RECENT CASES

Jeffrey Masson's libel action against The New Yorker Magazine is remanded for determination of whether magazine acted with actual malice in publishing altered quotations in Janet Malcolm article

Shrinking the lengthy background of the Jeffrey Masson-Janet Malcolm dispute involves noting that Malcolm's article about the psychoanalyst 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. According to the article, which was based primarily on Malcolm's tape-recorded interviews with Masson, the psychoanalyst claimed that his employment as the Projects Director of the Sigmund Freud Archives was terminated because of Masson's

position that Freud abandoned the "seduction theory" of mental illness in order to further his career.

Masson sued Malcolm and the publishers for libel, contending that the article placed him in a false light in violation of section 45 of the California Civil Code. The complaint alleged that Malcolm falsified words attributed to Masson within quotation marks and edited his statements so as to portray him as "unscholarly, irresponsible, vain, [and] lacking in personal honesty and integrity."

A Federal District Court in California (ELR 10:12:10) granted motions by Malcolm and the publishers for summary judgment, holding that the evidence would not permit a reasonable finder of fact to conclude that Malcolm published the allegedly defamatory statements with actual malice (Masson had conceded his status as a public figure for purposes of the litigation).

A three judge panel of the Federal Court of Appeals, over a strong dissent by Judge Alex Kozinski, upheld the District Court's decision (ELR 11:4:7; 11:9:20; 12:2:18, noting the denial of a rehearing and rehearing en banc).

In June 1991, the United States Supreme Court reversed the Federal Court of Appeals decision. Justice Anthony M. Kennedy, Jr. stated that for purposes of ruling on the motion for summary judgment, the court assumed that Masson was correct in denying that he made the statements attributed to him by Malcolm. 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 in issue. Justice Kennedy also noted that 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.

On remand, the Federal Court of Appeals found that a factual issue existed as to The New Yorker's conduct in publishing Malcolm's article.

Judge Kozinski recalled that the Supreme Court held that, when applied to altered quotations, falsity means "a material change in the meaning conveyed by the statement." On the basis of the record before the court, the Supreme Court found that five of the complained-of "quotations" could meet the announced standard and were actionable. However, before considering whether Masson presented sufficient evidence of actual malice on the part of The New Yorker and Knopf, Judge Kozinski considered the argument that the incremental harm doctrine barred Masson's action.

Citing the explanation of incremental harm set forth in Herbert v. Lando, 781 F.2d 298 (2d Cir.), cert. denied,

476 U.S. 1182 (1986; ELR 7:5:12; 8:6:9), Judge Kozinski stated that the doctrine measures the harm "inflicted by the challenged statements beyond the harm imposed by the rest of the publication. If that harm is determined to be nominal or nonexistent, the statements are dismissed as not actionable." The publishers argued that the unchallenged or verifiable accurate statements attributed to Masson portrayed him in such a bad light that any damage caused by Malcolm's allegedly creative quotations would not be actionable as a matter of law.

The United States Supreme Court rejected the suggestion that the incremental harm doctrine was compelled by the First Amendment. And Judge Kozinski commented that the California courts "have shown no interest in the incremental harm doctrine" and that it did not appear likely that the California Supreme Court would adopt the doctrine. On these grounds, among others,

Judge Kozinski concluded that the incremental harm doctrine "is not an element of California libel law."

Judge Kozinski, after declaring that the law of the case was that the evidence presented by Masson in opposition to summary judgment would support a jury verdict in his favor against Malcolm, proceeded to the issue of the publishers' liability. A guiding standard was set forth in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989; ELR 11:4:10), which, as described by Judge Kozinski, requires a public official or public figure to establish by clear and convincing evidence that the publisher of an allegedly defamatory work "in fact entertained serious doubts as to the truth of his publication." The complaining party may attempt to establish the publisher's state of mind by evidence that the publisher (as quoted by Judge Kozinski) "actually had a high degree of awareness of probable falsity." It also might be shown that the circumstances surrounding

publication gave the publisher "obvious reasons to doubt the veracity of the [author] or the accuracy of [facts and quotations in her book or article]," and that the publisher failed to take reasonable steps to dispel those doubts.

Masson claimed that he had pointed out to The New Yorker's fact-checker, Nancy Franklin, the inaccuracy of various quotations and unsuccessfully sought permission to review the quotations or information attributed to him. Masson stated that Franklin assured him that there were tape-recordings of all of the conversations and that the quotations would be verbatim and accurate.

Judge Kozinski pointed out that Masson's objections were far from a "cold call from a source complaining about the accuracy of a story." Masson raised his objections during a fact-checking process initiated by the magazine as part of its policy of maintaining the accuracy of its stories. A jury could reasonably conclude, stated the court, that "claims of inaccuracy raised in that

context would be taken seriously." Franklin's responses to Masson, in addition to the fact that some of Masson's changes were made in the galleys but were changed back by the time the magazine was published, also supported the inference that The New Yorker "did not dismiss Masson's charges of inaccuracy out of hand." The jury might conclude that Franklin developed a "serious doubt" about the accuracy of the quotations; that she talked to Malcolm and/or listened to the tapes; and that it was determined that it was necessary to make some changes, but that the quotations "were changed back as the result of a conscious decision to sacrifice accuracy to creativity."

It also would be possible for the jury to conclude, even if it found that the magazine's editors did not make a conscious decision to allow Malcolm to alter Masson's statements, that The New Yorker had developed obvious reasons to doubt the accuracy of the quotations, but attempted to purposefully avoid the truth by failing to conduct a reasonable investigation of Masson's claims of inaccuracy. The evidence presented by Masson suggested that the magazine allowed Malcolm to edit quotations, in the same manner as the author edited other portions of the text, and, on the basis of the evidence, the jury could conclude that The New Yorker "in fact entertained serious doubts" as to the accuracy of Malcolm's quotations, but chose not to investigate the matter."

The New Yorker pointed out that in Harte-Hanks, the court stated that a publisher's failure to conduct an investigation to verify the accuracy of reports it obtains from third parties cannot establish actual malice "even when a reasonably prudent person" would have conducted an investigation. Judge Kozinski responded that the cited language meant that a publisher who does not already have "obvious reasons to doubt" the accuracy of

a story is not required to initiate an investigation that might plant such doubt. However, once doubt exists, the publisher "must act reasonably in dispelling it," stated Judge Kozinski, who continued "where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place."

Masson presented evidence from which a jury could infer that The New Yorker conducted an investigation into the facts underlying Malcolm's article, including the quotations, and that this investigation yielded information that gave the magazine "obvious reasons to doubt" the accuracy of the challenged quotations. The tapes of Malcolm's conversations with Masson were available to enable the editors to resolve those doubts, and, stated the court, "it would have been prudent for The New Yorker to consult the tapes." To the extent that the

editors were aware that Malcolm was changing quotations during the editing process, the magazine had a responsibility to ask Malcolm to explain a practice that, on its face, was "so inconsistent with responsible journalism."

If the magazine produced evidence that it had undertaken an investigation and then concluded, even unreasonably, stated Judge Kozinski, that the quotations were accurate, the magazine would have been entitled to summary judgment. In the absence of such evidence, Masson presented a triable issue of fact as to whether The New Yorker "in fact entertained serious doubts" as to the accuracy of the quotations but chose to publish the article anyway.

In turning to Knopf's conduct, the court pointed out that the publisher's lawyer had contacted The New Yorker about the accuracy of the article. Apparently, Knopf knew of Masson's general allegation that the article contained defamatory material. In republishing the article, Knopf was entitled to rely on the investigation of the matter conducted by the magazine. And, given The New Yorker's "sterling reputation for accuracy and the existence of its fabled fact-checking department," Knopf had sufficient reason for dismissing Masson's claims that he was misquoted, particularly since Masson announced that he had presented the same claims to the magazine at the time of the original publication. Judge Kozinski noted that while it may have been prudent for Knopf to investigate Masson's claims, reckless disregard for the truth would require more than a departure from reasonably prudent conduct.

Given that Knopf did not have obvious reasons to doubt the accuracy of the story, and was not required to conduct an investigation that would cause it to develop such a doubt, no reasonable jury could find that Knopf entertained serious doubts as to the accuracy of the quotation. The company, accordingly, was entitled to summary judgment.

In a footnote, Judge Kozinski mentioned that on remand, the District Court also may consider whether Malcolm, as alleged by Masson, was an employee of The New Yorker rather than an independent contractor. Masson had argued that, under agency principles, Malcolm's conduct could be imputed to the magazine.

In another footnote, Judge Kozinski mentioned Malcolm's argument that some of the disputed quotations came from notes of conversations that were not recorded. At trial, Malcolm may seek to introduce the alleged notes "and attempt to persuade the jury that the challenged passages were essentially verbatim renditions of statements made by Masson that were not on tape."

Judge Kozinski also commented on the increased burden placed on publications maintaining a policy of investigating the accuracy of stories in comparison to tabloids. Readers of publications such as The New Yorker are more likely to trust the accuracy of the stories they read than are the readers of supermarket tabloids or even daily newspapers, stated the court, and "the harm inflicted by a misstatement in a publication known for scrupulously investigating the accuracy of its stories can be far more serious than a similar misstatement in a publication known not to do so. This is not to say...that statements in publications less rigorous than The New Yorker cannot be defamatory, or that such publishers will escape liability when they turn a blind eye to known or strongly suspected inaccuracies."

Masson v. The New Yorker Magazine, Inc., Case Nos. 87-2665; 87-2700 (9th Cir., Apr. 6, 1992) [ELR 14:1:3]

Federal District Court decision that biographer's use of unpublished material by author Richard Wright was fair use is upheld

In 1990, a Federal District Court ruled that biographer Dr. Margaret Walker's use of unpublished journal and unpublished material by author Richard Wright was fair use (ELR 12:11:5). A Federal Court of Appeals, although disagreeing with portions of the District Court's analysis, has affirmed the court's conclusions.

Ellen Wright holds the copyrights in the works of her husband, who died in 1960. On appeal, Wright did not challenge the use of Richard Wright's published work in Walker's book, "Richard Wright Daemonic Genius," published by Warner Books, Inc. in 1988, nor did Wright challenge the use of certain letters written to a translator or of an essay entitled "I Choose Exile." Rather, Wright focused on the biography's use of the

unpublished letters from Wright to Walker and the use of allegedly unpublished journal entries.

Judge Thomas J. Meskill first observed that most of the passages in issue consisted of facts or ideas contained in ten journal entries and in six letters from Wright to Walker. Walker paraphrased fourteen portions of the journal entries; the portions were short, and of the fourteen sections, only three, "under a generous reading of expression," adopted Wright's creative style. For purposes of the appeal, the court stated that it would treat the biography's use of the three portions of the paraphrased journal entries as "borderline expression."

The biography's use of ten brief passages from Wright's letters solely communicated facts relating to events in Wright's life and the mutual interests of Wright and Walker, noted the court. Only four of the ten quoted sections would meet the threshold test of copyright protection.

Judge Meskill, on the basis of the finding that some portions of the journal entries and letters contained at least "borderline expression, disagreed with those portions of the District Court's opinion that suggested that the biography used only facts from Wright's letters and journals.

In turning to the question of whether the doctrine of fair use would apply to the three paraphrased sections of Wright's journals and four quoted portions of the Wright-Walker letters, the court noted that the purpose and character of the biography's use of the material favored the Walker parties. Walker's book was a scholarly biography, and furthered the goal of the copyright laws "by adding value to prior intellectual labor."

The District Court had ruled on behalf of the Walker parties with respect to the second fair use factor - the nature of the copyrighted work. The court based its conclusion on the fact that Walker paraphrased, rather than directly quoted, Wright's work, that the paraphrasing involved "straightforward factual reportage," and that no privacy interests were involved in view of Wright's death in 1960.

Judge Meskill disagreed with the District Court's analysis, stating that "unpublished works are the favorite sons of factor two." Given the narrow inquiry involved in the context of biographers' use of unpublished letters, the District Court, observed Judge Meskill, gave insufficient weight to the unpublished status of the letters and journal entries. And again, some of the appropriated material conveyed Wright's expressive language. For Judge Meskill, "whether the infringer paraphrased or copied, whether he borrowed fact or expression, or whether his use implicates the author's privacy interests or not...may enter into the infringement equation. They just have no bearing on factor two." The District Court's explanation might apply to other aspects of the fair use analysis, but, again, had no bearing on the nature of the copyrighted work; the court should have ruled on behalf of Wright on this aspect of the fair use claim.

The District Court correctly determined that the third fair use factor - the amount and substantiality of the portion used - favored the Walker parties, stated Judge Meskill. It was found that Walker used no more than one percent of the Wright-Walker letters or of the journal entries and that, qualitatively, the quoted material was not of critical significance.

Citing the existence of some confusion as to whether the third fair use factor should consider the allegedly infringing work, the court noted that the language of section 107 did not direct the court to examine the third factor in relation to the infringing work. However, certain precedents applied this "gloss" to factor three, and Judge Meskill therefore briefly considered the amount and substantiality of the protected passages in relation to

the work accused of infringement. The expressive portions comprised about two pages of a 428 page book, and although the material "enhance[d] Dr. Walker's analysis and serve[d] to establish her credibility as one who, having known Wright, ha[d] a unique insight into his career," the material did not "make the book worth reading." The third factor therefore favored the Walker parties.

Judge Meskill agreed with the District Court's conclusion that the factor focusing on the effect on the market also favored the Walker parties. The biography "in no way supplants Wright's letters and journals. Impairment of the market for these works is unlikely," stated the court.

In affirming the finding that the Walker parties were entitled to summary judgment, Judge Meskill cautioned that there is no per se rule regarding unpublished works, and that "the fair use test remains a total inquiry, tailored to the particular facts of each case. Because this is not a mechanical determination, a party need not 'shut-out' her opponent on the four factor tally to prevail."

The biography's use of Wright's expressive works was modest and "serves either to illustrate factual points or to establish Dr. Walker's relationship with the author, not to 'enliven' her prose." Wright also had argued that Walker's use of Wright's journals violated an agreement between Walker and Yale University's Beinecke Library. Wright sued as a third party beneficiary of the contract, as the owner of the copyrights in the materials covered by the agreement. There was no evidence that Walker signed the library agreement in issue. The agreement provided, in part, that the library manuscripts might not be published in whole or in part unless such publication was specifically authorized. Assuming that Dr. Walker signed the agreement, the use of the journals did not breach the agreement.

Judge Ellsworth A. Van Graafeiland wrote a concurring opinion to express the view that the arguments on Walker's behalf were stronger than would appear from the majority opinion. Judge Van Graafeiland would have held that the amount of copyrightable material allegedly infringed by Walker, "if existent at all, was so minimal that the subject of fair use need not be reached." The defense of fair use assumes the existence of infringement, noted Judge Van Graafeiland, and any infringement in the instant case was so de minimis as not to be actionable.

It also appeared to Judge Van Graafeiland that the court placed too much emphasis on the unpublished nature of Wright's works in discussing the second fair use factor and that it should be more important to determine whether the pertinent portions of an author's work constitutes facts, ideas or expression than whether the works were published.

Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991) [ELR 14:1:5]

Copyright infringement claim against author Anne Rice is dismissed because developer of romantic mummy project was not co-author or co-owner of material written by Rice

Konigsberg International claimed that it entered an oral contract with Anne Rice to develop "The Mummy Project," a project based on a story idea involving a romantic mummy. Konigsberg allegedly agreed to pay Rice an unspecified sum to complete the development of the story idea and to prepare the story idea into a detailed written treatment form known as a "bible." Rice also purportedly agreed to develop a publishable novel which would be entitled "The Mummy." Konigsberg planned

to retain all sequel, merchandising, audio and ancillary rights arising from the bible.

Konigsberg claimed that Rice failed to acknowledge Konigsberg's rights to exploit The Mummy Project bible, and sued the author for copyright infringement.

A Federal District Court in California, in an unpublished memorandum decision, has agreed with Rice that Konigsberg was not entitled to relief under the Copyright Act because Konigsberg was neither a co-author nor co-owner of the work.

Judge Mariana R. Pfaelzer noted that the complaint did not allege that Konigsberg contributed protectible expression to the bible and the company therefore was not a co-author of the work. In a footnote comment, Judge Pfaelzer pointed out that a copy of an unsigned contract, which was incorporated by reference into the complaint, indicated that Konigsberg considered Rice the sole author of The Mummy Project bible, and that Konigsberg did not have the requisite intent to qualify as a co-author of a joint work.

It was further found that Konigsberg was not a coowner of the work - there was no writing setting forth a transfer of copyright ownership. Judge Pfaelzer, in another footnote, referred to Konigsberg's argument that the parties were involved in a joint venture and that a writing therefore was not required. Without deciding the legal merit of the argument, the court found the argument "counter to the facts alleged." Apparently, the unsigned contract characterized Konigsberg as the "purchaser" and Rice as the "writer." If the parties were joint venturers, "they certainly did not describe themselves as such," noted the court.

Konigsberg also argued that a writing was unnecessary where an agreement concerns rights to a work not yet completed, but the court cited Effects Associates, Inc. v. Cohen, 908 F.2d 555 (9th Cir. 1990; ELR 12:4:12;

12:7:20), cert. denied, 111 S.Ct. 1003 (1991), in which it was held that a writing was necessary to transfer exclusive rights in a "to-be-developed" work.

Judge Pfaelzer then noted that in Valente-Kritzer Video v. Pinckney, 881 F.2d 772 (9th Cir. 1989; ELR 11:6:15), cert. denied, 493 U.S. 1062 (1990), the court held that the Copyright Act's requirement of a writing preempts claims for breaches of oral contracts that involve rights in copyrighted material, stating that section 204(a) not only bars copyright infringement actions but also breach of contract claims based on oral agreements. Konigsberg, accordingly, did not state a cognizable claim for breach of contract.

The court dismissed Konigsberg's claims for breach of fiduciary duty and for an accounting.

Konigsberg has filed a notice of appeal in the matter.

Konigsberg International, Inc. v. Rice, Case No. CV 91-6398 (C.D. Cal., March 19, 1992) [ELR 14:1:6]

Songwriter's heirs are entitled to terminate 1951 assignment of copyright renewal term

During the period 1925 through 1931, as reported at ELR 12:11:6, Dave Dreyer co-wrote, among other works, the songs "Me and My Shadow," "Wabash Moon," "Back in Your Own Backyard," and "There's a Rainbow Round My Shoulder," and "Cecelia." Dreyer assigned his copyrights in the songs to Irving Berlin, Inc., the predecessor in interest of Bourne Company.

In 1951, Dreyer assigned the renewal terms of the copyrights to Bourne, and Bourne renewed the copyrights prior to their expiration. Under the copyright laws then in effect, the copyrights would have continued until

1981-1987. The Copyright Act of 1976 extended the terms of the copyrights until 2000-2006.

Dreyer died in March 1967. He was survived by his widow Anna, his son Lewis and his daughter Marie Dreyer Rothblum. Dreyer's will set up a testamentary trust for his music assets, consisting of copyrights, renewal copyrights and extensions thereof, publishing contracts, and Dreyer's rights with respect to his membership in ASCAP. The income from the trust was to be paid to Anna Dreyer (one-third), Lewis Dreyer and Marie Rothblum (sharing one-third), and Dreyer's mistress, Mynna Granat (one-third).

In 1972, Lewis Dreyer died. In April 1981, Anna Dreyer, Marie Rothblum, Steven Dreyer and Dean Dreyer (Lewis's sons), sent Bourne notices of termination. In 1984, Anna Dreyer died intestate; her interests in the trust passed to Marie, Steven and Dean.

In 1988, Steven and Dean Dreyer assigned their portions of the copyrights to Larry Spier, Inc. In 1989, Dean Dreyer died, leaving a son as his only heir. In May 1990, Marie Rothblum also assigned her portion of the copyrights to Spier.

In 1990, Spier brought a copyright infringement action against Bourne, alleging that the Dreyer family had, in accordance with section 304(c) of the Copyright Act of 1976, terminated Bourne's copyright assignments and that Bourne wrongfully refused to recognize the termination and relinquish the copyrights to Spier. Spier claimed that section 304(c) did not apply to the assets comprising Dave Dreyer's testamentary trust. The statute states, in pertinent part, that "the grant of a transfer or license of the renewal copyright or any right under it" made by the author, his widow or his children, "otherwise than by will," may be terminated by the author, his widow or his children. Spier claimed that since Dreyer assigned the renewal terms of the copyrights to Bourne by separate contracts prior to Dreyer's death, and not in his will, the writer's heirs were entitled to utilize the statutory termination procedures.

Federal District Court Judge Charles S. Haight, stating that Bourne's approach was "more consistent" with the congressional intent underlying the termination provisions, as well as with Dreyer's intent, found that Dreyer's heirs had no power to terminate the copyrights in issue and granted summary judgment to Bourne.

A Federal Court of Appeals has reversed the District Court's decision.

Judge Roger J. Miner noted that Judge Haight apparently concluded that the 1951 agreement assigning the renewal copyrights to Bourne was within the term "publishing contracts" as used in Dreyer's will, and that the agreement was a "right under" the renewal copyright for purposes of section 304(c).

However, the court agreed with Spier's analysis of the operation of section 304(c) in the instant case. Under the 1951 assignment, Dreyer assigned to Bourne the renewal copyrights and "all his right, title and interest, vested and contingent, therein and thereto," (emphasis added by the court), subject to the payment of certain royalties. While choosing not to define the scope of the term "right under" a renewal copyright as used in the statute, the court held, that in view of the language of the assignment agreement, Dreyer did not have any "right under" the renewal copyrights remaining at the time he executed his will - all of Dreyer's rights already had been transferred to Bourne in 1951.

Dreyer's right to receive part of the royalties from the copyrights did not mean that he retained any interest in the renewal copyrights themselves.

Judge Miner noted that Dreyer's testamentary transfers did not involve any property rights covered by section 304(c). Therefore, the Dreyer family was entitled to terminate the 1951 assignment and recapture the renewal copyrights for the family. The post-termination assignment of the renewal copyrights by members of the Dreyer family to Spier was valid, stated the court.

The text and structure of the statute were sufficiently clear, according to Judge Miner, so as to obviate the need to consider the legislative history of the Copyright Act.

With respect to the issue of whether Mynna Granat would be "entirely cut off" from the income of the Dreyer trust if the termination were given effect, Judge Miner observed that Mynna still would share in ASCAP's writer distribution of public performance royalties. And the Dreyer family and Spier will recapture only prospective revenue from licenses granted post-termination, stated Judge Miner, in remanding the matter for further proceedings.

Larry Spier, Inc. v. Bourne Company,, 953 F.2d 774 (2d Cir. 1992) [ELR 14:1:7]

New York appellate court reverses \$4 million compensatory damage award to former Penthouse model in sexual harassment action; dissent would have vacated \$60,000 compensatory damages award

When Marjorie Thoresen sued Penthouse International and Penthouse principal Robert Guccione alleging sexual harassment, a New York trial court awarded Thoresen compensatory damages of \$60,000 and \$4 million in punitive damages (ELR 12:10:11).

An appellate court has ruled that punitive damages were not available under the state's Human Rights Law, and vacated the award of punitive damages.

Judge Bentley Kassal, in a concurring opinion, emphasized that although the court determined that punitive damages were not recoverable, "the conduct of...Guccione constituted a most reprehensible form of sexual harassment."

Judge Wallach agreed that punitive damages were not recoverable, and also expressed the view that Thoresen did not establish a cause of action under the applicable statute. According to Judge Wallach, "whatever exploitation occurred here was self-exploitation, willingly undertaken for monetary and other gain." It did not appear to Judge Wallach that Thoresen withdrew her consent to such exploitation.

After describing Thoresen's background and her employment relationship with Penthouse, Judge Wallach commented that the case was "all about sexuality. Whether it is about sexual discrimination is entirely another matter." The statute defined as an unlawful

discriminatory practice an employer's refusal, on the basis of sex, to hire or employ, the decision to bar or discharge from employment, the offer or denial of compensation or privilege in connection with employment, or the imposition of terms or conditions of employment. Thoresen admittedly was hired on the basis of her sexuality, observed Judge Wallach, and was fired seven years later for her refusal to go on a promotional tour in Japan. For Judge Wallach, the record appeared "devoid of any of the crucially necessary evidence that her relationship with [the Penthouse parties] was ever conditioned on discriminatory (emphasis by the dissent) practices." There was no evidence that Thoresen ever complained of her personal sexual relationship with Guccione, that she was expected to perform any "sexual favors" for anyone during the promotional tour to Japan, or that she was ever asked to perform sexual favors for other employees and customers of Penthouse.

Thoresen engaged in two sexual liaisons with third parties at Guccione's request. In the first such liaison, Thoresen allegedly was to seduce a financial adviser into an adulterous relationship-the purported request occurred at a time when Thoresen was not on Penthouse's payroll. Thus, stated Judge Wallach, there was no evidence of coercion during an employment relationship. And Thoresen's compensation increased after she terminated the affair- she thus was not penalized for the independent decision to terminate the relationship. The record lacked details of the "one night stand" allegedly arranged by Guccione between Thoresen and a business associate, and it was likely, stated Judge Wallach, that little or no part of the damage award was based upon that encounter. Thoresen's allegation that Guccione asserted that she "owed him these favors" was the "sum and substance of his alleged 'Svengali-like' hold over her, over the course of seven years."

Judge Wallach agreed that a "worldly woman" would be entitled to the statutory protection as much as a woman raised in "sheltered circumstances." However, stated the dissent, Thoresen's background and experience in sex-oriented activities were relevant, particularly when compensatory damages, based solely on emotional harm, were the basis of recovery.

Judge Wallach again noted the dearth of evidence that sexually harassing conduct was pervasive and destructive of the working environment, and pointed out that Thoresen had presented no evidence of special damages linked to the alleged wrongdoing. The only pressure placed upon Thoresen to engage in the purported affairs was Guccione's alleged statements that Thoresen "owed" him these favors. But Judge Wallach commented that Thoresen willingly continued the initial affair, and that the second "rendezvous" was "too lacking in detail and substance to command any credibility."

Thoresen sued primarily to recover for the breach of her management contract with Penthouse; she was fired for a legitimate reason, and Judge Wallach would have found that the compensatory damage award for emotional harm, "unaccompanied by any allegations or proof of special damages" had no foundation in the record, and would have vacated the award of both compensatory and punitive damages and dismissed the complaint.

Thoresen v. Penthouse International, Ltd., New York Law Journal, p. 25, col. 3 (N.Y.App. April 2, 1992) [ELR 14:1:8]

"Pet of the Year's" breach of contract action against Penthouse Magazine for failure to deliver sports car is dismissed A young woman, identified only by the surname Martin, was selected as Penthouse International's "Pet of the Year" for the period from December 1, 1988 to November 30, 1989. In May 1988, Martin had signed a "Pet of the Year Candidate's Agreement;" the agreement stated that individuals involved in the contest would receive prizes identified in the magazine. Among the prizes listed in Penthouse was a Ladret Magnastar sports car valued at \$160,000.

Martin sued Penthouse for breach of contract, alleging that she did not receive the promised gifts and prizes, and for fraud and unjust enrichment.

Penthouse claimed that it paid Martin a salary of \$25,000 and that it gave Martin, as required by the agreement, gifts and prizes worth more than \$100,000. Apparently, the only items in issue were the sports car and about \$12,000 in prizes.

New York trial court Judge Baer first dismissed Martin's cause of action for fraud. It was noted that Penthouse's publicity "gave the impression that the delivery of a fabulous car was as certain as sunrise," and that the public may have been misled by the "tone and content of [Penthouse's] prose." But Martin was not entitled to rely on Penthouse's "purple puffery in its journal" any more than she could rely on the representations of the magazine's employees.

Penthouse's failure to deliver the car, when Rob Ladret "skip[ped] town with the bailiff on his heels," may have amounted to a material breach that would have permitted Martin to suspend her performance, but Penthouse's conduct did not constitute a "coverup" since the magazine did not have to produce the prizes until the end of Martin's term.

Judge Baer further noted that the magazine did not have a deal with the supplier of the car at the time the agreement was signed, and that Martin did not show that, in May 1988, Penthouse had no intention to carry out its promises.

The court then granted Penthouse's motion to dismiss Martin's cause of action for unjust enrichment - Martin received \$25,000 in cash and \$100,000 in prizes; the court declined to consider the remaining claims apart from the breach of contract cause of action.

In dismissing the breach of contract claim, Judge Baer pointed out that Penthouse agreed that the winner of its contest would receive additional compensation "in the form of the opportunity to collect all of the Pet of the Year prizes indicated in Penthouse... which are in fact made available to Penthouse by their supplier(s)." This was "something short," noted the court of an ironclad promise to supply the winner with the listed gifts.

Furthermore, Penthouse never intended to purchase the sports car for cash and then give it to the winner - as

with the other prizes, the magazine traded advertising space for the car.

Penthouse was required to use its best efforts to insure the availability of each prize, and not to list in the magazine any prize without a good faith belief that it would be provided. The court reviewed Penthouse's extensive, but unsuccessful, efforts to obtain the Ladret car, and stated that the fact that Penthouse did not reach an agreement with other established and better-known manufacturers did not seriously indicate bad faith on the part of the magazine. If the supplier failed to make available a prize of comparable value, the agreement did not require Penthouse to provide a substitute prize.

In an action brought by the 1979 Pet of the Year, the agreement in issue, unlike the agreement signed by Martin, obligated Penthouse to produce the specified gifts (Rixon v. Penthouse International, Ltd. (ELR 7:9:18).

Judge Baer concluded by stating that it seemed to the court that "when an ordinary reader juxtaposes the gushing prose of the published promotions against the nar-

attractive young women like [Martin] are the sine qua non of [Penthouse's] literary endeavors, the reader is likely to conclude that [Penthouse] will win no contests for generosity and that perhaps its treatment of [Martin] was even shabby." However, the matter was not "a lawsuit by the readership."

Martin v. Penthouse International, Ltd., New York Law Journal, p. 22, col. 5 (N.Y.City., April 15, 1992) [ELR 14:1:9]

New York court divides publishing couple's marital assets

Joni Evans and Richard Snyder were married in May 1978 and separated in 1986. At the time of their separation, Evans was president and publisher of the trade book division of Simon & Schuster. In 1987, Evans began working for Random House for a salary of \$300,000; after six weeks with her own imprint, Evans became publisher of the trade division.

By 1986, Snyder, the president and chief executive officer of Simon & Schuster, was earning about \$2.6 million annually.

New York trial court Acting Judge Elliott Wilk, in dividing the marital property, first rejected Snyder's request for a proportional distribution of assets based on the claim that the parties maintained separate economic identities during the course of the marriage. The court, noting that Evans and Snyder were "intelligent and sophisticated business people," also rejected Snyder's

assertion that the marital assets should be divided strictly in a manner calculated to reflect each party's monetary contribution to the marriage. "Marriage," stated the court, "signifies the establishment of an economic, emotional and social partnership. One cannot calculate numerically the value of love and emotional support."

Also rejected was Snyder's assertion that even if the court did not apply a formula which would mathematically reflect only the parties' financial contributions, Snyder would be entitled to almost all of the marital estate. According to Snyder, Evans did not demonstrate her right to any marital income or property acquired during the marriage beyond that attributable directly to her own efforts. Snyder pointed out that Evans did not bear or raise his children, did not cook or clean, and participated in business-related social functions to her own

benefit. Evans' emotional and sexual contributions to the marriage were reciprocated, according to Snyder.

Judge Wilk stated that the Equitable Distribution Law did not require the spouse who had earned less income to perform tangible services for, or make a quantifiable sacrifice to the other spouse in order to merit, as compensation, an equal share of the "marital pot." In dividing the assets (on the basis of the value as of the February 19, 1987 commencement date of the proceeding as stipulated by the parties), the court sought to implement "the conceptual fairness which an equal sharing of assets will effectuate."

Judge Wilk noted that Snyder's cash and cash equivalents had increased from about \$66,000 as of the date of the marriage to about \$103,000. The court found that Evans did not show that the premarital funds merged with the parties' marital assets, losing their separate character. The difference between the marriage date and

commencement date figures therefore was marital and would be divided equally. Also divided equally was the difference between Evans' cash on the marriage date and commencement date.

As of February 19, 1987, Evans had an interest in the Gulf & Western long term performance plan; this was a marital asset subject to equal division, ruled the court.

Snyder's deferred compensation of over \$1 million from 1986, scheduled to be received in 1988, was marital, and the net figure, after taxes, was split equally by Judge Wilk. A portion of a Gulf & Western bonus due Snyder also was divided equally by the court.

After dividing the parties' interest in cars and furniture, Judge Wilk considered Snyder's interest in Gulf & Western's pension plan. It was noted that Snyder's ten year premarital employment with Simon & Schuster was sufficient to vest him fully in the plan, and the court found that the pension was not a distributable asset. Any

appreciation during the marriage was passive and therefore also was separate property. However, the marital portion of Snyder's vested interest in a profit sharing plan was divided equally, as was the marital portion of Evans' vested interest in a Gulf & Western pension plan.

The parties' interests in the marital portion of various individual retirement accounts was divided by the court. It was noted that the increase in value during the marriage of certain stock options granted to Snyder prior to marriage represented passive appreciation of separate property and therefore also was separate. However, Evans was granted a forty percent interest in other stock options and the court set forth the manner whereby Evans might implement her interest.

In disposing of shares of restricted stock known as "golden handcuffs," Judge Wilk cited In re Marriage of Harrison, 179 Cal. App. 3d 1216 (Cal. App. 1986) and found that twenty-five percent of the stock was marital.

Evans would be entitled to an award of an appropriate portion of the stock at the time when a transfer would be possible.

Judge Wilk next reviewed the taxes and liabilities of the parties, finding, in part, that certain tax shelters in which Snyder invested without consulting Evans were valueless and would remain Snyder's property - the liability was too speculative to distribute.

The court concluded by finding that the evidence established that each party advanced professionally on his/her own talents and hard work. The record did not support a finding "that either party contributed sufficiently to the other's professional success to warrant a separate distribution above and beyond that which ha[d] been accorded consideration in the distribution of other marital assets."

Evans v. Snyder, New York Law Journal, p. 21, col. 3 (N.Y.Cnty., April 15, 1992) [ELR 14:1:10]

Mississippi cable provider's antitrust action against ESPN and The Learning Channel is dismissed with prejudice

Futurevision Cable Systems, a cable system overbuilder, enters areas already being served by a cable service provider, overbuilds that system, and, as described by a Federal District Court in Mississippi, begins to operate in competition with the existing cable provider. In the late 1980s, Futurevision overbuilt and began to offer cable television service in areas of Mississippi which were served by Multivision Cable TV Corp. or by B&E Grenada, Inc. The Learning Channel had entered into a contract with B&E granting the cable

operator the exclusive right to broadcast The Learning Channel programs in Grenada, Mississippi. And ESPN had entered into a contract with Multivision whereby ESPN agreed that Multivision would have the exclusive right to broadcast Sunday Night Football in three Mississippi communities.

Futurevision claimed that the exclusive contract arrangements between Multivision and B&E and the program providers constituted unlawful restraints of trade in violation of section 1 of the Sherman Act.

Futurevision also claimed that The Learning Channel and ESPN were part of a conspiracy among programming companies to prevent overbuilders from entering the cable services market, and further alleged that both The Learning Channel and ESPN violated section 2 of the Sherman Act by assisting Multivision and B&E in monopolizing the relevant markets.

The court dismissed with prejudice all Sherman Act claims against ESPN and The Learning Channel on the ground that Futurevision failed to state a claim upon which relief could be granted. Futurevision's state law claims were dismissed for lack of jurisdiction.

In discussing Futurevision's vertical conspiracy claim with respect to the contracts in issue, the court found, contrary to Futurevision's arguments, that "an analysis of the market power of ESPN and The Learning Channel in the cable programming market was necessary to determine the alleged anticompetitive effects of exclusive distributorships on interbrand competition in the market for cable services." Futurevision did not set forth the percentage of market share held by ESPN or The Learning Channel in the market which supplies cable programming. It appeared to the court that Futurevision merely alleged that The Learning Channel and ESPN, two of programmers, "prefer to distribute many

programming in one area through one company rather than another." Indeed, the allegations in Futurevision's complaint indicated that the actual effect of ESPN's exclusive licenses in the relevant cable service markets was "insignificant. Futurevision was apparently not fore-closed from competing in that market and obviously found alternative sources of supply in order to secure cable subscribers in those three communities."

The court emphasized that the recitation in broad, general terms that the challenged contracts adversely affected competition was insufficient when the complaint also presented facts concerning the substantial success experienced by Futurevision in the relevant geographic market. In all, the court expressed the view that the complaint did not provide a basis on which to conclude that the absence of ESPN Sunday Night Football and The Learning Channel was likely to adversely affect the ability of Futurevision to succeed in the relevant service

markets or to enter other cable markets in Mississippi. Futurevision's complaint charging restraint of trade based upon ESPN's and The Learning Channel's selection of one distributor over another failed to state a violation of the rule of reason and the court therefore concluded that Future did not state a claim that the challenged contracts constituted unreasonable vertical restraints of trade in violation of section 1 of the Sherman Act.

The court proceeded to find that Futurevision's complaint contained "nothing more than a conclusory allegation that there was a horizontal conspiracy in violation of section 1 of the Sherman Act." Such an allegation was not a substitute for the proper allegation of a conscious commitment to a common scheme designed to achieve an unlawful objective." The claim that The Learning Channel, ESPN, or other programming suppliers contracted to distribute their programming through

exclusive dealers was not sufficient to allege an unlawful horizontal conspiracy. The exclusive contracts were between program suppliers and B&E and Multivision - Futurevision did not allege facts as to any contracts running between The Learning Channel, ESPN and any of their (emphasis by the court) competitors.

It also was noted that Futurevision failed to identify the specific participants of the conspiracy; the complaint identified the alleged conspirators as "the channel providers," and identified "two other channel providers" as The Learning Channel's co-conspirators. The complaint contained only one express reference to ESPN and alleged no facts supporting ESPN's alleged participation in an industry-wide conspiracy.

Even if Futurevision's complaint were broadly construed to allege an actual agreement among the "channel providers," stated the court, the company did not state a claim under the horizontal conspiracy theory for the

same reasons that it failed to state a claim under a vertical conspiracy theory - Futurevision did not sufficiently plead any anticompetitive effect. Again, there was no factual basis for Futurevision's "sweeping assertion" that the grant of exclusive rights to Multivision and B&E was part of an "industry-wide" conspiracy to discourage overbuilders in violation of section 1 of the Sherman Act.

The court then found that Futurevision did not state a claim against ESPN for monopolization or attempted monopolization. ESPN and The Learning Channel did not have monopoly power, either singly or in combination in the market of suppliers of programming for cable television, and neither company competed in the cable services market.

And for the same reasons that Futurevision failed to state a claim that ESPN or The Learning Channel unlawfully conspired to monopolize under section 1 of the Sherman Act, the court found that Futurevision failed to state a claim that The Learning Channel or ESPN unlawfully conspired to monopolize under section 2 of the act. Futurevision's complaint did not allege that any single channel provider party, or any combination of such parties, had the requisite market power to establish a monopoly.

Even were the court to conclude that Futurevision alleged the market power necessary for ESPN and The Learning Channel to aid B&E and Multivision in monopolizing their markets, the dismissal of the section 2 claim still would be "in order," stated the court, because there was no allegation that The Learning Channel or ESPN either knew or cared that B&E or Multivision may have been using their exclusive rights to monopolize the relevant cable service markets.

The complaint also did not allege any specific intent to monopolize; failed to allege that ESPN and The Learning Channel had no valid business reason for refusing to supply Futurevision with their programming; and did not set forth any facts indicating that any action allegedly joined in by ESPN or The Learning Channel caused any injury to competition. The court also pointed out that it was "illogical" to suppose that The Learning Channel and ESPN would conspire to reduce competition among cable system operators.

The court concluded by dismissing Futurevision's price discrimination claim, as well as the company's state law claims.

Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp., Case No. E91-0039 (S.D.Miss., March 17, 1992) [ELR 14:1:11]

Retail store chain's use of radios qualifies for hometype exemption from copyright liability

A Federal Court of Appeals has upheld a District Court's ruling that Claire's Boutiques, Inc. was not liable for copyright infringement for playing radio broadcasts in the company's stores. Claire's owned 719 stores under the name Claire's Boutiques and 30 stores under the name Arcadia. The stores, located throughout the United States, ranged in size from 458 square feet to 2000 square feet. The average size of a Claire's store was 861 square feet; the average size of an Arcadia store was 2022 square feet. During the year 1990, Claire's had net sales of over \$165 million and earned about \$13 million in net income.

Claire's provided stereo components to each store; the equipment consisted of a 5 watt stereo receiver, two speakers, an indoor antenna and speaker wire. The

company generally shipped a radio receiver to each new store and general contractors would install the speakers and wiring pursuant to corporate specifications designed to conceal the wiring as much as possible.

The individual stores used the corporate-supplied components to receive and play radio broadcasts during business hours. The two speakers each were hung from the ceiling in the selling area; the speakers, as described by Judge Cummings, were hidden by a "decorative dropped ceiling."

Broadcast Music Inc. claimed that Claire's violated the Copyright Act by playing the radio broadcasts without obtaining a license. According to Judge Cummings, the annual BMI licensing fee, for all the Claire's stores using receivers to play radio broadcasts, would have been about \$40,000.

The District Court ruled that Claire's was exempt, under 110(5) of the Copyright Act from licensing requirements.

Judge Cummings after reviewing the cases under the Copyright Act of 1909, which discussed "public performance," noted that the Copyright Act of 1976 states that to perform a work "means to recite, render, [or] play...it, either directly or by means of any device or process" and that to perform or display a work "publicly" means to perform or display it "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered," or "to transmit or otherwise communicate a performance or display of the work ...to the public, by means of any device or process, whether the members of the public capable of receiving the performance of display receive it in the same place

or in separate places and at the same time or at different times."

The legislative history of the exemption, according to Judge Cummings, indicated that "Congress thought it unfair to impose liability on unsuspecting small business persons. Congress believed also that it was impractical to require small organizations to enter into licensing agreements with performing rights organizations. The secondary use of radio broadcasts in small establishments, Congress also recognized, would have only a minimal effect on authors' incentives to create new works."

The exemption is available only if a single receiving apparatus is used, the single receiving apparatus is of a kind commonly used in private homes, the transmission is provided free of charge, and is not "further transmitted" to the public.

BMI first argued that Claire's operations should be considered on a corporate-wide, rather than on a store-by-store, basis. But Judge Cummings pointed out that the statute, which speaks of one performance of one work, did not ask how many receiving apparatuses would be used to receive the different works; the language of the statute, for Judge Cummings, therefore "strongly suggests that the proper analysis should be limited to the area where a single work is performed."

The court distinguished the case from the situation which would arise if Claire's itself initiated the broadcast of an identical work to each of its 669 stores - in that case, Claire's would be more like a radio station owner or broadcaster. Similarly, if Claire's told its managers to tune to a particular station, the boutique owner would have "some indicia of a broadcaster." Judge Cummings stated that, in all, Congress, by using the phrase "single receiving apparatus" sought "to foreclose the unlicensed

playing of more than one receiver at a single geographic site." Since a sound system exists in only one geographical area, the court limited its analysis to the single receiving apparatus used in the individual Claire's stores.

BMI also argued that 110(5) would not apply to a large profitable business such as Claire's. The legislative history referred to the exemption as being for a "small commercial establishment...not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service..." (omissions in the decision). The court stated that it was not necessary to resolve the issue of whether the financial size of the alleged infringer relates to the exemption because any rule based on the financial strength of the company seeking the exemption, rather than the type of sound equipment utilized and the nature of the transmission, would be "directly contrary" to the terms of the statute.

Even when considered on a store-by-store basis, argued BMI, Claire's did not use a "home-type" receiving system. Judge Cummings agreed that the phrase "receiving apparatus" was "somewhat unclear" and could refer either to the receiver itself or to the entire stereo system, including the receiver, speakers, antenna, and wiring. The court concluded that the entire system should be examined, and proceeded to find that the components used by Claire's Boutique were home-type - the receiver was small, delivered only five watts of power, cost about \$130, and was capable of driving only two speakers. The speakers also were small, of limited power, cost about \$50 each and were designed either to stand on a table or be mounted on a wall or ceiling. The speaker wire and antenna also were for "home-type" use.

Judge Cummings then considered whether Claire's configured home-type components in a way not commonly found at home. Although noting that the

legislative history did not suggest a "hard and fast rule," the court stated that it was "apparent that Congress intended the exemption to apply only to stereo systems that produce music over a limited area." The physical size of an establishment would be relevant as indicative of the reach of a stereo system. Claire's stores are small, observed the court, and the fact that the broadcast of music covered the small areas involved "strongly" indicated, for the court, that the stereo system was of a kind commonly used in a private home. And even the larger stores (greater than 2,000 square feet) were "not of a sufficiently large size to deny automatically application of the exemption."

Furthermore, Claire's did not alter or augment the stereo systems use, did not integrate the system with a public address or telephone system, and only two speakers were used.

Judge Cummings agreed with the District Court in giving only "minimal weight" to the facts that the speakers were hidden in a dropped ceiling and that the speaker wires were concealed.

BMI's final argument was that Claire's further transmitted the music broadcasts received in its stores. The court noted that the Copyright Act did not define "further transmitted," but declared that it was "sensible to consider that the entire receiving apparatus, and not just the receiver, 'receives' the performance." To further transmit a performance must involve the use of some device or process that expands the normal limits of the receiver's capabilities, declared the court.

Judge Cummings, in affirming the judgment for Claire's, concluded by commenting that "Congress...was not so much concerned with whether an establishment could afford a license but rather with whether the nature of the sound system was such that the performance it

renders is more justly considered public in the commonsense, if not technical copyright, notion of that term."

Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482 (7th Cir. 1991) [ELR 14:1:12]

U2 and Hammer obtain national multi-district injunctions and orders of seizure for distribution of unauthorized merchandise

A Federal District Court in Florida has granted the musical group U2 and the group's exclusive licensee for concert merchandise, Winterland Productions, a national, multi-district injunction and order of seizure. The court authorized law enforcement officers to seize any and all infringing and imitation merchandise displaying the names or likenesses of U2 being sold within three

miles of any U2 concert during the group's 1992 United States tour.

A similar order was issued by a Federal District Court in Michigan with respect to unauthorized merchandise being sold in the vicinity of concerts by Hammer during his 1992 tour.

Winterland Concessions Company v. Miller, Case No. 92-0456 (S.D.Fla., Mar. 2, 1992); Winterland Concessions Company v. Tylor, Case No. 90-72483 (E.D.Mich., Mar. 20, 1992) [ELR 14:1:14]

Victim of errant golf ball may not proceed with negligence and failure to warn claims against golfer

A golf ball driven by Arthur McGovern or Donald Vogel soared off a golf course operated by Springville Country Club, travelled through (or over) a screen of trees and landed on an adjacent public road. The ball struck and shattered a car windshield, and injured car passenger Roberta Rinaldo. The golfers, according to New York Court of Appeals Judge Titone, intended to drive their golf balls straight down the fairway; there was no evidence that either golfer was careless or guilty of anything other than making "an inept tee shot."

Rinaldo's action alleged negligence and failure to warn. A trial court dismissed both causes of action and the appellate court affirmed the decision.

The Court of Appeals, in considering the liability of Arthur McGovern (Rinaldo discontinued the appeal with respect to the other golfer), noted that a golfer preparing to drive a ball has no duty to warn persons not in the intended line of flight on another tee or fairway. And a golfer ordinarily may not be held liable to individuals

located entirely outside of the boundaries of the golf course who happen to be hit by a stray, mis-hit ball.

Judge Titone concluded that under the circumstances of this case "a warning would have been all but futile..." It was unlikely that Rinaldo, riding in a car on the adjacent road, would have heard, much less had the opportunity to act upon, a shouted warning.

Rinaldo's negligence cause of action against McGovern also was "untenable," stated the court, for the possibility that a golf ball will fly off in another direction is a risk inherent in the game. A person injured by a mis-hit golf ball must show that the golfer failed to exercise due care; Rinaldo did not present such proof, and the cause of action based on McGovern's purported lack of due care was properly dismissed, ruled the court.

Rinaldo v. McGovern, Case No. 216, New York Law Journal, p. 23, col. 2 (N.Y., Nov. 21, 1991) [ELR 14:1:14]

Idaho statute precludes recovery by injured skier against ski area operator, promoter of race and fence manufacturer

Michael C. Collins was injured in a skiing accident at Schweitzer Ski Area in Idaho in January 1988. After crossing the finish line of a NASTAR ski race conducted by Schweitzer, Collins fell head first and slid down the hill and through a mesh fence surrounding a lift tower, and then struck the lift tower with the back of his neck; the accident rendered Collins a quadriplegic.

World Wide Ski Corp., doing business as NASTAR, promotes non-competitive ski race for amateurs seeking to improve their own time scores.

Collins alleged that Schweitzer negligently set the finish line too close to the lift tower and failed to adequately protect the tower with sufficient fencing and padding. It was alleged that NASTAR was vicariously liable in breaching a duty to use reasonable care in instructing its agent Schweitzer on properly setting a race course and in breaching a duty to inspect the course. Collins also sued Goodwin-Cole, the manufacturer of fence surrounding the lift tower, alleging various claims.

A Federal District Court in Idaho has granted the Schweitzer parties' motions for summary judgment on the ground that the Idaho Responsibilities and Liabilities of Skiers and Ski Area Operators Act applied to shield Schweitzer and NASTAR from liability.

The 1979 statute, noted Chief Judge Ryan, was passed in an attempt "to protect ski areas from potentially overwhelming liability from ski accidents." The relevant portion of the statute stated that ski area operators may not intentionally or negligently cause injury to any person; ski area operators, except for statutorily specified duties, have no duty "to eliminate, alter, control or lessen the risks inherent in the sport of skiing...and ... no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care."

The statute recognizes that skiing, as a recreational sport, is hazardous to skiers, "regardless of all feasible safety measures which can be taken," and that "Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing including any

injury caused by the following...lift towers and components thereof...." Each skier is assigned the sole responsibility for knowing the range of his/her abilities and the duty to ski within those abilities and to maintain reasonable control of his/her speed and course.

Chief Judge Ryan observed that anyone who strikes a ski lift tower while skiing is considered to have expressly assumed the risk and legal responsibility for any injury which results. The court found that the fact that Schweitzer had set up a NASTAR race course and that Collins was tragically injured while he was racing on the course did not change the application of the Idaho skier statute. Setting up a NASTAR course is a normal part of running a ski area, noted the court. Thus, anything the ski area does to eliminate or lessen the inherent risks of skiing in connection with setting up the race course or protecting skiers from hazardous obstacles cannot (emphasis by the court) be the basis of liability for negligence. Schweitzer owed no duty to Collins and there was no actionable breach, ruled the court in granting summary judgment to the Schweitzer parties.

The court upheld the constitutionality of the statute, agreeing with an Idaho Supreme Court decision in which the court found that the statute was rationally related to a legitimate government interest in protecting and promoting an important state industry. "Health, safety, and economic classifications not based on race or gender are reviewed at the minimum level of equal protection analysis," recalled Chief Judge Ryan.

The release signed by Collins when he registered for the NASTAR race also shielded Schweitzer from liability because the ski area operator, by meeting its public duty under the statute, was within the scope of the release's protection.

The claim against NASTAR was rejected - the race organizer could not be liable for the negligence of its

agent, Schweitzer, when Schweitzer was found not negligent as a matter of law.

Collins argued that the release did not specifically name NASTAR and that the race promoter could not be protected by the release. The court noted that the release was in the NASTAR registration form and presumably prepared by NASTAR. In any event, the court found it unnecessary to consider the question of the release with respect to the promoter's liability - NASTAR could not be held vicariously liable because its alleged agent, Schweitzer, was held to be not negligent as a matter of law.

Also rejected was Collins' claim against Goodwin-Cole because it was not shown that Collins' injuries would not have occurred but for the failure of the company's fence.

Collins v. Schweitzer, Inc., 774 F.Supp. 1253 (D.Idaho 1991) [ELR 14:1:14]

Insurance policy exclusion precludes recovery in wrongful death action brought by estate of Sea World jet ski show performer

Walter Garrison was killed in August 1986 while driving a Kawasaki jet ski during the "Ski Pirates" water ski show at Sea World of Florida. Garrison was employed by Maxwell Associates, a company which had contracted to provide personnel and services to Sea World. Maxwell held an insurance policy issued by Jefferson Insurance Co. of New York. Sea World was an additional named insured under the policy.

As described by Florida appellate court Judge Dauksch, Garrison's estate received workers'

compensation benefits from Maxwell. When Garrison's parents sued Sea World, the company argued that the claim was barred by workers' compensation immunity. Sea World also sought a defense from Jefferson on the wrongful death action to the full extent of the policy's coverage.

Jefferson, denying it had a duty to defend and indemnify Sea World, moved to intervene in the wrongful death action and filed a complaint for a declaratory judgment. Jefferson alleged that Garrison was an employee of Maxwell only, and that certain exclusions in its policy precluded coverage for the accident in which Garrison was killed.

The trial court found that Garrison was an employee of Maxwell, not a "special employee" of Sea World, and that the employee exclusions relied upon by Jefferson were inapplicable.

Another exclusionary endorsement cited by the appellate court stated: It is agreed that with respect to operations described above or designated in the policy as subject to this endorsement, the insurance does not apply to bodily injury to any person while performing in any exhibition or diving event sponsored by the named insured.

The trial court declared that the exclusion was ambiguous - the policy did not define the term "exhibition" - and that the exclusion also was inapplicable.

Judge Dauksch, although agreeing that the employee exclusions relied upon by Jefferson were inapplicable, disagreed with the trial court's ruling on the above-cited exclusion, stating that "the mere failure to provide a definition for a term involving coverage does not necessarily render the term ambiguous." The purpose of exclusions, such as the one in Jefferson's policy, was to except from liability coverage the risks which are

normally encountered in practicing for or participating in a sports contest or exhibition.

The plain meaning of the exhibition exclusion in the policy applied to the event in which Garrison was performing when he was killed, stated the court, in remanding the case to the trial court with instructions to enter a final declaratory judgment finding that Jefferson had no obligation to Sea World or Garrison for any claims arising out of the wrongful death action filed on behalf of Walter Garrison's estate.

Jefferson Insurance Company of New York v. Sea World of Florida, Inc., 586 S.2d 95 (Fla. App. 1991) [ELR 14:1:15]

Briefly Noted:

Board Game.

Mark T. Bonk invented a board game entitled "Play It Again Juke Box," in which players were asked to complete a phrase from a popular song after being given a few words of the lyrics. Milton Bradley Company began negotiations with Bonk with respect to a licensing agreement, but the company determined that Bonk had no right to use the copyrighted song lyrics featured in the game and canceled all negotiations.

When Bonk sued Milton Bradley for breach of contract, a Federal District Court jury returned a verdict in favor of the company.

A Federal Court of Appeals has upheld the judgment entered on the verdict and the denial of Bonk's motion for a new trial and the award of about \$31,000 in costs to Milton Bradley.

Judge Kanne found that there was no meeting of the minds between Bonk and Milton Bradley - there was no mutual assent to the term of an agreement; the terms of the purported agreement were not definite and certain; and the parties did not intend to be bound absent a written agreement.

The court also rejected the argument that a contract arose by promissory estoppel. Although Milton Bradley had not made an unambiguous promise to Bonk to license the game, Bonk nevertheless proceeded to terminate the activities of his own company. Judge Kanne stated that Bonk's reliance was unreasonable and could not have been expected or foreseen by Milton Bradley. The company had informed Bonk at its initial meeting about the possibility that a product under consideration for licensing could be canceled at any time during the company's review process.

In all, there was more than sufficient evidence upon which a reasonable jury could determine that no contract existed between Bonk and Milton Bradley.

M.T. Bonk Company v. Milton Bradley Company, 945 F.2d 1404 (7th Cir. 1991) [ELR 14:1:16]

Ballerina Injury.

In 1983, Shenika Dawn Nowlin, a law school student and former ballerina, was in New York visiting her college friend Andre Robertson, then a shortstop for the New York Yankees. During a pre-dawn drive, Robertson struck a concrete wall, and Nowlin sustained injuries which rendered her paraplegic.

A trial court jury apportioned liability sixty-seven percent against the city, and thirty-three percent against Robertson and returned a verdict of about \$14.3 million, of which about \$7.75 million was for past and future pain and suffering. In response to the trial court's indication that the award was excessive, the parties stipulated to reducing the pain and suffering component to \$2.5 million, for a total award of about \$9 million.

An appellate court has reduced the economic loss component from about \$6.6 million to \$5 million, and otherwise affirmed a total award in the amount of \$7.5 million.

Nowlin v. City of New York, New York Law Journal, p. 26, col. 6 (N.Y.App., April 6, 1992) [ELR 14:1:16]

Eric Roberts Matter.

Actor Eric Roberts, in suing his former girlfriend, alleged that Kelly Cunningham engaged in repeated acts of extreme violence and of extensive attempts, as described by New York trial court Judge Beatrice Shainswit, "to vilify him and destroy his film career by contacting prominent figures and stating to them, 'Eric threw me and our child out onto the street' and 'We had no place to go.'" Roberts and Cunningham are the parents of a young child.

The court had granted Roberts a preliminary order directing Cunningham to move out of Roberts' home in Rhinecliff, New York.

In the instant proceeding, Judge Shainswit denied Cunningham's motion to dismiss Roberts' cause of action for prima facie tort, finding that the actor alleged "disinterested malevolence" and pleaded special damages. The fact that isolated elements of Cunningham's alleged activities might serve as separate causes of action did not

prevent Roberts from setting forth a prima facie tort claim encompassing the various way in which Cunningham allegedly sought to destroy Roberts' career.

Roberts also presented sufficient evidence to proceed with causes of action for intentional infliction of emotional distress and defamation, ruled the court. Roberts' complaint sought \$100,000 in special damages, \$1 million compensatory damages and \$5 million punitive damages, as well as a permanent injunction to stop Cunningham's purportedly violent assaults on him and attacks on his career.

Roberts v. Cunningham, New York Law Journal, p. 22, col.5 (N.Y. Cnty., Mar. 27, 1992) [ELR 14:1:17]

Distribution Contract.

Jaywyn Video Productions, the owner of certain films in the "EROS" library, sued the film's distributor and other parties alleging that they had permitted the unauthorized release of the films without proper payment to Jaywyn.

B. Michael Klein, the president and sole stockholder of Ho-Tel, Inc., admitted that Ho-Tel received \$70,000 from HBO, \$107,000 from SHO and other funds for licensing the various films. And Servicing All Media, a film library, admitted that it failed to comply with a Laboratory Access Letter in that it did not determine whether Jaywyn received payment prior to releasing the master videotapes.

A New York trial court granted partial summary judgment to Jaywyn on the company's causes of action for breach of fiduciary duty, and conversion against Ho-Tel and granted summary judgment on Jaywyn's breach of contract claim against Servicing All Media.

An appellate court has upheld the trial court's decision, finding that there was no indication that Ho-Tel was defrauded into entering the distribution agreement. The trial court also correctly determined that there were issues of fact with respect to Klein's personal liability. However, the trial court, based on the fact that the contract claimed to be the genuine contract by Klein differed from the contract offered by Jaywyn, had ruled that issues of fact existed on the cause of action alleging Ho-Tel's tortious interference with contract. The appellate court found that Ho-Tel did not establish that Jaywyn's contract was not genuine.

Jaywyn Video Productions, Ltd. v. Servicing All Media, Inc., 577 N.Y.S.2d 847 (N.Y.App. 1992) [ELR 14:1:17]

Copyright Infringement/Music.

Metro Program Network, Inc. and Gerald Fitzgerald own and operate television station KOCR in Cedar Rapids, Iowa. The Metro parties failed to pay Broadcast Music, Inc. the amounts due under a contract for the performance of music on KOCR. BMI sued the Metro parties, alleging that the station engaged in the unauthorized performance of copyrighted works.

A Federal District Court in Iowa rejected the Metro parties' argument that the declaration of a witness was not a notarized affidavit, and found that Metro and Fitzgerald, the president and sole shareholder of the corporation, were vicariously liable as infringers for the performance of the copyrighted music by the television station. Judge David R. Hansen granted BMI's request for permanent injunctive relief and costs and attorneys fees, and awarded the performing rights society \$5,000

for each infringement for a total of \$60,000 in statutory damages.

Broadcast Music, Inc. v. Metro Program Network, Inc., Case No. 90-57 (N.D.Iowa, Sep. 23, 1991) [ELR 14:1:17]

Copyright Infringement/Music.

A Federal District Court in Alabama has granted summary judgment to the owners of several musical compositions in a copyright infringement action against the owners of Towne Tavern in Sylacauga, Alabama. It was noted that although three of the infringing performances were played on a jukebox located in the tavern, Towne Tavern was not entitled to the "jukebox exemption" under section 116 of the Copyright. To qualify for the

exemption, a jukebox must be located in an establishment making no direct or indirect charge for admission. At the time in issue, the tavern charged an admission or cover charge of \$2.00. The jukebox performances were infringements regardless of whether the machine itself was covered by a compulsory jukebox license, stated the court.

Lindell Bates, the co-owner, along with Towne Tavern, Inc., of the tavern, claimed that he did not supervise the playing of the copyrighted songs. Bates was the sole stockholder of Towne Tavern, Inc. and the corporate president; was actively involved in the tavern's business; and received income from the company. Judge Hancock found that Bates had the ultimate authority over the activities of the corporation, as well as a direct financial interest in the business. The fact that an employee handled day-to-day matters and that Bates did not select the music played in the club was declared irrelevant.

Judge Hancock awarded the copyright owners a total of \$10,000 in statutory damages, an injunction prohibiting further infringing performances, costs and reasonable attorneys fees.

Chi-Boy Music v. Towne Tavern, Inc., 779 F.Supp. 527 (N.D.Ala. 1991) [ELR 14:1:17]

Copyright Infringement/Music.

A Federal District Court in Florida has granted summary judgment to the copyright owners of five musical works in an infringement action against Alfred L. Cohen, the owner of Cafe Continental, Inc. in Fort Lauderdale. Cafe Continental had filed for reorganization under Chapter 11 of the United States Bankruptcy Code, citing the "potentially large judgment...and massive attorneys'

fees" to which the corporation might be subject in the lawsuit filed by the copyright owners.

The bankruptcy proceedings operated as a stay of the action as to the corporation, but did not bar suit against Cohen, stated Federal District Court Judge Paine.

The court, accordingly, granted the copyright owners a permanent injunction barring Cohen from performing the infringed compositions without a license, and awarded statutory damages in the amount of \$1,500 per infringement.

Morley Music Co. v. Cafe Continental, Inc., 777 F.Supp. 1579 (S.D.Fla. 1991) [ELR 14:1:18]

Cable Channel Marketing.

The state of Florida claimed that Storer Communications violated the Communications Fraud Act and the Deceptive and Unfair Trade Practices Act in connection with the marketing of "Encore," an all new cable channel. The negative option plan used to market Encore involved mailing at least eight different notices to existing cable subscribers about the new channel. The notices informed subscribers that they would receive Encore free of charge in June 1991; that from July 1991 until May 1992, the subscribers would be billed \$1.00 a month for the channel; and that subscribers could cancel Encore to avoid the monthly charge. Subscribers were provided with information about various methods available to cancel the channel

A trial court granted the state's motion for a temporary injunction barring Storer from continued marketing of Encore and from providing the Encore channel unless a cable subscriber expressly gave prior approval to receive the new channel.

A Florida appellate court has reversed the trial court's decision. It was noted that neither state nor federal laws prohibit the use of negative option plans, and that the trial court's order recognized that negative option plans were not illegal per se. Encore was a "one time offer," stated the court - Storer did not plan to mail a list of movies each month which the subscriber would have to reject each and every month. The marketing of Encore did not qualify as a negative option plan as the term was used in the Federal Trade Commission regulations, and those regulations did not provide a basis for determining whether the challenged marketing scheme constituted a deceptive and unfair business practice.

Furthermore, the state did not establish that the marketing plan was unfair or deceptive - at best, it may have been shown that the Encore plan was "confusing." The

court reversed and remanded the matter without prejudice.

Judge Garrett concurred in the finding that the state failed to establish a right to the temporary injunction, but would not have remanded the matter to allow the state to seek permanent injunctive relief. Judge Garrrett stated that before the state could proceed further, it was required to set forth rules specifying that the Encoretype marketing plan would be prohibited under the applicable state law and specifying the type of conduct which would be considered deceptive or unfair in connection with such marketing.

Storer Communications, Inc. v. State of Florida, Department of Legal Affairs, 591 S.2d 238 (Fla.App. 1991) [ELR 14:1:18]

Cable Television Regulation.

A Federal District Court in Florida has upheld a Riviera Beach ordinance regulating cable television franchises in the city.

In a lengthy opinion, Judge Marcus reviewed the background of Telesat Cablevision's attempt to obtain a franchise to operate a cable system using public rights-of-way within the city, and reviewed the terms of the challenged ordinance.

In finding that the city's regulation of cable television did not violate the First Amendment or federal and state guidelines, the court first observed that although the public property in the case was a non-public forum, the city had a reasonable basis for regulating cable operators due to concerns about physical scarcity and disruption of public property. The court also upheld the city's requirement that cable operators provide service

throughout the city's boundaries as a condition for being franchised. Judge Marcus rejected Telesat's argument that the universal service requirement operated as a content-based regulation by purportedly interfering with the company's editorial discretion concerning "to whom, when, and where to distribute its cable programming." The city was not requiring Telesat to carry particular programming.

Telesat further argued that even if the franchise requirements were considered content-neutral, the requirements did not meet either a substantial government interest or a rational basis test. However, noted Judge Marcus, in the event a municipality is concerned about "redlining," the Cable Act does not preclude a universal service requirement.

The city's remaining requirements did not appear to the court to be irrational or unreasonable. Judge Marcus

concluded by rejecting Telesat's equal protection argument.

Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F.Supp. 383 (S.D.Fla. 1991) [ELR 14:1:18]

Cable Television Franchise.

Cox Cable Communications operated a cable television system which provided exclusive service to Warner Robins Air Force Base in Georgia. The company had a ten year franchise which expired in February 1983. When the Air Force solicited competitive bids for cable service to the base, Centerville Telecable won the contract.

Cox obtained a preliminary injunction allowing it to remain on the base. The company then sought a permanent

injunction to prevent the Air Force from interfering with its provision of cable service to the base.

A Federal District Court in Georgia, in determining whether Cox was entitled to First Amendment protection, noted that Centerville claimed that an exclusive franchise was justified because the base was a natural monopoly. The court concluded that the natural monopoly theory did not apply to cable television. Since the number of cable channels is "practically limitless," stated Judge Fitzpatrick, the standard of First Amendment review applied to physically scarce radio airwaves would not apply; rather, cable television would be entitled to the same First Amendment protection as newspapers.

Judge Fitzpatrick further found that granting an exclusive franchise would not serve an important or substantial governmental interest, and stated that Cox established that its constitutional rights were violated.

Cox thus showed that it was likely to suffer irreparable injury, arising from the loss of First Amendment freedoms and from the disruption of the company's service and the ensuing loss of good will. Cox also established that it had an inadequate remedy at law, and the court therefore granted the company's motion for a permanent injunction.

Cox Cable Communications, Inc. v. United States, 774 F.Supp. 633 (M.D.Ga. 1991) [ELR 14:1:19]

School Extracurricular Activities.

A Texas statute required students to maintain a 70 average in their course work to be eligible to participate in extracurricular activities; the statute was amended to clarify standards for the suspension of handicapped

students. A class consisting of all learning disabled public school children challenged the statute on various grounds.

A Texas appellate court, after finding that the amendment of the statute did not render moot the issues concerning the application of the amended statute to the class, proceeded to determine that the court lacked jurisdiction to review the trial court's judgment on the class's application for injunctive relief. The trial court had concluded that equitable relief was inappropriate because the class did not pursue its administrative remedies. The appellate court agreed that it lacked jurisdiction, due to the failure to exhaust administrative remedies, to consider an appeal based on the alleged violations of the federal Education of Handicapped Act, the Fourteenth Amendment of the United States Constitution or the Rehabilitation Act.

Judge Sam Bass then found that "those handicapped students who do not meet the requirements of their [Individual Education Plan] do not constitute the type of discrete, insular minority necessary to constitute a 'suspect class'" under the Texas Constitution. The Texas Supreme Court had ruled that participation in extracurricular activities was not a fundamental right. Judge Bass, accordingly, found that the amendment was not subject to strict scrutiny and that "the classification of handicapped students into those who meet the requirements of their IEP and those who did not, for the purpose of determining whether to allow them to participate in extracurricular activities is rationally related to the state's legitimate state interest in providing a quality education to Texas' public school students." The claim

was rejected.

And the trial court's finding that the statute did not discriminate against minorities in violation of Title VI of the Civil Rights Act of 1964 also was upheld.

Texas Education Agency v. Stamos, 817 S.W.2d 378 (Tex.App. 1991) [ELR 14:1:19]

School Athletics.

A Federal District Court in Rhode Island has ruled that Brian Kleczek was not entitled to a preliminary injunction preventing the Rhode Island Interscholastic League from interfering with Brian's participation in interscholastic field hockey. Brian had joined his high school's girls' field hockey team; the high school did not have a boys' field hockey team. The court found that Kleczek's parents did not demonstrate a likelihood of success on the merits of their Title IX claim. There was no showing that either the league or the high school received federal financial assistance; the overall athletic opportunities for males at the high school had not been limited; and the evidence indicated that field hockey was not a "non-contact" sport.

The Kleczeks also were not likely to prevail on the merits of their equal protection claim, ruled the court, stating that it was "beyond question that redressing the disparate athletic opportunities available to males and females is an important governmental interest...excluding males from female teams is substantially related to achieving that objective."

The court pointed out that if the Kleczeks' federal claims are proven to be without merit, the court would have the discretion to refuse to exercise pendent jurisdiction over the state claims.

It also was noted that Brian would not suffer irreparable injury upon the denial of the motion for a preliminary injunction - the case should be reached on its merits before Brian's high school eligibility expires, declared the court. Judge Lagueux stated that a balancing of the equities was in the league's favor, and that allowing injunctive relief would not only affect the parties to the action, but all those associated with interscholastic field hockey in Rhode Island - consideration of their interest in well-settled rules was another factor prompting the denial of the Kleczeks' motion.

Kleczek v. Rhode Island Interscholastic League, 768 F.Supp. 951 (D.R.I. 1991) [ELR 14:1:19]

Horse Racing.

The New York State Racing and Wagering Board denied an application for renewal of a harness racing owner's license, citing the allegedly false statements in owner's 1989 and 1990 license applications and the owner's lack of "the requisite character and general fitness" in purportedly failing to disclose, or only partially disclosing, his record of arrests and ejections from various race tracks.

The owner claimed that he was penalized for exercising his Fifth Amendment privilege against self-incrimination by not being allowed to testify on his own behalf.

A New York appellate court, in upholding the Board's decision, noted that the owner had refused to answer all of the Board's questions and that while the owner had showed that the Board had granted licenses to other persons with criminal records, it was not shown that their

particular situations were similar to his or that they also failed to disclose their criminal records.

Agnello v. Corbisiero, 576 N.Y.S.2d 541 (N.Y.App. 1991) [ELR 14:1:20]

Photography/Damages.

International Record Syndicate hired Jeff Baker to take photographs of the musical group Timbuk-3. Baker mailed thirty-seven negatives to the company. When the negatives were returned, holes had been punched in thirty-four of them.

A trial court jury awarded Baker \$15,000 in actual damages and \$5,000 for attorneys' fees. The trial court agreed with the attorneys' fee award, but rendered judgment in the amount of \$51,000 in actual damages, based

on a liquidated damages clause setting damages at \$1500 per negative. However, the trial court later modified the judgment, awarded Baker \$15,000 and eliminated the attorneys' fee award.

A Texas appellate court has reversed the trial court ruling, and held that the liquidated damages clause was enforceable. Chief Judge Enoch noted that the clause stated: "[r]eimbursement for loss or damage shall be determined by a photograph's reasonable value which shall be no less than \$1500 per transparency." The court considered Baker's past earnings from sales of photographic works, the "potential for fame" of the group Timbuk-3, and the inherent difficulty in determining the value of a piece of art in concluding that \$1500 was not an unreasonable estimate of Baker's actual damages. Furthermore, the parties had agreed, via the liquidated damages clause, as to a reasonable measure of damages.

The court entered judgment for Baker in the amount of \$51,000 for actual damages and \$5000 for attorneys' fees.

Baker v. International Record Syndicate, Inc., 812 S.W.2d 53 (Tex.App. 1991) [ELR 14:1:20]

Photography.

Redbook magazine lost fourteen of photographer Penny Gentieu's transparencies from a shooting session. When Gentieu sought damages, the magazine argued that the photographer was paid \$5,500 for the one day's work.

A New York trial court stated that the fee did not include the purchase of any transparencies, and noted that

the court, in a prior ruling, had granted Gentieu's motion for summary judgment on the issue of liability.

Redbook argued that Gentieu's request for \$1,500 per transparency was unreasonable. Judge Fisher-Brandveen pointed out that the American Society of Magazine Photographers set a \$1,500 minimum figure for the loss of an original color transparency. In setting a value for the lost transparencies, the court considered such factors as "technical excellence, the selective eye of the photographer, the established prestige and earning level of the photographer, the uniqueness of subject matter, established sales and use prices and the frequency of acceptance by users." It was noted that Gentieu was an experienced professional specializing in photographing babies and mothers, and the fact that Redbook chose the fourteen lost transparencies meant that "they must have had some esthetic uniqueness about them to render them acceptable."

In all, the court concluded that \$1,500 per transparency was not an unreasonable figure and that Gentieu was entitled to a total of \$21,000 for the lost works.

Gentieu v. The Hearst Corp., New York Law Journal, p. 27, col. 2 (N.Y.Cnty., Feb. 25, 1992) [ELR 14:1:20]

Convict Publishing.

Elizabeth Diane Downs was convicted of the murder of her daughter and attempted murder of her two other children. Downs agreed to write a book for Danmark Publishing about the incident. Danmark was created by Downs' father and her family for the purpose of publishing the book. The contract provided for royalty payments, with a \$500 annual maximum on payments to Downs and allowed the company to deduct from

contract payments any money Downs owed Danmark, whether or not arising out of the contract.

Under Oregon law, funds that would otherwise be paid to a person convicted of a crime under a contract for a book describing the person's "thoughts, opinions or emotions about the crime" must be paid to the state's Department of Justice for deposit into an escrow account for the benefit of victims of the crime.

The department concluded that the royalty and commission percentages and the annual cap on royalties were "artificially low." There was testimony indicating that Downs expected that Danmark would "surreptitiously" provide her with more money from the sale of the book than was provided in the contract. The department declared that certain provisions of the contract were void because the provisions were entered into to defeat the purpose of the victims compensation statute.

An Oregon appellate court has ruled that the department did not have the statutory authority to modify the contract between Danmark and Downs by replacing the void royalty and commission provisions with provisions for the payment of those sums that Downs could reasonably have been expected to obtain.

Danmark Publishing, Inc. v. Department of Justice, 816 P.2d 629 (Ore.App. 1991) [ELR 14:1:21]

Previously Reported:

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: BMG Music v. Perez, 952 F.2d 318 (13:10:8); Dorsey v. National Enquirer, Inc., 952 F.2d 250 (13:11:9); Edison Brothers Stores, Inc. v. Broadcast

Music, Inc., 954 F.2d 1419 (13:9:8); General Mills, Inc. v. Filmtel International, 577 N.Y.S.2d 384 (13:6:9); Grand Upright Music Limited v. Warner Brothers Records, Inc., 780 F.Supp. 182 (13:11:8); Hendy v. Losse, 1 Cal.Rptr.2d 543 (13:8:17); In re Qintex Entertainment, Inc., 950 F.2d 1492 (13:8:11).

The United States Supreme Court has let stand the decisions in Midler v. Young & Rubicam, Inc. (13:9:4) and Penthouse International v. Meese (13:9:11).

In late 1991, according to news reports, Rodney Dangerfield and Caesars Palace settled a claim arising from an eye injury sustained by Dangerfield in a 1988 steam room accident at the hotel. A Federal District Court (ELR 13:4:19) had reduced to \$50,000 a jury award of \$500,000 in damages for pain and suffering. Dangerfield had the option to accept the reduced award or to seek a new trial. The terms of the settlement were not disclosed.

United States of America v. American Society of Composers, Authors and Publishers, In the Matter of the Application of Turner Broadcasting System, has been published at 782 F.Supp. 778. The District Court decision, reported at ELR 13:8:6, held that ASCAP must provide source licenses and per-program licenses to cable program suppliers.

A Federal Court of Appeals, in a per curiam decision published at 956 F.2d 21, has affirmed the judgment of the District Court "substantially for the reasons stated by Magistrate Judge Dolinger."

According to news reports, the New York Court of Appeals has refused to hear Hwesu Murray's action against the National Broadcasting Company.

Murray claimed that the television series "The Cosby Show" was based on a proposal Murray submitted to NBC.

A trial court had ruled (ELR 12:7:16) that Murray's causes of action for unfair competition, breach of the duty of care, and race discrimination arose out of the same set of facts as those alleged by Murray in a federal court action (ELR 11:9:11; 10:7:8; 9:10:4).

In 1988, the United States Supreme Court refused to hear the federal claims.

[ELR 14:1:21]

DEPARTMENTS

In the Law Reviews:

Capital University Law Review has published a Symposium on the Reform of Big-Time Intercollegiate Athletics with the following articles:

NCAA Enforcement Process: A Call for Procedural Fairness by C. Peter Goplerud III, 20 Capital University Law Review 543 (1991)

A Commentary on Professor Goplerud's Article "NCAA Enforcement Process: A Call for Procedural Fairness" by LeRoy Pernell, 20 Capital University Law Review 561 (1991)

Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics by Rodney K. Smith, 20 Capital University Law Review 567 (1991)

Values and Schizophrenia in Intercollegiate Athletics by Gregory M. Travalio, 20 Capital University Law Review 587 (1991)

Athletic Reform: Missing the Bases in University Athletics by Robert N. Davis, 20 Capital University Law Review 597 (1991)

What Are the Bases in University Athletics: A comment on "Athletic Reform: Missing the Bases in University Athletics" by Deborah A. Katz, 20 Capital University Law Review 611 (1991)

Is the Federal Government Suiting Up to Play in the Reform Game? by David Williams, II, 20 Capital University Law Review 621 (1991)

Unreasonable NCAA Eligibility Rules Send Braxston Banks Truckin' by Ethan Lock, 20 Capital University Law Review 643 (1991) Educational Values: A Necessity for Reform of Big-Time Intercollegiate Athletics, 20 Capital University Law Review 661 (1991)

The Reform of Women's Intercollegiate Athletics: Title IX, Equal Protection, and Supplemental Method, 20 Capital University Law Review 691 (1991)

Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception by Lillian R. BeVier, 78 Virginia Law Review 1 (1992)

International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News by Richard A. Epstein, 78 Virginia Law Review 85 (1992)

On Owning Information: Intellectual Property and the Restitutionary Impulse by Wendy J. Gordon, 78 Virginia Law Review 149 (1992)

An Economic Analysis of Copyright Collectives by Stanley M. Besen, Sheila N. Kirby and Steven C. Salop, 78 Virginia Law Review 383 (1992)

Beyond Betamax and Broadcast: Home Recording From Pay Television and the Fair Use Doctrine by Joni Lupovitz, 22 Fordham Entertainment, Media and Intellectual Property Law Forum 69 (1992)

Incidental Artwork in Television Scene Backgrounds: Fair Use or Copyright Infringement?, 2 Fordham Entertainment, Media & Intellectual Property Law Forum 159 (1992)

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: The Demise of New York's Son of Sam Law and the Decision that Could Have Been, 2 Fordham Entertainment, Media & Intellectual Property Law Forum 193 (1992)

Rap Parodies?: An In-Depth Look at Acuff-Rose Music, Inc. v. Campbell, 2 Fordham Entertainment, Media & Intellectual Property Law Forum 239 (1992)

Copyright Law's Broken Rear Window: An Appraisal of Damage and Estimate of Repair by Daniel A. Saunders, 80 California Law Review 179 (1992)

"Warning: Explicit Language Contained" Obscenity and Music by Keith S. Furer, 9 New York Law School Journal of Human Rights 461 (1992)

Women & Athletics: A Twenty Year Retrospective on Title IX by Diane Heckman, 9 University of Miami Entertainment & Sports Law Review 1 (1992)

"Television Without Frontiers": Possible U.S. Responses by Vincent Bela Feher, 9 University of Miami Entertainment & Sports Law Review 65 (1992)

Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach by Matthew W. Wallace, 9 University of Miami Entertainment & Sports Law Review 121

Will the Real Bette Midler Please Stand Up? The Future of Celebrity Sound-Alike Recordings by Sharon Chester-Taxin, 9 University of Miami Entertainment & Sports Law Review 165 (1992)

ENTERTAINMENT LAW REPORTER

Look What They've Done to My Song Ma - Digital Sampling in the 90's: A Legal Challenge for the Music Industry by James P. Allen, Jr., 9 University of Miami Entertainment & Sports Law Review 179 (1992)

Barnes v. Glen Theatre, Inc.: The Naked Truth by Kathleen T. Gibson, 9 University of Miami Entertainment & Sports Law Review 201 (1992)
[ELR 14:1:22]