

RECENT CASES

Producers of "Yellow Submarine" obtain damages of about \$2.2 million in copyright infringement action alleging unauthorized home video distribution by MGM-Pathe

In 1966, Subafilms, Ltd. and The Hearst Corporation entered into a joint venture to produce the animated Beatles film "Yellow Submarine." United Artists Corporation agreed to finance and distribute the film. In 1987, over the producer's objections, MGM-Pathe Communications Co. (referred to by the court as "MGM/UA") began distributing "Yellow Submarine" domestically through MGM/UA Home Video and granted international distribution rights to Warner Home Video.

When Subafilms sued MGM/UA and Warner, retired California trial court Judge Lester E. Olson, appointed as a Special Master, ruled in favor of the producer. A Federal District Court adopted Olson's findings and recommendations, except the award of prejudgment interest, and awarded Subafilms damages, attorneys' fees and injunctive relief.

In affirming the District Court's decision, a Federal Court of Appeals, in a memorandum opinion, noted that the dispute focused on a provision of the distribution agreement whereby United Artists obtained the "sole, exclusive, and irrevocable right...to rent, lease, license, exhibit, distribute, reissue and otherwise deal in and with respect to the Picture and...to license others to do so throughout the world...for a period of ten (10) years from the first general release of the Picture... The rights herein granted, without limiting the generality of the foregoing, shall include all so-called 'theatrical' rights in

the Picture...and shall also include the right to [do]...and [to] authorize and license others to project, exhibit, reproduce, transmit and perform the Picture and prints and trailers thereof by television and by any other technological, mechanical or electronic means, method or device now known or hereafter conceived or created." Pay, toll, and subscription television were defined as "theatrical" rather than "television" rights.

Also in dispute was a provision of the financing agreement reiterating the ten year distribution term and stating that upon the expiration, or earlier termination, of the distribution rights, the producer and United Artists would have "joint control over the further distribution, exploitation, exhibition, sale, or any other disposition whatsoever of the Picture...and no disposition whatsoever shall be made of such Picture or any part thereof by either Producer or United without the written consent of the other.." After the expiration of the distribution term,

either party could offer to buy or sell its rights in the film to the other party. The provision further stated that "notwithstanding anything to the contrary contained herein or in the Distribution Agreement, it is hereby specifically understood and agreed that, until and unless Producer has exercised the aforesaid 'buy-or-sell' provisions with respect to the Picture, United's sole and exclusive distribution and exploitation rights with respect to the Picture shall automatically continue and endure."

The Federal Court of Appeals first found that the Special Master correctly admitted parol evidence because of the ambiguity presented when reading the disputed provisions together.

In considering the distributors' argument that they possessed home video rights under the financing and distribution agreements, the Special Master found, on the basis of extrinsic evidence, that United Artists received only theatrical and television rights in "Yellow

Submarine." Judge Olson determined that home video rights, in the circumstances of the case, were properly characterized as non-granted "non-theatrical" rights. The Court of Appeals found that Judge Olson had both the opportunity to judge the witnesses' credibility on the issue and sufficient evidence to support his conclusions.

The Special Master also found that the "future technology" clause in the distribution agreement did not cover the later-developed home video market. In *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988; ELR 9:12:3), the court held that, in the absence of a future technology clause, "television" rights did not encompass home video rights. But Cohen did not state that a future technology clause would confer home video rights where the original rights were limited to theatrical and television rights, stated the court, again declaring that Judge Olson's conclusions were not clearly erroneous.

The court also upheld Judge Olson's finding that the clause in the financing agreement concerning the rights to the film upon the expiration of the ten year term could not have been intended, as argued by the distributors, to extend MGM/UA's distribution rights beyond the specified ten year period.

The distributors claimed that they had a right to license home video rights under the joint control provision, and pointed out that neither co-owners nor exclusive licensees may be sued for copyright infringement. Judge Olson found that although the distributors may have had certain rights to joint (rather than exclusive) control after the distribution term ended, such joint control did not apply with respect to distribution rights in the film which had not been granted to United Artists. Given the limited grant of rights in the distribution agreement, observed the Court of Appeals, it was "unlikely" that the producer would have agreed to a "blanket" expansion of

rights after the distribution term. In all, the District Court did not err in finding that the joint control provision did not enable MGM/UA to exploit home video rights in "Yellow Submarine."

The Court of Appeals next upheld the finding that Warner's international distribution constituted copyright infringement. The court cited *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986; ELR 8:2:20) in which it was held that an "act of infringement within the United States" was alleged where the illegal authorization of international exhibitions took place in the United States. MGM/UA acted in the United States when the company purportedly authorized Warner to distribute "Yellow Submarine" internationally on home video; the producers raised a valid claim of copyright infringement.

On the issue of damages, the District Court accepted the Special Master's calculations and awarded the

producer damages of \$2.228 million (split evenly between domestic and foreign distribution). Judge Olson had determined that the home video rights had a reasonable market value of \$3 million at the time they were misappropriated and a minor residual value of \$150,000 after the misappropriation. In reaching the final figure, Judge Olson reduced the market value by the twenty percent to which United Artists was entitled by the agreements. The damage award was supported by evidence in the record, stated the Court of Appeals, which concluded by affirming an award of attorneys' fees in the amount of about \$540,000 and an award of about \$28,000 in "litigation expenses," and by affirming the District Court's ruling that prejudgment interest was not warranted by the facts of the case. The District Court apparently commented that "the actual video cassette market value of [the film] would likely be realized over

time," and that interest on the entire amount of damages would be a "windfall" for the producers.

It should be noted that the decision stated that "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3."

Subafilms, Ltd. v. MGM-Pathe Communications Co.,
1993 U.S.App. LEXIS 4068 (9th Cir. 1993) [ELR
15:1:3]

**Court awards \$30,000 in statutory damages to
author of play about Jackie "Moms" Mabley**

Alice Childress, the author of the play "Moms: A Praise Play for a Black Comedienne," brought a copyright infringement action against Clarice Taylor and

other parties involved in the writing and production of a play entitled "Moms: The First Lady of Comedy." Both plays were about the life of the late black performer, Jackie "Moms" Mabley.

A Federal Court of Appeals affirmed a District Court decision granting summary judgment to Childress (ELR 13:7:11; 12:10:5).

The District Court, in considering Childress's claim for damages, first rejected the writer's claim seeking a six percent author's royalty from the allegedly infringing production - there was no basis to assume, stated Judge Haight, that Taylor, the general partner of The Moms Company, would ever have agreed in principle to pay such a royalty to Childress. Even if Taylor had been willing to pay the six percent royalty, it was "highly unlikely" that Childress actually would have received any royalty payments - the various productions of the play presented by The Moms Company all lost money. The

testimony of Childress's agent indicated that authors typically defer a significant amount of their royalties until the play shows a profit for the producer; if the play never makes money, the waived or deferred royalties are never paid. In all, the evidence did not support Childress's claim for actual damages based upon a six percent royalty of the gross box office sales realized by the infringing productions.

Judge Haight also rejected, as unsupported by the evidence, Childress's claim for \$25,000, the amount the author might have obtained as a non-refundable advance against future stock and amateur production income for her play.

The court agreed with Childress that the royalties paid to Taylor as the author and producer of the infringing play and to a co-author of the work were recoverable infringers' profits.

Upon finding that none of the Taylor parties sustained the burden of establishing innocent infringement, Judge Haight assessed statutory damages in the amount of \$30,000; the Taylor parties were directed to brief the court on certain issues concerning the apportionment of the award.

The court concluded by rejecting Childress's claims under the Lanham Act and under state law, and for punitive damages.

Childress v. Taylor, 798 F.Supp. 981 (S.D.N.Y. 1992)
[ELR 15:1:4]

Billy Joel obtains about \$675,000 in damages on conversion claim against former manager

Billy Joel sued his former manager and brother-in-law Francis X. Weber and Frank Management, Inc., alleging the improper diversion of funds that were due to Joel from two real estate partnerships. Joel challenged Weber's transfer of the proceeds to Frank Management as a set-off after the termination of the parties' agreement.

As described by New York trial court Acting Judge Edward H. Lehner, Joel, in September 1980, entered into a "Creative and Business Management Agreement" and a "Marital Property Management Agreement" with Weber. Weber was Joel's exclusive creative, business and financial manager with respect to all of the performer's entertainment and business activities.

Joel and Weber entered a new agreement in 1983 whereby Weber continued to act as Joel's exclusive manager and advisor, but received commissions only for his entertainment industry-related services.

The term of the 1983 agreement eventually was extended to December 31, 1989.

Among other investments, Weber invested Joel's funds in two real estate partnerships; Weber also personally invested in the partnerships and served as the managing partner.

Joel filed his lawsuit against Weber on December 6, 1989. Subsequently, one partnership's interest in a joint venture was purchased for about \$635,000 cash and a \$1 million promissory note. The other partnership also received a distribution check. Weber issued several checks made payable to Frank Management representing Joel's share of the funds. Joel allegedly did not learn about the distributions or the payments to Frank Management until April 1991, when discovery began in the lawsuit.

Judge Lehner noted that the 1983 agreement granted Weber the power to issue checks from Joel's bank

accounts for the offset of commission fees due, but did not permit Weber, as general partner of the real estate entities, to issue checks to his company for funds due to Joel from the bank accounts of the independent partnerships. It was further observed that the management agreement did not provide for the survival of this power after the termination of the agreement - Weber's right to issue checks had expired "well before he wrote the checks at issue here."

Weber had the right to collect claims, royalties, interest and monies due to Joel and to endorse Joel's name "on, and the depositing or cashing of, any and all checks payable to [Joel]," but this provision was expressly limited to the term of the management agreement.

The management agreement did not authorize payments to Frank Management after the expiration of the management agreement on December 31, 1989, stated the court.

Judge Lehner then noted that while Weber's failure to disclose the transaction was "suspicious," Weber's contention that he believed, based in part on the advice of counsel, that he was entitled to the monies and the offset under the management agreement, presented a question of fact as to fraudulent intent. The court therefore denied summary judgment on the cause of action for fraud, as well as on the cause of action for breach of fiduciary duty.

Judge Lehner concluded by finding that Weber had no right to transfer Joel's portion of the partnership distributions to Frank Management without Joel's consent; that Weber and Frank Management were liable for conversion; and that Joel was entitled to about \$675,000 with interest on the conversion claim.

Joel v. Weber, New York Law Journal, p. 21, col.6 (N.Y.Cnty., Mar. 9, 1993) [ELR 15:1:5]

ABC is ordered to pay about \$3500 in damages to video company for unauthorized use of footage

In 1990, Hi-Tech Video Productions produced a travel video entitled "Mackinac Island, Michigan: The Video." The cassette contained a printed label stating: "A Video Postcard/MACKINAC ISLAND/MICHIGAN/Hi-Tech Video Productions." A copyright notice, appearing at the "tail credits" portion of the tape, read: "A Hi-Tech Video Productions Presentation. All materials copyrighted c 1990. All rights reserved."

In June 1990, the Capital Cities/ABC, Inc. television program "Good Morning America" broadcast a feature/weather report from Mackinac Island. A 65 second background piece, narrated by the program's reporter, used about 38 seconds from Hi-Tech's video.

When Hi-Tech sued ABC for copyright infringement, ABC claimed that its use was privileged under the fair use doctrine. In rejecting ABC's argument, Federal District Court Judge Robert Holmes Bell reviewed the fair use factors and found that ABC's use was within the "news reporting" category of 107 of the Copyright Act. However, the use was of a commercial nature since "ABC stood to gain at least indirect commercial benefit from the ratings boost which it hoped to gain by running an interesting segment..."

The video was factual and informational, noted the court, but was not "a jumble of video film clips, assembled with a moment's notice." It appeared to the court that the video was "a product of creativity, imagination, and originality, as well as a fruit of hard work, with an expectant view of some financial return." ABC used only about five percent of the video's total running time, but took nine of the arguably best scenes from the video,

observed the court. Judge Bell commented that "without these nine shots, the video is probably not worth watching."

With respect to the effect on the potential market for or value of the copyrighted work, the court stated that although Hi-Tech suffered no actual damages from ABC's unauthorized use, the likelihood of future harm was presumed. Even if ABC's use had not been of a commercial nature, remarked the court, depriving Hi-Tech of a potential licensing fee constituted sufficient harm for purposes of the effect on the market fair use factor.

The court concluded by finding that ABC acted in reckless disregard of Hi-Tech's copyright and that the infringement was willful; by awarding Hi-Tech damages of \$3,420, representing three times the maximum amount that ABC would have had to pay for stock footage of Mackinac Island; and by allowing Hi-Tech to seek reasonable attorneys' fees and costs.

Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc., 804 F.Supp. 950 (W.D.Mich. 1992) [ELR 15:1:5]

United States Supreme Court announces "principal place of business" test for deductibility of home office expenses

The United States Supreme Court has upheld the Internal Revenue Service's disallowance of Nader E. Soliman's deduction from his federal income tax return of a portion of the household expenses attributable to his home office, agreeing with the Commissioner that the office was not Soliman's "principal place of business" under 26 U.S.C. 280A(c)(1)(A).

Justice Kennedy noted that Soliman, an anesthesiologist, spent thirty to thirty-five hours per week with

patients, dividing that time among three hospitals; the hospitals did not provide Soliman with an office. Soliman's condominium had a spare bedroom which he used exclusively as an office; the doctor spent two to three hours per day in the office on a variety of work-related matters.

When the Commissioner disallowed Soliman's deductions for the portion of condominium fees, utilities, and depreciation attributable to the office, Soliman filed a petition in the Tax Court. The Tax Court ruled that the home office was Soliman's principal place of business. A Federal Court of Appeals affirmed the Tax Court's decision.

Justice Kennedy stated that in deciding whether a location is "the principal place of business," a court must conduct a comparison of locations. The Court of Appeals, without having conducted such a comparison, set forth a test whereby a home office may qualify as the

principal place of business whenever the office is essential to the taxpayer's business, no alternative office space is available, and the taxpayer spends a substantial amount of time using the office. However, noted Justice Kennedy, the statute does not refer to the "principal office" of a business; rather, the court must determine "the most important or significant place for the business."

An inquiry concerning a taxpayer's principal place of business will depend upon the particular facts of each case, with the primary considerations being the relative importance of the activities performed at each business location and the time spent at home compared with the time spent at other places where business activities occur.

Soliman was not entitled to a deduction for home office expenses because his practice required the doctor to treat patients at hospitals - the actual treatment was the essence of the professional service, stated the court. The

home office activities were less important to the business of the taxpayer than the tasks he performed at the hospital - the fact that the office may have been essential was not controlling.

Justice Blackmun concurred only in the court's judgment, stating that the opinion did not serve to clarify a recurring question of tax law.

Justice Stevens, in dissent, would have found that the Tax Court and the Court of Appeals correctly concluded that Soliman was entitled to an income tax deduction for the cost of maintaining a home office. Soliman's home office was the only place where he could perform the administrative functions essential to his business - he was not employed by the hospitals where he worked, the hospitals did not offer him an office, and Soliman had to pay all the costs necessary for him to have any office at all. For Justice Stevens, the history of the statute did not warrant the disallowance of a deduction for

the expense of maintaining an office that is used exclusively for business purposes, that is regularly so used, and that is the only place available to the taxpayer for the management of his business.

Cases raising the issue of the allowability of deductions for home office expenses incurred by entertainment industry parties have been reported at ELR 12:5:14, 9:6:17, 2:17:8, and 2:14:7.

Commissioner of Internal Revenue v. Soliman, Case No. 91-998, 61 LW 4053 (U.S. Supreme Court, Jan. 12, 1993) [ELR 15:1:6]

Court upholds disallowance of deductions based on investment in master cassette recordings tax shelter

In 1981, investors in Structured Shelters, Inc. sold certain master recordings of children's stories to a company called Sonya, Inc. Thomas Graham, an agent for Structured Shelters, and his wife were the majority shareholders of Sonya, Inc.

During 1984 and 1985, Structured Shelters began marketing Children's Classics Audio Cassettes. The company purchased the right to reproduce artwork and to use titles for the production of new master cassette recordings from Sonya, Inc. Investors purchased four titles from Sonya for \$115,000; each payment consisted of \$25,000 cash and the remainder in a nonrecourse note. The investors also paid \$2,000 in cash and a \$6,000 note for an agreement with Marketing Complex, Inc. to develop an advertising program.

In the second phase of the cassette promotion, investors leased for a term of five years the right to produce cassette tapes from the master recordings that were to

be developed by the cassette production phase investors. The 1985 lease phase investors paid \$4,175 in cash and \$12,525 in nonrecourse notes. The investors also paid \$2,000 in cash and \$6,000 in notes to Marketing Complex for marketing services.

In 1984, Kerry Illes purchased one cassette title and leased the right to reproduce another title. On his 1985 federal income tax return, Illes claimed deductions totaling \$61,775 and an investment tax credit of \$5,473.

The Commissioner of Internal Revenue, finding that the cassette enterprise lacked economic substance, disallowed the claimed deductions and credit and assessed various additions to tax and an increased interest rate for Illes' underpayment.

A Tax Court decision upholding the Commissioner's decision has been affirmed by a Federal Court of Appeals.

Illes had stipulated in the Tax Court that the cassette investments had no economic substance and did not contest the disallowance of deductions and credits based on the investments. Illes argued, however, that he was entitled to deduct his out-of-pocket expenses in connection with the investments since the losses were incurred in a transaction entered into for profit.

The court stated that because Illes stipulated that the transaction lacked economic substance, the entire transaction was disallowed for federal tax purposes; the Commissioner therefore properly disallowed the claimed section 165 (c)(2) deduction, "regardless of whether Illes was actually, honestly, and exclusively motivated by profit."

The Commissioner's finding that the underpayment of tax was caused by Illes' negligence was presumptively correct and Illes did not present sufficient evidence to overcome the presumption.

Illes also challenged an addition to tax based on the finding that the tax underpayment resulted from a valuation overstatement. Illes admitted that the value he placed on his interest in the cassette project assets exceeded their correct value by more than 250%, but claimed that his underpayment was attributable to claiming an improper deduction, rather than to a valuation overstatement.

The court rejected the distinction, stating that the tax benefit generated by the cassette project directly depended upon the valuation overstatement; that the amount of the tax benefit actually was determined by the amount of the overvaluation; and that Illes' underpayment was attributable to the valuation overstatement.

Illes v. Commissioner of Internal Revenue, 1992 U.S.App. LEXIS 23255 (6th Cir. 1992) [ELR 15:1:7]

Court affirms denial of John Fogerty's counter-claims against music publisher

In 1988, a Federal District Court jury in San Francisco rejected a copyright infringement claim brought by Fantasy, Inc. against John Fogerty (ELR 10:7:20). Fantasy had claimed that Fogerty's song "The Old Man Down the Road" infringed the 1970 Fogerty song entitled "Run Through the Jungle;" Fantasy was the copyright assignee of the 1970 song.

A Federal Court of Appeals has affirmed several of the District Court's earlier rulings in the matter (ELR 9:10:12; 9:3:13). Fogerty, in a counterclaim, had alleged that Saul Zaentz, a general partner in Galaxy Records, a predecessor-in-interest to Fantasy, and later a minority shareholder and director of Fantasy, and Argosy Venture, Galaxy's sole shareholder, had fraudulently induced Fogerty "to enter an unwise and illegal tax shelter

scheme" between 1969 and 1974. If the allegations, stated Judge Robert Boochever, were meant to serve as the basis of a separate claim for rescission, the District Court correctly struck the allegations as barred by the four year statute of limitations for an action to rescind a written contract.

Fogerty also was barred by *res judicata* from relitigating the tax plan claims against Zaentz or his successors-in-interest. Judge Boochever noted that Fogerty obtained "substantial recovery" from other parties for his injuries from the tax shelter plan, but a California trial court had dismissed the songwriter's claims against Zaentz based on the statute of limitations.

Fogerty argued that the *Zaentz/Argosy* allegations were not meant to constitute an independent ground for rescission, but to present "relevant background and foundational facts" establishing a pattern of abuse to support his claim that Fantasy breached the music

publishing agreements. Judge Boochever stated that even if the court accepted Fogerty's argument, the District Court did not abuse its discretion in striking the allegations, particularly since the court expressly found that no pattern of abuse existed. And Fogerty did not show that the conduct of a predecessor-in-interest (emphasis by Judge Boochever) was relevant to materiality - in all, the question of whether Zaentz fraudulently induced Fogerty's consent to the tax plan was not relevant to the materiality of any breach Fantasy might have committed by escrowing royalties in 1985.

The District Court also properly found that Fantasy's payment of Fogerty's songwriting royalties into an irrevocable escrow account pending the resolution of the copyright action did not constitute a material breach warranting rescission of the music publishing agreement between Fogerty and Fantasy's predecessors-in-interest, Cireco Music and Galaxy Records. Judge Boochever

pointed out that Fogerty, although invited to do so by Fantasy, never requested a different escrow holder, sought to negotiate an alternative security, or "even inquired how much was deposited or where the account was located."

Any breach by Fantasy was nonmaterial as a matter of law, declared the court. Although Fogerty was deprived of royalties during the litigation, he did not show that Fantasy failed to keep accurate records. Furthermore, promptly after the trial, Fogerty received the full amount of royalties plus interest, totalling about \$1.4 million. It was not shown that any injury Fogerty might have suffered by the delay in receiving royalty payments could not be adequately compensated in damages.

The fact that Fogerty asserted that Fantasy brought its copyright infringement action in bad faith did not create a disputed issue of material fact precluding summary judgment, stated Judge Boochever, nor did Fogerty's

claim that the withholding of royalties from all of his songs was excessive and in itself a material breach. The court conceded that it "might be led" to agree with Fogerty on the latter point had Fantasy not offered Fogerty the chance to avoid the withholding of royalties by furnishing an alternate form of security. The court therefore concluded that the deposit of Fogerty's royalties in an irrevocable interest-bearing escrow account under the circumstances of the case did not constitute a material breach justifying the rescission of the music publishing agreements.

Judge Boochever also upheld the District Court's ruling denying Fogerty's motion for attorneys' fees.

Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1993 U.S.App.Lexis 1497 (9th Cir. 1993) [ELR 15:1:7]

Musician claiming co-authorship of Hoyt Axton song "Joy to the World" is barred by laches

In 1970, as described by Federal District Court Judge Terry J. Hatter, Jr., Hoyt Axton rented a recording studio and hired several musicians to record a demonstration tape of Axton's musical compositions. Axton and the musicians then completed the notes and lyrics and recorded a song that Axton was writing, a song entitled "Joy to the World."

In 1991, Axton sold his interests in his musical compositions, including "Joy to the World," to Rondor International.

In 1992, David Pancost Jackson, Jr., one of the session musicians who worked with Axton in 1970, sued Axton and other parties, claiming co-authorship of the song.

Judge Hatter noted that because of Jackson's twenty-two years of silence, Axton "reasonably believed that he

was the Song's sole author and conducted business accordingly." The court, citing *Stone v. Williams*, 873 F.2d 620 (2d Cir. 1989; ELR 11:4:16), vacated on other grounds, 891 F.2d 401 (2d Cir. 1989; ELR 11:12:10), found that Jackson's twenty-two year delay created a presumption of prejudice; that Jackson did not rebut the presumption; that circumstances, including the ownership of the song, had changed during the last twenty-two years; and that the Axton parties were entitled to summary judgment on the basis of laches.

Jackson v. Axton, Case No. CV 92-970 (C.D.Ca., Jan. 7, 1993) [ELR 15:1:8]

Court rejects Tom Seaver's breach of contract claim against Oldsmobile

In September 1988, former professional baseball player Tom Seaver entered a two year contract to advertise and promote Oldsmobile automobiles. Oldsmobile Dealer T.V. Communications, Inc. agreed to pay Seaver a total sum of \$225,000.

Several months later, Seaver began broadcasting and announcing New York Yankee baseball games for WPIX television. Oldsmobile, in April 1989, purportedly informed Mattgo Enterprises, Inc., Seaver's personal representative, that the company had selected Seaver because of his strong identification with the New York Mets baseball team, and that Oldsmobile planned to terminate the contract because of Seaver's association with another team. Mattgo apparently rejected the termination proposal.

In September 1989, Oldsmobile terminated the contract, claiming that Seaver rendered services "in

connection with commercials for products competitive to our products, specifically automobiles."

It was alleged that during a Yankee game broadcast in August 1989, Seaver read an announcement stating: "Participating advertisers in New York Yankee baseball are: Bud Light...; Your Local Mazda Dealer; Citgo...; The Daily News...and the New York Yankees" (emphasis added by the court).

Seaver sued Oldsmobile for the \$115,000 balance of the terminated contract, claiming that his one time, "hasty, spontaneous reading of the billboard while off camera, during the latter part of the baseball game" did not constitute a breach of contract since it was not intended to be an advertisement for a competitor. A "billboard" is not paid for by an advertiser, but is a statement for public information announcing the advertisers who sponsor a baseball game. Even if the announcement was a technical breach, it was de minimus, argued Seaver.

New York trial court Judge Tom noted that the contract provided that Seaver would not, during a specified period, render any services of any kind, directly or indirectly for any competitive product, or permit the use of his name, photograph, likeness, endorsement, voice or biographical material for any competitive product. Seaver was entitled to appear in radio or television programs provided that he did not appear in the commercials during the programs or lead-ins to, or lead-outs from the commercials.

The contract further provided that Oldsmobile's decision on all matters pertaining to the company's right to terminate would be conclusive. Seaver did not dispute that the contract granted Oldsmobile the right to terminate Seaver's employment if it concluded that Seaver failed to perform any of his obligations or that his actions might tend to injure the success of the company. Oldsmobile was entitled to cancel the contract at its

discretion based upon the breach of any of the stated conditions regardless of whether the breach was material. Seaver's contention that the alleged breach of the contract was de minimus was insufficient to preclude granting Oldsmobile's motion for summary judgment dismissing the complaint, concluded the court.

Seaver clearly failed to perform his obligation by using his voice during a public broadcast to publicize a competitive product, stated Judge Tom, even if the court agreed that the reading of the billboard was a one-time, spontaneous act and was not intended to be an advertisement for Mazda.

With respect to Oldsmobile's counterclaims, Judge Tom found that Seaver's reading of the billboard was not a personal endorsement of any kind and did not constitute a material breach of the exclusivity provision of the contract. Oldsmobile therefore was not entitled to recover any fees already paid to Seaver for work

performed, and the court declined to compel restitution from Seaver since he was not unjustly enriched by his announcement of the sponsors of the Yankees broadcast.

Mattgo Enterprises, Inc. v. Oldsmobile Dealer T.V. Communications, Inc., New York Law Journal, p. 23, col. 2 (N.Y.Cnty., Jan. 20, 1993) [ELR 15:1:8]

Gallery may recover \$40,000 paid for drawing repudiated by artist

Gallery: Gertrude Stein, Inc., as described by New York trial court Judge Myriam J. Altman, purchased a pencil on paper drawing, titled "Colette in Profile," by Balthazar Klossowski de Rola, known as Balthus. Stein had a photograph made of the drawing and sent it to Ms.

Frederique Tison, the seller of the work. Tison, who apparently had lived with Balthus for many years, signed the back of the photograph to authenticate the drawing as a Balthus work and returned it to Stein.

In October 1988, the drawing and the certificate of authenticity were given to Arnold Herstand & Co., Inc. pursuant to a consignment agreement. Herstand sold the drawing and paid Stein \$40,000.

The purchaser later consigned the painting back to Herstand for sale, and in October 1989, the Claude Bernard Gallery bought the work for \$51,000. In March 1990, Bernard informed Herstand that the drawing was a fake and that Balthus had repudiated the work. Herstand refunded Bernard's payment, and informed Stein of the artist's repudiation. Stein refused to refund Herstand's money and accept the return of the drawing.

The court granted Herstand's motion for summary judgment on the gallery's claim for rescission, stating

that the artist's repudiation of the work altered a material and substantial fact assumed by the parties at the time of their contract, i.e., the authenticity of the drawing.

Judge Altman found that although Stein did not accept the repudiation of the work or the fact that there was a mutual mistake, there was no material issue of fact requiring a trial. Stein did not present an affidavit by any expert or Ms. Tison stating that the drawing was an authentic work by Balthus. Furthermore, Stein did not suggest that the copy of the drawing viewed by Balthus was an inaccurate representation of the original or state that the artist no longer was capable of recognizing his own work. The affidavits of several art dealers referred to the uniform, accepted trade practice of accepting an artist's repudiation upon reviewing a photograph of the work in question. Stein presented an affidavit citing a trade practice of requiring a living artist to review the original work, but the statement was conclusory and

insufficient to raise a triable issue of fact, stated the court, in finding that the artist's signature and declaration that the drawing was not authentic was "the final word on the validity of the art work."

Judge Altman found that Stein's arguments concerning Balthus's motives for disclaiming his work were "meritless," and concluded that the parties entered into their contract under a mutual mistake of fact, with the proper remedy being rescission. The court ordered Stein to pay Herstand \$40,000, and ordered Herstand to return the drawing to Stein, but declined to award Herstand pre-judgment interest or legal fees.

Arnold Herstand & Co., Inc. v. Gallery: Gertrude Stein, Inc., New York Law Journal, p. 25, col. 4 (N.Y.Cnty., Jan. 21, 1993) [ELR 15:1:9]

Washington's "erotic music" statute is ruled unconstitutional

A Washington trial court has ruled that the state's "erotic music" statute (RCW 9.68.050, 9.68.060 and 9.68.090) is unconstitutional, and granted a motion by Soundgarden and other musical groups for a permanent injunction barring the enforcement of the statute.

The statute, as described by Judge Brucker, established a two-stage proceeding. In the first stage, an individual might be brought before a Washington trial court on five days notice and asked to defend against the state's allegation that certain material is "erotic." If the court determines that the material is "erotic," an "Adults Only" label, in specified type, would have to be conspicuously placed on the front cover of all copies of the material at issue; all dealers and distributors of the erotic material would be prohibited from displaying that material in

their store windows or in any other manner so as to make it "readily accessible" to minors; and any person who sells, distributes, or exhibits the erotic material to a minor would be guilty of a criminal offense.

The criminal conduct set forth in the criminal offense provision of the statute consists of the sale, distribution or exhibition of erotic material, regardless of whether or not a party had notice of the determination that such material had been found erotic.

Judge Brucker observed that the provisions of the erotic music statute failed to give persons affected notice of which materials have been determined to be erotic and therefore failed to provide notice to all those who might be subject to criminal prosecution under the statute. Due to the lack of clear notice to those affected by it, the erotic music statutes violated due process under the Fourteenth Amendment to the United States

Constitution and Article I, Section 3 of the Washington Constitution, ruled the court.

The statute caused Soundgarden and other parties to censor their speech out of fear of criminal prosecution, stated the court. This self-censorship, caused by state action, had a chilling effect on freedom of expression and creativity, and also deprived willing listeners of the right to hear protected speech in violation of the United States and Washington constitutions.

The statute defined "erotic" material as speech which would appeal "to the prurient interest of minors" (emphasis added by the court), thereby restricting constitutionally protected speech - the statute would reach speech which might not be obscene as to adults.

The court further found that in making the stage one "erotic" determination binding upon all citizens, the statute constituted a prior restraint on free speech; that the statute was not narrowly drawn to meet the state's

compelling interest in the protection of the physical and psychological well-being of minors; and that the statute did not provide for a jury in the proceeding in which the trial court determines whether challenged material is erotic.

The permanent injunction barred the state from enforcing any provision of the erotic music statute against music or sound recordings or any other materials as they may apply to sound recordings.

Soundgarden v. Eikenberry, 21 Med.L.Rptr.1025 (King Cnty. 1992) [ELR 15:1:10]

Conviction of distributor of Traci Lords videotapes is overturned as court, over strong dissent, declares section of child pornography statute unconstitutional

In 1986 and 1987, as described by Federal Court of Appeals Judge William C. Canby, Jr., an undercover police officer contacted Rubin Gottesman, the operator of X-Citement Video, Inc. regarding buying pornographic videotapes featuring Traci Lords. The officer stated that he wanted tapes that Lords had made when Lords was under the age of 18. Gottesman sold the officer a box of 49 tapes, and sent a second set of eight tapes, per the police officer's instructions, to Hawaii.

A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation of the Protection of Children Against Sexual Exploitation Act of 1977. After a bench trial, Gottesman was convicted of violating sections 2252(a)(1) and (a)(2) of the Act, which prohibit the distribution, receipt, or shipping of child pornography. The District Court sentenced Gottesman to twelve months incarceration and ordered him to pay a \$100,000 fine.

A Federal Court of Appeals panel has ruled that 2252 was unconstitutional on its face and has reversed the District Court's decision.

Judge Canby first discussed whether section 2256, a definitional section, rendered the statute unconstitutionally vague and overbroad. Section 2256 provides, in part, that the term "minor" means any person under the age of eighteen. Gottesman pointed out that in *New York v. Ferber*, 458 U.S. 747 (1982; ELR 4:14:5), the United States Supreme Court rejected constitutional challenges to a statute prohibiting the promotion or distribution of sexual performances by children under the age of 16. The court rejected Gottesman's argument that adding two years to the age of majority rendered the statute unconstitutionally overbroad.

It then was found that Congress's decision to replace the word "lewd" with the word "lascivious" in defining the illegal exhibition of the genitals of children did not

render section 2256 overbroad and vague, nor did the inclusion, among the covered acts, of actual or simulated bestiality and sadistic or masochistic abuse, although those terms were not further defined. The court in *Ferber* had upheld the constitutionality of a similar statute.

With respect to section 2252, Gottesman argued that the section did not require the government to demonstrate that the distributor of the challenged material knew that a performer was a minor. Judge Canby referred to *United States v. Thomas*, 893 F.2d 1066 (9th Cir.), cert. denied, 111 S.Ct. 80 (1990), in which the court held that section 2252 did not require knowledge that the performers were under the age of 18.

The government, stated Judge Canby, "appear[ed] to resist a requirement of proof that [Gottesman knew] that one or more performers were underage." The government emphasized that the Constitution does not require knowledge of the actual age of the underage performer,

but the question, stated the court, was whether the Constitution requires knowledge that one or more performers engaged in the specified sexually explicit acts was under age 18.

The court concluded that the constitutional minimum requirement of scienter in connection with the statute's proscription of transporting or receiving child pornography would be knowledge that at least one of the performers is under age 18.

Judge Canby next referred to the "highly instructive" decision in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988; ELR 10:6:14), in which the court dealt with charges, under section 2251(a) of the statute, against the producers of various films also featuring "the redoubtable Traci Lords." Upon considering whether the producers were entitled to an affirmative defense that they were deceived by Lords into believing that she was an adult, the court held that the First

Amendment required the statute to provide for such a defense, but declined to hold that the Constitution required knowledge of the minority of the performer to be an element of the offense.

In the instant case, involving a statute prohibiting the distribution, shipping or receipt of child pornography, the First Amendment, stated Judge Canby would require knowledge of the minority of the performers as an element of the crime defined by the statute. Section 2252, as construed by Thomas, did not so require, and thus was unconstitutional on its face.

Judge Alex Kozinski dissented in part, although stating, in a footnote comment, that his opinion, "strictly speaking," was a concurrence - he would have reversed Gottesman's conviction on the ground that Gottesman was tried under a theory which imposed strict liability as to the age of the minor. Judge Kozinski described his opinion as a dissent since he would have avoided

striking down the statute, and would have remanded the matter for a retrial under a properly narrowed statute.

Most of the materials distributed by Gottesman, observed Judge Kozinski, were protected by the First Amendment and "the thought that someone in his position might be convicted, despite an innocent mind, because of a short scene in one videotape...should give pause to anyone concerned about free speech." Judge Kozinski agreed that a child pornography statute must contain a mens rea requirement, but did not agree that Gottesman must have known that the videos he sold depicted child pornography. For Judge Kozinski, it would have been sufficient for the government to demonstrate recklessness on Gottesman's part, and the court should have construed the statute in this manner. After noting that Ferber did not establish what level of scienter is sufficient in a child pornography case, Judge Kozinski referred to the United States Supreme Court decision in

Osborne v. Ohio, 495 U.S. 103 (1990; ELR 12:3:7) which upheld a statute that prohibited the possession of child pornography where a party either knew the performers were underage or was at least reckless as to this fact. Obscenity precedents are not relevant in the child pornography context, continued Judge Kozinski - the court in Ferber did not extend the protection of the First Amendment to child pornography, without regard to whether the materials at issue were obscene.

Judge Kozinski then commented that the court in Thomas did not consider any constitutional issues and questioned the majority's "supine willingness to be bound by a panel that decided a question different from that posed" to the court. Judge Kozinski declined to read Thomas as foreclosing an issue that it had no reason to reach, and stated that the instant proceeding should have "saved" section 2252(a) by reading into it a requirement

that Gottesman acted recklessly as to the age of the minor.

Judge Kozinski, although joining in various other parts of the court's opinion, dissented from the majority's position as to the knowledge requirement, and also disagreed with that part of the opinion holding that the court's prior decisions would preclude reading a recklessness requirement into section 2252.

United States v. X-Citement Video, Inc., United States v. Gottesman, 982 F.2d 1285 (9th Cir. 1992) [ELR 15:1:11]

Amtrak's rejection of billboard lease signed by artist violates First Amendment

Artist Michael A. Lebron agreed to lease a giant billboard in New York's Pennsylvania Station for January and February 1993. Lebron planned to display a photo-montage, accompanied by text asking "Is it the Right's Beer Now?" The work, as described by Federal District Court Judge Pierre N. Leval, included photographs of individuals drinking Coors beer, juxtaposed with a Nicaraguan village scene "in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile." Additional text, appearing on either end of the montage, criticized the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Judge Leval noted that Coors advertising uses the slogan "Silver Bullet" for its beer cans; Lebron's piece announced that Coors was "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

In December 1992, Amtrak, the owner of the billboard, rejected Lebron's work on the ground that it was "political," and that the company would not allow political advertising on the billboard which had been leased to Lebron.

Judge Leval first decided that the "symbiotic relationship" test should apply to determine whether Amtrak would be considered a governmental or a private actor for purposes of Lebron's lawsuit. Under the standard, private activity is subject to the restrictions that the Constitution imposes on government when the government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity."

The court concluded, based on "the federal government's deep and controlling entwinement in Amtrak's structure and operations," that when Amtrak attempts to control the content of speech on its billboards, the

company's conduct would be deemed governmental, rather than private. Judge Leval commented that although Amtrak, was a for-profit business corporation and "in form and name," resembled a private entity, in "both image and reality," Amtrak was "impregnated with governmental character and inseparably intertwined with governmental authority and financing." All of Amtrak's directors are appointed directly or indirectly by the President of the United States; the federal government is deeply involved in financing Amtrak's operations and Amtrak's revenues from the leasing of its billboard space would be, "in a sense," revenue of the federal government; Congress has given Amtrak the power of eminent domain, exemption from state and local taxes and fees, and various loan guarantees; and the federal government has invested "billions of dollars" in Amtrak's properties.

It was noted that Amtrak's actions were not deemed governmental in certain cases brought by the company's

employees. But no important policies of the Constitution are undermined by permitting an employer that is entwined with government to deal with employees under the rules that govern private employers, stated Judge Leval. However, to allow an entity controlled by and intertwined with the government to regulate, control, or censor speech in the manner permitted for a private party may do "enormous damage to one of the most important principles of the Bill of Rights." By deeming Amtrak's billboard regulation governmental, the company "would be barred from favoring a political candidate, from favoring messages of any chosen viewpoint, from sponsoring messages that established religion, from exercising arbitrary discrimination in allowing access to its billboards, and from regulating the speech of its billboard tenants in any way, except within narrow parameters." Thus, notwithstanding Amtrak's private character in its employment contracts, the company

engaged in governmental action when it sought to regulate the content of the advertisements on its billboards.

Judge Leval next found that the Amtrak policy purportedly prohibiting "political" advertisements in Penn Station was not a written policy, and that the policy, even if it had been in writing, was vague and not consistently applied. It also was possible that the policy was void because of discrimination based on viewpoint, stated the court. Because Amtrak was "saturated with the presence of the federal government," the company was not entitled to regulate speech "in an effort to shield its customers from the abrasive, the obnoxious, the controversial."

The court concluded that Lebron demonstrated that in rejecting his contract to display his art on its billboard, Amtrak was engaged in governmental action in violation of the company's obligations under the First Amendment, and ordered Amtrak to give Lebron immediate access to the billboard space at issue.

Lebron v. National Railroad Passenger Corporation,
Case No. 92 Civ. 9411 (S.D.N.Y., Feb. 8, 1993) [ELR
15:1:12]

**Arbitrator's decision is affirmed in Writers Guild
matter**

In January 1989, Dadon Pictures of London Ltd. entered into an option agreement with two (unidentified) members of the Writers Guild. Dadon submitted to the Guild a letter of adherence to the 1988-1992 Writers Guild Theatrical and Television Basic Agreement; two assumption agreements, signed by David Dadon and Lydia Dadon, which provided that the Dadons would assume the obligations of Dadon Pictures; and a copy of the option agreement. The letter of adherence and the

assumption agreements identified the signatory company as "Dadon Pictures of London, Inc." (apparently a non-existent entity), while the option agreement was signed by "David Dadon aka Dadon Pictures of London Ltd."

The Writers Guild, upon noticing the discrepancy in the signatures, altered the name on the letter of adherence and assumption agreements to conform to the option agreement. The guild contended that David Dadon orally approved the modifications.

When a dispute arose concerning the agreement, the Guild served arbitration claims on the various Dadon parties. The arbitrator held that the Dadon parties were bound by the basic agreement, including its arbitration clauses, and assessed damages for breach of contract.

A Federal District Court confirmed the arbitration award.

David Dadon filed a notice of appeal, listing the appellants as himself, Lydia Dadon and David Dadon aka Dadon Pictures of London Ltd.

A Federal Court of Appeals first noted that David Dadon was not an attorney and was not entitled to represent Dadon Pictures or Lydia Dadon. Lydia Dadon had not signed the notice of appeal. The court, accordingly, dismissed Dadon Pictures' and Lydia Dadon's appeal.

The court then found that Dadon consented to have the arbitrator decide the issue of arbitrability. The arbitrator had found that Dadon intended either on his own behalf or as the president of Dadon Pictures, Ltd. to become a signatory to the bargaining agreement, including its arbitration clauses. The court stated that the arbitrator's finding was a "plausible" interpretation of the contract and the events surrounding its formation; deferred to the

arbitrator's decision; and affirmed the District Court's order.

The case report noted that "this disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R.36-3."

Writers Guild of America v. Dadon, 1993 U.S.App. LEXIS 4262 (9th Cir. 1993) [ELR 15:1:13]

RKO may enforce California judgment confirming arbitration ruling against Oklahoma investors in the film "Plenty"

In 1985, Michael Barkley and Tim Hayes and other parties agreed with RKO Pictures, Inc. (subsequently re-named Entertainment Acquisition Corporation) to invest

in the film "Plenty" starring Meryl Streep. The investors agreed to assume RKO's obligation to Twentieth Century Fox Film Corporation to pay Fox any shortfall in revenue if the film earned gross receipts less than \$3.5 million. The investors obtained the right to receive a portion of any gross receipts exceeding \$3.5 million.

RKO eventually sought arbitration of a dispute under the agreement, and, after an arbitration hearing, a California court entered judgment against the seven investors. The court followed the arbitrator's recommendation and awarded RKO about \$730,000, as well as interest and attorneys' fees.

An Oklahoma trial court agreed with Barkley and Hayes' claim that they did not receive, from the investors' Los Angeles-based agent for service of process, a copy of the Notice and Petition in RKO's action to compel arbitration. Barkley and Hayes alleged that they received no prior notice of the arbitration or the judgment.

An Oklahoma appellate court has reversed and remanded the trial court decision granting the motion to vacate judgment, finding that due process notice requirements were satisfied by RKO's service of process; Barkley's and Hayes' testimony that they did not receive the Notice and Summons mailed by the agent was immaterial, stated Judge Hunter. California law provides that a party may serve process by serving "a person authorized by [the defendant] to receive service of process." Barkley and Hayes, "investors in a sophisticated multimillion dollar motion picture deal," understood the provisions of the agreement with RKO; the agreement was not a form; RKO served the investors according to the terms of the agreement; and Barkley and Hayes were liable under the judgment.

Judge Hunter instructed the trial court to set aside its order vacating the foreign judgment and enter an order recognizing RKO's judgment as an Oklahoma judgment.

The Oklahoma Supreme Court denied certiorari in the matter.

RKO Pictures, Inc. v. Barkley, 838 P.2d 518 (Okla. App. 1992) [ELR 15:1:13]

New York magazine Christmas issue cover does not infringe The Old Farmer's Almanac cover design

Yankee Publishing, Inc. has published The Old Farmer's Almanac since 1941. The Almanac, described by Federal District Court Judge Pierre N. Leval as containing "folksy material of perennial interest..." has been published annually since 1792. Each year since 1852, the Almanac has used the same cover design, utilizing a distinctive, widely recognized mark (or trade dress) that has been widely associated with the Almanac.

The cover design consists of a yellow background framed by a red and white border. At the top of the frame is a red ellipse, framed in white, in which the edition is identified in white letters. The cover design is based on a "bucolic motif;" each corner of the cover features "an agrarian seasonal vignette..., and a variety of fruits, produce, grains and flowers are intertwined with the ornate design encircling the bold-faced title in the center of the cover." The title of the 1991 edition stated: The Old Farmer's 1991 Almanac by Robert B. Thomas; on either side of the title there were two small portraits in oval frames - one of Benjamin Franklin, the other of Robert B. Thomas, the Almanac's founder.

International Licensing Management, Inc., the exclusive merchandise licensing agent for the Almanac's trademark, licensed variations of the trademark and cover design to more than twenty licensees of products with a "natural affinity with the homespun image of the

Almanac." Licensee variations on the cover design usually retained many of the central design features.

New York magazine, published by News America Publishing, Inc., decided that its 1990 Christmas gift issue would have a thrift theme with a "satiric spin." The magazine, noted Judge Leval, is characterized by "the frivolous, trendy, inconstant, stylish, urbane glorification of consumption," all values diametrically opposite to the Almanac's association with "rusticity, thrift, homespun good sense, homely time-honored adages, practicality, permanence, and rejection of the new-fangled trendy changes."

New York, in order to highlight the opposing qualities of the two works, designed the cover of the Christmas gift issue as "an obvious takeoff" on the traditional cover design of the Almanac. However, the New York magazine cover did not use the Almanac's title; featured Mr. and Mrs. Santa Claus in the side portraits; and

substituted Christmas scenes for the Almanac's images of farm work. New York magazine's title appeared in its usual place, large size and distinctive typeface; except for the cover and one page of the Christmas gifts feature, the issue did not refer to the Almanac.

Judge Leval rejected the Almanac's trademark infringement claim, stating the New York magazine made it sufficiently clear that the obvious reference to the Almanac was a joke and that New York made clear its own identity by the prominent display of its title so as to dispel any substantial likelihood of real consumer confusion. Furthermore, even if there was some confusion as to source or origin, it was relatively minor and was far outweighed by First Amendment considerations protecting the right of commentary and artistic expression, declared the court.

In considering the likelihood of confusion issue, Judge Leval pointed out that a trademark owner's rights are

violated only where the allegedly unauthorized use has a substantial capacity to mislead consumers into confusion as to the entity furnishing the goods or services. New York did not use its imitation of the Almanac's trade dress as a trademark source identifier. The cover referred to the Almanac, but contained New York's title, and featured art work that was "a joking deviation from the themes of the Almanac." It also was observed that the size of New York magazine, as well as the contents of the issue, differed from the Almanac. Judge Leval concluded that New York's cover design was clearly recognizable as a joke and caused no significant likelihood of confusion concerning its source.

After reviewing the eight factors relevant to determining a likelihood of confusion, the court stated that it "remained convinced" that New York's cover did not cause a significant likelihood of confusion as to its source or origin.

Judge Leval continued by finding that the First Amendment protects the unauthorized use of trademarks when that use is a part of the expression of a communicative message. Free speech rights do not extend to labelling or advertising products in a manner that conflicts with the trademark rights of others, but when the unauthorized use of another's mark is part of a communicative message and not a source identifier, "the First Amendment is implicated in opposition to the trademark right."

New York's use of the cover design was artistic editorial expression; the danger of public confusion as to the source of origin was slight; and the public interest in avoiding confusion was clearly outweighed by the public interest in free expression, stated Judge Leval. The fact that the Almanac may not expressly proclaim the value of thrift did not undermine "the good faith of New York's claim that its reference to the Almanac was intended to evoke the value of thrift."

Although agreeing with Yankee Publications that the New York cover was not a parody, Judge Leval stated that this factor did not warrant a different result. Parody, declared the court, "implicates an element of ridicule, or at least mockery." The New York cover did not ridicule the Almanac, but made a joking reference to the work. Parody was merely an example of a type of expressive content that is favored in fair use analysis under the copyright law and may be entitled to First Amendment deference under trademark law. New York's commentary was an expressive message that was fully entitled to First Amendment deference, as much so as in the case of typical parody, stated the court. New York's position might have been stronger if its joke had been clearer, but First Amendment protections "do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."

Judge Leval concluded by finding that New York was not required to identify its cover as a parody; that the cover was not inherently misleading; that the same First Amendment considerations that limit a cause of action under the Lanham Act also apply to a cause of action under New York's anti-dilution statute; and that Yankee Publishing did not show that New York obtained any unjust enrichment.

Yankee Publishing Inc. v. News America Publishing, Inc., 1992 U.S. Dist. LEXIS 1985 (S.D.N.Y. 1992) [ELR 15:1:14]

Major League Baseball Players Association fails to enjoin distribution of 3-D baseball card display item

Dad's Kid Corp. manufactured and sold "Tri-Cards," a product derived by using three authentic licensed baseball cards originally made by licensees of the Major League Baseball Players Association. Leaving one card intact, Dad's Kid would cut the player's image from each of the two remaining cards and then slightly stagger those images above the player's image on the intact card, resulting in a 3-D effect. The reverse side of the Tri Card was the reverse side of the original licensed card, bearing the player's photograph, player information, and the trademarks and logos of the licensed manufacturer, Major League Baseball and the Players Association.

Dad's Kid mounted each Tri Card on a plastic frame. The packaging disclaimed any copyright or trademark right with respect to the previously manufactured cards used by Dad's Kid to create Tri Cards, and with respect to any proprietary rights to the name and logo of Major League Baseball. The company added a statement to

each Tri Card's plastic frame, providing the name of the manufacturer and disclaiming any affiliation with authorized licensees of Major League Baseball or the Players Association.

A Federal District Court in New York denied the Players Association's trademark infringement claim, finding no likelihood of confusion as to origin due to Dad's Kid's use of genuine baseball cards.

The court also rejected the claim that Dad's Kid misappropriated the publicity rights of major league baseball players. Judge Owen observed that "an enormous secondary market exists for baseball cards and baseball card derivative works," and concluded, on the record before the court, that baseball players "have little if any continuing publicity rights with respect to the use and reuse of their pictures on cards by subsequent purchasers and sellers of duly licensed baseball cards following a

perfectly proper first sale into commerce for which the players get a royalty."

Judge Owen, accordingly, denied the Players Association's motion for a preliminary injunction.

Major League Baseball Players Association v. Dad's Kid Corp., 806 F.Supp. 458 (S.D.N.Y. 1992) [ELR 15:1:15]

American Federation of Musicians prevails in action brought by local unions concerning hiring of local musicians for theatrical tours

Local unions belonging to the American Federation of Musicians sometimes negotiate collective bargaining agreements with particular employers. The agreements may specify the minimum number of local union

musicians who shall be hired to play for engagements in establishments covered by the agreement within the jurisdiction of the local union. The clauses, referred to as "local union minimums," apply to all performances in such establishments, including performances under the Federation's Pamphlet B which covers theatrical tours.

When a Pamphlet B production takes place in a venue covered by local union minimums, the producer may be required to employ the number of musicians specified by Pamphlet B plus the total number of local musicians provided for in the local's minimum.

In 1991, the Federation engaged in bargaining with League of American Theaters and Producers; the parties considered Rule 61 which deals with the requirements for the minimum number of musicians in those theaters where there is an existing contract between a local union and the theater where the performances are to take place. The parties ultimately agreed, subject to

ratification, to revise Rule 61 by providing that upon the expiration of contracts between local unions and covered theaters, the local union might continue to set minimums in collective bargaining, but those minimums would not exceed sixteen local musicians for Pamphlet B touring theatrical musicals. The revised rule also set forth various situations when local minimums would not apply and when touring musicians might be counted against the local minimums. In response to a lawsuit filed by several local unions against the Federation, a Federal District Court in Pennsylvania, after reviewing the relevant Federation bylaw provisions, found that the locals did not show immediate, irreparable injury. Judge Katz stated that it was "speculative and doubtful" that producers and the locals would bargain seriously for local musicians above the maximum specified in the contested Federation agreement. It was found that the Federation would suffer a substantial hardship if

injunctive relief were granted because the Federation then would be precluded from bargaining for touring musicians to get "a fair share of the work in the Locals' areas." It appeared to Judge Katz that the Federation's designation of a maximum number of touring musicians was "probably" a reasonable interpretation of the challenged bylaw and served to resolve the competing interests of local and touring musicians.

The court also pointed out that the failure to reach a compromise might lead to fewer touring productions in certain cities; that the public interest would be furthered by a reasonable resolution of work-sharing conflicts; and that the balance of equitable considerations warranted the denial of a preliminary injunction.

Philadelphia Musical Society v. American Federation of Musicians, 798 F.Supp. 247 (E.D.Pa. 1992) [ELR 15:1:16]

Court issues rulings in Washington apple growers' action arising from "60 Minutes" report on pesticide use in food production

In February 1989, the CBS television program "60 Minutes" presented a segment critical of daminozide, commonly known by the trade name "Alar." Alar was used in the apple industry as a growth regulator. Public interest groups expressed concern over the possibility that alar may chemically degrade into a carcinogen, and may remain in the flesh of the apple regardless of processing procedures.

The "60 Minutes" segment discussed a report on alar by the Natural Resources Defense Council. In response to the broadcast, sales and prices of apples fell sharply.

Eventually a class action was filed on behalf of 4,700 Washington apple growers.

Federal District Court Judge Wm. Fremming Nielsen first found that the presence of the three local CBS affiliates did not defeat diversity jurisdiction. The affiliates were not required to exercise editorial control over the broadcast. The court assumed, for purposes of disposition, that the affiliates, although serving as mere conduits relaying an unedited network feed, did republish the allegedly defamatory material. Judge Nielsen cautioned that there can be no liability for any defamation without fault; granted summary judgment in favor of the affiliates; and noted that the dismissal of the claims asserted against the affiliates would result in complete diversity.

The court next noted that the "of and concerning" requirement of defamation law would apply to the apple growers' product disparagement claim. The Washington

apple growers, the major producer of red apples in the United States, claimed that the group was implicated in the program and harmed thereby. Judge Nielsen observed that the broadcast referred only tangentially to growers. The focus of the segment was the agricultural use of hazardous substances, particularly the use of alar which physically merges with the fruit; the broadcast clearly was "of and concerning" the chemical-containing apples and all apples were targeted as suspect, even if alar-free.

Judge Nielsen then denied the motion of CBS and CBS "60 Minutes" to dismiss or for summary judgment, finding that further discovery was required on the falsity and malice issues.

In a subsequent opinion, Judge Nielsen, after careful consideration of the Natural Resources Defense Council's study on the risk posed to children by pesticides, stated that the study was not about apples per se; did not

condemn apple growers; and was not about the state of Washington. The court concluded that the apple growers failed to demonstrate standing - the subject matter of the study was "so wide-ranging and the indictment so all-embracing" that it was not shown that the study was of and concerning either the apple growers or their products. Judge Nielsen granted the Council's motion for summary judgment.

Auvil v. CBS 60 Minutes, 800 F.Supp. 928; 800 F.Supp. 941 (E.D.Wash. 1992) [ELR 15:1:16]

Decision granting summary action to Colorado broadcaster in libel action is affirmed

In June 1989, Linda Ann Lewis was arrested for shoplifting by security personnel at a J.C.Penney Co. store in

Aurora, Colorado; Lewis was convicted of the shoplifting charge.

Lewis and her husband subsequently filed a civil action against J.C.Penney, alleging that she had been seriously and unjustifiably beaten during the arrest, and that J.C.Penney discriminated against its black customers, including Lewis. In the course of reporting the Lewis' charges and the community's response to the incident, television newsperson Lynn Setzer spoke with the Lewis' attorney; the attorney told her that Linda Ann Lewis had no prior criminal record. But the town police department advised the television station that Lewis had previously been arrested for prostitution, indecent exposure and obstruction of justice. Setzer had attempted, without success, to contact Lewis' attorney prior to broadcasting a report which referred to the purported arrests; the report stated that it was not known if Lewis was convicted of the charges.

The police department information officer subsequently determined that the arrest information contained in the broadcast was incorrect; the individual arrested was not Linda Ann Lewis, although one individual had used that name. The television station broadcast a retraction of the item with an explanation that it was a result of mistaken identity.

In response to Lewis' defamation action against McGraw-Hill Broadcasting Company, doing business as Channel 7 News, a Colorado trial court entered summary judgment on behalf of the McGraw-Hill parties.

An appellate court has affirmed the trial court decision. Judge Reed found that the allegedly defamatory statement involved a subject matter of sufficient public concern to invoke First Amendment protections. It also was found that the trial court correctly determined that Lewis was a limited purpose public figure, and that Lewis did not present clear and convincing evidence establishing a

prima facie case of actual malice. The police department's public information officer was a proper and reliable source, stated Judge Reed - information regarding arrests was routinely provided to the media pursuant to established policies, such information had in the past been accurate, and there was no reason for the television station to doubt the accuracy of the official report.

The court held that when, as in the instant case, members of the media "have an objective basis to rely on the accuracy of an official report which relates to a matter of public concern or which involves a public figure, then publication need not be delayed in order to investigate its accuracy or to obtain corroboration from all possible sources."

Judge Reed concluded by upholding the trial court's dismissal of Lewis' claims for negligence and infliction of emotional distress.

In a special concurrence, Judge Dubofsky expressed the view that while the existing case law might require the result reached by the majority, that result was "fundamentally unfair." Judge Dubofsky noted that Colorado has adopted a more demanding standard of proof for an individual bringing a libel action to meet when faced with a summary judgment motion than the state uses in other types of cases. The "extremely destructive" nature of the accusations against Lewis, given the attorney's contradictory statement, should have caused the television station to investigate the accuracy of the police department's information.

Judge Dubofsky commented that "a reputation woven by a lifetime of work may be left in tatters by a 20-second sound bite. Media conglomerates which have the extraordinary capability to be so destructive to a person's life should be legally accountable if, as here, they fail to act responsibly," and ruled that the present state

of summary judgment law apparently permits media parties to avoid any liability for the harm caused by their erroneous statements.

Lewis v. McGraw-Hill Broadcasting Company, Inc.,
832 P.2d 1118 (Colo.App. 1992) [ELR 15:1:17]

Federal District Court dismisses investors' federal securities fraud claim against Taj Mahal casino/hotel partnership

A Federal District Court in New Jersey granted a motion to dismiss brought by Donald Trump and other parties in a securities fraud action by investors in the Taj Mahal hotel and casino.

In 1988, as the primary source of funding for the Taj Mahal, the Trump parties offered, and Merrill, Lynch,

Pierce, Fenner and Smith underwrote, \$674 million in fourteen percent first mortgage investment bonds. The bonds were issued pursuant to a prospectus.

Upon learning that the Taj Mahal planned to file Chapter 11 bankruptcy and establish a reorganization plan, various bondholders claimed that the prospectus included misrepresentations and omissions.

Chief Judge Gerry, in considering whether the complaint adequately alleged that the prospectus contained false and misleading statements or omissions, first reviewed the "bespeaks caution" doctrine. Where an offering statement, such as a prospectus, accompanies statements of its future forecasts, projections and expectations with adequate cautionary language, those statements are not actionable as securities fraud, according to the doctrine. Judge Gerry stated that whether an offering statement, such as a prospectus, "bespeaks caution" is directly relevant to whether it is actionable; the doctrine

subsumes the misrepresentation analysis because no reasonable inference can be drawn in favor of a party that a document or statement which bespeaks caution as to future forecasts contains actionable misrepresentations. It would be necessary for a court first to consider the cautionary language of a prospectus and to consider the challenged statements in context, in determining whether a complaint alleges actionable omissions or misrepresentations.

The "bespeaks caution" approach requires more than merely describing an investment as speculative, continued Judge Gerry; "it neither immunizes fraud nor nullifies the securities fraud protections of sections 11 and 10b." The doctrine applies only to "precise cautionary language which directly addresses itself to future projections, estimates or forecasts in a prospectus," emphasized the court. A blanket warning that an investment is "risky" would be insufficient to defeat a federal

securities fraud claim, and the doctrine would not apply to cautionary language regarding actual facts, such as past performance of an existing investment or the contents of appraisals or other expert reports.

The court, upon reviewing the portions of the prospectus relating to the bondholders' various claims, observed that the prospectus contained many warnings as to the extremely risky nature of the proposed investment as well as the highly speculative nature of any projections as to future results. The investors claimed that the Taj Mahal parties possessed no reasonable basis for the statement in the prospectus that they believed the project could generate sufficient funds to cover all the debt service on the bonds. But the challenged statement was followed by the statement that "No assurance can be given...that actual operating results will meet the Partnership's expectations."

Judge Gerry declared that the context of the allegedly false and misleading statement "fairly screams caution," and found that no reasonable investor could have been misled by one sentence, "buried in the middle of the prospectus and preceded by pages of pertinent warnings, which the investors claim was misleading." The text of the prospectus, "a carefully crafted, fully disclosing document, shielded the Taj Mahal parties from liability.

Judge Gerry then noted that aside from considerations of cautionary language, a claim based solely on the challenged statement was not actionable because the claim alleged nothing more than "fraud by hindsight." The Taj Mahal ultimately was not able to generate funds sufficient to cover all of its debt service, but the failure of an investment, commented the court, "is not intrinsically equatable with fraud in the offering of that investment. Such an equation is the very essence of fraud by hindsight." The investors did not show objective evidence

that the challenged statement represented a dishonestly held belief, or a belief without reasonable basis.

It was further found that the investors would be unlikely to convince a reasonable jury that the prospectus omitted to state uncertainties regarding the partnership's ability to generate funds sufficient to cover all of its debt service. In all, the investors failed to state a claim for which relief could be granted.

The court then rejected the investors' argument that the prospectus failed to adequately disclose the risks to the Taj Mahal's success posed by competition in the casino industry. The prospectus, again, contained many warnings regarding competition; the warnings were specifically addressed to the purported misrepresentations and omissions; and the prospectus' entire treatment of competition bespoke caution "to a striking degree."

Judge Gerry next dismissed the investors' claim challenging the manner in which the prospectus treated

appraisals of the Taj Mahal's value and a claim alleging that the prospectus contained false and misleading omissions and statements with respect to Donald Trump's financial status and obligations.

The investors also argued that certain remarks by Trump which were reported in the news media formed the basis for a federal securities fraud claim. Trump purportedly commented that the Taj Mahal would be a "tremendous success," that his net worth was four or five billion dollars, that he wanted to become the "king of cash," and that he denied having cash flow problems. Judge Gerry found that the statements were not actionable, noting that every statement was made during 1989 and 1990; that the bonds were issued in 1988 and purchased before 1989; and that the investors could not have relied on the statements in making their purchases.

In dismissing the investors' federal claims with prejudice, the court also dismissed, without prejudice, the

pendent state law claims for breach of fiduciary duty and false advertising.

In re Donald J. Trump Casino Securities Litigation, 793 F.Supp. 543 (D.N.J. 1992) [ELR 15:1:18]

Florida Supreme Court rules that taxing magazines, but not newspapers, violates First Amendment; court strikes newspaper exemption

Magazine Publishers of America, Inc. and the publishers of various magazines sued the Florida Department of Revenue challenging the constitutionality of a statute imposing a tax on the retail sales of secular magazines. The trial court granted the magazine parties' motion for summary judgment, finding that the statute imposed a differential tax on the press and was an unconstitutional

violation of the First Amendment of the United States Constitution.

The Florida Supreme Court (ELR 12:9:19) affirmed the trial court's order finding that the statute unconstitutionally burdened First Amendment interests, but reversed the part of the court's order striking the tax imposed on magazines. The court concluded that the proper solution was to eliminate the statutory exemption for newspapers.

The United States Supreme Court vacated the judgment of the Florida Supreme Court and remanded the matter for further consideration in light of *Leathers v. Medlock*, 111 S.Ct. 1438 (1991; ELR 13:2:13).

In *Leathers*, the Supreme Court considered the constitutionality of an Arkansas sales tax scheme that exempted both magazine and newspaper sales from taxation while imposing a sales tax on cable television. The Supreme Court noted that differential taxation of

the media does not by itself raise First Amendment concerns, and only triggers heightened scrutiny under the First Amendment if the tax singles out the press, targets a small group of speakers, or discriminates on the basis of the content of the speech.

On remand, the Florida Supreme Court observed that the state tax did not single out the press for special treatment or target a small group within the press to bear the burden of the tax. However, the Florida statute authorized the Department of Revenue to review the contents of a publication to determine whether the publication would qualify for the newspaper exemption. Administrative regulations stated that in order to constitute a newspaper, the principal purpose of the publication must be to disseminate news. One of the elements relevant to such a determination would be an evaluation of the contents of the publication to assess whether it contained "reports of current events and matters of general interest

which appeal to a wide spectrum of the general public." The latter element was not a content-neutral requirement, stated the court, and the tax therefore was required to withstand heightened scrutiny under the First Amendment.

The Department argued that the newspaper exemption furthered the compelling state interest of encouraging the literacy and general knowledge of Florida's citizens. The court, although noting that the state had a legitimate interest in fostering literacy, found that the tax scheme was not narrowly tailored to achieve that end -the state "need not look to the content of publications to attain the desired goal of increased public knowledge and literacy."

The Department of Revenue also claimed, apparently for the first time at oral argument, that the newspaper exemption was related to the fact that newsprint can be recycled while magazine paper generally cannot. If the

state based its decision on taxation solely on the type of paper or other format-based criteria, First Amendment rights would not be implicated, agreed the court. But the record indicated that this factor alone was not dispositive. Furthermore, the goals of recycling Florida's newspapers might be served without an administrative evaluation of whether the information being published was "current" and would appeal "to a wide spectrum of the general public."

The state failed to meet the burden of justifying a tax classification scheme based upon content and the tax scheme was ruled invalid under the First Amendment.

The court affirmed that portion of the trial court's order which held that the statute impermissibly burdened First Amendment rights and did not serve a compelling state interest, but reversed that portion of the trial court's order which concluded that the appropriate remedy was to strike the tax imposed on magazines. The court again

concluded that the appropriate remedy was to strike the statutory exemption for newspapers.

Judge Harding expressed disagreement with the majority's conclusion that the tax discriminated on the basis of the content of speech. The statute did not refer to the content of the publications subject to taxation and it appeared to Judge Harding that the format and frequency of a publication, without reference to the contents of the publication, were the primary factors for determining whether a publication would qualify for the newspaper exemption. "Form and frequency focused rules do not pose the type of censorial threat that a content-based classification does," stated Judge Harding, who would have found that First Amendment rights were not implicated by the tax scheme.

The tax also did not violate the magazine parties' right to equal protection, according to the dissent. Florida had a legitimate interest in encouraging the reading of

newspapers through a price subsidy and an equally valid interest, in Judge Harding's view, in promoting the recycling of newspapers; the differential taxation of magazines and newspapers thus met the rational relationship test, and the dissent would have upheld the newspaper exemption.

Department of Revenue v. Magazine Publishers of America, Inc., 604 S.2d 459 (Fla. 1992) [ELR 15:1:19]

MTV network's sweepstakes promotion did not violate New Jersey gambling laws

In 1989, VH-1, a channel offered by MTV Networks, sponsored a sweepstakes known as the "VH-1 Corvette Collection."

Barry Glick, seeking damages on behalf of himself and the state of New Jersey, claimed that the sweepstakes was prohibited under New Jersey law. One of the ways of entering the sweepstakes was to call a "900" number for which there was a \$2.00 charge. Glick alleged that calling the 900 number amounted to placing a \$2.00 wager and that VH-1 was engaged in an unlawful gambling scheme or a lottery.

A Federal District Court in New York noted that while New Jersey's constitution and civil laws prohibit gambling generally, neither defines an unlawful gaming transaction or the term "gambling." The state's criminal statutes relating to gambling offenses define gambling to mean: "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome"

(emphasis added by the court). After referring to the state's definitions of "lottery" and "something of value," Judge Kevin Thomas Duffy determined that New Jersey courts have identified chance, prize and price as the three components of gambling, but have not construed the statutory definition of "something of value."

MTV Networks argued that sweepstakes participants did not have to risk "something of value" because alternative cost-free means of entry were reasonably available, i.e., by using an "800" telephone number or an entry blank. MTV publicized the cost-free entry methods and the sweepstakes' official rules stated that no purchase was necessary to enter. It was observed that about 87 percent of the participants used the 900 number; MTV, according to Glick, encouraged the use of the 900 number and subjected participants using the alternate entry methods with a "disadvantaged opportunity to win."

Judge Duffy, in granting MTV's motion for summary judgment dismissing the complaint, noted that as all those who entered had an equal chance of winning, "there was no risk that certain entrants would secure a more favorable position than others," and found that Glick did not establish the price element necessary to his gambling claim. The \$2.00 charge for using a 900 number, when alternate cost-free entry methods were available, was not the type of activity that the state of New Jersey would proscribe under its gambling laws, declared Judge Duffy, who concluded by adverting to the fact that New Jersey chose not to prosecute MTV Networks or Viacom, its parent company.

Glick v. MTV Networks, 796 F.Supp. 743 (S.D.N.Y. 1992) [ELR 15:1:20]

Female umpire may proceed with Title VII claim arising out of termination by minor league, and with common law restraint of trade claim; Title VII claim of discrimination in hiring or promotion is dismissed

Pamela Postema, after successfully graduating from umpiring school, began work in 1977 as a professional umpire in the Gulf Coast League, a rookie league. Postema was promoted several times, and, from 1987 until 1989, umpired in the Triple-A league.

Postema claimed that notwithstanding increased responsibilities and honors, she was subjected to repeated and offensive acts of sexual harassment and gender discrimination. Postema also contended that she was not promoted to or hired by the National League or American League, but that the leagues hired, and promoted, male umpires with inferior experience, qualifications, and abilities.

In November 1989, Triple-A discharged Postema from her employment, stating that the National League and American League were not interested in considering Postema for employment as a major league umpire.

A Federal District Court in New York first considered Postema's claim of employment discrimination in violation of Title VII of the Civil Rights Acts of 1964. Judge Robert P. Patterson, Jr. noted that the American League, since 1988, had only one opening for and hired only one umpire - former minor league umpire Jim Joyce was hired in April 1989. Postema did not file a charge of employment discrimination with the Equal Employment Opportunity Commission until April 4, 1990, more than 300 days after Joyce was hired. Any claim arising from the Joyce hiring was time-barred, ruled the court, in granting summary judgment to the American League with respect to this claim.

Judge Patterson then found that since the American League did not hire or promote any umpires during the relevant time period, either male or female, Postema could not show that she was treated any differently from male applicants; Postema's complaint thus did not set forth a prima facie case of discrimination in hiring or promotion and the American League was entitled to summary judgment on the hiring and promotion claims arising from events which occurred within 300 days of the filing of the EEOC charge.

The court granted Postema an opportunity to conduct discovery to determine whether the American League was involved in her termination by Triple-A, and further found that the provisions of the Civil Rights Act of 1991 would apply retroactively to provide Postema with the right to trial by jury and the right to seek compensatory and punitive damages upon establishing intentional employment discrimination.

Postema also had filed charges of discrimination with the EEOC against the American League and the National League; the EEOC referred the complaints to the New York State Division of Human Rights. After reviewing the jurisdictional considerations involved, the court found that the court had jurisdiction over Postema's Human Rights Law claims against Triple-A, the American League and the National League, but not over a claim against the Baseball Office for Umpire Development.

Judge Patterson denied the baseball parties' motion to strike Postema's jury demand as to the Human Rights Law claim, but granted a motion to strike the prayer for punitive damages.

The court concluded by denying the baseball parties' motion to dismiss Postema's state law restraint of trade claims, concluding that there was no showing why the baseball exemption should apply to baseball's

employment relations with its umpires. Unlike the league structure or the reserve system, stated Judge Patterson, "baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability." New York's common law of restraint of trade did not conflict with the baseball exemption, and Postema's claims were not preempted.

Postema v. National League of Professional Baseball Clubs, 799 F.Supp. 1475 (S.D.N.Y. 1992) [ELR 15:1:20]

Ruling by NHL president in arbitration proceeding between player and team collaterally estopped player's action against agent

Daniel Mandich severely injured his right knee during a Minnesota North Stars hockey game in January 1984. He signed a new one-year contract in August 1984 while attempting to rehabilitate the knee. Mandich played in a few games near the end of the 1984-1985 season and hoped to resume his hockey career in the fall of 1985.

In negotiating Mandich's contract for the 1985-1986 season, Mandich's former agent, William W. Watters, and the North Stars knew that Mandich would retire that fall if the knee injury was disabling, and that Mandich would collect \$175,000 in NHL disability insurance benefits if he retired before playing twenty post-injury NHL games. The NHL Standard Player's contract provided that a player "disabled...by reason of an injury sustained during the course of his employment as a hockey player...shall be entitled to receive his remaining

salary due in accordance with the terms of this contract."

Mandich and the team signed a two year contract in May 1985 whereby the team agreed to pay Mandich a salary of \$105,000 in the first year and \$120,000 in the second year. However, Watters and the North Stars' general manager, Lou Nanne, orally agreed that if Mandich retired early enough to receive the disability benefits, the North Stars would have no further salary obligation under the 1985 contract.

In November 1985, when Mandich decided to retire, Nanne asked the player to sign a memo confirming the side agreement. Mandich, who claimed that Watters had not informed him of the arrangement, "reluctantly" signed the letter agreement, but then filed a grievance to recover his full 1985 contract salaries.

NHL President John Ziegler, without deciding whether the side agreement was binding and enforceable, ruled

in favor of the North Stars, concluding that the parties had agreed that the 1985 contract would not be effective if Mandich was physically unable to perform; that the 1985 contract never came into effect because there was a total failure of consideration on Mandich's part as well as a breach of an essential condition, i.e., the failure to report in good physical condition; and that the collective bargaining agreement did not require the full payment of the post-injury 1985 contract.

Mandich petitioned a Minnesota state court to vacate the arbitration award, arguing that Ziegler was not impartial and had exceeded his powers. The court upheld the award, finding that the oral agreement was valid, and that Ziegler was not biased.

A Minnesota appellate court affirmed the trial court decision, although a dissent apparently "harshly criticized Ziegler's contract analysis as 'wholly illegitimate' and concluded that Ziegler had exceeded his authority as an

arbitrator." The Minnesota Supreme Court declined further review.

Mandich brought an action against Watters seeking to recover the unpaid contract sums on the ground that the agent breached his duty by negotiating an illegal and unauthorized side agreement. Watters, a resident of Canada, removed the action.

A Federal District Court granted Watters' motion for summary judgment, concluding that the arbitrator's determination that the 1985 contract never came into effect was binding on Mandich and that collateral estoppel precluded his salary claim.

In affirming the District Court's decision, Federal Court of Appeals Judge Loken noted that under Minnesota law, an arbitration award is a prior adjudication for collateral estoppel purposes, and the grounds upon which a reviewing court may vacate an award are severely limited. Mandich's right to appeal Ziegler's award did not

include the right to have the arbitrator's interpretation of the 1985 contract reviewed on the merits, either by the trial court or the appellate court.

Judge Loken emphasized that the sole ground for Ziegler's award was that the 1985 contract never came into existence - that award was upheld upon judicial review. Relitigating the issue of the enforceability of the contract was precluded by collateral estoppel, concluded the court.

Mandich v. Watters, 970 F.2d 462 (8th Cir. 1992) [ELR 15:1:21]

Briefly Noted:

Film Worker Injury.

Phyllis Sagnelli, a free-lance hair stylist, alleged that she was seriously injured while working on the set of the film "Legal Eagles" in December 1985. Sagnelli sued R.P.I.6 Harrison Street, Limited Partnership and Universal Pictures, claiming that she tripped over a cable and fell down the steps of a prop located on one of the sets. Filming was being conducted, at the time of the alleged incident, on premises leased by Universal from R.P.I.

A New York appellate court modified a trial court ruling by granting R.P.I.'s motion for summary judgment dismissing the complaint. The court ruled that while R.P.I. retained the right to enter the premises and engage in business, and while the company had personnel monitoring the condition of the building in which the leased premises were located, it was clear that R.P.I. had no control or authority over Universal's day to day

operations such as the placement of cables or the layout of props and sets.

It also was found that the trial court correctly denied Universal's motion for summary judgment because there existed an issue of fact as to Sagnelli's employment status.

Sagnelli v. R.P.I. 6 Harrison Street, Limited Partnership,
586 N.Y.S.2d 8 (N.Y.App. 1992) [ELR 15:1:22]

Film Patron Injury.

Jon Lewis was shot and severely injured while attending the opening night of the showing of the film "Boyz 'N the Hood." Lewis sued Columbia Pictures for negligence, claiming that the studio's advertising campaign

was misleading and volatile and was likely to incite violence during screenings of the film.

A San Bernardino trial court has ruled that the advertisements and trailers for the film were protected by the First Amendment. It also was found that Lewis did not show any duty owed to him by Columbia or demonstrate how Columbia's promotional material was the proximate cause of the disturbance, during which Lewis was injured. The court sustained Columbia's demurrer to Lewis' second cause of action without leave to amend.

Lewis v. Columbia Pictures Industries Inc., 20 Med.L.Rptr. 1807 (San Bernardino Cnty. 1992) [ELR 15:1:22]

Film Patron Injury.

Alejandro Phillips, who was shot during a screening of the film "Boyz 'N the Hood," sued the theater's security service, his unknown assailant and Columbia Pictures Industries, the film's distributor.

A California trial court has granted Columbia Pictures' demurrer to Phillips' cause of action for negligence. Phillips claimed that the distributor created an advertising campaign for the film which was "unnecessarily and unreasonably misleading and volatile in nature and was likely to incite and produce violent and lawless activities during public screenings of the film."

The court rejected Phillips' suggestion that a party may be held liable for harm resulting from violence-inducing speech when the purpose of the speech is commercial. The cases cited by Phillips did not support this proposition, and the court stated that "given the multiplicity of objectives speech may have, the adoption of such a standard for separating non-protected from protected

violence-inducing speech" would involve the court in speculating about the objective of speech. The right to free speech is "too valuable to be...subject to such a[n] imprecise and subjective standard," stated the court; the First Amendment therefore insulated the Columbia parties from Phillips' claim.

Phillips v. Syufy Enterprises, 20 Med.L.Rptr. 1199
(Contra Costa Cnty. 1992) [ELR 15:1:22]

Cable Television Access.

A Federal District Court in West Virginia has denied injunctive relief to C/R TV Cable, Inc. in an action seeking a right of access to certain public rights-of-way, private roads and existing utility easements located in a residential development. The court found that C/R did

not show that it would suffer actual, immediate, irreparable injury in the absence of an injunction.

C/R TV Cable, Inc. v. Shannondale, Inc., 792 F.Supp. 1018 (W.Va. 1992) [ELR 15:1:23]

Jockey Injury.

Jockey Kerry D. Hardy suffered injuries when her horse lunged out of the starting gates seconds before a race began at the Delta Downs Race Track. A Louisiana trial court jury awarded Hardy damages of \$110,500.

In affirming the judgment entered on the jury verdict, Judge Doucet stated that the testimony presented at trial sufficiently supported the conclusion that an assistant starter's inaction breached a duty to Hardy and was a substantial factor in bringing about the accident. The

evidence also was sufficient to support a determination that Hardy's injuries were not wholly or partially the result of her own negligence.

The court concluded that there was no error in the amount of the award, particularly since the accident had left Hardy with a ten to fifteen percent permanent anatomical disability which would prevent her from pursuing a career as a jockey.

Hardy v. Delta Downs, Inc., 599 S.2d 364 (La. App. 1992) [ELR 15:1:23]

Copyright Infringement/Music.

A Federal District Court in Tennessee has granted summary judgment to Meadowgreen Music in a copyright infringement action against Voice in the

Wilderness Broadcasting, Inc. and Ralph McBride, the operator and owner of radio station KTFA-FM when the infringement occurred. The court found that the affidavits of a musical identification expert working for the American Society of Composers, Authors and Publishers and of the expert's supervisor were competent summary judgment evidence; that McBride, who owned all of the outstanding voting shares of stock in Voice in the Wilderness and served as the president of the company and general manager of KTFA-FM, was jointly and severally liable with Voice in the Wilderness for the copyright infringement; granted injunctive relief to the Meadowgreen parties; and, upon a finding of willful infringement, awarded the Meadowgreen parties \$3500 per infringement for a total of \$52,500 in statutory damages, as well as attorneys' fees and costs in the amount of about \$4,400.

Meadowgreen Music Company v. Voice in the Wilderness Broadcasting, Inc., 789 F.Supp. 823 (E.D.Tex.992) [ELR 15:1:23]

Previously Reported:

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: *Beal v. Paramount Pictures*, 806 F.Supp. 963 (14:5:7); *Bourne v. The Walt Disney Co.*, 976 F.2d 99 (14:9:3); *Danjaq, S.A. v. Pathe Communications Corporation*, 979 F.2d 772 (14:10:13); *Denney v. Universal City Studios, Inc.*, 13 Cal.Rptr. 170 (14:9:11); *Paul v. Haley*, 588 NYS 2d 897 (14:9:3); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (14:8:12); *United States v. Isgro*, 974 F.2d 1091 (14:10:8); *Denker v. Uhry*, 1992 U.S.Dist. LEXIS 18630 (14:12:3); In re the

Hearst Corporation, 982 F.2d 493 (14:11:16); Lemelson v. General Mills, Inc., 1992 U.S.App. LEXIS 14903 (14:11:10); Shaw v. Lindheim, 809 F.Supp. 1393 (14:9:7); Thoreson v. Penthouse International, 606 N.E.2d 1369 (14:12:15).

certiorari in the matter.

The decision in Beach Communications, Inc. v. Federal Communications Commission (14:10:18) has been published at 965 F.2d 1103; the United States Supreme Court has granted petitions for writs of The United States Supreme Court has let stand the decisions in Bressler v. Fortune Magazine (14:11:7); Nintendo of America, Inc. v. Lewis Galoob Toys, Inc. (14:3:6; 14:8:12; 14:10:19) and Williams v. Stone (14:6:8)

It has been reported that the PGA Tour and Karsten Manufacturing have settled a dispute over the use of clubs with U-shaped grooves. In Gilder v. PGA Tour, Inc. (13:8:16), a Federal Court of Appeals affirmed a

District Court decision granting several professional golf players and Karsten a preliminary injunction preventing the PGA Tour from prohibiting the use of the clubs. Under the settlement, Karsten withdrew its \$100 million lawsuit against the tour and recognized that the tour has "the right to make its own rules for its competitions." The tour withdrew a countersuit against Karsten and withdrew a ban, apparently never enforced, against the use of U-grooved clubs in professional golf competitions. [ELR 15:1:23]

WASHINGTON MONITOR

Federal Communications Commission's new "indecent programming" broadcast regulations are stayed pending judicial review; ACLU challenges new

blocking regulations for indecent programming on commercial leased access channels

A Federal Court of Appeals in the District of Columbia has stayed, pending review, the scheduled February 22, 1993 effective date of the Federal Communications Commission's new regulations concerning the broadcast of indecent material.

Section 16(a) of the Public Telecommunications Act of 1992 sets forth the time periods during which indecent material may not be broadcast. The Commission, in accordance with the statute, amended its rules to prohibit the broadcast of indecent material between the hours of 6 a.m. and 10 p.m. on public broadcast stations that go off the air at or before 12 midnight, and to prohibit the broadcast of indecent programming on all other broadcast stations between 6 a.m. and 12 midnight. Obscene broadcasts are prohibited at all times.

In its opinion, the Commission first noted that it defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

The overriding interest underlying section 16(a), stated the Commission, is the government's compelling interest in protecting children (defined as minors, ages 17 and under) "from the harm of exposure to indecent broadcast materials." Congress did not intend solely to assist parents in supervising their children's access to broadcast programming.

The Commission also expressed the view that the government interest may be even broader than protecting children and may extend to the right of all members of the public to be free of indecent material in the privacy of their homes - a "residential privacy interest."

The Commission affirmed its definition of "children," for purposes of restricting access to indecent material, as including children age 17 and under; stated that it has been "well established that harm to children from exposure to [broadcast indecency] may be presumed as a matter of law;" and concluded that the channeling program implemented by the Commission's regulations is a narrowly tailored means of achieving the government's compelling objective of protecting children from exposure to indecent broadcast programming and properly accommodates the various interests of broadcasters, adults and parents.

Expanding the indecency enforcement to 12 midnight will not foreclose all indecent programming or infringe upon a licensee's discretion to present timely news stories or meritorious programming, stated the Commission, further observing that programmers may present their indecent audio or video material through alternative

media, such as cable television, wireless cable or subscription satellite television services.

The importance of "context" in indecency determinations was cited by the Commission in response to the suggestion that licensee discretion over news coverage and meritorious programming would be infringed by extending the regulated time period. The subject matter alone, or the use of particular words or phrases, does not render material indecent, emphasized the Commission.

The accommodation for public broadcasters was designed to enable those public broadcasters not operating during the regular safe harbor time period "at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible."

The Commission, after "tentatively" concluding that it would continue to allow a station charged with indecent

broadcasting, on a case-by-case basis, to present evidence that there was no actual risk that children were in the broadcast audience in the station's market at the time of the broadcast in question, denied the broadcasters' request for a stay of enforcement activities.

In a separate proceeding, the Commission implemented section 10(b) of the 1992 Cable Act which required the Commission to promulgate "blocking" regulations for indecent programming on commercial leased access channels. The regulations govern indecent programming that cable operators have not voluntarily prohibited under the statute. Section 10(a) of the 1992 Cable Act allows a cable operator, if it chooses, to enforce a written published policy prohibiting indecent programming on commercial leased access channels.

If cable operators do not voluntarily prohibit indecent programming, the regulations require the operators to place on a single commercial leased access channel any

programming identified by program providers as indecent. The regulations also provide that subscriber access to this programming must be "blocked" unless the subscriber requests access in writing. Subscriber requests must state that the subscriber is at least eighteen years old. Cable operators must "unblock" the channel within thirty days of a subscriber request.

The new regulations also allow operators to require certification from program providers that their programming is not obscene or indecent and subject to blocking. If program providers refuse to provide the requested certifications, cable operators may refuse to permit them to use their facilities. For "live programming," cable operators may require program providers to certify that the programmers will exercise reasonable efforts to insure that no obscene programming, or indecent programming on a non-blocked channel, will be presented.

Cable operators may employ any blocking mechanism that they choose - scrambling, interdiction or any other effective method. A cable operator is not required to block a leased access channel to be used for the carriage of indecent programming until the operator receives a request for carriage from a provider of indecent programming. An operator should be allowed to use the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming. Thus, the Commission will require that the channel be blocked only during those time periods that indecent programming is being shown. The American Civil Liberties Union, along with a leased access channel programmer, two cable-access rights organizations, and other parties, has challenged the new regulations as a violation of the First Amendment rights of cable operators.

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency, 1993 FCC LEXIS 314; Implementation of Section 10 of the Cable Act of 1992 (Indecent Programming and Other Types of Materials on Cable Access Channels), 1993 FCC LEXIS 543 [ELR 15:1:24]

Federal Communications Commission adopts rules implementing must-carry and retransmission consent provisions of 1992 Cable Act

On March 11, 1993, the Federal Communications Commission issued a Report and Order adopting must-carry and retransmission consent rules to implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992.

The Commission first reviewed the standards set forth in the Act for determining whether a broadcast station qualifies as a local noncommercial educational station for purposes of must-carry rights. In order to implement this provision of the Act, the Commission, among other items, defined various statutory terms, including "activated channels," and the "substantial duplication" of programming by noncommercial educational channels.

With respect to local commercial television stations, the Commission pointed out that such a station is "any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system;" noted that the Commission specifically denied requests for exemptions for commercial subscribers like hotels and hospitals that receive specially designed channel line-ups; and stated that the Commission would use the current list of Arbitron Areas of Dominant Influence market designations

to establish must-carry obligations, with the list updated every three years.

In turning to retransmission consent, the Commission reiterated that as of October 6, 1993, no cable system or other multichannel video programming distributor shall retransmit the signal of any broadcasting station unless the multichannel distributor has the express authority of the originating station or, in the case of a cable system, a television broadcasting station has elected to assert must-carry rights. The requirements do not apply to non-commercial broadcasting stations; home satellite dish reception of superstations provided that the signal was retransmitted by a satellite carrier on May 1, 1991; home satellite dish reception of network stations, provided that reception is by an unserved household; and cable or other multichannel distributor retransmission of superstations provided that the signal was obtained from

a satellite carrier and the originating station was a superstation as of May 1, 1991.

Retransmission consent requirements apply to commercial radio signals and to low power television signals, unless a low power television signal is being carried pursuant to the must-carry rules. The requirements also apply to distant commercial television signals that are not superstations, but not to foreign stations.

The statute requires commercial television broadcast stations to make an election between must-carry and retransmission consent rights within one year of the date of enactment of the 1992 Act and every three years thereafter.

The Commission next set forth a schedule for the implementation of the must-carry and retransmission consent requirements.

It was further determined that retransmission consent is a new communications property right, created by

Congress "that inheres in the broadcasters' signal. This right is distinct from copyright, which applies to the programming carried on the signal. Broadcasters may bargain away their retransmission consent rights." However, in order to maintain the Congressionally-mandated distinction between retransmission consent and copyright, the Commission found that any bargaining must be for retransmission consent rights in the entire signal and not for individual programs carried on the signal.

The Commission also prohibited exclusive retransmission consent agreements and found that television broadcast stations that elect retransmission consent may exercise network nonduplication rights.

The Commission, on April 2, 1993, published an extensive synopsis of the Report and Order.

Federal Communications Commission, Rules Implementing Must-Carry and Retransmission Consent Provisions of 1992 Cable Act Adopted, (MM Docket 92-259) 1993 FCC LEXIS 1229 (March 11, 1993); Cable Act of 1992 - Must-Carry and Retransmission Consent Provisions, 58 FR 17350 (April 2, 1993) [ELR 15:1:25]

Federal Communications Commission orders temporary freeze of rates for cable services and sets "benchmarks" for rate reductions

On April 1, 1993, the Federal Communications Commission froze, for 120 days, rates for cable services, other than premium and pay-per-view services, provided by cable systems subject to regulation under the Cable Television Consumer Protection and Competition Act of 1992.

The Commission noted that it was proposing regulations to implement section 623(b)(1) of the Act, but that the basic cable and cable programming rate regulations would not become effective until about 75 days after adoption. And it will take additional time for franchise authorities to begin regulating the basic service tier and for cable subscribers to file complaints with the Commission about excessive charges for cable programming services.

The Commission ordered the freeze due to its expressed concern that there would exist a time period during which cable operators would be able to raise rates prior to the initiation of regulations that would otherwise govern their ability to raise existing rates. The freeze should not harm cable operators, stated the Commission, because current rates would remain in effect and because the freeze was "of relatively brief duration."

In a footnote comment, the Commission noted that the Cable Act provides that only cable systems not subject to effective competition, as defined in the statute, are subject to rate regulation. For purposes of the freeze, each cable operator has the responsibility of determining in good faith whether it is subject to effective competition.

Cable operators may add subscribers, retier, or provide additional equipment and services as long as the average monthly subscriber bill for these services does not increase over the level as of the publication date of the order.

It has been reported that the Commission, in a separate order, has required cable system operators to roll back unwarranted increases imposed by the cable systems since September 30, 1992. The order also apparently provides that any equipment used to receive the basic tier is subject to the rules, and that equipment charges

must be "unbundled" from other rates and charged separately.

According to news reports, the Commission, on May 4, 1993, released "benchmark" rates for use by cable operators to calculate rates. The benchmark rates, set forth in a 450 page report, seek to approximate the rates that would be charged by a cable operator in a competitive market. The report, scheduled to take effect on June 21, 1993, also provides that cable operators may not pass along the costs of retransmission consent to consumers in the first year of such consent, but that if a broadcaster and a cable operator negotiate a higher retransmission fee, the renegotiated costs may be passed on to consumers in subsequent years.

Federal Communications Commission, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation,

1993 FCC LEXIS 1631 (MM Docket 92-266, April 1, 1993) [ELR 15:1:26]

FCC seeks comments on policies concerning children's television programming

In March 1993, the Federal Communications Commission initiated a proceeding to seek comment on the possible revision of the Commission's rules and policies "to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children."

The Children's Television Act of 1990 and its implementing rules imposed an affirmative children's programming obligation on broadcasters and restricted the amount of commercial time during such programming.

In reviewing more than 320 television license renewal applications subject to the statutory requirements, the Commission found that the majority of the applications demonstrated "adequate effort" to meet the needs of children. However, it appeared to the Commission that broadcasters have been "uncertain" as to the scope their programming obligations, resulting in an attendant lack of growth in children's programming. The number of hours and time slots devoted to children's programming did not appear to have substantially changed.

The Commission has stated that broadcasters should rely primarily on standard-length programming that is specifically designed to serve the educational and informational needs of children and, as distinguished from short-segment programming, that is available to children at predictable times.

The Commission also has expressed the view that broadcasters should focus on programming "that has as

its explicit purpose service to the educational and informational needs of children, with the implicit purpose of entertainment, rather than the converse." According to the Commission, licensees should avoid relying on entertainment programming that is purportedly information or educational based principally on a "wrap-around" pro-social message, i.e., inserting a pro-social message at the beginning and end of an entertainment program in order to qualify the program as educational and informational.

Comments have been requested as to whether the Commission should establish guidelines specifying the amount and type of children's programming that would permit the Commission staff to grant a license renewal application meeting the guideline; applications not meeting the processing criteria would be subject to further review.

Information concerning the Notice of Inquiry is available from Barbara A. Kreisman, Mass Media Bureau, Video Services Division, Federal Communications Commission, Washington, D.C. 20554; (202) 632-6993.

Federal Communications Commission, FCC Seeks Comments on Policies and Rules Concerning Children's Television, 1993 FCC LEXIS 986 (Report No. DC-2347, March 2, 1993) [ELR 15:1:26]

Copyright Royalty Tribunal commences 1993 Audio Home Recording Act Distribution Proceeding

The Copyright Royalty Tribunal has announced the commencement of the 1993 Audio Home Recording Act Distribution Proceeding. Although certain of the claimants in the Musical Works Fund apparently reached a

settlement agreement in principal, the agreement was not a universal settlement. Controversies also were present in the Sound Recordings Fund.

The declaration of controversy was effective on March 31, 1993. For further information, contact: Linda R. Bocchi, General Counsel, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., Ste. 918, Washington, D.C. 20009. [ELR 15:1:27]

Fair market value of art sold at public auction, for estate tax purposes, is sales price plus ten percent buyer premium to auction house, rules Internal Revenue Service, and buyer premium is not deductible expense of sale

A decedent provided in her will that her daughter might select any or all of the works of art owned by the

decedent, provided that the aggregate value of the art selected by the daughter could not exceed the value of the residuary bequest that passed outright to the daughter under the will. The will directed that any work of art not selected by the daughter would be sold and the proceeds added to the decedent's general estate. The residue of the decedent's estate (including any works of art selected by the daughter) was divided into two equal shares. One share (in which was included the value of any selected works of art) was bequeathed directly to the daughter; the other share was held in trust for her benefit.

The daughter chose not to select any art work. The art was sold at public auction for an unspecified amount. The buyer of each item paid a commission or "premium" to the auction house equal to ten percent of the sales price. The estate received the net amount. For federal estate tax purposes, the decedent's estate reported the

proceeds it received from the sale as the fair market value of the art work sold.

Section 2031 of the Internal Revenue Code, according to an Internal Revenue Service National Office Technical Advice Memorandum, provides that for federal estate tax purposes, "the value of the decedent's gross estate is determined by including the value at the time of the decedent's death of all property, real or personal, tangible or intangible."

Section 20.2031-1(b) states that the value of every item of property includible in the decedent's gross estate is its fair market value at the time of the decedent's death, unless the estate elects use the alternate valuation date.

The Memorandum noted that buyer's premiums paid on the purchase of art work at auction are a standard practice in the auction industry; are recognized as a component of the sales price of the art work; and are properly

included in determining the fair market value of property.

It also was noted that the fair market value of the property for estate tax purposes should be the same as the gift tax fair market value. Case law has established that if a buyer of a work of art immediately transfers the art work by gift, then the value of the gift, for gift tax purposes, would be the sales price including the buyer's premium.

The estate elected to use the services of the auction house, with full knowledge that it would receive only the hammer price, observed the Memorandum. The estate could have sold the art work directly to a purchaser or through a private art dealer - any such buyer most likely would have paid an amount comparable to the total amount paid by the buyer at a public auction. The latter amount was the fair market value of the property for estate tax purposes.

The auction house was not acting as an agent of the buyer, but was retained by the seller to sell the items. And the premium was a cost of sale of the seller regardless of which party actually paid it. Therefore, concluded the Memorandum, the fair market value of the art work was the auction sales price plus the premium paid by the buyer.

In turning to the question of whether the premium was an allowable administration expenses, the memorandum cited regulation 20.2053-3(a) which provides that amounts deductible as administration expenses are limited to expenses actually incurred in the administration of the estate. The estate argued, unsuccessfully, that the expenses of the sale qualified as an administration expense because the sale was necessary to effect the distribution of the decedent's estate.

It was found that the sale was transacted by the estate at the daughter's request and for her convenience, and

that the expense of the sale was not a deductible administration expense under section 2053(a)(2) of the Code.

However, it appeared that the sale of at least some of the art work may have been necessary in order to raise funds to pay estate expenses. To the extent the sales were necessary to pay debts, expenses and taxes, the expense of the sale was deductible.

The memorandum states "This document may not be used or cited as precedent..."

Internal Revenue Service National Office Technical Advice Memorandum, 1992 PRL LEXIS 1102; Private Ruling 9235005 (May 27, 1992) [ELR 15:1:27]

IN THE NEWS

Estate of Bobby Darin and McDonald's settle "sound-alike" and copyright infringement claims arising from "Mac Tonight" commercials

In 1986-1987, an advertising campaign for McDonald's Corporation featured a character known as "Mac Tonight." The Bobby Darin Testamentary Trust and Dodd Darin brought a "sound-alike" action against McDonald's.

McDonald's claimed that *Midler v. Young & Rubicam, Inc.*, (1991 U.S.App. LEXIS 22641 (9th Cir. 1991; ELR 13:9:4) did not apply because Bobby Darin was deceased. Santa Monica trial court Judge Jack Newman rejected the argument on demurrer.

The trust and Dodd Darin have entered into a settlement of the "sound-alike" claim. The terms of the settlement are confidential, but include a federal copyright infringement action arising from the alleged use in the

commercials of the musical arrangement of "Mac the Knife" from the late performer's recording. Bobby Darin did not write the arrangement, but he owned it, according to an attorney for the trust. The settlement was reached with two advertising agencies and a publicity firm; the trust and Darin entered into a separate settlement with McDonald's Corporation in February 1992. [June 1993] [ELR 15:1:28]

Jury finds that Universal Pictures' agreement to pay \$500,000 to child actor is unenforceable

A Los Angeles trial court jury has found that a contract between Michael Oliver, the 11 year old star of the two "Problem Child" films, and Universal Pictures was unenforceable.

According to news reports, Oliver, just prior to filming, threatened to withdraw from "Problem Child II" unless he received \$500,000 in compensation; the parties had agreed to an \$80,000 fee.

It was found that Universal signed the new contract under duress.

The studio, which paid Oliver \$250,000, has indicated that it will seek to have the actor and his manager return \$170,000 of that amount. [June 1993] [ELR 15:1:28]

DEPARTMENTS

In the Law Reviews:

Loyola of Los Angeles Entertainment Law Journal has published Volume 13, Number 1 with the following articles:

Native American Team Names in Athletics: It's Time to Trade These Marks by Paul E. Loving, 13 Loyola of Los Angeles Entertainment Law Journal 1 (1992)

The Adverse Possession of Copyright by Matthew W. Daus, 13 Loyola of Los Angeles Entertainment Law Journal 45 (1992)

A Review of Barnes v. Glen Theatre, Inc. Calls for a Reexamination of the O'Brien Test by David W. Stuart, 13 Loyola of Los Angeles Entertainment Law Journal 99 (1992)

The Regulation of Indecent Telephonic Communication: Helms Amendment Slights First Amendment to Silence Dail-A-Porn by Jarret L. Johnson, 13 Loyola of Los Angeles Entertainment Law Journal 135 (1992)

Inside Edition: Out of a Prior Restraint and Above the Law? by William Medlen, 13 Loyola of Los Angeles Entertainment Law Journal 163 (1992)

The Politicization of Amateur Athletics: South Africa and the American Athlete's Legal Dilemma of Participation by Owen S. Solomon, 14 Loyola of Los Angeles International & Comparative Law Journal 937 (1992)

Hastings Communications and Entertainment Law Journal Comm/Ent has published Volume 15, Number 1 with the following articles:

The Right of Reply to the Media in the United States - Resistance and Resurgence by Jerome A. Barron, 15 Comm/Ent 1 (1992)

The Uniform Defamation Act: Is Too Much Being Asked of the Press in the Quest for Libel Law Reform? by Ben Dunlap Jr., 15 Comm/Ent 21 (1992)

Gambling and the Law - Update 1993 by I. Nelson Rose, 15 Comm/Ent 93 (1992)

How Valid are U.S. Criticisms of the Japanese Patent System? by Michael Todd Helfand, 15 Comm/Ent 123 (1992)

The Current State of Moral Rights Protection for Visual Artists in the United States by Amy L. Landers, 15 Comm/Ent 165 (1992)

Producing, Financing and Distributing Film: A Comprehensive Legal and Business Guide reviewed by Mary LaFrance, 15 Comm/Ent 199 (1992)

Legal Protection for Computer Programs, 1980-1992: A Bibliography of Law-Related Materials by James E. Duggan, 15 Comm/Ent 211 (1992)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 16, Numbers 3 and 4, with the following articles:

Fine Art Auctions and the Law: A Reassessment in the Aftermath of Cristallina by Stuart Bennett, 16 Columbia-VLA Journal of Law & the Arts 257 (1992)

The "Satisfactory Manuscript" Clause in Book Publishing Contracts: A Roundtable Discussion, 16 Columbia-VLA Journal of Law & the Arts 285 (1992)

Did Milli Vanilli Do the Mashed Potato? Lanham Act Responses to Misattribution in the Music Industry by Robert Clarida, 16 Columbia-VLA Journal of Law & the Arts 327 (1992)

Droit de Suite: The Artist's Resale Royalty Copyright Office Report Executive Summary, 16 Columbia-VLA Journal of Law & the Arts 381 (1992)

Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report by Shira Perlmutter, 16 Columbia-VLA Journal of Law & the Arts 395 (1992)

The Crisis in International Copyright by Robert D. Hadl, 16 Columbia-VLA Journal of Law & the Arts 427 (1992)

Authors' Rights and New Modes of Exploitation by Jean-Loup Tournier, 16 Columbia-VLA Journal of Law & the Arts 441 (1992)

New Dynamics in International Copyright by Paul Edward Geller, 16 Columbia-VLA Journal of Law & the Arts 461 (1992)

"Hey! What's the Score?" Copyright in the Orchestrations of Broadway Musicals by Patrick T. Perkins, 16 Columbia-VLA Journal of Law & the Arts 475 (1992)

New O and P Nonimmigrant Visa Categories: A Lesson in Compromise by Judith A. Kelley, 16 Columbia-VLA Journal of Law & the Arts 505 (1992)

The Illiteracy Problem and College Athletes: An Argument for Educational Malpractice by Lesa A. Barkowsky, 16 Columbia-VLA Journal of Law & the Arts 537 (1992)

The Rules of Baseball: A Needed Change by Lewis Kurlantzick, 10 The Entertainment and Sports Lawyer 1 (1992) (published by the ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497)

NHL v. Pepsi-Cola Canada, Uh-Huh! Legal Parameters of Sports Ambush Marketing by Steve McKelvey, 10 The Entertainment and Sports Lawyer 5 (1992)

Power Shifts in the Art World: The Importance of the Artist-Dealer Contract by Laurie Ziegler, 10 The Entertainment and Sports Lawyer 19 (1992)

University of Miami Entertainment & Sports Law Review has published Volume 9, Number 2 with the following articles:

Secondary Break: Dealing with AIDS in Professional Sports after the Initial Response to Magic Johnson by Tracey E. George, 9 University of Miami Entertainment & Sports Law Review 215 (1992)

Subliminal Messages in Music: Free Speech or Invasion of Privacy? by Matthew W. Daus, 9 University of Miami Entertainment & Sports Law Review 241 (1992)

Copyright Principles, Law and Practice by Paul Goldstein, reviewed by Jeffrey E. Jacobson, 9 University of Miami Entertainment & Sports Law Review 297 (1992)

Obscenity Predicates, RICO, and the First Amendment by Amanda M. McGovern, 9 University of Miami Entertainment & Sports Law Review 301 (1992)

The Legal Protection of Fictional Characters by Kenneth E. Spahn, 9 University of Miami Entertainment & Sports Law Review 331 (1992)

The NCAA Enforcement Program and Due Process: The Case for Internal Reform by Sherry Young, 43 Syracuse Law Review 747 (1992)

"Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for

Cultural Identity in the Theater by Lois L. Krieger, 43 Syracuse Law Review 839 (1992)

Moral Rights and Musical Works: Are Composers Getting Berned? by Patrick G. Zabatta, 43 Syracuse Law Review 1095 (1992)

Communications and the Law, Volume 14, Number 4, has been published by the Fred B. Rothman & Co., 10368 W. Centennial Road, Littleton, CO 80127 with the following articles:

Litigation Public Relations by Susanne A. Roschwalb & Richard A. Stack, 14 Communications and the Law 3 (1992)

News "Product" and the First Amendment: Corporate vs. Legal Claims to News Ownership by David J. Vergobbi, 14 Communications and the Law 25 (1992)

The Innocent Construction Rule: Ten Years After Modification by Kyu Ho Youm, 14 Communications and the Law 49 (1992)

FCC: The Ups and Downs of Radio-TV Regulation by William B. Ray, reviewed by Jeremy Harris Lipschultz, 14 Communications and the Law 75 (1992)

[ELR 15:1:29]