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Congress Resumes Consideration of Fair Use of Unpublished Works Issue

by Michael R. Klipper

At the urging of historians, biographers, journalists, and their publishers, Congress is again reviewing bills to clarify the rules governing the fair use of unpublished works. The virtually identical proposals are S. 1035 introduced by Senator Simon, and Title I of H.R. 2372, sponsored by Rep. Hughes (D-NJ). The bills were drafted in response to two Second Circuit decisions, Salinger v. Random House Inc. and New Era Publications Int'l v. Henry Holt and Co., decided in l987 and l989, respectively, and which contain statements that are said to have had the effect of seriously limiting the availability of the fair use defense in the unpublished works context.

In Salinger, J.D. Salinger sought to prevent an unauthorized biographer from quoting Salinger's unpublished, copyrighted letters. In reversing the district court, the Second Circuit found that the biographer's copying of some of Salinger's private letters was not excused by the fair use defense. New Era involved a motion for an injunction to halt publication of an unauthorized biography of L. Ron Hubbard, the founder of the Church of Scientology. The district court found that some of the biographer's unauthorized uses of Hubbard's unpublished materials did not qualify as a fair use; nonetheless, the court denied the motion on First Amendment grounds. The Second Circuit affirmed on the basis that the plaintiff's suit was barred by laches, but indicated that but for plaintiff's delay in filing its suit, the publication of the biography would have been enjoined.

At the heart of the current push for legislative relief is the concern engendered by the following comments made by the Second Circuit: (l) "[i]f he (a biographer) copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined" (Salinger); (2) unpublished materials "normally enjoy complete protection against copying any protected expression" (Salinger); and "[t]he copying of more than minimal amounts of unpublished expressive material calls for an injunction barring the unauthorized use" (New Era). It is argued that read together, these statements (1) create a virtual per se rule precluding a finding of fair use where quotations are taken from unpublished works, and (2) make the issuance of an injunction virtually automatic in such instances.

Remedial legislation was introduced last year in the House and Senate; these bills garnered significant support on and off Capitol Hill; however, they drew fire from members of the American computer and software industries who argued that they blurred the distinction between published and unpublished works, thus threatening the protections now available for confidential, unpublished business and technical works. The bills died at the end of the 101st Congress; proponents were forced to start anew when the 102nd Congress commenced in January, l991.

In May, l991, revised legislation was introduced in both the House and Senate and two days of hearings on H.R. 2372 were held before the House Copyright Subcommittee. The focus of the hearings was H.R. 2372, which provides in pertinent part:

"The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use if such finding is made upon full consideration of all the factors set forth in paragraphs (l) through (4)."

During the hearings the proponents made several key points. First, they testified that the decisions have a chilling effect on the ability of "second authors" to make use of unpublished materials -- "the building blocks of their trade." This is so, according to a witness for Magazine Publishers Association (MPA), (Kenneth M. Vittor, Vice President and Associate General Counsel of McGraw Hill, Inc.), because "publishers' lawyers [now] have no choice but to advise magazine editors . . . that almost any unauthorized use . . . of previously unpublished material which is challenged by a copyright owner will inexorably lead to a judicial finding of copyright infringement . . . ."

Second, they opined that the cases distort traditional fair use analysis by making a single issue -- the unpublished nature of the work -- dispositive. Title I would correct this problem by returning the law to where it stood after the Supreme Court's l985 decision in Harper & Row v. Nation Enterprises; there the Court made clear that although the unpublished nature of the work was an important element tending to weigh against a finding of fair use, it did not, as a representative of the Association of American Publishers (Mark Morril, General Counsel, Simon & Schuster) stated at the hearing, "overwhelm all of the other fair use considerations."

Third, the advocates emphasized that Title III is modest in scope; it does not give "second authors" free rein to quote from unpublished, copyrighted works; it merely ensures unpublished works are not routinely "off limits" to historians, biographers and journalists.

Fourth, in response to the argument that legislation was unnecessary because the Second Circuit has already begun to correct the situation, proponents argued that a carefully crafted law was clearly preferable to any piecemeal, unpredictable approach that might be forthcoming from the courts.

Finally, nothwithstanding subsequent efforts by Second Circuit jurists to clarify their earlier statements, Mr. Vittor expressed MPA's concern over the "virtual automatic injunction" language. "Given the exceedingly tight editorial and printing deadlines faced by magazine publishers," he asserted that "a preliminary injunction such as that issued in Salinger would kill the article in question (and possibly the entire issue of the magazine)." He urged Congress to request the Copyright Office to conduct a study of the injunction issue to enable Congress to determine whether "further legislative intervention [beyond H.R. 2372] is required."

Hearing testimony also revealed that the new bills satisfactorily addressed the concerns raised previously by representatives of the computer and software industries. For example, a witness for the Computer and Business Equipment Manufacturer's Association (CBEMA), (James M. Burger, Chief Counsel, Government, Apple Computer, Inc.) said that unlike the earlier bills, H.R. 2372 restates the principles enunciated in Harper & Row, does not equate published and unpublished works, and as a result CBEMA supported the current proposal.

At the second day of hearings, Ralph Oman, Register of Copyrights, termed the new draft a "great improvement" over its predecessor, and stated that "if the Subcommittee concludes that legislative action is called for, the Copyright Office supports the present formulation." Nonetheless, Mr. Oman wondered if the situation in the Second Circuit was yet ripe for a "legislative fix," or whether Congress should give the Circuit more time to "fine tune" its earlier decisions inasmuch as members of the Second Circuit had already begun to clarify their "loose language." Mr. Oman also reminded the bill's proponents that they will continue to have to make tough calls about whether or not to use unpublished works even if H.R. 2372 were to become law because such judgments "are inherent in the balancing required by the fair use defense..."

Well-known novelist Scott Turow, while questioning whether the legislation was necessary, made clear that he did not object to the bill's restatement of current law. He agreed with Mr. Oman, that this year's proposal was clearly preferable to last year's bill, which he felt threatened to make private papers too freely available for quotation.

While agreeing that the decisions have caused turmoil in the publishing industry, Catholic University Law Professor Shira Perlmutter questioned whether legislation was necessary. She took this position, in part, because the courts in subsequent cases "have made a good start at resolving the problem and clarifying that unpublished works are indeed subject to a fair use defense, . . . [and] it would be preferable to let the normal case by case process continue." If Congress were to go ahead with legislation, Professor Perlmutter suggested that Title I be revised to make clear that courts are free to continue to refer to all relevant factors, not merely the four fair use factors enumerated in Section 107.

An interesting issue raised at the hearings was the extent which H.R. 2372 accommodated the privacy interests of an original author who objected to the use of his unpublished expression. One response was that privacy interests were adequately protected by state privacy statutes. It was also suggested that privacy considerations were among those "fair use" factors that a court could consider in addition to the four factors set forth in existing law; for that reason it was pointed out that it was essential that the legislation should make explicit that courts remain free to weigh such non-statutory factors.

Given the absence of any discernible opposition to the legislation, prospects for its passage appear favorable at this time. The House Subcommittee is expected to vote on the bill early this summer. On June 13 the Senate Judiciary Committee approved S. 1035 and sent it to the full Senate. Senate action on the bill is expected later this year.

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[ELR 13:2:3]

RECENT CASES

Company involved in obtaining recording contract acted as unlicensed agent and may not arbitrate claim against musicians

In October 1990, PPX Enterprises sought arbitration of a claim alleging that John Davis and Ali Shaheed Muhammed, the members of the musical group "A Tribe Called Quest," breached their agency agreement with PPX. PPX alleged that it had obtained a recording contract for the group with Zomba Recording Corp., but that the musicians failed to pay all the fees due PPX.

Davis and Muhammed filed an application to stay arbitration, claiming that the agency agreement was unenforceable. The musicians stated that PPX took $37,500, constituting a fifteen percent fee, of the monies paid to the group by Zomba, but did not provide any services to the musicians other than procuring the contract. In the group's view, the agency agreement was void as against public policy because PPX was not licensed as a "theatrical employment agency" under state law.

PPX argued that it did not procure the recording contract from Zomba, but that it assisted in negotiating favorable contract terms on behalf of Red Alert Productions, Inc., the group's manager.

Section 172 of New York's General Business Law provides that "No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license..." The statute includes a "theatrical employment agency" within the definition of employment agency. And a theatrical employment agency refers to "any person who procures or attempts to procure employment or engagements for...phonograph recordings...or other entertainments or exhibitions or performances, but such term does not include the business of managing such entertainments, exhibitions or performances,... where such business only incidentally involves the seeking of employment therefor."

Red Alert had agreed to retain PPX as its agent, and that PPX would represent the company and the group exclusively for the purpose of "obtaining and negotiating a major recording contract." The agreement also stated that Red Alert would remain the exclusive manager of the group.

The musicians previously had agreed that Red Alert would act as their manager and had acknowledged that Red Alert was not an "employment agency" or "theatrical agent" and that the company's duties would not include obtaining employment for the musicians.

PPX was not licensed as an employment agency or theatrical employment agency at any time during the period January 1, 1989 through May 4, 1990.

New York trial court Judge Irma Vidal Santaella has found that PPX was retained to procure employment for the group, that PPX was within the meaning of "theatrical employment agency," and that PPX's failure to obtain a license rendered unenforceable the April 1989 agency agreement. The court therefore granted Davis and Muhammed's application to stay arbitration.

Davis v. P.P.X. Enterprises, Case No. 24217 (N.Y.Cnty., Mar. 14, 1991) [ELR 13:2:5]

New York court rules that pianist Andre Watts owes about $290,000 in commissions to former manager

Concert pianist Andre Watts hired Columbia Artists Management as his exclusive manager; the term of the contract was from August 1983 to September 1986. Watts agreed to pay Columbia Artists fifteen percent of the fees which Watts received for recitals, audience association concerts and appearances with orchestras, and a ten percent fee where a foreign engagement was arranged by a foreign manager.

The parties continued to perform under the contract until Watts notified Columbia Artists, in August 1988, that he was terminating their relationship, effective September 1988. At the time of the termination, Columbia Artists had scheduled forty engagements for Watts for the 1988-1989 season, and thirty-eight engagements for the 1989-1990 season.

Watts, in an action for declaratory relief, argued that Columbia Artists was entitled to receive compensation only for the forty-five engagements for which contracts already were executed as of September 1, 1988, and that the reasonable value of the manager's services was a seven and one-half percent commission, amounting to a total sum of about $87,000. Watts also argued that Columbia Artists was not entitled to any compensation for the thirty-three engagements where contracts were not executed as of September 1, 1988.

A New York trial court has ruled that Watts must pay Columbia Artists about $290,000, the commission for all seventy-eight engagements scheduled for performance and accepted by Watts during 1988 through 1990, and which were subsequently performed by Watts and for which he received payment.

Acting Judge Alfred J. Weiner noted that "when a contract expires by its terms and the parties continue to perform as before, the conduct of the parties gives rise to an implication that the parties intend that their rights and obligations should continue to be governed by the terms of their expired express contract." Watts continued to accept, and pay for, Columbia Artists' services until September 1988. The statute of frauds did not apply since the contract contained a provision allowing termination upon ninety days' notice.

Judge Weiner observed that an engagement is "scheduled" when a manager, with the authority of the artist, informs a presenter that an engagement at a specified date, time and fee is accepted by the artist. Columbia Artists earned its commission when it scheduled engagements during the term of the contract.

The contract did not provide separate compensation to Columbia Artists for providing managerial assistance in servicing the engagements. And Watts had advised the manager not to service the already scheduled engagements although Columbia Artists was "ready, willing and able to do so."

Watts v. Columbia Artists Management, Inc., New York Law Journal, p. 31, col. 2 (Rockland Cnty., Apr. 9, 1991) [ELR 13:2:5]

Arbitration award of over $200,000 to former college football player in proceeding against sports agent is upheld

In 1984, then college football player John Farley hired Michael Blatt as his sports agent and investment advisor. The parties agreed, in part, that disputes concerning the contract would be submitted to binding arbitration before the American Arbitration Association. In 1987, Farley claimed that he had received certain unsuitable investment recommendations, and sought arbitration. The arbitrators awarded Farley about $204,000, including $137,000 for damages, interest and tax liabilities,

$10,000 punitive damages, and $49,000 in attorneys' fees and expenses.

A trial court decision granting Farley's petition to confirm the award has been upheld by a California appellate court.

Farley correctly began arbitration proceedings by filing a demand for arbitration, stated Judge Richard M. Sims III.

Blatt argued that the parties' contract was effective only as long as a player contract was in effect, and that Farley was not playing football at the time he filed the demand. Judge Sims pointed out that written contracts to arbitrate future disputes are "valid, enforceable and irrevocable...;" that the arbitration clause in the contract remained enforceable; and that the arbitrators did not exceed their authority by awarding "tax liabilities" and an award in excess of the amount contained in Farley's demand.

In affirming the judgment, Judge Sims remanded the matter to the trial court to determine and award Farley reasonable attorneys' fees and costs incurred on appeal.

Blatt v. Farley, 276 Cal.Rptr. 612 (Ca.Ct.App. 1990) [ELR 13:2:6]

National Broadcasting Company may proceed with claims against Sony alleging interference with home video venture between RCA and Columbia Pictures subsidiary

In 1981, RCA and Columbia Pictures, via various affiliates and subsidiary companies, entered a series of agreements to acquire and exploit home video properties; the venture, as described by a New York trial court, purportedly was "successful and lucrative."

In October 1989, Sony Corporation acquired Columbia Pictures Entertainment. National Broadcasting Company obtained all rights under the agreements by assignment from General Electric Company, which obtained all of the rights and obligations of RCA by merger. NBC argued that Sony's plans to enter the home video market would violate the venture's rights.

Judge Ira Gammerman first dismissed NBC's cause of action for declaratory relief, stating that questions concerning the interpretation of the agreements and the scope of the parties' duties would be resolved in the course of the various legal and equitable claims, so that a separate declaration of rights was not appropriate.

The court also dismissed NBC's attempt to reform the partnership agreements so as to extend the terms of the agreements beyond 1992. Judge Gammerman then found that NBC was not automatically barred, as a partner, from seeking an accounting or any other valid equitable relief during the lifetime of the partnership.

NBC also alleged that Sony encouraged and directed Columbia Pictures Entertainment to block the venture's acquisition of certain home video rights, and that Sony acquired properties which should have gone to the venture. Judge Gammerman noted that ordinarily a contractual relationship does not create a fiduciary relationship between the parties. However, Columbia had agreed to "maximize" the profitability of the venture by exercising its good faith efforts on the venture's behalf. NBC's allegations created at least a question of fact concerning the existence of a fiduciary obligation on Columbia's part towards the venture; the court, accordingly, sustained the causes of action alleging breach of fiduciary duty.

Sony argued that it was not bound by any contractual or fiduciary obligation incurred by Columbia or its subsidiaries, and that Sony, as Columbia's parent corporation, was insulated from any claims of conspiracy, or of aiding and abetting its subsidiaries' alleged breaches of fiduciary duty.

Judge Gammerman found that NBC sufficiently plead facts which, if true, tended to show that Sony exercised considerable control over Columbia's affairs with regard to the venture; the facts might be sufficient to pierce the corporate veil and make Sony liable directly for the alleged deliberate breaches committed by Columbia and others. In any event, the allegations of aiding and abetting such a breach were sufficient to withstand Sony's motion to dismiss.

The court dismissed NBC's conspiracy claims because under New York law, a parent corporation cannot conspire with its subsidiary to commit a tort, and dismissed the claim against CBS for direct violation of alleged fiduciary duties owed to NBC because NBC did not show that CBS directed and controlled the affairs of Columbia Pictures.

With respect to the claim for intentional interference with contractual relations and prospective economic advantage, NBC had argued that Sony compelled the venture to renegotiate an "output agreement" with Trans-World Entertainment, so that the venture's acquisition of the company's properties available for home video release after 1982 would be subject to Columbia's veto - the original understanding of the parties allegedly did not contain this provision. NBC also claimed that Sony interfered with negotiations between the venture and Orion Pictures by secretly negotiating to obtain distribution rights for a package of fifty of the studio's films. According to news reports, when the package earlier was offered to the venture, Columbia refused to approve a deal.

NBC did not claim that any actual damage arose from the alleged interference with the Trans-World contract. But NBC sufficiently alleged that Sony used wrongful means in purportedly interfering with the venture's pre-contractual relationship with Orion.

The court concluded by considering various discovery motions.

National Broadcasting Co., Inc. v. Sony Corp., New York Law Journal, p. 26, col. 5 (N.Y.Cnty., Apr. 9, 1991) [ELR 13:2:6]

Sex discrimination claim against NBC for refusal to hire female applicant for sports program director is dismissed

The National Broadcasting Company did not violate Title VII of the Civil Rights Act of 1964 in refusing to employ Enid Roth as a staff director of television programs for NBC Sports, a Federal District Court in New York has ruled.

Judge Robert W. Sweet first described the responsibilities of the staff sports director of a television sports program, and mentioned that sports directors are the highest paid of all types of directors, "reflecting both the increased skill required to direct sports programs and the fact that sports programs are the most profitable programs aired by NBC." During the period at issue - the early 1980s - NBC never hired a woman as a sports director.

Roth, who began working for NBC in 1952, eventually became a director in the news division. In 1976, Roth directed NBC's national election coverage. Roth obtained an associate director assignment on a baseball game in 1973, but received no further assignments in sports.

Judge Sweet found that Roth did not establish that she "possessed the requisite sports directing ability," and therefore did not present a prima facie case of discrimination.

The Equal Employment Opportunities Commission also did not set forth a prima facie case of discrimination because it did not show that any qualified women were denied the opportunity to become a sports director.

Even if Roth was qualified to be a sports director, stated Judge Sweet, NBC presented legitimate non-discriminatory reasons for its hiring decisions.

The court dismissed Roth's action, and granted costs, excluding attorneys' fees, to NBC.

Equal Employment Opportunity Commission v. National Broadcasting Company, 753 F.Supp. 452 (S.D.N.Y. 1990) [ELR 13:2:7]

"Cat and mouse" watch copyright holder obtains preliminary injunction barring distribution of similar product

Direct Marketing of Virginia, the owner of a copyrighted watch face design known as the "Cat and Mouse Watch," has obtained a preliminary injunction barring E. Mishan & Songs, Inc. from manufacturing and distributing the "Playful Kitty Wrist Watch."

A Federal District Court in New York found that presenting a cat "in a sitting position facing to the left with a stylized rather than realistic rendering of a mouse" constituted protectible expression. It was noted that there was both direct and indirect evidence of copying, and that Mishan's design was substantially similar to Direct Marketing's copyrighted design with respect to color, general appearance, overall position on the watch face, the facial expression of the cat, the shape and placement of the mouse and the identical color of the background.

Judge Robert P. Patterson, Jr. also ruled that Mishan infringed the trade dress of Direct Marketing's watch, observing that Mishan engaged in the "near slavish reproduction of each and every feature of [Direct Marketing's] trade dress..." Although the use of transparent packaging material was a functional feature, the other elements comprising Direct Marketing's watch package, such as the color and placement of the product name, the background color, and the size and placement of the window, were "plainly aesthetic" rather than functional. It is the "unique collocation of words, color and designs on the [watch package] that is protected from appropriation."

The court concluded by noting that Direct Marketing established a likelihood of confusion between its trade dress and Mishan's, and, accordingly, was entitled to preliminary injunctive relief on the trade dress infringement claim as well as on its copyright infringement claim.

Direct Marketing of Virginia, Inc. v. E. Mishan & Sons, Inc., 753 F.Supp. 100 (S.D.N.Y. 1990) [ELR 13:2:7]

CNN temporarily ordered not to broadcast tapes of phone conversations between Manuel Noriega and his lawyers; but after reviewing transcripts, court vacated order and made transcripts available for public review

Several rulings by Federal District Court Judge William Hoeveler involving Cable News Network's "Noriega tapes" have been published. As reported at ELR 12:8:9, the United States Supreme Court let stand Judge Hoeveler's temporary order barring CNN from broadcasting tapes of government-recorded telephone conversations between Manuel Noriega and Noriega's lawyers.

In issuing the temporary order, Judge Hoeveler stated that the case presented a conflict between Noriega's Sixth Amendment right to a fair trial and CNN's First Amendment right to publish without prior restraint. "Among the very narrow range of cases which may justify a restraint are those involving a criminal defendant's right to a fair trial," observed the court. In addition to the problem of prejudicial pretrial publicity, the court cited an individual's right not to have his/her trial strategy and protected confidences disclosed to the prosecution.

The contents of CNN's tapes were not before the court, and Judge Hoeveler noted that it therefore was impossible to assess the extent to which Noriega's right to a fair trial would be hampered by disclosure. Although at least some of the tapes contained discussions of witnesses and other aspects of Noriega's defense, the court, given the "heavy" constitutional presumption against prior restraints, issued the temporary injunction only until such time as a federal magistrate could review the contents of the tapes in CNN's possession in order to determine whether publication of the tapes would present a "clear, immediate, and irreparable danger" to Noriega's right to a fair trial.

In a supplemental order, the court stated that the temporary restraining order would remain in effect only for up to ten days or such lesser time as needed by the magistrate to review the tapes. Given that CNN resisted turning the tapes over to the court, it seemed "fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court...when the only reason that no clear and immediate harm was apparent was because CNN had prevented the court from reviewing the content of the tapes."

Judge Hoeveler concluded that he could not conceive "that the law of prior restraint is so sacrosanct and so encompassing that there can be no fact situation which would justify enjoining publication of communications between attorney and client regardless of the nature of the communications or the method by which the information was obtained." In dealing with one of the most fundamental protections afforded an accused, the court found that it was necessary to consider the surrounding facts to determine the nature and extent of potential damage before publication.

In December 1990, several media organizations sought access to the court's transcripts of the tapes. Judge Hoeveler noted that upon review of the transcripts, the court had vacated its order restraining CNN from broadcasting Noriega's attorney-client conversations.

Judge Hoeveler then stated that the press had no First Amendment right of access to the transcripts at issue; the right of access to judicial records derives from common law. There is a presumption of openness attached to judicial records, but CNN argued that the presumption did not apply because the transcripts were the sole property of CNN and because the transcripts were never a part of the public record, but were kept under seal for the court's in camera inspection.

CNN's assertion of ownership was "somewhat remarkable," commented the court, given that the transcripts were translated and transcribed by court-employed interpreters at public expense. Furthermore, the court rejected the claim that CNN owned the recordings of Noriega's conversation, stating that if any entity owned the contents of the tapes, it would be the government, which monitored the conversations and recorded them. And Noriega's interest in his own conversations would take precedence over any proprietary claim asserted by CNN. CNN "did absolutely nothing to elicit the information it now claims to own."

The transcripts were properly considered judicial records, declared Judge Hoeveler, for they enabled the court to rule on the merits of Noriega's motion for an injunction on publication. And the in camera "aura" surrounding the transcripts ended with the court's decision to lift its restraint on CNN's broadcast of the tapes. At that time, the presumption of public access attached to the transcripts.

After affirming the importance of public scrutiny in the highly controversial Noriega matter and the "historical" interest of the contents of the CNN tapes, the court, although agreeing that CNN exhibited journalistic enterprise in obtaining the tapes, decided that the transcripts would be made a part of the public record. Judge Hoeveler observed that CNN, in the six days since the court lifted its restraint, declined to broadcast the "vast majority" of the conversations in its possession. The reluctance to broadcast the conversations seemed to diminish CNN's asserted interests in "primacy and exclusivity" of publication. The court refused to grant CNN "absolute and unfettered control over access to information which, in the court's discretion, should be made available for public review."

Judge Hoeveler delayed the release of the transcripts in order to allow CNN to appeal.

In a third ruling, Judge Hoeveler denied Noriega's motion to enjoin CNN from broadcasting the taped conversations between Noriega and his defense team. The court reviewed the context in which the restraining orders were entered, noting that the temporary restraint on the broadcast of Noriega's attorney-client conversations was not a determination on the merits because the court had not then concluded that Noriega's Sixth Amendment right to a fair trial outweighed CNN's First Amendment rights, or even that Noriega's right to a fair trial would be harmed by the disclosure of his attorney-client conversations.

The court then pointed out that only two of the taped conversations were within the "attorney client ambit." One of the conversations already had been broadcast, in large part, by CNN. A second conversation was "so cryptic and disjointed that neither the magistrate nor the court could construct an adequate description of its nature or content." Neither the unpublished portion of the first conversation nor the entire second conversation was so prejudicial as to undermine Noriega's right to an impartial jury, stated the court.

Judge Hoeveler, upon finding that Noriega was unlikely to suffer any prejudice were the disclosures on the unpublished tapes to reach the prosecution, declared that there was no factual basis for entering a permanent stay order, lifted the stay, and returned the tapes to CNN.

United States v. Noriega, 752 F.Supp. 1032; 752 F.Supp. 1037; 752 F.Supp. 1045 (S.D.Fla. 1990) [ELR 13:2:8]

Murals are protected by California Art Preservation Act

In 1980, Shell Oil Company hired several artists, including David Botello, to paint a large mural on the wall of a service station in East Los Angeles. The mural, entitled "Filling Up On Ancient Energies," covered 1200 square feet.

In 1988, Shell Oil, without notifying the artists, authorized the destruction of the wall to which the mural was affixed; the mural, except for a 120 square foot remnant, was destroyed.

When the artists sought damages under the California Art Preservation Act, a Los Angeles trial court granted summary judgment to Shell on the ground that the mural was not a painting within the meaning of the statute.

In reversing the trial court's ruling, appellate court Judge Norman L. Epstein first noted that the statute defined "fine art" as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality" other than a work prepared under contract for commercial use by its purchaser. Owners and possessors of fine art, other than the artist, are prohibited from destroying the art, and from authorizing others to do so.

If a work of art which is attached to a building cannot be removed from the building without damage to the art or the building, the artist is deemed to have waived his or her rights under the statute, according to Judge Epstein, unless there is an express reservation of rights in a written, recorded instrument. But if the fine art can be removed from the building without damage, the owner must attempt to notify the artist of the impending destruction or alteration. The artist then has ninety days to remove the art at his/her own expense. If the artist fails to remove the art within that time, the owner may destroy it without liability.

The court then found it apparent, from various definitions, that a mural was a "subset of painting. Much as rose is to flower, or ring to jewelry, or sonnet to poetry."

It appeared to Judge Epstein that depriving muralists from the protection accorded to individuals who create other kinds of paintings "would hardly serve the declared policies of protecting artistic expression and preserving the integrity of cultural and artistic creations, which are the purposes of the statute." The court cited a statute which exempted a David Hockney mural painted on the wall of a hotel swimming pool from a safety regulation that would have required the destruction of the mural. The legislature had stated that "To allow needless destruction of this unique work of art would be a great tragedy and inconsistent with the intent of the California Art Preservation Act, which establishes 'a public interest in preserving the integrity of cultural and artistic creations."

Upon finding that the legislature intended the term "fine art" to include paintings in the form of murals (that otherwise qualified for protection under the statute), the court remanded the matter for further proceedings. (Judge Epstein earlier noted that there apparently remained a triable issue of material fact concerning the removability of the mural from the wall.)

Botello v. Shell Oil Company, Case No. B048734 (Ca.Ct.App., May 1, 1991) [ELR 13:2:9]

Statute restricting minors' access to dial-a-porn messages is upheld

Providing access to telephone services offering sexually-oriented messages, recorded or live, only to those callers who request the service constitutes a "narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages," a Federal Court of Appeals in California has ruled.

In June 1989, the United States Supreme Court, in Sable Communications of California, Inc. v. Federal Communications Commission, 109 S.Ct. 2836 (ELR 11:4:20) held that section 223(b) of the Communications Act, in banning indecent as well as obscene interstate commercial telephone messages, was unconstitutionally overbroad.

In November 1989, Congress amended section 223(b). Parties may not knowingly make available, via telephone, any indecent communication to any person under 18 years old. But a message provider may defend against criminal prosecution upon showing that access to the prohibited communication has been restricted in accordance with the statute and with procedures set forth in Federal Communications Commission regulations.

Section 223(c)(1) states that a common carrier shall not provide access to prohibited communications unless a subscriber has requested such access in writing - the reverse blocking requirement. Under proposed regulations, the provider of dial-a-porn would have a defense if it had notified the common carrier on whose network it offered its service that the material was sexually oriented; had requested that the carrier specifically identify any calls to the dial-a-porn service on the subscriber's bill (if the provider offered its services on the generally available telephone lines); and required those using the dial-a-porn service to pay by credit card, obtain an access code, or use a descrambler.

The Information Providers' Coalition for Defense of the First Amendment argued that section 223 of the Act and the implementing regulations were not the least restrictive means for limiting minors' access to dial-a-porn messages, authorized an unconstitutional prior restraint on speech and took property without adequate procedural due process. The Coalition also challenged the FCC's definition of indecency.

Judge Aldisert emphasized that reverse blocking was only one of several "safe harbors" for message providers, and would apply only when the provider and the telephone carrier arrange to add any charges to the caller's telephone bill. The court found that substantial evidence supported the Commission's finding that reverse blocking was technically feasible.

The Commission had defined indecency, in the dial-a-porn context, as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary standards for the telephone medium." Judge Aldisert found that the definition was "sufficiently precise to survive constitutional scrutiny."

The court also rejected the prior restraint argument, noting that telephone carriers are private companies, not state actors, and, again, that if billing and collection services are not provided by the carrier, reverse blocking will not begin. Furthermore, subscribers to the dial-a-porn service would receive messages upon request; requiring a user to seek access in advance did not amount to a prior restraint.

Judge Aldisert, in denying the Coalition's petition for review, concluded by reiterating that the term "indecent" as used in section 223 and the regulation was not void for vaguenes, that the statute and the regulations were narrowly tailored to promote the compelling government interest of protecting the physical and psychological well-being of minors, that section 223 was not a prior restraint on speech, that substantial evidence supported the agency findings, and that the Commission did not act arbitrarily or capriciously, or abuse its discretion in adopting the challenged regulations.

Information Providers' Coalition for Defense of the First Amendment v. Federal Communications Commission, Case No. 90-70379 (9th Cir., Mar. 21, 1991) [ELR 13:2:10]

Assumption of risk doctrine bars recovery by soft-ball player for injuries suffered during game

During a recreational league softball game, Mark Krol was struck in the face by a thrown ball and suffered severe injuries. When Krol sued the opposing team, the "Chevron No Names," its corporate sponsor, and the player who threw the ball, a trial court granted summary judgment to the Chevron parties.

A California appellate court has affirmed the trial court decision, stating that the doctrine of reasonable implied assumption of risk was not abrogated by the comparative negligence system instituted by Li v. Yellow Cab Co., 13 Cal.3d 804 (1975). The doctrine survives as a defense which can negate the duty element of a negligence cause of action, stated Judge Ming W. Chin, and, in the instant case, Krol reasonably assumed the risk of being struck by the ball in the course of the game.

Krol argued that he could not have assumed the risk unless he knew the second baseman would throw to first base without looking to see where Krol was in the base path. Judge Chin disagreed, pointing out that whether or not Krol expected the second baseman to look before throwing was not material to Krol's assumption of the risk. After noting that one of the dangers inherent in the games of baseball and softball is the risk of being struck by the ball during the course of play, the court commented that the facts clearly indicated that Krol, who had played softball for about five years, was aware of the risk of being hit by batted and thrown balls. "If the fan in the stands necessarily assumes the risk of being struck and injured by a ball," commented Judge Chin, "no less can be expected of a knowledgeable and experienced participant in the game."

Judge Chin concluded by stating that "precluding liability for simple negligence in sporting contests, where the participants have actual knowledge of a sport's inherent risks, furthers the policy that active and vigorous participation in athletic endeavors should not be discouraged by the threat of litigation...Participation in recreational team sports is a socially desirable activity offering benefits to the participants and society as a whole...When an accidental injury such as [Krol's] occurs, it is unfortunate that the victim and family must bear the loss; but the alternative is to turn recreational sports into grist for the mills of litigation."

Judge Clinton White concluded, "reluctantly," that the majority ruling was correct, but wrote a concurring opinion to suggest that the doctrine of reasonable implied assumption of risk should be abolished altogether, or at minimum, should be applied "grudgingly." In Judge White's view, if the doctrine is to be applied to an individual injured during participation in sporting contests, a showing would be required that the party knew of the particular risk involved, i.e., the mechanism which caused the injury, and knew of the magnitude of the particular risk, i.e, the type and seriousness of the injury which might result.

Judge White agreed that Krol's action would be barred even if the court applied the proposed two-part test, for Krol was "acutely aware" of the serious risk posed by a thrown ball, and knew that this risk included the unfortunate possibility of losing an eye.

Krol v. Sampson, Case No.A047631 (Ca.Ct.App., Feb. 13, 1991) [ELR 13:2:11]

Judgment on jury verdict awarding damages of $1.1 million to amateur cyclist injured during race is reversed

In July 1982, Barbara Buchan participated in a bicycle race competition known as the "Self Magazine Cycling Circuit." The competition was sponsored by Conde Nast Publications, the publisher of the magazine, and was sanctioned by the United States Cycling Federation. Buchan was involved in a fall during a race in Malibu and suffered head injuries.

Buchan brought a personal injury action, alleging, among other claims, that the race was improperly supervised, and that the Federation failed to require, recommend or warn race participants to wear hardshell protective helmets and negligently sanctioned the use of an unsafe leather helmet.

A Los Angeles trial court granted Self Magazine's motion for summary judgment, noting that in 1982, Buchan signed a release of liability when she applied to the Federation for the renewal of her racing license. Buchan also signed a release as part of the entry application for the competition. The court initially granted the Federation's motion for summary judgment, but then vacated its order and denied the motion.

The jury found that the Federation was negligent, that Buchan was twelve percent negligent, and that Buchan was entitled to damages amounting to about $1.1 million.

A California appellate court has reversed the judgment entered on the verdict. The court found that the two above-noted releases constituted an express assumption of risk by Buchan. Presiding Judge Lillie noted that the 1982 release included, in part, an acknowledgement that cycling is an inherently dangerous sport and that the signing party agreed to "waive, release and forever discharge the United States Cycling Federation...from any and all liability..." The entry application for the magazine competition stated, in part, "I hereby waive, release and discharge any and all claims of damages for death, personal injury or property damage which I may have.." The release extended to any and all liability arising out of or connected in any way with participation in the event, and also stated: "Knowing the risks of bicycle racing, I nevertheless hereby agree to assume those risks and to release and hold harmless all of the persons or entities mentioned above..."

The argument that bicycle racing was a matter of public importance and that the release thus was void as being against public policy was rejected. A matter of great interest to the public is not a matter of "public interest," stated Judge Lillie; a matter of public interest requires some type of essential services which must be "involuntarily utilized by the general public."

Judge Lillie, after noting that collisions and falls are inherent risks of bicycle racing, and that it was solely Buchan's decision not to wear a sturdier helmet, remanded the matter to the trial court with directions to enter a judgment in favor of the Federation.

Judge Johnson, in dissent, first reviewed Buchan's bicycle racing achievements and then described the Federation's total control over the conduct of national level events such as the race in which Buchan was injured. It was noted that the Federation determined that novice rider Mary Pieper possessed sufficient skills to participate in the field of elite racers, although, according to Judge Johnson, prior to the 1982 races, no national level event had ever been conducted in which novice riders were allowed to race alongside the national level racers.

The dissent observed that Pieper fell during the first of four races, causing a "chain reaction of fallen riders." There were no serious injuries due to the collisions, and Federation officials, over the objection of several cyclists, including Buchan, allowed Pieper to continue racing. Six days later, during the Malibu race, Pieper lost control of her bicycle, fell, and caused another chain reaction of fallen riders, during which Buchan sustained head injuries.

Judge Johnson pointed out that "international amateur athletics involves the power and prestige of the United States;" that the public interest in international competition by United States amateur athletes is reflected in the

Amateur Sports Act of 1978; that the Federation has a total monopoly over world class amateur cycling in the United States; that Buchan could only participate in world class events through the Federation; that Buchan had no opportunity to discuss the terms of the release forms; and that the Federation did not provide racers with the opportunity to pay an extra fee for insurance against the Federation's negligence.

The factual record was before the trial court when the court ruled that the exculpatory clauses were unenforceable; Judge Johnson, citing the unique facts of the case, would have affirmed the trial court's ruling.

The California Supreme Court has denied Buchan's request that it hear the case.

Buchan v. United States Cycling Federation, Inc., Case No.B037872 (Ca.Ct.App., Jan. 30, 1991) [ELR 13:2:11]

Off-road race official may proceed with personal injury claim against race sponsor

James Van Meter was a checkpoint captain, or flagger, for the American Motor Sports Association. Van Meter would stop race cars and mark them as the cars passed through his checkpoint. During a race at Buzzard Bay, Van Meter was injured while working at an allegedly understaffed checkpoint.

A California appellate court has reversed a trial court decision granting summary judgment to the association parties. Judge Stone noted that if the race conditions at the Buzzard Bay checkpoint were those of a normal race, the trial court's ruling would have been correct. However, a trier of fact could determine that Van Meter did not have enough time to properly arrange his checkpoint and did not have adequate assistance. The hazards presented by the circumstances of the case might be distinguished from those normally expected during the running of an off-road race or operating a checkpoint.

Van Meter knew of the increased danger when he proceeded to operate the checkpoint, but whether he voluntarily assumed the risk of the additional hazards, and, if so, whether his choice was reasonable would be questions for the trier of fact.

Judge Stone proceeded to comment that the trier of fact might conclude that the increased risk appeared without sufficient time for Van Meter to make a rational decision as to whether or not to continue his participation in light of the potential danger to race drivers and others if he abandoned the checkpoint. On the basis of this conclusion, it might be determined that Van Meter's continued participation was involuntary, and the doctrine of assumption of risk would not apply.

Alternatively, the trier of fact might determine that Van Meter voluntarily proceeded with his activities in spite of the hazards, which included the dangers inherent in any off-road race, and the added dangers at the particular checkpoint. Then, if Van Meter acted unreasonably, the issue of liability would be governed by the principles of comparative fault. Upon a finding that Van Meter acted reasonably, the trier of fact might find that Van Meter would be entitled to a full recovery, or that the association parties were relieved of any duty of care to him.

However, it appeared to Judge Stone that a third option would better reflect the expectations of the parties. If the trier of fact finds the activity in which the injured party participated presented dangers normally associated with the activity and other dangers beyond those normally associated with the activity, the trier of fact then must determine whether the injury was proximately caused by the inherent dangers only (in which case assumption of risk would be a complete defense), the added dangers only (assumption of risk would not be a defense), or some combination of both (in which case there would be an apportionment of the award depending on the extent to which each caused the injury).

Van Meter v. American Motor Sports Association, Case No.F013058 (Ca.Ct.App., Feb. 20, 1991) [ELR 13:2:12]

United States Supreme Court upholds Arkansas tax on cable television service

Arkansas' Gross Receipts Act imposed a four percent tax on receipts from the sale of all tangible personal property and specified services; the statute exempted receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. In 1987, the state imposed the sales tax on cable television.

When various parties challenged the application of the sales tax to cable television services, the trial court, finding that cable television's use of public rights-of-way distinguished the service from other media, upheld the constitutionality of the statute.

The state subsequently extended the sales tax to "all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users."

In 1990, the Arkansas Supreme Court held that the sales tax violated the First Amendment for the period during which cable television, but not satellite broadcast services, were subject to the tax (ELR 12:8:18).

The United States Supreme Court has upheld the sales tax on cable television subscription fees, finding that the tax applied to a broad range of services, was not content-based, did not single out the press, and did not target cable television in a "purposeful" attempt to interfere with its First Amendment activities. Furthermore, noted Justice Sandra Day O'Connor, the tax applied to the approximately 100 cable systems then operating in the state; this was "not a tax structure that resembles a penalty for particular speakers or particular ideas."

The court rejected the cable parties' argument that the tax involved "intermedia and intramedia" discrimination, which, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violated the First Amendment. Justice O'Connor concluded that in applying the tax to cable television services alone, or to cable and satellite services, while exempting the print media, the state did not violate the First Amendment.

Justice Thurgood Marshall, with whom Justice Harry A. Blackmun joined in dissent, expressed the view that the First Amendment prohibits states from singling out a particular information medium for heavier tax burdens than are borne by like-situated media. Justice Marshall observed that the information service provided by cable does not differ significantly from the information services provided by Arkansas newspapers, magazines, television broadcasters and radio stations. By imposing tax burdens "that disadvantage one information medium relative to another, the State can favor those media that it likes and punish those that it dislikes," stated Justice Marshall. The only interest cited by the state for taxing cable operators more heavily than newspapers, magazines, television broadcasters and radio stations was its interest in raising revenue; this interest, for Justice Marshall, was not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle.

Justice Marshall then questioned the majority's emphasis on the fact that the tax at issue applied to about 100 cable systems, noting that there was no reference to the "magic number" above which taxation would be upheld. After expressing concern about the manner in which the tax might well influence the content of cable programming and pointing out that most communities are served only by a single cable operator, Justice Marshall took issue with the majority's failure to recognize "the potential for abuse inherent in the State's power to discriminate based on medium identity" (emphasis by the dissent). Justice Marshall cautioned that a statute, although content neutral, by imposing "differential burdens on like-situated members of the press violates the First Amendment because it poses the risk that the State might abuse this power." For the dissent, government, under the First Amendment, "simply has no business interfering with the process by which citizens' preferences for information formats evolve."

Leathers v. Medlock, Case Nos. 90-29, 90-38 (U.S.Supreme Court, Apr. 16, 1991) [ELR 13:2:13]

Pretrial rulings in Mapplethorpe photography exhibition matter are published, including finding that each allegedly obscene photograph must be judged separately, rather than in the context of the entire exhibit

In late 1990 (see ELR 12:6:21), a Cincinnati trial court jury acquitted the Contemporary Arts Center and gallery director Dennis Barrie of misdemeanor charges of pandering obscenity and using children in nudity-related material. The charges arose from the gallery's exhibit of sexually graphic photographs by Robert Mapplethorpe.

The June and September 1990 opinions of the Hamilton County Municipal Court, in which Judge Albanese ruled on various pretrial motions in the case, have been published.

The court initially found that the indictments correctly stated offenses under Ohio law; overruled a motion to dismiss for improper jury instructions; stated that an independent judicial determination of probable cause was not required; denied a request for an evidentiary hearing on selective prosecution; denied a motion to suppress any and all evidence of photographs videotaped pursuant to a search warrant; and rejected the claim that the statute prohibiting depictions of child pornography was unconstitutionally vague and overbroad.

In his September 1990 opinion, Judge Albanese first found that the jury, not the court, was required to decide the issues of fact involved in determining whether material is obscene under the test set forth in Miller v. California, 413 U.S. 15 (1973).

The court proceeded to consider whether an exhibition of photographs must be judged as one indivisible unit, or if each individual photograph may be judged separately. It was noted that the grand jury chose only to indict the gallery parties with pandering five photographs as obscene and that there were one hundred sixty-eight non-obscene pictures in the exhibition. The gallery parties argued that since the exhibition - the whole- was non-obscene, it was "undeniable" that the five photographs, as parts of the whole, also had to be non-obscene.

Judge Albanese cited the gallery parties' failure to appreciate "the liability inherent within the four corners of each photograph," and stated that "each photograph has a separate identity; each photograph has a visual and unique image permanently recorded. The click of the shutter has frozen the dots, colors, shapes, and whatever finishing chemicals necessary, into a manmade instant of time. Never can that 'moment' be legitimately changed."

After expressing the view that each photograph was a single presentation or work, the court pointed out that the five pictures at issue were displayed in separate arrangements, and that the five pictures were not shown in the catalogue of the exhibition due to (as quoted by the court) "budget restraints and esthetic design composition."

A finding that each photograph is a whole image would mean that the focus of inquiry would be placed on each picture "taken as a whole." Arranging photographs within an exhibition to claim a privilege of acceptability is not the test, emphasized Judge Albanese; "the 'whole' is a single picture...[t]o argue that possible obscene photographs as displayed are nevertheless non-obscene because they are part of an otherwise acceptable exhibit is rejected." Judge Albanese concluded by stating that to rule otherwise "would allow displays of such incongruity that imagination would be the only guideline for the arranging of a flagrant display resulting in a cultural calamity." The five photographs at issue will be individually "taken as a whole," with each measured against the Miller obscenity standards by the trier of fact.

Cincinnati v. Contemporary Arts Center, 566 N.E.2d 207; 566 N.E.2d 214 (Ohio Mun. 1990) [ELR 13:2:14]

Denial of insurance claims involving stolen art work is upheld

In 1975, Gordon R. Stone purchased fourteen Oriental art objects from Charles Bueche for $19,800. Bueche provided Stone with an appraisal in which the value of the items was set forth as $275,800. In the course of seeking insurance for the objects, Stone did not advise the insurance parties of the purchase price. Lloyds of London issued insurance in the amount of the appraisal. A few months later, all the items, except one, were taken from Stone's home in a burglary. Lloyds declined payment upon discovering the discrepancy between the cost of the items and the appraised value. A trial court entered judgment for Lloyds, rescinded the coverage and directed Lloyds to refund the premium paid by Stone.

An Illinois appellate court affirmed the judgment, finding that the failure to disclose the variation between the purchase price and the appraised value and the fact that the seller and the appraiser were the same person (even though Stone claimed that the insurance parties did not ask him about this information) constituted "a misrepresentation that affected the materiality of the risk..."

In a subsequent action against the Salvage & Bridges insurance agency, Stone alleged breach of contract for failure to obtain insurance. The trial court ruling granting, on the basis of collateral estoppel, the insurance agency's motion for summary judgment has been upheld. Judge Chapman stated that Stone's failure to reveal the circumstances surrounding the purchase and appraisal of the art objects was a material misrepresentation which provided the grounds for rescinding both the contract with Lloyds and Stone's oral contract with Salvage & Bridges to procure insurance.

Stone v. Salvage & Bridges Agency, Inc., 565 N.E.2d 318 (Ill.App. 1990) [ELR 13:2:14]

Judgment imposing costs on Twentieth Century Fox pursuant to contempt conviction for violating block booking ban of Paramount consent decree is upheld

In 1988, the late Federal District Court Judge Edmund L. Palmieri found that Twentieth Century Fox had violated the block booking prohibition of the 1951 Paramount consent decree (ELR 10:10:21). The court fined Fox $500,000, and also imposed a $5,000 fine on Leila Goldstein, the former manager of Fox's Midwest theatrical distribution office.

Subsequently, a Federal Court of Appeals, although upholding the contempt conviction, ruled that a jury trial was required in order for the court to impose a criminal contempt fine in an amount greater than $100,000 (ELR 11:10:5).

On remand, the government elected to accept a fine limited to $100,000, and Federal District Court Judge

Miriam Goldman Cedarbaum entered judgment in that amount. Judge Cedarbaum also imposed costs of prosecution in the amount of about $36,000.

A Federal Court of Appeals has rejected Fox's claim that the costs of prosecution were improperly assessed, stating that Fox waived its challenge to the calculation of costs by failing to raise it on the prior appeal. Judge Palmieri's initial ruling had not imposed costs as part of a contempt power punishment, and Judge Cedarbaum did not add to the costs beyond those previously imposed by Judge Palmieri in 1988.

United States v. Twentieth Century Fox Film Corporation, 926 F.2d 227 (2d Cir. 1991) [ELR 13:2:15]

Slander action brought by coach of woman's basketball team is remanded for determination of whether university athletic director's statements are entitled to absolute privilege

In March 1981, Orby Z. Moss, Jr., the Athletic Director of the University of the District of Columbia, notified Bessie Stockard that her contract to serve as the head coach of the women's basketball team would not be renewed. Stockard had been a tenured Associate Professor in the university's Physical Education Department before accepting the coaching position in June 1979. Moss, who apparently became dissatisfied with Stockard's handling of expense money provided by the university for a team trip, allegedly stated to various individuals that Stockard was discharged for the misappropriation of funds.

When Stockard sued Moss and other university parties alleging several causes of action, a Federal District court granted the university parties' motion for a directed verdict with respect to all claims except those for slander and breach of contract.

The jury awarded Stockard damages of $18,000 for breach of contract and $300,000 for slander. In considering post-trial motions, the court rejected Moss's argument that he was immune from civil liability for his statements under an absolute privilege for public officials acting in their official capacity. And there was sufficient evidence, according to the court, from which the jury could have found that Moss made the statement without adequately investigating whether the asserted misappropriation was true; this conduct constituted recklessness so as to overcome Moss's qualified "common interest" privilege.

The university parties were estopped from denying the existence of a contract for the 1981-1982 season, found the District Court, but not for the 1982-1983 season, and contract damages were remitted, accordingly, to $9,000.

Stockard also accepted the remittitur of the damages for slander to $100,000.

Federal Court of Appeals Judge Farrell has remanded to the trial court the issue of whether Moss's statements were shielded by an absolute privilege.

However, Judge Farrell proceeded to determine that the evidence supported the inference that the individuals who heard Moss's statements concerning the misappropriation of funds understood the statements to mean that Stockard had engaged in some form of deliberate wrongdoing. A reasonable juror also could have found that the statements were false; the District Court's refusal to direct a verdict on this issue therefore was correct.

Furthermore, although the failure to undertake a reasonable inquiry prior to publication, without more, did not, in Judge Farrell's view, constitute the malice necessary to overcome Moss's qualified common interest privilege, the District Court's error in instructing the jury on this issue did not affect the fairness of the verdict. Judge Farrell noted that there was substantial evidence allowing the jury to find that Moss had made the challenged statement with, "at the least, reckless indifference to its effect on Stockard's reputation" so as to defeat Moss's qualified privilege.

Judge Farrell next agreed with the District Court that, in the circumstances of the instant case, Stockard was a private figure, stating that "merely by achieving some success as a basketball coach, she did not expose herself to a greater risk of being falsely accused of financial defalcation in her duties than any other person."

The court concluded by finding that the District Court erred in allowing Stockard to recover $9,000 in damages for breach of contract for the 1981-1982 coaching season. It was noted that Stockard already had been fully compensated for any injury resulting from the purported breach of the promise to renew her contract in a settlement of Stockard's Human Rights Act claim against the university parties. Judge Farrell affirmed the remittitur of the jury verdict on the slander claim.

Moss v. Stockard, 580 A.2d 1011 (D.C.Cir. 1990) [ELR 13:2:15]

Professional Bowlers Association wins motion for summary judgment in antitrust action brought by bowling ball manufacturer

A Federal District Court in Missouri has ruled that the Professional Bowlers Association's refusal to sanction Eureka Urethane's bowling ball for tournament play did not violate the antitrust laws.

Eureka Urethane had obtained a license from Anheuser-Busch for the use of the Budweiser bow-tie logo; Eureka planned to place the logo on a bowling ball colored in "Budweiser red." The company sought the association's certification of the bowling ball, but certification was denied based on the appearance of the commercial logo on the ball.

In response to Eureka Urethane's antitrust action, the court first found that the relevant product market was "items used by professional bowlers during televised tournament play." Although expressing concern that the definition of the market was too narrowly drawn, the court found that the association did not present evidence which would substantiate a broader relevant product market; the association's motion for summary judgment on the ground that it did not possess a monopoly in the relevant market therefore was denied.

Judge Limbaugh then found that since the association exercised absolute control over the articles professional bowlers may use during televised tournament play, and may prohibit the use of any article, the association possessed monopoly power in the relevant market.

In turning to the issue of whether the association used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor, the court found that the refusal to sanction the Bud Ball was neither unreasonable nor anticompetitive, but was a valid exercise of business judgment to protect the association's enterprise and serve the interests of professional bowlers. It was observed that NBC viewed the Bud Ball as a means of free advertising for Anheuser-Busch, and informed the association that if the ball were used, the network might not televise the fall tour. The association also was concerned that the use of the ball would decrease the number of corporations willing to sponsor tournaments, and would decrease the value of spot commercial time.

The court also rejected Eureka Urethane's claim that the association denied the company an essential facility, i.e., the items which professional bowlers may use during televised tournament play. Among the factors considered by Judge Limbaugh was that the bowling ball manufacturer and the association were not competitors in any market.

Eureka Urethane also claimed that the association engaged in an illegal tying arrangement because a professional bowler must purchase a membership in the association in order to enter an association-sponsored tournament. Judge Limbaugh noted that Eureka Urethane was not a purchaser or potential purchaser of the tied product, and was not a competitor in the market for the tied product. The laws prohibiting tying arrangements were designed to protect competition in the tied market, noted the court, and Eureka Urethane's alleged injury was only "tangential" to that which the antitrust laws were designed to prevent.

The court then rejected Eureka Urethane's claims under section 1 of the Sherman Act. Although finding that the company alleged sufficient facts, with the exception of a claim against Miller Brewing Company, to prove a conspiracy involving the association and other parties, the court declined to find that the association parties engaged in a group boycott or price fixing in a per se violation of section 1. Applying a rule of reason analysis, Judge Limbaugh again noted that the association did not intend to harm or unreasonably restrain competition.

Judge Limbaugh concluded by dismissing Eureka Urethane's claim alleging tortious interference with business relations for lack of subject matter jurisdiction.

Eureka Urethane, Inc. v. PBA, Inc., 746 F.Supp. 915 (E.D.Mo. 1990) [ELR 13:2:16]

Dispute over fees due boxer Pinklon Thomas is resolved

Don King Productions agreed to pay Pinklon Thomas, Jr. $150,000 for participating in a December 9, 1988 boxing match with Evander Holyfield. Thomas purportedly received advances totalling about $53,000. The parties allegedly agreed that after the boxing match Don

King Productions (King) would pay $37,500 directly to Thomas' manager, New Opportunities, Inc., that King's co-promoter, Main Events Monitor, would pay $26,250 directly to Angelo Dundee, Thomas' trainer, and that King would pay about $33,000 to Thomas. However, King claimed that there were conflicting claims to Thomas' fee, and filed an interpleader action to determine the rights to the $33,000 fund deposited with the court.

A Federal District Court in New York noted that Richard Gidron had sued Thomas for breach of a management contract; a stipulation of settlement entered in the case provided that Thomas would pay $75,000 to Gidron from funds being held by a New York trial court, and $50,000 from the proceeds of each of Thomas' next three fights. And Don King Productions and King agreed that in the event that they promoted any of Thomas' next three fights, they would withdraw from the proceeds of the fights, prior to distribution to Thomas, the sums due to Gidron.

When Thomas fought Trevor Berbick, King paid $50,000 to Gidron. Thomas also fought Michael Tyson and, after further litigation, noted Judge Haight, Gidron received an additional $50,000.

In January 1988, Althea Jones obtained from a Michigan trial court a support order for Jones' and Thomas' daughter. Jones, claiming that Thomas owed about $14,000 on the judgment, served a writ of garnishment on Don King Productions.

The United States Government also claimed priority to the interpleader fund as a result of federal tax liens filed against Thomas for unpaid federal income taxes totalling, with interest and penalties, about $480,000.

Judge Haight found that Jones' child support payments had priority over the government to the interpleader funds; that the stipulation of settlement entered into between Thomas and Gidron was a valid assignment made for valuable consideration; and that Gidron's interest in the fee payable to Thomas predated the government's tax lien. Judge Haight then concluded that under New York law, Jones' support order had priority over Gidron's claim.

Don King Productions, Inc. v. Thomas, 749 F.Supp. 79 (S.D.N.Y. 1990) [ELR 13:2:17]

Madison Square Garden and promoter are not liable for injuries suffered by boxer due to alleged glove-tampering by opponent

During a 1983 boxing match with Luis Resto, promoted by Top Rank, Inc. at Madison Square Garden, now-deceased boxer Billy Ray Collins, Jr. suffered head and eye injuries that effectively ended Collins' career. Collins' injuries, according to facts established in a criminal case, apparently occurred when Resto's trainer removed the padding from Resto's boxing gloves.

Andrea Lee Collins, the boxer's wife and the administrator of his estate, brought a personal injury action against Resto and other parties. Collins claimed that the contract between Top Rank and Madison Square Garden required the facility to provide security guards for the event, and that a guard should have been stationed in Resto's dressing room to prevent the alleged tampering.

A Federal District Court in New York has found that there was no precedent for imposing such a duty upon Madison Square Garden. And under the New York State Athletic Commission's regulations, a guard working for the Garden would not be permitted in a boxer's dressing room prior to a match. Judge Owen therefore dismissed Collins' claim against Madison Square Garden.

Judge Owen then noted that the New York State Athletic Commission inspector is the person charged with the responsibility of detecting any possible glove-tampering. Top Rank was not required to monitor the gloves prior to the match, and the promoter's conduct was similar to the practices engaged in by other boxing promoters. Again, Top Rank would not have been permitted, under the Athletic Commission's regulations, to have a representative in Resto's dressing room unless the Commission granted its permission. Thus, although Top Rank was contractually obligated to provide the boxing gloves for the match, the company had no duty beyond providing those gloves to the contestants "in an unaltered, untampered state."

With respect to Collins' claim against Top Rank based on the conduct of the referee, the court noted that even assuming there was negligence on the part of the referee, Top Rank could not be held liable for such negligence. The promoter paid a fee for referee services to the Commission along with other required fees; the Commission made the payment directly to the referee. The Athletic Commission's rules specify that a promoter may not participate in selecting the referee, who is licensed, hired and supplied by the Commission. The referee thus was not an employee of the promoter, and did not have any duty to the promoter as an independent contractor.

The court granted the motions for summary judgment brought by Top Rank and Madison Square Garden on Collins' negligence and breach of contract claims.

Collins v. Resto, 746 F.Supp. 360 (S.D.N.Y. 1990) [ELR 13:2:17]

Briefly Noted:

Contracts/"Copacabana."

Rita Catlin and Charlotte Singer claimed that they submitted to Barry Manilow's manager a script based on Manilow's song "Copacabana." When the Manilow parties produced a television movie entitled "Copacabana," Catlin and Singer sued for breach of contract.

A New York appellate court has found that the trial court properly dismissed a cause of action for conversion as time-barred, and upheld the ruling that Catlin and Singer stated a valid claim in quasi or implied contract. Catlin and Singer also may proceed with a cause of action for breach of an express contract; the Manilow parties' promise to pay reasonable compensation for the use of the script was not, as found by the trial court, an unenforceable "agreement to agree" with a price term too indefinite to be enforced - the parties agreed to a price, which would be the fair market value of the script when used, declared the court.

Catlin v. Manilow, 566 N.Y.S.2d 59 (N.Y.App. 1991) [ELR 13:2:18]

Jimi Hendrix Royalties.

A 1971-1972 arbitration proceeding denied PPX Enterprises' claims to royalties from recordings by the late Jimi Hendrix, but Warner Bros. Records was directed to comply with certain undisputed royalty accounting provisions of a 1968 agreement between PPX and Hendrix. In a subsequent arbitration proceeding, in which the parties sought a determination of the proper amounts due, the arbitrator denied PPX's substantive claims. A New

York appellate court has affirmed a trial court decision refusing to vacate the arbitration award.

PPX Enterprises, Inc. v. Warner Bros. Records, Inc., 562 N.Y.S.2d 81 (N.Y.App. 1990) [ELR 13:2:18]

Copyright/"Koosh" balls.

"Koosh" balls, malleable as they may be, are not impervious to rejection. In 1988, the Copyright Office refused to register a copyright in the soft sculpture. A Federal District Court decision affirming the Copyright Office ruling has been upheld by a Federal Court of Appeals.

The Copyright Office determined that there was not enough additional creative work beyond the Koosh ball's basic spherical shape to warrant the registration of a copyright, and that the "feel" of the object was a functional part of the work.

Judge Ruth Bader Ginsburg emphasized that the court's review was limited to whether the Copyright Offices' refusal to register the ball, in the circumstances presented, was an abuse of discretion; the court did not reach the issue of the copyrightability of the ball.

OddzOn Products, Inc. v. Oman, 924 F.2d 346 (D.C.Cir. 1991) [ELR 13:2:18]

Distribution Contract.

PKO Television, claiming that Time Life Films failed to aggressively distribute a film produced by PKO, sued Time Life for conversion, unjust enrichment, breach of contract and fraud in the inducement. The portion of the trial court's ruling denying Time Life's motion to dismiss the conversion cause of action has been reversed. The appellate court upheld the ruling dismissing the cause of action for unjust enrichment, stating that the claim was inconsistent with the breach of contract claim.

PKO Television, Ltd. v. Time Life Films, Inc., 564 N.Y.S.2d 434 (N.Y.App. 1991) [ELR 13:2:18]

Attorneys' Fees.

When Herb Neft and other parties sued Vidmark, Inc. for copyright infringement, a Federal District Court in California granted Vidmark's motion for summary judgment. The court, finding that the lawsuit was frivolous and that it was litigated in bad faith, ordered the Neft parties and their counsel, jointly and severally, to pay fees and costs amounting to about $110,000.

A Federal Court of Appeals has reversed and remanded the District Court's decision. It was noted that section 505 of the Copyright Act allows the recovery of costs "by or against any party" and the award of attorneys' fees "to the prevailing party." There was no indication, stated Judge Beezer, that Congress intended section 505 to be a means of imposing sanctions on attorneys. In a footnote, the court commented that upon reconsideration, the District Court must provide an explanation of its reasons for the fee award.

Neft v. Vidmark, Inc., 923 F.2d 746 (9th Cir. 1991) [ELR 13:2:18]

Antitrust/ESPN Programming.

Telsat, an Indiana subscription television program service, claimed that ESPN monopolized the market for subscription television programming services for quality sports programming in the United States. A Federal District Court in New York found that Telsat adequately alleged monopoly power, as well as anticompetitive conduct, on the part of ESPN. Judge Leisure therefore denied ESPN's motion to dismiss Telsat's first cause of action. Telsat also alleged that ESPN's conduct with certain unnamed cable operators constituted a combination or conspiracy to monopolize the market for subscription television programming services. The court found that Telsat failed to set forth the information required to plead concerted action, and granted ESPN's motion to dismiss the claim under section 2 of the Sherman Act.

Judge Leisure denied ESPN's motion to dismiss Telsat's attempted monopolization claim and pendent state law claims, but concluded by rejecting Telsat's claims alleging the monopolization of certain local markets and the violation of section 1 of the Sherman Act.

Telsat v. ESPN, Inc., 753 F.Supp. 109 (S.D.N.Y. 1990) [ELR 13:2:19]

Satellite Dish.

A Federal District Court in New York has ruled that a Port Jervis city ordinance regulating the installation of satellite television receive-only dish antennas was preempted by a 1986 Federal Communications Commission regulation. The challenged ordinance contained minimum setback, screening and elevation restrictions.

Judge Robert L. Carter noted that the ordinance did not have a "clearly defined health, safety or aesthetic objective;" that the city did not justify the differentiation between the receive-only dish antennas and other antenna facilities; that the variance procedure granted the zoning authority "virtually unfettered" discretion to grant or deny a variance; and that certain parts of the ordinance imposed unreasonable limitations on the installing party's reception of satellite television signals. The court, without reaching the constitutional claims raised, concluded that the ordinance was preempted by federal law on its face and enjoined the city from enforcing the provisions at issue.

Cawley v. City of Port Jervis, 753 F.Supp. 128 (S.D.N.Y. 1990) [ELR 13:2:19]

Cable Television.

Warner Cable Communications, the holder of a nonexclusive franchise to provide cable service to Niceville, Florida, challenged the city's decision to operate a cable system. A Federal Court of Appeals has upheld a District Court decision granting summary judgment to the city.

The court found that Warner did not have a protected First Amendment interest even if the proposed city-owned system "prevented" the cable operator from communicating its message by making the delivery of such message economically unfeasible. The court noted that the city ordinance did not interfere with Warner's programming decisions and editorial policies, and did not restrict the company's access to its audience.

Chief Judge Tjoflat then found that Warner's due process claim was premature because the company did not allege an actual or immediately threatened injury likely to result from the city's dual role as Warner's regulator and competitor. And the provision of the ordinance establishing an independent editorial programming board did not violate Florida's constitutional prohibition against the delegation of unrestricted legislative authority, concluded the court.

Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990) [ELR 13:2:19]

False Light.

In May 1986, employees of television station KATU accompanied police officers who were executing a warrant to search the home of Timothy Magenis; the KATU parties filmed the raid and subsequently broadcast the film.

An Oregon trial court dismissed Magenis' claim for false light invasion of privacy and entered judgment on the jury's verdict for the KATU parties with respect to the Magenis' claim for invasion of privacy by intrusion upon seclusion. Appellate court Presiding Judge Buttler agreed that the one year statute of limitations applicable to defamation claims served to bar Magenis' false light claim since the alleged false light was "plainly defamatory."

Magenis also argued that the KATU parties were trespassers, but the court observed that the claim presented was for invasion of privacy, not trespass. Judge Buttler concluded that the trial court correctly allowed the jury to determine if the station's conduct was reasonable.

Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Ore.App. 1990) [ELR 13:2:19]

IN THE NEWS

Screen Actors Guild and American Federation of Television & Radio Artists members ratify new television and radio commercials contract

According to news reports, the newly ratified Screen Actors Guild and AFTRA television and radio commercials contract provides a thirteen percent increase in television commercial session fees and a thirty-five percent increase in reuse fees paid when commercials are shown on cable television. All fee increases are retroactive to February 7, 1990.

The contract also sets a twelve and one-half percent increase in program fees for Spanish language commercials and a nine percent increase in television "wildspot" payments.

The Guild has obtained jurisdiction over extras who work in filmed television commercials in the New York, Los Angeles, San Francisco, San Diego, Las Vegas, Hawaii, Chicago, Miami and Orlando markets.

With respect to radio, the contract includes a fifteen percent increase in session fees; a seven percent increase in all radio network use fees; and a ten to fifteen percent increase in all radio wildspot use rates.

Employer contributions to the unions' pension and health plans will increase to twelve and one half percent of covered earnings. The unions reached their agreement with the joint policy committee of the American Association of Advertising Agencies and the Association of National Advertisers. [July 1991] [ELR 13:2:20]

Walt Disney Co. settles "Sleeping Beauty" royalty claim

Mary Costa provided the voice of "Sleeping Beauty" in the animated Walt Disney film. It has been reported that Costa's $2 million royalty claim against Disney, based on the 1986 videocassette release of the film, has been settled. The terms of the settlement of the Florida action were not disclosed.

Costa's contract with Disney barred the company from selling "transcriptions" of the film without Costa's consent. Singer Peggy Lee's contract with Disney also contained this provision; in March 1991, Lee obtained a jury verdict awarding her damages totalling $3.8 million against Disney with respect to royalties from the sale of videocassettes of the animated film "Lady and the

Tramp." The trial court judge subsequently reduced the damage award to $2.035 million (ELR 12:12:10 ; 12:2:19), and Disney is appealing the award. [July 1991] [ELR 13:2:20]

DEPARTMENTS

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