LEGAL AFFAIRS

French High Court Remands Huston Colorization Case

by Paul Edward Geller

1. Introduction

The Asphalt Jungle tells a story of petty criminals who, in grim urban settings, plot the robbery of their lives and fail, tragically. The film was shot in black and white.

In France, the heirs of John Huston, the director of The Asphalt Jungle, as well as Ben Maddow, the screen-writer, brought an action sounding in moral right. They sought to prevent the French television channel La Cinq from televising a colorized version of that motion picture. They contended that respect for the integrity of the original work precluded disseminating this later version.

The claimants in the Huston case obtained a preliminary injunction, had it upheld in an initial trial on the merits, and then lost at a subsequent trial. The highest French court of appeal in suits between private parties has now ordered the case to be retried again in its entirety. This high court only expressly ruled, however, on a narrow choice-of-law issue arising at the threshold of the case. The next trial court will have to decide on the substantive issues and relief.

2. History of the Case

The ups and downs of the Huston case have to be understood within the structure of the French judicial system. There is no jury trial for civil cases there, but litigants do have more than one "bite at the apple."

The system has three levels. At the first level, private parties bring suit against each other before a court of first instance. At the second level, the parties may have a new trial on facts and law by an intermediate court, called a court of appeal. At the third level, there is the right to have a panel of the Court of Cassation, the highest court of appeal in private cases, review the intermediate court's decision for errors of law. If the high court finds reversible error, it will remand the case for a new trial by another court of appeal.

The Huston case has now been up the French judicial ladder twice. On the first trip up, before any trial, a court of first instance granted the Huston heirs and Ben Maddow a preliminary injunction against the televising of a colorized Asphalt Jungle, and the Fourteenth Chamber of the intermediate Court of Appeal of Paris upheld this injunction. On the second trip up, after a trial on the merits, the court of first instance issued a permanent injunction to protect Huston's and Maddow's moral rights. Still on this trip up, after another trial, the Fourth Chamber of the same intermediate court, the Court of Paris, rejected all claims based on moral rights. It was this decision that a panel of the Court of Cassation overturned.

The Fourth Chamber of the Court of Paris based its decision on a variety of overlapping findings of fact and law. Most importantly, the Fourth Chamber refused to consider either the director John Huston or the screenwriter Ben Maddow as "authors" of The Asphalt Jungle. Since only authors have moral rights in France, this refusal blocked the Huston heirs and Ben Maddow from suing on such rights. It was this obstacle to suit that the Court of Cassation removed at the threshold of the case.

3. The Reasoning of the French High Court

The Court of Cassation is known for its concise decisions. In one or at most a few pages, the Court indicates the issues it is to consider, as well as the provisions and principles of law dispositive of the issues, with at most a passing reference to the rationale of its decision. In the Huston case, it achieved brevity, to start, because it focused on but one issue on appeal: what law, American or French, properly defines "author" for purposes of exercising moral rights in France?

At trial, the Fourth Chamber of the Court of Paris looked to the American contracts and Hollywood studio procedures by which the producer of The Asphalt Jungle had employed directors and screenwriters to make films. It also referred to American law, ostensibly both the law governing these contracts and the copyright law of the United States which defines the employer as the "author" of a work made within the scope of employment. It concluded that the entire set of such elements, both of fact and law, "prohibits barring the application of American law and setting aside the contracts and, consequently, compels denying the parties Huston and Maddow any possibility of asserting their moral rights." The Court of Cassation quoted this language as encapsulating the very error of law which it could not let stand in the way of the suit on the director's and screenwriter's moral rights.

The Fourth chamber of the Court of Paris followed old French conflicts doctrine in looking beyond France, where relief was sought, to decide the Huston case under the law of the country from which the work at issue came. The Fourth Chamber did not resolve an ambiguity inevitable in this approach: a work can be said to come either from the country where it is created or from the country where it is first published. On the one hand, the Fourth chamber seemed to lean toward the law of the country of creation, arguing that such a choice would respect the contractual expectations which, under uniquely American conditions, the parties had in creating The Asphalt Jungle. On the other hand, the Fourth Chamber also spoke as if it were applying the law of the country of first publication, or at least it referred to the notion of the "country of origin" which, in the Berne Convention, often turns on first publication, although not clearly in all cases. Such ambiguity is, of course, compounded by the possibility that a film work could be created in one or a number of countries and first published in still others.

The Court of Cassation side-stepped these uncertainties by looking to French law alone. To start, it referred to the Law 64-689 of July 8, 1964, which allows French courts to refuse protection to foreign works absent reciprocity, for example, under a treaty. This reference is not decisive: the provision the Court cited in this Law of 1964, the second paragraph of article 1, merely assures that moral rights are not subject to the requirement of reciprocity. Nonetheless, in starting with this provision, the Court at least distinguished the Huston case from most international copyright cases, in which treaties such as the Berne Convention require protection. This distinction makes clear that the Court sought neither choice-of-law principles nor dispositive law for the case in any copyright convention or treaty, but rather in wholly domestic law. Thus, although they had invoked it, the Huston heirs did not need the Berne Convention, or any other treaty, to support their proposed choice of French law to govern their suit. France, like many other countries, grants foreign authors moral rights directly under domestic law, just as it protects foreign persons generally against torts to their persons. The Court cited article 6 of the Law of March 11, 1957, the French copyright statute, as the substantive basis for the suit.

Article 6 provides that moral rights are "attached" to the "person" of the author and are "inalienable."

The Court of Cassation held article 6 of the Law of 1957 to be a law of "imperative" or "compulsory application." While this term seems to mark a crucial link in the Court's reasoning, it does not provide much of a clue to its rationale in the Huston case. It would trivialize the Court's decision to read the term as merely reconfirming that article 6, by providing for inalienable moral rights, overrides contracts waiving such rights. On that reading, the Court would have logically had to indicate a further ground, such as international public policy, for applying article 6 instead of foreign laws allowing for waiver, but it did not take that step. To take a stronger position, the Court could have identified article 6 as a "law of police" which, under article 3 of the French Civil Code, must apply to all parties, whether French or foreign, throughout French territory. A French court must, accordingly, enforce a law of police on French territory even if there are foreign parties or other foreign elements present in a case that might otherwise lead the court to apply competing foreign law to the case. French commentary explains that, while "[u]ncertainty effectively subsists on the scope of this notion," it nonetheless seems to "concern matters where the social interests at stake appear to be so important that the law of the forum must apply according to its own terms." However, the Court of Cassation not only stopped short of calling article 6 of the Law of 1957 a law of police, but it indicated no "social interest" or other reason for giving it any priority in a conflict with foreign law. The Court simply used the term "compulsory application" to refer to some ground for having article 6 apply in the face of any conflict of laws, but it did not explain this ground any further.

The reasoning of the Huston decision might well seem conclusory in another respect. To benefit from moral rights under article 6 of the Law of 1957, a claimant needs to be an author. Yet, it would seem, the Court of Cassation reasoned as if article 6 gave the director and screenwriter of The Asphalt Jungle the status of authors. If so, the condition for benefitting from article 6 -- for having standing to invoke this provision -- was found to be satisfied by applying it. In effect, the Court of Cassation simply refused to split the issue of defining the "author" for purposes of article 6, on the one hand, from the issue of deciding whether to apply this provision, on the other. It is not difficult to imagine a rationale for invoking article 6 as authority on both points at once: this provision recognizes moral rights that, by their nature, protect the interests of flesh-and- blood creators, so that it can only be consistently applied by respecting its premise that the authors it mentions are natural persons.

On this point, the Huston decision may be read narrowly. The Court of Cassation, quoting from the first sentence of article 1 of the Law of 1957, stresses that only by virtue of the "fact of creation" do moral rights under article 6 vest in the "persons" of authors. The Court of Cassation has no power to determine facts, including those concerning the creation of a work, but its language at this point could be read as implying that it was error to accept proof of creation by the film studio, a legal entity. Thus the decision at a minimum would allow the argument at trial that the foreign director, John Huston, created The Asphalt Jungle, albeit in collaboration with others. The decision then assures that, once the fact of creation is established, French moral rights are deemed to be vested even in foreign flesh-and-blood creators.

4. Impact, if Any, on Copyright Commerce

Article 6 of the Law of 1957 categorically makes French moral rights inalienable. Applying it, the Court of Cassation, in the Huston decision, allowed members of the creative team for a film work to assert French moral rights in the face of contracts that ostensibly waived them. The Court was altogether indifferent to the fact that these were American contracts and to the possibility that American law governed them or even made them contractually effective.

The Huston case thus reminds us that moral rights remain a wild card in international copyright commerce. True, there are jurisdictions which, by statutory or case law, allow for the contractual waiver of moral rights. These laws nonetheless vary in contemplating the cases and contractual terms that might allow for a successful waiver of moral rights. Since some jurisdictions reject such waiver and others allow it to varying degrees, it should not be assumed that moral rights can be altogether removed from a deal between the producer and a member of a creative team by a blanket clause for all countries and cases.

The Huston decision has already prompted questions on a further point possibly significant in copyright commerce. The copyright laws of most countries deem flesh-and-blood creators to be authors generally: if the Huston decision allows foreign creators the status of authors for purposes of exercising moral rights, do these creators also have that status for purposes of exercising economic rights? If there is an internationally valid answer to this question, it should optimally derive from the Berne Convention which provides the key principles governing the choice of law in most copyright cases worldwide. Ostensibly, the Court of Cassation, in the Huston decision, reached a result which is not inconsistent with the Berne principle of national treatment. The Court, however, as explained in this comment, does not indicate that it took any account of the Berne Convention at all in its rationale. It therefore seems inappropriate to look to the Huston decision for any systematic approach to defining authors worldwide.

Unfortunately, there is no generally binding response to the question: what law defines the "author" of a work abroad? In theory, this uncertainty affects the starting point of worldwide chain of title to copyrights considered as economic entitlements. If different laws determine "authors" differently, such copyrights may initially vest in different parties from country to country and case to case. This risk is especially high for cases involving so-called team works, most notably audiovisual works, since copyright laws vary considerably in vesting economic rights in the producers and various creators of such works. In practice, a proper contract between a producer and all the members of a creative team can anchor such chain of title in the producer, albeit within certain limits. The contract would have to grant the producer economic rights for all countries in which they do not vest in the producer, but rather in the creators.

There have also been fears that the Huston decision would permit "unrestrained blackmail" by American film creators who would challenge "the exploitation of films in France on the basis of moral rights" in order to seek economic advantages from film producers. It is, however, settled law in France that an action sounding in moral right, but brought for reasons that have nothing to do with the raison d'etre of the right, must fail as an "abuse of right." French procedural law also provides for rigorous civil remedies against anyone who institutes French judicial proceedings in a "dilatory or abusive fashion."

5. Conclusion

Colorization has unleashed great passions. The Huston decision will do little to calm these passions, since it does not reach the concerns which feed them. It simply disposes of a difficult choice-of-law issue in international copyright in so far as it arose at the threshold of an extraordinary case. Further, it deals with this issue idiosyncratically, outside the usual context of international copyright, namely the Berne Convention and related treaties. Finally, its reasoning is concise to the point of being obscure, so that it hardly qualifies as persuasive in different cases.

Mr. Geller is an attorney in Los Angeles and an Adjunct Professor at University of Southern California Law Center. He is General Editor of International Copyright Law and Practice. He translated the French texts cited within this article.

NOTES

1. Arret 861 P, Cass. civ., le ch., hearing May 28, 1991.

2. The Court of Cassation will join its panels in a General Assembly if the intermediate court on remand decides a case on grounds which the high court has already found to be legally erroneous in that case. It may also meet in a General Assembly to decide cases brought before it for the first time if it deems it necessary to settle the law in such cases. The rulings of the General Assembly constitute binding precedents.

3. Ste. "La Cing" c. Angelica Huston et autres, Cour d'appel, Paris, 14e ch., June 25, 1988, 138 Revue Internationale du Droit d'Auteur [RIDA] 309 (1988). For commentary, see Gaubiac, Note, id. at 312.

4. Consorts Huston c. cinquieme Chaine et autres, Trib. de grande instance, Paris, le ch., Nov. 23, 1988, 139 RIDA 205 (1989).

5. Ste. Turner Entertainment c. Heritiers Huston et autres, Cour d'appel, Paris, 4e ch., July 6, 1989, 143 RIDA 329 (1990). For commentary, see Francon, Note, id. at 339; Edelman, Note, 116 J. du Droit international 992 (1989).

6. See Arret 861 P, supra note 1.

7. The Fourth Chamber granted other relief -- requiring notices in connection with televising the colorized version -- but not on the grounds of any author's moral right. Turner c. Huston, supra note 5, 143 RIDA at 337-338.

8. See id. at 335 (emphasis in the original text).

9. See 3 J.-P. Niboyet, Traite de droit international prive francais 309-310 (1944)

10. See S. Ricketson, The Berne Convention for the protection of literary and artistic works: 1886-1986, paras. 5.69-5.80 (1987).

11. See Arret 861 P, supra note 1.

12. See Geller, International Copyright: An Introduction section 3[2][a], in 1 International Copyright Law and Practice (M. Nimmer and P. Geller, eds. 1991).

13. See, e.g., Anne Bragance c. Olivier Orban et Michel de Grece, Cour d'appel, Paris, le ch., Feb. 1, 1989, 142 RIDA 301 (1989) (U.S. contractual waiver of moral

right not enforced, on the ground that international public policy favored applying French rule against alienability). For commentary, see Sirinelli, Note, id. at 307; Edelman, Note, 116 J. du Droit international 1012 (1989).

14. 1 H. Batiffol & P. Lagarde, Droit international prive section 251 at 299 (7th ed. 1981).

15. See also France, Law of March 11, 1957, art. 14 (natural persons who create an audiovisual work -- presumptively including screenwriters, soundtrack composers, and the director -- have the status of authors).

16. For different laws on point, see the national chapters at section 7[4], in International Copyright Law and Practice, supra note 12.

17. See Geller, International Copyright: An Introduction section 4[2][a][ii], in id.

18. See id. at section 6[2]-[3].

19. Wagner, France: High Court Bars Showing of Colorized Asphalt Jungle, 5 World Intellectual Property Report 171, 172 (1991).

20. Nouveau Code de Procedure Civile, art. 32-1 (Decr. 78-62, Jan 20, 1978). [ELR 13:3:3]

RECENT CASES

New York Court of Appeals upholds Crime Victims Board's ruling that book by Jean Harris is subject to "Son of Sam" law

A trial court decision finding that the book "Stranger in Two Worlds" by Jean Harris was subject to section 632-a of New York's Executive Law has been upheld by the state Court of Appeals. In 1987, the Crime Victims Board of the State of New York, pursuant to section 632-a (also known as the "Son of Sam Law"), ordered Harris' book royalties placed in escrow. The Board determined that "Stranger in Two Worlds" contained Harris' account of the killing of Dr. Herman Tarnower; Harris had been convicted of second degree murder for the crime. Harris' attempt to assign the royalties due from Macmillan Inc. to Children of Bedford Inc., a non-profit organization, was rejected by a trial court (ELR 11:11:12) and by an appellate court.

The Court of Appeals agreed that the Board's ruling did not violate Harris' due process or First Amendment rights. However, as distinguished from the trial court, the Court of Appeals concluded that the statute was content based, imposed a direct burden on speech, singled out a category of speech based on subject matter and imposed special burdens on that category, thereby warranting strict scrutiny analysis.

Before conducting such an analysis, Judge Richard D. Simons considered Harris' argument that "Stranger in Two Worlds" contained a minimal amount of material relating to the reenactment of the Tarnower killing and consisted primarily of reprinted transcripts of trial testimony. The trial court had found that the Board correctly determined that the two chapters in issue made up "the core of the work" around which the narrative of Harris' life story was structured; Judge Simons upheld the finding that the book was within the statute.

The court then observed that section 632-a singled out a category of speech based on subject matter and imposed special burdens on that category. However, the statute served the state's compelling interest in facilitating the compensation of crime victims, and in having criminals, rather than taxpayers, bear the burden of such compensation whenever possible. The statute also was enacted "to preserve the victim's equitable right to assets earned by a criminal as a result of the victimization," stated Judge Simons, and was "a codifiction of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs."

Judge Simons found that the statute was narrowly tailored to achieve the state's compelling interests. Section 632-a was not intended to reach profits received solely as a result of a criminal's notoriety, noted the court. A criminal may earn income from writings on subjects such as prison life in general. A criminal covered by the statute created, by illegal activity, a marketable asset. Other assets received by a criminal may be available to victims by the customary legal remedies, but would not be within section 632-a.

The statute does not prohibit non-criminal authors from writing about the crime or publishers from publishing their works. Publishers may profit in full from publishing any work about the crime, and only are required to submit a copy of their contract with the author to the Board; if there is a determination that the statute applies, the publisher then must turn over moneys owed to the criminal under that contract.

In all, section 632-a created a "unique and identifiable" resource and preserved it for the benefit of victims directly injured by a crime. The statute did not regulate the criminal's right to speak about the crime, did not impose a forfeiture of all profits and, indeed, granted the criminal priority to the funds for legal fees and certain expenses, as well as the balance of any funds remaining after authorized claims are satisfied.

The statute was not void for vagueness, and did not violate the free speech provisions of either the federal or state constitutions, concluded the court.

Matter of Children of Bedford Inc. v. Petromelis, New York Law Journal, p. 30, col. 2 (N.Y., May 8, 1991) [ELR 13:3:7]

Boston Athletic Association may not prevent local channel from broadcasting "Boston Marathon"

A Federal District Court decision refusing to enjoin WCVB-TV (Channel 5) from televising the Boston Marathon has been upheld.

The Boston Athletic Association, its licensing agent (ProServ), and WBZ-TV (Channel 4) argued that WCVB's use of the words "Boston Marathon" in connection with the station's unlicensed broadcast of the annual Patriot's Day race violated the association's trademark.

Federal Court of Appeals Chief Judge Breyer stated that the court did not find sufficient evidence of relevant customer confusion, arising out of Channel 5's use of the words Boston Marathon, to require the issuance of a preliminary injunction.

The association claimed that Channel 5's use of the words Boston Marathon would lead viewers to believe that the station had a license to use the words. But Judge Breyer stated that it was not shown that Channel 5 intended to use the words to suggest official sponsorship of the station's broadcasts - the station had offered to broadcast any disclaimers required by the association. Furthermore, there was no evidence that Channel 5 would profit from the possibility that viewers might believe that the association had authorized the broadcast.

Judge Breyer concluded by finding that Channel 5 was using the words "Boston Marathon" to describe the event being broadcast; by emphasizing that there was no showing of a real likelihood of relevant confusion; and by rejecting an estoppel argument based on the fact that Channel 5, in earlier years, paid the association for a license to use the mark.

WCVB-TV v. Boston Athletic Association, 926 F.2d 42 (lst Cir. 1991) [ELR 13:3:7]

Denver cable operator's antitrust action against ESPN is dismissed

TV Communications Network, a supplier of cable television and satellite master antenna television, brought an antitrust action against ESPN and other parties.

Federal District Court Chief Judge Sherman G. Finesilver first noted that TVCN operated solely in the Denver metropolitan area; that the company did not show a nexus between the challenged activities and interstate commerce; and that the action could be dismissed on jurisdictional grounds alone. Nevertheless, the court proceeded to review TVCN's amended complaint and concluded that the company failed to plead, with sufficient particularity, a set of facts upon which relief could be granted.

TVCN alleged that ESPN, Capital Cities/ABC and Turner Network Television had entered into an illegal monopoly in violation of section 2 of the Sherman Act. The amended complaint stated that the relevant markets were the ESPN Channel and the TNT Channel.

Judge Finesilver pointed out that "every manufacturer has a natural monopoly over its own product. As a matter of law, this monopoly is not a basis for antitrust liability under section two." Thus, TVCN did not prove that ESPN and TNT had an illegal monopoly over a relevant market. Furthermore, TVCN did not demonstrate that ESPN and TNT unlawfully acquired or maintained any monopoly power in the relevant market, or had no valid business reason for refusing to supply TVCN with their programming. Also rejected was any liability based on the "essential facilities" doctrine because, in part, ESPN did not deny an essential facility "to a competitor" (emphasis by the court).

The court then granted a motion to dismiss the claim that various cable operators had entered an illegal monopoly with respect to subscription television in the Denver metropolitan area. TVCN did not show that the program suppliers had the power to control prices or the power to exclude competition, and there was no evidence of an agreement by any of the companies to boycott TVCN.

TVCN's claims alleging conspiracy to monopolize in violation of section two of the Sherman Act were denied because there was no evidence indicating the existence of any conspiracy among the various program suppliers and cable operators. The court also observed that the cable companies had "no rational economic motive to conspire against their own interests."

Judge Finesilver concluded by dismissing TVCN's claims for attempt to monopolize the Denver area subscription television market, for unreasonable restraint of trade and unfair competition in violation of section 1 of the Sherman Act, and for price discrimination under the Robinson-Patman Act.

TV Communications Network, Inc. v. ESPN, Inc., Case No. 90-F-864 (D.Colo., Apr. 5, 1991) [ELR 13:3:8]

Opera singer Frederica von Stade's celebrity status is marital asset subject to distribution in divorce

To the extent that Peter Elkus' contributions and efforts led to an increase in the value of opera singer Frederica von Stade's career, this appreciation was a product of the marital partnership, and, therefore marital property subject to equitable distribution, a New York appellate court has ruled.

A trial court had found that Elkus might receive compensation on the basis of his claim that he deferred the development of his own earning potential, but that a court determining such compensation would focus more on Elkus' need rather than on "a more nebulous valuation of his wife's career." And it appeared to the court that Elkus would be sufficiently compensated through the distribution of the parties' other assets (ELR 12:6:14).

In reversing the trial court's decision, Judge Ernst H. Rosenberger noted that in 1973, the first year of the parties' marriage, von Stade earned $2,250. In 1989, von Stade, an international recording and concert artist, earned about $620,000. During the marriage, Elkus travelled with von Stade and was her voice coach and teacher for ten years. Elkus stated that he sacrificed his career as a singer and teacher in order to assist von Stade and to care for their family.

New York's Domestic Relations Law section 236, observed Judge Rosenberger, broadly defines marital property as property acquired during the marriage "regardless of the form in which title is held." For the court, "Any attempt to limit marital property to professions which are licensed would only serve to discriminate against the spouses of those engaged in other areas of employ- ment. Such a distinction would fail to carry out the premise upon which equitable distribution is based, i.e., that a marriage is an economic partnership to which both parties contribute, as spouse, parent, wage earner or homemaker..."

In Golub v. Golub, 139 Misc.2d 440 (ELR 9:12:5), the court found that the increase in value in the acting and modeling career of Marisa Berenson was marital property subject to equitable distribution as a result of Golub's contributions to Berenson's career. The court rejected Berenson's claim that since her celebrity status was neither professional nor a license and was subject to substantial fluctuation, it should not be considered marital property, finding, according to Judge Rosenberger, that there was no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income. The Golub court also noted the "tremendous potential for financial gain from the commercial exploitation of famous personalities."

Judge Rosenberger next referred to Piscopo v. Piscopo, 231 N.J.Super. 576, aff'd., 232 N.J.Super. 559, cert. denied, 117 N.J. 156, (ELR 11:3:12 ; 11:7:18) in which the parties, after marriage, had "focused on one goal - the facilitation of [Joe Piscopo's] rise to stardom." In Piscopo, the court rejected Joe Piscopo's argument that celebrity goodwill is distinguishable from professional goodwill and stated that "it is the person with particular and uncommon aptitude for some specialized discipline whether law, medicine or entertainment that transforms the average professional or entertainer into one with measurable goodwill." Judge Rosenberger agreed that "the enhanced skills of an artist...albeit growing from an innate talent...may be valued as marital property subject to equitable distribution."

In all, concluded the court, it is "the nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career, whether licensed or otherwise, that should determine the status of the enterprise as marital property."

Elkus v. Elkus, New York Law Journal, p. 21, col.3 (N.Y.App., July 2, 1991) [ELR 13:3:8]

Former wife of Mark Gastineau obtains one-third interest in marital assets, including portion of salary forfeited by football player's abrupt retirement during 1988 season

In 1988, football player Mark Gastineau was under contract with the New York Jets at a salary of $775,000. He left professional football in October 1988 after the sixth game of the season in order to accompany actress Brigitte Nielsen during Nielsen's treatment for cancer.

A New York trial court has declined to condone Gastineau's "walking away from a lucrative football contract when the result is that his wife and child are deprived of adequate support." Gastineau would have received a total of about $485,000 for playing the games remaining in the 1988 season; the court found that by failing to play those games, Gastineau dissipated a marital asset in that amount.

Judge H. Patrick Leis noted that Gastineau did not make any of the court ordered child support, maintenance, or home mortgage payments, and that Gastineau, since leaving professional football, had not worked or earned any money except for $20,000 that he earned when he played football in Canada.

Minimal testimony was presented concerning Lisa Gastineau's direct or indirect contributions to Mark Gastineau's acquisition of marital assets. Judge Leis noted that although it was Mark Gastineau's own athletic abilities and training "which made it possible for him to obtain and retain his position as a profession- al football player," equity required that Lisa Gastineau receive one-third of the marital assets. Upon calculating Lisa Gastineau's interest in the home, in Mark Gastineau's abandoned salary (as tax-effected) and in the arrears owed by Mark Gastineau, the court awarded Lisa Gastineau the total equity in the parties' Huntington, New York home in full satisfaction of her one-third interest in the parties' marital assets and also granted Lisa Gastineau a judgment for about $1,900 for the remaining arrears owed to her. It was noted that Lisa Gastineau already had received the total amount of Gastineau's NFL severance pay of $83,000.

Judge Leis also ordered Gastineau to pay $200 a week for child support, and, for a three year period, to pay an additional $150 per week to Lisa Gastineau for maintenance. And Gastineau was directed, upon collecting his pension, to pay Lisa Gastineau one-third of the net monies he receives from his pension for as long as he collects that pension.

Gastineau v. Gastineau, New York Law Journal, p. 27, col. 2 (Suffolk Cnty., July 2, 1991 [ELR 13:3:9]

Former Washington Redskin football players are entitled to District of Columbia workers compensation benefits because employment was "principally localized" in the District

The District of Columbia Department of Employment Services ruled that the principal place of employment of several former Washington Redskins football players was the District, and that the players therefore were entitled to benefits under the District's Workers'

Compensation Act for injuries sustained, as described by District of Columbia appellate court Judge Schwelb, in the course of "their often heroic but always perilous employment."

It was noted that the Redskins play all of their home games at Robert F. Kennedy Stadium in Washington, D.C. The team holds pre-season training in Pennsylvania and regular season training in Virginia, but the Redskins generate no income in either state.

None of the player-claimants lived in Washington, D.C. while employed by the Redskins. Their injuries were sustained at different times and in different places. However, although most of the players signed their contracts outside the District, the contracts stated that the laws of the District of Columbia would govern the agreement of the parties.

Pro-Football, Inc. argued that the majority of the players' employment-related time was spent in Virginia. But the Department of Employment Services concluded that each player's employment was "principally localized" in the District - the principal service for which the players were hired was to play in regularly scheduled NFL football games. The team played far more games in RFK Stadium than in any other place, and the practice sessions were "merely preparatory" to the performance of the principal services.

Judge Schwelb commented that "In the final analysis, professional athletes are entertainers. Just as an actor's rehearsals are ancillary to his performance on the stage, so a professional athlete's practice is merely preparatory to the game."

Four of the fifteen player-claimants never played a game at RFK Stadium, nor had they performed any other service for the Redskins in Washington, D.C. The court remanded for further proceedings the question of whether the employment of the four players was principally localized in the District of Columbia.

Pro-Football, Inc. v. District of Columbia Department of Employment Services, 588 A.2d 275 (D.C.App. 1991) [ELR 13:3:10]

Taxpayers' deductions arising from investment in episode of videotaped series are disallowed due to lack of economic substance

In 1977, James M. And Phyllis Gerhart acquired from Metro Productions, Inc. a videotaped episode of a series entitled "Coping." In exchange for the payment of $90,000, Metro agreed to transfer ownership of the episode to Gerhart. Gerhart paid $7,000 to Metro, and executed an $83,000 promissory note for the balance of the purchase price.

Gerhart made the $2,000 annual interest payments required by the note for each of the years 1978 through 1982. At the end of the initial five year term, he exercised his option to renew the note for another five years, and made additional annual interest payments of $2,000 in 1983 and 1984. In 1985, Gerhart exercised the option to convert the note to nonrecourse by making a $1,000 payment towards the unpaid principal balance. Gerhart made no further payments on the note, believing that the conversion of the note to nonrecourse status constituted a relinquishment of his ownership rights in the videotape. However, there was no evidence that Metro ever initiated foreclosure proceedings pursuant to its security interest.

In order to comply with the production services agreement, Gerhart hired a management consulting firm to assist him in distributing the videotape.

In 1977, the Gerharts claimed an investment tax credit in the amount of $9,000 on their federal income tax return. In subsequent years, Gerhart claimed accelerated depreciation of the cost basis, using an assigned useful life of seven years, and claimed as deductions, the expenses incurred for the videotape's distribution and the interest payments made on the note. The investment generated "negligible receipts," and losses from the activity were reflected for each of the years in issue.

The Internal Revenue Service disallowed in full each of the credit and deduction items claimed by the Gerharts in connection with the videotape investment.

Tax Court Judge Buckley found that the Gerharts' investment in the series episode was devoid of economic substance and that the taxpayers were motivated to purchase the videotape, not by an objective of profit, but by the tax avoidance aspects of the investment. The court pointed out that the investment arrangement was "atypical" of the way videotape productions are marketed in the industry. A large number of episodes of the series were produced prior to testing the marketplace, and the distribution fee charged by the management company did not compare to the size of the fees paid to other film and videotape distributors. "It is as though none of the participants in the arrangement truly anticipated the videotape production to be profitable," observed the court.

Neither Gerhart not his advisors had any experience in or knowledge of the videotape production and distribution industry, continued Judge Buckley. But Gerhart did not investigate Metro's qualifications, apparently never viewed any of the other episodes in the series, and did not know who the other investors were.

The promotional material provided by Metro contained little information about the potential profitability of the videotape; did not contain revenue forecasts; and, although the material explained the high degree of risk involved in videotape productions, the focus was on the potential tax benefits of the investment. The material included charts indicating the amount of anticipated sheltered income investors might achieve through deductions arising out of the acquisition of the video-tape.

It was further noted that Gerhart readily accepted Metro's proposed sale price and other terms without negotiation; was uninvolved in selecting and supervising the distribution manager; and, in all, that Gerhart's dealings with Metro indicated that he lacked the requisite profit objective.

The court next rejected the assertion that the purchase of the videotape was made at arm's length for $90,000, finding that as a single episode, the videotape had essentially no value - its value was dependent upon the value of the series as a whole. The fair market value of the purchase, based on expert testimony, was between $2,700 and $3,600. The disparity between the purported sales price and fair market value was another indication, for the court, that the entire transaction lacked economic substance.

Judge Buckley's review of the financing arrangement revealed that once the tax benefits were exhausted (after the first five years of the agreement), Gerhart "was able to extricate himself from personal liability on the note by merely paying $1,000." And Metro received total cash payments "far in excess" of the fair market value of the asset sold. In economic reality, commented the court, Gerhart never was responsible for repaying the entire debt, and "both he and Metro were well aware of it." Metro did not verify Gerhart's credit history or determine his financial ability to repay the amount of the note, and Gerhart was liable on the note only to the extent of the payments actually made, concluded the court, in finding that the taxpayer lacked an actual and honest profit objective. Again, the videotape investment activity was devoid of economic substance, and the Gerharts were not entitled to the investment tax credit or the distribution fee expense and depreciation deductions claimed in connection with the activity.

The court concluded by rejecting Gerhart's argument that his background of engaging in speculative activities indicated the requisite profit objective; by allowing the deduction of the portions of the annual payments allocable to interest; and by agreeing that Gerhart would be liable to additions to tax for the years 1981 and 1982.

Gerhart v. Commissioner of Internal Revenue, T.C. Memo 61 (1991) [ELR 13:3:10]

Confidential source may proceed with promissory estoppel claim against newspapers who revealed his identity, rules United States Supreme Court

The United States Supreme Court, by a 5-4 vote, has ruled that Dan Cohen may seek damages in his promissory estoppel claim against the St. Paul Pioneer Press Dispatch and the Minneapolis Star and Tribune based on the newspapers' breach of a promise not to identify Cohen as the source of certain documents.

As reported at ELR 12:7:13, Cohen, who was involved in the 1982 Minnesota gubernatorial election campaign, approached reporters for the two newspapers with an offer to provide documents relating to a candidate in the election. The reporters agreed to Cohen's request for confidentiality, and Cohen provided them copies of public court records concerning a candidate for lieutenant governor. However, the editorial staffs of the two newspapers independently decided to identify Cohen as the source of the court records. On the same day as the newspaper articles were published, Cohen was fired by his employer.

When Cohen sued the newspapers for fraudulent misrepresentation and breach of contract, a trial court jury awarded him $200,000 in compensatory damages and $500,000 in punitive damages.

A Minnesota appellate court found that misrepresentation was not shown as a matter of law and set aside the punitive damages award. The court upheld the award of compensatory damages.

The Minnesota Supreme Court reversed the compensatory damages award, finding that a breach of contract cause of action was inappropriate. The court also concluded that enforcing the promise of confidentiality under a promissory estoppel theory would violate the newspapers' First Amendment rights.

United States Supreme Court Justice Byron R. White first found that a private cause of action for promissory estoppel involved "state action" within the meaning of the Fourteenth Amendment, such that the protections of the First Amendment were invoked. Promissory estoppel is a doctrine of general applicability, stated Justice White, and the First Amendment does not forbid applying the doctrine to the press. The parties themselves determined the scope of any publication restrictions, and Minnesota law "simply requires those making promises to keep them." Furthermore, Cohen was not seeking to use a promissory estoppel cause of action to avoid the requirements for establishing a libel or defamation claim, and was not seeking damages for injury to his reputation or his state of mind.

Justice White, after again noting that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law," rejected Cohen's request to reinstate the jury's compensatory damages award. The Minnesota Supreme Court, on remand, must determine whether the oral agreement was a legally enforceable promise and whether the state constitution would shield the press from a promissory estoppel cause of action such as Cohen's, observed Justice White.

Justice Harry A. Blackmun, with whom Justice Thurgood Marshall and Justice David H. Souter joined in dissent, would have rejected the use of the promissory estoppel claim "to penalize the reporting of truthful information regarding a political campaign..." For Justice Blackmun, applying the doctrine of promissory estoppel in the instant case would not have a merely "incidental" burden on speech. Citing Hustler Magazine, Inc. v.

Falwell, 485 U.S. 46 (1988; ELR 9:10:3), Justice Blackmun stated that the doctrine should not be enforced "to punish the expression of truthful information or opinion."

Justice Souter, with whom Justice Marshall, Justice Blackmun and Justice Sandra Day O'Connor joined in dissent, pointed out that "the fact of Cohen's identity expanded the universe of information" available to Minnesota voters, and that the public interest should have been considered by the court. Justice Souter would have found that the state's interest in enforcing the newspapers' promise of confidentiality did not outweigh the interest in the "unfettered publication of the information revealed in this case..."

Cohen v. Cowles Media Company, Case No. 90-634 (U.S.Sup.Ct., June 24, 1991) [ELR 13:3:11]

Government's denial of poster importer's request to make travel payments to Cuba is upheld

Daniel Walsh, an importer of political posters, arranged a business trip to Cuba. Under the Cuban Assets Control Regulations, Walsh was required to apply for a license to make payments for his travel. The regulations, which originated with the complete embargo on trade with Cuba proclaimed by President Kennedy, were based on the Trading With the Enemy Act of 1917. A 1988 amendment barred the use of the statute to prohibit or regulate the importation of informational materials, including posters. Nevertheless, the Secretary of the Treasury denied Walsh's application. A Federal District Court upheld the regulations as applied to Walsh, and a Federal Court of Appeals has affirmed the District Court's decision.

Judge Stephen F. Williams first pointed out that the purpose of the disputed regulations was to stop the flow of hard currency from the United States to Cuba. Thus, although the 1988 amendment would allow an importer to pay for the direct costs, such as purchase, packing, insurance and shipping costs, of importing posters into the United States, the amendment, in the Secretary of the Treasury's view, did not require any changes to the regulations concerning payments for travel expenses.

Walsh argued that it was necessary for him, before entering an import contract, to view not only the posters but also the production capabilities of Cuban poster makers and the quality of their materials and printing techniques. Walsh also planned to meet and negotiate with Cuban poster artists, publishers and exporters.

Judge Williams found that the travel-related payment ban furthered the stated goals of the embargo program - to deprive Cuba of hard currency and to make a political statement against the Cuban regime, and that the Secretary of the Treasury's position with respect to the ban was "entirely reasonable."

In rejecting Walsh's claim that the challenged, content-neutral, regulations violated the First Amendment, Judge Williams stated that there was considerable support for the government's argument that the interest in denying hard currency to embargoed countries such as Cuba was "important" and "substantial."

The regulations provided a general license for travel-related payments for individuals traveling for the purpose of gathering news, making documentary or news films, engaging in professional research, or similar activities. Walsh argued that the government's failure to extend this exemption to importers of informational materials violated the equal protection clause. Judge Williams pointed out that there was no showing that the travel ban was a material burden on individual importing of posters, nor was it essential for commercial poster importers to travel to Cuba. Importers still may travel to Cuba, noted the court, if their travel expenses are paid by Cuban hosts or other non-U.S. persons. Posters, as distinct from news, "are valuable as pre-packaged political artifacts, so on-site review is less important," concluded Judge Williams.

Judge Buckley, in concurring with the court, stated that it was not necessary to inquire into the applicability of an intermediate scrutiny standard of review. Judge Williams also wrote a concurring decision expressing his inability to "make sense of requiring strict or intermediate scrutiny for a distinction that is concededly content-neutral and free of any hint that it could have been intended to get at content indirectly, simply because the distinction is used to qualify a direct or indirect burden on free speech."

Walsh v. Brady, 927 F.2d 1229 (D.C.Cir. 1991) [ELR 13:3:12]

Ill mushroom hunters may not recover damages from publisher of reference work

In 1988, when Wilhelm Winter and Cynthia Zheng went mushroom hunting, they relied on The Encyclopedia of Mushrooms to determine which mushrooms were safe to eat. Unfortunately, after cooking and eating certain mushrooms, Winter and Zheng became critically ill and both required liver transplants.

Winter and Zheng claimed that the book contained erroneous and misleading information concerning the identification of the most deadly species of mushrooms, and sued G.P. Putnam's Sons alleging product liability, breach of warranty, negligence, negligent misrepresentation, and false representations.

Putnam had purchased copies of the book from the British publisher and neither wrote nor edited the work. A Federal District Court decision granting summary judgment for Putnam has been upheld.

Federal Court of Appeals Judge Joseph T. Sneed, after observing that products liability law generally focuses on tangible items, declined to analogize The Encyclopedia of Mushrooms to aeronautical charts for the purpose of products liability law. Winter and Zheng suggested that the book and charts both contained representations of natural features and were intended to be used while engaging in a hazardous activity. But the court noted that aeronautical charts are highly technical tools containing "graphic depictions of technical, mechanical data." The book in issue was "like a book on how to use (emphasis by the court) a compass or an aeronautical chart. The chart itself is like a physical `product' while the `How to Use' book is pure thought and expression."

The court next rejected Winter and Zheng's claim that Putnam had a duty to investigate the accuracy of the contents of the books published by the company, stating that "there is nothing inherent in the role of publisher...to suggest that such a duty should be imposed on publishers...Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."

Judge Sneed concluded by finding that publishers are not required to provide a warning that the information in a book may not be complete and that the consumer may not fully rely on such information, noting that a publisher would not know what warning, if any, were required without conducting a detailed analysis of the factual contents of the book. Again, publishers have no duty to independently investigate the accuracy of the text. Winter and Zheng's alternate contention - that publishers should provide a warning that the text has not been investigated and that the publisher cannot guarantee its accuracy - also was rejected; such a warning was unnecessary given that no publisher has a duty as a guarantor, emphasized Judge Sneed.

Winter v. G.P. Putnam's Sons, Case No. 89-16308 (9th Cir., July 12, 1991) [ELR 13:3:13]

Court dismisses, as moot, appeal of ruling concerning publication of book by former Iran-Contra investigation staffer, and vacates District Court judgment

The book Opening Arguments: A Young Lawyer's First Case-United States v. Oliver North, written by Jeffrey R. Toobin, recounted Toobin's experiences as associate counsel in the Iran Contra special prosecutor's office. A Federal District Court in New York entered a declaratory judgment stating that the publication of the book would not violate any fiduciary or contractual duties owed by Toobin to Independent Counsel (and former federal judge) Lawrence E. Walsh and the Office of Independent Counsel.

After an appeal was scheduled, but before oral argument was heard, Toobin and Penguin Books USA, Inc. decided to publish Opening Arguments.

A Federal Court of Appeals, finding that the publication of the book eliminated the controversy before the court, dismissed the appeal as moot, vacated the lower court order and remanded the matter with directions to dismiss the complaint.

Judge Irving R. Kaufman noted that Toobin, while employed by the Office of Independent Counsel, signed several non-disclosure agreements obligating him to keep confidential certain information he acquired during the investigation. Toobin signed three documents which required him "to preserve grand jury secrets and to submit for review all classified or classifiable information prior to its dissemination." In May 1989, on the day he left the Office of Independent Counsel, Toobin signed an agreement which provided that he would not, without written approval, divulge specified investigative material.

Nevertheless, as described by Judge Kaufman, Toobin had accumulated thousands of pages of notes taken during internal staff meetings and retained many additional working documents, and used these materials in writing his book.

When Toobin submitted a portion of the manuscript for his proposed book, an official of the Office of Independent Counsel objected to the inclusion of internal material in the draft. However, a Justice Department official rejected Judge Walsh's request to take "all appropriate administrative steps with respect to the dissemination and threatened publication" of the book, finding only one instance of classified information.

Toobin and Penguin sought injunctive relief against further harassment by the Independent Counsel parties and a declaratory judgment that the publication of Opening Arguments did not violate federal law or any other legal obligation owed by Toobin to the Independent Counsel parties.

The court granted the declaratory relief requested, but denied the request for a permanent injunction barring future interference with the publication of the book.

On appeal, Judge Kaufman observed that Toobin and Penguin, by publishing the book, "vitiated any potential chilling of their expression." The likelihood of future prosecution of the author and publisher was "substantially diminished, if not non-existent," stated the court, and Toobin had agreed not to further use the many government documents still in his possession. In dismissing the case for mootness, the court did not express any view on the merits of the District Court's conclusion.

Penguin Books USA Inc. v. Walsh, 929 F.2d 69 (2d Cir.1991); 756 F.Supp. 770 (S.D.N.Y. 1991) [ELR 13:3:13]

Court denies temporary restraining order in trademark infringement action involving brewery's "Super Ticket" promotion

Tom Green claimed that he had a protectible common law trademark in the game "Supertickets" and in a "Super Tickets" poster. Green sued G. Heileman Brewing Co., the distributor of Old Style beer, and the Hadley

Group, a sales promotion agency, claiming trademark infringement arising from a product promotion during which Heileman attached a ticket, called a Super Ticket, to cartons of the beer. Purchasers of the beer could win prizes and discounts.

A Federal District Court in Illinois first noted that the Superticket trademark and Heileman's Super Ticket game pieces were dissimilar in color, layout and print style. The court then observed that a finding that Hadley imitated Green's promotion might have a "serious impact" on the agency's ability to generate new business; could jeopardize Hadley's relationship with Heileman; and would have an incalculable effect on Heileman's customer relations. Furthermore, issuing a temporary restraining order, with only three weeks remaining in the promotion, would result in considerable costs.

The court also stated that Green had "virtually no chance" of succeeding on the merits of his claim, in that he failed to show a protectible property interest in the use of the phrase "Supertickets," and that even if the court were to find a protectible property interest, Green had not demonstrated any likelihood of confusion. Judge Brian Barnett Duff noted that there was almost no evidence presented that the public associated "Supertickets" with Green; that there was no evidence of actual consumer confusion; and that there was no likelihood of confusion, particularly since Heileman always displayed the Old Style trademark in conjunction with the use of the words "Super Tickets." There was no showing that, at the time the promotion was developed, Heileman was aware of Green's Superticket game.

Heileman and Hadley had a strong likelihood of prevailing on a fair use defense under the Lanham Act, and the public interest would not be harmed by continuing the promotion, concluded Judge Duff in denying Green's request for a temporary restraining order.

Green v. G. Heileman Brewing Company, Inc., 755 F.Supp. 786 (N.D.Ill. 1991) [ELR 13:3:14]

Art dealer's lawsuit against estate of Hal B. Wallis is dismissed because settlement agreement imposed unreasonable restraints on alienation of paintings

In 1980, Martha Hyer Wallis delivered four paintings to Gerhard Whiffen and Rory Keegan. The paintings included Monet's "Houses of Parliament," Gauguin's "The Siesta - A Brittany Landscape," and two Remington works. Wallis pledged the paintings as collateral for loans, executed a power of attorney authorizing Whiffen and Keegan to sell the works, and, as described by Federal District Court Judge Miriam Goldman Cedarbaum, apparently directed Whiffen and Keegan to have copies of the paintings made in London to be used as replacements. Wallis did not discuss these transactions with her then-living husband, director Hal B. Wallis.

Whiffen and Keegan agreed to sell the Monet and Gauguin paintings to Wildenstein & Co. for $650,000. Subsequently, Hal Wallis learned about the sale and notified Wildenstein that the paintings were sold without permission. In 1982, the Wallises and the art dealer entered a settlement agreement whereby Wildenstein sold the paintings back to the Wallises for $665,000. Wildenstein obtained a right of first refusal and exclusive right of consignment with respect to all fifteen paintings in the Wallis collection - these rights did not extend to any paintings distributed to a charitable organization by the estate of either of the Wallises.

When Hal Wallis died in 1986, the paintings in the collection were distributed to the Wallis Foundation, a charitable organization.

In 1989, Wildenstein learned of the pending auction of the Wallis Collection and brought a lawsuit against the Wallis Estate and Brent Wallis as executor alleging various violations of the art dealer's rights under the settlement agreement.

Judge Cedarbaum first found that New York had sufficient contacts with the transactions to justify the application of New York law.

With respect to the Wallis parties' rule against perpetuities claim, the court noted that under the rule, a provision which creates a contingent future interest which might vest beyond the statutorily permissible period, i.e. "later than twenty-one years after one or more lives in being at the creation of the estate," would be void. The parties acknowledged that the agreement violated the rule by restricting not only the Wallises' individual rights to dispose of the paintings in the collection, but by binding the executors of the Wallises' estates and their "successors and assigns." And the agreement not only granted rights to Wildenstein, but also to its "successors and assigns" without any limitations on the potential duration of the rights.

The court declined to decide whether the rule against perpetuities would apply in the instant proceeding, but stated that even if the rule did not apply to the facts of the case, "the combined exclusive consignment right and right of first refusal provisions of the Agreement are unreasonable restraints on alienation, and are therefore invalid." Judge Cedarbaum noted that all rights of first refusal restrain alienation, and that Wildenstein did not show that the restraints in issue would facilitate the business of art dealing. Potential purchasers would likely be discouraged by the art dealer's first refusal rights, and the exclusive consignment right "effectively eliminate[d] public auction as a means of sale."

In all, the agreement gave Wildenstein "perpetual control over who purchases fifteen paintings, and how they are sold," and these private restrictions on the transferability of the art works unreasonably restrained alienation and were invalid, concluded the court in dismissing the complaint.

Wildenstein & Co. v. Wallis, 756 F.Supp. 158 (S.D.N.Y. 1991) [ELR 13:3:14]

"Shattered dove" poster copyright dispute is resolved by consent judgment

A consent judgment has been ordered in the dispute concerning the copyright in a poster, known as "Give Peace a Chance," which was created for an exhibition commemorating the fortieth anniversary of the bombing of Hiroshima.

As reported at ELR 13:1:5, 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 Kan and Omni, a Federal District Court in New York dismissed the artist's copyright and trademark infringement claims against the magazine, but found that issues of fact precluded granting Morita and Kan's motions for summary judgment with respect to copyright ownership.

In vacating the previous opinion and order of the court, Judge Cedarbaum decreed that Minoru Morita was the owner of the copyright in the lithograph, photograph and sculpture in issue, and that Kan was the joint author and co-owner of the copyright in the photograph, but was not an author of the sculpture.

Kan agreed to assign to Morita all right, title and interest in and to the photograph, and waived all claims to any revenue from the photograph or from derivative versions of the work.

The consent judgment also provided that Omni would publish a credit reading: The credit for the cover of the May, 1988 issue of Omni should have read as follows: Cover photograph part of a series taken for the poster "Give Peace a Chance" to commemorate the bombing of Hiroshima. The poster is part of the permanent collection of the Hiroshima Modern Museum of Art. Art/Design: Minoru Morita; Glass Sculpture: Milon Townsend; Photography: Kan Nakai; COPYRIGHT 1985 MINORU MORITA (emphasis by the court). The location and timing of the credit were set forth, as was the requirement that the credit would be accompanied by a 1/2 inch by 1/2 inch reproduction of the cover photograph.

Morita v. Omni Publications International, Ltd., 760 F.Supp. 45 (S.D.N.Y. 1991) [ELR 13:3:15]

Alleged infringer of copyrighted adult films was entitled to jury trial on issues of liability and damages although films' licensor sought only statutory damages

Video Views, Inc., a licensor of adult films, sued Studio 21, the operator of an "adult entertainment business," for copyright infringement. A Federal District Court jury found that Studio 21 had willfully infringed Video Views' rights in two of the seven films in issue. The court granted Studio 21's motion for judgment notwithstanding the verdict on the issue of willfulness, but awarded Video View statutory damages in the amount of $5,000 for each infringement.

Senior Federal District Court Judge Myron L. Gordon, sitting by designation, first carefully reviewed Video Views' argument that a jury trial was improper because the company sought only statutory damages. Judge Gordon declared that the statutory damage provisions of the Copyright Act enabled copyright owners to avoid the difficulty of proving actual damages, but did not require the alleged infringer to forego a trial on other factual issues, such as infringement, or, in certain cases, willfulness. The court concluded that "when monetary damages of any kind are sought, the issues of infringement and willfulness are for the jury to resolve. The fact that the district judge is given the responsibility to assess the statutory damages does not, without more, transform the proceeding - one in which monetary relief is sought - from one legal in nature to one equitable in nature."

In the instant proceeding, the District Court correctly submitted the factual questions of infringement and willfulness to the jury, stated Judge Gordon, and based on its verdict, determined the appropriate award of statutory damages, as directed by section 504(c).

Furthermore, Video Views, although not the "copyright owner" of the adult films in issue, had entered exclusive licensing agreements with producers whereby the company obtained the exclusive right to sub-license the "video arcade exhibition" of numerous adult films. Video Views was the "owner" of the property right it sought to enforce against Studio 21, ruled Judge Gordon.

The court concluded by finding that the films were "performed publicly" by Studio 21 within the meaning of the Copyright Act; that the District Court properly vacated, on the ground that the record was "bare" of any specific evidence supporting the jury's determina- tion that the infringement of the two films was willful, the judgment awarding increased statutory damages in the amount of $10,000 for each film; and that the denial of costs and fees sought by both parties did not abuse the court's discretion.

Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010 (7th Cir. 1991) [ELR 13:3:16]

Damages are allocated in dispute over consignment of Miro works

In September 1987, Werner Linssen, the operator of an art gallery in Cologne, Germany, entered a written agreement with Jacob Weintraub, the operator of a New

York City gallery, whereby Linssen consigned seventeen works by Joan Miro for exhibition and sale at the Weintraub Gallery. Weintraub guaranteed that he would purchase at least $200,000 worth of the consigned works; the price to Weintraub for such works would be Linssen's list price minus fifteen percent.

In late October 1987, Bo Franzen, the operator of an art gallery in Stockholm, Sweden, agreed to purchase four Miro sculptures in the Weintraub exhibition for prices totalling $380,000; Franzen never paid for the works.

Although Weintraub had not shipped the sculptures to Franzen, Linssen sought to collect payment for the works from Weintraub. Weintraub did not pay for the sculptures and did not purchase any of the works on consignment under the agreement.

Federal District Court Judge Tenney found that Weintraub was not liable to Linssen under the written consignment agreement because, under New York law, there was no "sale" to Franzen. However, Weintraub was liable to Linssen for $52,000 - the full profit Linssen would have received under the guarantee clause of the agreement, stated the court. It was further found that Franzen's refusal to pay for the works caused Weintraub to suffer a lost profit of about $80,000, and the court entered judgment against Franzen for $132,600 - Weintraub's lost profits from the sale of the four works plus Weintraub's liability to Linssen under the guarantee clause of the agreement.

Linssen v. Weintraub, 759 F.Supp. 140 (S.D.N.Y. 1991) [ELR 13:3:16]

Limited partners of PTL religious organization may intervene in insurance company action against Jim Bakker and other parties

Employers Reinsurance Corporation issued a multimedia policy to the Heritage Village Church providing libel and related torts coverage for PTL's media operations (PTL refers to the church and related entities).

When Joseph W. Teague and other members of a class of lifetime partners of PTL sued James Bakker and other parties, Employers Reinsurance sought a declaratory judgment that the company owed no obligation to the insureds under the multimedia policy for the claims asserted by the Teague parties.

A Federal District Court denied the Teague parties' motion to intervene in the Employers Reinsurance proceeding. Subsequently, a jury returned a verdict against James Bakker solely on the issue of common law fraud and in favor of the Teague parties, in excess of $129 million. The jury found in favor of the two other PTL parties. A Federal Court of Appeals has reversed the District Court's decision, finding that the Teague parties had an interest in the subject matter of the declaratory judgment action, that the parties' ability to protect their interest would be impaired or impeded by the disposition of the Employers Reinsurance action, and that the PTL and insurance company parties did not represent the interests of the class.

Teague v. Bakker, 931 F.2d 259 (4th Cir. 1991) [ELR 13:3:17]

Briefly Noted:

Copyright Infringement/Julio Iglesias Song.

"Hey," a song written by Julio Iglesias and other parties and initially recorded by Iglesias in late 1979, did not infringe Henry Chia's copyrighted song, "Es," a Federal District Court in New York has ruled.

Judge John F. Keenan first reviewed, at length, the independent creation of "Hey," and then declared that the testimony presented was not sufficient to allow the court to infer access to Chia's work. "Es" may have received radio airplay in 1979, stated the court, but there was no basis upon which to conclude that any of the co-authors of "Hey" heard Chia's song at that time. The court then noted the "substantial dissimilarities" in the works and found, in dismissing the complaint, that the elements and techniques used in the compositions were "unoriginal and constitute[d] 'scenes a faire.'"

Intersong-USA v. CBS, Inc., 757 F.Supp. 274 (S.D.N.Y. 1991) [ELR 13:3:17]

Copyright Infringement/Musical Work.

In 1983, Frost Belt International Recording Enterprises, doing business as Tuff City Records, entered into a contract with performer Curtis Fisher. In 1985, Fisher entered a separate songwriter contract with Street Tuff Tunes.

Subsequently, Tuff City brought a copyright infringement action alleging the wrongful use of Fisher's song "A Girl Named Kim," on an album produced by Cold Chillin' Records. A default judgment was entered in February 1990.

A Federal District Court in New York has rejected Cold Chillin's motion to set aside the default judgment, finding that there was clear and convincing evidence of the company's willful default. Judge Kram also rejected Cold Chillin's defenses to the copyright claim, finding that Tuff City obtained a valid copyright to the song; that the record did not support the claim that the "music" of the allegedly infringing work, "A Thing Named Kim," was sufficiently different from the copyrighted work, despite the identity of lyrics, to defeat the infringement claim; and that Tuff City's action was not preempted by the Copyright Act.

The matter was referred to a magistrate for a determination of Tuff City's damages under the Copyright Act as well as costs and reasonable attorneys' fees incurred in opposing Cold Chillin's motion.

Frost Belt International Recording Enterprises, Inc. v. Cold Chillin' Records, 758 F.Supp. 131 (S.D.N.Y. 1990) [ELR 13:3:17]

Copyright Infringement/Music.

A Federal District Court in New York has refused to grant summary judgment to various composers and music publishers in a copyright infringement action against ESPN, Inc. The court found that issues of fact remained to be resolved, such as whether each of the allegedly infringing uses was substantial and whether any individual use was likely to impair the potential market for or value of the copyrighted work. Judge Robert P. Patterson, Jr. also rejected a motion for summary judgment dismissing the defense of copyright misuse, but found that there were no issues of fact raised with respect to ESPN's defense of unclean hands and estoppel (as to eighteen of twenty cited musical works) and granted the composers' motion for summary judgment as to the latter defenses.

Coleman v. ESPN, Inc., Case No. 90 Civ. 3632 (S.D.N.Y., May 7, 1991) [ELR 13:3:17]

Radio Station Contest Prize.

Steven Sweeney claimed that he won the $10,000 prize offered in a contest sponsored by a Montgomery, Alabama radio station. The radio station claimed that Sweeney was not eligible to win the prize because he was an "employee" of the station under the contest rules. Sweeney had taken photographs of various events for the station; he received free film and processing and obtained free admission to the events. And for about six months, Sweeney accompanied a station sales representative on promotion visits to various schools.

The Alabama Supreme Court has agreed with a trial court ruling finding that the services provided by

Sweeney and "the regular, close contact" that Sweeney had with station employees suggested the possibility of unfair advantage and collusion. Although Sweeney did not receive a salary from the station, noted the court, "compensation to an individual is not a requisite of an employer/employee relationship" under Alabama law, and summary judgment was properly granted to the radio station parties.

Sweeney v. WSYA (Sunny 103) Radio Station, 574 So.2d 769 (Ala. 1991) [ELR 13:3:17]

Baseball Umpire Death.

Linda Hickey was the fiancee of a baseball umpire who died of a heart attack. Hickey sued the National League for intentional and negligent infliction of emotional distress, alleging that the heart attack resulted from the umpire's "grueling" schedule.

A trial court decision dismissing the complaint has been upheld. It was noted, in part, that the League's conduct did not exceed "all reasonable bounds of decency;" that Hickey was not within the zone of danger; and that the alleged injuries did not result from Hickey's contemporaneous observation of the alleged mistreatment and eventual death of her fiance.

Hickey v. National League of Professional Baseball Clubs, 565 N.Y.S.2d 65 (N.Y.App. 1991) [ELR 13:3:18]

Wrestling Spectator Injury.

Roy Massey was injured by a wrestler while attending a wrestling exhibition. In response to Massey's personal injury action, a trial court granted summary judgment to the promoter of the wrestling match and granted the motion to dismiss filed by a security company. The Supreme Court of Appeals of West Virginia has reversed the trial court's decision, finding that material issues remained to be resolved by a trier of fact. Massey raised questions concerning whether sufficient security personnel were hired to control the crowd, whether it was foreseeable that there would be an altercation between one of the wrestlers and a spectator as a result of the wrestlers provoking the crowd, whether the wrestler was acting in the course of his employment in provoking and inciting the spectators, and whether the promoter and security company exercised ordinary care to protect Massey from injury.

Massey v. Jim Crockett Promotions, Inc., 400 S.E.2d 876 (W.Va. 1990) [ELR 13:3:18]

Health Club.

When 21st Century Leisure Spa International, doing business as 21st Century Fitness Center, ceased its operations and then filed for bankruptcy, New York State Attorney General Robert Abrams brought an action on behalf of the club members.

A New York trial court found that the club failed to comply with a statutory bond requirement, failed to provide pro rata refunds to its members after closing its doors, and engaged in repeated fraudulent and deceptive conduct. Judge Edward J. Greenfield observed that Anthony Verderame, the president of 21st Century, was aware of the corporation's financial condition and imminent closing when Verderame accepted new and extended memberships; Judge Greenfield held Verderame personally liable for the damages (as yet undetermined) sought.

The court also enjoined the 21st Century parties from, among other activities, entering into any new contracts or renewing any existing contracts pending compliance with the bond requirement.

People v. 21st Century Leisure Spa International Ltd., New York Law Journal, p.24, col. 1 (N.Y.Cnty., May 30, 1991) [ELR 13:3:18]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Boehm v. American Broadcasting Company, Inc., 929 F.2d 482 (13:1:3); Braun v. Soldier of Fortune Magazine, Inc., 757 F.Supp. 1325 (12:12:14); Collier v. Superior Court (MCA, Inc.), 279 Cal.Rptr. 453 (13:1:3); Finger v. Omni Publications International, Ltd., 564 N.Y.S.2d 1014, 566 N.E.2d 141 (13:1:9); Pasillas v. McDonald's Corporation, 927 F.2d 440 (12:12:16); Starkman v. Mann Theatres Corporation, 278 Cal.Rptr. 543 (12:12:16).

In August 1990, a Federal Court of Appeals in California reversed a judgment awarding over $5 million to entertainer Wayne Newton in his libel action against NBC (12:4:10; 12:10:18). The court, making certain minor amendments in its opinion, has denied Newton's petition for a rehearing and rejected the suggestion for a rehearing en banc in Newton v. National Broadcasting Company, Inc., 930 F.2d 662 (9th Cir. 1991).

In December 1990, a Federal District Court in New York granted summary judgment to NBC and various parties involved in writing and producing the television program "Saturday Night Live" in a copyright infringement action brought by writers E.J. Novak and Debra Studer (12:10:5). The court has denied the writers' motion for reargument in Novak v. National Broadcasting Company, Inc., 760 F.Supp. 47 (12:10:5).

The decision in Powell v. National Football League (12:9:5) has been republished, as corrected, at 930 F.2d 1293.

Delicious Vinyl Records, in early 1991, obtained a preliminary injunction barring Marvin Young, known as Young MC, from recording for any other company until October 31, 1991 (12:12:19). It has been reported that Delicious Vinyl and Capitol Records have reached an agreement whereby Young will record for Capitol; the terms of the settlement were not disclosed.

In early 1991, a Los Angeles trial court jury awarded Cosmo Cappellino damages totalling $10.2 million in the former KIIS sales manager's breach of contract action against Rick Dees and former KIIS president and general manager Walter Clark (12:12:19). It has been reported that the parties reached a confidential settlement of the matter.

The United States Supreme Court has refused to review the decisions in American Booksellers v. Webb (12:11:14) and Immuno A.G. v. Moor-Jankowski (12:11:10).

[ELR 13:3:19]

WASHINGTON MONITOR

Federal Communications Commission adopts children's television rules

In April 1991, the Federal Communications Commission adopted new rules and policies implementing the Children's Television Act of 1990.

The FCC will require license renewal applicants to demonstrate that they have met the educational and informational needs of children by presenting programs produced and broadcast primarily for an audience of children 16 years of age and under. Educational and informational programming has been defined as "programming that furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs." The Commission has not specified the minimum amount of such programming that must be aired. A summary of the licensee's programming and nonbroadcast activities with respect to the educational and informational needs of children must be maintained in each station's public file and must be submitted as part of the licensee's renewal application.

The FCC also defined program-length commercials as programs "associated with a product, in which commercials for that product are aired." The programs will apply toward the statutory commercial limits of 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. Commercial time limits apply to programs produced and broadcast for an audience of children 12 years old and under.

The commercial time limits and program requirements will take effect on October 1, 1991.

Children's Television Programming, 68 RR 2d 1615 (April 12, 1991) [ELR 13:3:20]

FCC declines to adopt syndicated exclusivity requirements for satellite carriers sending signals to home satellite dishes

The Satellite Home Viewer Act of 1988 provides an interim compulsory copyright license to satellite carriers that distribute distant broadcast station signals to home satellite dish owners. Satellite carriers must pay specified copyright royalty fees to copyright owners through 1992, or until they reach separate fee agreements with the copyright owners. The interim compulsory license expires in 1994.

In enacting the statute, Congress also directed the Federal Communications Commission to determine the feasibility of imposing syndicated exclusivity requirements on satellite carriers.

The Commission has found that it is not technically or economically feasible to impose syndicated exclusivity requirements for satellite carriers at this time.

Syndicated Exclusivity Requirements for Satellite Carriers, 68 RR 2d 1172 (Feb. 8, 1991) [ELR 13:3:20]

DEPARTMENTS

In the Law Reviews:

The Day the Music Died: Ward v. Rock Against Racism by Gregory L. Lippetz, 25 University of San Francisco Law Review 627 (1991)

The Recent Assault on Sexually-Explicit Music Lyrics by Mark A. Hollingsworth, 12 Whittier Law Review 367 (1991)

"At the Ol' Ball Game" and Beyond: Spectators and the Potential for Liability by Walter T. Champion, Jr., 14 American Journal of Trial Advocacy 495 (1991)

Broadcast Regulation, Has the Marketplace Failed the Children: The Children's Television Act of 1990, 15 Seton Hall Legislative Journal 345 (1991)

Negotiating Points for a Writer's Television Movie Deal by Susan G. Schaefer, 25 Beverly Hills Bar Association Journal 85 (1991)

Privacy and the Other Miss M by Dorothy Glancy, 10 Northern Illinois University Law Review 401 (1990)

Newspaper-Broadcast Cross Ownership Policy: A New Standard From Across the Border by Karen A. Hoffman, 23 Case Western Reserve Journal of International Law 333 (1991)

Untangling the Regulatory and Legal Wires to Telephone and Cable Television Technology by Jane A. Strachan, 11 University of Bridgeport Law Review 599 (1991)

Event Licensing: The America's Cup Example by Weston Anson, 11 The Licensing Journal 7 (1991)

An Interview with Frank Simio of Major League Baseball Properties, 11 The Licensing Journal 10 (1991)

Paramount Communications, Inc. v. Time Inc.: Taking the Teeth Out of Proportionality Review, 22 Loyola University Law Journal 229 (1990) [ELR 13:3:22]

Book Notes:

Advertising Compliance Handbook, Second Edition, by Kenneth A. Plevan and Miriam L. Siroky.

This comprehensive update, published this summer, is divided into four parts: 1) Advertising Litigation Under the Lanham Act with chapters on remedies, damages and compliance, litigation, and settlement; 2) Agency and Administrative Regulation of Advertising with chapters on prior substantiation, standards for deception and unfairness, clinical studies, FTC remedies, and national advertising and network challenges; 3)

Advertising Law and Related Substantive Areas including copyright law and advertising, the First Amendment, and rights of privacy and publicity issues; and finally 4) Issues Involving Interpretation of Advertising with guidelines for interpreting advertising, consumer surveys in Lanham Act litigation, and designing and conducting a survey for use at trial. 657 pages, $95.00, published by the Practising Law Institute, 810 Seventh Avenue, New York, NY 10019.

Henn on Copyright Law: A Practitioner's Guide by Professor Harry G. Henn.

This recently-published third edition contains two new chapters on Statutory Transmission Licenses by Satellite Carriers for Private Home Viewing and Protection of American Works in Foreign Countries. It examines legislative and decisional developments as the "copyright system sheds its emphasis on formalities, and adds the third category (`moral rights') to `copyrights' and tangible embodiments of works." It includes the Omnibus Copyright provisions as riders to the Judicial Improvements Act: Visual Artists Rights, Architectural Works, and Computer Software; a 15-page chart of copyright, trademark and patent comparisons; plus Appendixes. 436 pages, $95.00, publishing by the Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. [ELR 13:3:22]