

RECENT CASES

Court reverses injunction barring Walt Disney Co. from using "When You Wish Upon a Star" in video-cassette advertising for Euro Disney

In 1939, Walt Disney Company assigned to Bourne Co. the copyrights to the songs from the movie "Pinocchio," including "When You Wish Upon a Star." Disney claimed that the agreement gave Bourne only the right to collect licensing fees from third parties and to keep fifty percent of the fees, with Disney retaining the right to use the songs for its own purposes. Bourne claimed that it obtained all rights to the songs, and that Disney was entitled only to use the songs in public performances of motion pictures.

During the 1950s, Disney used *When You Wish Upon a Star* as the theme for its weekly television series - the song and the series were used to promote Disneyland. Disney's national advertising campaign featured the songs from *Pinocchio*, and the songs were used on reel-to-reel movies sold for home use and on videocassettes. In all, stated Federal Court of Appeals Judge Ralph K. Winter, the songs were used for decades in a wide variety of media in a manner inconsistent with Bourne's characterization of the 1939 assignment.

In 1991, Bourne filed a lawsuit against Disney. Subsequently, Euro Disney requested licenses from Bourne in connection with a proposed promotion using *When You Wish Upon A Star* in advertising trailers attached to home videocassettes. Disney claimed that the request was a mistake and, eventually, Euro Disney withdrew the request. However, a Federal District Court granted Bourne's request for a preliminary injunction barring the

use of the Pinocchio songs on videocassette trailers; the court ruled that the videocassette trailers were a new use of the songs and that Bourne had promptly objected to such use.

Judge Winter reversed the District Court's ruling, finding that Bourne, as a matter of law, failed to demonstrate irreparable harm. The company did not object, for several decades, to "pervasive violations of what it now claims are its contractual rights." The harm caused by the past use of the songs was qualitatively similar to the challenged use, stated the court, and Disney had "clearly signaled its intentions to use the songs for a multitude of purposes and in new media forms as technology developed."

The court did not address the circumstances in which a truly new use of a name or song would revive the presumption of irreparable harm, but commented that the harm from the new use would have to be qualitatively

different from the harm flowing from the prior uncontested use and that the injured party could not reasonably have foreseen the new harm. The use of When You Wish Upon a Star to advertise Euro Disney on videocassettes was not a qualitatively different harm and was not unforeseeable.

Bourne Co. v. The Walt Disney Co., New York Law Journal, p. 21, col. 4, (2d Cir., Sep. 29, 1992) [ELR 14:9:3]

Misappropriation of ideas claim against estate of "Roots" author Alex Haley is dismissed

Alex Haley's "Roots: The Saga of an America Family," published by Doubleday & Company in 1976, did not misappropriate material contained in an unpublished

autobiography written by Emma Lee Paul, a New York appellate court has ruled.

Doubleday Publishing Company, in December 1974, had rejected Paul's manuscript entitled "The Bold Truth." Paul obtained a copyright for her work in 1976 and continued to resubmit the manuscript to Doubleday and to other publishers.

In 1981, Paul sued Haley, Doubleday, and American Broadcasting Companies for copyright infringement and unfair competition. A Federal District Court adopted a magistrate's report recommending the dismissal of the copyright infringement claims for lack of similarity and the dismissal of the unfair competition claim for lack of pendent jurisdiction. A Federal Court of Appeals affirmed the District Court's order.

Paul then brought a lawsuit in a Nassau County trial court setting forth various causes of action. The court dismissed seven of Paul's nine claims, but denied

motions for dismissal and for summary judgment with respect to two causes of action based on the alleged misappropriation of novel ideas and material contained in the manuscript.

On appeal, Judge Geraldine T. Eiber noted that to the extent that Paul continued to base her claims upon the copying of expression rather than the misappropriation of noncopyrightable ideas, Paul's claims in the state court proceeding were preempted by the Copyright Act of 1976. However, assuming that the material allegedly misappropriated from Paul's manuscript constituted the author's "ideas" rather than expression, Paul failed to demonstrate that her ideas were novel and original. The purported instances of misappropriation indicated to the court that Paul's claims were based "on nothing more than the fact that certain words and phrases appear in both works, albeit in totally different contexts." Various descriptive phrases were not genuinely innovative or

original, stated Judge Eiber, and references to historical fact were common literary devices which may be freely used.

In all, since the "ideas" which Haley allegedly copied from Paul's work were not novel, the court rejected Paul's causes of action for unfair competition and breach of implied contract.

Judge Eiber concluded by declaring that even if the record demonstrated an issue of fact concerning novelty, the Haley parties rebutted Paul's claims with proof that Roots was independently conceived by Haley well before Paul's manuscript was submitted to Doubleday. The court therefore granted the Haley parties' motion for summary judgment dismissing the complaint.

Paul v. Haley, New York Law Journal, p. 22, col. 3
(N.Y.App., Oct. 19, 1992) [ELR 14:9:3]

Ruling that 2 Live Crew's parody of "Oh, Pretty Woman" was fair use is reversed over strong dissent

A Federal Court of Appeals in Tennessee has reversed a District Court decision (ELR 12:12:10) finding that 2 Live Crew did not infringe the copyrighted song "Oh, Pretty Woman."

Roy Orbison and William Dees co-wrote "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music.

In 1989, 2 Live Crew released its version of the song, entitled "Pretty Woman;" the album, compact disc and cassette versions of "As Clean As They Wanna Be" credited Orbison, Dees and Acuff-Rose as the authors and publisher of "Oh, Pretty Woman." Acuff-Rose refused to grant a license to the group and brought a copyright infringement action claiming, in part, that 2 Live

Crew's rendition of the song was inconsistent with good taste and would reduce the future value of the copyright.

The District Court granted summary judgment to 2 Live Crew, holding that the group's use of the song was a parody and constituted a fair use under section 107 of the Copyright Act.

Senior Federal District Court Judge Joiner, sitting by designation, noted that section 107 provides an exception to a copyright holder's exclusive rights in his/her work when the challenged use is for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research." The popular definition of parody and the statutory definition of parody as a form of criticism have, according to Judge Joiner, "become somewhat confused." Section 107 does not direct the courts to conclude that parodies, in the popular sense, are fair uses. However, for the purpose of the instant case, the court assumed, as found by the District Court, that 2

Live Crew's song was a parody of Acuff-Rose's copyrighted song.

Judge Joiner, proceeded, after observing that the question of fair use in the context of musical works, was one of first impression in the circuit, to consider the four statutory fair use factors. The court accepted, with a footnote comment stating its "considerable reservation," the District Court's conclusion that the purpose of the use was to parody the original work.

The court then agreed that the commercial purpose of 2 Live Crew was not itself controlling on the issue of fair use. But Judge Joiner stated that the District Court did not sufficiently emphasize the United States Supreme Court's statement in *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539 (1985), expressly reaffirming its earlier holding that "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of

the copyright." (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

Without setting aside the District Court's conclusion that 2 Live Crew's song was a criticism in the nature of a parody, Judge Joiner nevertheless found that the District Court erred in determining that the criticism constituted a fair use of the copyrighted work. The admittedly commercial nature of the 2 Live Crew work required the conclusion that the first statutory factor weighed against a finding of fair use, declared Judge Joiner.

The District Court correctly found in favor of Acuff-Rose on the second fair use factor concerning the nature of the copyrighted work.

In proceeding to the amount and substantiality of the portion of the copyrighted work used in the challenged work, the court observed that parodies generally are allowed to use more of the copyrighted work and warrant a finding of fair use than are other types of copying.

Judge Joiner noted, however, that evidence was presented that 2 Live Crew's song tracked the music and meter of the original, and that the song was "built upon the recognizable bass or guitar riff of the original." "[T]aking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original," stated the court, in ruling against 2 Live Crew as to this fair use factor.

In considering the effect on the potential market, the court pointed out that the use of the copyrighted work was wholly commercial; presumed the existence of a likelihood of future harm to Acuff-Rose; and stated that the record on this factor did not support a finding of fair use.

Judge Joiner concluded by commenting that it was "the blatantly commercial purpose of the derivative work that prevent[ed] this parody from being a fair use," and reversed and remanded the matter for further proceedings.

Judge David A. Nelson, in dissent, emphasized that section 107 provides a fair use defense for purposes "such as criticism, comment...scholarship or research..." and that the statutory fair use factors are nonexclusive. Judge Nelson then discussed the etymology of the work parody, which derives from a Greek word meaning "a song sung alongside another." A definition cited approvingly by the dissent appeared in a student essay published in the 1987 ASCAP Copyright Law Symposium, and stated that "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable."

It seemed to Judge Nelson that under anyone's definition, the 2 Live Crew song was "a quintessential

parody." Judge Nelson referred to the decision in *Berlin v.E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), cert. denied, 379 U.S. 822 (1964), in which the court found that a *Mad Magazine* piece entitled "Louella Schwartz Describes Her Malady" was a parody constituting fair use of Irving Berlin's "A Pretty Girl is Like a Melody." In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), the song "When Sonny Sniffs Glue" copied the first six bars (the recognizable main theme) of the 38 bars of the original song, "When Sunny Gets Blue." The court affirmed a finding that the parody was entitled to fair use protection as a matter of law.

In Judge Nelson's view, the 2 Live Crew work imitated and distorted the original work for comic or satiric effect, and did so in such a way that both the original work and the work of the parodist were readily recognizable. Judge Nelson questioned whether the Supreme Court would hold that the mere fact that the parodists

hoped to make money meant that their use of the original work was presumptively unfair. The cases cited by the majority involved mechanical copying, literally or figuratively, stated Judge Nelson, without alteration of the copied material, and it has been suggested that the presumption of unfairness in cases of commercial exploitation would be appropriate only when applied to commercial reproductive uses (emphasis by the dissent).

The fact that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement was a factor which favored 2 Live Crew because the scope of fair use is narrower with respect to unpublished works, noted Judge Nelson, who also remarked that neither the music nor the lyrics of "Pretty Woman" amounted to near-verbatim copying of the original song.

Furthermore, it appeared to Judge Nelson that the parody did not have the intent nor the effect of fulfilling the demand for the original. Judge Nelson pointed out that

parody "transforms as it copies, and it may well savage the original work in the process." Although consensual "parody licenses" may now be more common than in the past, Judge Nelson expressed uneasiness with the prospect of the courts "turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result."

In considering the fair use issue with respect to parodies, Judge Nelson suggested that courts should consider the social value of the parody as criticism. In the instant case, this factor would weigh strongly in favor of affirming the District Court's finding of fair use, concluded Judge Nelson.

Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) [ELR 14:9:4]

Attorney suing CBS for malicious prosecution in dispute over music group "Boston" may amend complaint to comply with New York law

During the litigation involving CBS and the music group Boston, CBS, among other claims, had alleged that Donald S. Engel, the attorney for Boston's leader, Donald T. Scholz, was liable for copyright infringement and breach of contract, based on Engel's participation in negotiations with other record companies for the release of future Boston recordings. A Federal District Court in New York granted summary judgment in favor of Engel.

In November 1985, Engel and his law firm, Engel & Engel, sued CBS, in a Federal District Court in California, for malicious prosecution. A stay of the proceedings was entered pending the resolution of CBS' breach of contract action against Boston's members and managers.

A Federal District Court in New York eventually awarded Scholz \$6.5 million.

In 1991, the California court granted summary judgment in favor of CBS on Engel's malicious prosecution claim, holding that the claim was barred as a matter of law because CBS had probable cause to institute the prior litigation in New York.

A Federal Court of Appeals has reversed the District Court's decision and remanded the matter in order to allow Engel to amend his complaint to comply with the pleading requirements under New York law.

Judge Schroeder set forth the elements of a civil action for malicious prosecution as follows: the commencement or continuance of a criminal, civil or administrative proceeding; its legal causation or institution by the present defendant against the plaintiff, who was the defendant in the original proceeding; its bona fide termination in favor of the present plaintiff; the absence of probable

cause for such proceeding; malice, and damage to the plaintiff.

The only issue in dispute was the issue of probable cause, and Judge Schroeder expressed disagreement with the District Court's conclusion that CBS had probable cause to support the company's action against Engel. A determination of probable cause would be based on the law of the jurisdiction where the purportedly malicious civil proceeding was filed, noted Judge Schroeder, in this case New York. New York case law states that probable cause "is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." An attorney generally cannot be held liable to a third party for purported injuries caused by services performed on behalf of a client, or advice offered to a client, absent a

showing of fraud or collusion, or a malicious or tortious act.

CBS did not allege that Engel acted fraudulently, maliciously, tortiously or collusively; the company, according to Judge Schroeder, only stated that Engel "openly shopped the market for a new record contract for his client." CBS thus was not entitled to summary judgment on the issue of whether probable cause supported the civil action filed against Engel. CBS may have had probable cause to seek to enjoin the conduct of Scholz, Boston, or MCA Records. But the District Court apparently did not distinguish between the latter parties and Engel, the attorney representing one of the parties.

Judge Schroeder then pointed out that New York, in addition to requiring a party alleging malicious prosecution to show the commencement of a civil proceeding, with malice, without probable cause and the termination

in the party's favor, requires the party to show special injury.

Applying California choice of law principles, Judge Schroeder found that while California had an interest in whether CBS's action amounted to malicious prosecution, the interest was "diminished by the fact that Engel and his client availed themselves of the New York forum by agreeing that the CBS record contract would be governed by New York law." And the interests of New York would be more significantly impaired if its law were not applied in this case. The complained-of prosecution was instituted in New York by a New York corporation to enforce a New York contract that expressly provided that it would be governed by New York law. Engel, a member of the New York Bar, represented Scholz in the New York action. New York seeks to control malicious prosecution actions filed against New York litigants by imposing a stringent special injury

requirement. If a party could circumvent the requirement by filing a claim in a different forum, New York's policy of limiting malicious prosecution actions would be seriously impaired, observed Judge Schroeder, in finding that the District Court erred in ruling that California law applied to the malicious prosecution claim.

Judge Schroeder then stated that although Engel's amended complaint did not allege facts which would meet New York's special injury requirement, the court hesitated to conclude that Engel could not allege any set of facts that would state a claim for malicious prosecution under New York law. Thus, on remand, the District Court was directed to allow Engel the opportunity to amend his complaint to state a claim under New York law.

Engel v. CBS Inc., Case No. 91-55508 (9th Cir., Dec. 16, 1992) [ELR 14:9:5]

Dismissal of "New Kids on the Block" lawsuit concerning newspapers' reader telephone polls is upheld because newspapers did not imply sponsorship or endorsement

As reported at ELR 12:6:3, the Gannett Satellite Information Network, Inc., doing business as USA Today, and News America Publishing, Inc., doing business as Star Magazine, conducted separate reader polls in 1990 concerning the musical group The New Kids on the Block. USA Today's announcement contained a picture of the group, asked readers to select a favorite performer by using a 900 number, costing 50 cents per call, for voting, and mentioned that any profits from the phone line would be donated to charity. The Star's announcement also contained a picture of the group, asked

"Now which kid is the sexiest,?" and directed readers to a 900 number costing 95 cents per minute. According to news reports, the polls earned \$1900 in revenue.

In response to the group's lawsuit, a Federal District Court granted the newspapers' motion for summary judgment on the basis that the polls were part of their news-gathering activities.

Federal Court of Appeals Judge Alex Kozinski focused on the group's trademark infringement claims, and stated that the nominative use of a mark, "where the only word reasonably available to describe a particular thing is pressed into service - lies outside the strictures of trademark law." If the use of a mark does not implicate the source-identification function that is the purpose of trademark, such use would not constitute unfair competition in that it would not imply sponsorship or endorsement by the trademark holder, declared the court.

Judge Kozinski pointed out that the newspapers used the group's mark to describe the group. In such circumstances, a commercial user, such as the newspapers, would be entitled to a nominative fair use defense if the product or service in question is not readily identifiable without use of the trademark; if only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and if the user has done nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

The New Kids did not claim that the newspapers' use of the mark was false or misleading, but that the use of the New Kids name in conducting the unauthorized polls implied that the group sponsored the newspapers' activity. However, observed the court, the only way to refer to the New Kids as an entity involved the use of the group's trademark, in the same manner as a newspaper

might refer to the Chicago Bulls or the Boston Marathon.

With respect to the second and third requirements of the nominative use defense, the court found that the newspapers referred to the New Kids only to the extent necessary to identify the group as the subject of the polls, and that the announcements did not suggest joint sponsorship or endorsement by the group.

The New Kids argued that even if the newspapers' announcements were protected by the fair use defense, the protection did not extend to the polls, which were profit-making enterprise apart from the newspaper's reporting businesses. It was noted that the newspapers could have used an 800 number or normal telephone lines, and that the use of the 900 number directly competed with the group's own 900 numbers.

In rejecting the group's argument, the court found that while the New Kids had a limited property right in their

name, that right "did not entitle them to control their fans' use of their own money." Given the finding that the newspapers' use did not imply sponsorship or endorsement, the fact that the poll may have earned a profit and competed with the trademark holder's business was "beside the point." The court commented that the New Kids could not use the trademark laws to prevent the publication of an unauthorized group biography or to censor parodies using the group's name. In all, summary judgment was proper with respect to the group's first seven causes of action which depended on a theory of implied endorsement.

The court also rejected the New Kids' argument that the newspapers' use of their name constituted commercial and common law misappropriation under California law. Judge Kozinski pointed out that the newspapers had a complete defense to the claim, under California

Civil Code section 3344(d) because the use occurred "in connection" with news items about the group.

The court concluded by rejecting the group's claim for intentional interference with prospective economic advantage - the New Kids did not have a tort claim based on the alleged loss of some business to a competitor.

New Kids on the Block v. News America Publishing, Inc.; New Kids on the Block v. Gannett Satellite Information Network, Inc., 971 F.2d 302 (9th Cir. 1992) [ELR 14:9:6]

Court grants motion for judgment as a matter of law following jury verdict on behalf of writer of "The Equalizer" script

As reported at ELR 12:5:10, in 1978, Lou Shaw entered into an option agreement with Richard Lindheim, a programming executive with NBC Television. The contract granted NBC an option to develop "The Equalizer," a pilot script created by Shaw, into a television series. NBC subsequently declined to produce Shaw's script and all rights reverted to the author.

Lindheim left NBC in 1979 and began working for Universal Television. In 1981, according to a Federal Court of Appeals description of the background of the dispute, Lindheim wrote a television series treatment entitled "The Equalizer." In 1982, Michael Sloan expanded the treatment, and the revised work became the pilot script for a television series which was broadcast on CBS beginning in 1985.

When Shaw sued Lindheim, Sloan, Universal City Studios, CBS and MCA Television, a Federal District Court granted the CBS parties' motion for summary

judgment with respect to Shaw's copyright infringement and Lanham Act claims on the ground that there was no substantial similarity between the works as a matter of law.

A Federal Court of Appeals upheld the District Court's decision dismissing the Lanham Act claim, but reversed the decision on the copyright infringement claim and remanded the matter, stating that Shaw had presented a triable issue of fact regarding substantial similarity of protected expression.

On remand, Federal District Court Alicemarie H. Stotler noted that the parties stipulated that Shaw's action was based solely on the alleged infringement of his "Equalizer" script by the pilot episode of "The Equalizer" television series.

Judge Stotler observed that the works at issue depicted the Equalizer as "a man who will equalize the odds, a lone man working outside the system to protect his

underdog clients and to resolve their predicaments as part of his rough notion of justice...both works involve a cover up/blackmail conspiracy and a woman who is in jeopardy...in [the Sloan work] the main character takes on two cases whereas [Shaw's] Equalizer has only one client..both works involve a criminal organization that blackmails a public official." In the CBS pilot, the character McCall, a former spy turned Equalizer, "is motivated by past wrongs and seems intent on helping any underprivileged person who face[s] insurmountable odds." Shaw's character, Jericho, "also seeks to prevent injustice...both are well educated, wealthy and have expensive tastes."

At trial upon remand, Shaw's expert witness testified as to numerous similarities in the settings, plot and characters of Shaw's script and the CBS pilot episode.

Lindheim claimed, in part, that he had provided only the "rough concept" of the pilot episode's script to

Sloan, who was the sole author of the script. The CBS expert testified that there were no significant similarities between the works other than scenes a faire.

The jury returned a verdict in favor of Shaw on the copyright infringement claim.

The court subsequently granted the CBS parties' motion for judgment as a matter of law and conditionally granted their motion for a new trial.

Judge Stotler recalled that the extrinsic test for substantial similarity of protectible expression in the allegedly infringed and infringing works is "an objective analysis of the similarity of the expression of plot, themes, characters, dialogue, mood, setting, pace and sequence of events in the two works, measured by analytic dissection and expert testimony." The intrinsic test "measures substantial similarity of protectible expression based on the response of the ordinary reasonable person as to whether the [allegedly infringing] work

captured the 'total concept and feel'" of the allegedly infringed work. And a presumption of copying arises, according to the court, where a party offers proof that the author of the allegedly infringing work had a reasonable opportunity to gain access to the allegedly infringed work and the two works are substantially similar in their protectible expression.

Shaw, declared Judge Stotler, did not produce evidence that the works at issue were substantially similar under the extrinsic test. The alleged similarities between the works were similarities "in ideas, concepts and other unprotected elements such as stock scenes and aspects of characters which flow naturally from the particular genre or primarily serve a plot function."

Shaw had written a treatment prior to registering his script as a derivative work. The court further found that the script did not contain protectible expression to the extent that it included protectible material contained in

the treatment. Shaw had argued that a "work in progress" or a draft such as the treatment would not be deemed an underlying work, with the final product, such as the script, being a derivative work. But the Copyright Act, noted Judge Stotler, states that "[a] work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole represent an original work of authorship, is a derivative work."

Even if the court disregarded the derivative work status of Shaw's script, whatever the treatment contributed to the script either constituted mere uncopyrightable ideas or unprotectible scenes a faire, stated the court.

Judge Stotler also found that Shaw did not produce evidence of actual copying by Sloan. Lindheim may have read the script, although he purportedly had not retained it, and apparently added "only broad-based verbal suggestions" to Sloan. It was not shown that Lindheim must have received Shaw's script based on Lindheim's

"placement in the chain of command in an entertainment company that had considered [Shaw's] script," and "participation in the development of the allegedly infringing program" At most, declared Judge Stotler, Shaw demonstrated that Lindheim "succeeded in transferring what uncopyrightable ideas and concepts he could recall from [Shaw's] script to Sloan's." Shaw did not present evidence of "striking similarities that would bespeak copying and preclude the possibility of Sloan's independent creation of his script."

The Ninth Circuit's decision in Shaw did not constitute the "law of the case" for purposes of the court's ruling on the motion for judgment as a matter of law, in light of the substantially different evidence presented at trial upon remand," ruled Judge Stotler.

The conditional grant of the motion for a new trial also was appropriate, stated the court, since the jury had

insufficient evidence to support a finding of similarity under the objective test or access on the part of Sloan.

Shaw v. Lindheim, Case No. 87-06926 (C.D.Ca., Sep. 4, 1992) [ELR 14:9:7]

Court rejects copyright infringement claim against writers of "On Our Own" due to lack of substantial similarity

Derrick D. Moore, the writer of a song entitled "She Can't Stand It," claimed that the song "On Our Own," written by Antonio Reid and Kenny Edmonds, also known as L.A. and Babyface, infringed his copyrighted work. Moore sued the writers and Columbia Pictures Industries, the distributor of the film "Ghostbusters II;" the

Reid/Edmonds work was used as the theme song of the film.

A Federal District Court in Minnesota granted summary judgment to the Columbia parties, ruling that Moore's evidence was insufficient to find access as a matter of law; that the Reid/Edmonds song was not strikingly similar to Moore's work as to create an inference of access; and that Moore did not refute Reid and Edmonds' claim of independent creation.

Federal Court of Appeals Senior Judge Heaney first noted that in order to establish access, Moore was required to prove that the Columbia parties had a reasonable possibility of viewing his work. The "corporate receipt doctrine" may establish access if it is shown that an employee of the corporation possessed a party's work and that "by reason of the physical propinquity" between employees, the writer of the allegedly infringing work had the opportunity to view the work in the possession

of the fellow employee. The court stated that the corporate receipt doctrine would apply when there is a relationship linking the intermediary and the alleged copier even though the alleged copier is not an employee of the intermediary.

The court found that Moore raised a question of fact with respect to the issue of access. It was observed that Moore's agent had delivered two cassette tapes of the writer's work to Cheryl Dickerson, an Artists and Repertoire executive of MCA Records. In response to Dickerson's request, the agent provided a final version of "She Can't Stand It," but there were no further dealings between Dickerson and the agent concerning Moore's work.

Dickerson had introduced Reid and Edmonds to several MCA performers, and the writers, upon a suggestion from Dickerson's supervisor, Louil Silas, began working on a song for the Ghostbusters II soundtrack.

Senior Judge Heaney concluded that there was a reasonable possibility that Reid and Edmonds had access to the instrumental version of Moore's work before they composed "On Our Own." It was noted that the writers and the MCA executives had on-going professional and personal relationships; that Dickerson obtained a copy of "She Can't Stand It" on the same day that Reid and Edmonds claimed that they began working on the music of "On Our Own;" and that Dickerson, who initially indicated a strong interest in Moore's work, subsequently did not contact the writer's agent. In all, Moore established that Reid and Edmonds had a reasonable opportunity to view or copy his work, and the District Court erred in holding as a matter of law that the writers did not have such an opportunity.

In turning to the issue of substantial similarity, the court referred to expert testimony attributing any similarities between the songs to the fact that they belonged

to the same genre - "R & B/hip hop" music. On the basis of the expert testimony, and the "inconclusive and unsubstantiated testimony" of Moore's witness, Judge Heaney determined that a reasonable factfinder could not find that "On Our Own" was substantially similar to "She Can't Stand It," and agreed with the District Court's summary judgment dismissal of the matter.

Senior Judge Lay concurred in part, but questioned whether the court should have resolved the case on the issue of substantial similarity when the District Court had not considered the issue. Senior Judge Lay pointed out that the credibility of expert witnesses is an issue for the jury; that the majority's reliance on the testimony of the expert witnesses was "completely misplaced;" and that the experts, whose testimony was offered to refute that there was any similarity of expression between the songs, had admitted that there was a similarity of ideas.

Senior Judge Lay would have remanded the matter for further findings.

Moore v. Columbia Pictures Industries, Inc., 972 F.d 939 (8th Cir. 1992) [ELR 14:9:9]

New Jersey county lacked standing to raise studio's First Amendment rights in action involving "Bonfire of the Vanities" filming

As reported at ELR 13:9:4, a Federal District Court in New Jersey ruled that New Jersey Supreme Court Chief Justice Robert N. Wilentz improperly barred Warner Bros. from using a Newark courthouse to film a scene for "Bonfire of the Vanities." The lawsuit was brought by Essex County; Warner Bros., in order to obtain

access to the old Essex County Courthouse, had offered to donate \$250,000 to the Courthouse Restoration Fund.

A Federal Court of Appeals, in December 1991, held that the county lacked third party standing to raise the First Amendment rights of Warner Bros. The court therefore set aside the judgment on the merits and an award of attorneys' fees, and directed the District Court to dismiss the case.

Judge Becker, in reviewing the background of the matter, noted that before 1988, the New Jersey state judiciary had no formal written policy governing the use of state courthouses for commercial filmmaking. When Judge Wilentz turned down Warner Bros.' request to film a climactic scene, he later stated, in part, that the scene might cause "justifiable offense to any black person."

The District Court ruled, in part, that the county had standing to assert Warner Bros.'s First Amendment

rights, and that Judge Wilentz's action were capable of repetition, yet evading review, and thus not moot.

Judge Becker emphasized that the county did not claim that Judge Wilentz violated the county's own First Amendment rights. The court noted that Warner Bros. may have had limited practical incentives to sue, but did not face an affirmative obstacle to suing. In Judge Becker's view, the studio most likely "was skeptical about the legal merits of the suit or had concerns about the costs and risks involved..." Judge Becker questioned whether the county adequately advocated Warner Bros.' interests; the fact that First Amendment considerations were raised did not "trump" the concerns attendant to recognizing third party standing.

Judge Becker concluded by considering the issue of federalism, citing Judge Wilentz's view that, of all the possible representatives to bring a third party action against a state officer, a county would be among the

"least appropriate." Under current law, stated Judge Becker, Essex County probably could not have succeeded in suing the Chief Judge for violating its own rights of free expression.

In all, given the fact that Warner Bros. had only minor obstacles to its own suit, that the court perceived significant potential conflicts of interest between the studio and the county; that federalism concerns were present; and that third party standing is "exceptional," the county lacked third party standing to raise Warner Bros.' First Amendment rights.

Amato v. Wilentz, 952 F.2d 742; 1991 U.S.App. LEXIS 30138 (3d Cir. 1991) [ELR 14:9:9]

Claims based on minors' viewing of pornographic segment on altered videotape of "Who Framed Roger Rabbit" are dismissed

A pornographic passage was included in an altered videotape of "Who Framed Roger Rabbit," rented in April 1990 at a supermarket operated by Supermarkets General Corp. The Reverend Alan Thomas, whose children, then ages 7 and 4, viewed the tape, sued Supermarkets on behalf of the children, alleging that they suffered extreme mental anguish and grief due to Supermarkets' negligence.

Thomas sought damages on his own behalf for the loss of the services, society and companionship of his children, and for negligent infliction of emotional distress caused by learning that his children had watched such "degrading material."

New York trial court Judge Bernard F. McCaffrey noted that the physical safety of the children was not jeopardized, and there was nothing in the record to indicate that Supermarkets reasonably knew or should have known of the existence of the altered passage on the tape. A reasonably prudent merchant is not required to examine each videotape, in its entirety, in its inventory. And requiring retailers to inspect a video after each rental would be "unduly burdensome."

The minors' causes of action were inadequate as a matter of law, and the dismissal of their direct claim mandated the dismissal of the derivative action. Again, it was not alleged that Reverend Thomas or the children encountered a direct physical risk of injury, and there was a question of fact as to whether Reverend Thomas was in "the zone of danger" when the children viewed the material. Judge McCaffrey stated that "even considering the special sensibilities of Reverend Thomas as a

member of the clergy," the impact from viewing the altered portion of the tape was not actionable, and, accordingly, granted Supermarkets' motion to dismiss the complaint for failing to state a cause of action.

Thomas v. Supermarkets General Corp., New York Law Journal, p. 26, col. 6 (Nassau Cnty., July 23, 1992) [ELR 14:9:10]

Ruling that pianist Andre Watts owes about \$290,000 in commissions to former manager is upheld

As reported at ELR 13:2:5, concert pianist Andre Watts, in August 1983, hired Columbia Artists Management as his exclusive manager; Andre Watts Performances Inc., in part, agreed to pay the manager fifteen

percent of the fees which Watts received for recitals and other specified appearances.

The corporation dissolved in August 1985 and the contract terminated in September 1986, but the parties continued to perform under the contract until Watts notified Columbia Artists, in August, 1988, that he was terminating the relationship, effective September 1988. At the time of the termination, the manager had scheduled a total of 82 engagements for Watts for the next two concert seasons. As of September 1, 1988, contracts had been executed for 48 of the 82 scheduled engagements; Watts performed and was paid for 46 of the 48 engagements. There were 34 scheduled engagements for which no contract had been executed prior to the termination; Watts performed, and was paid for, 32 of the engagements.

Watts, in an action for declaratory relief, argued that Columbia Artists was entitled to receive compensation

only for the 46 engagements for which contracts had been executed prior to September 1, 1988, and that the manager was entitled only to a seven and one-half percent commission, because additional managerial services, including travel arrangements, rehearsal schedules, piano delivery, receptions and other details were performed by another manager retained by Watts after September 1st. Watts also claimed that Columbia Artists was not entitled to any compensation for the 32 engagements for which contracts had not been executed as of September 1, 1988.

A New York appellate court has affirmed a trial court decision finding that Watts owed Columbia Artists about \$290,000, the commission for all the engagements scheduled for performance and accepted by Watts during 1988 through 1990, which were subsequently performed by Watts and for which he received payment.

Watts argued that the trial court erred in holding him to the terms and conditions of a contract to which he was not a party. Judge Casey stated that the trial court apparently found a separate and distinct contractual relationship between Watts and Columbia Artists, implied in fact, which arose out of the parties' continued relationship after the corporation was dissolved and the written contract expired. For Judge Casey, the parties' conduct, including the fact that the manager continued to provide services and Watts accepted and paid for those services, "clearly establish[ed] a contract implied in fact with substantially the same terms and conditions as embodied in the expired written contract between [Columbia Artists] and the Corporation." Although Watts was not a party to the written contract, this did not preclude the formation of a new contract, implied in fact, between Watts and the manager, with terms and conditions similar to those contained in the written contract.

Jude Casey then found that Columbia Artists' commission depended upon the scheduling of an engagement during the term of the contract and Watts' receipt of payment for the engagement. The trial court therefore correctly found Watts liable for commissions on all 78 bookings, regardless of whether a contract was executed prior to September 1, 1988.

The manager was entitled to the full commission on each of the engagements, concluded the court, stating that although Watts chose to have additional management services performed by another manager, this did not, in the instant case, preclude Columbia Artists from receiving the full amount of its commissions.

Watts v. Columbia Artists Management, Inc. New York Law Journal, p. 25, col. 3 (Dec. 22, 1992) (N.Y. Cnty., Dec. 10, 1992) [ELR 14:9:10]

Studio technician may proceed with age discrimination and retaliation claims against Universal Studios

Al B. Denney, who was 54 years old in 1989, had worked as a film set lighting technician beginning in 1960. As described by California appellate court Judge Fukuto, Denney, as of 1979, worked principally for Universal City Studios. After an injury in 1979, Denney was limited to working on less strenuous projects. In 1986, Denney unsuccessfully sought full "show" assignments.

Denney sued Universal alleging age discrimination in employment, handicap discrimination, and retaliation in violation of California's Fair Employment and Housing Act. The assistant to Universal's set lighting director, according to Denney, told Denney he was "too old and crippled" to work. In 1987, Denney testified on behalf of another worker who had a filed a grievance against Universal in connection with the use of younger workers

who were not yet eligible for union membership. When Denney finished testifying, the Universal assistant, by Denney's account, told him, "That's it. You're through at Universal."

Universal called Denney to work for only ten days in 1988 and for five days in 1989, and after May 8, 1989, did not recall Denney.

Universal moved for summary adjudication of only the retaliation and handicap discrimination causes of action, but a Los Angeles trial court granted the studio's motion for summary judgment.

The appellate court first ruled that the decision to grant summary judgment to Universal on Denney's age discrimination cause of action exceeded the trial court's jurisdiction. And although summary adjudication (rather than summary judgment) as to the remaining issues generally would be nonappealable, the court proceeded to consider the contentions raised by Universal.

Judge Fukuto stated that Denney timely complied with the statutory one-year complaint requirement with respect to all of his claims and that the claims were not barred by the failure to exhaust administrative remedies.

The court then found that Denney's handicap discrimination cause of action was barred by the exclusive remedy provisions of the Workers' Compensation Act. Judge Fukuto pointed out that Denney was Universal's employee when he became injured, and that Denney received workers' compensation for the injury, as well as occasional unemployment compensation.

The evidence presented by Denney did not warrant a determination, as a matter of law, that Denney did not undergo retaliation for opposing age discrimination.

Judge Fukuto concluded by directing the trial court, on remand to enter an order summarily adjudicating that Denney's handicap discrimination cause of action was

barred, and denying Universal's motion for summary adjudication in all other respects.

Denney v. Universal City Studios, Inc., Case No. B064211 (Ca.Ct.App., Nov. 4, 1992) [ELR 14:9:11]

Court dismisses National Football League's claim that players and agents combined to fix salaries in violation of antitrust laws

In March 1992, Federal District Court Judge Doty granted the National Football League Players Association's motion to dismiss an antitrust action filed by the National Football League (earlier rulings in the proceeding were reported at ELR 14:2:18; 13:6:13). The League argued that the Association's agreement to exchange information concerning player salaries with player agents

was a per se antitrust violation because the agreement indicated, as described by the court, "the existence of a broader conspiracy to fix, raise, stabilize or maintain prices, that is, players' salaries."

The court found that the League's allegations concerning the dissemination of compensation information were insufficient to support a per se violation of the Sherman Act. Any exchange of salary information between players or their agent was not subject to the per se rule, stated Judge Doty, because such an exchange occurred "in an environment where most players are not able to compete for the same jobs on the same teams." There was "virtually no information sharing" between the Association and agents representing players in actual competition with each other for the same job.

Even assuming that some players were competitors, continued the court, the challenged exchange of information among competitors was not within any of the

categories of conduct that would be "so manifestly anti-competitive as to warrant per se condemnation." It was found that the League's allegation of a per se violation based solely on an agreement to exchange salary information failed to state a claim on which relief could be granted.

Judge Doty next found that the League's allegation were too vague to provide adequate notice of the factual grounds supporting the League's price-fixing claim. Without an allegation that the player-agents agreed to act in accordance with the Association's alleged aims, a section 1 claim would fail whether based on rule of reason or per se unlawful activity, stated the court.

In all, the League's complaint did not state a per se violation of section 1 of the Sherman Act, declared the court.

In turning to the League's rule of reason claim, Judge Doty found that the League failed to allege any injury to

competition or to define a relevant market in which such injury occurred. The League did not allege the requisite factors to establish a rule of reason violation based solely on the exchange of salary information. And the alleged exchange of information did not state a rule of reason violation, continued the court, because any such exchange could have no anticompetitive effect "given the present system of player restraints." Further, the dissemination of salary information, observed Judge Doty, "may actually benefit competition because it provides players with the same type of information concerning other players' salaries that [the League] already possess[es]."

The court dismissed the League's claim with prejudice and without leave to amend.

The Five Smiths, Inc. v. National Football League Players Association, 788 F.Supp. 1042 (D.Minn. 1992)
[ELR 14:9:12]

Court upholds criminal copyright infringement conviction arising from sale of bootlegged videocassettes of films

A Federal District Court jury in New York convicted Julio Larracuate of criminal copyright infringement (ELR 13:1:16). The court's decision has been affirmed by a Federal Court of Appeals.

Larracuate owned and operated a videocassette rental store. An investigator from the Motion Picture Association of America, as described by Judge Jon O. Newman, identified tapes rented from the store as counterfeit. The investigator, and subsequently, the FBI, began a

surveillance of Larracuate; eventually a search of Larracuate's home, pursuant to a warrant, revealed a video counterfeiting laboratory consisting of 78 videocassette recorders, about 1,700 counterfeit videocassettes of films, hundreds of covers and stickers for videocassettes, and videotape copying equipment.

The District Court jury, in addition to convicting Larracuate of both the substantive and conspiracy offenses, found that Larracuate met the statutory requirements for punishment of up to five years' imprisonment and a fine of up to \$250,000.

In affirming the conviction, Judge Newman pointed out that although the government's burden in a criminal copyright infringement case is to establish the commission of the offense beyond a reasonable doubt, the elements to be proven are the same as those in a civil copyright infringement case - ownership of a valid copyright and copying. If an accused infringer has obtained a

license from a licensee of the copyright holder, the license would be an affirmative defense.

Even if the absence of a sublicense could be considered an element of the offense, continued the court, the accused party would bear the burden of producing some evidence of a sublicense before the prosecution would have to negate the element beyond a reasonable doubt.

The evidence concerning Larracuate's clandestine operation entitled the jury to conclude that Larracuate had not been validly authorized to reproduce the films, stated the court.

With respect to the calculation of the retail value of the bootleg tapes for purposes of sentencing, the District Court had agreed with the prosecution's expert who testified that the retail price of the films copied by Larracuate averaged just over \$73 - the total value of the tapes amounted to about \$193,000. The District Court correctly applied the sentencing guidelines to the normal

retail price, rather than the lower bootleg price paid by parties who are aware that the copies they are buying might not be legitimate, concluded the court.

United States v. Larracuenta, 952 F.2d 672 (2d Cir. 1992) [ELR 14:9:12]

New York's Shield Law protects CBS's unpublished videotapes from disclosure sought by robbery suspect

For several days in February 1992, a CBS News crew, together with producer Christine Weicher, accompanied a group of New York City Transit police officers as the officers carried out decoy operations at the Times Square subway station. On February 5, 1992, Lamont

Griffin was arrested in the Times Square station and charged with the crime of robbery in the second degree.

Griffin served a subpoena duces tecum for CBS's unpublished video footage and a subpoena for the personal appearance of Weicher. Griffin claimed that the videotapes would show that he was wrongly arrested in the midst of the confusion arising from a disruption of the police operation, and that only the film taken by a hidden camera would accurately depict the situation in the subway at the time of the incident. Griffin further claimed the Weicher's testimony would not duplicate the videotape because Weicher was not necessarily observing the scenes filmed by the video camera.

A New York trial court has granted CBS's motion to quash Griffin's subpoenas, stating that each subpoena was governed by the qualified reporter's privilege for nonconfidential unpublished news pursuant to the state's "Shield Law." The qualified privilege, for

nonconfidential unpublished news protects journalists in connection with "any civil or criminal proceeding" and does not distinguish between documentary or physical evidence and testimonial evidence, stated Judge Fried, so long as the demand is for unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news.

Griffin did not show that the requested information was "highly material and relevant" or was "critical or necessary to the maintenance of the defense or proof of an issue material to the defense." Griffin did not allege that the videotapes depicted his arrest, would prove or disprove who may have committed the alleged crime, or that Weicher witnessed the actual incident.

People v. Griffin, New York Law Journal, p. 26, col. 1 (Nov. 19, 1992) [ELR 14:9:13]

Injured touch football player assumed risk of injury, rules California Supreme Court

In *Knight v. Jewett* and the companion case of *Ford v. Gouin* (discussed below), the California Supreme Court addressed the issue of the application of the assumption of risk doctrine in view of the court's adoption of comparative fault principles in *Li v. Yellow Cab Co.*, 13 Ca. 3d 804 (1975).

In January 1987, as described by Judge Ronald M. George, writing for the three justices who signed the opinion and Judge Mosk who wrote a concurring and dissenting opinion, Kendra Knight and Michael Jewett, along with several other individuals, played an informal game of touch football. Jewett stated that while attempting to catch a pass, he collided with Knight, knocked her down, and then landed on her right hand, injuring Knight's hand and little finger. Knight stated that Jewett,

while running toward another player, ran into Knight from behind, knocked her down and stepped on her hand. Knight's little finger eventually had to be amputated, and she sued Jewett for damages, alleging negligence and assault and battery.

The trial court granted Jewett's motion for summary judgment. The appellate court, noting the conflict in appellate court decisions with regard to the "reasonable implied assumption of risk" doctrine, decided to apply *Ordway v. Superior Court*, 198 Cal. App. 3d 98; found that there were no disputed material facts to be determined; and affirmed the trial court decision.

Judge George first reviewed the decision in *Li*, in which the court reexamined the common law doctrine of contributory negligence. Contributory negligence generally has been defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a

legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." Li determined that the "all-or-nothing" contributory negligence doctrine should be replaced by a system of comparative negligence, and that the doctrine of last clear chance would be "subsumed under the general process of assessing liability in proportion to fault."

With respect to the assumption of risk doctrine, the court in *Li*, according to Judge George, contemplated that the assumption of risk doctrine would be partially merged or subsumed into the comparative negligence scheme. The court distinguished between those instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk, and those instances in which the defendant may owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the

defendant's breach of that duty. The category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves the cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., "primary assumption of risk" cases. Cases involving "secondary assumption of risk" would be merged into Li's comprehensive comparative fault system.

In primary assumption of risk cases, a plaintiff would not be entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable, stated Judge George. In secondary assumption of risk cases, the defendant would not be entitled to be entirely relieved of liability for an injury proximately caused by a breach of the duty of care simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather

than unreasonable. The question of whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm would focus on, not the reasonableness or unreasonableness of the plaintiff's conduct, but the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.

Judge George next considered the dissent's suggestion that even when a defendant has breached its duty of care to the plaintiff, a plaintiff who reasonably has chosen to encounter a known risk of harm imposed by such a breach may be totally precluded from recovering any damages, on the theory that the plaintiff, by proceeding in the face of a known risk, has "impliedly consented" to any harm. Judge George pointed out that Li explicitly held that a plaintiff who "unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence" is not completely barred from recovery - the

recovery of such a plaintiff is reduced under comparative fault principles. To state that a plaintiff who proceeds to encounter a known risk has impliedly consented to absolve a negligent defendant of liability for any ensuing harm would be irreconcilable with *Li*, observed Judge George.

Judge George also found that the implied consent rationale rests on an "untenable" legal fiction, as applied to conduct that represents a breach of the defendant's duty of care to the plaintiff. An individual who engages in a potentially dangerous activity or sport may agree to assume the risks inherent in the activity, but does not therefore consent to (or agree to excuse) a breach of duty by others that increases the risks posed by the activity itself.

The dissent's claim that the category of cases in which the assumption of risk doctrine would operate to bar a plaintiff's cause of action after *Li* should be evaluated on

the basis of an implied consent analysis was untenable for another reason, declared Judge George. The dissent apparently relied on several pre-Li cases which arose in the secondary assumption of risk context and which held that, in such a context, applying the assumption of risk doctrine depended on proof that the particular plaintiff subjectively knew, rather than simply should have known, of both the existence and magnitude of the specific risk of harm imposed by the defendant's negligence.

If the implied consent theory governed the application of the assumption of risk doctrine in sports matters, the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant might not be able to determine (such as the particular plaintiff's knowledge and expectations), rather than on the nature of the sport. There then would be "drastic disparities" in the manner in which the law would treat

defendants who engaged in precisely the same conduct, stated Judge George, based on the subjective expectations of a particular plaintiff.

In contrast, the question of the existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' relationship to the activity, and is an issue to be decided by the court, rather than the jury. The question of assumption of risk would be more amenable to resolution by summary judgment under the proposed duty analysis, in Judge George's view, than under the dissent's suggested implied consent approach.

Judge George further noted that under the comparative fault doctrine, a jury in a secondary assumption of risk case would be entitled to consider a plaintiff's voluntary action in choosing to engage in an unusually risky sport, whether or not the plaintiff's decision to encounter the risk would be characterized as unreasonable, in

determining whether the plaintiff properly should bear some share of responsibility he/she suffered. If an injury has been caused both by a defendant's breach of a legal duty to the plaintiff and by the plaintiff's voluntary decision to engage in an unusually risky sport, applying comparative fault principles will not operate to relieve either individual of responsibility for his or her actions, but will insure that neither party escapes such responsibility.

In the instant case, the court did not inquire about the reasonableness of Knight's conduct in choosing to engage in the risk of touch football or in continuing to participate in the game after she became aware of Jewett's allegedly rough play. The court also did not focus on whether there was a factual dispute with regard to whether Knight subjectively knew of, and voluntarily chose to encounter, the risk of Jewett's conduct, or impliedly consented to relieve or excuse Jewett from any

duty of care to her. Instead, stated Judge George, the court would inquire whether, in light of the nature of a touch football game, Jewett's conduct breached a legal duty of care to Knight.

Judge George adverted to the majority of cases, both within and outside California, that have addressed the issue of coparticipant liability in a game such as touch football, and have concluded that it would be improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport, and that liability may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activities involved in the sport. Judge George agreed that a participant in a sport breaches a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally

outside the range of the ordinary activity involved in the sport.

The court, applying the above-cited rule, affirmed the appellate court judgment upholding the summary judgment entered by the trial court in favor of Jewett. Jewett was, at most, careless or negligent in his conduct and did not engage in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport. Jewett did not breach any legal duty of care to Knight; Knight's action was barred under the primary assumption of risk doctrine; and comparative fault principles did not apply.

Judge Stanley Mosk, agreeing with the substance of the majority opinion in *Li*, concurred generally with Judge George's analysis, but would have concluded that the liability of sports participants should be limited to those cases in which their misconduct falls outside the range of the ordinary activity involved in the sport.

Furthermore, Judge Mosk would have eliminated entirely implied assumption of risk, stating that the "all-or-nothing aspect of assumption of risk is as anachronistic as the all-or-nothing aspect of contributory negligence;" that analysis should be limited to concluding that a participant owes no duty to avoid conduct of the type ordinarily involved in the sport; and that comparative fault principles should be applied to determine liability.

Judge Edward Panelli concurred in the majority opinion solely with respect to the result, but reaching that result by adopting and applying the "consent-based" analysis set forth in Judge Kennard's dissenting opinion. In Judge Panelli's view, however, Jewett met the burden of demonstrating that Knight assumed the risk of injury attendant to participating in a touch football game.

Although the dissent noted that few rules were set forth for the game in which Knight was injured, this fact was "irrelevant," stated Judge Panelli, for the risk of physical

contact and possible injury is inherent in the game of football.

Judge Joyce Kennard, in dissent, would have followed the majority of the state's appellate courts in holding that implied assumption of risk remains an affirmative defense under the system of comparative fault adopted in *Li*, and would have denied Jewett's motion for summary judgment. Judge Kennard stated that the inconclusive record would not permit a pretrial determination that Knight knew and appreciated the risks she faced or that her injury resulted from a risk inherent in the game.

Judge Kennard noted that before *Li*, a person's own lack of due care for his or her safety, known as contributory negligence, completely barred that person from recovering damages for injuries inflicted by the negligent conduct of another. *Li* eliminated contributory negligence as a separate defense, and held that juries might

compare the fault or negligence of the plaintiff with that of the defendant to apportion loss between the two.

Judge Kennard next observed that the defense of contributory negligence was based on a lack of due care, or, a departure from the reasonable person standard; however, the defense of implied assumption of risk depended on a voluntary acceptance of a risk with knowledge and appreciation of that risk. Under contributory negligence, the plaintiff's conduct was measured against the objective standard of a hypothetical reasonable person, whereas implied assumption of risk depended upon the plaintiff's subjective mental state. Li did not alter the basic attributes of the implied assumption of risk defense, according to Judge Kennard, and the defense would completely bar recovery in negligence cases in which the plaintiff has knowingly and voluntarily consented to encounter a specific risk.

For Judge Kennard, the plurality's decision worked a "sleight-of-hand" switch on the assumption of risk defense. In those situations in which implied assumption of risk does not merge into comparative fault, the plurality "recasts what has always been a question of the plaintiff's implied consent into a question of the defendant's duty. This fundamental alteration of well-established tort principles was not preordained by *Li...*," stated Judge Kennard, who continued by noting that the plurality's analysis, without "need or justification for this drastic revision," would completely abolish a defense that California courts have adhered to for more than fifty years.

Judge Kennard, in reviewing Knight's conduct, observed that Knight had objected when Jewett ran into her, that Jewett apparently acknowledged her statement, but that Knight was injured on the very next play. In Judge Kennard's view, Jewett did not establish implied assumption of risk as a complete defense to Knight's

action for negligence. There was no evidence that Knight either knew or must have known that by participating in the game she would be engaging in a sport that would subject players to being knocked to the ground. There were men and women players on each team, and the game was more of a "mock" football game, particularly given the use of a child's peewee ball. Jewett would be entitled to summary judgment only upon a showing that Knight knew that the game in issue involved a risk of being knocked to the ground. Since such knowledge on the part of Knight was not established, the trial court erred in granting summary judgment for Jewett on the ground that Knight had assumed the risk of injury, stated Judge Kennard.

Judge Kennard concluded by questioning the plurality's "no-duty-for-sports" rule; by emphasizing the difficulty of attempting to decide, by a motion for summary judgment, the question of duty; and by reiterating that in the

absence of uncontroverted evidence that Jewett's aggressive style of play was appropriate, there was no basis for the plurality's conclusion that his injury-causing conduct in knocking Knight to the ground was within the range of ordinary and acceptable behavior for the ill-defined sports activity in which Knight was injured.

Knight v. Jewett, 11 Cal.Rptr.2d 2 (Ca. 1992) [ELR 14:9:13]

Ski boat operator obtains summary judgment in negligence action brought by injured water skier

In 1983, Larry C. Ford was seriously injured while water skiing in the "Warren Cut" channel of the Sacramento River Delta. At the time of the accident, Ford was skiing barefoot and backward. He was injured when

the back of his head struck a tree limb that extended over the channel from one of the riverbanks.

Ford sued Jack Gouin, who, at the time of the accident, was driving the boat that towed Ford. Ford alleged that the accident was proximately caused by Gouin's negligence in driving the boat too close to the riverbank.

Gouin responded that Ford was totally barred from bringing the action by the reasonable implied assumption of risk doctrine. Gouin noted that Ford was an experienced water skier who had been skiing barefoot and backward for about two years prior to the time of the accident; that Ford had selected the water skiing site, had decided on the length of the tow rope, and had skied on the particular stretch of water at least fifty times in the past; and that Ford, at the time of the accident, was wearing a protective neck brace and other safety equipment, and was aware that the sport was risky.

Ford relied on the declaration of a water ski expert who stated that the site of the accident was reasonably safe. Ford also cited Gouin's statement acknowledging that, prior to the accident, Gouin had driven water skiers in the same area on more than five occasions.

The trial court granted summary judgment in favor of Gouin and the appellate court affirmed the judgment.

Judge Armand Arabian referred to the decision in *Knight v. Jewett* in stating that the assumption of risk doctrine operates as a complete bar to a plaintiff's action only in instances in which, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff. And, in general the legal duty applicable to a coparticipant in an active sport simply is a duty to avoid either intentionally injuring another participant or engaging in conduct so reckless as to bring it totally outside the range of the ordinary

activity involved in the sport. A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent.

In considering Gouin's motion for summary judgment, Judge Arabian asked whether Gouin's alleged conduct breached the legal duty of care that Gouin owed to Ford. As a coparticipant in the sporting activity, Gouin, under the authorities discussed in Knight, would be liable only if he intentionally injured Ford or engaged in conduct that was so reckless as to be totally outside the range of ordinary activities involved in the sport. It appeared to Judge Arabian that Gouin was, at most, careless in steering the boat.

Ford argued that a limited duty standard should not apply in the context of a cooperative sport such as water skiing. But Judge Arabian stated that the rationale applicable to sports played by competing teams equally

applied to an active sport such as water skiing even when engaged in on a noncompetitive basis.

Imposing legal liability on a ski boat driver, noted Judge Arabian, for ordinary negligence in making too sharp a turn, or in pulling the skier too rapidly or too slowly, "likely would have the same kind of undesirable chilling effect on the driver's conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of water skiing as a whole...Accordingly, the general rule limiting the duty of care of a coparticipant in active sports to the avoidance of intentional and reckless misconduct, applies to participants engaged in noncompetitive but active sports activity, such as a ski boat driver towing a water skier." Under Knight, summary judgment

was properly entered in favor of Gouin, declared Judge Arabian.

The court then discussed section 658. subdivision (d) of the Harbors and Navigation Code, dealing, in part, with the obligation of the operator of a vessel to avoid having a water skier strike against any object or person. After lengthy consideration, it appeared to the court that the statute imposed a duty on the operator of the vessel not to cause a collision between the person towed and any object or person, and that another subdivision of the statute imposed a corresponding duty on the water skier not to endanger other persons. The statute did not impose a duty of care on Gouin that was otherwise precluded under the principles set forth in Knight; and Ford's action was clearly barred by the doctrine of assumption of risk.

Judge Kennard concurred in the court's opinion, but stated that the concurrence was not based on the cited

statute, but on "settled principles governing the defense of implied assumption of risk..."

For Judge Kennard, the case was a "classic example" of implied assumption of risk. Ford, an experienced water skier voluntarily decided to engage in an activity that he knew would be dangerous and thus was barred from suing the ski boat driver for the harmful consequences resulting from Ford's choices.

Judge Kennard declared that the instant case illustrated the "flawed approach" of the Knight plurality, and demonstrated that the courts should continue to apply the doctrine of implied assumption of risk in its traditional form as a complete defense in an action for negligence. Judge Kennard proceeded to repeat the discussion of the issue as set forth in the dissent in Knight, emphasizing that the defense of implied assumption of risk is never based on the "reasonableness" of the plaintiff's conduct, as such, but rather on a recognition that a person

generally should be required to accept responsibility for the normal consequences of a freely chosen course of conduct. Judge Kennard would have held that the defense of implied assumption of risk continued to exist in situations in which a plaintiff's decision to encounter a specific known risk was not the result of carelessness.

Judge Kennard next found that the facts in the instant matter supported the trial court's ruling. Ford voluntarily engaged in the water skiing activity and must have been aware of the danger he faced in skiing barefoot and backward in the location chosen.

Judge Arabian and the dissent disputed the effect of the duty imposed by the Harbors and Navigation Code. In Judge Kennard's view, the injury-causing conduct violated the statute, but that fact was not dispositive on the issue of assumption of risk. The statute was not the type of safety enactment that would preclude Gouin from asserting assumption of risk as a defense barring Ford

from recovering damages for negligence, stated Judge Kennard.

In all, the evidence established as a matter of law the complete defense of implied assumption of risk, declared Judge Kennard, who, on that basis, affirmed the judgment of the appellate court.

Judge George concurred in Judge Arabian's opinion with respect to the analysis and resolution of the validity of the trial court's ruling under the "duty" approach to the doctrine of assumption of risk set forth by the court in Knight.

Judge George disagreed with Judge Arabian's interpretation of the section 658, subdivision (d) of the Harbors and Navigations Code, stating that the statute was intended to protect not only third parties, but also the towed water skier, from a collision caused by the operator of the boat that is towing the skier. After careful review of the entire statute and its legislative history,

Judge George observed that were the trier of fact to find that Gouin violated that statute, it would follow that Gouin violated his legal duty of care to Ford, unless the trier of fact also were to find Gouin had proved (pursuant to the Evidence Code) that, in operating the vessel, "he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

For Judge George, a triable issue of fact was raised as to whether Gouin's conduct breached a legislatively created duty of care owed to Ford, and summary judgment should not have been granted in favor of Gouin under the doctrine of assumption of risk.

Chief Judge Malcolm Lucas concurred in Judge George's opinion.

Judge Stanley Mosk, in dissent, stated that the Harbors and Navigation Code required reversal of the judgment of the appellate court. Furthermore, citing his concurring

and dissenting opinion in Knight, Judge Mosk again expressed the view that the court should abolish the "anachronistic" doctrine of implied assumption of risk.

Ford v. Gouin, 11 Cal. Rptr. 2d 30 (Ca. 1992) [ELR 14:9:16]

Briefly Noted:

Securities Claim.

Balcor Film Investors was formed to produce and distribute films pursuant to an agreement with New World Entertainment, Ltd. After an unsuccessful initial offering, a second offering was made to investors. Two groups of investors, the Majeski group and the Eckstein group, whose cases were consolidated in a Federal

District Court in Wisconsin, claimed that the Balcor Film parties violated 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 by portraying the Balcor investment as "safe and conservative."

After various preliminary rulings (ELR 13:1:17; 12:8:6), the court has held that the Balcor Film parties adequately conveyed the risky nature of the investment. There were sufficient facts present in the prospectus itself, supplemented by numerous reports which discussed the losses associated with the released films, to put the Majeski investors on notice that the Balcor Film investment was risky. Other warnings also should have put a reasonable investor on notice that the Balcor Film investment was not safe and conservative, and the applicable statute of limitations served to bar the Majeski group's complaint.

The Eckstein group's complaint also was dismissed as untimely.

The dismissal of all the federal claims required the court to relinquish its pendent claim jurisdiction, noted Senior District Judge Reynolds, in dismissing the entire action.

Majeski v. Balcors Entertainment Company Ltd.; Eckstein v. Balcors Film Investors, 786 F.Supp. 1458 (E.D.Wis. 1992) [ELR 14:9:18]

Art/Will Dispute.

Renate Hofmann, the second wife and primary beneficiary of the estate of the late artist, Hans Hofmann, died in September 1992, leaving assets valued at over \$50 million. Certain individuals interested in Hofmann's 1972 will challenged the fiduciaries named in a 1988 will, claiming that Hofmann lacked testamentary

capacity. New York Surrogate Eve Preminger agreed that it was "undisputed" that Hofmann suffered from a serious paranoid delusion. But a psychiatrist's letter attached to the 1988 will stated that there was no medical reason for Hofmann not to make a will. It was clear to the court that Hofmann, in writing her own will, had revoked all prior wills, disinherited her siblings, and, in all, exhibited "a great deal of lucidity and common sense..." with respect to the will and codicil.

Surrogate Preminger declared that the fact that Hofmann had sieges of paranoid psychosis which required the appointment of a conservator and then later a committee to manage her assets and arrange medical care did not automatically render Hofmann incapable of making a will. Hofmann had indicated her wish to avoid having the 1972 parties serve as executors, and the surrogate, accordingly, appointed as preliminary fiduciaries

the parties named by Hofmann as executors of her 1988 will.

Matter of Renate Hofmann, New York Law Journal, p. 27, col. 2 (N.Y.Surrogate's Ct., Nov. 30, 1992) [ELR 14:9:18]

Tax/Animation.

A California State Board of Equalization regulation imposed a sales and use tax on off-shore special effects work. Regulation 1529(c)(2) provided an exemption from taxation for long term studio employees. In 1988, according to news reports, the regulation was changed and animation and special effects categories were exempted from sales and use taxes.

During the years 1982-1987, Marvel Productions had paid about \$6 million in taxes for animation work, contracted in Korea, on such shows as "Spiderman and Friends," "Captain America," and "Muppet Babies."

In response to Marvel's lawsuit seeking a refund of the taxes, a Los Angeles trial court has found that the animation services provided to Marvel by the off-shore animation studios did not constitute special effects within the meaning of the regulation as it existed when the services in issue were rendered, and ordered the Board of Equalization to refund, with interest, the sales and/or use taxes paid.

Marvel Productions Ltd. v. State Board of Equalization,
Case No. BC 019 670 (L.A.Cnty., Oct. 28, 1992) [ELR
14:9:18]

IN THE NEWS

National Football League club owners and players reach labor agreement

The National Football League's club owners and the league's players have entered a seven year agreement, ending lengthy litigation.

It has been reported that beginning on February 1, 1993, players who have been in the league at least five years and whose contracts have expired will be unrestricted free agents. The players will have the right to negotiate with any of the league's clubs. The free agency signing period will run from about March 1 to July 15 each year. If a free agent does not sign with another team by July 15, the rights to the player revert to his original team which must pay him 110% of his last year's salary.

The agreement also provides that if player costs reach 67% of designated NFL gross revenue, a salary cap will be triggered; designated revenue means primarily television and gate receipts. Other club income, such as payments for luxury boxes, will be retained by each owner. It is likely that by 1996, players will be eligible for free agency in four years, rather than five years.

Players will receive a minimum of 58% of the league's designated gross revenue during each year of the agreement that includes a salary cap.

The agreement reduces the draft from twelve to seven rounds, plus one round for teams that lose free agents, and provides that the total salaries of drafted rookies will be capped at about \$2 million per club - the levels will increase with the growth of designated revenue.

The parties have agreed that each team will be entitled to exempt one "franchise" player from free agency for the duration of his career if he is offered a contract at

the average of at least the top five players at his position. In 1993, each team will be able to use the right of first refusal on two of its free agents if they are offered a contract at the average of at least the top ten players at that position. In 1994, every club will have one right of first refusal under the same conditions as 1993.

The NFL has agreed to pay \$195 million in damages and lawyers fees to settle all outstanding litigation.

Subsequent to the announcement of the settlement, it was revealed that any team competing in the conference championship games in the 1992-1993 season will be prohibited from signing any free agent unless the team loses a player of comparable stature to free agency. And if the team loses such a player, it will be allowed to sign a free agent for only the same salary or less than the departing player received. The four losing teams in the semifinals will be allowed to sign only one free agent at a salary of about \$1.5 million per year; the teams will be

able to replace departed players, but only at salaries of less than \$1 million.

The newly announced prohibitions, according to news reports, will apply to years in which there is no salary cap; the salary cap, again, will be triggered when league-wide player costs reach 67 percent of gross revenue. [February 1993] [ELR 14:9:19]

Cincinnati Reds owner Marge Schott is suspended and fined \$25,000 for purported use of "racially and ethnically insensitive language"

Baseball's Executive Council has suspended Cincinnati Reds owner Marge Schott for one year, as of March 1, 1993, finding that Schott's alleged use of "racially and ethnically insensitive language" was not in the best interest of baseball. The Council, according to news

reports, also reprimanded and censured Schott; directed the Reds owner to complete a multicultural training program; and fined her \$25,000.

Schott, upon complying with the sanctions, may apply for reinstatement on November 1, but then would be probation until February 28, 1994.

Although Schott may not participate in the day-to-day operation of the team during her suspension, Schott's ownership interest and status as general partner will not be affected. Furthermore, Schott may attend games and may sit in the executive suite at Riverfront Stadium, but may not sit in the owner's box behind the dugout. Schott was permitted to select the individual responsible for running the daily operation of the Reds - Schott selected General Manager Jim Bowden.

The ten member Council, empowered with the commissioner's authority, reportedly took into account Schott's significant contributions to charity and youth

programs, and a minority hiring program recently implemented by the Reds. [February 1993] [ELR 14:9:19]

Los Angeles trial court dismisses television show host's lawsuit against rappers N.W.A.

As reported at ELR 13:9:7, Denise Barnes, at one time the host of the television show "Pump It Up," sued Andre Young (professionally know as Dr. Dre), for assault and battery. Barnes also sued Eric Wright (Eazy-E), Lorenzo Patterson (M.C. Ren), and Antoine Carraby (Yella), members, along with Young, of the rap group N.W.A., for willful misconduct and conscious disregard of Barnes' safety and for libel and slander. It was alleged that Wright, Patterson and Carraby, in discussing the assault in media interviews, purportedly stated "The bitch deserved it," and "Hope it happens again."

A Los Angeles trial court granted Wright, Patterson and Carraby's motion for judgment on the pleadings, based on First Amendment grounds.

Barnes filed an appeal of the court's ruling. During the pendency of the appeal, Barnes filed a lawsuit against N.W.A., the group's manager, Jerry Heller, and its record label, Ruthless Records, seeking to hold the parties liable for the comments allegedly made by Wright and Patterson. The lawsuit also claimed that the N.W.A. parties were liable for the assault purportedly committed by Young.

Los Angeles Superior Court Judge Jerold A. Krieger has sustained the N.W.A. parties' demurrers to Barnes' complaint. [February 1993] [ELR 14:9:19]

California increases minimum compensation requirement for obtaining injunction to prevent breach of personal services contract to \$50,000 per year

California Governor Pete Wilson has approved an act amending sections 3423 of the Civil Code and section 526 of the Code of Civil Procedure relating to the availability of injunctive relief in certain proceedings. Injunctive relief may not be granted to prevent the breach of a contract other than in specified circumstances, such as the breach of a written contract for personal services of a special, unique, unusual, extraordinary, or intellectual character where the minimum compensation is at the rate of \$6,000 per year.

The statute revised the provision to specify that an injunction may be granted to prevent the breach of a written contract for personal services where the minimum compensation is at the rate of \$50,000 per year. The

statute still provides that the promised service must be "of a special, unique, unusual, extraordinary, or intellectual character, which give it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced..." [February 1993] [ELR 14:9:20]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, published by Fred B. Rothman & Co., 10368 W. Centennial Road, Littleton, CO 80127, has published Volume 14, Number 3 with the following articles:

FCC Regulation of Political Broadcasting: A Critical Legal Studies Perspective by Eric Engle, 14 Communications and the Law 3 (1992)

Authors and Creators: Up by Their Own Bootstraps by William Klein II, 14 Communications and the Law 41 (1992)

Analysis of the Computer Security Act of 1987 and Its Consequences for the Freedom of Information Act by Shannon E. Martin, 14 Communications and the Law 73 (1992)

Book Review: Modern Intellectual Property, Second Edition, by Michael A. Epstein, reviewed by Raymond Weisbond, 14 Communications and the Law 91 (1992)

Collection and Distribution of the Statutory Remuneration for Private Copying with Respect to Recorders and Blank Cassettes in Germany by Reinhold Kreile, 23 International Review of Industrial Property and Copyright Law 449 (1992) (available from Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Siebertstrasse 3, 8000 Munchen 80 (Federal Republic of Germany))

The Entertainment and Sports Lawyer, a publication of the ABA Forum on the Entertainment and Sports Industries, has published Volume 10, Number 2 with the following articles:

Around the World in Eighty Ways: The EEC Spin on Global Arts Import-Export Policy by Jessica L. Darraby, 10 The Entertainment and Sports Lawyer 1 (1992)

Stretching the Canvas: Protection of Visual Artistic Styles in Works of Fine Art under Section 43(a) of the Lanham Act by Mark Traphagen, 10 The Entertainment and Sports Lawyer 3 (1992)

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The Sports Lawyer, the bimonthly newsletter of the Sports Lawyers Association, 2017 Lathrop Avenue, Racine, WI 53405, has published Volume XI with the following articles:

The McNeil Verdict: What Does It Mean? by Gary Roberts, 11 The Sports Lawyer 1 (1992)

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FCC Regulation of Political Broadcasting: A Critical Legal Studies Perspective by Eric Engle, 14 Communications and the Law 3 (1992) (published by Fred B. Rothman & Co., 10368 W. Centennial Road, Littleton, CO 80127)

Authors and Creators: Up by Their Own Bootstraps by William Klein II, 14 Communications and the Law 41 (1992) (for address, see above)

Entertainment Law Review, published by ESC Publishing/Sweet & Maxwell, Mill Street, Oxford OX2

OJU, United Kingdom, has issued Volume 3, Issues 5 and 6 with the following articles:

The Draft EC Directive on Rental and Lending Rights Related to Copyright: ITV's View by Kathryn Fulton, 3 Entertainment Law Review 155 (1992)

Cultures of Copying: Digital Sampling and Copyright Law by Lionel Bently and Brad Sherman, 3 Entertainment Law Review 158 (1992)

Organisation and Structure of Radio and Television Broadcasting in Belgium by Christine De Keersmaeker, 3 Entertainment Law Review 164 (1992)

National and International Issues Concerning the New Draft Cinema Law in Italy by Giovanni A. Pedde, 3 Entertainment Law Review 171 (1992)

UK Tax Incentives for Film Production by Larry Chrisfield, 3 Entertainment Law Review 177 (1992)

Note on the Indian Copyright (Second Amendment) Bill 1992 and the Copyright Cess Bill 1992 by Pravin Anand, 3 Entertainment Law Review 181 (1992)

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Structuring the Multimedia Deal: Legal Issues-Part 1 Licensing in the Multimedia Arena by David L. Gersh and Sheri Jeffrey, 3 Entertainment Law Review 196 (1992)

Withholding Tax and Payments to Authors by Adrian Shipwright, 3 Entertainment Law Review 204 (1992)

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Authorship, Ownership and Infringement in Music Copyright by Alison Firth, 3 Entertainment Law Review 211 (1992)

Court of First Instance Judgment on the Net Book Agreement: Implications for the Irish Book Market by

Ciaran Walker, 3 Entertainment Law Review 215 (1992)

Columbia University School of Law and Volunteer Lawyers for the Arts have published Volume 16, Number 2 of Columbia-VLA Journal of Law & the Arts with An Examination of the Droit de Suite, the Artist Resale Royalty:

The Berne Convention and Droit de Suite Legislation in the United States: Domestic and International Consequences of Federal Incorporation of State Law for Treaty Implementation by Lee D. Neumann, 16 Columbia-VLA Journal of Law & the Arts 157 (1992)

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Book Review: The Droit de Suite in Literary and Artistic Property: A Comparative Law Study by Liliane de Pierredon-Fawcett reviewed by Barbara Ringer, 16 Columbia-VLA Journal of Law & the Arts 247 (1992)

The Federal Communications Law Journal has published Volume 45, Number 1 with the following articles:

Free-Lance Photojournalism in a Digital World: Copyright, Lanham Act and Droit Moral Considerations Plus a Sui Generis Solution by Don E. Tomlinson and Christopher R. Harris, 45 Federal Communications Law Journal 1 (1992)

The Legal Bounds of Confidentiality Promises: Promissory Estoppel and the First Amendment by Kyu Ho Youm and Harry W. Stonecipher, 45 Federal Communications Law Journal 63 (1992)

The Contestability of the Local Network: The FCC's Open Network Architecture Policy by Chris L. Kelley, 45 Federal Communications Law Journal 89 (1992)

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[ELR 14:9:22]