# RECENT CASES

## Judgment entered on jury verdict awarding $1.34 million in damages to terminated ABC executive is affirmed, because new job offered to executive by ABC was not substantially equivalent

In November 1982, American Broadcasting Company terminated Frank Boehm's employment. In a subsequent lawsuit, a Federal District Court jury agreed with the fourteen-year employee that ABC breached an implied employment contract, and awarded Boehm $1.34 million in lost compensation damages as well as $150,000 for negligent infliction of emotional distress. The District Court granted ABC's motion for judgment notwithstanding the verdict with respect to the award of damages for emotional distress.

On appeal, ABC claimed that when Boehm was terminated as vice president of ABC Radio in charge of Los Angeles regional sales, the company offered Boehm a newly created position at ABC and thus no longer was liable for any further damages. The base salary of the new position was the same as Boehm's prior base salary. However, Boehm had earned commissions in the prior position, and the parties disagreed about the equivalence of the total compensation. ABC and Boehm also disagreed about the equivalence of the responsibilities involved, particularly since in the new position, Boehm would have reported to his replacement in his former job. Apparently, the new position never was filled, and Boehm questioned the legitimacy of the offer of reemployment.

A Federal Court of Appeals has affirmed the judgment entered on the verdict. Judge Jerome Farris found that there was substantial evidence in the record to support the jury's finding that Boehm acted reasonably to mitigate damages, and that ABC did not establish the substantial equivalence of the new position.

Boehm v. American Broadcasting Company, Inc., Case No. 89-55846 (9th Cir., Mar. 27, 1991) [ELR 13:1:3]

---

## Former MCA employee may proceed with wrongful discharge claim

George A. Collier may sue MCA, Inc. for wrongful discharge, a California appellate court has ruled.

Collier, who worked for MCA for ten years, became the West Coast regional manager based at a distribution center responsible for shipping phonograph records and other material, at no cost to the recipient, for promotional purposes. The products, as described by Judge

Epstein, were known as "cleans" because they were not marked with any notation limiting them to non-sale or promotional purposes only.

In early 1984, Collier claimed that he noticed that certain recipients of large quantities of "cleans" did not ordinarily handle that type of product. Collier requested copies of all shipping orders for the product, and reported to higher management his suspicions of illegal conduct. MCA fired Collier in June 1984 for failing to perform his job adequately.

Collier sued the company alleging wrongful termination, breach of the covenant of good faith and fair dealing, and breach of implied contract.

Judge Epstein noted that although an employment contract of indefinite duration generally is terminable at the will of either party, "a public policy basis for a wrongful discharge action also has been recognized where an employee is discharged after complaining to his or her employer about working conditions or practices which the employee reasonably believes to be unsafe." The court declared that Collier's report served not only MCA's interests, but the public interest in deterring crime and as such was a disclosure of "illegal, unethical or unsafe practices" which would support a tort action for wrongful discharge.

Collier apparently claimed that the alleged wrongdoing might deprive MCA recording artists of royalty payments for the improperly distributed products; that taxes might be due for "cleans" that were improperly sold; and that retailers who had to pay for the MCA products might have been at a competitive disadvantage in pricing the products. It was emphasized that the potential violation of federal antitrust laws and California laws prohibiting bribery and kickbacks affected members of the public, as well as MCA.

Judge Epstein directed the trial court to issue an order overruling the demurrer to Collier's cause of action for wrongful discharge.

Collier v. Superior Court, Case No. B050670 (Ca.Ct.App., Mar. 26, 1991) [ELR 13:1:3]

---

## Dallas television station news personnel are entitled to overtime pay

Nineteen general assignment reporters, producers, directors, and assignment editors employed in the news and programming departments of television station KDFW-TV in the Dallas-Fort Worth area sued the station alleging that they were required to work more than forty hours per week without overtime pay, in willful violation of section 7 of the Fair Labor Standards Act.

A Federal District Court held that the staff members were not exempt from section 7 as bona fide executive, administrative, or professional employees and that KDFW had violated the statute. However, the court found that the station did not act willfully and therefore was not liable for damages beyond the applicable two year statute of limitations.

Federal Court of Appeals Judge Alvin B. Rubin, after discussing the appropriate standard of review, agreed with KDFW that determining an employee's "primary duty" does not depend on calculating the amount of time each day an employee spends on exempt and nonexempt work. But the court did not agree that the District Court misconstrued the concept of primary duty; the court did not base its ruling solely on the amount of time the station's employees spent at various tasks, but carefully assessed the nature of each of the job classifications at issue.

Judge Rubin pointed out that the District Court "painstakingly catalogued the tasks performed by each type of employee, and related how each task contributed to producing a KDFW newscast." Accordingly, the Court of Appeals found no error.

Judge Rubin then reviewed the District Court's characterization of each job category. The court had found that KDFW failed to prove that the work constituting its reporters' primary duty was original or creative in character. The court recognized that general assignment reporters may be exempt creative professionals, and that the station's reporters "did, from time to time, do original and creative work." But the station management set the reporters' approach to their day-to-day work, and the daily stories were "neither analytic nor interpretive nor original." The evidence supported the inferences drawn by the court, and, based on those inferences and the underlying historical facts, the court did not err in concluding that the reporters were not exempt professionals. KDFW's news producers were not exempt either as creative professionals, administrators, executives, or a combination thereof, ruled Judge Rubin, nor were the station's directors or assignment editors. The directors may have been highly skilled coordinators, but they were not exempt managers.

According to news reports, the employees may be entitled to receive about $250,000 in overtime payments.

Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) [ELR 13:1:3]

---

**Former Detroit Lions football players must arbitrate claims against team although claims arose after expiration of collective bargaining agreement**

A Federal District Court in Michigan has dismissed the actions of football players Angelo T. King and Stanley Edwards against the Detroit Lions.

In 1987, King entered a one year contract with the team for a salary of $135,000, and Edwards signed a one-year, contract for $100,000. The players became members of a collective bargaining unit; the unit's representative was the National Football League Players Association.

The 1982 collective bargaining agreement negotiated by the association with the National Football League Management Council expired in August 1987; the parties continued to operate under the terms of the 1982 agreement during negotiations for a new agreement.

In October 1987, King allegedly suffered an injury while playing in a Lions football game. Soon after, the team terminated King's individual player contract. The player filed a grievance under the relevant provisions of the expired collective bargaining agreement. Edwards apparently underwent experiences very similar to those encountered by King.

King and Edwards claimed that since their employment was terminated, the team refused to pay their salaries or to provide the benefits specified under their contracts, and that the team violated the collective bargaining agreement by terminating their contracts while they were allegedly injured.

For purposes for the motion to dismiss, the players set aside those portions of their claims which were based on their individual player contracts, admitting that the claims arising from the contracts were subject to arbitration.

The court rejected the players' argument that the arbitration provisions of the expired collective bargaining agreement did not apply to their claims, but that the court should apply various other provisions of the agreement. Although the claims at issue arose after the expiration of the agreement, the parties continued to operate under the expired agreement, and the arbitration provisions therefore applied to the players' claims.

King v. Detroit Lions, Inc.; Edwards v. Detroit Lions, Inc., 748 F.Supp. 488 (E.D.Mich. 1990) [ELR 13:1:4]

---

**Former football player's tort claims against team are subject to arbitration under collective bargaining agreement**

Former football player Timothy Sherwin was injured during an Indianapolis Colts practice session in July 1988. Sherwin, although experiencing pain, continued to practice because, purportedly, he was informed by team representatives and/or the team doctors "that there was nothing to worry about."

In August 1988, Sherwin was traded to the New York Giants. Subsequently, it was found that the player had a herniated disc in his spine which required surgery; the unfortunate injury ended Sherwin's football career.

When Sherwin claimed that the team failed to provide adequate medical care and intentionally withheld information regarding the true nature of his injury, the Colts responded that the claims were subject to arbitration under Sherwin's player contract and the collective bargaining agreement between the National Football League Players Association and the National Football League Management Council.

A Federal District Court in New York has ruled that Sherwin's state law claims were "substantially dependent" upon an analysis of the collective bargaining agreement, and thus were preempted by section 301(a) of the Labor Management Relations Act.

Jannice Sherwin's derivative claim for loss of consortium was stayed pending arbitration.

Sherwin's claims against the two team doctors were dismissed for lack of personal jurisdiction. The court noted, in part, that the doctors' only contacts with New York were annual trips to Buffalo when the Colts played the Buffalo Bills.

Sherwin v. Indianapolis Colts, Inc., 752 F.Supp. 1172 (N.D.N.Y. 1990) [ELR 13:1:5]

---

**Sculpture of couple holding eight puppies infringes copyrighted photograph**

In 1980, Art Rogers photographed Jim and Mary Scanlon and their eight puppies. The photograph was published in a local newspaper, exhibited at a museum and reproduced as a notecard.

Jeff Koons opened a sculpture exhibition in New York in November 1988; the exhibition included a polychromed wood sculptural version of the photograph. Koons sold an edition of three of the "String of Puppies" sculptures for a total of about $365,000.

A Federal District Court in New York has granted summary judgment to Rogers in his copyright infringement claim against Koons. Koons had argued that his use of the photograph involved only noncopyrightable elements of the work. Judge Charles S. Haight noted that Koons did not state which non-protectible factual information the artist used. "[T]he manner in which Rogers arranged his subjects and carried out his photographer's art constitute[d] a protectible original act of expression," stated the court. Judge Haight then noted that Koons' sculpture was a derivative work, and that Rogers had the exclusive right to authorize any such work; the court rejected the argument that a sculpture cannot, in law, infringe a copyrighted photograph.

There was no question that "an average lay observer" would recognize the sculpture as "having been appropriated from" the photograph, stated Judge Haight, who proceeded to find that Koons' use of the photograph was not a fair use. Koons' sculpture did not criticize or comment upon Rogers' photograph, observed the court-"it simply appropriates it." Koons' use of the photograph was of a commercial nature; the photograph was a creative work "more closely akin to fiction;" the entire work was appropriated; and there was a market for new versions or new uses of the photograph which Koons' use "clearly undermine[d], found the court, in concluding that Rogers was entitled to injunctive relief and damages in an amount to be determined at trial.

Rogers v. Koons, 751 F.Supp. 474 (S.D.N.Y. 1990) [ELR 13:1:4]

---

**Artist's copyright and trademark infringement claims against Omni magazine are dismissed, but artist may proceed with claim that photograph was work made for hire or work of joint authorship**

In the course of preparing a poster for an exhibition to commemorate the fortieth anniversary of the bombing of Hiroshima, Minoru Morita commissioned Milon Townsend to create a glass sculpture of a "shattered" dove. Kan Nakai then took photographs of the sculpture for the poster.

In 1988, Kan authorized Omni magazine to use one of the dove photographs that was not used in the poster.

When Morita sued the photographer and the magazine alleging various causes of action, Federal District Court Judge Cedarbaum first observed that Morita's application for copyright registration did not mention either the sculpture or Townsend. Rather, Morita described the material in which he claimed a copyright as "lithography and underlying photograph."

The court expressed the view that there was a "substantial" question as to whether the dove sculpture-consisting of unassembled pieces of glass-was fixed enough to be copyrightable. And, stated Judge Cedarbaum, it was "doubtful" that by registering the poster, Morita also registered the underlying sculpture. Morita's claim that he was the author of the sculpture was based on an employment relationship not mentioned in the registration application. The application also indicated that the artist had disclaimed that he was registering the poster as a derivative work or that he was registering a copyright in any preexisting material. In all, the application for registration of the poster did not serve to register Morita's copyright in the dove sculpture.

The court then pointed out that the layout of the sculpture in the photograph used in the poster was different from the arrangement of the pieces of glass in the Omni cover photograph. Thus, even if the underlying sculpture was registered by the application for the poster, the sculpture registered was a different work from the one purportedly copied by the magazine parties. Omni did not use the work that Morita claimed to have registered "by implication," stated the court, and Morita had not attempted to register the arrangement of the pieces of glass in the photograph used by the magazine. Morita therefore was not entitled to sue for copyright infringement based on owning the copyright in the underlying sculpture.

The court refused to grant summary judgment to Morita on the artist's claim that Kan's photographs were works made for hire, finding that there was a material factual dispute between the parties about several aspects of their working relationship. Issues of fact also precluded granting the parties' motions for summary judgment on the issue of joint authorship.

With respect to the Lanham Act, the court rejected Morita's claim that the photograph used by Omni was inferior to the photograph used for the poster, and that the use of the allegedly inferior work would damage his reputation.

Morita next challenged the magazine's use of the photograph in connection with an apparently pro-nuclear energy article and headline, when the dove sculpture and the photograph were created for a different purpose.

Judge Cedarbaum stated that Morita's claim actually was a claim in the nature of copyright that did not "fit into the mold of unfair competition...The Lanham Act should not be distorted to provide a remedy for a failed claim of copyright infringement."

Morita further claimed that Omni violated the false designation of origin provision of the Lanham Act by failing to include his name in the credit for the photograph used on the magazine cover. Kan was identified as the photographer of the cover photo. The magazine did not have a duty of express attribution, and Morita did not allege that he and Kan were in competition-a requisite element of a false designation claim.

The court concluded by dismissing Morita's claim under the New York Arts and Cultural Affairs Law. The cover photograph did not mutilate or alter Morita's work at all, stated Judge Cedarbaum, and juxtaposition with a magazine headline is not an alteration, defacement, mutilation or modification.

Morita v. Omni Publications International, Ltd., 741 F.Supp. 1107 (S.D.N.Y. 1990) [ELR 13:1:5]

---

**Cabbage Patch Kids licensee may be entitled to share of $7 million paid to copyright holder by Topps Chewing Gum to settle Garbage Pail Kids matter**

In 1983, Original Appalachian Artworks, the owner of the Cabbage Patch Kids copyrights and trademarks, granted S. Diamond Associates a license to market a Cabbage Patch Kids puffy sticker product. Diamond agreed to pay Original Appalachian a fee of $45,000 and ten percent of sales revenues.

In 1986, Original Appalachian obtained a preliminary injunction (ELR 8:5:9) barring Topps Chewing Gum from selling Garbage Pail Kids products, including sticker cards; the characters on the Topps items featured characters that were "strikingly similar to the Cabbage Patch Kids, but depicted in less than flattering situations." Topps eventually agreed to a $7 million settlement payment; Original Appalachian agreed not to sue Topps, and not to authorize any of its licensees to sue Topps, for copyright or trademark infringement related to the Garbage Pail Kids.

Diamond had sought to intervene in the above proceeding before the court dismissed the case, but the District Court denied Diamond's motion.

Original Appalachian then sought a declaratory judgment that Diamond had no interest in the proceeds of the settlement agreement. The District Court held that Diamond had no right under the licensing agreement to a share of the compensation recovered by Original Appalachian from an infringer, and granted summary judgment to Original Appalachian.

A Federal Court of Appeals has reversed the District Court's decision. Chief Judge Tjoflat noted that if, in marketing the Garbage Pail Kids stickers, Topps appropriated Diamond's exclusive license to manufacture stickers, then Diamond would be entitled to the proportion of the settlement representing that appropriation. Alternatively, Diamond might be entitled to the proportion of the settlement representing the company's injuries as a result of Topps' sales, even if that injury did not relate to a right that the licensing agreement expressly granted to Diamond. Original Appalachian had a fiduciary obligation not to allow its copyright to be used to the detriment of its licensees. Judge Tjoflat stated that if Diamond was injured by Topps' conduct-even if that conduct was not an appropriation of Diamond's exclusive license-then Diamond would be entitled to the proportion of the settlement representing that injury.

The matter was remanded for a determination of the issue of whether, and to what extent, Diamond suffered injury as a result of Topps' conduct.

Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc., 911 F.2d 1548 (11th Cir. 1990) [ELR 13:1:6]

---

**Publisher who reprinted books without permission may be liable for conversion of author's property interest in his name and reputation, and author may state claim in quasi-contract**

Richard Nossen, a former Internal Revenue Service official, wrote two books concerning the investigation of financial crimes. When Michael Hoy, a mail order publisher, offered for sale a publication entitled "Advanced Investigative Techniques for Private Financial Records," Nossen sued the publisher for the unauthorized use of his books.

Nossen claimed that Hoy directed his publications to individuals planning to engage in criminal activity, that Hoy intentionally distorted the characterization of Nossen's works, and that the public might believe that Nossen approved of Hoy's publication of the book.

Nossen sued Hoy for the unauthorized use of his name under Virginia law, for the unlawful conversion of Nossen's property (his name, reputation and work), and for unjust enrichment. A Federal District Court in Virginia, after rejecting Hoy's motion to transfer the action to the state of Washington, found that under Virginia law, Nossen stated a claim for the conversion of his property interests in his name and reputation. Since

Washington law might apply to the conversion claim, the court determined that Washington, like Virginia, recognized "the property interest in an individual's name-his or her identity-that can be unlawfully converted..."

Judge Merhige dismissed Nossen's claim for the conversion of his property interest in the books. The United States Government, rather than Nossen, held all such rights to the books.

The court concluded by finding that to the extent that Nossen alleged that Hoy used his name and reputation without permission and knowingly received a benefit from that use, Nossen stated a claim for quasi-contract under both Virginia and Washington law.

Nossen v. Hoy, 750 F.Supp. 740 (E.D.Va. 1990) [ELR 13:1:7]

## Judgment on jury verdict awarding book designer $10,000 in punitive damages on conversion claim against author is upheld

Book designer John Laursen estimated that the cost of producing a book written by Jeanne Morris would be about $18,000 to $24,000 based on 1,200 soft-bound copies of a 320 page book, plus an additional amount for slipcovers. However, as Laursen was working on the project, Morris continued to revise the book. Laursen notified the author that the changes would increase the cost of publication. At one point, thirty pages of revisions arrived when the originals of the pages already were at the typesetter; Laursen had to prepare typographic specifications for the new material and have them typeset, proofread and reviewed again.

A 300 page mock up was completed, and Laursen advised Morris that further editorial revisions would be expensive - Morris proceeded to make changes on 200 of the 300 pages. Laursen prepared another entire mock up of the book, with all of the revisions, and informed Morris that the charges incurred were about $15,000 and that the costs for paper, printing and binding one thousand hard cover books consisting of 384 pages would be about $15,200.

Morris decided not to complete the project, claiming that the mock up contained errors and that Laursen had made unauthorized changes in the manuscript. The designer, deducting the $9,000 he already received, sent Morris a bill for about $5,700.

Morris refused to make any additional payments, kept the mock up, made more changes, and had the book printed. "Numerology: Spiritual Life Vibrations," was substantially the same as Laursen's mock up. In January 1988, Morris demanded that Laursen return the $9,000 payment he had received.

When Laursen sued Morris, alleging various causes of action, a jury returned a verdict awarding the designer about $5,700 in general damages and $10,000 in punitive damages on his conversion claim; Laursen elected to recover for conversion only.

An Oregon appellate court has upheld the judgment entered on the verdict, stating that the jury could have found from the evidence that Morris converted Laursen's interest in the mock up. Laursen designed, compiled, laid out and prepared the book for publication and his work was reflected in the mock up. There was evidence that Morris took Laursen's work product, and, with only slight modifications, reproduced the work and sold it to third parties as a book without fully compensating Laursen. The trial court properly denied the motion for a directed verdict.

Furthermore, stated the court, the jury could have found that Morris procured Laursen's property without fully paying for it and intentionally used the property "with the knowledge that [Morris had] not paid and would not pay for it." The trial court correctly submitted the claim for punitive damages to the jury.

Laursen v. Morris, 799 P.2d 648 (Ore.App. 1990) [ELR 13:1:7]

---

**Federal District Court in Tennessee enjoins allegedly infringing use of package design for children's product**

Someday Baby, Inc., used a design known as the "Puzzle Piece" for packaging a book and a related cassette recording. The plastic case containing the cassette tape would fit within a window on the front of the book's package, and the artwork on the cassette case completed a larger image on the box in the same way, as described by Federal District Court Judge John T. Nixon, "that a jigsaw puzzle is completed by its final piece."

JTG of Nashville, Inc., the exclusive distributor for Someday Baby in the book industry, began selling its own products using the puzzle piece package design.

When Someday Baby sued JTG for unfair competition under section 1125(a) of the Lanham Act, Judge Nixon first found that there was a substantial likelihood of confusion between the products at issue. In considering the factors relevant in determining the likelihood of confusion issue, the court found that the design used by both parties was extremely similar; that the design concept was "sufficiently novel and memorable that two products packaged in this manner are likely to appear extemely similar, if not identical, in their packaging;" and that the products themselves were extremely similar, and were directed toward the same target audience. The puzzle piece design appeared to the court to be an extremely strong mark and was "easily the most recognizable and distinctive characteristic of the packaging."

Judge Nixon then found that the packaging was primarily decorative rather than functional - the design related entirely to the product's appearance before it was purchased and the packaging had "no effect on the actual product either in terms of cost of production or in terms of quality."

With respect to the issue of secondary meaning, the court noted that Someday Baby has sold over 400,000 units of its product, and although consumers might not associate the puzzle piece design with the company, the court agreed that the buying public would associate the distinctive design with Someday Baby's product and its "good qualities." There was a sufficient likelihood of Someday Baby proving this element at trial to warrant the granting of injunctive relief.

Judge Nixon found that Someday Baby would suffer irreparable harm in the absence of injunctive relief, and that such harm outweighed any harm to JTG, particularly since JTG began marketing three of the products at issue after the lawsuit began. And the public interest was best served "by protecting the right of manufacturers to identify their products through the creative use of trade dress." The court therefore enjoined JTG from marketing or selling the company's own products which used the "puzzle piece" package design pending the resolution of the case.

Someday Baby, Inc. v. JTG of Nashville, Inc., 744 F.Supp. 811 (M.D.Tenn. 1990) [ELR 13:1:8]

## Photographer's claim against advertising agency does not "arise under" copyright laws

Wells, Rich, Greene, Inc. agreed to pay Bodi Lukasewych $15,500 to photograph hotel settings for the agency's client, ITT Sheraton. The agency planned to use the photographs in advertising materials. Lukasewych claimed that although he received his fee, the agency did not fully reimburse his expenses. The photographer sued Wells, Rich, Greene for, among other causes of action, copyright infringement, and breach of contract, claiming a balance due of about $10,000.

Federal District Court Judge Haight has found that Lukasewych's claim did not, in any meaningful sense,"arise under" the federal Copyright Act. Although reciting the "copyright litany" in his first cause of action, the photographer proceeded to allege "quintessential state law contract claims arising out of a failure to reimburse expenses and a dishonored check."

Lukasewych claimed that since Wells, Rich, Greene did not pay him the purportedly agreed-upon amount, the agency's license to use his copyrighted photographs did not become effective and the agency therefore infringed his work. But the court found that the purchase orders prepared by the agency and signed by Lukasewych, rather than the photographer's unsigned handwritten estimate of his expenses, constituted the contract between the parties. The purchase orders expressly provided that they were "complete," and contained "all of the terms, conditions and covenants pertaining to the materials or work to be performed hereunder..." and superseded any prior writings.

It was observed that the photographer did not claim that the agency exceeded the use licensed by the purchase orders.

Judge Haight dismissed the complaint without prejudice and without costs for want of federal subject matter jurisdiction.

Lukasewych v. Wells, Rich, Greene, Inc., 747 F.Supp. 1089 (S.D.N.Y. 1990) [ELR 13:1:8]

---

**Unauthorized use of family's photograph to illustrate magazine article about fertility research does not violate New York Civil Rights Law, rules New York Court of Appeals**

In June 1988, Omni magazine published an article entitled "Caffeine and Fast Sperm;" the article discussed research findings concerning the effect of caffeine on in vitro fertilization rates. The caption beneath a photograph accompanying the article read, in part, "Want a big family? Maybe your sperm needs a cup of java in the morning." The photograph depicted Joseph and Ida Finger surrounded by their six children, but neither the article nor the caption mentioned the family's name or indicated that the couple used caffeine or that the children developed through in vitro fertilization.

The Fingers sued the magazine under sections 50/51 of the New York Civil Rights Law for the use of their photograph without consent. A trial court decision granting summary judgment to Omni was upheld by an appellate court (ELR 12:3:17).

The New York Court of Appeals has agreed with the magazine's argument that the use of the photograph in conjunction with the article did not violate sections 50/51 because the picture was not used for trade or advertising purposes, but to illustrate an article on a subject of legitimate public interest. The Fingers argued that their photograph had no real relationship to the article because their children were not conceived by in vitro fertilization, and the family did not participate in the research project described in the article.

Judge Fritz W. Alexander 2d stated that the article's "theme" of fertility was reflected in the caption beneath the photograph and in the images used, and declined to find, as a matter of law, that there was no "real relationship" between the content of the article and the photograph.

Finger v. Omni Publications International Ltd., New York Law Journal, p.21, col. 3 (N.Y., Dec. 27, 1990) [ELR 13:1:9]

---

**USA Network and Jones Intercable settle dispute over affiliation contract**

In 1989, a Federal District Court in New York denied USA Network's motion for a preliminary injunction in the company's action against Jones Intercable, Inc. alleging the breach of an affiliation contract (ELR 11:6:18).

In early 1990, Judge Kenneth Conboy reviewed the background of the dispute. Judge Conboy noted that USA had alleged that Jones breached its contract by terminating USA from two-thirds of the company's systems in 1988, and from the remainder of its systems by the beginning of 1989. Jones was contractually obligated to provide the USA Network to at least seventy-five percent of its aggregate subscribers. A side letter did not alter Jones' obligations, stated the court, and Jones breached its contract with USA when it cancelled USA from two-thirds of its subscribers in 1988.

The court further found that a termination notice given by Jones was ineffective, and that the company breached the affiliation contract by cancelling USA from the remainder of its subscribers in January 1989.

Judge Conboy determined that USA was entitled to summary judgment on its claims that Jones breached the "best efforts," promotion, and marketing obligations of the affiliation contract; that Jones was required to indemnify USA for all damages resulting from the contractual breach; and that USA was not entitled to summary judgment on its tortious interference claim. The court denied Jones' motion to dismiss USA's common law fraud claim, but granted the company's motion to dismiss USA's RICO claim.

In March 1991, according to news reports, the USA Network and Jones Intercable agreed to settle their dispute; the terms of the settlement were not revealed, but the parties apparently negotiated a new long-term affiliation contract.

USA Network v. Jones Intercable, Inc., 729 F.Supp. 304 (S.D.N.Y. 1990) [ELR 13:1:9]

____________________

**Federal Communications Commission's order granting bona fide newscast exemption to equal time rules for segments of "The McLaughlin Report" is upheld**

In 1988, the producer of "The McLaughlin Group" television program asked the Federal Communications Commission to declare certain segments of the program exempt from the "equal time" requirements of section 315 of the Communications Act.

The Commission's Mass Media Bureau ruled that the news reporting segments of the program were bona fide newscasts exempt from the equal time provisions.

The Telecommunications Research and Action Center had challeged the exemption, claiming that any appearances by candidates during the brief news segments were "fleeting uses" to which section 315 did not apply. According to the organization, a Commission ruling on the bona fide newscast issue was unnecessary.

The organization also contended that the Bureau erred in
extending the exemption beyond traditional news broadcasts to a panel program, and by applying the exemption to a program that was not under the editorial control of a licensee or network.

The Commission affirmed the Bureau's ruling.

In its petition seeking review of the Commission order, the organization argued only that the Commission misconstrued section 315(a)(1) by applying the bona fide newscast exemption to the news reporting segments of the program.

Federal Court of Appeals Judge Harry T. Edwards first noted that the organization generally has standing to challenge Commission orders under the doctrine of "viewer standing." The doctrine permits an individual viewer, or a membership organization representing viewers, to seek review of Commission actions affecting the rights of the public to be informed. In this case, the organization alleged that the exemption obtained by the program would deprive member-viewers of hearing alternative viewpoints. Judge Edwards then adverted to the "somewhat unusual posture" of the case, in that the organization previously had argued, in part, for the outcome it was seeking to challenge. The court agreed with the Commission that, based on the record, the organization suffered no injury and therefore lacked standing to seek review of the Commission's decision. The contentions that the program was both excepted from the equal time rule under the "fleeting use" doctrine, and subject to the rule because it was not a bona fide newscast were "patently inconsistent."

Judge Silberman concurred in all but the penultimate paragraph of the court's opinion, in which Judge Edwards commented on possible future challenges by the organization in the event of a change in the program's format, describing the paragraph as "pure dicta which is patently unnecessary for our disposition of this case."

Telecommunications Research and Action Center v. Federal Communications Commission, 917 F.2d 585 (D.C.Cir. 1990) [ELR 13:1:10]

---

**Copyright Office's refusal to retroactively impose interest charges on late cable royalty payments is upheld**

In 1986, the National Cable Television Association, Inc., and Cablevision, a cable system operator, sued various copyright owners and the Motion Picture Association of America seeking a declaratory judgment with respect to certain terms in the cable compulsory license.

The compulsory license allows cable systems to retransmit the signals of broadcast television stations containing copyrighted programs, provided that the systems file certain financial statements and pay a statutory royalty fee. The fee generally is based on the number of distant signals the cable system transmits and the system's gross receipts from subscribers, with smaller cable systems paying a flat statutory rate.

The cable systems challenged the Copyright Office's definition of gross receipts, arguing that including in such receipts the fees generated by nonbroadcast programs was unreasonable. A Federal Court of Appeals found that the Copyright Office's interpretation of gross receipts was consistent with the legislative intent, provided a clear manner of computing royalty payments, and was a reasonable interpretation due judicial deference (ELR 10:1:8). After the Court of Appeals decision, the Copyright Office collected about $107 million in underpaid or late fees incurred during the course of the litigation, but did not collect interest on the payments.

The Motion Picture Association requested the Copyright Office to issue a rule requiring cable operators to pay interest on the late or underpaid fees; as calculated by the MPAA, the interest on the fees would be about $15 million. In 1989, the Copyright Office imposed interest charges on prospective underpaid royalties only.

A Federal District Court has found that the Copyright Office's prospective application of the interest regulation was "necessary and reasonable." The Copyright Office had pointed out that its decision would not prevent the copyright owners from taking cable operators to court in order to obtain a judicial ruling that the systems were required to pay interest charges on the late payments. Judge Stanley S. Harris concluded by observing that retroactivity is "a disfavored legal principle, and the Copyright Act does not grant retroactive rulemaking authority."

Motion Picture Association of America, Inc. v. Oman, 750 F.Supp. 3 (D.C.Cir. 1990) [ELR 13:1:10]

---

**Nassau Coliseum may not ban distribution of noncommercial leaflets**

In July 1988, Mitch Paulsen and Andrew Nesselroth, members of an evangelical group, distributed religious leaflets outside the Nassau Memorial Veterans Coliseum during a Judas Priest rock concert. A Nassau County police officer informed Paulsen that he was not permitted to distribute the leaflets. When Paulsen protested, the officer forcibly placed him in a patrol car and took him to a Coliseum office. A Coliseum management official advised Paulsen of the ban on distributing literature on Coliseum sidewalks. However, Paulsen and Nesselroth were not charged with violating any law, and were informed that they could retrieve their leaflets from the police following the concert.

When Paulsen and Nesselroth sought injunctive relief, a Federal District Court in New York granted their motion, finding a serious likelihood that their First and Fourteenth Amendment rights to engage in expressive activity had been violated. The court directed the Coliseum management company to permit the distribution of noncommercial literature on the outside grounds of the arena, subject to reasonable safety regulations.

A Federal Court of Appeals has affirmed the District Court decision. The court noted that prohibitions on leafletting and on the dissemination of religious views contravene core First Amendment values, thus satisfying the initial requirement for securing injunctive relief, i.e., irreparable harm.

The court then observed that the Nassau County Charter, the instrument by which the Coliseum was established, and a Nassau County law regulating citizen conduct on Coliseum property indicated the county's intent to dedicate the Coliseum to "a broad array of public and expressive uses." Furthermore, the lease between Nassau County and the management company expressly declared that the Coliseum was to be operated in the interests of the county. The District Court had found that the county parties failed to demonstrate a consistent practice of limiting noncommercial, expressive activity - the grounds of the Coliseum have been used for parades, political rallies and speeches, religious weddings, circuses, and charitable events. And many groups, prior to a change in management in 1988, were regularly permitted to solicit contributions or distribute literature.

A management ban on noncommercial distribution was "not enough to convert the Coliseum into a nonpublic forum," stated Judge Irving R. Kaufman, who proceeded to cite the District Court's finding that the Coliseum area could accommodate a wide variety of expressive activities at the same time. It also was observed that the leaflets were not likely to disturb event patrons; that the nature of any intrusion was minimal; and that the leafletting was not likely to interfere with "the mood or the quality" of Coliseum events. In all, the District Court correctly classified the Coliseum as a public forum by government designation. Judge Kaufman concluded by stating that "In many cities and suburban environments like Long Island, the municipal stadium has replaced the town meeting hall and the public square as a gathering place for large segments of the population to engage in meaningful discourse. If free public discussion is to maintain its vitality in our national life, we must remain vigilant against unnecessary restraints on our liberties, particularly those arbitrarily imposed by government fiat."

Paulsen v. County of Nassau, New York Law Journal, p. 21, col. 3 (2d. Cir., Feb. 4, 1991) [ELR 13:1:11]

---

## Guggenheim Museum's action to recover Chagall work from good faith purchaser is not time-barred

New York Court of Appeals Chief Judge Sol Wachtler, proceeding from the premise that in the New York City art market "illicit dealing in stolen merchandise is an industry all its own," has found that the Solomon R. Guggenheim Foundation (the operator of the Guggenheim

Museum) may seek to recover a Chagall gouache from a good faith purchaser.

As reported at ELR 12:3:13, sometime in the mid-1960s, a watercolor painting, or gouache, by Marc Chagall, was stolen from the museum. The 1912 work, worth about $200,000, was a study for Chagall's oil painting, "Le Marchand de Bestiaux" ("The Cattle Dealer"). Solomon R. Guggenheim donated the gouache to the museum in 1937.

Rachel Lubell and her husband, now deceased, purchased the work in 1967 from an art gallery for $17,000. Mrs. Lubell claimed that before the museum demanded the return of the gouache in 1986, she had no reason to believe that the painting had been stolen. The invoice and receipt indicated that the gouache had been in the collection of a certain individual. (At some unspecified later date, it was found that the individual was the museum employee suspected of stealing the work.) The

Lubells exhibited the painting at the gallery in 1967 and in 1981.

In 1985, a slide of the work was sent to an auction gallery for appraisal. The museum then discovered the location of the piece, demanded its return, and, in 1987, sued for replevin.

A New York trial court granted Lubell's motion for summary judgment on the ground that the cause of action was time-barred. A New York appellate court reversed the trial court's decision, finding that the question of whether the museum acted reasonably in attempting to locate the work was an issue of fact relevant to the defense of laches; the action therefore should not have been dismissed as barred by the statute of limitations. And a laches claim, noted the court, would require Lubell to show that she had been prejudiced by the museum's purported delay in demanding the return of the gouache.

The appellate court granted leave to the Court of Appeals, certifying the question of whether the appellate court's order, modifying the order of the trial court, was properly made. Judge Wachtler agreed with the appellate court that the timing of the museum's demand for the gouache and Lubell's refusal to return the work were the only relevant factors in assessing the merits of the statute of limitations defense. In New York a cause of action for replevin against the good faith purchaser of a stolen chattel accrues when the true owner demands the return of the chattel and the person in possession refuses to return it. In a seeming anomaly, when the stolen object is in the possession of the thief, the statute of limitations runs from the time of the theft. In DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987; ELR 10:1:6), cert. denied, 486 U.S. 1056, a case relied on by the trial court, the Second Circuit, noting that New York law treats thieves and good faith purchasers differently, imposed, on the basis of that different treatment, a reasonable diligence requirement on the true owners of stolen art.

Judge Wachtler declared that the Second Circuit "should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the statute of limitations." The demand and refusal rule for determining the accrual of replevin claims is, according to the court, the rule that affords the most protection to the true owners of stolen property. It was pointed out that the true owner, upon discovering the location of the lost property, cannot unreasonably delay a demand for its return.

The court observed that although there was a dispute concerning when the Guggenheim discovered that the gouache had been stolen, it was undisputed that the museum did not inform other museums, galleries or art organizations about the theft, and did not notify the police, the FBI, or any other law enforcement authorities. However, the parties disagreed about whether the gouache would have been found if the theft had been publicized; this dispute demonstrated to the court the difficulty of specifying the type of conduct that would be required for a showing of reasonable diligence by the true owner of a work of art. Among the factors relevant to a search for lost property would be the value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen. It would be difficult, if not impossible, stated Judge Wachtler, "to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner."

The court suggested that placing the burden of locating stolen art works on the true owner and foreclosing the rights of the owner to recover the property if the burden is not met would "encourage illicit trafficking in stolen art...this shifting of the burden onto the wronged owner is inappropriate...the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."

Turning to the instant case, the court cautioned that it was not stating that the museum's conduct no longer was an issue. The trial court, in the context of Lubell's laches defense, may consider the argument that the museum did not undertake a reasonably diligent search for the missing work, and Lubell will have the opportunity to establish prejudice.

The limited record before the court did not indicate that the equities favored either party. The Lubells investigated the provenance of the gouache before the purchase by contacting the artist and his son-in-law directly, a fact which also may be considered in connection with the laches defense. But because it was impossible to conclude that the museum's conduct was unreasonable as a matter of law, the motion for summary judgment was properly denied. The burden of proving that the painting was not stolen was placed, properly, on Mrs. Lubell.

Solomon R. Guggenheim Foundation v. Lubell, 569 N.E.2d 426 (N.Y. 1991) [ELR 13:1:11]

---

**Art buyers' breach of warranty claims against Hawaii gallery arising from sale of allegedly counterfeit Salvador Dali works is not time-barred**

Beginning in 1978, Edward M. Balog and other parties purchased from Center Art Gallery in Hawaii various works of art purportedly created by Salvador Dali; the buyers paid a total of about $36,000 for the pieces. The gallery stated, in "Certificates of Authenticity" sent to the buyers from 1979-1982 and in 1987, that the works were produced by Dali either as exclusive originals or as limited editions, and that the pieces were increasing in value. When the art buyers sued the gallery, alleging a cause of action for breach of an express warranty under the Uniform Commercial Code arising from the sale of purportedly counterfeit works of art, Center Art cited the statute of limitations-the last purchase by the buyers was in 1981, but the lawsuit was not filed until 1989.

A Federal District Court in Hawaii first noted that the gallery parties already had been criminally convicted of mail and wire fraud for conduct similar to that alleged by the Balog parties. Senior District Court Judge Pence, after reviewing methods of art forgery, methods of detection, and the protection available to buyers given the expense of authentication, found that the gallery parties had not made any attempt to disclaim their opinion that the works at issue were created by Dali. The buyers justifiably relied on the gallery parties' expertise and superior knowledge, and the gallery encouraged such reliance and belief in the authenticity of the art work by continuing to solicit additional sales and by continuing to send the buyers "Certificates of Authenticity." The buyers thus were entitled to seek damages based on a violation of the express warranties of the Uniform Commercial Code.

The court declared that when parties "are in such a discrepancy as far as information, the capacity to verify that information, and bargaining position, fairness dictates that representations offered by one party with the expectation that they be relied upon by another have some reasonable basis in fact." To the extent that such representations did not possess a reasonable basis in fact, a violation of the express warranties might be found.

In turning to the gallery parties' argument that the statute of limitations barred the buyers' claims, Judge Pence expressed "strong disagreement" with the approach taken by other federal courts, and held that "in the case of artwork which is certified authentic by an expert in the field or a merchant dealing in goods of that type, such a certification of authenticity constitutes an explicit warranty of future performance sufficient to toll the U.C.C.'s statute of limitations." Judge Pence cautioned that the court's holding would apply narrowly to works of art subject to the Uniform Commercial Code. In the court's view, questions about the authenticity of works of art normally arise only at some future time, usually the time of resale.

Center Art's warranty "necessarily" guaranteed the present and future existence of the art works as authentic works by Dali, and, continued Judge Pence, "to force buyers to secure an additional warranty of future performance after an expert had certified a piece as genuine would be not only redundant, but ridiculous." Each "Certificate of Authenticity" was an explicit warranty that a work was, and would be in the future, a Dali original. Based on the explicit warranty of future performance, the statute of limitations was tolled until the defect in the product was, or reasonably should have been, discovered. The limitations period of a claim brought by a party seeking damages for the breach of such warranty accrues at the time when the breach is discovered or reasonably should have been discovered.

The court also stated that it would view the gallery's conduct as an ongoing course of conduct extending beyond the actual sale of the art works. The buyers' cause of action would accrue at the time of the breach of the gallery parties' warranties, i.e., at the time of the last reiteration of those warranties. In this case, the gallery sent appraisals in 1987; the buyers thus would have had until 1991 to sue for breach of warranty.

The art buyers also argued that the gallery's continuing reiteration of the authenticity claim was affirmative conduct which prevented the buyers from discovering their cause of action-the fraudulent concealment theory. The court agreed that the conduct of the gallery parties tolled the statute of limitations for the period in which those representations continued, and thus the action was not time-barred.

Based on all of the above reasons, the court denied the gallery's motion for summary judgment.

Balog v. Center Art Gallery-Hawaii, Inc., 745 F.Supp. 1556 (D.Hawaii 1990) [ELR 13:1:13]

## Justice White dissents from United States Supreme Court's decision to deny certiorari in action involving racketeering conviction of bookstore owners

The United States Supreme Court has denied a petition for writ of certiorari in the case of Pryba v. United States.

Justice White would have granted certiorari on the issue of the conduct necessary to sustain a conviction under section 1962(d) of the RICO statute.

Dennis and Barbara Pryba and other parties were charged, in part, with racketeering arising from the interstate sale of obscene videos and magazines. As reported at ELR 11:1:12, the Prybas were convicted of conspiring to violate section 1962(a). The jury also returned special verdicts ordering the Prybas to forfeit a warehouse and the inventories of three adult bookstores and eight videotape rental stores.

Section 1962(a) provides in relevant part "It shall be unlawful for any person who has received any income derived...from a pattern of racketeering activity...to use or invest,...any part of such income...in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in...interstate or foreign commerce."

The trial court instructed the jury that to convict the Prybas of RICO conspiracy, the government had to prove that each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of section 1962(a) or that each defendant agreed that another coconspirator would commit two or more acts of racketeering in violation of 1962(a).

In affirming the convictions, a Federal Court of Appeals held that a conviction for RICO conspiracy does not require that the defendant personally agree to commit two or more predicate acts of racketeering, but that it would be sufficient if the defendant agrees to the commission of the predicate acts by another coconspirator.

The United States Supreme Court has denied a petition for a writ of certiorari.

Justice Byron R. White would have granted certiorari on the issue of the conduct necessary to sustain a conviction under section 1962(d) of the RICO statute.

Justice White noted that two Federal Courts of Appeals have held that a RICO conspiracy conviction requires a showing that a party has agreed to personally commit two or more predicate acts. To resolve the conflict, Justice White would have granted certiorari, limited to the foregoing issue.

Pryba v. United States, 900 F.2d 748 (4th Cir. 1990); Case No. 89-1902 (U.S.Sup.Ct., Oct. 15, 1990) [ELR 13:1:13]

## Distributor of sexually oriented materials obtains preliminary injunction barring government officials from bringing multiple prosecutions against company

PHE, Inc., a mail order distributor of sexually oriented magazines and videotapes, appeared as amicus curiae in the case of United States v. Pryba (above). In the summer of 1990, a Federal District Court in the District of Columbia granted PHE a preliminary injunction to prevent various government officials from conducting simultaneous multiple prosecutions and/or multiple consecutive prosecutions for obscenity, from seizing expressive materials, and from issuing criminal subpoenas to coerce PHE into ceasing the distribution of certain sexually oriented materials which the government parties acknowledged would not be found obscene.

Federal District Court Judge Joyce Hens Green first presumed, as alleged by PHE, that the government officials were acting in a coordinated effort to cause the company to face criminal prosecutions in multiple Federal District Courts for the purpose of coercing PHE to stop distributing constitutionally protected materials. Judge Green pointed out that PHE could not adequately protect its First Amendment rights by defending itself simultaneously or seriatim in each separate district in which the company might be indicted, for "the enormous disparity between [PHE's] resources and the resources of the government means, as a practical matter, that [PHE] could be swiftly driven out of business before [it] ever set foot inside a courtroom."

Judge Green further found that PHE's allegations of bad faith and harassment were sufficient to overcome the government's motion to dismiss, and that the allegations showed sufficient bad faith to establish a substantial likelihood of success on the merits of the company's claim that the government parties violated the First Amendment as well as the due process clause of the Fifth Amendment. The government's threats of prosecution were "real and direct," stated the court, in proceeding to find that PHE established irreparable injury and a balance of the equities in the company's favor.

The court enjoined the government parties from permitting indictments to be returned against PHE in more than one federal judicial district within the United States, pending determination of the instant case on the merits, or further order of the court.

PHE, Inc. v. United States Department of Justice, 743 F.Supp. 15 (D.D.C. 1990) [ELR 13:1:14]

## Briefly Noted:

### Copyright Infringement/Music.

A Federal District Court in Montana has granted summary judgment to the owners of several copyrighted musical compositions in an infringement action against Andrew and Mary Ann Andrews, the owners and operators of George Henry's restaurant in Billings. The sound system at the restaurant consisted of an amplifier, tuner, audio cassette deck, and the speakers and wiring originally installed for a public address system. The sound system, during business hours, often was tuned to a local radio station. However, the Andrews refused to obtain a license from ASCAP, claiming that the system was comparable to a home sound system which would be exempt, under section 110(5) of the Copyright Act, from an infringement claim.

Senior Judge Battin found that the copyright owners met their burden of proving copyright infringement. The court then found that although the sound system at the restaurant was installed by an amateur, contained some components that were commonly found in homes, and did not provide optimal sound, the overall system was commercial in nature.

The Andrews "further transmitted" the musical compositions to the public, declared Judge Battin, and had not shown that the size, capacity, and revenues of their restaurant met the statutory "small commercial establishment" classification.

The court awarded the copyright owners statutory damages of $250 per infringement, for a total damage award of $1,500, and granted their request for injunctive relief preventing the Andrews from performing the copyrighted material at issue until the restaurant owners obtained a license. Judge Battin initially denied the copyright owners' request for attorneys' fees and costs based on a finding that there was no showing of "bad faith or frivolity." In ruling upon the parties' motions for reconsideration of various issues, the court agreed with the copyright owners that such a showing was not required to justify an award of attorneys' fees. However, upon reviewing the factors relevant to an attorney fee award, Judge Battin again declined to award the requested fees, stating, in part, that the injunction and fine would "adequately serve the goals of deterrence and punishment."

Hickory Grove Music v. Andrews, 749 F.Supp. 1031 (D. Montana 1990) [ELR 13:1:15]

**Copyright Infringement/Music.**

A Federal District Court in Texas has granted summary judgment to several copyright holders in an infringement action against the owners of three "K-Bob's Steakhouse" restaurants in El Paso, including the K-Bob's on Viscount Street. The restaurant, without having obtained a license, allegedly played radio music for its customers over a loudspeaker system; the "apparatus" consisted of a public address system with a stereo wired into it and eleven speakers installed throughout the premises.

The court found that the copyright holders presented a prima facie case of copyright infringement. K-Bob's claim that the restaurant was exempt from liability under section 110(5) of the Copyright Act was rejected. Evidence was presented that the tuner used "was of a commercial type, the speakers were designed for dissemination of sound in a commercial building, [and] the microphones were of commercial quality..." It also was noted that the restaurant was "of no small proportion," containing about 7,000 square feet of dining area and grossing between $800,000 and $900,000 in yearly revenues. The fact that patrons could not always hear the music, or could only hear it in certain sections of the restaurant was not dispositive, stated the court, because it was "the general atmosphere to which such music contributes which benefits therefrom."

Chief Judge Bunton found that an absentee owner of the restaurant retained "the right and ability to supervise the restaurant, including the playing of music on the speakers;" had a direct financial interest in the financial success of the restaurant; and was jointly and severally liable for the infringing activity. The court issued an injunction barring the unlicensed performances of "radio tunes" over the restaurant's loudspeaker system, awarded the copyright holders statutory damages of $1,500 per infringement for a total damage remedy of

$9,000, as well as attorneys' fees in total amount of about $11,500 and costs in an undetermined amount.

Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F.Supp. 763 (W.D.Tex. 1990) [ELR 13:1:15]

---

**Copyright Infringement/Music.**

A Federal District Court in Virginia has granted summary judgment to Broadcast Music, Inc. in an infringement action against Jeep Sales & Service Co., the owner of Haynes Jeep. BMI claimed that Haynes Jeep performed seventeen copyrighted musical works by radio over at least four recessed ceiling speakers and at least four public address horns mounted on exterior light poles. The court stated that the company's conduct was "undoubtedly a 'public performance'" within the scope of the Copyright Act; that Haynes Jeep exceeded the "outer limit" of the small business exemption of section 110(5) of the Act; and that BMI was entitled to statutory damages of $8,500, as well as injunctive relief, attorneys' fees of about $800 and costs of about $400.

Broadcast Music, Inc. v. Jeep Sales & Service Co., 747 F.Supp. 1190 (E.D.Va. 1990) [ELR 13:1:15]

---

**Bootleg Videos.**

Julio Larracuente challenged his indictment on charges of engaging in a conspiracy to distribute illegal video cassettes. A Federal District Court in New York has denied Larracuentes' motion for a bill of particulars, stating that the indictment adequately advised Larracuente of the specific acts of the crimes he was accused of committing. The court also found that the warrant was based upon sufficient probable cause. A motion to suppress physical evidence was rejected, with the exception of certain evidence seized from an area that was beyond the scope of the warrant issued.

United States v. Larracuente, 740 F.Supp. 160 (E.D.N.Y. 1990) [ELR 13:1:16]

---

**Journalist Trade Name.**

Rafael Klinger, when employed by the "Weekly World News," wrote essays and editorial material under the pseudonym "Ed Anger." In 1987, the newspaper notified Klinger that it no longer would publish his essays, and in mid-1989, terminated his employment.

Klinger claimed that the newspaper then began to publish a series of articles under the names "Ed Anger," "Ed Anger's America," and "My America By Ed Anger," and that the unauthorized use of the trade name violated federal trademark law and Florida's Deceptive and Unfair Trade Practices Act.

A Federal District Court has ruled that Klinger stated a claim for injunctive relief under the statute. It was noted that the writer alleged that the newspaper's use of the name at issue created "deception, confusion and mistake" on the part of the public, that Klinger was entitled to avail himself of the protections of the statute, and that Klinger's claim that he lost publishing opportunities constituted an injury sufficient to permit him to seek injunctive relief.

Judge Gonzalez stated that there was "no good reason why [the protections of the statute] should not extend to those who are aggrieved or damaged because of someone's deceptive use of a trademark or tradename."

The court then refused to dismiss the newspaper's counterclaim alleging that Klinger infringed Weekly World News' copyright in the literary character "Ed Anger."

Klinger v. Weekly World News, Inc., 747 F.Supp. 1477 (S.D.Fla. 1990) [ELR 13:1:16]

---

**Photography.**

Photographer Robert S. Rivkin agreed to be represented by FPG International, a stock photography agency. When Rivkin became dissatisfied with the agency, he requested the return of his slides. The agency returned only 33 of the 72 slides it had accepted from Rivkin.

A New York appellate court has upheld a trial court decision finding that Rivkin was bound by the exculpatory and limitation of liability clauses in his contract with FPG. There was no indication of gross negligence or unconscionability to avoid the application of the contract provisions. The court noted that the contract recommended that clients protect the material consigned to the agency by obtaining insurance and/or duplicating the photographs. Although FPG acknowledged an obligation to return Rivkin's works, the limitation of liability provision restricted the maximum loss to the cost of film and processing.

The trial court, however, should not have granted summary judgment with respect to Rivkin's claim that the agency did not disclose certain sales of his work. And there was no basis for an award of attorneys' fees to FPG, or the assessment of $3,500 in costs.

Rivkin v. Brackman, 561 N.Y.S.2d 738 (N.Y.App. 1990) [ELR 13:1:16]

---

**Wrongful Termination.**

Dr. Jerzy Kosmala sued the Baton Rouge Symphony Association alleging that he was wrongfully terminated from his employment as its principal violist. The symphony argued that Kosmala's claim was subject to arbitration under the musician's employment contract.

Kosmala alleged that the symphony failed to re-engage him for the 1988-89 season based solely upon his failure to indicate his interest in returning to perform with the symphony, in writing, before May 31, 1988. Kosmala claimed that this reason for failing to re-engage him did not fall within certain contractually enumerated reasons for dismissal, and therefore he was not required to submit his dispute to arbitration.

A Louisiana appellate court noted that the arbitration clauses in the symphony's contract were not explicit and did not have "a reasonably clear and ascertainable meaning," and, in all, that the symphony did not establish the existence of an arbitration agreement. The appellate court therefore affirmed the ruling of the trial court denying the symphony's defenses, and remanded the matter for further proceedings.

Kosmala v. Paul, 569 S.2d 158 (La.App. 1990) [ELR 13:1:16]

# Art.

Dr.Nercy Jafari sought to buy the painting "Grand Opera" by Salvador Dali. At Jafari's request, Dennis DiLorenzo, representing the owner of the painting, obtained opinions from two Dali experts attesting to the authenticity of the work; the parties discussed a purchase price of $210,000. However, after several months of negotiations, DiLorenzo sold the painting to Renee Fotouhi; Fotouhi consigned the piece to Sotheby's for sale at auction; and Jafari finally acquired the painting at the auction for $330,000.

When Jafari sued DiLorenzo for breach of contract, a Federal District Court in New York first assumed, for purposes of DiLorenzo's motion for summary judgment, that Jafari and DiLorenzo did form a contract in January 1988. Judge Sweet then pointed out that although both parties knew that DiLorenzo had a deadline in which to sell the painting, Jafari "conceivably was unwilling to tender payment as late as March 25, 1988." Given the known deadline, Jafari's failure to pay within that time amounted to a material breach of the contract, stated the court.

When Jafari materially breached, DiLorenzo no longer was bound to deliver the painting and was free to sell it to Fotouhi. Thus, even assuming a contract existed, it was Jafari who materially breached and was not entitled to recover for the subsequent purchase of the painting at a higher price. The court therefore granted DiLorenzo's motion for summary judgment.

Jafari v. Wally Findley Galleries, 741 F.Supp. 64 (S.D.N.Y. 1990) [ELR 13:1:16]

## Communications Act.

The Greek Radio Network of America provides ethnic programming to radio subscribers. The broadcaster transmits its programming on frequencies available only through the use of special, modified radio equipment provided by the Greek Radio Network to subcribers for a yearly fee.

The broadcaster claimed that Joyce and Gregory Vlasopoulos violated various federal statutes by illegally modifying radio units in order to intercept Greek Radio Network programming. A Federal District Court in Pennsylvania rejected the Vlasopoulos' argument that the programming was intended for the general public and therefore was not protected by section 605(a) of the Communications Act. The court found that the complaint adequately pleaded the requisite elements of a cause of action under section 605(a).

It then was found that the broadcaster's transmissions were not the type of transmissions protected under sections 2511 and 2520 of the Communications Act, and that the Greek Radio Network thus did not have a cause of action under the Federal Wiretapping statute for the interception of its radio transmissions.

A claim alleging the violation of the Racketeer Influenced and Corrupt Organizations Act also was dismissed. The broadcaster argued that the Vlasopoulos parties, as a predicate act, had committed the state law crime of robbery. But the court noted that under Pennsylvania law, the use of or threat of force, however slight, is an essential element of the crime of robbery; the Greek Radio Network did not allege that the Vlasopoulos parties used force or the threat of force, and no other predicate offense was alleged.

Greek Radio Network of America, Inc. v. Vlasopoulos, 731 F.Supp. 1227 (E.D.Pa. 1990) [ELR 13:1:17]

## Securities Fraud.

A Federal District Court in Wisconsin, after dismissing certain investors' claims against Balcor Film Investors (ELR 12:8:6), has granted the investors' motion for leave to file a second amended complaint and has found that the complaint sufficiently pleaded reliance. The court held that a party may satisfy the reliance requirement of a Rule 10b-5 claim if it is proven that without the material misstatements and omissions the securities in question could not have been sold at any price - the second amended complaint included this allegation.

Eckstein v. Balcor Film Investors, 750 F.Sup. 375 (E.D.Wis. 1990) [ELR 13:1:17]

---

**Contracts/Damages.**

Radio TV Reports engaged in the business of recording, transcribing, and monitoring radio and video programming for its clients. Paul Ingersoll worked for Radio TV Reports from 1965 until his retirement on August 31, 1986. During July and August 1986, Ingersoll decided to form his own media monitoring business using the name Transmedia. In August 1986, Radio TV Reports and Transmedia submitted bids for a United States Department of Defense contract; Transmedia won the contract and performed services under it until the company went out of business in June 1987. Radio TV Reports then offered a new bid and won the contract.

When Radio TV Reports sued Ingersoll, a Federal District Court in the District of Columbia found that the former employee breached the duty of loyalty he owed to the compnay when, on August 29, 1986, Transmedia bid on the media monitoring contract.

In considering the issue of damages, the court noted that Radio TV Reports had failed to introduce a copy of the actual bid as it was submitted, but based its damage claim on the handwritten figures on a copy of the draft. Judge Stanley S. Harris therefore inferred that the document would not have supported the company's calculation of damages. However, the court found that for the period from September 1986 through May 1987, Radio TV Reports' lost profits amounted to about $13,000. The company also was entitled to receive compensation about $2,300, the amount of Ingersoll's compensation for August 1986, and $725 as the value of the property misappropriated by Ingersoll.

Radio TV Reports, Inc. v. Ingersoll, 742 F.Supp. 19 (D.D.C. 1990) [ELR 13:1:17]

---

## Damages.

Voice-over recording artist Corinne Orr had obtained a commitment for work on a cartoon series when she was injured at the Kiamesha Concord hotel, and could not perform the job. A New York appellate court has affirmed a trial court ruling granting Orr's claim for lost earnings on the series, but modified the judgment to strike the performer's claim with respect to earnings from a Brazilian film for which Orr was unable to audition since the latter claim was not reasonably certain.

Orr v. Kiamesha Concord, Inc., 561 N.Y.S.2d 234 (N.Y.App. 1990) [ELR 13:1:17]

---

## Attorneys' Fees.

A Federal District Court in New York, in a decision reported at ELR 9:12:6, determined that Bourne Co., was the owner of the extended renewal term in the copyright to the song "Cecilia." However, it was "undisputed" that Kenneth and Richard Marx were entitled to the author's share of royalties for the first two terms of the copyright, amounting to about $5,800.

Bourne claimed that the indemnity provision of the applicable songwriter's agreement allowed the company to set off against the payment of the royalties the attorneys' fees incurred by Bourne in the underlying action; the total amount of legal expenses was about $42,000.

Judge Sprizzo found that the agreement at issue provided for indemnification when Bourne was required to protect its right, title and interest in the composition; that such language typically referred to indemnification for third-party claims, rather than ligitation between the parties to the agreement; and that it was not "unmistakably clear" from the language of the agreement that there was an intention to provide indemnification for claims between the parties. The court therefore granted the Marx parties' motion for partial summary judgment against Bourne's indemnity claim.

Bourne Co. v. MPL Communications, Inc., 751 F.Supp. 55 (S.D.N.Y. 1990) [ELR 13:1:18]

---

**School Athletics.**

Alyson Habetz sought to try out for and, if selected, compete on her high school baseball team, which was comprised of all male players. School officials barred Habetz from tryouts, citing the rules of the Louisiana High School Athletic Association. Habetz sued for declaratory and injunctive relief, but during the course of litigation, the Association changed its rules and stated that girls would be allowed to participate in boys sports if a school does not offer a comparable girls sport. A Federal Court of Appeals found the matter moot. On remand, Habetz moved to dismiss the complaint and sought attorneys' fees and costs. The District Court granted summary judgment dismissing the case, but denied the motion for attorneys' fees.

The Court of Appeals has held that the District Court had jurisdiction at least to determine whether or not the Association's regulations constituted "state action," giving rise to federal question jurisdiction. Habetz asserted "more than a colorable claim of jurisdiction," and the District Court "clearly" had jurisdiction to determine its own jurisdiction. Federal Court of Appeals Judge Garza declined to decide any controlling issues of constitutional and statutory law in the context of a section 1988 fee dispute, and remanded the case for the District Court to determine who, if anyone, was the prevailing party in the case. It seemed to Judge Garza that Habetz "may be entitled to some kind of fees," but the District Court was free to determine whether or not the Habetz lawsuit "was the cause of the rule change of the LHSAA, and if it was, what, if any attorneys' fees should be granted to [Habetz]."

Habetz v. Louisiana High School Athletic Association, 915 F.2d 164 (5th Cir. 1990) [ELR 13:1:18]

## School Athletics.

The Tennessee Secondary School Athletic Association ruled that Michael Crocker was ineligible to participate in interscholatic sports for a period of twelve months after his transfer from a private school to a public high school. Although Crocker claimed a learning disability in the area of written language, his hardship appeal was denied. A series of proceedings ensued, primarily alleging the deprivation of Crocker's rights under the Education of the Handicapped Act.

A Federal District Court has found, in ruling on Crocker's claim under section 1983, that the Association interfered with the rights guaranteed to the student under federal law; that the Association was a state actor; that Crocker would suffer irreparable harm unless the court issued an injunction; and that the public interest "does not lie in preventing a student, who has been certified as handicapped pursuant to federal law, from playing in a high school football game because an organization disagrees with the implications of that certification." Various courts had ordered the Association not to retaliate against Crocker, but the Association remained "in callous defiance" of the orders; the public interest therefore would be served by enjoining "this defiance of the rule of law," stated the court.

The court, among other rulings, issued an injunction barring the Association from taking any action which might prevent the high school from allowing Crocker full participation in all interscholastic athletics, pending further orders of the court.

Crocker v. Tennessee Secondary School Athletic Association, 735 F.Supp. 753 (M.D.Tenn. 1990) [ELR 13:1:18]

## Horse Racing.

A Federal Court of Appeals has upheld a District Court decision (ELR 12:6:19) granting summary judgment to Yonkers Racing Corporation in a civil rights action brought by George Hadges, a harness race horse driver, trainer and owner.

In September 1989, Yonkers Raceway denied Hadges' application to work at the track. The New York State Racing and Wagering Board had suspended Hadges' license from 1974 to 1976 because the driver had not reported his criminal record on his license application. And in 1989, Hadges' license was suspended because the driver allegedly passed wagering information to a patron at Roosevelt Raceway on a race in which Hadges was participating; the Board reinstated Hadges' license in July 1989.

Hadges' claim under section 1983 alleged that state action was involved because the racetrack was subject to "pervasive" regulatory control, generated significant tax revenues for the state, received state tax credits, and held a monopoly over harness racing in the New York metropolitan area.

Federal Court of Appeals Chief Judge Oakes pointed out that the state did not have a proprietary interest in the racetrack, and agreed with the District Court that Hadges did not establish state action either under the "close nexus" or "symbiotic relationship" tests. It was noted that there was no evidence that a state official participated in the racetrack's decision to deny Hadges' application. Furthermore, the racetrack retained its common law right to exclude "undesirable" persons from the premises, and the existence of the racetrack's alleged monopoly status was "dubious at best." Even assuming that Hadges established that the racetrack held such a monopoly, the court concluded that there was no link between the alleged monopoly and the denial of the driver's application.

Hadges v. Yonkers Racing Corporation, 918 F.2d 1079 (2d Cir. 1990) [ELR 13:1:18]

---

**Horse Racing.**

Stewards at the Hawthorne Race Course suspended jockey Anthony DeSilva for not riding a horse "so as to finish as near as possible to first, and show the best and fastest race it was capable of" in violation of Illinois Racing Board rules. The Board reviewed the decision and imposed a thirty day suspension. An Illinois appellate court has upheld a trial court finding that the Board's decision was not contrary to the "manifest weight of the evidence nor contrary to law." It also was found that Board's rule was not unconstitutionally vague - the rule requires jockeys "to procure the best possible performance from a horse." Testimony during the proceedings established the existence of "a common understanding among jockeys as to how to produce a horse's best and fastest performance," noted the court. And combining this understanding with the purpose of the rule-to protect the wagering public from inaccurate or misleading information regarding a horse's ability-the rule was "definite enough to serve as a guide for the individuals who must comply with it."

DeSilva v. Hartack, 59 N.E.2d 51 (Ill.App. 1990) [ELR 13:1:19]

## Horse Racing.

In 1986, the Louisiana State Racing Commission revoked Carl Guillory's owner's license. Guillory had entered a nolo contendere plea to a state charge of attempted theft by fraud; Guillory subsequently pled guilty to a second state charge of attempted theft by fraud. In 1988, Guillory received a full pardon for his state convictions, and a restoration of full rights of state citizenship for his convictions on federal charges in the early 1970s. In 1989, the Commission denied Guillory's application for a horse owner's license. A Louisiana trial court reversed the Commission's decision, and an appellate court has found that the trial court did not abuse its discretion in granting the license.

Guillory v. Louisiana State Racing Commission, 569 S.2d 33 (La. App. 1990) [ELR 13:1:19]

## Horse Racing.

A Louisiana trial court judge granted summary judgment to the owner of the Delta Downs Race Track and its insurer in a wrongful death action brought by the widow and children of jockey John Davis Sam. Sam died after the horse he was riding broke its two front legs during a race at the Delta Downs Race Track. The deceased's head struck either a wooden post or a rail in the resulting fall.

The insurance policy excluded coverage for "bodily injury to any person while practicing for or participating in any athletic or sporting event or contest."

Sam's widow argued that an ambiguity was present as to whether the insurance company intended to exclude both bodily injury and death claims, and also argued that the race track improperly supervised medical employees and maintained inadequate on-site medical facilities.

The appellate court found that the latter claims were independent of the deceased's participation in horse racing, and were not excluded from coverage. In all, summary jdugment was improper since the parties alleged claims as to which there were genuine issues of material fact; the matter was remanded to the trial court for further proceedings.

Sam v. Delta Downs, Inc., 564 S.2d 829 (La.App. 1990) [ELR 13:1:19]

---

**Jockey Injury.**

Gerald E. Ailes, a professional jockey, was injured while racing a horse at Portland Meadows. A pretrial motion to dismiss the action based on the statute of limitations was denied. The jury returned a verdict on behalf of Ailes. Subsequently, the trial court granted Portland Meadows' motion for judgment notwithstanding the verdict, finding that that action was time-barred.

An Oregon appellate court has reversed the trial court's decision because Portland Meadows did not raise the statute of limitations argument by a motion for a directed verdict "or its equivalent." The matter was remanded for the reinstatement of the jury verdict and the entry of judgment thereon.

A dissenting judge would have found that payments made by the insurer to Ailes were not subject to certain statutory provisions; that the statute of limitations was not suspended; and that the judgment notwithstanding the verdict should have been affirmed.

Ailes v. Portland Meadows, Inc., 799 P.2d 203 (Or.App. 1990) [ELR 13:1:19]

---

## Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Scott Eden Management v. Kavovit, 563 N.Y.S.2d 1001 (12:9:5); Entertainment and Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc., 735 F.Supp. 1334 (superseding the opinion at 623 F.Supp. 647, 6:10:10); Ferguson v. Writers Guild of America, West, Inc., 277 Cal.Rptr. 450 (12:10:4); Bella Lewitzky Dance Foundation v. Frohnmayer, 754 F.Supp. 774 (12:10:6); Nash v. CBS, Inc., 750 F.Supp. 328 (12:9:18); Thoreson v. Penthouse International, Ltd., 563 N.Y.S.2d 968 (12:10:11).

Federal District Court Judge Pierre N. Leval's opinion awarding $43,000 in damages to the publisher of "The Hunt for Red October" for the premature sale of the paperback edition of the book was reported as a news items at 12:3:18; the opinion in United States Naval Institute v. Charter Communications Inc. has been published at 18 Med.L.Rptr. 1417 (S.D.N.Y. 1990).

In August 1990, a Federal Court of Appeals affirmed a District Court decision granting summary judgment to commentator Andy Rooney and CBS Inc. in a defamation action brought by Unelko Corporation (12:6:3). The United States Supreme Court, without comment, has refused to review the Court of Appeals decision.

In October 1989, a Federal District Court in Kansas refused to grant Paramount Pictures a preliminary injunction barring the placement of local advertisements on videocassettes of the studio's films (11:8:14). It has been reported that Paramount and Video Broadcasting

Systems have settled their dispute. The terms of the settlement were not disclosed, but the court apparently has issued an order enjoining Video Broadcasting from placing commercials on any prerecorded videocassette.

As previously reported (ELR 12:4:18), a trial court awarded Mars Productions about $30,000 in an action against U.S.Media Corp. in a case alleging the breach of a film distribution contract. A New York appellate court has affirmed the decision, but modified the judgment to the extent of granting Mars' motion to dismiss U.S. Media's third counterclaim. Mars Productions Corp. v. U.S. Media Corp., 564 N.Y.S.2d 402 (N.Y.App. 1991)
[ELR 13:1:20]

---

## DEPARTMENTS

### In the Law Reviews:

The Successful Musical Copyright Infringement Suit: The Impossible Dream by Debra Presti Brent, 7 University of Miami Entertainment & Sports Law Review 229 (1990)

Judicial Review, Copyrightability and the Register's Discretion: A New Direction? by James A. Booth and E.J. Yera, 7 University of Miami Entertainment & Sports Law Review 255 (1990)

The Right of Publicity and Its Descendibility by Vicky Gerl Neumeyer, 7 University of Miami Entertainment & Sports Law Review 287 (1990)

The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation by Wayne R.

Cohen, 7 University of Miami Entertainment & Sports Law Review 311 (1990)

Libel & Slander: Masson v. The New Yorker: Fabricated Malice, 43 Oklahoma Law Review 531 (1990)

Community for Creative Non-Violence v. Reid: The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work for Hire Doctrine of the 1976 Copyright Act, 56 Brooklyn Law Review 1081 (1990)

Buchwald v. Paramount: Beyond the Hype by Jonathan L. Kirsch, 14 Los Angeles Lawyer 19 (1991) (published by the Los Angeles County Bar Association)

Advance Payments Taxation by Schuyler M. Moore, 14 Los Angeles Lawyer 23 (1991)

The Power of Suggestion: Subliminal Rock Lyrics by Stephen F. Rohde, 14 Los Angeles Lawyer 26 (1991)

Negotiating Motion Picture Actor Contracts by Christian L. Castle, 14 Los Angeles Lawyer 31 (1991)

A Proposal to Recognize Component Works: How a Teddy Bears on the Competing Ends of Copyright Law by Christian H. Nadan, 78 California Law Review 1633 (1990)

Should Copyright Law Make Unpublished Works Unfair Game?, 51 Ohio State Law Journal 1399 (1990)

When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law by Alfred C. Yen, 62 University of Colorado Law Review 79 (1991)

Regulation of Indecent Radio Broadcasts: George Carlin Revisited-What Does the Future Hold for the Seven "Dirty" Words? by Richard G. Passler, 65 Tulane Law Review 131 (1990)

Alleged Inciteful Rock Lyrics-A Look at Legal Censorship and Inapplicability of First Amendment Standards by Robert N. Houser, 17 Ohio Northern University Law Review 323 (1990)

Thick Veils and Undrawn Lines: Eimann v. Soldier of Fortune and the Demise of the Negligent Advertising Cause of Action, 23 Connecticut Law Review 451 (1991)

Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe

Controversy"? by MaryEllen Kresse, 39 Buffalo Law Review 231 (1991)

The Reification of Celebrity: Persona as Property by George M. Armstrong, Jr., 51 Louisiana Law Review 443 (1991)

In the Forest of Copyright Law, Are Son of Sam Laws Barking Up the Wrong Tree? by James P. Broderick, 22 The John Marshall Law Review 111 (1988)

A Critical Assessment of Reid's Work for Hire Framework and Its Potential Impact on the Marketplace for Scholarly Works by Sherri L. Burr, 24 The John Marshall Law Review 119 (1990)

Broadcasting and Copyright in the Internal Market: The New Proposal by the EC Commission Concerning Cable and Satellite Broadcasts by Thomas Drier, 2 Entertainment Law Review 9 (1991) (published by ESC Publishing, Mill Street, Oxford, OX2 OJU, United Kingdom)

Security Interests in Copyright: The New Learning by Dianne Brinson and Mark Radcliffe, 2 Entertainment Law Review 14 (1991) (published by ESC Publishing, Mill Street, Oxford, OX2 OJU, United Kingdom)

Constitutional Law-First Amendment-A "Rational Interpretation" of Masson v. New Yorker Magazine, Inc., 13 Western New England Law Review 127 (1991)

Medication Regulations of the California Horse Racing Industry: Are Changes Needed to Prevent the Use of Illegal Drugs?, 27 San Diego Law Review 743 (1990)

A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition by Paul T. Hayden, 76 Iowa Law Review 67 (1990)

Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge by Charles Feeney Knapp, 76 Iowa Law Review 107 (1990)

Reforming the NCAA Drug-Testing Program to Withstand State Consitutional Scrutiny: An Analysis and Proposal by Thomas P. Simon, 24 University of Michigan Journal of Law Reform

"Root, Root, Root for the Home Team": Pete Rose, Nominal Parties, and Diversity Jurisdiction by Peter G. Neiman, 66 New York University Law Review 148 (1991)

The People's Republic of China's First Copyright Law Analyzed by Jianming Shen, 14 Hastings International and Comparative Law Review 529 (1991)

Basketball Anyone? Recklessness and Sports Injury Cases: Dotzler v. Tuttle, 24 Creighton Law Review 529 (1991)

The Ban on Dial-a-Porn Services: A Broad Regulation Requiring Constitutional Scrutiny-Sable Communications of California, Inc. v. Federal Communications Commission, 24 Suffolk University Law Review 213 (1990)

Political Broadcast Regulation in the United States and Great Britain, 17 Brooklyn Journal of International Law 87 (1991)

Keynote Address: The Impact of Television on the Jury System: Ancient Myths and Modern Realism by Fred Graham, 40 The American University Law Review 623 (1991)

Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases by Arlen W. Langvardt, 36 Villanova Law Review 1 (1991)

Cameras in the Courtroom: A Case Study by S. L. Alexander, 74 Judicature 307 (1991)
[ELR 13:1:22]