RECENT CASES

Psychoanalyst Jeffrey Masson may proceed with libel action against author of New Yorker Magazine article, rules United States Supreme Court

The United States Supreme Court has ruled that psychoanalyst Jeffrey Masson may proceed with a libel action against author Janet Malcolm. Malcolm's article about Masson's relationship with the Sigmund Freud Archives was published by The New Yorker magazine in December 1983 and was reprinted by Alfred A. Knopf, Inc. in a book entitled In the Freud Archives.

A Federal District Court in California (ELR 10:12:20) granted summary judgment to Malcolm, holding that the evidence would not permit a reasonable finder of fact to conclude that Malcolm published the allegedly defamatory statements with actual malice.

A Federal Court of Appeals upheld the District Court's decision (ELR 11:4:7; 11:9:20; 12:2:18).

In reversing the Federal Court of Appeals, Justice Anthony M. Kennedy, Jr. first noted that the false attribution of statements to a person may constitute libel under California law if the falsity exposes that person to an injury within the scope of section 45 of the state's Civil Code. However, a public figure, such as Masson, may not recover for an alleged injury absent a showing of actual malice - the publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.

Justice Kennedy observed that, in general, quotation marks around a passage "indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject."

A fabricated quotation may injure a reputation by attributing an untrue factual assertion to a speaker, or because, whether or not the statement is true, the manner of expression indicates a "negative personal trait or an attitude the speaker does not hold." Furthermore, commented Justice Kennedy, although writers often use quotations to indicate a hypothetical conversation, Malcolm did not suggest that the quotations at issue were being used "as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude." The fact that the article was published in The New Yorker, a magazine with a reputation for "scrupulous factual accuracy," also might have caused readers to take the quotations at face value. In all, stated the court, a trier of fact could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by Masson.

Justice Kennedy next considered to what extent attributing words to a speaker would constitute the falsity required to prove actual malice. Masson argued that except for altering quotations to correct for grammar and syntax, the publication of a quotation with the knowledge that it does not contain the words the public figure used would demonstrate actual malice. Justice Kennedy rejected the proposed standard, pointing out that "even if a journalist has tape recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be re-constructed with complete accuracy."

The court determined that essential principles of defamation law would accommodate instances of inaccurate quotations. If an author alters a speaker's words but makes no material change in meaning, "including any meaning conveyed by the manner or fact of expression," the speaker may not suffer a compensable injury to reputation. Such a deliberate alteration of a speaker's words therefore might not amount to knowledge of falsity for purposes of New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 341 (1974) unless, reiterated the court, the alteration "results in a material change in the meaning conveyed by the statement."

Quotations may be a "devastating instrument" for conveying false meaning, continued the court. The Federal Court of Appeals had found that an altered quotation would be protected so long as it was a "rational interpretation" of an actual statement. But Justice Kennedy stated that where a writer "uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said;" the protection for rational interpretation thus was inapplicable in the instant case.

Justice Kennedy pointed out that if the court were to assess quotations under a rational interpretation standard, this "would give journalists the freedom to place statements in their subjects' mouths without fear of liability." If readers could not distinguish between the statements of a subject and the interpretation of an author, cautioned the court, this would decrease "the trustworthiness of the printed word, and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded."

The court then noted that for purposes of ruling on the motion for summary judgment it was assuming that Masson was correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm published the article with knowledge or reckless disregard of the differences between what Masson said and what was quoted. It was found that the record contained substantial evidence which would support a jury determination under a clear and convincing standard that Malcolm deliberately or recklessly altered the quotations. Justice Kennedy cited, among other factors, the lack of a tight deadline - Malcolm was not working on a "hot news" item and had the ability to compare the tapes with the work in progress - and that Malcolm's explanations of the time and place of allegedly unrecorded conversations were not consistent. In all, the evidence created a jury question as to whether Malcolm published the statements with knowledge or reckless disregard of the altered quotations.

Furthermore, several of the published passages differed materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity.

Justice Kennedy concluded by noting that on remand, the court would have an opportunity to consider Masson's argument that the District Court erred in granting summary judgment to The New Yorker Magazine and Alfred A. Knopf, Inc. on the basis of their relations with Malcolm or the lack of any independent actual malice.

Justice White, with whom Justice Scalia joined, although concurring in the court's opinion, disagreed with the holding that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity...unless the alteration results in a material change in the meaning conveyed by the statement." The issue, for Justice White, was whether Masson spoke the words attributed to him, not whether the fact, if any, asserted by the attributed words was true or false; the court needed to go no further, in Justice White's view, to conclude that Malcolm was not entitled to summary judgment on the issue of malice with respect to any of the six erroneous quotations. Justice White concluded by stating that "for a court to ask whether a misquotation substantially alters the meaning of spoken words in a defamatory manner is a far different inquiry than whether reasonable jurors could find that the misquotation was different enough to be libelous. In the one case, the court is measuring the difference from its own point of view; in the other it is asking how the jury would or could view the erroneous attribution."

Masson v. New Yorker Magazine, Inc., 59 LW 4726 (U.S.Supreme Court, June 20, 1991) [ELR 13:4:4]

"Suicide-by-music" claim against Ozzy Osbourne is rejected

Thomas and Myra Waller claimed that Ozzy Osbourne and other parties associated with the distribution of the song "Suicide Solution" on the album "Blizzard of Oz" caused the wrongful death of the Waller's adolescent son by inciting him to commit suicide. Michael Waller died in May 1986 as the result of a self-inflicted pistol wound to his head; the suicide allegedly occurred after Waller repeatedly listened to an Osbourne tape.

The song "Suicide Solution" contained the audible and perceptible lyrics: Ah know people, You really know where it's at. You got it, Why try, why try, Get the gun and try it, Shoot, shoot, shoot. In an amended complaint, the Wallers alleged that the lyrics which purportedly incited their son to commit suicide were contained in a subliminal message that was consciously intelligible only when the music was electronically adjusted.

CBS Records, pursuant to the Wallers' discovery request, provided the twenty-four track and stereo master tapes of the "Blizzard of Oz" album for expert analysis. The expert determined that no subliminal messages existed anywhere on the entire tape. Another expert witness found that the challenged lyrics were audible, but not immediately intelligible.

A Federal District Court in Georgia first concluded that the Wallers did not raise an issue of fact concerning whether the song "Suicide Solution" contained subliminal messages. Judge Fitzpatrick further found that the Osbourne parties did not engage in culpable incitement, stating that "there was no evidence that the music was intended to produce acts of suicide, and likely to cause imminent acts of suicide; nor could one rationally infer such a meaning from the lyrics.

The court, although expressing sympathy for the Wallers, granted the Osbourne parties' motion for summary judgment, on the ground that the First Amendment precluded liability on the claims of negligence, nuisance, fraud and invasion of privacy.

Waller v. Osbourne, 763 F.Supp. 1144 (M.D.Ga. 1991) [ELR 13:4:5]

Academy of Motion Picture Arts and Sciences may proceed with copyright infringement, trademark infringement, unfair competition and dilution claims involving statuette resembling "Oscar," rules Federal Court of Appeals in reversing District Court decision

In 1976, as described at ELR 11:12:5, Creative House Promotions, Inc., a Chicago manufacturer and distributor of advertising specialty items, developed a trophy sculpture known as the Star Award. The sculpture consisted of a streamlined, abstract rendering of a naked, muscular male holding a star; the work was cast in solid metal, had a gold finish and stood on a circular gold cap mounted on a cylindrical base.

In response to a copyright and trademark infringement action brought by the Academy of Motion Picture Arts and Sciences, a Federal District Court in California found that the Academy failed to show that recipients of the Star Award or parties viewing the sculpture were likely to confuse it with the Academy's "Oscar" statuette. The court also rejected the Academy's unfair competition and dilution claims.

A Federal Court of Appeals has reversed the District Court's rulings. Judge Harry Pregerson noted that from 1929 through 1941, the Academy claimed common law copyright protection for the Oscar as an unpublished work of art. In 1941, the Academy registered the Oscar with the Copyright Office as an unpublished work of art not reproduced for sale; the statuettes awarded since that date have contained statutory copyright notices.

Judge Pregerson observed that the two sculptures were very similar, except for the fact that the Star Award was two inches shorter than the Oscar, and held a star rather than a sword.

With respect to the copyright infringement claim, the District Court had found that the Oscar was not entitled to copyright protection because a divesting, general publication occurred before the effective date of the Copyright Act of 1976. But Judge Pregerson stated that the District Court erred in not granting a presumption of validity to the 1941 copyright. The registration certificate created a rebuttable presumption that the Oscar was an unpublished work in 1941, and the statuette did not enter the public domain by being publicly displayed or by the presentation of the piece, to a limited number of individuals, at award ceremonies.

The District Court, relying on Brown v. Tabb, 714 F.2d 1088 (11th Cir. 1983; ELR 6:1:12), ruled that the

Academy's purpose in presenting the Oscar was, in part, to promote the film industry, and that such purpose was not sufficiently limited. But Judge Pregerson pointed out that the Academy has never sold the Oscar to anyone. Furthermore, as distinguished from Brown, the Academy never distributed the Oscar to anyone other than the recipients and did not promote the Oscar for its own commercial benefit. Allowing Oscar winners to advertise the fact that they won an award did not amount to a distribution, and the indirect commercial benefits accruing to the film industry from the Oscar promotion "[did] not necessarily transform the limited distribution into a general publication where no direct sales of the work [were] involved." The Academy's purpose therefore was limited.

Judge Pregerson proceeded to note that after 1941, the Academy required Oscar recipients to give the Academy a right of first refusal on any sale of their award and imposed restrictions on advertising. The court concluded that restrictions on further distribution were implied with respect to recipients' use or distribution of the Oscar before 1941. Neither the Academy nor any living Oscar recipient has ever offered to transfer an Oscar to the general public; each trophy is personalized with the name of the individual winner; and the Academy has not indicated that recipients may make copies of the Oscar and distribute them. In all, the Academy's conduct from 1929 through 1941 constituted a limited publication that did not divest the Oscar of its common law protection. The matter was remanded to the District Court to allow the Academy to present evidence of copyright infringement damages.

In turning to the Academy's claims under section 43 of the Lanham Act, Judge Pregerson first observed that the Oscar's "sleek, muscular build and distinctive design [was] non-functional because an achievement award need not have those particular characteristics." The statuette also had acquired a secondary meaning, for "people throughout the world associate the award with excellence in film." The District Court therefore correctly concluded that the Oscar was entitled to protection under the Lanham Act.

Upon reviewing the factors relevant to determining the existence of a likelihood of confusion, Judge Pregerson found that the "Oscar" mark was entitled to the strongest possible protection against infringement. With respect to the marketing channels involved, the District Court concluded that the Academy's "market" was the annual awards ceremony, and that Creative House marketed its award to corporate buyers or through distributors. However, there was evidence that Creative House's market extended to buyers in the entertainment industry. There also existed a possibility of post-sale confusion, stated Judge Pregerson, a situation existing when consumers view a product outside the context in which it is originally distributed and confuse it with another, similar product - this secondary audience, "might conceivably assume the Star Award was somehow associated with the Oscar."

Furthermore, the Academy had presented evidence, some of which apparently was overlooked by the District Court, of actual confusion. Although actual confusion is not necessary to a finding of likelihood of confusion under the Lanham Act, such evidence was sufficient to show a likelihood of confusion among consumers.

Judge Pregerson also determined that the evidence showed that Creative House may have attempted to benefit advantage from the Academy's good will, and that a likelihood of confusion thus might be inferred.

Given the "substantial" evidence of likelihood of consumer confusion, and because the District Court erroneously applied several of the factors relevant to a finding of trademark infringement, the court reversed the District Court's conclusion that no violation of the Lanham Act occurred, and remanded the matter to allow the Academy to present evidence of damages.

The court next reversed the dismissal of the Academy's unfair competition claim and remanded for further proceedings on the issue of damages. The Academy also may proceed on its claim for unlawful dilution under section 14330 of the California Business and Professions Code. The statute does not require a showing of actual injury or likelihood of confusion; the Academy must show only that its business reputation is likely to be injured, or that the distinctive value of the Oscar mark is likely to be diluted (emphasis by the court). Judge Pregerson pointed out that "if the Star Award looks cheap or shoddy, or is disseminated without regard to the ultimate recipient, the Oscar's distinctive quality as a coveted symbol of excellence, which cannot be purchased from the Academy at any price, is threatened."

The court affirmed the District Court's denial of Creative House's request for attorneys' fees.

Academy of Motion Picture Arts and Sciences v. Creative House Promotions, Inc., Case Nos. 90-50506; 90-55144 (9th Cir., July 31, 1991) [ELR 13:4:6]

Owner of early tapes recorded by "George Thorogood and the Destroyers" has no copyright interest in tapes

In 1976, John Forward arranged two recording sessions for a band comprised of musicians George Thorogood, Jeff Simon, and Ronald Smith; Forward, a music fan and record collector, retained the tapes of the sessions.

The band, under the name "George Thorogood and the Destroyers," eventually released several successful albums.

In 1988, when the band objected to Forward's decision to release his tapes, Forward sought a declaratory judgment that he was the owner of the copyright in the material.

A Federal District Court in Massachusetts noted that neither the band nor any of its members ever agreed to convey a copyright interest in the tapes to Forward, or entered into a contract with Forward to produce a record or to release the tapes.

The court also rejected Forward's claims that the tapes were works made for hire - Forward did not compensate any of the band members for their work. A claim of joint authorship also was unsuccessful, since the band provided all of the musical and artistic contributions to the tapes. Judge Tauro ruled that the musicians owned the copyrights to the tapes and enjoined Forward from any commercial use of the works.

Forward v. Thorogood, 758 F.Supp. 782 (D.Mass. 1991) [ELR 13:4:7]

Plastic Ono Elephants Memory Band may proceed with New York Civil Rights Law claim in connection with use of musician's names on soundtrack album, but keyboard player's palming off claim against Yoko Ono Lennon is dismissed

The Plastic Ono Elephants Memory Band performed as the backup band to John Lennon and Yoko Ono Lennon at two charity concerts in 1972. A one-hour television special featuring footage from the concert was aired on ABC, again for the benefit of charity.

In 1986, Capitol Records, pursuant to a contract with Yoko Ono Lennon, released a videotape of the two concerts and an accompanying soundtrack. The names and photographs of the band members were used in connection with the "John Lennon - Live in New York City" products.

In 1988, Warner Bros. and David L. Wolper Productions released a commercial film and a home video cassette called "Imagine: John Lennon." The film contained two clips from the 1972 concerts. Capitol released the soundtrack of the film; the soundtrack album included the performance of one song from the concerts.

The band members claimed that the unauthorized use of their names or images violated sections 50/51 of the New York Civil Rights Law. Adam Ippolito also argued that Yoko Ono Lennon did not play keyboards at the concerts, but only pretended to do so, and that the credit given Ono Lennon on the 1986 soundtrack album constituted a "palming off" of Ippolito's performance.

New York trial court Judge Harold Baer Jr., after noting the background of the matter (ELR 10:3:12; 11:9:19), stated that the fact that the band members consented to the use of their names and pictures in connection with a single television broadcast of their performance could not be transformed by the Ono Lennon parties into a consent "to all uses for all time."

Judge Baer also rejected the argument that the section 50/51 claims were time-barred with respect to broadcasts of the 1986 video on Showtime and MTV. But the band members' Civil Rights Law claims arising out of the sale of videocassettes, audiocassettes, records, compact disks, and laser disks would be barred if such claims were brought more than one year after the musicians learned of the distribution.

The public interest exception to sections 50/51 precluded the band members' claims with respect to the inclusion of clips of their performances in the film "Imagine," declared the court, particularly since the film principally was a biography of Lennon, and was not a "disguised trade product."

The court further found that the use of the band members' pictures in "Imagine" was de minimis; the images of the musicians were "unquestionably visual footnotes, incidental and insignificant appearances in a larger work."

However, continued Judge Baer, the soundtrack of the film did not contain an "information context," and was a trade product. Only one song on the soundtrack album and compact disk was taken from the 1972 concert and the mere sound of the band's performance was not protected. But printed matter sold with the "sound products" contained the names of the musicians. Judge Baer, although questioning whether the purpose of the identification was to exploit the band members' publicity rights, declined to find that the use was de minimis; therefore, the musicians were entitled to proceed with a cause of action based on the sale of "Imagine" soundtrack albums and compact disks.

Judge Baer concluded by dismissing Ippolito's palming off claim. It was noted that the credits for the 1986 video stated that the Plastic Ono Elephants Memory Band played at the 1972 concert, and listed the names of all of the group and the instruments they played. Included as one of the band members was Ono Lennon; Ono Lennon was a member of the band and did in fact play keyboards at the concert, noted the court. Ono Lennon did not know that her playing was not on the soundtrack - an engineer, acting on his own, had removed it all. The mere editing of the tape by the engineer, who apparently was an independent contractor, did not constitute palming off. The editing together with the package credit might have given rise to a palming off claim, but the packaging most likely was undertaken by Capitol, and, observed Judge Baer, there was no proof that Ono Lennon participated in the packaging arrangements.

Ippolito v. Ono Lennon, New York Law Journal, p.22, col.1 (N.Y.Cnty., May 21, 1991) [ELR 13:4:7]

United States Supreme Court upholds Indiana ban on nude dancing

The United States Supreme Court, by a 5-4 vote, has ruled that the state of Indiana may enforce its public indecency law to prevent bars and adult establishments from presenting totally nude dancing as entertainment.

After lengthy litigation, as described at ELR 12:8:10, a Federal Court of Appeals held that the nude dancing in issue was expressive conduct protected by the First Amendment.

In reversing the Court of Appeals decision and finding that the statutory requirement that the dancers wear pasties and a G-string did not violate the First Amendment, Chief Justice William H. Rehnquist noted although nude dancing may be expressive conduct "within the outer perimeters of the First Amendment...we view it as only marginally so." Indiana's public indecency statute was justified despite its incidental limitations on some expressive activity, stated Justice Rehnquist, who concluded that the statute was within the constitutional power of the state and furthered substantial governmental interests, including protecting "societal order and morality." The state sought to prevent public nudity, whether or not it was combined with expressive activity, and the statute's apparel requirements were "the bare minimum necessary to achieve the state's purpose."

Justice Antonin Scalia, concurring in the judgment, would have viewed the challenged statute as a general law regulating conduct and thus not subject to First Amendment scrutiny at all. Justice Scalia observed that the First Amendment protects the freedom of speech [and] of the press, not "expressive conduct," and stated that "moral opposition" to nudity provided a rational basis for its prohibition.

Justice David H. Souter also concurred in the judgment, agreeing with the plurality and the dissent that "an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection." However, Justice Souter based his concurrence on the state's substantial interest in regulating the secondary effects of adult entertainment establishments such as those represented in the instant proceeding. The state's avowed interest in preventing prostitution, sexual assault, and other criminal activity was sufficient under United States v. O'Brien, 391 U.S. 367 (1968), in Justice Souter's view, to justify the enforcement of the statute. The ban on nude dancing resulted from "a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing," and was unrelated to the suppression of free expression, concluded Justice Souter.

Justice Byron R. White, with whom Justices Thurgood Marshall, Harry A.Blackmun and John Paul Stevens joined in dissent, commented that the court agreed that nonobscene nude dancing performed as entertainment was expressive conduct protected by the First Amendment. Justice White then pointed out that the challenged statute was not a general proscription on nudity, and that the references by the court and Justice Scalia to the state's general interest in promoting societal order and morality did not provide sufficient justification for a statute which reaches a significant amount of protected expressive activity.

Justice White noted that viewers of nude dancing in theaters and barrooms are exclusively consenting adults who pay money to see the dances; the purpose of the regulation in this context, stated Justice White, would be "to protect the viewers from what the State believes is the harmful message that nude dancing communicates." For Justice White, the nudity element of nude dancing performances "cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance." The state's interest in regulating prostitution and associated evils could be furthered by restrictions that would not interfere with the expressiveness of non-obscene nude dancing performances, and banning an entire category of expressive activity would not satisfy the narrow tailoring requirement of strict First Amendment scrutiny, emphasized Justice White. And if nude dancing in barrooms, as compared with other establishments, was the state's primary concern, the state could impose appropriate regulation under its Twenty-first Amendment powers. In the absence of a compelling state interest, the dissent would have affirmed the judgment of the Federal Court of Appeals.

Barnes v. Glen Theatre, Inc., Case No. 90-26 (United States Supreme Court, June 21, 1991) [ELR 13:4:8]

Marla Maples' father may proceed with libel and invasion of privacy claims against the National Enquirer arising from publication of purported "interview"

The cover of the April 10, 1990 edition of the National Enquirer displayed the headline: "Marla's Angry Dad Warns: TRUMP MISTRESS CLOSE TO SUICIDE." A caption appearing next to a photograph of Donald Trump stated: "He threatens to punch out Donald for dumping her." The publication also featured an "exclusive interview" with Stan Maples, during which Maples purportedly commented on his daughter's relationship with Trump.

When Stan Maples sued the National Enquirer alleging libel, commercial appropriation and false light invasion of privacy, a Federal District Court in Georgia denied the publication's motion to dismiss the complaint. Judge Harold L. Murphy noted that although Stan Maples was not the subject of the challenged article, Maples was cited as the source of the information contained in the "interview." According to Maples, the article, by attributing false statements to him, portrayed Maples "as a father who would sell intimate details of his daughter's life to a national publication for money." The court declined to find, as a matter of law, that such statements could not form the basis of a libel complaint.

Judge Murphy also refused to dismiss the false light invasion of privacy of claim, commenting that Maples was entitled to show that the statements in issue were "highly offensive." And Maples may proceed with the claim for commercial appropriation - Maples' likeness and story apparently were used by the National Enquirer as publicity or advertising for the publication itself. The court rejected the argument that the challenged article was a news account protected by the First Amendment.

Maples v. National Enquirer, 763 F.Supp. 1137 (N.D.Ga. 1990) [ELR 13:4:9]

Decision finding that contract granting "broadcasting" rights in films included videocassette and videodisc viewing is reversed by New York appellate court

In 1964, as reported at ELR 11:12:7, Tele-Pac, Inc. granted Video-Cinema Films a license to distribute a package of 26 black and white films "for broadcasting by television or any other similar device now known or hereafter to be made known," including but not limited to "pay television, home television, theatrical television, etc." In a dispute involving the ownership of the video rights, a New York trial court granted Tele-Pac's motion for partial summary judgment dismissing a counterclaim brought by Edmund C. Grainger, the administrator of the estate of Raymond Rohauer. The court found that under the 1964 contract, Tele-Pac transferred the video rights in issue to Video-Cinema and that Tele-Pac could not have transferred those same rights to Rohauer in 1987.

A New York appellate court has reversed the trial court's decision, finding it "implicit" in the concept of broadcasting by television that there occur a transmission of sound and images from a point outside the home for reception by the general public. Judge Sullivan also observed that even if the court agreed that videocassettes are "broadcast," the broadcasting device would be a videocassette player, an "entirely different device involving an entirely different concept and technology from that involved in a television broadcast."

Unlike the trial court, Judge Sullivan found that Cohen v. Paramount Pictures Corp., 845 F.2d 851 (ELR 9:12:3) would apply to the instant matter. The contract provision referring to the right to distribute films for broadcasting by television or any other similar device was, by its own terms, sufficiently limited so that no express reservation of rights was required, stated Judge Sullivan. The court then questioned the dissent's conclusion that Tele-Pac's consistent course of conduct indicated acquiescence in Video-Cinema's interpretation of the contract; Judge Sullivan considered the interpretation of the contract a pure question of law, precluding the need to look to extrinsic evidence.

In all, the court found that the 1964 license did not convey video rights in the subject films to Video-Cinema; that Tele-Pac, via a 1987 contract, had transferred to Rohauer all rights to the films except the rights previously granted to Video-Cinema in the 1964 contract; and that the video rights thus passed to Rohauer.

In dissent, Judge Asch declared that the grant of rights clause, the intent of the parties at the time the contract was entered into, and the "extremely broad and completely unambiguous language" of the entire contract meant that the contract could fairly be read as including later developed media such as videocassettes. For Judge Asch, the parties' consistent course of conduct and Tele-Pac's apparently consistent acquiescence in Video-Cinema's interpretation of the contract was "the best and indeed conclusive evidence of the intent of the parties at the time the contract was entered into."

Tele-Pac, Inc. v. Grainger, 570 N.Y.S.2d 521 (N.Y.App. 1991) [ELR 13:4:10]

MGM/UA is not liable for fees arising from placement of K-Tel's "Kids, Incorporated" television series

K-Tel Entertainment hired International Program Consultants and its principal shareholder, officer and director, Russell J. Kagan to place a pilot and locate a distributor for the television series "Kids, Incorporated." Kagan placed the series with MGM/UA, and the company, pursuant to a 1984 contract, agreed to pay K-Tel certain fixed amounts for each episode.

K-Tel, apparently without a written contract, paid Kagan $15,000 for the sale of the pilot, and a $10,000 advance towards sums due on the first eight programs in the series. Subsequently, K-Tel assigned its rights under the distribution contract with MGM/UA to Hal Roach Entertainment, Inc. Soon after, K-Tel filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code. Roach, according to Kagan, at some point filed a similar petition.

Kagan sued various parties seeking to recover 10 percent of the amount paid by MGM/UA for the entire series of about 26 episodes.

A New York appellate court has reversed a trial court order denying MGM/UA's motion for summary judgment dismissing the complaint and has rejected Kagan's unjust enrichment claim against MGM/UA. The fact that MGM/UA may have received a benefit from the activities of Kagan's company did not provide a sufficient basis for recovery, stated the court, nor did MGM/UA's acquiescence in the assignment by K-Tel to Roach of the production agreement.

Kagan v. K-Tel Entertainment, Inc., 568 N.Y.S.2d 756 (N.Y.App. 1991) [ELR 13:4:10]

Dispute over right to publish Hungarian language books is dismissed for lack of subject matter jurisdiction

During the years 1976 through 1987, Claire De Bardossy granted Sandor Puski the right to publish several of De Bardossy's books in the Hungarian language. In 1989, Puski entered a contract with a state-owned publisher in Budapest to have two of De Bardossy's books published in Hungary, and subsequently arranged to have his own company in Hungary publish additional works.

When De Bardossy brought a copyright infringement action against Puski, a Federal District Court in New York found that the court lacked subject matter jurisdiction. Judge Martin noted that De Bardossy did not show that an infringing act occurred in the United States and that such act led to further infringement abroad. The author did not allege that Puski's publication of Hungarian language editions of her books in the United States violated the Copyright Act. The act of taking books legally produced in the United States to Hungary did not violate the Copyright Act, and the contracts authorizing the alleged improper use of De Bardossy's copyright in

Hungary were negotiated in Hungary and not in the United States.

De Bardossy also argued that under the Universal Copyright Convention, if the purported infringements took place in and entitled the author to sue in Hungary, then jurisdiction also would be present in the Federal District Court. Judge Martin noted that the Convention did not expand a member state's copyright laws extraterritorially, but provided that a member state must grant the same copyright protection to a work produced or created abroad but infringed in the contracting state as it would to a domestic work. The court, accordingly, dismissed De Bardossy's complaint and Puski's counterclaim.

De Bardossy v. Puski, 763 F.Supp. 1239 (S.D.N.Y. 1991) [ELR 13:4:11]

Dismissal of author's claim alleging publisher's breach of covenant of good faith and fair dealing is affirmed

Richard Denholm sued Houghton Mifflin and its wholly owned subsidiary, Riverside Publishing Co., for tortious breach of contract and fraud arising out of an agreement to develop and publish a mathematics program for elementary school students.

A Federal District Court dismissed the fraud claim as barred by the applicable statute of limitations and dismissed the tortious breach of contract claim on summary judgment. The court allowed Denholm to proceed with a cause of action alleging ordinary breach of contract, but excluded evidence of damages for lost royalties and loss of reputation, restricting such evidence to the reasonable value of the time the author devoted to the project; Denholm estimated this amount as $20,000.

The jury returned a verdict in favor of Denholm and awarded him $100,000. Denholm accepted a remittitur to $20,000; the court vacated the judgment on the verdict and awarded the author damages of $20,000.

A Federal Court of Appeals, noting that case law bars the appeal of a remittitur order that a party has accepted, dismissed Denholm's appeal as to the amended judgment, the judgment on the verdict and the pretrial order concerning evidence of damages. However, Judge Brunetti stated that Denholm's appeal of the orders dismissing the tortious breach of contract and fraud claims was properly before the court.

In affirming the dismissal of the tortious breach of contract claim, Judge Brunetti noted that tort recovery for a breach of the covenant of good faith and fair dealing requires proof of a special relationship between the parties. The characteristics of a special relationship were not present in the instant case, observed the court.

Denholm and his publishers were of equal bargaining stature, stated Judge Brunetti, as Denholm had been active in publishing for over twenty years and had published more than forty textbooks. Months of negotiation preceded the parties' agreement. Furthermore, Denholm did not show that ordinary contract damages were inadequate, or that he was "in any way vulnerable or of necessity placed any trust in his publishers." In all, the court found no evidence of a special relationship as required under California law.

The court also affirmed the dismissal of Denholm's fraud claim.

Judge Cynthia Holcomb Hall, dissenting in part, would have allowed Denholm to appeal the pretrial order excluding evidence regarding lost royalties and loss of reputation.

Denholm v. Houghton Mifflin Company, 912 F.2d 357 (9th Cir. 1990) [ELR 13:4:11]

Publisher of unlicensed book about "Twin Peaks" series may not resolve copyright or trademark dispute in Illinois due to lack of personal jurisdiction over California production company

A Federal District Court in Illinois has dismissed, on the basis of a lack of jurisdiction, an action brought by Publications International, Ltd. seeking a declaratory judgment that its unlicensed book, "Welcome to Twin Peaks - A Complete Guide to Who's Who and What's What," did not infringe any trademark or copyright owned by Twin Peaks Productions, Inc.

"Welcome to Twin Peaks" contained episodic plot summaries, character descriptions, and photographs.

Twin Peaks Productions, the owner of the copyrights in all of the Twin Peaks television programs, as well as various Twin Peaks trademarks, did not maintain an office in Illinois and had no agents, employees, or real property in the state. ABC's local affiliates, including those in Illinois, broadcast the show, but, in all, the production company's contact with the state was found "too attenuated" to support personal jurisdiction. The instant proceeding did not involve defamation or invasion of privacy, and the broadcast of the television series was "irrelevant" to the determination of whether the book infringed the production company's copyrights or trademarks, stated the court. Twin Peaks Productions did not "purposely avail itself of the privilege of conducting activities" within the state, and the complaint was dismissed accordingly.

Publications International, Ltd. v. Simon & Schuster, Inc., 763 F.Supp. 309 (N.D.Ill. 1991) [ELR 13:4:11]

Art dealer loses conversion claim against United Parcel Service arising from lost Erte paintings

In 1985, Art Masters Associates assigned six paintings by Erte to an art gallery in Buffalo, New York. When the paintings were not sold, the gallery returned the works, via United Parcel Service, to Art Masters; the gallery declared that the value of the package was $999.99 and paid $2.25 for the shipment. Although a UPS driver stated that on July 19th, 1985, a package was left at the side door of the Art Masters premises in Brooklyn, New York, the package was not found at that location and the paintings never were located.

Art Masters sued UPS, seeking to recover $27,000, the full value of the paintings.

A New York trial court granted summary judgment to Art Masters on the art dealer's common law liability claim; limited the damages to the $999.99 declared value; and granted summary judgment to UPS on a conversion cause of action.

An appellate court held that state law, rather than federal law would apply to the conversion claim, and that under state law, Art Masters established a prima facie case of conversion.

The New York Court of Appeals, on certified question, has reversed the appellate court ruling. Judge Alexander first noted that federal and state law permit regulated motor carriers to limit their liability for loss, damage or injury to goods entrusted to them to the agreed-upon declared or released value of the property. Art Masters had relied upon I.C.C. Metals v. Municipal Warehouse Co., 50 N.Y.2d 657, an action for conversion involving a warehouse's failure to return bailed goods. The warehouse parties were unable to adequately explain the loss, and thus were not entitled to the benefit of a contractual limitation of liability, according to the court. Under I.C.C. Metals, conversion was presumed and the bailor was entitled to recover the full value of the undelivered goods without any affirmative proof of wrongdoing by the bailee.

Judge Alexander declined to extend the presumption of conversion to common motor carriers.

In a lengthy dissent, Judge Titone questioned the majority's creation of "a dual standard of proof for conversion actions against bailees..." It appeared to Judge Titone that the concerns of the I.C.C. Metals court applied to most bailees, including carriers, regardless of the precise service provided. The existence of a federal regulatory scheme affecting common carriers was an insufficient ground to depart from the I.C.C Metals evidentiary rule, concluded Judge Titone, who noted that placing the burden of explanation on a bailee does not increase the bailee's duty of care, nor does it lead to the imposition of strict liability. Thus, following the case would not lead to a divergence in federal and state principles of tort law concerning common carriers.

Furthermore, "strong public policies" favored applying the I.C.C. Metals rule to common carriers, stated Judge Titone, for "a bailor generally loses all control over its property after delivering it into the hands of a carrier, and thus it is the carrier that 'is in the best, if not the only' (emphasis by the dissent), position to discover and explain the circumstances surrounding the property's disappearance or destruction..." If a bailor must prove that the property was lost through an action of conversion, rather than negligence or accident, this would impose an almost impossible burden, in the dissent's view, and might allow an "unscrupulous" party to obtain the benefits of a liability limitation clause solely by claiming ignorance as to the whereabouts of the goods. I.C.C. Metals' rule of imposing a minimal burden of explanation on the carrier should have been applied to the instant action and, declared Judge Titone, common carriers and warehouse operators alike should be required to explain, in a conversion action, the circumstances surrounding the loss or destruction of property entrusted to their care.

Art Masters Associates, Ltd. v. United Parcel Service, 566 N.Y.2d 184 (N.Y. 1990) [ELR 13:4:12]

Age discrimination claim against television station is rejected

In 1987, WGN Television transferred Ron G. McCoy, who was then 45 years old, from a position as the station's director of creative services to the newly-created position of director of promotions and publicity. In 1988, WGN fired McCoy, along with about 40 other individuals; the station had experienced ongoing financial difficulties.

When McCoy sued WGN, alleging violations of the Age Discrimination in Employment Act of 1967, a Federal District Court in Illinois granted WGN's motion for summary judgment. Judge Shadur pointed out that McCoy had not shown that the restructuring of his former job was a materially adverse change in employment, or that the restructuring was not made in good faith or was done as a pretext for age discrimination. Furthermore, WGN produced evidence that the decision to transfer McCoy, although based primarily on the employee's generally unsatisfactory performance, also was an attempt to take advantage of certain skills demonstrated by McCoy.

McCoy also asserted that WGN retaliated against him by terminating his employment because he had filed an age discrimination complaint. The court stated that McCoy again failed to offer any direct evidence of discrimination, and did not show that there was a causal link between his filing of a claim and WGN's decision to discharge him.

The court concluded by rejecting McCoy's claim that he was discharged on the basis of his age. It was noted again that WGN presented evidence that McCoy's performance was unsatisfactory and that the station was experiencing financial problems, and there was "no reasonable predicate" for drawing the inference that age discrimination was involved in WGN's decision to terminate McCoy.

McCoy v. WGN Television, 758 F.Supp. 1231 (N.D.Ill. 1990) [ELR 13:4:13]

New York Times' action seeking release of Challenger tapes is remanded upon rehearing en banc of NASA's exemption claim

The National Aeronautics and Space Administration has refused to release a tape of the voice communications aboard the tragic flight of the Challenger space shuttle, although the agency released a transcript of the tape. When the New York Times filed a Freedom of Information Act claim, a Federal District Court held that the tape was not exempt from release because it was not within the category of "personnel and medical files and similar files" to which the exemption applied. A Federal

Court of Appeals initially affirmed the District Court's decision (ELR 10:8:12).

The Federal Court of Appeals, on rehearing en banc, has reversed, by a 6-5 vote, the District Court's decision. It was noted that NASA need not disclose information which applies to a particular individual, if, as described by the court, the disclosure "would constitute a clearly unwarranted invasion of personal privacy." Judge Ginsburg stated that the tape in issue met the threshold test in that it applied to particular individuals. NASA therefore was entitled to an opportunity to prove its claim that the release of the tape would invade the privacy of the deceased astronauts or their families, and the matter was remanded to the District Court to consider "the private and public interests involved" before deciding whether NASA must release the Challenger tape.

In reviewing the claims of the parties, Judge Ginsburg noted NASA's argument that the voice inflections of the astronauts, rather than the words spoken, were personal to the crew members. The Times contended that the transcript alone could not verify NASA's claim that the astronauts had no advance warning of a problem and that the sounds from the engines were not "unusual."

For Judge Ginsburg, the only question before the court was whether the tape passed the threshold requirement of the relevant exemption from the Freedom of Information Act. The transcript of the taped words may not have contained information about the personal lives of the astronauts, but if the tape would reveal the sound and inflection of the crew's voices, that would be personal information, stated the court, which would require the balancing of the public interest against any private harm.

Judge Ginsburg stated that the panel of the court had erred in failing to acknowledge that information is not conveyed by words alone. And, contrary to the dissent, the court emphasized that the scope of the exemption is not based on the nature of the file in which the information is contained, but on whether the information in the file "applied to a particular individual." The voices of the astronauts did indeed constitute "information which applies...to particular individual[s]," declared the court.

Judge Harry T. Edwards, in dissent, noted that NASA had conceded before the District Court that the withheld tape contained no information about the personal lives of the Challenger astronauts or any of their family members. Although agreeing with the majority that voice inflections can constitute personal information sufficient to satisfy the relevant exemption, Judge Edwards questioned the court's failure to inquire whether the "non-lexical" information on the tape in issue actually constituted genuinely personal information. The dissent, after careful consideration, would have held that the exemption was not available to NASA.

New York Times Company v. National Aeronautics and Space Administration, 920 F.2d 1002 (D.C.Cir. 1990) [ELR 13:4:13]

Copyright dispute involving Barbie doll and importation of allegedly infringing "Miss America" dolls initially must be reviewed by U.S. Customs, rules court in denying preliminary injunction sought by Kenner Products

Mattel, Inc. claimed that the head sculptures for two dolls in Kenner Products' proposed "Miss America" fashion doll series were designed from the same mold as that used for Mattel's "Super Star Barbie."

When Kenner and the Miss America Organization sought a preliminary injunction barring Mattel and other parties from interfering with the importation and sale in the United States of the dolls in issue, Mattel argued that the court lacked jurisdiction pending the issuance of a final order in a proceeding conducted by United States Customs to determine whether the "Miss America" dolls infringed Mattel's copyright.

Federal District Court Judge Leonard B. Sand noted that under the Copyright Act, importing into the United States copies of copyrighted work acquired outside the United States infringes the copyright owner's exclusive right to distribute copies. The Secretary of the Treasury has set forth regulations outlining the procedures with respect to the importation of allegedly infringing material. Judge Sand found that Kenner was required to exhaust the administrative procedures contained in the Copyright Act before obtaining judicial review.

Miss America Organization v. Mattel, Inc., 760 F.Supp. 1107 (S.D.N.Y. 1991) [ELR 13:4:14]

Architect prevails in copyright infringement claim involving format of toy stores

Jaroslaw Kunycia, the architect responsible for designing the Kay-Bee Toy and Hobby Stores, claimed that the Melville Corporation, which acquired Kay-Bee in 1981, infringed the "format" of his drawings. According to Kunycia, the format included the layout of the store, the arrangement of detailed drawings on a sheet, the style and perspective of the drawings, the language of the notes, and the method of presenting the notes. The design of the stores, in which Kunycia did not claim copyright protection, included the arrangement of the physical elements of the Kay-Bee outlets.

A Federal District Court in New York found that the store design elements did not impose such a uniformity of format that the format would not be protectible under the Copyright Act; that the format was sufficiently original to warrant copyright protection; that Kunycia, an independent contractor, owned his drawings; and that the distribution of the architectural drawings to contractors, landlords and building authorities did not constitute a publication requiring copyright notice.

Judge Vincent L. Broderick concluded that Kunycia owned a valid copyright in the format of the drawings in issue, and that the design elements of Melville's drawings were substantially similar to Kunycia's work. "Although limitation [sic] may be the most sincere form of flattery, it is this direct appropriation of another's work that is prohibited by the Copyright Act," declared the court.

Judge Broderick determined that Kunycia's state law claim of unjust enrichment was preempted by the

Copyright Act, and rejected Melville's defenses of laches and the statute of limitations.

Kunycia v. Melville Realty Company, Inc., 755 F.Supp. 566 (S.D.N.Y. 1990) [ELR 13:4:14]

Briefly Noted:

Motion Pictures/Copyright Infringement.

On Command Video installs videotape performance systems which allow hotel guests to view videotapes in the guests' rooms. On Command sought a declaratory judgment that its system would not violate copyrights held by Columbia Pictures Industries. When Columbia Pictures proposed to notify On Command's hotel customers of the pending litigation, the video company argued that sending such letters would be actionable for bad faith.

A Federal District Court in California observed that Columbia Pictures' proposed letter was neutrally-worded, notified the hotels of On Command's status as a party to litigation concerning copyrighted films, and stated that the hotels installing the video performance system might be liable for damages and subject to an injunction if Columbia Pictures prevailed on its claim. Judge Weigel noted that a copyright holder, acting in good faith, has the right to notify a competitor's customers of the pendency of an infringement action and to warn them of similar actions. On Command did not show that the notification contained misstatements or other language unsupported by the allegations of the complaint in the pending action, and the court therefore granted Columbia Pictures' motion for court approval of the notice of potential infringement to hotels who had installed or were under contract to install On Command's video system.

On Command Video Corporation v. Columbia Pictures Industries, Inc., 764 F.Supp. 1372 (N.D.Ca. 1991) [ELR 13:4:14]

Sports Stadium Lease.

In a decision issued in January 1989, but only recently published, an Ohio appellate court affirmed a trial court decision on behalf of the Cincinnati Bengals football club against the city of Cincinnati and the Cincinnati Reds baseball team.

The Bengals alleged that the installation of a videoboard and adjacent advertising panels interfered with the view from a large number of stadium seats, thereby violating various provisions in the parties' stadium lease agreement. The trial court's order requiring the city to install 560 new seats was supported by competent evidence and did not prejudice the parties, stated Presiding Judge Hildebrandt.

The court also upheld the trial court's order requiring the Reds to remove certain new auxiliary scoreboards.

Cincinnati Bengals, Inc. v. City of Cincinnati, 567 N.E.2d 284 (Ohio App. 1989) [ELR 13:4:15]

Trademark Infringement/Magazine Titles.

Dr. Doe Lang, the owner of New Choices Press, was not entitled to an injunction preventing Retirement Living Publishing Co., Inc. from using the name "New Choices for the Best Years" as a magazine title. After reviewing the factors relevant to determining consumer confusion in trademark infringement cases, a Federal District Court in New York granted summary judgment to the Retirement Living parties. It was noted that the marks differed in size, layout, and design; that there was no "proximity" with respect to the products and the target audiences; and that the evidence did not raise a genuine issue of fact as to the likelihood of consumer confusion. The court also found that there was undisputed evidence that Retirement Living acted in good faith in adopting the mark, and concluded by granting Retirement Living's motion for summary judgment on Lang's state law claims alleging the violation of New York's anti-dilution statute and the use of a trade name with intent to deceive the public.

Lang v. Retirement Living Publishing Co., Inc., 759 F.Supp. 134 (S.D.N.Y. 1991) [ELR 13:4:15]

Libel.

A New York appellate court has affirmed the dismissal of a libel action brought by a juvenile furniture company against a consumer advocate and against Phil Donahue, several employees of the "Donahue" television program, Multimedia, Inc., and the National Broadcasting Company. Karin Weber had appeared as one of several guests on a "Donahue" show concerning consumer advocacy.

The court, citing Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235 (ELR 12:11:10), found that the allegedly defamatory statements made by Weber, when considered as a whole and from the viewpoint of a reasonable person, were clearly a personal expression of Weber's disappointment with Behr's furniture delivery services, based on Weber's experience with the company, and therefore were not actionable.

Summary judgment also was correctly granted to the media parties, stated the court. Phil Donahue had announced that Weber appeared on the program to provide her own perspective on consumer advocacy, and Weber stated on the broadcast that she was presenting her personal views. Furthermore, Weber's critical comments did not constitute libel per se.

Behr v. Weber, 568 N.Y.S.2d 948 (N.Y.App. 1991) [ELR 13:4:15]

Slander.

When George Beim was fired as general manager of the Columbus Capitals, a professional indoor soccer team, team owner Robert L. Jerles stated, according to an Ohio appellate court, that Beim had committed acts of embezzlement. Jerles apparently was referring to the purported misappropriation of office supplies and Beim's use of company time for the purpose of personal business ventures.

When Beim sued Jerles and Jemo Associates alleging breach of an employment contract, a trial court jury returned a verdict in favor of the Jemo parties. The trial court had directed a verdict in favor of the Jemo parties on Beim's defamation claim.

In affirming the trial court decision, an Ohio appellate court, in an opinion issued in 1989, but only recently published, questioned whether Jerles' remarks were defamatory since the requisite "publication" was "marginal;" only Beim and his immediate supervisor were present. In any event, the court found that the statements were entitled to a qualified privilege - Jerles' comments concerned the activities of Beim arising out of his employment - and that Beim had not shown actual malice.

Beim v. Jemo Associates, Inc., 572 N.E.2d 812 (Ohio App. 1989) [ELR 13:4:15]

Contracts/Halston Clothing.

In March 1990, Halston Enterprises, agreed to design a line of women's clothing for the Fall 1990 season; a company identified as DeNatale agreed to manufacture, promote and sell the ready-to-wear apparel. DeNatale and Halston signed a letter agreement. Subsequently, DeNatale claimed that due to the success of the project, Halston granted DeNatale a ten year license in return for a royalty on net sales receipts; the parties apparently did not execute a written document.

DeNatale stated that Halston delivered a 1990-91 "resort line" for production, manufacture and sale, but that in July 1990, Halston removed the apparel from DeNatale's premises, thereby breaching the license agreement.

A New York trial court has found that the statute of frauds barred a breach of contract claim based on the license agreement. Judge Baer rejected the argument that the delivery of the resort line constituted part performance, noting that the single delivery was not "unequivocally referable to the claimed ten-year agreement..." The argument that Halston was equitably estopped from asserting the defense of the statute of frauds because of the labor, service and materials provided by DeNatale in reliance on the delivery of the 1990-91 Halston line also was unsuccessful, as were causes of action for fraud and for piercing the corporate veil of Revlon, the parent corporation of Halston. The court, accordingly, dismissed the complaint.

DeNatale v. Halston Enterprises, Inc., New York Law Journal, p. 27, col. 4 (N.Y.Cnty., June 6, 1991) [ELR 13:4:16]

Cable Television/Local Tax.

The Supreme Court of Virginia has ruled that Chesterfield Cablevision, Inc. was required to pay a county license tax. The company claimed that it qualified for the exemption provided to businesses engaged in "operating or conducting any radio or television broadcasting station or service." In upholding the trial court decision dismissing the case, Judge Russell stated that Chesterfield was not a broadcasting service; that the tax did not violate the free speech and free press guarantees of the Virginia and federal constitutions; and that there was a rational basis for distinguishing between the tax obligations of cable services and those of broadcasters.

Chesterfield Cablevision, Inc. v. County of Chesterfield, 401 S.E.2d 678 (Va. 1991) [ELR 13:4:16]

Previously Reported:

In the July 1991 issue, the Entertainment Law Reporter reported California Court of Appeal decisions in two cases involving the question of whether the doctrine of "reasonable implied assumption of the risk" may bar recovery by a plaintiff who has been injured in an amateur sporting event in California which is a "comparative fault" state. See, Krol v. Sampson, 227 Cal.App.3d 724 (ELR 13:2:11), and Van Meter v. American Motor Sports Ass'n, 227 Cal.App.3d 1198 (ELR 13:2:12).

Subscriber Robert A. Holtzman, of Loeb & Loeb in Los Angeles, wrote to chide us (good naturedly) for having missed the fact that in May, the California Supreme Court granted hearings in both cases. As Bob noted in his letter, it appears that the Court's decision in both of those cases will be controlled by its decision in Ford v. Gouin, a case that was argued June 11th. It is not clear, however, just when Ford will be decided. In a brief order issued just this month, the Court indicated that it wants further briefing on "the survival of the defense of assumption of risk, or the manner in which it has been assimilated into the comparative fault system, in the specific context of an action between co-participants in sports and other recreational activities." [ELR 13:4:16]

WASHINGTON MONITOR

Congress Considers Obscenity "Copycat" Proposal

by Michael R. Klipper

Is there a causal link between a person's exposure to obscene materials and his subsequent commission of a sex offense? Should the creators, distributors, sellers, and exhibitors of obscene materials be liable for money damages if those materials provoke an individual to commit a sexual offense? These questions were addressed by the Senate Judiciary Committee on July 23, 1991 when it held a hearing on the Pornography Victims' Compensation Act of 1991 (the "Bill").

Basically, the Bill before the Committee provides that the victim of a rape, or other sexual offense, can bring a lawsuit against the producer, distributor, exhibitor, or seller of material that is obscene or child pronography, if it can be shown by a preponderance of evidence that:

1) that the producer, distributor, exhibitor, or seller should have reasonably foreseen that such material would create an unreasonable risk of such a crime; and

2) the material was a direct motivating factor in causing the offender to commit the crime.

In its original form the Bill was far broader. It would have applied to works that were sexually explicit, even if they were not obscene or child pornography. A torrent of criticism was aimed at the original proposal. Opponents argued that it was clearly unconstitutional and would reach many TV shows, films, books, magazines, and other forms of constitutionally protected expression. These and other concerns with the original bill were catalogued in a memorandum submitted to the Judiciary Committee by eighteen business and professional organizations, including representatives of local TV stations, motion picture producers, book, newspaper and magazine publishers, cable TV operators, authors, and theater owners.

On the eve of the hearing, the Bill was rewritten to delete the reference to sexually explicit material, and, to limit its reach to works that are obscene or child pornography.

This change, however, did not mollify several industry witnesses (e.g., representatives of video store owners, booksellers and magazine distributors) who appeared at the hearing. Despite the changes these witnesses expressed the fear that the revised proposal would still have a significant chilling effect on those who produce and disseminate creative works. In part, these parties argued that the legislation was still seriously flawed because it penalized third parties who produce and/or distribute expressive material, and not those who allegedly committed the criminal act.

As a result, the new proposal would still subject producers, distributors and retailers to the possibility that victims of sex crimes could drag them into court and sue them for money damages, even where the individual accused of the sexual offense was not prosecuted, or even if he were acquitted!

Not surprisingly, at the hearing advocates of the proposal touted it as an important tool in the ongoing battle against pornography. They buttressed their argument by pointing out studies that purport to show the correlation between the viewing of certain types of sexually explicit material and anti-social behaviour. In addition, the Committee received poignant testimony from a victim of sexual abuse who underscored the role that sexually explicit materials played in provoking her attacker.

At this time it is impossible to predict the prospects for enactment of the Pornography Victims' Compensation Act of 1991. The full Senate Judiciary Committee is not expected to take up the proposal until sometime this fall, at the earliest. To date, there have been no hearings on the issue in the House of Representatives. By narrowing the bill's reach to obscene material or child pornography, the proponents have attempted to quell the outpouring of criticisms aimed at the earlier version of the proposal, and to come up with a proposal that can garner enough votes to pass both the House and the Senate. Only time will tell whether or not they have succeeded.

Mr. Klipper is of counsel to the Washington D.C. law firm of Leventhal, Senter & Lerman. Prior to his current employment he served as counsel for both the United States Senate Judiciary Committee and the Motion

Picture Association of America, Inc. [Sept. 1991] [ELR 13:4:17]

Manufacturers of digital recording equipment agree to pay royalties to music industry

In July 1991, manufacturers of electronic equipment agreed to pay royalties to the music industry on the sales of digital home recorders and blank tapes.

The Electronic Industries Association, the Recording Industry Association of America and the National Music Publishers' Association (on behalf of songwriters and music publishers) will ask Congress to enact legislation concerning consumer audio taping. It has been reported that under the proposed legislation, consumers would be exempt from copyright infringement actions in connection with digital and analog audio recording for private, noncommercial use. The parties agreed that the Serial Copy Management System would be required in all non-professional consumer digital audio recorders; the system allows an unlimited number of digital copies to be made from a digital original, but prevents the making of digital copies of copies.

Manufacturers and importers of digital audio recording equipment will be required to pay royalties based on the manufacturers' wholesale price or customs value of the recording equipment (with a minimum of $1 per machine and a maximum of $8). If a machine has two or more digital recorders, the maximum would be $12; both the $8 and $12 maximum payments may be increased after five years. A 3 percent royalty will be due on the wholesale price of blank tapes and discs.

The royalty fund will be administered by the United States Copyright Office and the Copyright Royalty Tribunal. After record sales and, in some cases, airplay, are considered, record companies, featured artists, songwriters, and music publishers will receive royalty payments; the American Federation of Musicians and the American Federation of Television & Radio Artists also will receive a percentage of the fund.

As part of the agreement, the National Music Publishers Association settled a lawsuit alleging that Sony Corp. contributed to copyright infringement by the purchasers of the company's DAT recorders. [Sept. 1991] [ELR 13:4:18]

Federal Communications Commission grants exemptions from primetime access rules to two network co-owned productions

The Federal Communications Commission has granted an exemption from the primetime access rule to the program "Memories...Then And Now," produced by LBS Communications and NBC Productions.

The Commission's new financial interest/syndication rules provide that "network-produced first run programming shall be considered network programming for the purposes of the primetime access rule." According to news reports, the Commission granted the waiver because the program was financed and apparently substantially complete prior to the adoption of the new regulations.

The Commission previously had approved an exemption for the Blair Entertainment program, "Studio 22," in which KCBS-TV held a part ownership interest. [Sept. 1991] [ELR 13:4:18]

IN THE NEWS

Producer of Roman Polanski's "Pirates" obtains $11 million jury verdict in breach of contract action against Universal Studios

In July 1991, a Federal District Court jury in Santa Ana, California, awarded Accent Films $11.6 million in damages in the company's breach of contract action against Universal Studios.

Tarak Ben Ammar, the owner of Accent Films, claimed that Universal breached a contract to distribute the Roman Polanski film "Pirates" by acting in bad faith in refusing to approve a revised screenplay. Ben Ammar, on the basis of the contract, obtained loans to complete the film and personally guaranteed $10 million to his backers. When Universal rejected the screenplay, Accent entered into what has been described as a "less lucrative distribution deal" with MGM/UA Entertainment. [Sept. 1991] [ELR 13:4:19]

Rodney Dangerfield must accept reduced damages in lawsuit against Caesars Palace or undergo new trial

A Federal District Court in Nevada has ruled that Rodney Dangerfield may recover only $50,000 in damages for pain and suffering in the comedian's lawsuit against Caesars Palace.

Dangerfield claimed that he missed five performances in March 1988 because his eyes were burned in a steam bath accident at the hotel. A jury (ELR 12:6:20) found that the injury should have excused Dangerfield from performing, and awarded the comedian damages of

$225,000 for the missed performances and another $500,000 for pain and suffering.

It has been reported that Judge Roger Foley found that the $500,000 awarded by the jury was grossly excessive. Dangerfield may elect to recover $50,000 or to undergo a new trial on the issue of pain and suffering.

Caesars Palace did not seek a new trial on the breach of contract issue.

The jury apparently awarded the company the requested contract damages, but not the complete interest. Universal has announced that it will challenge the jury's verdict. [Sept. 1991] [ELR 13:4:19]

Arbitrator rejects Patrick Ewing's free agency claim

In August 1991, arbitrator Daniel G. Collins denied New York Knicks center Patrick Ewing's request to become a restricted free agent. Ewing therefore will be required to remain with the Knicks for the last four seasons of his contract; if the contract is not renegotiated, the Knicks will pay Ewing $14.2 million during the four year period.

Ewing's 1985 contract with the Knicks provided that the player would be a free agent if he was not one of the top four highest-paid players in the NBA on June 1, 1991.

Collins noted that Cleveland player John Williams will earn $4 million during the 1991-1992 season, that Houston will pay Hakeem Olajuwon $3.5 million, and that Chicago's Michael Jordan will receive $3.25 million. The Knicks will pay Ewing $3.18 million for the 1991-1992 season. Although Boston player Larry Bird will be paid $7.1 million, Collins ruled that $4.6 million of this amount was a signing bonus and would not be considered in ruling on Ewing's claim. [Sept. 1991] [ELR 13:4:19]

New York theatrical producers are subject to revised limited partnership regulations

As of July 1, 1991, theatrical producers in New York will be subject to revised regulations governing limited partnerships, and will be required, among other obligations, to publish announcements of production partnerships. Such announcements, including the names of the principals and the purpose of the partnership, must be published once a week for six consecutive weeks in two newspapers approved by the court clerk. Theatrical producers previously were exempt from the publishing requirement, but the new regulations, although limiting the amount of information required in the announcements, did not retain the exemption. [Sept. 1991] [ELR 13:4:19]

Japan increases copyright protection on foreign recordings

The Japanese government has increased copyright protection on foreign recordings from thirty years to fifty years, according to the Recording Industry Association of America.

The increased term of protection will extend to foreign recordings dating back to 1968.

It has been reported that there will be a waiting period before foreign recordings can be submitted to Japan's rental market, but the length of the waiting period was not yet available. [Sept. 1991] [ELR 13:4:20]

Recording Industry Association of America anti-piracy update

The Recording Industry Association of America has announced its year-end summary of anti-piracy activities for 1990.

During the year, law enforcement officials seized about 1.1 million counterfeit cassettes.

The RIAA noted that there was a 400 percent increase in the number of compact discs confiscated in the United States, with nearly forty percent of the total seized by U.S. Customs. The RIAA honored Customs, as well, for its role in ending an illegal cassette operation responsible for the production of about 400,000 counterfeit cassettes per month.

There was an almost 200 percent increase in the number of bootleg albums, cassettes and videos confiscated nationwide; the leading region for the seizure of illegal goods was the Far West.

The RIAA also reported that there were ninety additional criminal seizures of unauthorized sound recordings in 1990 over the previous year; that there was a fifty percent increase in the number of convictions for sound recording piracy throughout the United States; that the association, in conjunction with Artists Against Counterfeit Tapes, has focused on sale of counterfeit cassettes by street and flea market vendors; and that the association, on behalf of its member companies, obtained a total of about $1 million in damages in civil copyright infringement cases, over twice the amount awarded in 1989. [Sept. 1991] [ELR 13:4:20]

DEPARTMENTS

A Memorial Tribute to Anthony E. Liebig, 1929 - 1991

The entertainment bar has prematurely lost one of its most vigorous, successful and colorful litigators. Anthony E. Liebig, of Liebig & Kulzick in Los Angeles, passed away August 13, 1991, a victim of brain cancer. He was only 62 years of age.

Tony specialized in defending plagiarism, defamation, and right of publicity cases. Over a career that spanned 36 years, he was a trial lawyer "for the defense," representing writers, publishers, producers, studios, networks, and advertising agencies and their clients. Tony was co-head of the media and entertainment law department of the firm formerly known as Lillick McHose & Charles, for more than two decades. Then in 1987, he and his long-time partner and friend, Ken Kulzick, left

Lillick to form their own litigation boutique, Liebig & Kulzick.

Tony had a reputation as an outspoken and absolutely honest lawyer whose briefs even his friends described as "pungent." Indeed, Tony was a litigator from the "old school" of lawyers who were trained before the advent of photocopy machines and word processors, when every word and document had to count for something. His style was to zero in on the essence of a lawsuit, on its central issue. Then, confident that judges would read the law if only pointed in the right direction, Tony's "points-and-authorities" usually were just that; and his legal briefs respected the dictionary definition of the word "brief."

Just last year, with a summary judgment motion of fewer than a dozen pages, Tony won the dismissal of one of the many plagiarism lawsuits that have plagued Eddie Murphy's hit movie, "Coming to America." His brief to the Court of Appeals was barely longer, and it too was successful. In a decision regretfully marked "Not for Publication," the Ninth Circuit agreed with Tony's succinctly-made argument that "Coming to America" was not substantially similar to a script entitled "Toto, the African Prince." Gregory v. Murphy, (9th Cir., Case No. 89-56240, Mar. 22, 1991)(ELR 12:12:17).

Though Tony always sought winning results for his clients, his views about what the law is and should be were not simply result-oriented. Instead, they were informed by a conception of the creative process and a desire to foster that process. Most lawyers think of the "public domain" as a cemetery for works so old their legal protection has died, or as a trash dump for works so lacking in creativity they have been denied legal protection altogether. Tony, on the other hand, thought of the public domain as an artist's pallet and as a storehouse of raw components from which artists fashion their creations. From his perspective, laws that diminish the public domain, diminish the supply of materials from which drama, literature and art are made. (Tony's views on this subject may well have been influenced by the fact that in addition to being a defense lawyer, he was an accomplished sculptor whose work has been exhibited at Trinity College in Dublin.)

In an article published in these pages in 1987, "Copyright Inroads on the Public Domain in the Ninth Circuit" (ELR 9:7:3), Tony lamented the damage he saw being done to the public domain by courts here in California. The article was prompted, for the most part, by the Ninth Circuit's decision in Sid and Marty Krofft v. McDonald's, 562 F.2d 1157 (9th Cir. 1977), and its progeny. That case was particularly frustrating to Tony, because he had represented McDonald's in that losing effort.

Fortunately, Tony lived long enough to see the Ninth Circuit modify the Krofft test for infringement almost out of existence. Fortunately, too, Tony himself was able to undo some of Krofft's damage by winning another McDonald's case in the Ninth Circuit, just a year and a half before his passing. Pasillas v. McDonald's, 927 F.2d 440 (9th Cir. 1990)(ELR 12:12:16), upheld the dismissal of an action which complained that McDonald's "Mac Tonight" commercial infringed the copyright to a man-in-the-moon mask.

For the last three years, I have been privileged to know Tony as a friend and professional colleague. He and his partner Ken Kulzick honored me by asking me to work as counsel to their firm on some of the most interesting cases of my career. They have given me the opportunity to work in actual law practice with legal principles I had previously taught, in a purely academic setting, in my classes at Loyola Law School. I worked, and talked, and argued, and ate with Tony. And now I shall miss him, enormously. All who knew him will.

Lon Sobel

[ELR 13:4:3]

In the Law Reviews:

The Loyola of Los Angeles Entertainment Law Journal has published Volume 11, Number 1 with the following articles:

Proprietary Interests in Television Shows: A Production Company's View by Ralph M. Baruch, 11 Loyola Entertainment Law Journal 1 (1991)

The Interplay of Collective Bargaining Agreements and Personal Service Contracts by Edgar A. Jones, Jr., 11 Loyola Entertainment Law Journal 11 (1991)

Net Profit Participations in the Motion Picture Industry by Hillary Sue Bibicoff, 11 Loyola Entertainment Law Journal 23 (1991)

Shaw v. Lindheim: The Ninth Circuit's Attempt to Equalize the Odds in Copyright Infringement by Jamie Busching, 11 Loyola Entertainment Law Journal 67 (1991)

Narell v. Freeman: The Ninth Circuit Has Delusions About "Illusions of Love" by Barbara Wendy Stearns, 11 Loyola Entertainment Law Journal 101 (1991)

Walt Disney Co. v. Powell: Good News for the Character Infringer by Judy D. Vaccaro, 11 Loyola Entertainment Law Journal 133 (1991)

The Mountain Dew Decision Is Hard to Swallow: Sakon v. Pepsico, Inc. by Marilyn Sipes, 11 Loyola Entertainment Law Journal 159 (1991)

The California Supreme Court Sets the Stage for Destruction of the Newsperson's Shield Law in Delaney v. Superior Court by Jill S. Linhardt, 11 Loyola Entertainment Law Journal 181 (1991)

The Duty to Defend in Liability Insurance Policies: Has It Gone Too Far? by Sarah Ambrose Eddy, 11 Loyola Entertainment Law Journal 205 (1991)

A Fair Use Analysis of Trademark Parody: Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group by David Alain Robinson, 11 Loyola Entertainment Law Journal 233 (1991)

Cardozo Arts & Entertainment Law Journal has published Volume 9, Number 2 with the following articles:

The "Moral Rights" of Creators of Intellectual Property by Rufus C. King, 9 Cardozo Arts & Entertainment Law Journal 267 (1991)

Contradiction and Context in American Copyright Law by Keith Aoki, 9 Cardozo Arts and Entertainment Law Journal 303 (1991)

Book Excerpt: Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius by Edward de

Grazia, 9 Cardozo Arts & Entertainment Law Journal 387 (1991)

The Doctrine of Elections: Has the Need to Choose Been Lost? by Douglas R. Wolf, 9 Cardozo Arts & Entertainment Law Journal 439 (1991)

A Proposal to Curb Congressional Interference with the National Endowment for the Arts by Nancy Ravitz, 9 Cardozo Arts & Entertainment Law Journal 475 (1991)

Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry by Hal I. Gilenson, 9 Cardozo Arts & Entertainment Law Journal 501 (1991)

Buchwald v. Paramount Pictures Corp. and the Future of Net Profit by Adam J. Marcus, 9 Cardozo Arts & Entertainment Law Journal 545 (1991)

The North Dakota Law Review has published Volume 67, Number 2 with the following articles pertaining to the law of sports:

The Courts and Athletic Scholarships by Robert N. Davis, 67 North Dakota Law Review 163 (1991)

Universities, Student-Athletes, and Sports Agents: It Is Time for Change by Ed Garvey and Frank J. Remington, 67 North Dakota Law Review 197 (1991)

NCAA-Based Agent Regulation: Who Are We Protecting? by Jan Stiglitz, 67 North Dakota Law Review 215 (1991)

Gender Discrimination in Athletics by Cheryl L. Schubert-Madsen, Arline F. Schubert, and George W. Schubert, 67 North Dakota Law Review 227 (1991)

College Presidents and the NCAA Presidents' Commission: All Bark and No Bite by Laurence M. Rose, 67 North Dakota Law Review 243 (1991)

My World With Sport by Burton F. Brody, 67 North Dakota Law Review 259 (1991)

The NCAA's Drug Testing Policies: Walking a Constitutional Tightrope? by Walter T. Champion, Jr., 67 North Dakota Law Review 269 (1991)

The Marquette Sports Law Journal has published Volume 1, Number 2 with the following articles:

Horse Sense and the UCC: The Purchase of Racehorses by John J. Kropp, J. Jeffrey Landen, and Daniel C. Heyd, 1 Marquette Sports Law Journal 171 (1991)

College Coaching Contracts: A Practical Perspective by Martin J. Greenberg, 1 Marquette Sports Law Journal 207 (1991)

A Historical Review of Litigation in Baseball by Richard Irwin, 1 Marquette Sports Law Journal 283 (1991)

Subverting the Internal Revenue Code in the "Game" of Sports Stadium Financing by John D. Finerty, Jr., 1 Marquette Sports Law Journal 301 (1991)
[ELR 13:4:22]