RECENT CASES

National Endowment for the Arts' "decency clause" violates First and Fifth Amendment

The National Endowment for the Arts, created by Congress in 1965 as part of the National Foundation on the Arts and Humanities, was authorized to provide grants-in-aid to individuals involved with the arts. A Council on the Arts, with 26 members appointed by the President, reviews grant applications. The Chairperson of the Endowment then approves or disapproves the applications.

In mid-1990 performance artists Karen Finley, John Fleck, Holly Hughes and Tim Miller submitted grant applications. A Performance Artists Program Peer Review recommended funding, but John E. Frohnmayer, the

Chairperson of the Endowment, asked the Panel to reconsider three of its recommendations (apparently Frohnmayer had received a report from friends that Karen Finley's show was not obscene). Although the Panel, after reconsideration, again unanimously recommended the approval of the requested funding, the Endowment denied the applications. Several newspaper articles about the incident included references to the artists' Endowment application files; some articles cited the Endowment as the source of their information.

The performance artists brought a lawsuit alleging that the Endowment and other parties violated their First Amendment rights by denying their applications because of the content of their past work and by failing to provide a written statement of reasons for the denial; violated their rights under the National Foundation on the Arts and the Humanities Act of 1965 by basing the denials on criteria other than those set forth by statute and

by failing to follow statutory procedures; and violated the Privacy Act.

In November 1990, Congress amended the Endowment's governing statute by, in part, adding a provision requiring that the Endowment consider "general standards of decency and respect for the diverse beliefs and values of the American public" in making funding determinations. Subsequently, the National Association of Artists' Organizations joined the artists in filing an amended complaint challenging the new provision under the Fifth Amendment as well as under the First Amendment.

A Federal District Court in California has ruled that the "general standards of decency" clause violates the First and Fifth Amendments.

Judge A. Wallace Tashima first noted that the artists applied for funding to support their professional growth and development, rather than to fund a specific work or

project. The Endowment, in denying the grants, could not have been aware of the content of the artists' future works. It was found that the artists sufficiently stated a claim that their applications were denied based on the content of their past work, amounting to a penalty for past speech.

The argument that the Endowment did not provide the artists with a written statement of reasons for the denials did not state a claim under the First Amendment, determined the court, but the artists did state claims that the funding denial violated the Endowment's governing statutes and the Administrative Procedure Act, and that they were entitled to relief under the Privacy Act.

In turning to the artists' motion for summary judgment, the court, after finding that the artists and the Association had standing to challenge the decency clause, noted, contrary to the Endowment's argument, that it was clear from the language of the statute that the Endowment

was required to consider "decency" and "respect" for diverse beliefs in determining "artistic merit" and eligibility for funding. Judge Tashima found that the decency provision failed to adequately notify applicants of what is required of them or to circumscribe the discretion of the Endowment, and therefore violated the due process requirement of the Fifth Amendment.

The court next considered the artists' analogy comparing funding for the arts to funding of public universities. In both situations, limited public funds are allocated to support expressive activities, stated the court, and some content-based decisions are "unavoidable." However, continued Judge Tashima, "this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university, nor should it provide such license in the arts funding context...professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of 'decency' are

not...The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom..." The court, accordingly, held that government funding of the arts is subject to the First Amendment, and that the decency clause, extending to protected speech and artistic expression, violated the First Amendment for overbreadth.

Finley v. National Endowment for the Arts, Case No. CV 90-5236 (C.D.Ca., June 9, 1992) [ELR 14:3:3]

Criminal copyright infringement convictions arising from counterfeiting of audio cassettes and labels is upheld

Pedro and Jose Hernandez were convicted of four felonies relating to the counterfeiting of audio cassettes and

labels. A Federal Court of Appeals in California has affirmed the convictions.

The search of a self-storage unit and a warehouse used by the Hernandez brothers revealed 124 cassette tapes, several boxes for cassette tapes, 11,700 completed counterfeit cassette tapes, 40,000 partially-completed counterfeit cassette tapes, a wall of blank cassette tapes in boxes, 2.6 million counterfeit J-cards (the piece of paper that wraps up the cassette inside the plastic library box and contains the photo of the group performing on the tape and trademark), and other items used to produce cassette tapes.

The Hernandezes were indicted on charges of conspiracy to traffic in counterfeit labels and goods, and criminal copyright infringement. The court denied Jose Hernandez's motion to sever his trial. After the jury verdict, the court sentenced each brother to seventy-one months in prison.

Judge Trott found that there was sufficient evidence to sustain the verdicts. The evidence established that the Hernandez brothers were connected to the conspiracy and knowingly intended to further its illegal objectives.

The denial of Jose Hernandez's motion for a separate trial was upheld. The court rejected Pedro Hernandez's arguments that he would have testified at a severed trial that Jose was not involved in Pedro's legitimate record distribution business and that his brother was too unsophisticated to understand that he was involved in a counterfeiting operation.

During the trial, a juror reported that he observed Jose make "a slit across his throat, a motion to the witness who was on the stand." The court and counsel agreed that the gesture "could have been a threat," and the court proceeded to admonish the entire jury that the only evidence to be considered in the case would be the evidence from the witness stand and physical items of

evidence. Judge Trott rejected Jose Hernandez's argument that the court should have declared a mistrial. It was not plain error for the District Court to continue the trial after Hernandez's gesture. And even if Hernandez did preserve the issue for appeal, he was not entitled to a new trial, for, given the evidence and viewed in the context of the entire trial, the court reasonably concluded that Hernandez's gesture would not affect the jury's verdict.

The District Court calculated a probable or intended loss of about $10.4 million, by using a $4 per tape estimate, reflecting the average market value of the tapes counterfeited. Judge Trott found that the District Court correctly used the number of J-cards in calculating the loss, even though the counterfeiting operation did not actually produce or sell that many tapes.

The Hernandezes questioned the District Court's use of the market value of the tapes rather than the profit lost

by the victim, the recording industry. But Judge Trott pointed out that the Hernandezes' method would have required "detailed information and complex economic calculations" - the sentencing guidelines did not require such precision. The market value of the counterfeited tapes was a reasonable value to use in a copyright case, declared the court, and $4 per tape was not an unreasonable estimate of market value.

United States v. Hernandez, 952 F.2d 1110 (9th Cir. 1991) [ELR 14:3:4]

CBS, not syndicator, is entitled to cable retransmission royalties

In 1970, CBS assigned to Viacom International all of CBS's syndication rights to specified television

programs. Viacom was entitled to retain a specified percentage of the gross receipts obtained from program syndication, with CBS receiving the balance of the income.

After the enactment of the Copyright Act of 1976, Viacom applied for and received royalties from the Copyright Royalty Tribunal. The royalties, which accrued from the cable retransmission of the programs covered under the agreement, were included in the gross receipts used to determine Viacom's distribution fee.

CBS claimed that it was entitled to one hundred percent of the Copyright Royalty Tribunal royalties because the royalties were not included in the grant of syndication rights under the agreement and thus would not be included in the gross receipts.

A New York trial court has agreed with the decision in Barris Industries, Inc. v. Worldvision Enterprises, Inc., 875 F.2d 1446 (1989; ELR 11:10:19; 11:6:15) to the

extent that where the copyright is divided between two parties, as in the instant case, it is not the general rule that the distributor of the programs to over-the-air television is entitled to retain the statutory cable royalties.

In reviewing the parties' agreement, Judge Moskowitz pointed out that CBS did not expressly grant to Viacom the right to license the retransmission of broadcast programming by cable operators, and that Viacom's compensation under the agreement was set as a percentage of the fees derived from the company's licensing activities. Viacom's expectations under the agreement were "expressly limited to a percentage of the licenses it was able to sell and did not include any other type of renumeration [sic]." CBS reserved any revenue that might arise from a source other than Viacom's syndication venture, declared the court, in granting CBS partial summary judgment on various breach of contract claims.

CBS, Inc. v. Viacom International, Inc., New York Law Journal, p. 22, col. 1, (N.Y.Cnty., May 22, 1992) [ELR 14:3:4]

Bankruptcy Court decision allowing NBC to setoff DeLaurentiis Entertainment Group advertising debt is affirmed

DeLaurentiis Entertainment Group arranged to purchase $1.6 million in television advertising from the National Broadcasting Co. DeLaurentiis was not directly a party to the purchase contract; NBC billed the advertising agency, BBDO, which in turn billed DeLaurentiis. Neither DeLaurentiis nor BBDO had paid the $1.6 million to NBC at the time DeLaurentiis filed for bankruptcy protection under Chapter ll.

NBC filed a proof of claim asserting the advertising obligation and seeking a right of setoff against a $1.25 million debt to DeLaurentiis in connection with the televising of the DeLaurentiis film "Manhunter." The Bankruptcy Court converted the claim into an adversary proceeding.

In May 1990, the Bankruptcy Court confirmed a reorganization plan whereby most of DeLaurentiis's assets were purchased by Carolco Television, Inc., merged with a Carolco subsidiary and renamed CTI. Under the plan, CTI acquired the rights to the $1.25 million claim against NBC "free and clear" of all pre-bankruptcy claims or interest not listed in the reorganization plan. NBC's $1.6 million claim was not listed in the plan; NBC did not object to the plan or contest the order confirming the plan.

In July 1990, CTI intervened in the NBC-DeLaurentiis proceeding, asserting its right to the $1.25 million. NBC

again asserted its right to a setoff. The Bankruptcy Court concluded that disputed issues of fact as to whether BBDO had acted as DeLaurentiis's agent in buying advertising from NBC precluded summary judgment on NBC's contract claims. The court, however, granted NBC summary judgment on a quantum meruit claim against DeLaurentiis, and concluded that NBC was entitled to assert its quantum meruit claim as a setoff against CTI.

A Federal District Court upheld the Bankruptcy Court's decision, on the basis of the Bankruptcy Court's finding that DeLaurentiis benefitted from the time provided by NBC "at DEG 's special instance and request" (emphasis added by Federal Court of Appeals in affirming the District Court's decision).

Judge Dorothy W. Nelson noted that CTI agreed that DeLaurentiis had requested that BBDO purchase advertising time for its benefit from NBC, and that

DeLaurentiis received a benefit from NBC. CTI argued that quantum meruit recovery would be improper because NBC expected to be paid by BBDO, not DeLaurentiis.

Judge Nelson pointed out that the majority of California cases support the position that a party seeking recovery must have expected compensation "only in the sense that the services rendered must not have been intended to be gratuitous" - an expectation of payment by the party being sued is not required. The "whole point" of quantum meruit recovery, stated the court, is to compensate parties who have provided a benefit but who do not have a contract - express or implied with the party receiving the benefit.

The Bankruptcy Court and the District Court had allowed NBC to setoff the $1.6 million claim, rejecting CTI's argument that NBC lost its right to a setoff when

DeLaurentiis's Chapter 11 reorganization plan was confirmed.

Section 1141 of the Bankruptcy Code provides for the discharge of pre-petition debts after a debtor goes through bankruptcy. It also provides that any assets retained by the debtor under the plan of reorganization are free and clear of any pre-petition debts.

Section 553 of the Bankruptcy Code allows a creditor to set off a claim that the debtor owes against the claim that the creditor owes the debtor, as long as both debts arose before the bankruptcy. It appeared to the court the sections were in direct conflict in the instant case. After reviewing analogous case law and considering the language and structure of the statute, Judge Nelson concluded that section 553 would take precedence over section 1141. Section 553 provides, in relevant part, that "this title does not affect the right of any creditor to offset a mutual debt..." For the court, the statutory language

established a right to setoffs in bankruptcy, subject to specified exceptions, and "seems intended to control notwithstanding any other provision of the Bankruptcy Code."

A contrary conclusion, continued the court, essentially would nullify section 553. If section 1141 took precedence over section 553, setoffs would be allowed under Chapter 11 only when written into a plan of reorganization. Section 553 would be largely superfluous, stated Judge Nelson, since a setoff could be written into the reorganization plan even without section 553.

The court referred to the "long and venerable" history of setoffs and setoffs in bankruptcy. Giving precedence to section 1141 would reverse a long-standing presumption, declared the court, and if Congress had intended to make such a major change from the common law such as allowing setoffs only if sanctioned in a plan of reorganization, "one might expect some indication of that

intent in the statute itself." Judge Nelson did not find any such indication.

The primacy of setoff also was found essential to the equitable treatment of creditors - the creditor can claim only an amount large enough to offset its debt and cannot collect anything from the debtor.

In the instant case, NBC asserted its setoff during the pendency of the bankruptcy proceedings, and pursued its claim before the Bankruptcy Court. According to Judge Nelson, the Bankruptcy Court "apparently assumed that NBC's claim would survive the order confirming reorganization;" the court scheduled discovery and other proceedings after the reorganization plan was confirmed.

Although commenting that the court's decision would place "some burden on the policies of discharge and finality served by section 1141," Judge Nelson again

noted that NBC did not seek to collect its debt from CTI, but merely sought a setoff against CTI's claims.

In re DeLaurentiis Entertainment Group, Inc., Case Nos. 91-55471; 91-55473 (9th Cir., May 7, 1992) [ELR 14:3:5]

"Game Genie" does not infringe Nintendo's copyrighted video games

Lewis Galoob Toys was a licensed distributor of a video game accessory known as the Game Genie Video Game Enhancer, which, as described by Federal District Court Judge Fern M. Smith, attaches to a video game cartridge and allows the player to temporarily alter certain attributes of the video game. The game genie, continued Judge Smith, was sold for personal consumer use

only, not for video game arcades; did not create a separate copy of the original video game; did not make permanent changes to the original game; and could only be used when attached to the original game.

Nintendo of America, Inc., the distributor of home video games hardware systems and video game cartridges sued Galoob for copyright infringement, arguing that the game genie created a derivative work.

The court found that Galoob was not liable for copyright infringement and vacated a pending preliminary injunction.

Judge Smith declared that the use of game genie by consumers to temporarily alter copyrighted video games for the consumer did not create a derivative work - the consumers were not direct infringers, and Galoob was not a contributory infringer. Furthermore, even if the game genie created a derivative product, Galoob was entitled to a fair use defense. And Galoob's use of

copyrighted video games for the purposes of testing or marketing the game genie did not violate any of Nintendo's rights under the Copyright Act, determined the court.

In a lengthy opinion, Judge Smith first described the products involved in the lawsuit - the Nintendo Entertainment System, Nintendo copyrighted video games and the game genie. The court then evaluated Nintendo's claim that the video games modified by the game genie were unauthorized derivative works. It was noted that the parties agreed that it would be acceptable, under the copyright laws, for a noncopyright holder to publish a book of instructions on how to modify the rules or method of play of a copyrighted game. For Judge Smith, the holders of copyrighted video games were not entitled to broader protections or monopoly rights than holders of other types of copyrighted games simply because a more sophisticated technology was involved.

"Having paid Nintendo a fair return," stated the court," the consumer may experiment with the product and create new variations of play, for personal enjoyment, without creating a derivative work."

With respect to the issue of fair use, the court relied on Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984; ELR 5:9:10), in finding that even if the game genie was a derivative work, Galoob still would be exempt from liability. Judge Smith commented that fair use is a privilege against a direct infringement claim, and would be held in the first instance by the alleged direct infringer, in this case, by the person playing the video game. The statutory factors established that a family's noncommercial home use of the game genie created a presumption of fair use, as did the fact that the Nintendo games were published - a party had to acquire a published copy of a Nintendo game before using the game in combination with the game genie.

And although Sony recognized that the reproduction of an entire work ordinarily would weigh against the claim of fair use, in this case, the game owner "who has fairly acquired a Nintendo game has a right to use the entire work. The game owner's rights are equal to, if not greater than, those of the user in Sony, who did not pay for the product being used."

Furthermore, Nintendo did not show that the game genie supplanted the market for the company's copyrighted works - the game genie did not compete for sales with the original copyrighted works for which Nintendo claimed infringement; did not show any injury to the relevant market for the copyrighted works; and did not show that any uses of the game genie would have a harmful effect on sales. Nintendo sought to achieve "the exclusive right to modify game play as it alone sees fit and to maintain game play in its original state." But the Copyright Act protects authorship, not market

psychology, stated the court and the claimed damage resulting from the potential detriment to the "Nintendo Culture" was not cognizable under the Copyright Act.

The court concluded by reiterating that Galoob did not authorize the use of a copyrighted work without actual authority from the copyright owner and by issuing declaratory relief stating that the use of the game genie by consumers, for noncommercial use, did not violate Nintendo's rights under the Copyright Act of 1976, and that Galoob was neither a contributory nor a direct infringer.

Lewis Galoob Toys v. Nintendo of America, Inc., 780 F.Supp. 1283 (N.D.Ca. 1991) [ELR 14:3:6]

Sega Enterprises obtains preliminary injunction in copyright and trademark infringement against computer software distributor

Sega Enterprises develops and markets video entertainment systems, including the Genesis console and video game cartridges. Accolade, Inc. manufactures computer entertainment software, including game cartridges compatible with the Genesis console.

Sega sued Accolade in October 1991, alleging copyright and trademark infringement and unfair competition. A Federal District Court in California has granted Sega's motion for a preliminary injunction to prevent Accolade from disassembling, translating, converting or adapting the copyrighted object code in Sega's game programs, and from using, modifying, enhancing or embellishing Sega's disassembled code in any manner. The court also barred Accolade from developing, manufacturing, and distributing any Genesis-compatible video game programs that were derived from, based upon or otherwise created, in whole or in part, by means which included

the disassembly or translation of the copyrighted object code in Sega's game programs, and from manufacturing or distributing any Genesis-compatible video game program which would prompt the message "Produced by or under license for Sega Enterprises Ltd." when inserted in a Genesis console.

Judge Barbara A. Caulfield noted that Sega claimed that Accolade infringed Sega's copyrights because the Genesis-compatible games allegedly were based upon illegal reproductions and adaptations of Sega's copyrighted works. Accolade argued that Sega was required to establish substantial similarity between the Accolade final product and Sega's final product. But the court, citing Walt Disney Productions v. Filmation Associates, 628 F.Supp. 871 (C.D.Ca. 1986; ELR 8:7:10), stated that intermediate copying may be actionable.

With respect to Accolade's fair use defense, the court pointed out that the copying in issue was undertaken for

financial gain, and involved the creation of a competitive product which would adversely impact the value of the copyrighted work. It also was observed that Sega's disassembled code was an unpublished work and thus was subject to a narrower scope of fair use.

Judge Caulfield stated that the public's need for access to the copyrighted work would be "fully satisfied by the copyright owner's marketing of the original," and rejected any implication that fair use should be allowed in order to gain access. The legislative history indicated that Congress did not intend to provide a fair use exception for intermediate copying of software; the Copyright Act did not provide an exception for intermediate copying of software for the purpose of "reverse engineering."

The court commented that section 117 of the Copyright Act allows an owner of a program to make a copy for personal use. However, Accolade did not copy Sega's game programs for the exclusive purpose of using those

programs, nor for archival purposes, but, again, for the purpose of manufacturing compatible games.

Accolade raised a copyright misuse defense based upon antitrust tying allegations, which the court ordered stricken from Accolade's counterclaim. Judge Caulfield stated that no antitrust violation was alleged and there was no proof of fraud or other clear violation of a legal duty.

Accolade further claimed, unsuccessfully, that the intermediate copying of computer software would assist in developing programs compatible with video game hardware.

In turning to the cause of action alleging trademark infringement, the court noted that Accolade agreed that the false Sega message prompted when Accolade's games were played on the Genesis III console created the strong likelihood of confusion by consumers.

Accolade's functionality defense was rejected, as was the company's claim for false designation of origin.

There was no adequate remedy at law for any damage to Sega's good will and business reputation by Accolade's alleged copyright and trademark infringement, concluded the court in granting the requested injunctive relief.

Sega Enterprises Ltd. v. Accolade, Inc., Case No. C-91-3871 (N.D.Ca., April 13, 1992) [ELR 14:3:7]

Buffalo Board of Education is liable for violating First Amendment rights of teacher who appeared in film project

In 1980, Christie Rothschild and Sanford Morris participated in the production of a videotape at a Buffalo

public school. The teachers were disciplined for their involvement with the project. Rothschild, who was a temporary, untenured teacher at the time, was never rehired by the Board of Education. Morris, a tenured teacher, was not discharged but claimed that after an initial suspension, he was removed from his position as a teacher in the field of communications.

Rothschild sued the board under 1983, alleging the violation of her First Amendment rights. Both teachers asserted claims under New York law based on statements and actions by school officials.

Federal District Court Judge Curtin described the film as "isolated scenes...depicting the fictional adventures of a high school teacher." The film was not pornographic, but included vulgar language, scenes of illegal drug use by high school students, and scenes of individuals in various states of partial undress.

After viewing the film, school officials engaged in the challenged conduct and statements.

A Federal District Court in New York first found that Rothschild was not speaking as an employee when she participated in the making of the film. Under the circumstances of the case, the teacher's off-duty activities, although conducted on school grounds, occurred in her role as a private citizen. And Rothschild's speech - her artistic expression in the form of acting in the film - was constitutionally protected. The court rejected the school officials' claims that action was taken against Rothschild independent of the content of the film itself, concluding that the content of the film remained "at least a substantial or motivating factor in the Board's ultimate decision not to rehire Rothschild. And the school officials did not demonstrate that Rothschild, by participating in the production, impaired the efficiency of the services provided by the school or the Board of Education.

In view of the above-cited factors, the court found that the school officials violated Rothschild's First Amendment rights by suspending and refusing to rehire the teacher on the basis of the content of her protected First Amendment expression.

Judge Curtin then declared that two school officials were entitled to qualified immunity for their roles in the actions taken against Rothschild insofar as their potential personal liability. But the Buffalo Board of Education was found liable for the decision of one of the officials to discipline Rothschild in July 1980 and for the violation of the teacher's First Amendment rights.

The court rejected the teachers' causes of action alleging defamation, prima facie tort, libel by publishing a false criminal complaint, and intentional infliction of emotional distress.

Rothschild v. Board of Education of the City of Buffalo, 778 F.Supp. 642 (W.D.N.Y. 1991) [ELR 14:3:8]

Dispute over "Wedding Bears" trademark is remanded for further proceedings

In 1984, Americana Trading, Inc, doing business as Amtra, began selling pairs of stuffed toy bears under the trademark "Wedding Bears." The bears, dressed as a bride and groom, were connected by strips of velcro on the bears' hands.

In early 1986, Russ Berrie & Co. began distributing teddy bears dressed as brides and grooms. Russ's bears were named "Bride Bear" and "Groom Bear;" a sewn-in "content tag" bore the inscription "Wedding Bear" although the phrase was not used on promotional or sales material.

When Amtra sued Russ for trademark infringement and related state law claims, a Federal District Court entered a preliminary injunction barring Russ from using the "Wedding Bear" mark. Russ complied with the injunction. The court subsequently granted Russ's motion for summary judgment.

A Federal Court of Appeals, in reversing the District Court's decision, noted that the court had held that there was insufficient evidence as a matter of law that "Wedding Bears" had come to be associated with Amtra. The parties agreed that the name was a descriptive mark. But Judge Hall stated that the District Court gave insufficient weight to the fact that the registration of Amtra's mark carried a presumption of secondary meaning.

The District Court determined that Russ's use of "Wedding Bear" was not similar to Amtra's because Russ "did not use that phrase on its hang tags, displays, advertising, or any other material which is apparent to the

purchasers in the retail store." Judge Hall expressed the view that the District Court could not properly determine at summary judgment whether or not the Wedding Bear mark was apparent to consumers - the ruling depended upon assumptions of fact that should have been sent to trial.

Judge Hall commented that the District Court appeared to rely upon Russ's argument that the use of the company's mark on temporary hang tags would serve to negate any likelihood of confusion. However, the prominence of Russ's mark might have created reverse confusion that Russ, and not Amtra, was the source of Amtra's Wedding Bears. In all, the District Court erred by finding no genuine issue of material fact as to similarity of appearance, sound, and meaning.

The District Court also had found that Amtra had not raised a genuine issue of material fact as to actual confusion. Amtra had offered testimony by its owner that

retailers were confused about the source of the bears, and presented sufficient evidence to preclude a finding that there was no issue of fact as to actual confusion.

The court next stated that the trier of fact would have sufficient evidence to conclude that Russ intended to infringe Amtra's mark. The District Court thus correctly held that Amtra had raised a genuine issue of material fact concerning Russ's intent to infringe.

In addition to the above factors, the court pointed out that the products were "virtually identical" and were sold through similar channels, and concluded by reversing the judgment of the District Court.

Federal Senior District Court Judge Burns dissented (without writing an opinion).

Americana Trading Inc. v. Russ Berrie & Co., Case No. 88-15334 (9th Cir., June 2, 1992) [ELR 14:3:8]

New York Times may not obtain release of Challenger tape from NASA

As reported at ELR 13:4:13, 10:8:12, the National Aeronautics and Space Administration has refused to release a tape of the voice communications aboard the tragic flight of the Challenger space shuttle, although the agency released a transcript of the tape. When the New York Times filed a Freedom of Information Act claim. a Federal District Court held that the tape was not exempt from release because it was not within the category of "personnel and medical files and similar files" to which the exemption applied. A Federal Court of Appeals initially affirmed the District Court's decision.

The Federal Court of Appeals, on rehearing en banc, reversed, by a 6-5 vote, the District Court's decision, and remanded the matter. On remand, Federal District Court Judge Norma Holloway Johnson granted the

agency's motion for summary judgment. The court noted that the statute provided that an agency may not disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The privacy interest asserted on behalf of the Challenger families was a "valid and substantial one," declared the Judge Johnson. Although the agency agreed that the substantive information contained in the tape was technical and nonpersonal, the privacy interest involved in the tape was the sound of the astronauts' voices, for "how (emphasis by the court) the astronauts said what they did, the very sound of the astronauts' words, does constitute a privacy interest."

The privacy interest was substantial, continued the court, in that the families might be subject to media calls "as well as a disruption of their peace of mind every time a portion of the tape is played within their hearing."

Judge Johnson then stated that it did not appear that the release of the disputed tape would serve the public interest in learning about the agency's conduct "before, during, and after the Challenger disaster." The speculative nature of the material sought precluded any finding that the information would "significantly contribute" to the public understanding of the Challenger disaster.

New York Times Company v. National Aeronautics and Space Administration, 782 F.Supp. 628 (D.D.C. 1991) [ELR 14:3:9]

Ruling on broadcaster's request for access to videotapes of state correctional facilities is upheld

When the operator of a television station in Buffalo, New York, attempted to obtain all videotapes taken in

the course of a 1988 prisoners' uprising at the Coxsackie Correctional Facility, and for all videotapes taken at Attica Correctional Facility during 1987 and 1988, a New York appellate court rejected the state's claim to a blanket exemption from disclosure under the Freedom of Information Law, and granted conditional access to the broadcaster (ELR 12:9:13).

The correctional authorities then reviewed the tapes and redacted those portions of the Coxsackie facility tapes which purportedly involved safety concerns with respect to the techniques, weapons and equipment used by correctional personnel in suppressing prison disturbances or information on the facility's physical layout which might be useful for an inmate uprising or escape. The correctional officials also claimed that all 315 tapes of the Attica Special Housing Unit were exempt from disclosure, essentially on the ground, as described by a New York appellate court, that "the extreme

dangerousness of the inmate population of that unit requires that operations of the unit and even its physical configuration be shrouded in total secrecy."

A New York trial court, after an in camera review of the redactions and the withheld tapes, rejected the correctional officials' claim as to the exemption for the Coxsackie material based on the danger to personal safety. The court found that the disclosure of the material would not create serious safety risks.

The court also rejected the officials' refusal to disclose the Attica material, although upholding specific redactions involving possible invasions of personal privacy or the endangerment of prison security and the personal safety of the correctional staff. The court permitted the redaction of a tape showing the security system switchboard at the Attica facility.

The appellate court has upheld the trial court's ruling.

Buffalo Broadcasting Company, Inc. v. New York State Department of Correctional Services, 578 N.Y.S.2d 928 (N.Y.App. 1992) [ELR 14:3:9]

FCC decision on Orlando, Florida television license is upheld

A Federal Court of Appeals has upheld a decision by the Federal Communications Commission to grant Reece Associates a license to build a new UHF television station in Orlando, Florida. It was found that the Commission properly awarded Reece one hundred per cent quantitative integration credit, and properly applied its comparative criteria to each of the other applicants.

Judge Karen LeCraft Henderson noted that Reece originally filed its application as a corporation owned fifty-one percent by Marsha Reece and forty-nine per

cent by her husband, Rudolph Reece. Both Reeces planned to be actively involved in the management of the station. The black couple had lived in the Orlando area for about nine years, participated in civic activities and had some broadcasting experience. The Reeces subsequently allowed two trusts funded by Robert Herpe to participate in the venture, and amended their application to indicate the change from a corporation to a limited partnership.

After describing the structure and qualifications of the other parties who sought the Orlando license, the court pointed out that the "quantitative" credit involves the degree to which an applicant's owners will be integrated into the station's management. The quantitative credit may be qualitatively enhanced if the integrated owners possess other characteristics such as minority or female status, local residence in the station's coverage area, civic participation, or prior broadcast experience.

A Federal Communications Commission Administrative Law Judge concluded that Reece was entitled to one hundred per cent integration credit. The Commission's Review Board agreed with this finding, but rejected the revised ownership structure, finding it an inaccurate representation of the station's actual management.

In rejecting the challengers' argument that the Reeces' application should have been dismissed as a sham, the court stated that it was undisputed that the station would be managed solely by the Reeces, and affirmed the decision to award Reece one hundred per cent integration credit. The Commission was entitled to adjust the application to reflect accurately the actual division of management responsibilities among the applicant's general partners.

The court discussed certain comparative differences among the applicants, and concluded by denying the petitions for review.

Marlin Broadcasting of Central Florida, Inc. v. Federal Communications Commission, 952 F.2d 507 (D.C.Cir. 1992) [ELR 14:3:10]

General partners of video distribution organization are subject to jurisdiction in New Jersey on $550,000 contract claim

Star Video, a Jersey City-based distributor of prerecorded videocassettes, sold tapes to Video USA. Video USA purchased the tapes on behalf of a series of limited partnerships, which owned and operated retail video

sales and rental stores throughout the eastern United States.

When Star sued Video for about $550,000 on its account, Star obtained judgment by default. The Video USA parties sought to dismiss the complaint for lack of personal jurisdiction. The court subsequently ruled that on the basis of the agency relationship of Video USA to the limited partnerships, the non-resident partnerships had purposely availed themselves of the privilege of conducting business with a New Jersey corporation.

The court dismissed the claims against the general partners of the limited partnerships for lack of jurisdiction, finding that the general partners' only connection to the New Jersey forum consisted of their relationship to Video USA, and that jurisdiction over the limited partnerships did not in and of itself confer jurisdiction over their incorporated general partners. And although Star Video might have presented a basis for holding certain

individual parties liable under alter ego theory, this was found insufficient to confer jurisdiction on the court.

The trial court also dismissed the claims against the Video USA parties on forum non conveniens grounds.

A New Jersey appellate court has reversed the order dismissing the complaint against the corporate general partners. Having found that New Jersey had jurisdiction over the limited partnerships, the court was compelled to find jurisdiction over the general partners as well, stated Judge Landau.

The court, citing the factual issues raised by Star, also reversed the finding that there was no jurisdiction over the individual parties on the basis of alter ego theory. The individual parties may not have "set foot" in New Jersey or directly participated in carrying out Star's contract with Video USA, but the exercise of New Jersey jurisdiction would not offend "traditional notions of fair play and substantial justice," declared Judge Landau.

The court concluded by reversing the dismissal on grounds of forum non conveniens - the contract sued upon was negotiated, and largely performed, in New Jersey - and by remanding the matter for trial on the merits.

Star Video v. Video USA, 601 A.2d. 724 (N.J.App. 1992) [ELR 14:3:10]

Minnesota Supreme Court upholds statute granting property tax exemption for Metrodome space leased to Minnesota Twins and Minnesota Vikings

The Minnesota legislature, in creating the Metropolitan Sports Facilities Commission, exempted the Commission's real and personal property from taxation. The Commission owns and operates the Hubert H.

Humphrey Metrodome in Minneapolis; the two major users of the facility are the Minnesota Vikings Football Club and the Minnesota Twins.

In 1983, Minneapolis attempted to assess a tax upon certain space in the Metrodome, such as a locker room area, office space and private spectator boxes, leased by the Commission to the sports teams. In l985, the legislature expressly provided that the property leased to the Vikings and the Twins was tax exempt. Nevertheless, the city assessor claimed that the Twins were liable for 1986 and 1987 taxes totalling about $75,000; the Vikings were assessed a total of almost $425,000 for the two years.

The state Tax Court, although finding that Hennepin County lacked standing to challenge the constitutionality of the statute, apparently ruled that the 1985 statutory amendment was unconstitutional. The Minnesota

Supreme Court subsequently found that the county had standing to sue (ELR 12:4:18).

In a December 1991 opinion, the Minnesota Supreme Court reversed the Tax Court decision. Applying a rational basis test, the court stated that the Commission's agreements to provide tax-exempt exclusive use space met a legitimate purpose. The agreements were "an integral part of the rather intricate financial arrangements needed to put the stadium to its intended and realized public purpose... The exclusive use provisions serve as an incentive for the ball clubs to enter into the long-term use agreements which are central to the Commission's financial stability."

The 1985 amendment created two classifications by distinguishing between the Commission and other public bodies that leased their property to private parties, and by distinguishing between the Commission's lessees and other private parties that lease publicly-owned property.

But the court found that the classifications were "genuinely related to the legitimate purposes behind the tax exemption." The legislature reasonably could have believed, stated the court, that the exemption would contribute to insuring that the stadium would be used for its intended public purpose.

Furthermore, "the unique nature of the Commission (particularly its public financing structure) sufficiently distinguishes the Commission and its tenants from other stadium operators and sports clubs." The fact that the classifications included only a few members did not necessarily render the statute invalid - the use of the facility was "inherently and functionally" limited to two major occupants. Under the circumstances, stated the court, the narrowness of the class membership did not invalidate the exemption. In all, there was no equal protection violation under either the state or the federal constitutions.

Metropolitan Sports Facilities Commission v. County of Hennepin, 478 N.W.2d 487 (Minn. 1991) [ELR 14:3:11]

Sacramento utility tax on cable television service is upheld

Sacramento Cable Television claimed that enforcing a city utility tax on users of cable television service violated both the First Amendment and the franchise agreement between the company and the city.

A California appellate court has upheld a trial court ruling granting summary judgment to the city on the ground that the tax, which also applied to telephone, gas and electric utilities was one of general applicability and was rationally based.

Presiding Judge Puglia noted that the city imposed various sales and use taxes on transactions involving tangible personal property, including books, video tapes and audio tapes, but that the tax did not apply to newspapers, periodicals, radio transmissions and other signal distribution systems. The city also imposed a tax on the price of admission to certain live entertainment events and to the closed circuit transmission of those events.

Sacramento Cable argued that the tax treated cable television differently from other protected speakers and singled out the company, the provider of 99 percent of the cable service in the city. Judge Puglia agreed that if the tax in issue had been imposed solely on cable television, the court might question the constitutionality of the tax. However, the actual tax was the city's utility users tax, which also covered the use of telephone, gas and electric service - the challenged ordinance did not create

a new tax but "merely expanded the coverage of an existing one."

The cable company also claimed that there was no rational basis for including cable television in the general utility users tax (a 7 1/2 percent tax) because cable television is not a utility and because Sacramento Cable already pays the city for the use of public easements and utility structures.

Judge Puglia, although stating that cable television would not be a "utility" under the Public Utilities Code, was, much like telephone, gas and electric service, delivered to customers through structures located in or on public easements created expressly for utility access. Cable television operators are regulated by the Public Utilities Commission, and are subject to certain regulations and restrictions regarding services and rates.

The court emphasized that the use of easements and support structures was the basis for classifying cable

television with the three utilities which transmit their services in a similar fashion, and was not the basis for the tax, which was occasioned by the city's need to raise revenue. Judge Puglia found that the grouping of cable television with the three utilities was rationally based, and "was not an arbitrary grouping designed to punish cable television but instead flow[ed] naturally from similarities in the businesses involved."

There may have been a more equitable classification, but the city was required to show only that a rational basis was used. Since such a rational basis was shown and because the record contained no evidence of intent to suppress ideas and no evidence that such suppression would result from the enforcement of the ordinance, the court found that the tax did not violate the First Amendment.

The court also rejected Sacramento Cable's franchise agreement claim, noting that if the relevant provisions

were intended to prohibit any tax, fee, or assessment contrary to the First Amendment, those provisions were not violated by the addition of cable television to the utility users tax which, as held by the court, did not violate the First Amendment. Furthermore, the tax was not a special assessment and did not discriminate against a particular taxpayer or business.

Sacramento Cable Television v. City of Sacramento, 286 Cal.Rptr. 470 (Ca.Ct.App. 1991) [ELR 14:3:11]

Cable franchise operator is not entitled to access to private residential property, rules Federal Court of Appeals

Section 621(a)(2) of the Cable Communications Policy Act of 1984 grants cable companies which have been

franchised by a municipality a right to access "public rights-of-way" and "easements...which have been dedicated for compatible uses."

Cable Holdings of Georgia, Inc, doing business as Smyrna Cable TV, sought access to the interiors of certain multi-unit apartment buildings owned and operated by McNeil Real Estate Fund VI, Ltd. and other parties. McNeil had agreed to grant interior access to a telephone company, an electric company, and a competing video programming service provider. Smyrna argued that McNeil thereby dedicated compatible easements pursuant to the statute.

A Federal District Court agreed with Smyrna Cable and ordered McNeil to allow the cable company to obtain access to the apartment buildings in order to maintain a cable system.

A Federal Court of Appeals has reversed the District Court's decision. Judge Birch observed that the District

Court's construction of the statute, rather than avoiding substantial constitutional difficulties, created an issue under the takings clause of the Fifth Amendment. The Cable Act does not contain a just compensation provision.

Judge Birch declared that the statute was capable of being construed constitutionally to the extent that the statute authorizes a franchised cable company's access to easements on private property only when the property owner has dedicated those easements for the general use of any utilities. The proposed construction would be consistent with the court's prior precedent and would avoid the cited constitutional problems, stated Judge Birch, because through dedication, the property owner voluntarily relinquishes his/her right to exclude particular users. Since McNeil had not dedicated the easements within its buildings for the general use of all utilities,

stated the court, the statute did not provide Smyrna with a right of access to McNeil's property.

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992) [ELR 14:3:12]

New York State regulation of charges for downgrading cable service is not preempted by Cable Act

Cable companies often charge customers seeking to downgrade to a lower tier of cable service. The actual cost to a cable company of implementing a downgrade of service depends on the company's technology, and may range from between $50 and $75 in those systems where a visit to the subscriber's home is required. In other systems, the cable company can instruct a

descrambling chip from the company's central computer, and the actual cost of a downgrade is minimal.

The New York State Commission on Cable Television adopted regulations limiting the ability of cable companies to impose downgrade charges. The regulations limited charges to the company's actual cost, required notice to the customer, and allowed charges where the customer downgraded from a service which the customer had not maintained for the last six months.

A Federal District Court, ruling from the bench, rejected an action brought by the Cable Television Association of New York. The court stated that a downgrade to a lower tier amounted to the removal of cable services, not the provision of such services, and that the preemption provisions of the Cable Communications Act of 1984 did not apply.

In affirming the District Court's judgment granting summary judgment to the state, Federal Court of

Appeals Judge Walker noted that the association was attempting to enjoin state officials from enforcing a regulation that interfered with claimed federally protected rights. The District Court therefore had subject matter jurisdiction to hear the action.

The parties agreed that if a downgrade charge was a rate for the provision of cable services, then section 543 of the Cable Act preempted the state regulations. After careful analysis, Judge Walker determined that a reduction in service was not a provision of service, and in the absence of a clear statement by the Federal Communications Commission on the issue, the Cable Act did not expressly preempt state regulation of downgrade charges. In all, stated the court, it appeared that Congress "meant to pre-empt only those states' rules that regulate rates charged by cable companies for providing services to customers... Neither the language of the preemption clause, nor the structure of the statute, nor the

regulatory and legislative background, nor the relevant case law support[ed the association's] claim that the Cable Act expressly pre-empts all state regulations that will effect rates for the provision of cable services."

Cable Television Association of New York, Inc. v. Finneran, 954 F.2d 91 (2d Cir. 1992) [ELR 14:3:12]

South Carolina criminal libel statute is ruled overbroad and vague in violation of the First Amendment

In May 1988, James A. Fitts, the president of a weekly newspaper in Kingstree, South Carolina, published an article entitled "My Vote is not for Sale." Fitts referred to two state legislators participating in upcoming elections as "black traitors" who participated in "corrupt

dealings." The article also stated that "if every black in Williamsburg County would start stealing today and steal every day for the rest of their lives, they could not steal as much as those two have stolen during their time in power."

The two politicians to whom Fitts referred, Senator Frank H. McGill and Representative B.J. Gordon, filed charges alleging that Fitts published the statements in violation of the South Carolina criminal libel statute.

Fitts was arrested, and a state magistrate set bond at $40,000, eight times the maximum fine provided for in the statute. Fitts then spent two nights in jail before being released on his own recognizance. As a special condition of Fitts' release, the magistrate required that the publisher not write any further derogatory articles about McGill and Gordon.

A county grand jury subsequently entered an indictment charging Fitts with violating the criminal libel

statute. But before the case came to trial, McGill and Gordon, who had both been re-elected, requested that all charges be dropped. The indictment was dismissed.

A similar incident occurred when Drew Wilder, a writer for a newspaper in Orangeburg, South Carolina, published an article concerning a local high school principal. The article alleged that the principal "was arrested and charged with assault and battery and disorderly conduct...in connection with an attack on his wife." Wilder reported that the principal had been charged with a criminal act, when, in fact, he had not. The article was based on a police report that incorrectly stated that charges had been filed.

The principal and his wife alleged that Wilder had violated the criminal libel statute. Wilder was arrested, but was released on his personal recognizance. The warrants issued against Wilder were dismissed at the preliminary hearing stage.

The statute in issue provided that "any person who shall with malicious intent originate, utter, circulate or publish any false statement or matter concerning another the effect of which shall tend to injure such person in his character or reputation shall be guilty of a misdemeanor and, upon, conviction therefor, be subject to punishment by fine not to exceed five thousand dollars or by imprisonment for a term not exceeding one year, or by both fine and imprisonment..."

Federal District Court Judge George Ross Anderson, Jr. reviewed the history of criminal libel law, found that the publishing parties had standing to sue, and declined to abstain from deciding the matter in order to allow the South Carolina courts the opportunity to interpret the term "malicious intent" in the statute. Judge Anderson noted that the five state supreme courts that have reviewed the constitutionality of criminal libel statutes have refused to judicially limit the statutes to meet

federal constitutional requirements. Instead, all five courts struck down the statutes on constitutional grounds, and left the revisions to state legislatures. If the court abstained and allowed the issue to reach the South Carolina Supreme Court, stated Judge Anderson, that court probably could not judicially interpret the term "malicious intent" but would have to decide the constitutional issue. Thus, continued the court, because the constitutional issue would not be avoided, abstention was inappropriate.

The court then found that the statute was unconstitutionally overbroad and vague. It was noted that the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), applies in civil and criminal cases when the matter being discussed concerns public affairs. Under the actual malice standard, no criminal liability for libel may be imposed in connection with the discussion of public affairs unless the publisher of a falsehood

knew it was false at the time it was published or had a reckless disregard of whether it was false or true.

The South Carolina criminal libel statute, according to the court, did not provide the high degree of protection afforded by the actual malice standard and would allow the imposition of criminal penalties with no showing that the publishers knew the information being published was false or had a high degree of awareness of its probable falsity.

The statute referred to "malicious intent," but this term was not synonymous with the actual malice standard of New York Times, declared the court. The common law malice standard of the South Carolina criminal libel statute was not the equivalent of the actual malice standard. The lower common law malice standard would mean that publishers of erroneous statements might be subject to criminal punishment even though the publication was "immunized from governmental control by the

Constitution." A statute which permits punishment for the publication of protected speech is overbroad, stated Judge Anderson, and the South Carolina statute was facially unconstitutional.

The court further found that to the extent that the statute used the term "malice," the statute was void for vagueness - the ambiguity in the term "malice" created the possibility of confusion between the common law use of the phrase and the New York Times constitutional definition. The court rejected the argument that the statute was unconstitutionally vague, apart from the failure to distinguish between common law malice and constitutional malice.

Judge Anderson concluded by rejecting the publishing parties' request for a declaration that any criminal libel statute would be unconstitutional if it imposed criminal penalties on speech regarding a public official, public figure, or matter of public concern.

Fitts v. Kolb, 778 F.Supp. 1360 (D.S.Car. 1991) [ELR 14:3:13]

Race car driver may proceed with negligence claim against race track, rules Ohio Supreme Court

In May 1987, William T. Bowen participated in an automobile race at Kil-Kare Speedway. During the race Bowen's car became disabled on the racetrack. Bowen claimed that the flagman did not attempt to stop the race or to permit Bowen to remove himself and the automobile from the racetrack. The car was struck by another vehicle, and Bowen was seriously injured.

In his negligence action against Kil-Kare, Bowen denied that he had read or signed a release for the race,

although his signature appeared on a release form and on a registration card containing a release of liability.

An Ohio trial court granted Kil-Kare's motion for summary judgment, finding that the release was a complete defense to the negligence, and that the release also barred any derivative claims raised by Bowen's wife and children.

An appellate court affirmed the trial court's decision, except as to the order granting summary judgment to Kil-Kare on the negligent infliction of emotional distress claims by Bowen's wife and children; it was found that Kil-Kare had not moved for summary judgment on those claims.

The Ohio Supreme Court has ruled that Kil-Kare was not entitled to summary judgment with respect to Bowen's negligence claim and the loss of consortium claims of Bowen's wife and children. The court found that there existed a question of fact was to whether

Bowen signed the release or was denied the opportunity to read the release and also found that reasonable minds might differ as to whether the racetrack's failure to timely stop the race, "in clear violation of the rules of the event," was either negligent or willful and wanton.

The court also found that Bowen, by participating in the race, did not impliedly assume the risks of any injury caused by Kil-Kare's failure to comply with the rules of the event; that Brenda Bowen's cause of action for damages for loss of consortium was an independent right which was not barred by a release of liability which she had not signed; that the contributory fault of a spouse may be imputed to the spouse claiming loss of consortium arising out of the injurious occurrence for purposes of limiting or defeating recovery on the loss of consortium claim; and that the matter would be remanded to the trial court to determine, among other issues, whether a child can maintain a cause of action for

loss of parental consortium against a party who negligently or intentionally injured the child's parent.

Judge Wright concurred in the court's conclusion that the trial court erred in granting summary judgment on Bowen's claim that Kil-Kare's conduct was willful and wanton, and agreed that the appellate court correctly determined that Kil-Kare was not entitled to summary judgment on the claims of negligent infliction of emotional distress. However, in Judge Wright's view, the Bowens did not produce sufficient evidence to avoid summary judgment on the negligence and loss of consortium issues.

Bowen v. Kil-Kare, Inc., 585 N.E.2d 384 (Ohio 1992) [ELR 14:3:14]

Briefly Noted:

Talent Agents/Arbitration.

Regulations negotiated by the American Federation of Television and Radio Artists and the Association of Talent Agents govern the contracts between the agents and performing artists represented by the union. New regulations proposed by the union would have the effect of disallowing the payment of commissions to the agents for vacation, overtime, wardrobe and other purposes.

The association sought to arbitrate the new regulations. A New York trial court found that the matter was non-arbitrable because a proviso in the arbitration clause of a 1953 letter agreement between the union and the association's predecessor exempted from arbitration any dispute or controversy between the union and the other signatories to the letter agreement concerning "new regulations..."

An appellate court has upheld the trial court ruling and further found an independent basis to stay arbitration in the phrasing of the association's demand to arbitrate. The claim in issue, in the court's view, involved certain named agencies seeking commissions with respect to daytime dramatic serials. However, the demand presented the dispute in terms of the right of talent agencies, in general, to receive such commissions, again in general, without limiting the demand to daytime dramatic serials. The court pointed out that the demand did not definitively connect the "looser category" of talent agencies to the named parties or otherwise restrict that category to the named agents. For the court, the demand, as structured, resembled a class action. And to the extent that the association and the named agents might assert an arbitrable claim, the claim would have to be advanced on their own behalf, and not on behalf of talent agents or agencies in general.

American Federation of Television and Radio Artists, AFL-CIO v. Association of Talent Agents, 576 N.Y.S.2d 575 (N.Y.App. 1991) [ELR 14:3:15]

Contracts.

American Media Concepts alleged that Atkins Pictures, known as A-Pix, agreed to produce a film entitled "Forced March." According to American Media, Kenneth Hochman introduced the owner of the rights to the film to the A-Pix parties. In a letter to Hochman, A-Pix agreed to grant Hochman a share in the net profit, sales fees and various shares of stock and stock options in the company. A subsequent letter stated that A-Pix agreed to guarantee payment of $40,000 to American Media in eight monthly installments, which would be "a complete

fulfillment of A-Pix's obligation to American Media Concepts, Inc."

A New York trial court denied a motion for dismissal sought by the two individuals who had formed A-Pix, and also denied American Media's motion for summary judgment.

An appellate court has reversed that part of the decision which denied the individuals' motion for dismissal. The court noted that the letter agreements indicated that any contract was only between American Media and A-Pix.

American Media Concepts, Inc. v. Atkins Pictures, Inc., 578 N.Y.S.2d 193 (N.Y.App. 1992) [ELR 14:3:15]

Promissory Note.

In 1986, Young Broadcasting executed a promissory note in the amount of $3 million in favor of Backe Communications, Inc. as part of the purchase price under an asset purchase agreement. From 1987 through 1990, Young made annual payments of interest in the sum of $165,000 each year. When Young failed to pay the principal sum, Backe sued to recover the principal along with accrued and default interest.

A New York trial court has ruled that the subject compound interest clause was unenforceable and granted Backe straight interest at a rate of eleven percent on the $3 million principal balance. The court also rejected a claim to default interest prior to September 15, 1991, but granted Back's motion for summary judgment on the principal sum, together with the above-cited interest. Backe v. Young Broadcasting, Inc., New York Law Journal, p. 22, col. 3 (N.Y.Cnty., May 22, 1992)

Booking Agent/Jurisdiction. In January 1991, Susan Weaving, the president of NAMCO Booking, a division of National Artists Management Company, terminated her employment; Weaver had eleven months remaining on the term of her employment contract. NAMCO subsequently lost several of its customers and clients.

NAMCO sought to enjoin Weaving from establishing any business competing with the theatrical booking company during the unexpired term of her exclusive employment contract.

A Federal District Court in New York has found that the court lacked diversity jurisdiction over the action. However, subject matter jurisdiction was present with respect to NAMCO's unfair competition claim under section 43(a)(2) of the Lanham Act.

Judge Conboy proceeded to find that section 43(a), contrary to Weaving's argument, did not apply only to existing goods and services and that Weaving "had

taken sufficient steps toward the start of her new business for the Lanham Act to apply."

Furthermore, some of Weaving's disparaging remarks about NAMCO may have constituted "commercial advertising or promotion" within the scope of the Lanham Act, and, stated Judge Conboy, applying the Lanham Act to such conduct did not violate Weaving's First Amendment rights.

National Artists Management Company, Inc. v. Weaving, 769 F.Supp. 1224 (S.D.N.Y. 1991) [ELR 14:3:16]

Cable Television Installation.

The owner of a mobile home park denied Times Mirror Cable Television access to provide cable television service. An Illinois trial court granted Times Mirror a

permanent injunction prohibiting the mobile home park owners and operator from interfering with cable television installation.

An Illinois appellate court has upheld the trial court decision, finding that the state statute regulating cable television did not unconstitutionally permit a taking without just compensation. And the United States Constitution did not require a pre-deprivation hearing in this case because the statute adequately protected the property owner's due process rights. The cable statute was not a special law and treated all municipalities, cable television franchisees and property owners in the same manner; no person or entity was singled out.

Judge Knecht stated that the cable statute "precludes property owners from interfering with cable installation when it has been requested by tenants. Only compensation is the issue; the statute does not require proof of public use or purpose." Times Mirror agreed to

indemnify the owners of the mobile home park for damage caused by installation, operation or removal of cable services; the parties were not required to enter an indemnity agreement; and the trial court did not err in finding that Times Mirror provided valid notice, concluded the court.

Times Mirror Cable Television of Springfield, Inc. v. First National Bank of Springfield, 582 N.E.2d 216 (Ill.App. 1991) [ELR 14:3:16]

Satellite Dish Antennas.

When the Kessler and Soriano families sought to install satellite television receive-only dish antennas on the rooftops of their respective homes in Niskayuna, New York, the town prevented the Kesslers from installing

the satellite dish and threatened legal action against the Sorianos if the family did not remove the dish from its roof.

A Federal District Court has granted summary judgment to the families on the ground that the zoning ordinance in issue was preempted by federal law.

A 1986 Federal Communications Commission regulation preempted state and local zoning or other regulations "that differentiate between satellite receive-only antennas and other types of antenna facilities" unless such regulations have a "reasonable and clearly defined health, safety or aesthetic objective" and do not impose unreasonable limitations on the reception of satellite delivered signals by receive-only antennas.

Chief Judge McCurn noted that the ordinance in question distinguished between the receive-only antennas and other types of antenna facilities, in that of all types of antennas, only satellite dishes were considered

"accessory structures" subject to a height limitation. And the ordinance did not meet the requirements for an exemption from the Commission's regulation.

Kessler v. Town of Niskayuna, 774 F.Supp. 711 (N.D.N.Y. 1991) [ELR 14:3:16]

Workers Compensation/Football Injury.

Minnesota Vikings football player Joseph M. Senser suffered a right knee injury during a 1981 game. In 1984, Senser reinjured the knee during a practice session. Senser retired from football in July 1985 because of his right knee disability and subsequently underwent surgery. In 1987, Senser filed a worker compensation claim against the Vikings arising from the knee injuries.

The compensation judge denied the team's application for retroactive registration of the 1981 injury with a Special Compensation Fund under Minnesota's 1984 second injury law. The Workers' Compensation Court of Appeals reversed the judge's ruling, concluding that the team did not have notice of the 1984 injury until Senser filed his claim petition in 1987.

The Minnesota Supreme Court noted that the Second Injury Law provided for reimbursement to employers of compensation paid for an injury made substantially greater because of a preexisting physical impairment. A basic requirement for reimbursement was registering the physical impairment. The registration provision in effect on the date of Senser's 1984 injury allowed for post-second-injury registration as long as such registration occurred within 180 days after the employer received notice of the injury. The court agreed with the compensation judge that the team failed to register within 180

days after receiving notice of the injury; reversed the decision of the Workers' Compensation Court of Appeals; and reinstated the compensation judge's finding.

Senser v. Minnesota Vikings Football, 474 N.W.2d 312 (Minn. 1991) [ELR 14:3:16]

Jurisdiction/Boxing Dispute.

The Puerto Rico Professional Boxing Commission, an entity created by the Department of Recreation and Sports of Puerto Rico, is a member of the World Boxing Association. In February 1988, Julio Gervacio Lind and Bernardo Pinango participated in a World Boxing Association sponsored boxing match to determine the world junior featherweight championship title. Following a referee decision for Pinango, a drug test was conducted.

The results of Pinango's first urinalysis showed traces of cocaine metabolites.

The Commission urged the World Boxing Association to disqualify Pinango, but the association refused to do so, apparently because of certain procedural imperfections in the urine sampling.

Gervacio and the association, among other claims, asserted that the association violated its own requirement that a boxer found to use drugs be disqualified.

A Federal District Court held that the Gervacio and the commission had not exhausted the internal grievance procedures of the World Boxing Association and therefore were not entitled to judicial review of the procedural fairness of the hearing granted them.

A Federal Court of Appeals has upheld the decision granting summary judgment to the association with respect to Gervacio's failure to exhaust internal association remedies. The court then found that the association

did not properly plead the jurisdiction of the Federal District Court - the commission did not supply specific factual allegations to support the amount in controversy requirement. It did not appear that there was any amount in controversy, much less one in excess of the $10,000 threshold, and the court therefore vacated the judgment with respect to the commission and remanded the matter to the District Court with instructions to dismiss the complaint for lack of jurisdiction.

Department of Recreation and Sports of Puerto Rico v. World Boxing Association, 942 F.2d 84 (1st Cir. 1991) [ELR 14:3:17]

Employment Termination.

Robert E. Brodhead claimed that he entered into an oral employment contract whereby he was to be a full-time athletic director of Southeastern Louisiana University for five years at the salary of $72,000 per year. The university terminated Brodhead's employment after ten months. A Louisiana trial court awarded Brodhead about $275,000, the amount of salary due for the remaining fifty months of the five year term, discounted to present value.

A Louisiana appellate court has reversed the trial court's ruling, agreeing with the university that Brodhead was hired as an "at will" employee who could be terminated at any time.

Brodhead v. Board of Trustees for State Colleges and Universities, 588 S.2d 748 (La.App. 1991) [ELR 14:3:17]

Gambling Debt.

The MGM Desert Inn obtained a default judgment in a Nevada trial court against North Carolina resident William Herbert Holz in the amount of $14,000, plus prejudgment interest, costs and attorneys fees. A North Carolina trial court granted the casino enforcement of the Nevada judgment.

In affirming the trial court decision, a North Carolina appellate court stated that although gaming debts incurred in North Carolina are not enforceable in the state's court, the full faith and credit clause required the court to enforce the Nevada judgment against Holz. Holz did not question the jurisdiction of the Nevada court, and the trial court did not err in granting summary judgment in favor of MGM Desert Inn.

MGM Desert Inn, Inc. v. Holz, 411 S.E.2d 399 (N.C.App. 1991) [ELR 14:3:17]

Slot Machine Claim.

When Kirk Erickson was nineteen years old, he won a slot machine jackpot of $1.06 million. Desert Palace, the operator of Caesar's Palace Casino in Las Vegas, refused to pay Erickson because he was under twenty-one, the legal gambling age in Nevada.

Erickson's parents sued Desert Palace, alleging various claims. A Federal District Court in Nevada dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim. The Ericksons appealed the dismissal of their third cause of action alleging fraud and cheating.

A Federal Court of Appeals has affirmed the District Court's decision. Judge Brunetti noted that under Nevada law, an unpaid slot machine jackpot is a gaming debt not evidenced by a credit instrument. Such debts are void and unenforceable in Nevada and do not give rise to any administrative or civil cause of action. A patron may seek review by the State Gaming Control Board of a casino's refusal to pay alleged winnings.

The Board denied the Erickson's claims, holding, in part, that because the casino had properly warned Erickson that the legal gambling age was twenty-one and had made no misrepresentations of gambling rules, the casino was not guilty of fraud. The Ericksons unsuccessfully sought review by the Nevada state courts.

The Ericksons had filed their action in the Federal District Court prior to the decision by the State Gaming Control Board. The District Court noted that the

Ericksons had failed to exhaust the administrative remedies provided by Nevada law.

Federal District Court Judge Brunetti declined to remand the matter to the District Court because the court had provided an alternative ground for dismissing the complaint, i.e., that Nevada law limited a claimant to an administrative proceeding followed by judicial review in state court. The District Court therefore determined that the Ericksons could not state a claim upon which relief could be granted.

Judge Brunetti agreed with the District Court that Nevada law limited a party's recovery of a gaming debt to the exclusive administrative/judicial review procedure. The casino's refusal to pay the slot machine jackpot did not constitute fraud, stated Judge Brunetti. Under state law, "parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review."

Erickson v. Desert Palace, Inc., 942 F.2d 694 (9th Cir. 1991) [ELR 14:3:18]

Labor Relations/Casino Employees.

From about 1964 through 1984, the Nevada Resort Association, a group of casino operators, had bargained through two multi-employer units with the union representing hotel and restaurant employees. The casinos operated under two similar agreements. However, employees who customarily received tips earned a slightly higher rate of pay at the downtown casinos. The wage differential, known as the "downtown premium," was intended to compensate for the tipping practices of the clients at casinos located on the Las Vegas Strip and

the fact that the strip casinos maintained free employee parking.

During the 1984 negotiations, the employers sought to eliminate the premium paid to downtown workers. When the existing bargaining agreements expired, the union struck the casinos. Many of the hotels subsequently reached agreements with the union. Certain downtown casinos also complied with the terms of an oral agreement reached by the union and the other casinos, but refused to pay the wage premium.

The union filed grievance proceedings, arguing that the employers had committed an unfair labor practice by refusing to execute collective bargaining agreements incorporating the terms contained in the oral agreements ratified by union members. The employers claimed that no agreement existed because they never consented to the downtown premium.

The National Labor Relations Board ordered the employers to sign the collective bargaining agreement; the casinos sought to set aside the order, arguing, in part, that the unit was not appropriate.

A Federal District Court pointed out that the Board was seeking to enforce a labor agreement between employers and a bargaining unit that, for many years, included supervisors with the employers' consent. The court found substantial evidence to support the Board's decision, denied the petition for review and enforced the Board's order.

E.G. & H. Inc. v. National Labor Relations Board, 949 F.2d 276 (9th Cir. 1991) [ELR 14:3:18]

Puzzles.

Dirk Laureyssens created a series of foam rubber puzzles comprised of six pieces which could be assembled in a flat form in a rectangular frame and also into a three-dimensional hollow cube. When Laureyssens claimed that Idea Group, Inc. was distributing a similar puzzle, a Federal District Court in New York agreed that Laureyssens presented evidence sufficient to establish a question as to whether the trade dress of the puzzles should be protected under the doctrine of "secondary meaning in the making." After reviewing the factors relevant to a determination of the issue of likelihood of confusion, Judge Sweet granted a preliminary injunction under 43(a) of the Lanham Act to the extent of restraining Idea Group from marketing its puzzles in flat form packaging. The court also granted Laureyssens' request for a preliminary injunction on the grounds of common law unfair competition, but only with respect to Idea Group's flat form shrink wrapper package.

Laureyssens' motion for injunctive relief under New York's anti-dilution statute was denied.

Judge Sweet, in considering Laureyssens' copyright infringement claim, observed that the puzzles were deserving of protection as original works, that the selection of pieces was "clearly" separate from purely functional considerations, and that the idea of a flat-to-cube puzzle was separable from Laureyssens' expression of that idea. However, upon careful analysis of the design of the puzzle pieces, the court concluded that there was no substantial similarity between any of the Idea Group puzzles and Laureyssens' puzzles, and, accordingly, denied Laureyssens' motion for a preliminary injunction under the Copyright Act.

Laureyssens v. Idea Group, Inc., 768 F.Supp. 1036 (S.D.N.Y. 1991) [ELR 14:3:18]

WASHINGTON MONITOR

President Bush signs new film preservation statute

President Bush has signed into law a film preservation statute which extends certain provisions of legislation which expired in 1991. The Librarian of Congress, with the assistance of a National Film Preservation Board, will continue to select twenty-five films each year for the National Film Registry. The prior law set forth a labeling requirement to identify National Film Registry films which were colorized or otherwise materially altered in post-theatrical release; the new statute does not contain a labeling provision.

The statute authorizes the Library of Congress to conduct a one-year study of film preservation efforts. [ELR 14:3:19] [August 1992]

Federal Communications Commission allows broadcast networks to own limited interest in cable television systems

The Federal Communications Commission has voted to allow broadcast television networks to own cable television systems. According to news reports, a network would not be permitted to take an interest in systems that can be received by more than ten percent of the nation's homes or by more than fifty percent of homes with cable television in a local market. And the networks still would be prohibited from investing in cable television systems in markets where they own television stations. [ELR 14:3:19] [August 1992]

Federal Communications Commission allows telephone companies to transmit television programming and to purchase five percent interest in cable television or video programming companies

The Federal Communications Commission has ruled that regional telephone companies may transmit films and other television services by telephone lines, and also voted to allow telephone companies to purchase up to a five percent interest in cable television or video programming companies.

The telephone companies may transmit video programming created by other companies but are prohibited by the Cable Act of 1984 from creating or transmitting their own programming. [ELR 14:3:19] [August 1992]

DEPARTMENTS

Book Notes:

Law and Business of the Entertainment Industries (Second Edition), by Donald E. Biederman, Edward P. Pierson, Martin E. Silfen, Jeanne A. Glasser and Robert C. Berry

In the four years since the publication of the first edition of this book, considerable changes have taken place in the entertainment industries. Changes have occurred in the areas of technological innovation, consolidation, internationalization of ownership and distribution, inflation, and censorship. Lawyers who practice in the entertainment industries would be well-advised to learn about the latest developments in these areas as well as in the business and legal aspects of their specialized fields.

Teachers of Entertainment Law, in addition to presenting statutory and case law, must prepare their students to creatively anticipate and address an ever-expanding range of issues. Successfully confronting change is the theme of Law and Business of the Entertainment Industries.

Attempting to create and compile a book of this nature, with the needs of practicing attorneys, teachers and students in mind, is a difficult task. This book meets the challenge. Its 800 pages are filled with well-organized and well-edited cases, statutes and analyses covering all segments of the entertainment field, including literary publishing, music publishing, sound recordings, films, television and theater. There are separate chapters covering agents, managers, attorneys and promoters, personal rights, and most importantly to this reviewer, a chapter entitled "Contract Considerations and Special

Statutes." The text features factual, historical and anecdotal information relevant to the chosen material.

The authors are extremely qualified and distinguished. Donald Biederman is Senior Vice-President, Legal and Business Affairs at Warner/Chappell Music, Inc., and an Adjunct Professor of Law at Southwestern University School of Law in Los Angeles. Edward Pierson is Vice-President (having been recently promoted) of Legal and Business Affairs at Warner/Chappell Music, Inc., and an Adjunct Professor of Law at Southwestern University School of Law. Martin Silfen is in private practice in New York and Adjunct Professor of Law at New York Law School. Jeanne Glasser is in private practice in New York and Adjunct Professor of Law at Pace Law School. Robert Berry is Professor of Law at Boston College Law School.

The authors have done a remarkable job of covering, in a clear and concise way, the present and future concerns

of the entertainment industries. The book is informative and thought-provoking, and every practicing attorney will want to keep a copy readily available as a handy reference guide and as a research tool.

The first edition of Law and Business of the Entertainment Industries was reviewed four years ago (ELR 10:4:18) by Lionel Sobel, Editor of the Entertainment Law Reporter, and Professor of Law at Loyola University School of Law in Los Angeles. His review dealt primarily with the use of the book for educational purposes. Law and Business of the Entertainment Industries may be ordered from Praeger Publishers, 88 Post Road West, Box 5007, Westport CT 06881. The book costs $50, with a shipping and handling charge of $3.00 for the first book; there is a $1.00 handling charge for each additional book. For more information, call (203)226-3571/FAX (203)222-1502.

Reviewed by Ira Selsky[ELR 14:3:20]

In the Law Reviews:

The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable? by David J. Sisson and Brian D. Trexell, 2 Marquette Sports Law Journal 1 (1991)

A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League by Ian Craig Pulver, 2 Marquette Sports Law Journal 39 (1991)

Planning for Effective Risk Management: A Guide for Stadium and Arena Management by Bernard P. Maloy, 2 Marquette Sports Law Journal 89 (1991)

The Legal and Political Challenges to Academic Eligibility Requirements by Barbara Ferguson, 2 Marquette Sports Law Journal 103 (1991)

The Entertainment Law Review, available from ESC Publishing, Mill Street, Oxford, OX2 OJU, United Kingdom, has published Volume 3, Issue 2 with the following articles:

Parallel Imports and Books in Australia: Copyright Amendment Act 1991 by Warwick A. Rothnie, 3 Entertainment Law Review 39 (1992)

The Conflicting Treatments of Compilations of Facts under the United States and United Kingdom Copyright Laws by Thomas P. Arden, 3 Entertainment Law Review 43 (1992)

The Canadian Advantage: The Benefits of Producing a Film in Canada by David B. Zitzerman and Michael A. Levine, 3 Entertainment Law Review 48 (1992)

Performers' Protection: The Evolution of a Complete Offence by Brian G. Sherrard, 3 Entertainment Law Review 57 (1992)

The Audio Home Recording Act of 1991: A Road to Compromise by Jason Berman, 3 Entertainment Law Review 64 (1992)

Satellite-delivered Pay TV Services: The Copyright Issues Relating to Film by Nathalie Curtis, 3 Entertainment Law Review 71 (1992)

Mass Communications and the First Amendment: An Overview by L. A. Powe, Jr., 55 Law and

Contemporary Problems, Durham, North Carolina, 53 (1992)

Setting Standards for High Definition Television: Federal Policy Must Promote More Than Just a Better Picture by George Snyder, Jr., 40 Buffalo Law Review 613 (1992)

The Complete Picture on Donations of Art by Kenneth L. Levine, 4 The Journal of Taxation of Exempt Organizations 23 (1992)

Cinematic Sex and Censorship in Indian Film by Anita Ramasastry, 33 Harvard International Law Journal 205 (1992)
[ELR 14:3:21]