RECENT CASES

Vanna White may proceed with right of publicity and Lanham Act claims arising from advertisement's depiction of futuristic "Wheel of Fortune" set

A Samsung Electronics advertisement for the company's videocassette recorders depicted a robot, dressed in a blond wig, gown and jewelry, posed next to a game board which was "instantly recognizable" as the Wheel of Fortune game show set. Vanna White, who had not consented to the ad, sued Samsung alleging the violation of California Civil Code section 3344, the common law right of publicity, and section 43(a) of the Lanham Act. A Federal District Court (ELR 11:9:10) granted Samsung's motion for summary judgment.

In reversing the District Court's decision, a Federal Court of Appeals first noted that section 3344 provides, in pertinent part, that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, ...for purposes of advertising or selling...without such person's prior consent...shall be liable for any damages sustained by the persons injured as a result thereof."

Judge Alfred T. Goodwin acknowledged that Samsung used a robot, rather than a mannequin with White's precise features. Without deciding for all purposes when a caricature or impressionistic resemblance might become a "likeness," Judge Goodwin agreed with the District Court that the robot was not White's "likeness" within the meaning of section 3344.

The District Court erred, however, in dismissing White's right of publicity claim on the ground that the Samsung had not appropriated the performer's name or

likeness. Judge Goodwin, upon careful review, declared that the common law right of publicity was not limited to the appropriation of an individual's name or likeness. And the method of appropriation was not dispositive, particularly since the identities of popular celebrities are "the easiest to evoke without resorting to obvious means such as name, likeness, or voice." A celebrity has the sole right to exploit his/her "celebrity identity value," declared the court.

Judge Goodwin proceeded to evaluate White's Lanham Act claim, using various factors relevant to determining a likelihood of confusion (the District Court apparently did not use any of the various multi-factor tests in dismissing the claim). Initially, it was noted that in cases involving confusion over an endorsement by a celebrity, "mark" means the celebrity's persona. In this case, White's mark was strong, and her "goods," i.e., the fame based on White's televised performances, was closely

related to Samsung's product - the advertising copy reinforced the relationship.

The similarity of the marks was an ambiguous factor, stated Judge Goodwin, and White presented no evidence of actual confusion. With respect to the marketing channels used, the court noted that White, in several magazines, had appeared in the same stance as the robot in the ad, and that magazines were used as the marketing channels for the Samsung advertisement. The court also found that consumers were likely to be confused as to whether White was endorsing Samsung's videocassette recorders.

Samsung had used celebrities such as Morton Downey Jr. in other advertisements for the company's products, and the court found that viewing the series of advertisements as a whole, a jury could reasonably conclude that "beneath the surface humor of the series lay an intent to

persuade consumers that celebrity Vanna White, like celebrity Downey, was endorsing Samsung products."

Judge Goodwin, emphasizing the "peculiar facts" of the case - that the robot ad identified White and was part of a series of ads in which other celebrities participated and were paid for their endorsement of Samsung's products - concluded that White raised a genuine issue of material fact concerning a likelihood of confusion as to her endorsement. The matter therefore was remanded for further proceedings.

The court rejected the argument that the robot ad constituted protected speech. Samsung distributed a true advertisement, not a parody; the "spoof" of White and Wheel of Fortune was "subservient and only tangentially related to the ad's primary message; and "the difference between a 'parody' and a 'knock-off' is the difference between fun and profit," declared the court.

Judge Arthur L. Alarcon concurred with the majority's decision on White's right of privacy claim, but dissented from the court's holdings on the right of publicity and Lanham Act claims.

Judge Alarcon questioned the conclusion that White was authorized to recover damages upon showing an appropriation of her "identity," and stated that the record did not support the finding that White's identity was appropriated. According to the dissent, California case law requires that a party alleging the appropriation of the right of publicity must show the appropriation of a name or likeness. In each of the federal cases relied upon by the majority, the advertisements in issue affirmatively represented that the person depicted in the advertisement was the party challenging the unauthorized use. The advertisements used attributes of an individual's identity which made it appear that the individual was the person identified in the advertisement.

In the dissent's view, "no reasonable juror could confuse a metal robot with Vanna White," and Samsung thus did not appropriate White's identity.

Judge Alarcon next considered the distinction between a performer and the role played by the performer. The attributes claimed by White as her identity were attributes of the role played by White, stated the dissent, and the representation of those attributes did not constitute a representation of Vanna White. For Judge Alarcon, "there was nothing unique about Vanna White or the attributes which she claims identify her. Although she appears to be an attractive woman, her face and figure are no more distinctive than that of other equally comely women. She performs her role as hostess on 'Wheel of Fortune' in a simple and straight-forward manner. Her work does not require her to display whatever artistic talent she may possess." Judge Alarcon noted that an attractive appearance, a graceful pose, blond hair, an

evening gown and jewelry are common attributes of game show hostesses, models, actresses and singers. Even if viewed together, the attributes did not identify Vanna White so as to raise a triable issue as to the appropriation of her identity, stated the dissent.

The imitation of the "Wheel of Fortune" set might lead a consumer to think of Vanna White, but the set was not an attribute of White's identity, observed Judge Alarcon. The advertisement was intended to depict a robot playing the role White played on "Wheel of Fortune;" the fact that an actor or actress may be famous for playing a particular role was not sufficient, in Judge Alarcon's view, to give the performer a proprietary interest in the role.

In turning to White's Lanham Act claim, Judge Alarcon stated that White offered no evidence that any portion of the consuming public was deceived. After careful consideration, including a reminder that the features of the

robot were very dissimilar to White's face and that there was no evidence that Samsung intended to confuse consumers, the dissent stated that the use of a robot in the advertisement made it clear that White did not endorse Samsung's product, and that White did not raise a genuine issue of material fact to support her Lanham Act claim.

Judge Alarcon next adverted to Samsung's First Amendment defense, commenting that the majority's position would seem "to allow any famous person or entity to bring suit based on any commercial advertisement that depicts a character role performed by [the person]." It appeared to the dissent that any advertisement showing a competitor's product, or any recognizable brand name, would be liable for damages under the majority's analysis, and that "even the depiction of any obvious facsimile of a competitor's product may provide

sufficient basis for the maintenance of an action for damages."

Judge Alarcon concluded by pointing out that although Samsung may have used the idea of a glamorous female game show hostess, the company did not appropriate Vanna White's expression of that role. Again, no reasonable consumer could confuse the robot with White or believe that because the robot appeared in the advertisement, White endorsed Samsung's product; Judge Alarcon therefore would have affirmed the District Court's judgment.

In a footnote response to Judge Alarcon's First Amendment discussion, Judge Goodwin stated that the dissent read the decision "too broadly," and pointed out, in part, that the First Amendment does not bar all right of publicity actions and that in the case of commercial advertising, "the first amendment [sic] hurdle is not so high."

White v. Samsung Electronics America, Inc., Case No. 90-55840 (9th Cir., July 29, 1992) [ELR 14:4:3]

Walt Disney obtains injunction barring Edmonton, Canada amusement park from using the name "Fantasyland"

Mr. Justice J.B. Dea of the Court of Queen's Bench of Alberta, Judicial District of Edmonton, has ruled that the Triple Five Corporation may not use the name "Fantasyland" for a theme park located in the West Edmonton Mall.

Mr. Justice Dea, after carefully reviewing relevant case law, noted that Walt Disney Productions, in order to establish a claim of passing-off, was required to show that a certain goodwill or reputation was attached to the company's goods or services in the mind of the public,

and that the name in issue was identified with those goods or services. Disney also was required to show that Triple Five engaged in a misrepresentation, whether or not intentionally, which was likely to lead the public to believe that the goods or services were those of, or were authorized by, Disney; and that the company had suffered, or was likely to incur, damages. Disney claimed that in 1955, it initiated the use of the word Fantasyland for one of the theme parks at Disneyland, and that Fantasyland was associated in the public mind with Disney and was part of the company's reputation or goodwill. Triple Five pointed out that Disney had not registered a trade mark in the name, and argued that "fantasyland" simply was a descriptive compound noun not subject to appropriation by any individual party.

Mr. Justice Dea discounted a lexicographer's testimony that the word "fantasyland" had existed as a common English compound noun possibly since the fourteenth

century. Only three dictionaries defined "fantasyland" as a word, and before the 1980s, no dictionary listed the word at all. The lexicographer acknowledged that the word often was used in a Disney context, and the court found that the testimony, rather than showing that "fantasyland" did not have a secondary meaning, served to show the opposite.

In turning to Disney's promotional efforts, the court pointed out that during the late 1950s, a television series called "Disneyland" was broadcast in Edmonton and elsewhere in Canada and North America. The series regularly featured programs emanating from "Fantasyland." Mr. Justice Dea, commenting on evidence indicating that Disney was "the single largest advertiser in the world," stated that apparently Disney spent a considerable amount of money on advertising and promotion, via many means including television, films, print media, and product licensing.

Triple Five argued that Disney was promoting "Disneyland," not "Fantasyland." But the court stated that "compared to almost any other business or product being conducted or sold in Canada, the prominence given to 'Fantasyland' by the promotions and advertisements of [Disney] cannot be described as other than extensive and widespread."

In 1983, Disney rebuilt Fantasyland at Disneyland and engaged in additional promotion activity. Triple Five opened Fantasyland at West Edmonton Mall in August 1983.

In considering the survey evidence, Mr. Justice Dea reviewed the methodology used, and noted that two surveys agreed that a majority of the public in Edmonton associated "Fantasyland" with West Edmonton Mall, and that a majority of the public elsewhere (except Calgary), associated "Fantasyland" with Disneyland.

With respect to the issue of trademark protection, it was pointed out that Disney did not own a trademark for Fantasyland in Canada nor exclusively for Fantasyland in the United States. A third party had owned a trademark in Canada for Fantasyland, although there was no evidence that the owner ever used the name. The third party's ownership (registered after Disney began to use the name and advertise it broadly) only recently was expunged. Disney, although emphasizing that the instant action was for passing-off, expressed the view that the company might have considered acquiring a trademark for Fantasyland, but could not have successfully maintained such a trademark if challenged because the company's amusement park was not located in Canada.

Mr. Justice Dea then found that the parties both were engaged in the amusement park business. Triple Five had followed many of Disney's general ideas, such as the concept of a theme, the kinds of rides, the use of

boats, and the 1890s decor, but "the Edmonton version was not so impressive as the Disney one." Triple Five's park was entirely indoors and was advertised in conjunction with the mall - these were not significant distinguishing features, stated the court.

The court next found that the standard to be applied in passing-off cases is that of "the person with an imperfect recollection who upon being faced with the [challenged] activities may well believe there is a connection..." and, again, that when the word "fantasyland" was used by itself, without any leading context, the public everywhere (except Edmonton) associated Fantasyland with Disneyland, the theme amusement park.

In all, the court found that Disney held the goodwill in the word "Fantasyland" as the name of its amusement park in Edmonton and Canada generally, and agreed that misrepresentation was shown when Triple Five began to use "Fantasyland" as the name of its amusement

park in Edmonton. Mr. Justice Dea pointed out, in part, that a July 1983 advertisement referring to the August 17th opening of the attraction mentioned "Fantasyland (an indoor Disneyland)." The evidence also disclosed several examples of public confusion.

Triple Five's use of the name "Fantasyland" constituted a misrepresentation because the work, with respect to amusement parks, was part of Disney's reputation and goodwill - no intention to misrepresent was needed. The court, accordingly, granted Disney's motion for an injunction restraining Triple Five from using the name "Fantasyland" in operating their amusement park.

Walt Disney Productions and Triple Five Corporation, In the Court of Queen's Bench of Alberta, Judicial District of Edmonton (June 29, 1992) [ELR 14:4:4]

Mike Tyson may proceed with claims seeking rescission of management contracts, but court grants summary judgment to manager on fraud charges

In July 1988, Mike Tyson and William D. Cayton entered a contract to settle a dispute over their boxer-manager contract. Tyson and Cayton also signed a new boxer-manager contract, which, in part, decreased Cayton's share of Tyson's boxing earnings from one-third to one-fifth. The parties executed a new personal manager contract, making the relationship non-exclusive and reducing Cayton's share of Tyson's non-boxing earnings from one-third to one-sixth for renewal commercials and ten percent for new commercials.

In November 1988, Tyson sued Cayton and various corporate parties seeking to rescind the settlement contract, a film rights contract between Cayton and Tyson, and the management contracts.

A Federal District Court in New York first granted Cayton's motion for summary judgment on the claim that Cayton fraudulently induced Tyson to enter into the July 1988 settlement and boxer-manager contracts. The court noted that Tyson did not provide any evidence that Cayton made fraudulent oral representations during the settlement negotiations. Judge Keenan also granted Cayton's motion for summary judgment with respect to Tyson's claim of fraudulent concealment.

In turning to the breach of contract claims, the court found that the question of whether Cayton breached his fiduciary duties to Tyson by refusing to sign a promotional contract between Tyson and Don King was an issue to be determined by the trier of fact. As Tyson's boxing manager, Cayton had "a more complex responsibility to his client than does an ordinary fiduciary to his principal. Cayton was hired to manage (emphasis by the court) Tyson, a function that anticipates something more

than blind obedience to the boxer's every inclination. Whether Cayton elevated his own personal interest above those of Tyson in exercising his managerial responsibilities" was an issue of fact. However, the refusal to sign the Tyson-King contract was not in and of itself a breach of Cayton's fiduciary duties.

Tyson also sought rescission of a 1984 contract - the first personal manager contract between the parties - and the restitution of any money Cayton earned under the contract. The court found that several issues of fact, including whether a corporate party was an unlicensed theatrical employment agency, precluded summary judgment.

Judge Keenan concluded by granting Cayton's motion for summary judgment on Tyson's claim seeking rescission of the management contract - the subject of Tyson's June 1988 state court litigation. The state action was settled in a written contract and the parties filed a

stipulation of dismissal with the court. Tyson thus was barred from relitigating any claims that would have been decided had the first action been fully litigated.

Tyson v. Cayton, 784 F.Supp. 69 (S.D.N.Y. 1992) [ELR 14:4:5]

Member of the "Orlons" singing group may proceed with royalty claim against ABKCO

In 1963, Stephen J. Caldwell, Sr. a member of the singing group known as the "Orlons" entered into a recording contract with Cameo-Parkway Records, Inc., the predecessor in interest to ABKCO Industries, Inc.

During the next few years, the group recorded "The Wah Hatusi," "Don't Hang Up," and "South Street." In December 1966, Caldwell claimed that he terminated

his contract with Cameo-Parkway and that he executed a general release for recording royalties then due him through the record company's last accounting period.

Caldwell eventually sued ABKCO, claiming that the company reissued or licensed others to reissue the Orlons' records without paying the performers any royalties.

The challenged release provided that Caldwell, for one dollar and other good and valuable consideration, agreed to "remise, release, and forever discharge Cameo-Parkway Records..of any and all claims of any nature whatsoever from any record contract or otherwise, individually or as a member of the group known as the 'Orlons' which against [sic] the said Cameo-Parkway Records...from the beginning of the world to the date of these presents."

A New York trial court, after finding that Pennsylvania law would apply to determine the validity of the release,

noted that Caldwell was an adult at the time he executed the release, and did not deny the signature as his own or allege that his signature was obtained under fraud or mistake.

The court then commented that the release contained an "inherent ambiguity" with respect to the company's future obligation for royalties. In a release signed by two of the group's back up singers in October 1966, the singers agreed to release Cameo-Parkway from all claims the singers might have "or which may hereafter accrue on account of...any record contract."

Judge Tom ruled that a trial was required to resolve the issue raised by Caldwell and denied ABKCO's motion for an order dismissing the performer's claims.

Caldwell v. ABKCO Industries, Inc., New York Law Journal, p. 26, col. 2 (N.Y.Cnty., June 25, 1992) [ELR 14:4:6]

Federal Communications Commission's gender preference policy in granting broadcast licenses is ruled unconstitutional

A Federal Court of Appeals has ruled that the Federal Communications Commission's gender preference policy violates equal protection principles.

Circuit Justice Clarence Thomas, who was a member of the court when the case was briefed and argued, described the Commission's policy for reviewing mutually exclusive license applications. The goals of the 1965 Policy Statement on Comparative Broadcast Hearings were to diffuse control of the media and to provide the best service to the public. In attempting to meet these goals, the Commission used a "quantitative-integration credit," which focused on the degree to which

prospective owners would participate in the station's day-to-day management. The credit then would be enhanced based on "qualitative" factors, such as an owner's character, the service the owner proposed to offer, and the owner's local residence, involvement in civic affairs, and experience and education in broadcasting.

In 1978, the Commission's Review Board decided, without explanation, to give preferences to women in its competitive licensing procedures.

The Commission subsequently decided to reexamine its racial, ethnic and gender classification policies. However, Congress, in a rider to a 1988 appropriations statute, instructed that "none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the...Commission with respect to comparative licensing, distress sales and tax certificates..to expand minority and women ownership of broadcasting

licenses...other than to close [the pending reexamination] with a reinstatement of prior policy."

After reviewing Congressional and court responses to the Commission's preference policies, the court turned to the instant case which arose in 1982 when Jerome Thomas Lamprecht, Barbara Driscoll Marmet, Dragon Communications, Inc. and Port Royal Broadcasting filed mutually exclusive applications to build a radio station in Middletown, Maryland.

An administrative law judge awarded the permit to Marmet, and the other parties appealed, challenging the decision to give Marmet enhancement credit for local residence and civic participation. The Commission's Review Board affirmed the decision. Port Royal withdrew from the proceeding, and the Commission denied Lamprecht and Dragon's petitions for review.

Justice Thomas stated that the United States Supreme Court decision in Metro Broadcasting, Inc. v. Federal

Communications Commission, 110 S.Ct. 2997 (1990; ELR 12:3:8) compelled the court to strike down the Commission's gender preference policy. In Metro, the Supreme Court rejected an action challenging, on equal protection grounds, two programs through which the Commission awarded broadcast station licenses based, in part, on an applicant's race, ethnicity, or surname.

Justice Thomas was not convinced that the evidence presented demonstrated that there was a link between broadcast station ownership by women and any type of underrepresented programming. The government did not show that the gender preference policy was substantially related to achieving diversity in broadcasting and the court therefore held that the policy was unconstitutional. On remand, concluded Justice Thomas, the Commission must determine which party, in the absence of the policy, was entitled to receive the permit to build the station in Middletown.

Judge Buckley, in a concurring opinion, expressed the view that the majority opinion was consistent with the decision in Metro and respected Congress's factfinding and policymaking roles. A Congressional Research Service analysis revealed an "impressive relationship between minority ownership and program diversity." But there were only minor differences in programming between stations owned primarily by women and those owned by men. Judge Buckley called for a formal investigation of the circumstances leading to the disclosure to The Legal Times of the preliminary drafts of the opinions in the matter.

Chief Judge Mikva, in dissent, stated that it was "impossible to reconcile the Supreme Court's decision in Metro Broadcasting with my colleagues' decision today." The Supreme Court had held that Congress may require the Federal Communications Commission to make certain broadcasting licenses available only to

minorities. But the majority's decision in the instant matter, stated Chief Judge Mikva, would prevent Congress from requiring the Commission "to adopt a far milder and far less discriminatory preference program for women."

It was noted that the study cited by the majority determined that there indeed was a link between female ownership and programming diversity. Metro emphasized that courts should defer to Congress's conclusions about the link between ownership and programming "as long as the conclusions reflect reasoned analysis rather than archaic stereotypes." Chief Judge Mikva would have ruled that Congress used reasoned analysis in finding that increasing the number of women who own and manage broadcast stations would increase programming diversity. Metro therefore would have barred the Federal Court of Appeals from striking down the policy.

In his lengthy dissent, Chief Judge Mikva questioned the majority's refusal, apparently on the basis of the Congressional Research Service report, to defer to Congress. Again, stated Chief Judge Mikva, Metro announced that courts must defer to Congress's judgment that there is a link between ownership and broadcast diversity as long as "the policies are...a product of 'analysis' rather than a 'stereotyped reaction' based on '[h]abit.'" (citation omitted by the court).

Chief Judge Mikva declared that a series of cases raising gender classifications did not support the majority's holding; recalled that Congress's objective in endorsing the Commission's gender preference was to increase programming diversity in general, rather than to increase women's or minority programming; commented that the cited research study supported Congress's judgments and that other studies, although not brought before the court, would have provided statistical support for gender

preference; and expressed regret with respect to the majority's "paraphrased descriptions of [his] positions."

It should be noted that in a footnote response to Chief Judge Mikva's dissent, the court, among other comments, pointed out the in Metro, the Supreme Court, in an "unambiguous reservation," stated that "[T]he Commission's gender preference policy is not before us today."

Lamprecht v. Federal Communications Commission, 958 F.2d 382 (D.C.Cir. 1992) [ELR 14:4:6]

Viacom may proceed with certain antitrust claims against Time, Home Box Office and affiliated cable operators

In 1989, Viacom International and its subsidiary Showtime Networks brought an antitrust action against Time Inc., its wholly-owned subsidiary, Home Box Office, American Television & Communications Corporation, a subsidiary of Time, and Manhattan Cable Television, a wholly-owned subsidiary of American Television.

Viacom alleged, in part, that the Time parties monopolized certain local markets for cable television in the United States. Viacom claimed that the Time parties exploited the monopoly position of American Television and Manhattan Cable in the local markets to effect a distortion of the larger programming services market in which Time, through Home Box Office, allegedly enjoyed market power. This leveraging claim was not based on American Television or Manhattan Cable's percentage share of the national market for pay television, but rather on the percentage of the programming services market over which Time allegedly exerted

control, and on the interplay between that power in the national market and the allegedly exclusionary activities of American Television and Manhattan Cable in the local markets.

Viacom claimed that American Television and Manhattan Cable's alleged discrimination against Showtime Network subsidiaries denied Viacom and Showtime access to subscribers in the local markets in which American Television and Manhattan Cable operated systems under franchises from local authorities. The denial of access, according to Viacom, also prevented Viacom from taking advantage of economies of scale available to the Time parties.

Time argued that the alleged foreclosure of Viacom's programming services from cable systems owned and operated by American Television and Manhattan Cable, prevented, at most, Viacom's access to less than ten

percent of all cable television subscribers nationwide, thus precluding a monopoly leveraging claim.

Federal District Court Judge McKenna found it impossible, on the existing record, to determine as a matter of law that Viacom would be unable to establish monopoly leveraging. The Time parties eventually may prevail on the theory "that the alleged denial of access to something less than 10% of the national subscriber base for cable television effects no redressable alteration of competition in the national market for pay programming services," but Viacom, stated Judge McKenna was entitled to have an opportunity to try to prove distortion of the national market sufficient to entitle Viacom and Showtime to relief.

Viacom also raised an actual monopolization claim, alleging that American Television and Manhattan Cable possessed monopoly power in certain local markets for the delivery of cable television and that the companies

engaged in prohibited anticompetitive activities, including discriminatory treatment of Viacom and Showtime subsidiaries, and the refusal of access to cable systems in the American Television and Manhattan Cable franchise areas.

Judge McKenna stated that Viacom failed to allege that American Television and Manhattan Cable willfully acquired, maintained or exercised monopoly power in the local markets in which they had obtained a franchise.

The court allowed Viacom to proceed with a claim for conspiracy to monopolize, declining to find as a matter of law that the insubstantiality of American Television and Manhattan Cable's percentage share of the nation's cable subscriber bases necessarily precluded a showing by Viacom and Showtime that their subsidiaries were effectively foreclosed from competition in the national market for pay programming services.

Time then argued that the Cable Act of 1984 precluded an award of relief under the Sherman Act, apparently based on a theory of "implied immunity" from prosecution under the antitrust laws. In rejecting Time's argument, the court noted that the pervasiveness of a regulatory scheme enacted by Congress may be such that courts will grant primary authority to a regulatory agency, thus "displacing" application of the antitrust laws. However, in enacting the Cable Act, Congress indicated an intention to accommodate, not to displace, the goals of the antitrust statutes.

Judge McKenna dismissed, as against American Television and Manhattan Cable, Viacom's claim alleging unreasonable restraint of trade, but refused to dismiss Viacom's state law unfair competition claims and retained pendent jurisdiction over those claims.

Viacom International Inc. v. Time Incorporated, 785 F.Supp. 371 (S.D.N.Y. 1992) [ELR 14:4:8]

Artist obtains preliminary injunction in trade dress infringement claim

Romm Art Creations, the licensed distributor of posters and other fine art based upon the work of an artist named Tarkay, sought to enjoin Simcha International and other parties from distributing allegedly infringing works by artist Patricia Govezensky.

Romm set forth causes of action for trade dress infringement under the Lanham Act; trade dress dilution in violation of New York statutory and common law; and unfair competition and deceptive acts and trade practices.

A United States Magistrate Judge found that Romm properly commenced its lawsuit under section 43(a) of the Lanham Act, 15 U.S.C. section 1125(a), notwithstanding the lack of a copyright infringement claim; that the Tarkay works were produced in limited edition form prior to the allegedly similar limited editions by Patricia; that Romm Art's posters and Tarkay limited editions had acquired secondary meaning; that Romm established likelihood of confusion; and that Romm would be irreparably harmed by the continued sales of the Patricia works.

Federal District Court Judge Arthur D. Spatt first noted that Simcha did not object to the finding that section 43(a) would provide relief for a claim of trade dress infringement arising from the commercial reproduction of particular art works, although the works were not protected by federally registered trademarks. The court cited the decision in Hartford House Ltd. v. Hallmark

Cards, Inc., 846 F.2d 1263 (10th Cir.; ELR 10:7:14; cert. denied, 488 U.S. 908 (1988), in which it was found that the combination of features comprising the trade dress of certain greeting cards was not functional, and thus was protectible under section 43(a). Judge Spatt adopted the finding of the Magistrate Judge that the Tarkay posters and limited editions created a distinctive visual impression sufficient to establish secondary meaning as to the source of the works and that, although unregistered, the works were entitled to protection under section 43(a).

The court also agreed with the Magistrate Judge's finding that the Tarkay works in issue, those with the "Women and Cafes" look, were produced in limited edition form prior to the allegedly infringing Patricia works.

Judge Spatt next conducted an analysis of the factors relevant to the issue of likelihood of confusion. It was found that Tarkay's images, "as imaginative, artistic

portraits," were strong marks. The court then stated that "upon examining the color patterns and shading of the Tarkay works, the placement of figures in each of the pictures examined, the physical attributes of his women, the depiction of women sitting and reclining, their characteristic clothing vis-a-vis those portrayed by Patricia," there was sufficient similarity between the products to consider whether the evidence indicated proof of confusion. The Simcha parties apparently did not specifically challenge the Magistrate Judge's finding of sufficient similarity in this instance. The test for determining similarity was whether the works created the "same overall impression" when viewed separately. For the court, the similarity of the patterns was "striking."

In view of the strength of the Tarkay trade dress and the striking similarity of the works, the court stated that "consumer confusion is a likely result" and held that the

trade dress of the artists works created the "same overall impression" when viewed separately.

It was further found that the two products were in direct competition with each other, thereby increasing the likelihood of confusion, and that there was sufficient evidence of actual confusion.

The Simcha parties did not refute Romm's substantial evidence on the issue of intentional copying, leaving the court "with the strong perception" that the Simcha parties acted in bad faith.

The fact that the art works in issue generally sold for thirty dollars and that the buyers of the posters were not sophisticated consumers provided additional support for a finding of likelihood of confusion.

Romm demonstrated that Tarkay's market position and promotional investment would be irreparably damaged, and the court, accordingly, granted Romm's motion for a preliminary injunction with respect to specified Patricia

limited editions and posters. The court adopted the Magistrate Judge's recommendation that Romm be required to post an undertaking in the amount of $20,000 as security for the preliminary injunction.

Romm Art Creations, Ltd. v. Simcha International, Inc., 1992 U.S.Dist. LEXIS 3445 (E.D.N.Y., March 18, 1992) [ELR 14:4:9]

Art cataloger obtains summary judgment in product disparagement claim brought by owner of painting

Roger Kirby owned a painting entitled "La Rue de la Paix," by the nineteenth century French artist Jean Beraud. In March 1988, Kirby consigned the painting to Christie, Manson & Woods International. Christie's set a

reserve price of $160,000 and the painting was scheduled to be offered at a May 1988 auction.

Kirby agreed that Christie's was entitled to verify that the painting would be included in a Beraud catalogue raisonne which was being prepared by Patrick Offenstadt. When Offenstadt asked Daniel Wildenstein to examine the painting, Wildenstein observed that the canvas had been relined and that the figures in the painting were more blurred than those of other Beraud works he had seen. Wildenstein concluded either that paint had been removed from the work through overcleaning or that the painting was a copy.

Offenstadt informed Christie's that the painting would not be included in the catalogue raisonne. A Christie's representative, although believing that the work was genuine, decided to withdraw the painting from the auction. In response to an inquiry from Christie's, a Paris art dealer provided documents showing that he had

purchased the painting directly from Beraud in 1907. The Christie's representative then forwarded the documents to Wildenstein and asked that Wildenstein reevaluate his opinion as to the painting's authenticity.

Wildenstein subsequently revised his opinion on the painting's authenticity, and stated that the painting would be listed in the catalogue raisonne with a notation that it had been damaged by "an abusive restoration and cleaning."

Christie's included the painting in an October 1988 auction, but it was not sold.

Kirby sued Wildenstein for product disparagement and sought damages of $250,000. A Federal District Court in New York has granted Wildenstein's motion for summary judgment on the basis that Kirby failed to make the requisite showing of special damages.

Judge Sand noted that special damages are limited to losses having pecuniary or economic value, must be

stated with particularity, and must be the natural and immediate consequence of the disparaging statements. Kirby's original complaint did not specify the losses underlying the $250,000 sought or state the present value of the painting. The complaint did not identify any particular person who would have bid on the painting but did not do so because of the alleged disparagement. Kirby claimed that a similar painting by Beraud had sold at a spring 1988 auction for about $200,000; that Wildenstein initiated a "whispering campaign" about the painting that led one unnamed potential bidder to doubt the marketability of the painting's title; and that Kirby's experts probably would testify that the painting was worth no more than $10,000, "if it could be sold at all."

In response to Kirby's "vague allegations of damages," the court issued a memorandum stating that summary judgment would be granted unless Kirby amended his complaint to present greater specificity with respect to

his pecuniary loss. However, Kirby's further submissions, ruled Judge Sand, did not raise a triable issue of fact as to special damages.

The court also observed that Kirby did not demonstrate that any losses were causally related to Wildenstein's statements - there was no evidence supporting the existence of a "whispering campaign" or the claim that the allegedly disparaging statements were circulated by Wildenstein.

Kirby v. Wildenstein, 784 F.Supp. 1112 (S.D.N.Y. 1992) [ELR 14:4:10]

Copyright infringement action against Mexican racetrack arising from simulcast horse racing programs is dismissed for lack of subject matter jurisdiction

In 1983, ITSI T.V. Productions, Inc., entered a contract with the California Authority of Racing Fairs to provide closed-circuit television services to various race tracks. From September 1986 until 1988, the racing authority simulcast ITSI's television version of the horse races by satellite transmission to remote locations. Video Sports America was one of the brokers or "disseminators" who arranged the simulcasts, including the transmissions of horse racing programs and other sporting events to Hipodromo de Agua Caliente.

In May 1988, Caliente sought to obtain audiovisual signals directly from some California race tracks. The authority allowed Caliente to acquire the exclusive right to use, transmit, receive and provide for the dissemination of audiovisual signals.

ITSI claimed that the authority, various county and local fairs, certain brokers of the signal, and Caliente

infringed its copyrighted programming by simultaneously broadcasting the shows to off-track betting locations without ITSI's authorization.

A Federal District Court in California has granted Caliente's motion to dismiss for lack of subject matter jurisdiction.

Chief Judge Emeritus Lawrence K. Karlton first assumed without deciding that the transmissions of the horse races that were videotaped were copyrightable and that ITSI owned the copyright in the "shows" of the horse races.

The court then noted that the Copyright Act of 1976 grants copyright owners the right to reproduce the copyrighted work; to prepare derivative works; to distribute or sell copies of the copyrighted work; to publicly perform and display the work; and to authorize such activities. Citing 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, section 12.04[A], at 12-63

(1991), Judge Karlton pointed out that Congress, by using the phrase "to authorize," apparently established the liability, whether vicarious or as a contributory infringer, "of one who does no more than cause or permit another to engage in an infringing act."

Despite the change in language in the statute, courts, according to Judge Karlton, have continued to deal with indirect infringers as contributory or vicarious infringers under the theories developed under the 1909 Copyright Act. Although stating that the courts "have been less than precise in their delineation of the contours of contributory versus vicarious liability for copyright infringement," Judge Karlton explained that a party may be vicariously liable for the infringing acts of others if the party has the right and ability to supervise the infringing activity of another, and the party has an obvious and direct financial interest in the exploitation of the copyrighted materials. A party may be contributorily liable

for the infringing acts of another when the party, with knowledge of the infringing activity, materially contributes to the infringing conduct of another.

Judge Karlton next reviewed the factors relevant to the court's subject matter jurisdiction, pointing out that because the United States copyright laws do not have extraterritorial effect, "infringing act that take place outside the United States are not actionable in United States federal courts" (citing Peter Starr Productions, Inc. v. Twin Continental Films, Inc., 783 F.2d 1440 (9th Cir. 1986; ELR 8:2:20). ITSI was required to show that the racing authority parties, under a theory of direct or vicarious liability, were liable for an act of infringement committed in the United States.

The court would have subject matter jurisdiction if ITSI alleged that the racing authority "authorized" another to commit an infringing act, so long as the act of authorization occurred in the United States. The

authorizing party then would incur liability even if the allegedly infringing acts occurred outside the United States. It was noted that the court in Danjag S.A. v. MGM/UA Communications Co., 773 F.Supp. 194 (C.D.Ca. 1991; ELR 13:5:8; 13:9:19) determined, as described by Judge Karlton, that because third-party liability, including liability under a theory of "authorization," depended upon the existence of a "direct" act of copyright infringement, a party who authorizes or otherwise is contributorily or vicariously liable for an act which does not take place in the United States, cannot as a matter of law be liable for copyright infringement.

Judge Karlton stated that the Daniag court attempted to distinguish Peter Starr by arguing that Peter Starr addressed the question of subject matter jurisdiction, not the sufficiency of the claim. But Judge Karlton questioned Daniag's "attempted distinction," stating that the court did not consider the fact that the jurisdictional and

substantive issues before it were so related that the question of jurisdiction depended on the resolution of factual issues going to the merits. In these circumstances, in Judge Karlton's view, summary judgment standards must be applied to resolve a motion to dismiss for lack of subject matter jurisdiction.

The Peter Starr court addressed the jurisdictional and the substantive aspects of the case before it, stated Judge Karlton, and the court was bound by the decision that a party states a claim when it is alleged that the opposing party, in the United States, has authorized the display, performance, or copying of a copyrighted work. "Authorization" itself is actionable as a direct act of copyright infringement - the fact that the act allegedly authorized by the opposing party occurred abroad would be irrelevant to the question of whether the court had subject matter jurisdiction over an infringement claim based on the act of authorization.

ITSI, in all, was required to show that the complained-of direct acts of infringement by Caliente occurred in the United States. Judge Karlton cautioned against confounding the questions of subject matter and personal jurisdiction, and noted that requiring that a party's acts "giving rise to contributory or vicarious liability for acts of copyright infringement of others must occur in the United States confuses the minimum contacts analysis necessary to determine personal jurisdiction with the subject matter jurisdiction extraterritoriality analysis."

The court proceeded to determine that it lacked subject matter jurisdiction over ITSI's claims that Caliente was liable for the unauthorized performance or secondary transmission of ITSI's shows in Mexico. Although the racing authority or other parties might be liable for authorizing Caliente's extraterritorial performance of ITSI's show, Caliente did not authorize itself to perform those shows, declared Judge Karlton.

ITSI also argued that Caliente was vicariously liable for direct acts of copyright infringement committed in the United States by Video Sports America, one of the disseminators of the shows. The court assumed for purposes of the motion that Video Sports was liable for the secondary transmission of ITSI's works and/or for authorizing Caliente to perform ITSI's works abroad. Caliente may have had a financial interest in the disseminator's allegedly infringing acts, but there was no evidence that Caliente had the right or ability to supervise or control the company's acts. The disseminator had access to and controlled ITSI's signal before and after any contract was entered into between Caliente and Video Sports. A similar analysis, stated the court, would apply to any claim brought by ITSI that Caliente was vicariously liable for infringing acts by the racing authority or individual race tracks.

ITSI also failed to present evidence, on a contributory liability theory, from which a reasonable juror could find that Caliente knew or should have known that the racing authority parties were infringing ITSI's copyright and that Caliente induced, caused, or materially contributed to the allegedly infringing conduct.

ITSI did not demonstrate that Caliente committed a direct act of copyright infringement in the United States, or that Caliente was contributorily or vicariously liable for acts of copyright infringement committed by others in the United States, and the court therefore lacked subject matter jurisdiction over ITSI's claims against Caliente.

Judge Karlton concluded by rejecting ITSI's suggestion that the court grant leave to amend the complaint to state a cause of action against Caliente under Mexican copyright law for acts Caliente committed in Mexico.

ITSI T.V.Productions, Inc. v. California Authority of Racing Fairs, Case No. CIV. S-89-1686 (E.D.Ca., Mar. 3, 1992) [ELR 14:4:10]

Reebok obtains preliminary injunction and freeze order in trademark infringement action involving sale of counterfeit shoes in Mexico

Reebok International, claiming that Marnatech Enterprises and Nathan Betech were selling counterfeit Reebok shoes in Mexican border towns, obtained a Federal District Court temporary restraining order and, subsequently, a preliminary injunction, ordering the Betech parties to cease any counterfeiting activity and to transfer certain assets only after court approval.

The District Court decision, as described by Federal Court of Appeals Judge Stephen Reinhardt, found that Betech, at the very least, organized and directed the manufacture of counterfeit Reebok shoes from the United States and knew that the counterfeit shoes regularly returned to the United States. The District Court further found that Betech's sales of counterfeit Reebok shoes decreased the sale of genuine Reebok shoes in Mexico and the United States, and directly decreased the value of Reebok's consolidated holdings. Betech's activities affected American foreign commerce in a manner which caused an injury to Reebok cognizable under the Lanham Act, noted Judge Reinhardt.

Reebok also was required to show that the challenged activities involved links to American commerce which were sufficiently strong in relation to those of other nations to justify the extraterritorial application of the Lanham Act. An analysis of the factors relevant to such a

finding supported the District Court's decision to exercise jurisdiction, stated Judge Reinhardt.

It was noted that the District Court was aware that the extraterritorial application of the Lanham Act in this case might result in some degree of conflict with an action of the Mexican courts, but that the degree of such potential conflict was small; that although Betech was a Mexican citizen, he resided in San Diego and was the president and owner of a California corporation; and that the United States had the "superior ability" to enforce Mexican and United States trademark laws because Betech's businesses and the majority of his assets were located in the United States.

The relative significance of the effects of Betech's activities on the United States as compared with the effects elsewhere, the extent to which there was a purpose to harm or effect American commerce, and the

foreseeability of such a result also supported the District Court's exercise of extraterritorial jurisdiction.

Turning to an issue of first impression in the circuit, Judge Reinhardt considered whether the District Court had the authority to freeze Betech's assets.

The District Court had found that California's attachment statute did not authorize the asset freeze sought by Reebok because the Lanham Act and related state law claims were not based on a contract. Reebok argued that the Rule 64 of the Federal Rules of Civil Procedure permits seizures authorized by federal law, and that Section 1116(a) of the Lanham Act "undisputedly authorizes the injunction issued in Reebok I, which enjoined Betech from the continued infringement of Reebok's trademarks."

The court determined that it was not necessary to decide whether Rule 64 of the Federal Rules of Civil Procedure or the Lanham Act itself authorized the

prejudgment asset freeze because, regardless of the scope of those provisions, the injunction was authorized by the District Court's inherent equitable power to issue remedies ancillary to its authority to provide final equitable relief and to insure the availability of Betech's profits.

Judge Reinhardt rejected Betech's argument that Congress's passage of the Lanham Act deprived the District Court of its inherent power to issue equitable remedies in cases arising under the statute, and concluded by agreeing with the District Court's finding that the balance of hardships was in Reebok's favor.

In a concurring opinion, Judge Ferdinand F. Fernandez expressed reservations about the use of freeze orders in Lanham Act cases, noting that "the danger that people will start seeking what amount to attachment orders in simple tort cases is substantial." Judge Fernandez agreed that freeze orders are proper where some form of

equitable relief is sought, and that the accounting sought by Reebok was a form of equitable relief. However, the prejudgment freeze in the instant case was "sweeping, general, and very broad. It is the kind of order that could drive an opponent to the wall regardless of the ultimate merits of the action. It is a frightening example of the reach of the court's injunctive power, and that in a case where an attachment would not lie and an insubstantial bond was required."

Judge Fernandez noted that the Betech parties did not properly raise an appellate issue regarding the scope of the freeze order, and only attacked the District Court's power to issue such an injunction in a Lanham Act case. All the court was required to hold, in Judge Fernandez's view was that in the instant type of case a District Court "can in some instances issue a freeze of some assets for some period of time."

Reebok International, Ltd. v. Marnatech Enterprises, Inc., Case No. 90-55400 (9th Cir., July 2, 1992) [ELR 14:4:12]

United States Supreme Court rules that Mexican restaurant's trade dress may be protected under Lanham Act based on a finding of inherent distinctiveness, without proof of secondary meaning

Taco Cabana operated a chain of fast-food Mexican restaurants in San Antonio, Texas; the first restaurant opened in 1978. The company described its trade dress as "a festive eating atmosphere having interior dining patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The

stepped exterior of the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme."

In December 1985, a Two Pesos restaurant opened in Houston - the restaurant's decor resembled the Taco Cabana decor. In 1986, Taco Cabana expanded into other Texas cities, including Houston, and in 1987, Taco Cabana sued Two Pesos for trade dress infringement under section 43(a) of the Lanham Act.

A Federal District Court jury, in response to the court's questions, stated that Taco Cabana's trade dress, taken as a whole, was nonfunctional and inherently distinctive, but had not acquired a secondary meaning in the Texas market. The jury also stated that the alleged infringement created a likelihood of confusion on the part of ordinary customers as to the source of the restaurant's goods or services.

The court entered judgment awarding about $3 million in damages to Taco Cabana and in the course of calculating damages, held that Two Pesos had intentionally and deliberately infringed Taco Cabana's trade dress.

A Federal Court of Appeals found that the evidence supported the jury's findings, rejecting Two Pesos' argument that a finding of no secondary meaning contradicted a finding of inherent distinctiveness.

The United State Supreme Court has ruled that trade dress which is inherently distinctive is protectible under section 43(a) without a showing that it has acquired secondary meaning.

Justice Byron R. White observed that the general principles qualifying a mark for registration under section 2 of the Lanham Act were for the most part applicable in determining whether an unregistered mark would be entitled to protection under section 43(a). In order to be registered, a mark must be capable of distinguishing the

applicant's goods from those of others. Marks have been classified in categories of generally increasing distinctiveness; descriptive marks may acquire the distinctiveness which would allow them to be protected - the acquired distinctiveness generally is called secondary meaning, noted Justice White.

Justice White pointed out that it had been found that Taco Cabana's trade dress was inherently distinctive and that it was not functional, and assumed, without deciding, that those rulings were correct and were not before the court. In agreeing that Taco Cabana's inherently distinctive trade dress was entitled to protection, Justice White stated that there was "no persuasive reason to apply to trade dress a general requirement of secondary meaning which is at odds with the principles generally applicable to infringement suits under section 43(a)."

The Court of Appeals for the Second Circuit had issued rulings in which protection for trade dress was

found unavailable absent proof of secondary meaning, but Justice White declared that section 43(a) provided no basis for distinguishing between trademark and trade dress. The statute does not mention trademarks or trade dress and does not refer to the concept of secondary meaning. Again, the court saw "no basis for requiring secondary meaning for inherently distinctive trade dress protection under section 43(a) but not for other distinctive words, symbols, or devices capable of identifying a producer's product."

Adding a secondary meaning requirement might have anticompetitive effects, stated Justice White, for "denying protection for inherently distinctive nonfunctional trade dress until after secondary meaning has been established would allow a competitor, which has not adopted a distinctive trade dress of its own, to appropriate the originator's dress in other markets and to deter

the originator from expanding into and competing in those areas."

Justice John Paul Stevens, concurring in the judgment, agreed with the court's conclusion that section 43(a), which provides a federal remedy for using either "a false designation of origin" or a "false description or representation" in connection with any goods or services, created a federal cause of action for infringement of an unregistered trademark or trade dress and that such a trademark or trade dress should receive essentially the same protection as those that are registered. Judge Stevens referred to the importance of recognizing that federal courts, during the past few years have changed the meaning of the text of the Lanham Act, and agreed with the transformation, describing it as consistent with the purpose of the statute.

On the basis of stare decisis concerns, Justice Stevens concurred in the judgment, but not in the opinion, of the court.

Justice Clarence Thomas also concurred in the judgment, citing the language of section 43(a). Justice Thomas noted that the statute, before being amended, made actionable "any false description or representation, including words or other symbols tending falsely to describe or represent," when "used[d] in connection with any goods or services." The language referred to causes of action for false descriptions or representations concerning the source of production of goods or services.

At common law, noted Justice Thomas, words or symbols that were arbitrary, fanciful, or suggestive were presumed to represent the source of a product, and the first user of a trademark could sue to protect it without having to show that the word or symbol represented the product's source in fact. The presumption was not

available to personal or geographic names or to words or symbols that only described a product - the user of such names or words could obtain relief only if it were shown that the trade name represented not just the product but a producer, i.e., that the good or service had developed "secondary meaning."

Trade dress, which consisted of a product's packaging, seemed at common law, stated Justice Thomas, "to have been thought incapable ever of being inherently distinctive, perhaps on the theory that the number of ways to package a product is finite. Thus, a user of trade dress would always have had to show secondary meaning in order to obtain protection." However, courts have determined that particular trade dress may be as capable as a particular trademark of serving as a "representation or designation" of source under section 43(a). Therefore, in Justice Thomas' view, the first user of an "arbitrary package," like the first user of an arbitrary word,

"should be entitled to the presumption that his package represents him without having to show that it does so in fact." This rule, according to Justice Thomas, follows from the language of the statute and would apply without regard to the registration section of the Lanham Act cited by Justice White.

Justice Antonio Scalia, although agreeing with Justice Thomas' views, declared that Justice Thomas' analysis was "complementary to (and not inconsistent with) the court's opinion, and therefore concurred in the latter.

Two Pesos, Inc. v. Taco Cabana, Inc., Case No. 91-971 (United States Supreme Court, June 26, 1992) [ELR 14:4:13]

National Football League may not present nonstatutory labor exemption defense in antitrust action challenging uniform salary provisions in developmental squad player contracts

In March 1989, the National Football League adopted a resolution establishing developmental squads of up to six players for each of the twenty-eight League teams. The resolution provided that developmental squad players, usually rookies and first year free agents, would be paid a fixed weekly salary rather than being permitted to negotiate their own salaries. The Executive Committee of the League Management Council subsequently set the salary at $1,000 per week.

Antony Brown and other developmental squad players brought a class action against the League alleging the violation of the antitrust laws.

A Federal District Court in the District of Columbia has granted the players' motion to strike the League's nonstatutory labor exemption defense. In a decision issued in June 1991, but only recently published, Judge Lamberth noted that the National Football League Player Association's exclusive bargaining rights extended to developmental squad players "insofar as they are potential NFL players." Although the collective bargaining agreement between the League and the Players Association expired in August 1987, Judge Lamberth pointed out that the Federal Court of Appeals of the District of Columbia had stated that the provisions of an expired collective bargaining agreement that relate to mandatory subjects of collective bargaining survive the expiration of the agreement. However, Judge Lamberth observed that the developmental squad salary resolution was not shielded by the nonstatutory labor exemption

because the exemption expired when the 1982 collective bargaining agreement expired in 1987.

Judge Lamberth questioned the wisdom of continuing to recognize the "court-made" doctrine extending the labor exemption, noting that "for the past four years, by continuing to hold parties to the terms of the expired collective bargaining agreement, courts have been treating the parties as if they had a current agreement. Such treatment results not from any legislation or express assent of the parties, but from a judicial fiction ostensibly fashioned to promote the negotiation of a new collective bargaining agreement..."

Judge Lamberth stated that the nonstatutory labor exemption provided a disincentive for the League to sign a new agreement; declined to find that the exemption would apply where union consent is absent; and expressed the view that the League's antitrust liability should attach at the expiration of the collective

bargaining agreement, not at "some indeterminate point beyond expiration which is labelled 'impasse.'"

The court declared that it was not bound by the holding in Powell v. National Football League, 930 F.2d 1293, and would not follow the holding. Judge Lamberth would not require a union to give up its rights as the bargaining agent for employees in order to escape the application of the terms of an expired collective bargaining agreement and reinstate the League's liability under the antitrust laws. Again, the court stated the belief that a union, by signing a collective bargaining agreement, cannot be required to be governed by its terms, absent express approval, after that agreement has expired.

Even assuming that the nonstatutory labor exemption extended beyond the expiration of the collective bargaining agreement and that the parties bargained in good faith to impasse, the court held that the nonstatutory labor exemption did not extend antitrust liability

protection beyond impasse after a collective bargaining agreement expired. It appeared to the court that the parties bargained at arm's length and in good faith to impasse - the parties did not change their respective positions regarding the developmental squad salary terms during the five months preceding the effective date of developmental squad formation.

The court concluded by holding that the nonstatutory labor exemption did not extend beyond impasse; that the League was liable for imposing the developmental squad salary restraint; and, as an additional alternative holding, found that the nonstatutory labor exemption did not shield the League from antitrust liability for the salary provisions because the provisions never were part of the expired collective bargaining agreement.

The court granted partial summary judgment to the players as to the League's nonstatutory labor exemption defense.

Brown v. Pro Football, Inc., 782 F.Supp. 125 (D.D.C. 1991) [ELR 14:4:14]

Baseball season ticket holder does not obtain contract right to purchase tickets for subsequent season

Eric Soderholm purchased about twenty Cubs season tickets for each season from 1985-1990. In January 1990, the Chicago National League Ball Club advised Soderholm that the club would not sell tickets "to people who resell tickets at inflated prices," and that the club believed that Soderholm's tickets were "repeatedly sold at above face value prices." In November 1990, the club informed Soderholm that it would not offer him 1991 season tickets, but subsequently agreed to sell him six season tickets subject to all of the terms applicable to

such tickets, including the prohibition against resale at any price above face value and that all ticket sales were made on a one-year basis with no automatic right of first refusal or renewal.

Soderholm sued the club claiming that he had a contract right to the season tickets, and seeking specific performance and injunctive relief.

An appellate court has upheld the trial court's dismissal of the action, finding that Soderholm did not show any evidence of mutual assent between the parties to enter an option contract. In the absence of an agreement, the court declined to conclude that the sale of season tickets to Soderholm from 1985 through 1990 obligated the club to sell Soderholm season tickets in 1991. The club did not send an offer to sell Soderholm season tickets for the 1991 season.

Judge McNamara rejected Soderholm's alternative argument that the season ticket was a lease and that the

club gave improper notice of termination. The court stated that a season ticket consists of a series of revocable licenses, rather than a lease, and that the club, as licensor, was entitled to revoke the license at its option.

Soderholm v. Chicago National League Ball Club, Inc., 587 N.E.2d 517 (Ill.App. 1992) [ELR 14:4:15]

Former college basketball player may proceed with breach of contract claim alleging that university denied promised access to its academic program

As reported at ELR 12:8:13, Creighton University, to induce Kevin Ross to attend and play basketball, assured the academically disadvantaged student, that he would receive a "meaningful education" at the school. From 1978 until 1982, when his basketball eligibility

expired, Ross maintained a D average and acquired only 96 of the 128 credits needed to graduate. When he left Creighton, according to a Federal District Court, Ross had the reading skills of a seventh-grade student, and his overall language skills were at the fourth grade level.

Ross enrolled, at Creighton's expense, for a year of remedial education at a Chicago preparatory school. Ross also attended Roosevelt University, but withdrew due to a lack of funds.

Ross eventually sued Creighton, alleging that Creighton committed "educational malpractice" by not providing him with a meaningful education and preparing him for employment after college. Ross also set forth a cause of action for negligent infliction of emotional distress, claiming that he was enrolled in a university environment for which he was not prepared and that remedial programs were not available. Ross further alleged

causes of action for "negligent admission" and breach of contract.

The District Court granted Creighton's motion to dismiss the complaint.

A Federal Court of Appeals has affirmed the District Court's dismissal of Ross's negligence claims, first noting that the "overwhelming majority" of states that have considered the educational malpractice claim have rejected it. The policies cited by the court as the basis for dismissing the educational malpractice claim also warranted the rejection of Ross's claims for negligent admission and for negligent infliction of emotional distress, stated the court.

With respect to Ross's breach of contract claim, Judge Ripple found that the complaint fairly alleged that Creighton agreed, in exchange for Ross's promise to play basketball, to allow him an opportunity "to participate, in a meaningful way, in the academic program of

the University despite his deficient academic background." According to Ross, Creighton did not provide adequate tutoring services, did not require Ross to attend tutoring sessions, did not allow Ross to red-shirt and did not provide the funds to allow Ross to complete his education.

Judge Ripple, cautioning that Illinois would bar any attempt to "repackage" an educational malpractice claim as a contract claim," noted that Ross's complaint did not merely allege that Creighton failed to provide him with an education of a certain quality, but that the school promised that it would provide certain specific services in order to insure his ability to participate in an academic program.

The court, emphasizing the "narrow" ground of its disagreement with the District Court, remanded the matter for consideration of Ross's claim that he was barred

from any (emphasis by the court) participation in and benefit from Creighton's academic program.

Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992) [ELR 14:4:16]

Briefly Noted:

Arbitration/Screen Credit.

Cine-source hired Jonathan Burrows to serve as the associate producer of the film "Texasville." The company agreed to pay an unspecified weekly amount to Burrows for a minimum of twenty weeks. Cine-source terminated Burrows' employment after four weeks.

Burrows, pursuant to the arbitration clause in his contract, demanded arbitration and recovered an award which was confirmed by a New York trial court.

In a second demand for arbitration, Burrows sought an award of actual damages arising from the company's failure to grant him credit on the film. Cine-source argued that the prior award and judgment barred the claim for screen credit.

A New York appellate court noted that the purported breach of the screen credit provision had not yet occurred at the time of the arbitration hearing, and no cause of action for its breach had accrued. The issue of screen credit had not been determined by the arbitrator, and the court, accordingly, reversed a trial court decision granting Cine-source's motion to stay arbitration.

Cine-source, Inc. v. Burrows, 581 N.Y.S.2d 9 (N.Y.App. 1992) [ELR 14:4:16]

Invasion of Privacy/Statute of Limitations.

In a decision issued in May 1991, but only recently published, a Federal District Court in Utah denied Simon & Schuster's motion to dismiss a section 1983 action brought by J. Gary Sheets.

In August 1988, Simon & Schuster published the book "A Gathering of Saints" by Robert Lindsey. The book contained portions of a diary written by Sheets' deceased wife. Sheets filed his action, claiming the unreasonable invasion of his privacy, on July 31, 1989 and filed an amended complaint in December 1990.

The court found that the most analogous statute of limitations with respect to the section 1983 claim was Utah's residual statute of limitations for personal injury

claims, not a limitations statute enacted by the state purporting to govern federal civil rights actions.

Sheets v. Lindsey, 783 F.Supp. 577 (D.Utah 1991) [ELR 14:4:16]

Attorney Sanctions.

Mike Ousley Productions agreed to sell its program, "Augusta Rocks," to a television station. During negotiations with the station, Ousley visited a nightclub allegedly owned by Ric and David Hogan and proposed to someone at the club that the television show be taped there. Ousley subsequently sued various parties, including Ric Hogan, claiming that the Hogans maliciously induced the television station to breach its oral contract so

that the Hogans and the station could then produce a similar show without compensating Ousley.

Ousley eventually moved to dismiss Ric Hogan and a Federal District Court granted the motion. Hogan then sought Rule 11 sanctions, claiming, in part, that the allegations in the complaint about his conduct lacked a reasonable factual basis. The court ordered sanctions against Ousley's attorney, Gary Hooper, in the amount of about $4,800 for failing to conduct a reasonable inquiry prior to naming Ric Hogan in the complaint.

A Federal Court of Appeals has affirmed the District Court's order. The court stated that it appeared that Hooper named Hogan as a defendant relying solely on hearsay provided by Mike Ousley. Although Hogan had stated that he was not involved in the dispute, his deposition was not taken. And there was no evidence of any legitimate excuses for failing to conduct a reasonable inquiry.

Mike Ousley Productions, Inc. v. WJBF-TV, 952 F.2d 380 (11th Cir. 1992) [ELR 14:4:17]

Attorney Sanctions.

A Federal Court of Appeals in Washington, D.C., in an October 1991 unpublished order, affirmed the Federal Communications Commission's decision to dismiss an application filed by South Star Communications, Inc. Apparently, South Star had sought to compete for a license but did not furnish any assurance that a transmitter site would be available to the company. The Commission also had found that South Star unjustifiably failed to prosecute its application in a diligent and timely manner.

The court noted the frivolity of the appeal, asked the Commission to comment on the propriety and amount of sanctions, and awarded sanctions solely against South Star's counsel in the amount of $1,000, about one-fifth of the Commission's estimated expenditures on the appeal.

The court pointed out that Rule 39(b) imposed limits on the award of costs for or against the government, but that Rule 38 did not set limitations on the imposition of sanctions.

South Star Communications, Inc. v. Federal Communications Commission, 949 F.2d 450 (D.C.Cir. 1991) [ELR 14:4:17]

Multicorporate Tax.

The California Franchise Tax Board found that Barclays Bank, a California bank, together with its United Kingdom-based corporate parent and related worldwide subsidiaries, comprised a unitary enterprise. The board, using a three-factor formula to apportion the income of the foreign-parent multicorporate unitary enterprise, assessed a tax against the bank.

When Barclays sued for a refund, a California appellate court held that the apportionment method violated the foreign commerce clause of the United States Constitution as applied to foreign-based unitary groups because the imposition of the tax involved foreign policy issues within the sphere of the federal government. It also was found that the use of the formula conflicted with a federal directive supporting the use of an alternative apportionment method.

The California Supreme Court, noting Congress' "persistent refusal to regulate state taxation of

multinationals," has remanded the case for a determination of whether the formula apportionment method violates due process. The court observed that the taxation method may not operate "unreasonably and arbitrarily to attribute to the taxing state a percentage of total income out of all appropriate proportion to the business transacted by the taxpayer in that state."

Barclays Bank International Ltd. v. Franchise Tax Board, Case No. SO19064 (Ca., May 11, 1992) [ELR 14:4:17]

Contracts/Dance Troupe.

Mascotte Productions, a Pennsylvania corporation, was formed in April 1991 to arrange tours throughout the world for the Ukrainian ballet troupe known as the

Donetsk Ballet Company. A booking agreement provided that Mascotte would act as the exclusive agent for the troupe and for Vadim Pisarev, the company's star dancer, in procuring performances. The agreement stated, in part, that Mascotte would receive fifteen percent of any fees payable to Pisarev or the troupe for any live dance performances, and sixty-five percent of any fees payable to Pisarev or the troupe for anything other than live performances, such as books, movies, or television shows.

A separate agency agreement contained many of the same terms as the booking agreement, but was signed only by Pisarev and Mascotte. Mascotte was to receive a twenty percent commission - there was no indication whether the parties intended that the commissions under the two agreements would be cumulative or not. Mascotte stated that it would use reasonable efforts to

counsel Pisarev in career matters and to assist him in earning higher fees.

A Federal District Court in Pennsylvania, after cataloging the lack of services performed by Mascotte, agreed with the ballet company that any contracts relating to representing the company, whether as agent or booking agent, were materially breached by the Mascotte parties. The court, accordingly, granted the troupe's request for injunctive relief discharging the troupe from all contractual duties to Mascotte and ordering Mascotte to refrain from interfering in the troupe's lives and contract negotiations in the future.

Kershentsev v. Mascotte Productions, Inc., 781 F.Supp. 339 (E.D.Pa. 1991) [ELR 14:4:17]

Assignment of Assets.

Columbia Record Productions obtained a judgment for $100,000 against Edward J. Holland in a Federal District Court in Michigan. The company secured a writ of execution from a Federal District Court in California and sought an order assigning assets. Magistrate Judge George H. King issued the order, but Columbia did not recover any of the assets. The company then discovered other assets and the magistrate judge issued a second order.

Holland unsuccessfully argued that the magistrate judge had no power to enter the order and that the court lacked personal jurisdiction.

A Federal Court of Appeals has reversed the District Court's decision to deny Holland's motion seeking relief from the magistrate judge's order. The court noted that the District Court did not specially designate the

magistrate judge to exercise jurisdiction and that the parties did not affirmatively consent to the magistrate judge's authority. In the absence of a statutory basis for the magistrate judge's order, the court concluded that the magistrate judge lacked the authority to enter the order, and remanded the matter to the District Court.

Columbia Record Productions v. Holland, Case Nos. 91-55429; No. 92-56014 [ELR 14:4:18]

Avedon Photograph.

A Richard Avedon photograph, which was published in the September 1955 issue of Harper's Bazaar, showed the model Dovima, dressed in a designer gown, posing among the elephants at the Cirque D'Hiver in Paris.

Eventually, Pearl Korn acquired the photograph and offered it for auction at Sotheby's.

The print apparently sold for $19,500. Avedon, claiming that the magazine had failed to return the print to him as required, sued Korn and the auction house demanding the proceeds of the sale.

In February 1992, Avedon executed a stipulation discontinuing the action against Sotheby's and agreeing that Sotheby's could turn over the proceeds of the sale to Horn. Horn declined to consent to a voluntary discontinuance by Avedon, and sought the dismissal of the complaint and sanctions.

New York trial court Judge Edward J. Greenfield noted that serious question were raised as to whether Avedon had abandoned all claim to the print, whether Avedon had permitted the magazine to dispose of the print, and whether the statute of limitations barred Avedon's claim. The court, although denying Korn's motion

to dismiss as moot, granted Avedon's motion to discontinue, and dismissed the action with prejudice. The application for sanctions was denied.

Avedon v. Korn, New York Law Journal, p. 29, col. 2 (N.Y.Cnty., June 15, 1992) [ELR 14:4:18]

Landmark Designation.

New York's Landmarks Preservation Commission designated as a landmark a five story stone commercial building on Lower Broadway; from 1853 until 1859 the building housed the gallery of photographer Mathew Brady. The Commission cited the building's "special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City."

The owner of the building, Lena Russo, claimed that the landmark designation wrongly interfered with plans for the demolition of the building and the development of the site.

A New York trial court rejected Russo's argument that the city's definition of "landmark" was unconstitutionally vague, and found that there was "ample" evidence, both historical and architectural, to support the designation.

Russo v. Beckelman, New York Law Journal, p. 21, col. 6 (N.Y.Cnty., April 29, 1992) [ELR 14:4:18]

Wrongful Death.

Edwin Peters, an experienced competitive cyclist, participated in a July 1989 race organized by the Cincinnati Velo Club and sanctioned by the United States Cycling

Federation. During the race, Peters, thrown from his bicycle, suffered fatal injuries. A Federal District Court in Kentucky has ruled that the Federation was not liable in a wrongful death action brought on behalf of Peters' estate. Peters had signed two waivers releasing the promoters and sponsors of bicycle races and sporting events in which he participated of liability for any injuries he sustained. In addition, Peters signed a release form in registering for the race in issue; the form placed the responsibility on each entrant to be familiar with the race course.

The court found that the estate did not show that the Federation engaged in willful or wanton conduct, and granted the Federation parties' motion for summary judgment.

Estate of Peters v. United States Cycling Federation, 779 F.Supp. 853 (E.D.Ky. 1991) [ELR 14:4:18]

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[ELR 14:4:20]