Federal District Court in Kansas granted summary judgment to Rural on the company's copyright infringement claim, and a Federal Court of Appeals, in an unpublished decision, affirmed the ruling.

United States Supreme Court Justice O'Connor, in reversing the decision, first noted the "well-established propositions" that facts are not copyrightable, but that compilations of facts generally are. Facts are not copyrightable because the sine qua non of copyright is originality, emphasized Justice O'Connor. As used in copyright, original means "that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity...Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."

Justice O'Connor pointed out that originality is a constitutional requirement, and that facts "do not owe their origin to an act of authorship." However, the author of a compilation, in selecting and arranging facts, may demonstrate the minimal degree of creativity necessary for

copyright protection. Such protection extends only to the components of the work that are original to the author, and "inevitably" the copyright in a factual compilation is "thin." But the uncompensated use of raw facts, stated Justice O'Connor, is "neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."

The court rejected the "sweat of the brow" doctrine set forth in certain cases as a doctrine that "flouted basic copyright principles."

After reviewing relevant provisions of the Copyright Act of 1976, Justice O'Connor found that the selection, coordination and arrangement of Rural's white pages did not satisfy the minimum constitutional standards for copyright protection. Rural's directory was "a garden-variety white pages directory, devoid of even the slightest trace of creativity." Feist's use of the listings in

Rural's white pages did not constitute infringement, concluded the court.

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., Case No. 89-1909 (U.S.Sup.Ct., Mar. 27, 1991) [ELR 12:12:17]

Briefly Noted:

"Coming to America."

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to Eddie Murphy, Paramount Pictures Corporation and other parties in a copyright infringement action brought by Shelby M. Gregory concerning the film "Coming to America."

The court, in an opinion marked "Not for Publication," agreed with the District Court that Gregory did not establish that the film was substantially similar to his play "Toto, the African Prince." It was noted that the two works differed with respect to plot, theme, dialogue, setting, characters, and events. The Paramount parties' request for sanctions was denied.

Gregory v. Murphy, Case No. 89-56240 (Mar. 22, 1991) [ELR 12:12:17]

Copyright Infringement/"Harlem Nights."

A Federal District Court in New Jersey has granted summary judgment to Eddie Murphy, Paramount Pictures Corporation and other parties in a copyright

infringement action brought by Rafiz Farid involving the film "Harlem Nights."

A transcript of proceedings before Judge Harold A. Ackerman set forth the court's finding that an ordinary lay observer would not detect a substantial similarity between the film and Farid's script, entitled "Going Straight." Judge Ackerman declined to address Farid's civil RICO claim, and dismissed various state law claims without prejudice.

Farid v. Murphy, Case No. 90-874 (D.N.J., Jan. 28, 1991) [ELR 12:12:17]

"The Simpsons."

A Federal District Court in New York has granted Twentieth Century Fox Film Corporation's motion for a

preliminary injunction to bar Mow Trading Corp. from distributing products featuring the characters from Fox's copyrighted television show "The Simpsons." The court found that Fox demonstrated irreparable harm and a likelihood of success on the company's copyright and trademark infringement claims. It was noted that irreparable harm was shown, in part, by the evidence that certain merchandise seized from Mow Trading's premises depicted the Simpson characters "in unauthorized and grossly disparaging ways." The court also granted Fox's motion for expedited discovery.

Twentieth Century Fox Film Corporation v. Mow Trading Corp., 749 F.Supp. 473 (S.D.N.Y. 1990) [ELR 12:12:18]

Musical Group Name.

A New York appellate court has affirmed a trial court decision granting a preliminary injunction to Glenn Miller Productions, Inc. to prevent Clement DeRosa, a former leader of the company's ensemble, from using the name "Glenn Miller Memorial Orchestra" during two proposed tours of France. Although it was disputed whether DeRosa withdrew from the French tour prior to the commencement of the action, the court found that Glenn Miller Productions showed a likelihood of success on the merits, a substantial risk of irreparable injury, and a balance of the equities in its favor.

The employment contracts between the parties restricted DeRosa's use of the name "Glenn Miller" only in his musical enterprises, and did not prevent him from competing with the company, or from working as a musician or bandleader. The contract clauses thus were not

restrictive covenants. And even if the clauses were so characterized, the court stated that it would find them "reasonable and enforceable."

Glenn Miller Productions was not attempting, by contract, to extend its trademark to the "Glenn Miller" name into areas excluded from federal trademark protection; the clauses were not an improper extension of a domestic trademark in a foreign market; and the clauses were legitimately intended to avoid consumer confusion over the name "Glenn Miller."

Glenn Miller Productions, Inc. v. DeRosa, 561 N.Y.S.2d 783 (N.Y.App. 1990) [ELR 12:12:18]

Musical Group Name.

A North Carolina band called "Sidewinder" sued an Arizona band known as "The Sidewinders, Inc." alleging trademark infringement under the Lanham Act and the violation of the North Carolina Unfair and Deceptive Trade Practices Act.

A Federal District Court in North Carolina noted that the North Carolina band did not register its name as a trademark under federal or state law. When the Arizona band conducted a federal trademark search, it found no competing registration.

The state statute did not apply to the "innocent infringement of an unregistered trademark," stated the court. Furthermore, the band had a remedy under the Lanham Act to recover all of its losses "if appropriate..." Even if the statute were found to be applicable, the Arizona band still would prevail because the claims raised "at most amount[ed] to a claim for unintentional infringement;" the court therefore granted the Arizona

band's motion to dismiss the claim alleging unfair and deceptive trade practices.

Sideshow, Inc. v. Mammoth Records, Inc., 751 F.Supp. 78 (E.D.N.Car. 1990) [ELR 12:12:18]

Copyright Infringement/Music.

A Federal District Court in New York has granted summary judgment to Broadcast Music, Inc., in a copyright infringement action against Ed Smith Entertainment Corp. and Edward W. Smith, alleging the unauthorized performance of copyrighted musical compositions at the Melody Fair Theatre in North Tonawanda, New York. Edward W. Smith, the sole shareholder, director and officer of Ed Smith Entertainment Corp., determined

which musical groups would perform at the Melody Fair Theatre during 1988 and 1989.

Judge John T. Curtin found that there was extensive evidence of willfulness; that Edward Smith should be held liable individually in addition to the corporation; and that it appeared that BMI was entitled to a substantial award as to each claim.

In a subsequent ruling, Judge Curtin awarded judgment to BMI against Ed Smith Entertainment Corp, and Edward W. Smith, jointly and severally, for statutory damages in the amount of \$112,000, and attorneys' fees and costs in the amount of about \$8,600.

Broadcast Music, Inc. v. Ed Smith Entertainment Corp.,
Case CIV-89-1223C (W.D.N.Y., July 31, 1990; Oct.
31, 1990) [ELR 12:12:18]

IN THE NEWS

Peggy Lee's damage award in action against Walt Disney is reduced to \$2.3 million

In March 1991, a Los Angeles trial court jury awarded Peggy Lee damages totalling \$3.8 million in the singer's lawsuit against Walt Disney Co. Lee had sought about \$9 million in royalties from the sale of videocassettes of the animated film "Lady and the Tramp." Disney paid Lee \$3,500 for providing the voices for four characters in "Lady and the Tramp;" Lee also co-wrote several songs for the 1955 film.

Lee earlier had prevailed on her claim that a 1952 contract, which barred Disney from selling records or transcriptions of "Lady and the Tramp" without Lee's permission, extended to videocassette sales.

It was reported that the jury awarded Lee about \$2.3 million in damages for breach of contract, \$500,000 for unjust enrichment, and a total of \$100,000 for various unauthorized uses of Lee's name, likeness and voice.

In April 1991, Superior Court Judge Stephen M. Lachs reduced the damage award to \$2.305 million because the parties had agreed, prior to jury deliberations, that Lee would receive only the largest of any amounts awarded by the jury. [May 1991] [ELR 12:12:19]

Jury awards actor damages of \$2 million in action against ABC-TV alleging interference with "Like a Virgin" film project

A Los Angeles trial court jury has awarded Max Baer Jr. damages of \$2 million in the actor's action alleging

that ABC-TV wrongly interfered with his plan to purchase the film rights to the song "Like a Virgin."

Baer purportedly was negotiating with songwriters Tom Kelly and Billy Steinberg when ABC, claiming to have made a prior offer to the writers, notified Baer of its interest in the work. Baer argued that ABC had not entered a contract with Kelly and Steinberg, and that the network's conduct interfered with his prospective economic advantage.

According to news reports, ABC purchased the film rights to the song in early 1991. [May 1991] [ELR 12:12:19]

Jury awards \$10.2 million in damages to Rick Dees' former partner

A Los Angeles trial court jury has awarded Cosmo Cappellino damages totalling \$10.2 million in the former KIIS sales manager's breach of contract action against performer Rick Dees and former KIIS president and general manager Walter Clark.

Cappellino claimed that in 1983, he entered a five year contract with Dees and Clark to produce a radio show, "Rick Dees Weekly Top 40," for national syndication. According to Cappellino, Dees and Clark failed to pay him his 25 percent share of advertising revenue from the show, and also failed to notify him that they had entered an \$11 million syndication contract.

It has been reported that the jury found that Dees and Clark breached their fiduciary duty to Cappellino, and awarded Cappellino compensatory damages of about \$3.4 million, punitive damages of about \$3.7 million from Clark, and punitive damages of about \$3.1 million from Dees. [May 1991] [ELR 12:12:19]

Record company obtains preliminary injunction restraining Young MC from recording for another company

A Los Angeles trial court has granted Delicious Vinyl Records a preliminary injunction barring Marvin Young, known as Young MC, from recording for any other company until October 31, 1994.

In mid-1990, Young MC had sued Delicious Vinyl, alleging various accounting and royalty claims; the company filed a cross-complaint against the performer. In January 1991, according to news reports, Young MC signed a contract with Capitol Records.

Judge William Huss, in issuing the preliminary injunction, required Delicious Vinyl to post a \$3 million bond.

The case was sealed, and no written opinion was available to the ELR. [May 1991] [ELR 12:12:19]

Major League Baseball Players Association announces \$280 million settlement of collusion cases

The Major League Baseball Players Association has settled its collusion cases against the 26 Major League clubs. Various arbitrators found, as the association alleged, that the clubs engaged in collusion against major league free agent players following the 1985, 1986, and 1987 seasons, in violation of the collective bargaining agreement between the association and the clubs.

According to a published notice "to all current and former Major League baseball players who played during the collusion years," the December 21, 1990 agreement will resolve all claims for lost salary; lost special

covenants, such as signing bonuses, performance and award bonuses, trade limitation provisions, and option buy-outs; lost multi-year (or longer multi-year salary) contracts; lost contract extensions or options exercised; lost employment; other non-salary claims; interest; and all other claims for consequential damages, to the extent that such claims were or could have been brought under the basic agreement.

Arbitrators Thomas T. Roberts and George Nicolau will allocate the settlement fund. The association has prepared, and has sought comments on, a proposed "Framework for the Evaluation of Individual Player Claims." After the arbitrators approve a framework, the association will evaluate individual player claims. An arbitrator then will decide how much money, if any, each individual player claimant will receive.

The association's notice required claimants to submit a claims questionnaire by May 20, 1991. Parties without

"good and substantial cause" for failing to complete the questionnaire will lose the right to file a claim and will not receive any of the \$280 million settlement money. [May 1991] [ELR 12:12:19]

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[ELR 12:12:22]