RECENT CASES

United States Supreme Court rules in favor of film studios on antitrust claims brought by hotel in action involving in-room viewing of rented videodiscs

In 1989, a Federal Court of Appeals in California (ELR 10:9:13) upheld a District Court decision finding that Professional Real Estate Investors, Inc. and Kenneth F. Irwin, the operators of La Mancha Private Club and Villas in Palm Springs, did not violate the Copyright Act by renting videodiscs to the hotel's guests for viewing on videodisc players placed in the guests' rooms.

The hotel had filed counterclaims charging that Columbia Pictures Industries and seven other major film studios violated the Sherman Act and state antitrust and unfair competition laws. It was alleged that the

copyright infringement action was a sham brought with the intent to monopolize and restrain trade. The hotel owner also claimed that the studios' concerted refusal to grant licenses to the hotel to rent videos, as well as other unspecified activities, constituted a pattern of anticompetitive conduct.

A Federal District Court granted the studios' motion for summary judgment with respect to the antitrust claims, stating that the hotel did not demonstrate that the alleged conduct caused antitrust injury. It also was found that the studios, in filing the infringement action, did not violate the antitrust laws. Under the Noerr-Pennington doctrine, the filing of a lawsuit is immune from the antitrust laws unless the lawsuit is a "sham." But the hotel did not allege that the studios' lawsuit involved misrepresentations and did not challenge the finding that the lawsuit was brought with probable cause and presented issues that were difficult to resolve. A Federal Court of

Appeals upheld the District Court's decision (ELR 13:5:10) and the United States Supreme Court has affirmed the Court of Appeals ruling, holding that "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless."

Judge Clarence Thomas reviewed cases supporting the position that neither Noerr immunity nor its sham exceptions turns on subjective intent alone. The court then set forth a two-part definition of "sham" litigation, stating that the lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail."

If challenged litigation is objectively meritless, a court may examine the litigant's subjective motivation,

focusing on whether the baseless lawsuit attempts to directly interfere with the business relationships of a competitor. A party who demonstrates both the objective and the subjective components of a sham still must prove a substantive antitrust violation, cautioned the court.

Under the court's ruling, continued Judge Thomas, a probable cause determination "irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception..." It was correctly found that Columbia and the other studios, as copyright holders, had probable cause to bring an infringement lawsuit; conditioning a copyright on a demonstrated lack of anticompetitive intent, stated the court, "would upset the notion of copyright as a 'limited grant' of 'monopoly privileges...'"

In 1986, when the District Court granted the hotel's motion for summary judgment, it was not clear whether

the challenged videodisc rental activities infringed the studios' copyrights. Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning an infringement suit against the hotel, observed Judge Thomas. A court could reasonably conclude that Columbia's infringement action was "an objectively plausible effort to enforce rights," and the hotel thus did not meet the objective test of Noerr's sham exception. Examining Columbia's economic motivations in bringing the lawsuit would be irrelevant.

Judge David H. Souter, in a concurring opinion, stated that he would have refrained from using the term "probable cause" to represent objective reasonableness and would have preferred to conclude that on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits. Judge Souter expressed concern that courts might erroneously read the opinion

as "transplanting every substantive nuance and procedural quirk of the common law tort of wrongful civil proceedings into federal antitrust law," and emphasized his understanding that the court's use of the term "probable cause" was "shorthand" for a reasonable litigant's realistic expectation of success on the merits.

Judge Stevens, with whom Judge O'Connor joined, concurred in the judgment but dissociated himself from "some of the unnecessarily broad dicta in the Court's opinion." Judge Stevens would not have equated "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits," and, after careful consideration, questioned whether the court should have used this "easy" case to announce a rule that might govern the decision of difficult cases, some of which might involve abuse of the judicial process.

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., Case No. 91-1043, 1993 U.S. LEXIS 3121 (U.S.Supreme Court, May 3, 1993) [ELR 15:4:3]

SMATV systems are subject to franchise requirements of Cable Act, rules United States Supreme Court

As reported at ELR 14:10:18, Beach Communications operates external, quasi-private satellite master antenna television facilities; the system uses wires or other closed transmission paths to interconnect, without using public rights-of-way, separately-owned and controlled multiple-unit dwellings. The Cable Definition Rule, promulgated by the Federal Communications Commission pursuant to the Cable Communications Policy Act

of 1984, defines the statutory term "cable system" to include such facilities. The rule excludes internal facilities (where wires do not interconnect separate buildings or use public rights-of-way) and wholly private facilities (where a single building or a group of commonly-owned, controlled or managed buildings are served, and the wires do not use public rights-of-way). The Cable Act requires the operator of a "cable system" to obtain a local franchise.

When Beach challenged the franchise requirement on, in part, equal protection grounds, a Federal District Court of Appeals in the District of Columbia upheld the statutory definition of external, quasi-private SMATV facilities as cable systems. However, the court remanded the matter to the Commission for consideration of whether some rational basis justified the distinction between the Beach facility and the facilities exempted by the Cable Definition Rule.

The Commission, returned the record, according to the court, without providing any justification for the challenged distinction. It therefore was found that the Cable Act violated the equal protection guarantee of the Fifth Amendment insofar as the statute required local franchises for external, quasi-private SMATV facilities and exempted wholly private facilities from the requirement.

The court's decision that the operators of external, quasi-private SMATV facilities are not required to obtain franchises under section 621(b)(1) of the Cable Act has been reversed by the United States Supreme Court.

Judge Clarence Thomas commented that the Court of Appeals evidently believed that "the crossing or use of a public-right-of-way was the only conceivable basis upon which Congress could rationally require local franchising of SMATV systems..." However, Judge Thomas considered several plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities

serving separately owned and managed buildings, and stated that in conducting a rational basis review, such findings were sufficient to preclude a constitutional challenge to the statutory definition at issue.

Judge Stevens, concurring in the judgment, expressed the view that "the interest in the free use of one's own property provides adequate support for an exception from burdensome regulation and franchising requirements when the property is occupied not only by family members and guests, but by lessees and co-owners as well, and even when the property complex encompasses multiple buildings."

This justification would not necessarily extend to the situation where the satellite antenna is being used to distribute signals to subscribers on other people's property, noted Judge Stevens. Although declaring that he was not "fully persuaded" that the "private cable" exemption was justified by the factors cited by the court,

Judge Stevens agreed with the court's ultimate conclusion, stating that it was reasonable to presume that Congress was motivated by an interest in allowing property owners to exercise freedom in the use of their own property, and did not violate a duty to govern impartially.

Federal Communications Commission v. Beach Communications, Inc., 1993 U.S. LEXIS 3744 (United States Supreme Court, June 1, 1993) [ELR 15:4:4]

Court vacates FCC's 1991 revised financial interest and syndication rules

In 1970, as described by Federal Court of Appeals Judge Posner, the Federal Communications Commission adopted "financial interest and syndication" rules designed to limit the power of the CBS, NBC and ABC

television networks over television programming. The rules prohibited television networks from syndicating programs produced by the network for rebroadcast by independent television stations. The networks also were barred from purchasing syndication rights to programs that the network might obtain from outside producers, or from otherwise obtaining a financial stake in such programs. If a network itself had produced a program, it could sell syndication rights to an independent syndicator, but could not retain an interest in the syndicator's revenues or profits. In all, the financial interest and syndication rules, according to Judge Posner, "severely limited the networks' involvement in supplying television programs other than for their own or their affiliated stations."

The rules apparently were adopted to prevent the networks, which have controlled a large part of the system for distributing television programs, from using this

distribution "monopoly" to secure a dominant role in the production of television programs. Networks might refuse to buy programs for network distribution unless the producers agreed to surrender their syndication rights to the network. If the networks controlled such rights, independent television stations might have to seek access to reruns from the networks, the owners of a competing system of distribution.

The Commission hoped, stated Judge Posner, that the financial interest and syndication rules, by restricting the ability of the networks to supply the program market represented by the independent stations, and by protecting producers against being pressured into giving up potentially valuable syndication rights, would strengthen an alternative source of supply for independent stations, i.e., television producers not owned by networks.

Judge Posner, after questioning the basis for the rules, noted that in subsequent years, the structure of the

television industry changed "profoundly" due to the growth of cable television, the use of videocassette recorders and the emergence of a fourth network, the Fox Broadcasting Corporation. The number of independent stations has increased, but the production of prime time programming has become more concentrated.

In 1991, the Commission promulgated a revised set of financial interest and syndication rules. After setting forth the revisions and examining the nature of the Commission's rulemaking, Judge Posner, contrary to the view of the Supreme Court, expressed doubt that the First Amendment "authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting..." and observed that the challenged rules were "so complicated that it is unclear whether they are more or less restrictive than the rules they modified."

Judge Posner found that the Commission did not adequately articulate its grounds for adopting the revised rules. After briefly acknowledging the Commission's argument that the new rules would give the networks a greater opportunity to participate in programming that the old ones did, while protecting outside producers and independent stations from too much network competition, Judge Posner observed that the Commission did not discuss the most substantial objections to its approach and that it seemed that the new rules, like their predecessors, harmed rather than helped outside producers as a whole (emphasis by the court) by reducing their bargaining options. The Commission was not entitled to ignore the possibility that the unrestricted sale of syndication rights to networks would strengthen the production industry and thereby increase programming diversity by enabling a sharing between fledgling producers and the networks of the risks of new production.

In all, the arguments raised by the networks were sufficiently persuasive to require a response from the Commission, but such a response was not forthcoming, stated Judge Posner, who also found that the Commission's treatment of precedent was "cavalier;" that the Commission failed to distinguish among various types of diversity, to explain the interrelation among them, or to explain how restrictions on network participation in programming promote diversity.

Judge Posner declared that the Commission's opinion was "unreasoned and unreasonable" and therefore, was arbitrary and capricious. The court vacated the Commission's order and returned the matter to the Commission for further proceedings. In a supplementary proceedings on remedy, the court modified its order to invalidate the Commission's order except insofar as the order abrogated the 1970 financial interest and syndication rules,

and as so modified, the November order was stayed for 120 days (as of December 7, 1992).

In a separate opinion, Judge Posner rejected a motion by outside producers and independent stations seeking to disqualify him based on an affidavit the judge submitted as an expert witness on behalf of CBS in February 1977 in an antitrust case brought in a Federal District Court in California. Both cases involved restricting television networks from participating in the production and distribution of television programs, noted Judge Posner. But the motion, filed two weeks after the decision in the instant matter was issued, was untimely. Judge Posner also noted that he was a professor of antitrust law, not a network lawyer, in the 1977 proceeding.

In February 1993, the judges on the original panel voted to deny a petition for rehearing; none of the active judges requested a vote on the suggestion for rehearing en banc.

Schurz Communications, Inc. v. Federal Communications Commission, 982 F.2d 1043; 982 F.2d 1057 (7th Cir. 1992) [ELR 15:4:4]

LA Dodgers may not prevent restaurant from using the name "The Brooklyn Dodger"

Beginning in March 1988, Sed Non Olet Denarius, Ltd. and other corporate and individual parties included the phrase "The Brooklyn Dodger" in the names and service marks of certain restaurants which they operated in Brooklyn, New York.

When Major League Baseball Properties, Inc. and Los Angeles Dodgers, Inc. sued the restaurant parties, Federal District Court Judge Constance Baker Motley noted that the restaurant owners had conducted a trademark

search and found that the "Brooklyn Dodger" mark was not registered. The restaurant owners then applied to register a composite design mark incorporating the term "The Brooklyn Dodger" as a service mark for restaurant and tavern services. The mark consisted of the words "The," "Brooklyn," and "Dodgers" entwined with one another and sometimes featuring a cartoon character styled after Charles Dickens' character "Artful Dodger." The logo was similar to Los Angeles' trademarks, as used prior to 1958, with respect to the style of script, the use of the color blue, and the design of the "swash" or tail underlining the word "Dodger."

Judge Motley observed that the restaurant owners used their logo in a sports-oriented atmosphere; intended to allude to the Brooklyn Dodgers baseball club; used the word "Dodger" alone, without the word "Brooklyn," on certain merchandise and on the names of menu items; displayed Brooklyn Dodgers memorabilia in the

restaurants; and used the word "Dodgers" (with the "s") in an advertisement.

In turning to the activities of the Los Angeles Dodgers, the court recalled that upon relocating its franchise to Los Angeles, the team changed its corporate name from the Brooklyn National Baseball Club, Inc. to Los Angeles Dodgers, Inc. On various occasions, such as in connection with oldtimers games, the team made commercial use of its Brooklyn heritage and trademarks. But it appeared to the court that Los Angeles' first licensed the "Brooklyn Dodgers" mark in April 1981 in an agreement with the predecessor to Major League Baseball Properties.

During the years 1981 to 1988, Los Angeles used the "Brooklyn Dodgers" mark primarily for clothing, sports paraphernalia and novelty items, but also licensed a New Jersey restaurant to use photographs of the

Brooklyn Dodgers as wall decorations, and authorized other advertising uses.

In all, declared Judge Motley, the various uses of the mark, granted for minimal or no compensation, did not constitute trademark uses.

Judge Motley then conducted the likelihood of confusion evaluation with respect to the trademark infringement claim, and determined that Los Angeles and Major League Properties did not prove either actual confusion or the likelihood of confusion arising from the restaurant owners' trademark "The Brooklyn Dodger" even though it was similar to the "Brooklyn Dodgers" trademark.

The court stated that the Brooklyn Dodgers mark, used by Los Angeles before it left Brooklyn, was a strong mark, and the marks indeed were similar. It was found, however, that the parties' goods and services were diverse as were their advertising orientation, their geographical markets and their marketing channels and

competitors. Judge Motley determined that Los Angeles was not likely to use the trademark in connection with the operation of a sports bar and restaurant; that Los Angeles failed to present proof of actual confusion; and that the restaurant owners did not use their mark so as to trade upon the reputation of Los Angeles, but acted in good faith in using the mark "to elicit memories of the 'Brooklyn Dodgers,' a historical concept."

The court further found that the restaurant's patrons were likely to be sophisticated concerning the difference between Los Angeles' goods and services and the restaurant's services. In Brooklyn, according to Judge Motley, "the 'Los Angeles Dodgers' and the 'Brooklyn Dodgers' are seen as two separate entities which have been wholly unrelated for more than 30 years." In all, there was "virtually no likelihood" that consumers would believe that Los Angeles had authorized the restaurant

owners to do business under "The Brooklyn Dodger" name.

Los Angeles asserted that the "Dodgers" mark without a geographical reference was a protected use. But Judge Motley responded that "Brooklyn" was more than a geographical designation - the "Brooklyn Dodgers" (emphasis by the court) was "a non-transportable cultural institution separate from the "Los Angeles Dodgers." Even assuming that the relevant mark was "Dodgers," the parties' uses were sufficiently distinct to permit the restaurant owners' use, stated the court. Los Angeles did not register the "Dodgers" mark (without "Brooklyn") for commercial use until 1967 and never used the name for a "nostalgic sports restaurant." Los Angeles used the "Brooklyn Dodgers" mark only sporadically between 1958 and 1981, and such "warehousing" was not permitted, stated Judge Motley - trademarks must be used as trademarks to retain enforceable property rights. Los

Angeles' failure to use the "Brooklyn Dodgers" trademark between 1958 and 1981 constituted abandonment of the mark, ruled the court.

Los Angeles also failed to demonstrate its intent to resume commercial use of the mark. The use of "Brooklyn Dodgers" after 1981 was not a continuous commercial use until 1986 when Major League Properties entered the name in the Cooperstown Collection.

Judge Motley agreed with an Eleventh Circuit case which held that an abandonment, once established, is not cured by a resumption of use and that upon resumption of use of the mark, the holder's rights begin on the date it resumes use, in this case 1981. Los Angeles' rights extended only to the precise goods on or in connection with which the trademark was used since the resumption of use. The fact that Los Angeles resumed use prior to the restaurant owners did not mean that Los

Angeles was entitled to preclude the use of the mark in a restaurant business in Brooklyn.

Judge Motley declined to enjoin the restaurant owners' limited use of the "Brooklyn Dodger" mark in connection with its local establishments; declined to cancel the registration of the "Brooklyn Dodgers" mark by Los Angeles for use of the name on clothing items; and concluded by rejecting Los Angeles' state law claims for unfair competition and dilution.

Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd., 817 F.Supp. 1103 (S.D.N.Y.1993) [ELR 15:4:6]

Court reverses decision awarding damages to creator of "Paladin" character in action against distributor of "Have Gun - Will Travel"

During the 1940s, Victor DeCosta, a former rodeo performer, created a character named "Paladin;" the Western hero wore a black outfit and carried calling cards containing an image of a white chess knight and the slogan "Have Gun Will Travel." The chess piece logo also was imprinted on Paladin's holster. DeCosta appeared as Paladin at rodeos and other events.

In 1957, CBS began televising the series "Have Gun - Will Travel," starring a character called "Paladin." The fictional character wore a black costume identical to the costume worn by DeCosta's character, and carried a calling card embossed with a picture of a chess knight.

In 1963, DeCosta sued CBS and lengthy litigation, as described at ELR 13:8:5, ensued. In 1975, a Federal Court of Appeals ordered the matter remanded with instructions to enter judgment for CBS on DeCosta's common law service mark infringement and unfair

competition claims. Also in 1975, the Patent and Trademark Office granted DeCosta's application to register his mark. DeCosta then sued Viacom International, CBS's successor as the distributor of the television series. In 1991, a Federal District Court jury in Rhode Island awarded DeCosta damages of $3.5 million in his action against Viacom.

A Federal Court of Appeals, finding that DeCosta's action against Viacom depended upon relitigating issues that the court already decided against DeCosta and that the doctrine of collateral estoppel barred DeCosta's new claims, has reversed the judgment entered on the jury verdict.

Chief Judge Breyer noted that DeCosta had consistently failed to allege the elements of copyright or trademark infringement and, in particular, that DeCosta did not show a likelihood of confusion between his Paladin character and that of CBS. DeCosta had a "full and fair

opportunity" to litigate that issue, declared the court and there was no showing of significant factual or legal changes to warrant relitigation.

DeCosta argued that the issue of legal "confusion" in the instant case differed from the issue in DeCosta's earlier 1975 case because of the registration of his mark. Although a change in relevant burden of proof rules might transform a legal issue, permitting relitigation of an issue that collateral estoppel otherwise would bar, the court stated that the fact of registration did not transform the burden of proof rules so as to make it easier for a registrant to prove that a relevant buying public might confuse some other person's mark with the registrant's mark. It was further noted that registration generally is a factor considered with respect to the strength of a mark, rather than in the context of determining the issue of likelihood of confusion.

DeCosta then argued that Viacom's use of "Paladin" constituted "reverse confusion," purportedly a post-1975 development in trademark law. According to DeCosta, the public might believe that Viacom was the source of DeCosta's product.

Chief Judge Breyer referred to Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977), cert. dismissed, 434 U.S. 1052 (1978) in which it was found that a trademark holder could base a claim on "reverse confusion." But the Big O court did not suggest that its holding was "a totally new, or novel, principle," noted Chief Judge Breyer, and, in fact, the court reasserted a principle set forth in International News Service v. Associated Press, 248 U.S. 215 (1918).

DeCosta also claimed that the law of "reverse confusion" has been significantly expanded since 1975 in that dicta in some opinions has suggested that a party claiming reverse confusion may recover for harm suffered

simply because the public wrongly believes that the party has copied another's name. Chief Judge Breyer found that the theory did not correctly state trademark law and would undermine an important limitation central to trademark law - "the limitation of trademark protection to the protection of marks as used on particular goods to identify their source or sponsor" (emphasis by the court).

Chief Judge Breyer adverted to the availability of non-trademark law protection for a falsely labeled "pirate," such as copyright law and the tort of commercial disparagement. These areas of law contain conditions and limitations "designed to prevent their becoming vehicles for unduly limiting the use of words, phrases, and other forms of speech where no serious harm, in fact, will likely occur." The existence of such types of protection, for Chief Judge Breyer, cautioned against introducing into trademark law, "a kind of overriding concept such

as the actionable harm of 'falsely being thought a pirate...'"

The court observed that Big O suggested that commercial disparagement law, not traditional trademark law would provide proper legal relief for the harm of "falsely being thought a pirate" and discussed trademark "reverse confusion" in the context of confusion "about the source of the product, not the source of the name."

In all, the court found that there were no changes in the law, based on the doctrine of "reverse confusion," to overcome the effects of collateral estoppel.

The court next rejected DeCosta's claim that factual changes had occurred since 1975, such that the litigation of the confusion question would represent a significantly different factual issue. DeCosta's evidence, stated Chief Judge Breyer, was offered to prove the same ultimate fact - "confusion" - that DeCosta failed to prove before. The holding of "no confusion" in the initial decision in

the matter amounted to a holding that DeCosta had no legal right to exclude others from using his mark in the field of television. CBS and Viacom did not use the mark in "bad faith," stated the court, and the evidence, again, did not show a significant change.

DeCosta v. Viacom International, Inc., 981 F.2d 602 (1st Cir. 1992) [ELR 15:4:7]

Judge Kozinski dissents from decision concerning Vanna White case; United States Supreme Court lets stand ruling allowing White to proceed with right of publicity and Lanham Act claims

In March 1993, a Federal Court of Appeals in California denied Samsung Electronics' petition for a rehearing of the court's decision allowing Vanna White to proceed

with right of publicity and Lanham Act claims arising from the company's advertisement depicting a futuristic "Wheel of Fortune" set (ELR 14:4:3).

Judge Alarcon voted to accept the suggestion for rehearing en banc, but the matter failed to receive a majority of the votes of the unrecused active judge in favor of en banc consideration.

Judge Alex Kozinski, with whom Judges O'Scannlain and Kleinfeld joined, dissented from the order rejecting the suggestion for rehearing en banc. Judge Kozinski, although recognizing the value of private property as an incentive "for investment and innovation" which "stimulates the flourishing of our culture," commented that "overprotecting intellectual property is as harmful as underprotecting it..."

In the instant case, the panel majority, in Judge Kozinski's view, had granted White a property right "of remarkable and dangerous breadth," which might impose

tort liability upon advertisers who remind (emphasis by Judge Kozinski) the public of a celebrity, and which created conflicts with the Copyright Act and Copyright Clause, as well as raising First Amendment concerns.

The advertising campaign displayed Samsung products along with various humorous predictions about the future intended to convey the point the products still would be in use twenty years from now. One ad featured a robot dressed in a wig, gown and jewelry "reminis-

posed next to a Wheel of Fortune-like game board. The text read "Longest-running game show, 2012 A.D."

White sued for the violation of section 3344(a) of the California Civil Code. But Samsung didn't use White's name, voice or signature or likeness, noted Judge Kozinski, who observed that "the whole joke was that the game show host(ess) was a robot, not a real person. No

one seeing the ad could have thought this was supposed to be White in 2012."

The Federal District Court granted Samsung's motion for summary judgment. But the Federal Court of Appeals panel held that the common law right of publicity extended beyond name and likeness, to any "appropriation" of White's "identity."

Intellectual property rights protect only against certain specific kinds of appropriation, cautioned Judge Kozinski. The majority's decision created a new and much broader property right, which would replace the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. In Judge Kozinski's view, every famous person now has an exclusive right "to anything that reminds the viewer of her."

It appeared to Judge Kozinski that it was the fact that the robot was posed near the "Wheel of Fortune" game

board that reminded people of White, not the robot's face or dress or jewelry. The panel thus gave White an exclusive right "not in what she looks like or who she is, but in what she does for a living."

Intellectual property law contains many careful balances, but the property right created by the panel apparently has no fair use exception, no right to parody and no idea-expression dichotomy, stated Judge Kozinski, who pointed out that advertisers will have to address "vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance."

The panel, continued Judge Kozinski, by refusing to recognize a parody exception to the right of publicity, directly contradicted the Copyright Act. Samsung parodied Vanna White appearing in a copyrighted television show, and parodies of copyrighted works are governed by federal copyright law. But it is impossible, stated

Judge Kozinski, to parody a film or a television show without evoking the identities of the actors. And actors are not entitled to veto fair use parodies of the shows in which they appear or to prevent a copyright holder's exclusive right to license derivative works of those shows. The majority's decision would diminish the rights of copyright holders, argued Judge Kozinski.

The majority's decision seemed to go "way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness," stated Judge Kozinski, who expressed doubt that even a name-and-likeness-only right of publicity can stand without a parody exception. The majority did not address the First Amendment issue because the ad was commercial speech. "So what?," queried Judge Kozinski - commercial speech may be less protected by the First Amendment than noncommercial speech, but is protected nonetheless. The majority failed to ask whether the speech restriction was justified

by a substantial state interest, whether the restriction directly advanced the interest, or whether the restriction was narrowly tailored to the interest, as directed by the United States Supreme Court in commercial speech matters.

In all, the majority diminished the rights of copyright holders and the public at large, declared Judge Kozinski.

The United States Supreme Court has let stand, without comment, the court's opinion.

White v. Samsung Electronics America, Inc., 1993 U.S.App. LEXIS 4928 (9th Cir. 1993) [ELR 15:4:8]

Commentary: Is Vanna White Right and Judge Kozinski Wrong?

by J. Thomas McCarthy

In the summer of 1992, the Ninth Circuit court of appeals gave TV game show celebrity Vanna White the green light to go to trial to try and convince a jury that a Samsung advertisement used her identity to help sell video recorders.n1 This spring, Ninth Circuit Judge Alex Kozinski wrote a long, impassioned dissent when the Ninth Circuit judges refused to rehear the Vanna White case en banc.n2 Kozinski was upset about many things, but mainly felt that first amendment principles of free speech were somehow impinged upon if Vanna White were allowed to go to trial with a claim that her right of publicity had been infringed.

Samsung ran a series of humorous print advertisements for video recorders in which a current item from popular culture was shown with a Samsung product, but was set in the 21st century, conveying the message that Samsung products would still be around then. A Samsung

Ad for video recorders showed a shiny, metallic robot dressed like game show hostess Vanna White. The robot was poised to turn a letter on a game board instantly recognizable as the familiar letter board of the Wheel of Fortune game show, one of the most popular game shows in television history. The caption of the ad said: "Longest running game show. 2012 A.D." The intended humor was that Samsung would still be selling when Vanna White was replaced by a Vanna-robot.

If the reader did not replace the robot with Vanna in their mind's eye, then the "joke" advertisement would have been meaningless and stupid. Defendants internally referred to their ad as the "Vanna White" ad and in fact argued that the ad was immune as a "spoof" of the game show. The court of appeals held that there was a triable issue of fact for a jury to determine whether the advertisement improperly used White's identity, infringing on her right of publicity under California common law. It

was that decision that the whole Ninth Circuit refused to rehear and from which Judge Kozinski vehemently dissented.

The Ninth Circuit had held in the 1992 Vanna White decision that the failure to qualify for the statutory right of publicity does not preclude recovery under the common law. The California common law right of publicity is not limited to the appropriation of name, likeness or voice. Infringement is triggered by the use of any indicia by which the plaintiff is identifiable:

"It is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so. [Prior cases] teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity."

As the elements of similarity with the plaintiff add up, they do so geometrically, with the whole of dress, hair color, and pose turning a letter on an immediately

recognizable game board all combining to point to only one person. Thus, the court held that a jury should be permitted to decide if Vanna White is identifiable from the advertisement, rather than a judge saying that identifiability is impossible. The tort consists of using without payment the identity of a person to help attract attention to a commercial advertisement.

Judge Kozinski felt that all the Samsung ad did was to "evoke the celebrity's image in the public mind." In his view, any advertiser is free to use anyone's identity to help sell a product so long as they do not use that person's name, picture or voice. Because the Ninth Circuit held that an appropriation of a person's "identity" was an infringement, Kozinski accused the court of "creating a new and much broader property right, a right unknown in California law." But to say this, Kozinski had to artfully dodge a race car: a 1974 Ninth Circuit case which held that a triable issue of fact of identifiability was

created when an ad for Winston cigarettes used without permission a photograph of race car driver Lothar Motschenbacher's distinctively marked and decorated racing car. Kozinski had to try to distinguish the race car case by arguing that "although the plaintiff's likeness wasn't directly recognizable by itself, the surrounding circumstances would have made viewers think the likeness was the plaintiff's." This is a much too narrow reading of the Motschenbacher case. The driver was not asserting a right of publicity in his car, but claiming that an object closely related to him was used in an advertisement in such a way that he was identifiable - his identity was taken to help sell Winstons.

Because it was the familiar Wheel of Fortune game board that primarily placed the robot as a Vanna White robot, Kozinski accuses the court of "giving White an exclusive right not in what she looks like or who she is, but in what she does for a living." But this view

confuses objects closely identified with a person with the person herself. Fake bushy eyebrows and mustache and a large cigar are mere objects, but are closely identified with the famous Groucho character created by Julius Marx. The commercial value of the identity of Vanna White was as surely taken by Samsung as if the metallic robot used had a label reading "Vanna W-357693" or if Samsung pictured an android with distinctive Vanna White features.

Judge Kozinski in his dissent also criticized the Ninth Circuit for not holding that the Samsung advertisement was, as a matter of law, immune as a "parody." At this point, Kozinski stirs in Copyright law to whip up a frothy analysis under which the state law right of publicity is somehow in conflict with federal Copyright law. His thesis is that the Samsung ad is a parody of a person appearing in a copyrighted television show, federal copyright law has a parody fair use defense (of wildly

uncertain dimensions n3) and therefore a company like Samsung is free to use in advertising without pay or license the identity of someone appearing in that television show. This breathtaking argument is illustrated by examples of true, "Saturday Night Live"-type theatrical parody, such as: "You can't have a mock Star Wars without a mock Luke Skywalker, Han Solo and Princess Leia, which in turn means a mock Mark Hamill, Harrison Ford and Carrie Fisher." It is not clear what all this has to do with a commercial advertisement touting a product. Is Kozinski seriously trying to promote acceptance of a "joke defense?" Apparently, in his view it should be an absolute defense to every unpermitted use of personal identity in an advertisement for the advertiser to say: "Whatsamatta, you can't take a joke?"

Finally, Kozinski pulls out what he seems to see as his trump card: the first amendment. Kozinski's version of the first amendment, even in its abbreviated,

"commercial speech" embodiment, is a hurricane of a legal concept, which blows away all personal torts and property rights. As the judge puts it: "Where does White get this right to control our thoughts?" Surely the specter of Vanna White, or anyone else for that matter, having the power to "control our thoughts" is a frightening one. But how does making Samsung pay to use Vanna White's identity in an ad for VCRs give Vanna White the power to control our thoughts? The answer to this seems to lay in Kozinski's singular view that there is no constitutional distinction between political and social messages on the one hand and advertising messages on the other hand: "In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and non-commercial has not merely blurred; it has disappeared." Kozinski argues that the Samsung "parody" is no different from "a parody on Saturday Night live or in Spy Magazine"

because "both are equally profit-motivated," thus erasing any distinction between political/social speech and commercial speech. This, of course, was never the law and is not the law now. The Supreme Court has consistently made it clear that the fact that media publications and broadcasts are sold for profit does not put political or social commentary or parody into the "commercial speech" column.n4 And commercial speech has always occupied the lowest position in the first amendment hierarchy.n5

Surely, the First Amendment is stretched beyond recognition if it is read as permitting advertisers to use without consent anyone's identity to attract attention to commercial messages. Regardless of any incidental social messages or attempts at humor, the paramount message of any advertisement is "buy," and that is why it is dubbed "commercial speech" and not given the same

degree of immunity as political, social or entertainment speech.

Kozinski asks why Vanna White's right to profit from her professional identity should be superior to "Samsung's right to profit by creating its own inventions?" The problem with this view is that the Vanna-robot ad was almost wholly derivative and non-inventive. The only appeal of the Samsung ad lies in the viewer's immediate recognition that this is not just any game show robot, this is a Vanna White robot. Without the ability to derive recognition and gain from Vanna White, this advertisement would be worthless. The Ninth Circuit opinion will not, as Kozinski argues, chill an ad agency's inventiveness. Rather, it will chill the temptation to be wholly derivative of a prominent personality without pay and will stimulate ad agency creative juices to produce something truly original. Both Vanna White and the consumer will benefit from that result.

The Ninth Circuit decision from which Kozinski dissented is a relatively modest one, and simply lets a jury make the decision as to whether Ms. White was identifiable from Samsung's ad. I can think of no reason why advertisers should be able to treat you, me or Vanna White as a commodity to use without pay or permission to assist Samsung to make money selling VCRs.

NOTES

J. Thomas McCarthy is a professor at the University of San Francisco and author of the treatise The Rights of Publicity and Privacy (Clark Boardman Callaghan).

1. White v. Samsung Electronics America, Inc., 971 F.2d 1395, 23 U.S.P.Q.2d 1583 (9th Cir 1992) (ELR 14:4:8).

2. White v. Samsung Electronics America, Inc., 1993 U.S.App.LEXIS 4928, 93 CDOS 1933 (9th Cir 1993) (March 18, 1993) (ELR 15:4:3).

3. The Supreme Court may enlighten us about the scope of the fair use parody defense in the Roy Orbison vs. 2 Live Crew parody song case, for which the Court granted cert in March, 1993. The 2 Live Crew did a parody of the late Roy Orbison's hit "Pretty Woman." Campbell v. Acuff-Rose Music Co., 972 F.2d 1429 (6th Cir. 1992) (cert. granted March 29, 1993) (ELR 14:9:4).

4. See e.g. Joseph Burstyn Inc. v. Wilson, 343 US 495, 501-502 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.")

5. See e.g. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 563 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.")
[ELR 15:4:9]

Chef Paul Prudhomme may proceed with claim alleging use of "look-alike" in television coffee commercial

Chef Paul Prudhomme claimed that a Procter & Gamble Company commercial for Folgers Coffee depicted an actor resembling Prudhomme, and alleged that the commercial suggested that he sponsored or approved of the product.

A Federal District Court in Louisiana referred to Allen v. National Video, Inc.,, 610 F.Supp. 612 (S.D.N.Y. 1985; ELR 7:5:7) and Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F.Supp. 826 (S.D.N.Y. 1990; ELR 12:5:12), decisions which modified the standard "likelihood of confusion" test in trademark infringement actions to accommodate look-alike cases. The court first considered the extent to which a party may have developed a favorable association of his/her mark in the public's eye. "Mark" in this context, noted Chief Judge Sear, would mean a party's name and likeness. Instead of comparing the similarity of the marks in issue, the New York courts compared the similarity of a party with the alleged "look-alike." The courts then considered the involvement of a party in the area being advertised, and noted that there was no requirement that the parties be in actual competition.

Chief Judge Sear found that Prudhomme alleged sufficient facts to satisfy the likelihood of confusion test. Prudhomme claimed that he was famous for his restaurants, cookbooks and food-related products and services; that the "look-alike" actor purportedly bore a strong resemblance to the chef and appeared in the commercial dressed in a white cap and bandanna; that the subject matter of the commercial was one in which Prudhomme, as a restauranteur, was involved; and that there was actual confusion as to Prudhomme's sponsorship of the coffee.

Procter & Gamble claimed that the commercial clearly identified the chef as someone other than Prudhomme. The mere existence of a disclaimer would not preclude a finding of consumer confusion, noted the court.

Chief Judge Sear also rejected Procter & Gamble's claim that the alleged use of Prudhomme's "likeness" was not actionable under the Lanham Act, stating that

Prudhomme may allege enough facts to support a showing that his likeness has derived secondary meaning and thus was a protectible image under traditional trademark law. The court denied Procter & Gamble's motion to dismiss Prudhomme's Lanham Act claim and to dismiss state law claims alleging trademark infringement, unfair competition, anti-dilution, common law misappropriation, false light, and violation of the right to publicity.

Prudhomme v. Procter & Gamble Co., 800 F.Supp. 390 (E.D.La. 1992) [ELR 15:4:11]

Federal "rate court" sets copyright license fees payable by local television stations for ASCAP music in syndicated and locally-produced programs

A federal "rate court" in New York City has issued a ruling which establishes the amount of money that approximately one thousand local televisions will have to pay to ASCAP as license fees for their broadcast of ASCAP music in connection with syndicated and locally produced television programs and commercials.

The proceeding was conducted under the terms of an antitrust consent decree entered into by ASCAP more than 40 years ago. That decree requires ASCAP to issue public performance licenses to television stations in return for "reasonable" license fees, either on a blanket or per-program basis. (Blanket licenses authorize the unlimited broadcast of any or all of the songs in ASCAP's repertoire, in return for a single annual fee the amount of which does not fluctuate with the number of programs that contain ASCAP music. Per-program licenses authorize the performance of ASCAP songs in return for

fees paid only for those programs that actually contain ASCAP music.)

The decree further provides that if ASCAP and broadcasters are unable to agree on a "reasonable" fee, broadcasters may apply to the federal district court in New York to set such a fee. Following the Second Circuit's 1984 decision in favor of ASCAP and against television stations in the Buffalo Broadcasting antitrust case (ELR 6:5:3), the stations did just that.

In the resulting rate making proceeding, ASCAP proprosed that stations pay fees based on a formula that would have resulted in fees of approximately $95 million a year (to be paid in the aggregate by all television stations). The stations, on the other hand, proposed formulas that would have resulted in aggregate annual fees of $17 million or $42 million. During the preparation and trial of the case, the court set an "interim" blanket fee that has amounted to some $60 million per year.

(ELR 7:4:3) This was approximately the amount payable under a 1969 agreement between ASCAP and local television stations. That 1969 agreement set the blanket fee at 2% of a station's revenues up to a certain point and 1% of revenues above that point; and it set the per-program fee at 9% of revenues from programs containing ASCAP music.

ASCAP urged the rate court to continue using the 1969 percentage-of-revenues formula, with certain upward adjustments. The stations proposed instead a flat fee (i.e., a fee unrelated to station revenues) based (in one of two alternate ways) on the amount the three television networks had paid. (One alternative was that local stations pay 56% of what the three networks have paid, because local stations use only 56% as much ASCAP music. The other alternative was that local stations pay 138% of what the networks have paid, because in years past, local stations had paid (in the aggregate)

approximately 1.38 times as much in fees as the networks.)

In his recent ruling, Federal Magistrate Judge Michael Dolinger agreed with the local stations that they should pay a flat fee, rather than a fee based on a percentage of the stations' revenues, because station revenues are not directly influenced by the amount of ASCAP music in their programming. He found that "Music unquestionably makes an aesthetic contribution to those programs in which it is included -- typically as a mood enhancer in the form of background or bridge music -- but for most televised productions, the script, acting and direction are far more significant contributors to the success of the program." However, Judge Dolinger did not agree with the stations' contention that their fees should be based on the amount that the networks have paid. Instead, Judge Dolinger agreed with ASCAP that the stations'

fees should be related in some fashion to the amount they paid under the 1969 formula.

This brief recitation of the parties' contentions and the court's conclusions does not do justice to any of them. The trial of the case took 22 days and produced a record of several thousand pages. Closing briefs alone totaled more than 300 pages. And Judge Dolinger's decision (as clarified and revised in two follow-up opinions) comes to more than 250 pages. The opinion reviews, with remarkable literacy and in painstaking detail, the entire history of ASCAP's relationship with television stations, as well as the merits and shortcomings of each of the parties' contentions.

Ultimately, Judge Dolinger issued a multi-part ruling dealing separately with the fees payable for blanket and per-program licenses.

Stations may elect to take blanket licenses at an aggregate flat fee equal to $19.3 million (the amount they paid

in 1972 under the 1969 formula) adjusted upward for inflation and further adjusted to take into account the fact that the number of television stations now using ASCAP music has increased since 1972. (According to news accounts, it appears to the parties that the amount yielded by this formula will be approximately the same as the fees paid by stations under the "interim fee," even though the formula is different.) The court was not asked to determine the manner in which the stations are to divide the aggregate fee among themselves.

Alternatively, stations may elect to take per-program licenses at a rate equal to 150% of the blanket license fee, adjusted downward by a formula that reflects the percentage of a station's total revenues that are earned from programs that do not contain any ASCAP music. In setting the amount for the pre-program license fee, Judge Dolinger had to take into account that the consent decree provides that the per-program license fee must

give stations a "genuine choice" between blanket and per-program licenses. Per-program licenses, in other words, may not be made so expensive that it would not make sense for stations to use them. Thus, Judge Dolinger arrived at the "150% of blanket" formula for per-program licenses in the following fashion.

The evidence showed that ASCAP music is contained in approximately 75% of the syndicated programs, movies and locally produced programs broadcast by local stations. Therefore the breakeven price for per-progam licenses -- that is, the point at which the cost of per-program and blanket licenses would be the same -- would be a per-program fee approximately equal to 133% of the blanket fee, reduced to reflect that only 75% of the programs broadcast by local stations contain ASCAP music (i.e., 133% x 75% = 100%). Judge Dolinger then added 7% to compensate ASCAP because per-program licenses are more expensive for it to

administer than blanket licenses. And he added a further 10% to compensate ASCAP for additional "incidental uses" of ASCAP music not already reflected in the 133% figure.

United States v. ASCAP (Application of Buffalo Broadcasting), 1993 U.S.Dist.LEXIS 2566, 1993 U.S.Dist.LEXIS 7058, 1993 U.S.Dist.LEXIS 8848 (S.D.N.Y. 1993) [ELR 15:4:12]

Songwriters of "The Lion Sleeps Tonight" obtain rights in renewal copyright term

Folkways Music Publishers owns the copyright in the songs "Mbube" and "Wimoweh." The underlying music for the songs was composed by Solomon Linda who assigned his interest in "Mbube" to Gallo Africa, Ltd. in

1952. On May 7, 1952, Gallo registered a copyright in the work in the United States. After the expiration of the original term on December 31, 1980, the renewal rights in the song vested in Linda's widow who allegedly assigned Folkways all of her rights in "Mbube."

In 1951, Pete Seeger and the Weavers, using the name Paul Campbell, wrote a new arrangement of Mbube entitled "Wimoweh;" Campbell assigned all rights and other interests in the song to Folkways. Folkways registered the copyright in January 1952; in November 1979, the original term of the copyright was renewed in Campbell's name and thereafter assigned to Folkways.

In 1961, George David Weiss, June Persetti, and Luigi Creatore wrote another version of "Wimoweh," known as "The Lion Sleeps Tonight." Token Music Publishing published the work and registered a copyright in October 1961.

Soon after, Folkways notified Token of its claim that "The Lion Sleeps Tonight" infringed its copyright in "Wimoweh." Token, as described by Federal Court of Appeals Court Judge Oakes, ceded its rights as the publisher of the "Lion" version to Folkways. Weiss, Persetti and Creatore also entered various agreements, including acknowledging the infringement and assigning rights in the Lion version to Folkways.

In November 1961, the songwriters signed a letter, drafted by Folkways, providing for a distribution of public performance royalties payable and also signed a contract transferring and assigning all rights in the Lion version to Folkways. Folkways registered a copyright in the Lion version in December 1961; the original term expired on December 31, 1989.

Folkways claimed that in October 1989, prior to the expiration of the original term of copyright, the Weiss parties announced that Folkways' rights were limited to

the original term of the copyright. When Folkways refused to pay the songwriters for rights in the renewal term, the songwriters filed a demand for arbitration. Folkways then filed a copyright infringement action, arguing that the songwriters' use of the Lion version since the beginning of the renewal term infringed on its rights not only in the Lion version but also in "Mbube," "Wimoweh" and another version of the song owned by Folkways. Folkways asked a Federal District Court to stay the arbitration or limit its scope to renewal rights in the Lion version.

The District Court granted the songwriters' demand for arbitration.

The arbitration panel ruled that rights to the Lion version had reverted to the songwriters at the end of the initial copyright term. The award did not explicitly discuss whether the songwriters' use of the Lion version would infringe on Folkways' copyrights in the underlying

works, but did state that Folkways would have no claims against the songwriters' use of the Lion version.

The District Court subsequently agreed that the songwriters were entitled to exploit the Lion version free from any claims by Folkways, including claims for infringement of the underlying works, affirmed the award and granted summary judgment to the songwriters.

In upholding the District Court's decision, Judge Oakes noted that the District Court found that language in the arbitration award clearly barred any infringement claims by Folkways against the songwriters based on rights to the underlying music. In finding that the award encompassed rights to the underlying works, the District Court properly interpreted the award, stated Judge Oakes.

Folkways challenged the arbitration award itself, attacking the breadth of the arbitrators' determination. Judge Oakes agreed with the District Court finding that the broad language contained in the parties' agreement

with respect to arbitration granted the arbitrators the right to determine rights in the underlying works.

Folkways did not show that the arbitrators acted "in manifest disregard of the law;" concluded the court in upholding the District Court's confirmation of the arbitration award and grant of summary judgment to the songwriters.

Folkways Music Publishers, Inc. v. Weiss,1993 U.S.App.LEXIS 6206, 989 F.2d 108 (2d Cir. 1993) [ELR 15:4:13]

Ontario court restricts broadcast of fictional mini-series pending conclusion of imminent criminal trials

Certain members of a Catholic religious order known as the Christian Brothers were charged with physical

and sexual abuse that allegedly took place in Catholic training schools where the brothers were teachers; the alleged victims were young boys who were in their care.

The Canadian Broadcasting Corporation proposed to broadcast, in early December 1992, a four-hour mini-series entitled "The Boys of St. Vincent." At the time of the proposed broadcast, the trial of one of the brothers was being held; the other three parties were scheduled to be tried during the first six months of 1993.

An Ontario appellate court has upheld, as modified, a trial court decision to restrain the broadcaster from airing the program.

Judge Dubin noted that the beginning of each episode of the two-part series contained a disclaimer stating that although the program was "inspired" by recent events in Newfoundland and elsewhere in Canada, the program was fictional. But the broadcaster conceded that the

facts depicted in the mini-series paralleled the facts upon which charges were brought against the brothers.

The program depicted, in flashbacks, scenes of the actual abuse, and made it clear that there was a cover-up of the abuse by the church and high ranking members of the government. The second part of the program portrayed the trials, fifteen years later, of several brothers.

Judge Dubin, in finding that the right to a fair trial outweighed the broadcaster's right of free expression, noted that the first two hours of the series were characterized as "amongst the most startling ever seen on television;" the prejudicial effect on a potential jury was apparent to the court.

The trial court ordered only the postponement of the broadcast until the trials were completed, upon concluding that alternative remedies would not be effective and that the showing of the series before the conclusion of

the trials presented "a real and substantial risk that it would be impossible to empanel an impartial jury."

However, Judge Dubin modified the injunction by limiting the scope of the order to the province of Ontario and to a Montreal television station, and by deleting a prohibition against publishing in any media any information relating to the proposed broadcast of the program until the completion of the criminal trials. The court also deleted the trial court's prohibition against the publication of the proceedings.

According to news reports, the Canadian Broadcasting Corporation has appealed, to the Supreme Court of Canada.

Canadian Broadcasting Corporation v. The National Film Board of Canada, 1992 Ont.C.A.LEXIS 342 (Ont.App. 1992) [ELR 15:4:14]

Court seals Macaulay Culkin's contract for "Home Alone 2"

In June 1993, a New York appellate court closed from public view the court records concerning Macaulay Culkin's contract to perform in "Home Alone 2." A New York County Surrogate earlier had denied the parties' requests that the court file be sealed.

Twentieth Century Fox had sought approval of its contract with Culkin. Under New York's Arts and Cultural Affairs Law, if a court determines that the submitted contract is "reasonable and provident and for the best interests of the infant," the child performer will be precluded from later disaffirming the contract on the ground of infancy or on the ground that his or her parent or guardian lacked the authority to enter into the contract. The court may review not only the terms of the contract itself, but the proportion of the child's earnings which

are to be set aside in trust for the future and the proportion which is made available to the child's family for current use.

In determining the propriety of a contract, courts generally review the certificate of employment, the performing agreement, and any commercial tie-in or merchandising agreements, and also may examine the screenplay and other information concerning the earnings and financial status of the child and his/her family.

The surrogate had found that in the instant case, the public interest in disclosure outweighed the stated reasons of the parties for requesting confidentiality and that, with the exception of the screenplay, the records would not be sealed.

The appellate court found that compelling arguments were presented in favor of preserving the privacy of the parties, particularly Macaulay Culkin. The court noted that the goal of the statute is to encourage parties to

enter into contracts beneficial to the infant which they might otherwise forego because of the uncertainty of voidability. If private information concerning finances and business arrangements are made public as a matter of course in order to permit a contract to receive the benefits of the statute, "the prospect of such disclosure would undoubtedly have a chilling effect on the willingness of those who would otherwise wish to contract with infants."

The records in such proceedings should not automatically be sealed in every case, stated the court. However, in the instant case the parties demonstrated that the essentially confidential nature of such a proceeding should be preserved. The court cited the studio's argument that its relationship with its competitors, as well as with its other artists, could be compromised by the disclosure of the details of the contracts, which include information as to how the studio marketed the subject film. The parties

also claimed that disclosing the details of the contract would subject Culkin to "harassment and annoyance" from investment advisors and might subject Culkin to "potential dangers."

Matter of Agreements Pertaining to the Furnishing of Services of Macaulay Culkin to Twentieth Century Fox Film Corp., 1993 N.Y.App.Div.LEXIS 5473, New York Law Journal, p. 21, col. 3 (N.Y.App., June 3, 1993) [ELR 15:4:15]

NLRB order granting back pay to former Seattle Seahawk player Sam McCullum is upheld

Sam McCullum began playing professional football as a wide receiver in 1974 and joined the Seattle Seahawks in 1976. As described by Federal Court of Appeals

Judge D.H. Ginsburg, it was undisputed that McCullum was unlawfully released by the Seahawks in September 1982 for engaging in union-related activities.

McCullum accepted an offer of employment with the Minnesota Vikings. Minnesota released McCullum in May 1984, after he rejected the team's offer of about $200,000 for the 1984 season. McCullum then notified the team that he did not intend to resume playing for the National Football League.

The National Labor Relations Board determined that McCullum's backpay period - the period during which he would have remained employed by the Seahawks but for the employer's unlawful discrimination - extended through the end of the 1985 football season. But the Board set December 1984 as the cut-off date because McCullum, at that time, had abandoned his search for employment.

The Board also found that McCullum's earnings from the Vikings' participation in the 1982 playoffs resulted from "interim employment," and were not deductible from the amount of backpay due from the Seahawks. And the Board ordered the Seahawks to compensate McCullum for the income he would have received due to the Seahawks' participation in the 1983 playoffs.

In upholding the Board's order, the court stated that the Board sufficiently established that McCullum would have played for the Seahawks through the 1984 season but for the unlawful discrimination. The Vikings' offer, combined with McCullum's experience with the Seattle system, and Seattle's "dearth of wide receivers" indicated that the backpay period should extend at least through the end of 1984.

Although expressing concern that McCullum failed to seek alternative employment in the Canadian Football League, Judge Ginsburg agreed with the Board that at

least for the limited time between McCullum's waiver by the Vikings and the end of 1984, it was reasonable for McCullum to look for employment only in the NFL. The employer argued that McCullum effectively abandoned his search for employment when he sent his letter of resignation to the Vikings in August 1984. But the court agreed that the letter was a formality and revocable if McCullum received a contract offer from an NFL team. The letter did not limit McCullum's prospects for re-employment and did not serve to terminate the employer's liability.

Judge Ginsburg, in granting the application for enforcement, concluded by observing that if the Board had not used its longstanding and consistent calendar quarter system, McCullum's 1983 playoff earnings might properly have been offset against his lost earnings from the 1982 playoffs.

Nordstrom v. National Labor Relations Board, 1993 U.S.Ap..LEXIS 1506, 984 F.2d 479 (D.C.Cir. 1993) [ELR 15:4:15]

Nike prevails in trademark infringement action against clothing distributor

Michael Stanard manufactured and distributed clothing bearing the logo "Mike," displayed in the same typeset and along with a reproduction of the Swoosh stripe for which Nike, Inc. obtained trademark protection. Stanard conducted business under the trade name "Just Did It" Enterprises.

When Nike sued Stanard, alleging various causes of action, a Federal District Court in Illinois noted that Nike had registered the trademark NIKE, the Swoosh stripe design, and the trademark NIKE along with the

Swoosh stripe. Although the slogan "Just Do It" was not registered, it also was entitled to trademark protection because Nike's use of the phrase in association with apparel made it distinctive and arbitrary.

In determining that there would be a significant likelihood of confusion resulting from Stanard's use of MIKE with the Swoosh stripe, Judge Kocoras noted that the marks were almost identical, that both parties sold the same type of merchandise, and that there was evidence indicating that Stanard intended to pass off his merchandise as that of Nike.

The court rejected Stanard's claim that his design was protected under the First Amendment as a parody. Judge Kocoras commented that parody "is not a defense to trademark infringement, but ...is another factor to be considered in determining the likelihood of confusion" and that a party's parody argument will be disregarded where the purpose of the similarity between the marks is

to capitalize on the popularity of the famous mark for the [party's] commercial use." It was not clear from viewing Stanard's merchandise that it was intended as a parody, and it was found likely that a consumer might substitute one of Stanard's satirizing products for one of Nike's products.

In all, the court held that Nike would succeed on its infringement claims and that the balance of hardships with respect to injunctive relief was in favor of Nike, and granted the company a permanent injunction preventing Stanard from infringing on any Nike trademark in any manner and requiring Stanard to deliver any remaining merchandise or other material bearing the MIKE logo.

It next was observed that Stanard willfully and knowingly designed his product to infringe Nike's trademark; Judge Kocoras therefore granted Nike's motion for summary judgment and for reasonable attorneys' fees.

Nike, Inc. v. "Just Did It" Enterprises, 799 F.Supp. 894 (N.D.Ill. 1992) [ELR 15:4:16]

Broadcaster's purchase of syndicated programming is subject to use tax, rules Nebraska Supreme Court

The Nebraska Department of Revenue assessed a use tax on May Broadcasting Company's payments for various syndicated programming agreements between May and distributors.

A Nebraska trial court reversed the determination of the Department of Revenue and ordered the refund of the tax payment. The Nebraska Supreme Court, in reversing the trial court's decision, observed that May, the operator of an Omaha television network affiliate, received almost all of its syndicated programming on film or videotape by physical transfer of the film or

videotape from the distributor to May. May also received programming via satellite, but Judge Grant declined to focus on the method of program transmission, stating that in cases involving syndicated television, different forms of transmission resulted in tangible films or videotapes which the station would broadcast. The videotapes were "tangible, unique, material items altered by the distributor to suit the customer," stated the court.

Although May purchased or rented an intangible right to use programming, continued Judge Grant, "the value of the agreements between television stations and distributors is based on the physical possession by the stations of a copy of the original film or videotape." Such transactions are transfers of tangible personal property and are taxable, held the court.

The trial court also had decided that the license of syndicated television programming constituted a "sale for resale" and was therefore exempt from the consumer's

use tax. With respect to this issue, the Department argued that the property sold was not the syndicated programming, but a television broadcast for a certain audience. May argued that it was reselling, in a modified form, what it purchased - syndicated programming.
Judge Grant reiterated the holding that syndicated programming is tangible personal property subject to a use tax, but declined to find either that May's product sold to its advertisers was tangible property or that the product sold by May to its advertisers constituted a resale of the product purchased by May from syndicated program distributors. May purchases from its distributors a film or videotape in tangible form for later broadcast; May sells its advertisers the right to present the advertiser's message to a certain audience watching the broadcast film or videotape. In all, May does not resell what it has bought. It also was noted that although the product

purchased by May is tangible, the product sold by May is intangible.

The court therefore found that the transactions between May and its advertisers were not sale for resale of the product May purchased from its distributors.

Judge Boslaugh, dissenting in part, observed that some syndicated programming is transmitted to purchasers via radio waves, and that to the extent such programming is transmitted by such means, a purchaser has not received tangible personal property from the seller which is subject to taxation.

May Broadcasting Company v. Boehm, 490 N.W.3d 203 (Neb. 1992) [ELR 15:4:16]

Court considers television station's claims seeking funding and interconnection with state-funded public television network

Eight in-state public television stations share in a state-funded network known as the Pennsylvania Public Television Network, which links the stations via microwave relay and produces statewide public television programming. The network is operated by the Pennsylvania Public Television Network Commission, a commonwealth entity consisting of 22 commissioners. The commission, in addition to operating the network, distributes state grants to the public television stations.

Independence Public Media of Philadelphia, Inc. operates public television station WYBE in Philadelphia, which began broadcasting in 1990. Independence, claiming that the eight "sister stations" unlawfully denied WYBE's attempts to join the network, sued various

parties associated with the network and the stations alleging federal constitutional claims under 42 U.S.C. section 1983, antitrust claims, and state law claims.

Judge John R. Padova first agreed with WYBE that the statute governing the operation of the commission violated the Pennsylvania Constitution to the extent that it allowed private parties, i.e., the boards of the sister stations, to appoint members of the commission. The court also agreed with the contention that the commissioners affiliated with the sister stations "necessarily labor under a pecuniary conflict of interest" when considering WYBE's applications for microwave relay interconnection and funding. The conflict of interest, according to WYBE, violated the station's right to an impartial decision maker, guaranteed by the Fifth and Fourteenth Amendments.

Judge Padova stated that due process requires an impartial commission; agreed that the presence of eight

"financially biased commissioners" violated WYBE's right to an impartial decision maker; and found that WYBE was entitled to partial summary judgment as to this claim. The court enjoined the eight commissioners from further participating on the commission with respect to decisions on WYBE'S requests for funding and interconnection, but declined to enter an order enjoining the commissioners from disbursing funds pursuant to any decision of the commission in which they had participated.

The court next found that WYBE's federal constitutional claims regarding the interconnection of the station via microwave with the Pennsylvania Public Television Network did not present a justiciable case or controversy and dismissed the claim without prejudice for lack of jurisdiction.

In turning to WYBE's federal constitutional claims with respect to the commission's decision to deny

funding, Judge Padova encountered uncertain issues of state law with respect to the issue, as well as other special circumstances, which warranted the court's abstention; the court retained jurisdiction over the funding claims pending an authoritative decision by the Pennsylvania courts.

Judge Padova then rejected certain of WYBE's section 1983 claims against the television stations, stating, for instance, that since the Pennsylvania legislature established the make-up of the commission, WYBE would have to seek legislative review of the constituency of the commission. However, the court found that the public television stations did not show that there was no evidence pursuant to which a reasonable jury could find that the television stations and the commissioners "came to some understanding or conspired" to deny funding to WYBE, and denied the television stations' motion for summary judgment on this claim.

The court concluded by granting the television stations' motion for summary judgment as to WYBE's federal antitrust claim, but allowed WYBE's state law claims to proceed to trial.

In February 1993, the court denied the Commission's motion to reconsider and vacate portions of its order.

Independence Public Media of Philadelphia, Inc. v. Pennsylvania Public Television Network Commission, 808 F.Supp. 416 (E.D.Pa. 1992); 1993 U.S.Dist.LEXIS 2945; 813 F.Supp. 335 (E.D.Pa. 1993) [ELR 15:4:17]

Cable companies agree to pay $4.75 million to settle dispute over access to programming

New York State Attorney General Robert Abrams has announced that seven major cable television companies

have agreed to pay a total of $4.75 million to settle an investigation of charges that the cable companies sought to inhibit the growth of new technologies, such as wireless transmission and direct broadcast satellite, by restricting access to programming. The payment, according to news reports, will reimburse the states for their investigative costs.

The settlement involved more than forty state attorneys general. The companies, including Tele-Communications, Inc., Time Warner Cable, Cox Enterprises, Comcast Corp., Continental Cablevision and Newhouse Broadcasting, entered a consent judgment, without trial or adjudication of any issue of fact or law, which requires them to provide equal access to programming such as Cable News Network, Showtime, HBO, MTV and the Discovery Channel. Viacom apparently reached a separate, but similar, settlement with the state officials.

United States of America v. Primestar Partners, L.P.,, Case No. 93-Civ-3913 (S.D.N.Y., June 9, 1993), 58 Fed. Regis. 33944 (June 22, 1993) [ELR 15:4:18]

Rodney Dangerfield may seek identity of confidential sources quoted in allegedly libelous article

An article in the September 11, 1990 edition of the Star described four incidents involving Rodney Dangerfield that occurred at Caesars Palace. Dangerfield claimed that the article, which contained direct quotes attributed to four unnamed sources, was defamatory.

When Dangerfield deposed Barry Levine, the Star's Los Angeles bureau chief at the time of publication, Levine refused to answer questions regarding the

newspaper's editorial decision-making process and regarding the identities of the reporter's sources.

A magistrate, after initially denying Dangerfield's motion to compel responses pending the completion of discovery of all non-confidential sources, granted the entertainer's motion to compel the Star parties to respond to questions related to the editorial process. The magistrate denied the motion to compel the newspaper parties to reveal their confidential sources.

A Federal District Court in California has granted Dangerfield's motion to compel responses. Judge Lew noted that federal courts, and California courts, when presented with the issue of discovery of media sources in libel actions, have found that the First Amendment protection includes a qualified privilege against compelled disclosure. However, various courts have developed a balancing test that weighs a journalist's privilege against

the public interest in the fair administration of justice and a litigant's right to protect his/her reputation.

It was observed that Dangerfield sought the identity of the reporter's sources in order to prove that the newspaper acted with actual malice - the information sought thus would go to "the heart of the claim." Judge Lew then found that Dangerfield clearly made a prima facie showing of falsity in that the entertainer denied the occurrence of the events in the article. Dangerfield, on the basis of statements from non-confidential sources, also presented a genuine fact issue for trial on the issue of falsity.

The court rejected the Star's arguments that circumstantial evidence of similar conduct by Dangerfield on other occasions allowed for an inference that the "substance" of the alleged defamation was true, and that Dangerfield's reputation was "sullied" before the publication of the Star piece so that the entertainer could not

prove that the article injured his reputation. Dangerfield's claim was not frivolous, declared Judge Lew - the record disclosed no thorough investigation by the newspaper of the statements prior to publication. Even without disclosure of the sources, the record appeared to the court to include some evidence relevant to a showing of actual malice.

Judge Lew next found that Dangerfield had exhausted alternative sources for the information sought, and that although the entertainer did not depose the reporter involved, the decision not to do so was not determinative. The nature of the article made the identity of the confidential sources "nearly essential" to prove actual malice - "the veracity, reliability, and the very existence of these eyewitness becomes paramount, and the importance of the steps taken in the editorial process is minimized as evidence of actual malice." In granting Dangerfield's motion to compel the disclosure of the

identity of the newspaper's sources, the court restricted the information about their identities to counsel and required that the information be used strictly for purposes of the instant litigation.

Dangerfield v. Star Editorial, Inc., 1993 U.S.Dist.LEXIS 7635, 817 F.Supp. 833 (C.D.Ca. 1993) [ELR 15:4:18]

Ordinance regulating satellite antennas does not violate First Amendment, but court orders further proceedings on preemption claim

Wayne and Judie Johnson challenged a Pleasanton ordinance setting height, screening and setback requirements for satellite receive-only antennas. The Johnsons conceded that their fourteen-foot tall satellite dish did not conform to the ordinance. Federal Court of

Appeals Judge Alfred T. Goodwin first noted that a Federal Communications Commission regulation, enacted pursuant to the Federal Communications Act, provided that state or local regulations differentiating between satellite receive-only antennas and other antennas are preempted unless such regulations have a reasonable and clearly defined health, safety or aesthetic objective. And the regulation must not impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas or impose costs on antenna users that are excessive in light of the purchase and installation cost of the equipment.

Judge Goodwin found that an initial Federal District Court decision erroneously excluded the city's evidence concerning the Johnsons' ability to comply with the ordinance. As a result of the error, the court granted summary judgment for the Johnsons on their claim that the federal regulation preempted the Pleasanton ordinance.

Judge Goodwin therefore reversed the District Court's preliminary ruling - a partial summary judgment holding the ordinance preempted by the FCC regulation - but stated that there remained a fact question for determination on remand of whether or not the ordinance prevented or imposed unreasonable limitations on satellite signal reception or imposed disproportionate costs on satellite antenna users.

The court proceeded to affirm the decision (ELR 13:12:10) of a second Federal District Court judge who ruled that the ordinance did not violate the First Amendment. Judge Goodwin observed that the ordinance was a content-neutral regulation of the time, place and manner of expression; served substantial governmental interests in public safety and aesthetic values; and did not unreasonably limit alternative avenues of communication.

Johnson v. City of Pleasanton, 1992 U.S.App.LEXIS 33686, 982 F.2d 350 (9th Cir. 1992) [ELR 15:4:19]

Court orders further proceedings in wrongful death action brought by parents of student athlete

At ELR 14:12:18, it was reported that Drew Kleinknecht, a student at Gettysburg College and a member of its lacrosse team, suffered cardiac arrest and died at an off-season lacrosse practice. A Federal District Court in Pennsylvania concluded that the college had no duty to anticipate and guard against a healthy student athlete's cardiac arrest that occurred in a manner unconnected to the risks of the game. Judge Caldwell entered summary judgment on behalf of the college in the Kleinknechts' wrongful death action. The court rejected the Kleinknechts' claim that the college was negligent in failing to

provide CPR-trained coaches and trainers at the practice or otherwise institute measures to deal immediately with possible life-threatening conditions.

A Federal Court of Appeals has reversed the District Court decision. Judge Hutchinson noted that at the time of the incident, Kleinknecht was participating in a scheduled athletic practice for an intercollegiate team sponsored by the college under the supervision of college employees. Judge Hutchinson expressed the belief that based on these facts, the Supreme Court of Pennsylvania would hold that a special relationship existed between the college and the student that "was sufficient to impose a duty of reasonable care on the [c]ollege." The court distinguished between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, with the distinction

serving to limit the class of students to whom a college owes the duty of care such as arose in the instant case.

Judge Hutchinson then noted that evidence was presented that a life-threatening injury occurring during participation in an athletic event like lacrosse was reasonably foreseeable. The college owed Kleinknecht a duty to take reasonable precautions against the risk of death while he was taking part in the college's intercollegiate lacrosse program, stated the court; given the magnitude of the foreseeable harm, the failure to protect against such a risk was not reasonable.

It was emphasized that the recognition of a duty on the part of the college was limited to intercollegiate athletes, and that the determination of whether the college breached its duty at all was a question of fact for the jury. The court recognized only that under the facts of the case, the college owed a duty to Kleinknecht "to have measures in place at the lacrosse team's practice...

in order to provide prompt treatment in the event that he or any other member of the lacrosse team suffered a life-threatening injury." Judge Hutchinson predicted that the Supreme Court of Pennsylvania would hold that a college has a duty to be reasonably prepared for handling medical emergencies that foreseeably arise during a student's participation in an intercollegiate contact sport for which a college recruited him.

Judge Hutchinson commented that it will remain for a jury to determine whether the emergency medical measures the college had in place were sufficient to fulfill its duty. If the factfinder concludes that the college breached its duty, the question whether that breach was the proximate or legal cause of Kleinknecht's death also would be a question of fact, stated the court.

The District Court also had held that the college acted reasonably in providing Kleinknecht with medical assistance. The college's conduct must be reconsidered on

remand in light of the court's holding that the college owed Kleinknecht a duty of care to provide prompt and adequate emergency medical assistance to the student while he was participating as an intercollegiate athlete in a school-sponsored athletic activity.

The court concluded by reversing the District Court's holding that the college was entitled to immunity under Pennsylvania's Good Samaritan law.

Judge Alito, in dissent, would have held that the facts set forth by the Kleinknechts were insufficient to establish a breach of the college's duty to participants in its intercollegiate athletic program.

Kleinknecht v. Gettysburg College, 1993 U.S.App.LEXIS 6609, 989 F.2d 1360 (3d Cir. 1993) [ELR 15:4:19]

LucasArts may not enjoin licensee's use of software for computer video games

Humongous Entertainment Company granted Electronic Arts, Inc. the right to distribute Humongous' products, including a computer video game entitled "Putt Putt Joins the Parade." Humongous' principals, former employees of LucasArts Entertainment Company, had created a software tool called the Script Creation Utility for Maniac Mansion System. LucasArts licensed the system, which is used in developing computer video games, to Humongous. The license agreement, as described by Federal District Court Judge Walker, states that Humongous may not sell games utilizing the system to any third party distributor other than LucasArts for less than a specified price and that Humongous must verify its compliance with the licensing agreement at LucasArts' request.

LucasArts claimed that Humongous violated the licensing agreement by failing to follow the terms of the price restriction provision and by allowing Electronic Arts to publish "Putt Putt." The company claimed that Humongous' alleged breach of the licensing agreement was "so extreme as to constitute a material failure of consideration;" that the failure of consideration entitled LucasArts to rescind the license agreement; and that, once rescinded, Humongous' continued use of the copyrighted system constituted infringement warranting a preliminary injunction.

Humongous argued that the license agreement was not intended to prevent the company from selling system-based products to third-party publishers. The court agreed that Humongous did not breach its obligation by entering into the agreement with Electronic Arts because Humongous, not Electronic Arts, was the publisher of the system-based games. Humongous had greater artistic

control, and controlled the manner of marketing the games. Electronic Arts' role in determining the artistic content of the games was "extremely limited." In all, Humongous was the publisher and Electronic Arts was the distributor of the system-based games, stated the court.

Judge Walker noted that the evidence indicated that the principal consideration LucasArts received in exchange for the SCUMM software was a commitment from the individual who developed the system and who was a co-founder of Humongous to maintain and update certain elements of the system and to agree that any enhancements and improvements made to the system would belong to LucasArts. It appeared to the court that Humongous' alleged breach of the agreement to publish its own games, rather than to develop system-based games for a competitor, did not amount to a material failure of consideration.

Even if there was a failure of consideration, LucasArts did not meet the requirements necessary for rescission. A party seeking rescission must, in part, "restore to the other party everything of value which he has received from him under the contract." It was observed that LucasArts continues to receive support and upgrades for the SCUMM system from Humongous.

Since there was no material failure of consideration, rescission was not available. LucasArts therefore was not entitled to raise a copyright infringement claim.

Judge Walker held that LucasArts failed to show a reasonable likelihood of success on the merits and was not entitled to a presumption of irreparable harm. Even if LucasArts succeeded in showing a likelihood of success in its copyright claim, Humongous' game did not compete directly with any games produced by LucasArts; the absence of direct competition precluded the

company from obtaining injunctive relief based on a presumption of irreparable harm.

Finding that issuing an injunction could be "disastrous" for Humongous, the court denied LucasArts' motion for a preliminary injunction.

LucasArts Entertainment Company v. Humongous Entertainment Company, 1993 U.S.Dist.LEXIS 2527, 815 F.Supp. 332 (N.D.Ca. 1993) [ELR 15:4:20]

Briefly Noted:

Age Discrimination/Jurisdiction.

Herbert O. Weiss began working for Columbia Pictures Television in 1980, but did not have a written employment contract until early 1991. The contract

provided for Weiss' employment through December 31, 1991. In August 1991, Columbia advised Weiss that his contract would not be renewed. Prior to his termination, Weiss was Columbia's Vice President responsible for Eastern Regional television sales.

Weiss claimed that Columbia's decision not to extend his employment contract violated the Federal Age Discrimination in Employment Act. The contract contained a forum selection clause designating the state and federal courts in Los Angeles as the exclusive courts for any dispute arising out of Weiss' employment or the termination of such employment.

A Federal District Court in New York granted Columbia's motion to transfer the matter to the Federal District Court for the Central District of California. It was noted that Weiss had not claimed that there was fraud, or a misuse of bargaining power which would justify a refusal to enforce the choice of forum clause, nor was

there a lack of notice. Mere inconvenience to Weiss and the expense of travelling, observed the court, were not, standing alone, adequate reasons "to disturb the parties' contractual choice of forum." Furthermore, although Weiss was employed in New York, his supervisors were in California, and any documentation concerning his employment apparently was located in California.

Judge Leisure concluded by finding that the enforcement of the forum selection clause would not be inconsistent with the purposes of the Age Discrimination in Employment Act.

Weiss v. Columbia Pictures Television, Inc., 801 F.Supp. 1276 (S.D.N.Y. 1992) [ELR 15:4:21]

Trademark Infringement/"Kelley Blue Book."

Kelley Blue Book, under the trademark "Kelley Blue Book & Design," publishes material which lists values for new and used cars and other vehicles. In order to obtain trademark registration, Kelley disclaimed a right to the exclusive use of the words "Blue Book" apart from the registered mark.

Car-Smarts, Inc. operates an automobile pricing information service under the service marks and telephone designations "1-900-Blu-Book," and "1-800-Blue Book"

When Kelley sued Car-Smarts for trademark infringement, a Federal District Court in California found that the phrase "blue book" was not a generic term for vehicle or other valuation guides, and that the "Kelley Blue Book & Design" trademark, when viewed as a whole, was a strong mark in the automotive field - the term was inherently distinctive and the descriptive portion had

acquired a secondary meaning. Judge Lawrence T. Lydick noted that there was a close proximity between the products at issue; that the marks, in their entirety and as they appeared in the marketplace, were confusingly similar in sight, sound and appearance; that there was actual confusion; and that a reasonably prudent purchaser of Kelley's goods and services would likely believe that Car-Smarts' telephone numbers were actually being offered by Kelley Blue Book, absent a clear indication that Car-Smarts was the source of the challenged numbers.

Judge Lydick further found that Car-Smarts used the phrase "blue book" with the intention of capitalizing on Kelley Blue Books' reputation "as an authoritative source in the vehicle valuation field," and concluded that there was a likelihood of confusion in that field, at least in California, Nevada, Arizona, Oregon and Hawaii,

between Kelley's trademark and Car-Smarts' telephone number designations.

In turning to Kelley Blue Book's other claims, the court found that Car-Smarts engaged in the false designation of origin in violation of 15 U.S.C. section 1125(a), in unfair trade practices in violation of Section 17200 of the California Business and Professions Code, and in common law unfair competition. Kelley Blue Book also established common law trademark infringement, declared Judge Lydick, but did not establish the dilution of trademark rights in violation of section 14330 of the California Business and Professions Code.

After rejecting Car-Smarts' defenses, including an unclean hands defense and the claim that the use of the phrase "blue book" was protected by the First Amendment, the court noted that the evidence indicated that Car-Smarts did not profit from its infringing acts and

that Kelley Blue Book did not show that it suffered money damages.

The court, however, enjoined Car-Smarts from using the phrase "blue book" or any confusingly similar phrase in the above-mentioned western states in connection with the advertising or distribution of automobile pricing information or as part of an "800" or "900" telephone number used in connection with car pricing information.

Kelley Blue Book v. Car-Smarts, Inc., 802 F.Supp. 278 (C.D.Ca. 1992) [ELR 15:4:21]

Employment Termination.

In the fall of 1987, Wolff Broadcasting Corporation hired Patricia Williams Howard as a disc jockey and advertising salesperson. The company fired Howard in late

January 1988; the station manager informed Howard that she was being fired because Karen Wolff, the wife of the owner of the station, did not want any females on the air.

Howard sued the company, alleging fraud and breach of contract. The trial court ruling granting Wolff's motion for summary judgment has been affirmed by the Alabama Supreme Court.

Howard argued that her employment was not terminable at will because there was an implied covenant that the broadcaster would not discriminate against her on the basis of race, gender, religion, or national origin. According to Howard, the covenant was implied in every employment contract governed by the regulations of the Federal Communications Commission.

Judge Maddox declined to hold that the provisions in the regulations cited by Howard transformed Howard's at-will employment relationship into a permanent one.

Howard also claimed that a sign in the station lobby stated that Wolff would not discriminate against "females, blacks, or any others." Howard did not produce substantial evidence to support the claim that the sign misrepresented any material existing facts, ruled the court, and also did not establish a cause of action for promissory fraud.

It was noted that at the time Wolff fired Howard, the company had only seven employees and was not subject to the jurisdiction of the Equal Employment Opportunity Commission. The court deferred to the judgment of the state legislature as to whether to create a public policy exception to the doctrine of at-will employment and, accordingly, affirmed the trial court judgment.

Howard v. Wolff Broadcasting Corporation, 611 S.2d 307 (Ala. 1992) [ELR 15:4:22]

Previously Reported:

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: Denney v. Universal, 13 Cal.Rptr.170 (14:9:11); Jackson v. Axton, 814 F.Supp. 42 (15:1:8); Lebron v. National Railroad Passenger Corporation, 1993 U.S.Dist.LEXIS 1297, 811 F.Supp. 993 (15:1:12); Morgan Creek Productions Inc. v. Capital Cities/ABC Inc., 22 USPQ 2d 1881 (13:10:4); Watts v. Columbia Artists Management, Inc., 591 N.Y.S.2d 234 (14:9:10); Denker v. Uhry, 820 F.Supp 722 (14:12:3)

The decision in Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corporation (ELR 14:1:11), which dismissed with prejudice a Mississippi cable provider's antitrust action against ESPN and The Learning Channel, has been affirmed by a Federal Court of Appeals in a ruling filed on Feb.10, 1993;

the court did not issue a written opinion.

In CBS Inc. v. Viacom International, Inc., 1993 N.Y.App.Div.LEXIS 2396, a New York appellate court, without issuing an opinion, affirmed a trial court decision (ELR 14:3:14) holding that a 1970 syndication agreement between the parties did not include cable retransmission royalties and that CBS was entitled to all such royalties. According to a news report, the royalties at issue was about $26 million (including interest).

In April 1993, Chief Justice William Rehnquist, as Circuit Justice for the District of Columbia Circuit, declined to enjoin the enforcement of sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (ELR 15:2:8). Chief Justice Rehnquist's opinion in Turner Broadcasting System, Inc. v. Federal Communications Commission has been published at 1993 U.S.LEXIS 3120.

In Price v. United States, 707 F.Supp. 1465 (S.D.Tex. 1989; ELR 11:4:18), a Federal District Court in Texas ordered the United States government to return to an art investor and to the children of a German photographer four paintings and two photographic archives seized in Germany by the United States Army in May 1945.

The four watercolors in issue were painted by Adolph Hitler and were given to Heinrich Hoffman, Sr. in 1936. It was not until 1982 that Hoffman's children learned that the watercolors and photographs had been relocated in the United States. Although the family was advised that the paintings and photographs would be returned, the government subsequently refused to return the works.

It has been reported that the court has ordered the federal government to pay Bill F. Price more than $7.9 million in actual damages and about $1.8 million in interest. [ELR 15:4:22]

NEW LEGISLATION & REGULATIONS

California reduces, through 1993, minimum compensation requirement for obtaining injunction to prevent breach of personal services contract to $6,000 per year

At ELR 14:9:20, it was reported that California Governor Pete Wilson approved an act amending section 3423 of the Civil Code and section 526 of the Code of Civil Procedure relating to the availability of injunctive relief in certain proceedings. Under the revised statutes, an injunction to prevent a breach of certain contracts for personal services was to be granted only if the contract provided compensation for the services of at least $50,000 per year.

In April 1993, Governor Wilson approved an "urgency statute" to amend section 3423 of the Civil Code. Effective as of the date of signing, the bill reduces the $50,000 amount to $6,000 until January 1, 1994. The amended statute, in relevant part, provides that an injunction cannot be granted "to prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for the service is at the rate of six thousand dollars ($6,000) per annum to and including December 31, 1993, and after that date the rate shall be fifty thousand dollars ($50,000) per annum, and where the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced...."

State of California, Senate Bill 32, 1993 Ca.S.B.32 (April 3, 1993) [ELR 15:4:23]

WASHINGTON MONITOR

FCC adopts revised financial interest and syndication rules

In April 1993, in response to the decision in Schurz Communications v. Federal Communications Commission (ELR 15:4:4), the Federal Communications Commission adopted amended financial interest and syndication rules.

The Commission removed all restrictions on network acquisition of financial interests and syndication rights in network programming (except for certain reporting

requirements); eliminated the forty percent cap on network in-house productions; extended the prohibition on active network syndication to all domestic syndication, regardless of whether a network has produced a program in-house or acquired it from an outside producer; eliminated affiliate favoritism restraints; retained the rule prohibiting warehousing; and retained the 1991 restrictions on first-run domestically syndicated programming. For the domestic market, networks are permitted to own financial interests and syndication rights in first-run syndicated programming produced solely in-house, subject to the ban on active domestic syndication. Networks may not acquire any interests in or right to syndicate other first-run syndication productions in the United States.

The Commission will continue to permit, without restriction, network purchase of foreign syndication rights in, including active syndication of, off-network

programming distributed solely outside the United States and first-run programming distributed solely outside the United States. And the Commission will continue to permit network purchase of foreign syndication rights, including active syndication of first-run programming in foreign markets, even if the program is also distributed domestically, so long as the network has produced the programming solely in-house.

The Commission will continue to permit, without restriction, network ownership and syndication of all non-prime time network programming and all non-entertainment network programming (whether prime-time or not).

Emerging networks will be exempt from all restrictions, except reporting requirements, which are required once an emerging network provides sixteen hours of prime time programming per week to interconnected affiliates.

The Commission will eliminate its remaining financial interest and syndication restrictions two years after the Federal District Court in the Central District of California enters an order granting the networks' motions to modify certain restrictions of the consent decrees that limit the networks' participation in the financial interest and syndication areas.

After carefully reviewing the arguments of the parties, the Commission stated, among other findings, that its 1991 market analysis was too narrow and that program producers "are not so limited in finding buyers for their products to justify continued restraints on network participation in the purchase of back-end rights." The 1991 Report and Order defined the relevant market to include only prime time entertainment series capable of successful syndication - this definition was "excessively narrow," declared the Commission, and, "in any event, whatever market advantage the networks once enjoyed

has further diminished." The Department of Justice and the Federal Trade Commission have taken the position that the program acquisition market is competitive and that the networks do not have the power, despite the advantages of being able to offer network distribution of programming, to drive prices below a competitive level.

It also was noted that an increasing amount of entertainment series programming is being sold directly to local stations in the first-run market, and that cable television networks have become a "burgeoning market" for programming. Thus, concluded the Commission, the market power of the networks "vis-a-vis other purchasers of programming is limited." And inter-network competition serves as an additional constraint on any one network's ability to dictate terms in its overall dealings with the production community, stated the Commission.

The Commission proceeded to find that impediments to network purchases of financial interest and

syndication rights have negative effects on the smallest, least established producers; that there has been a trend toward concentration in the production community since adoption of the 1970 rules; and that direct restraints on network purchases of back-end rights are unnecessary. The Commission will retain reporting requirements with respect to programs which networks have produced or aired, or in which they hold financial interests or syndication rights.

The Commission emphasized that it would not allow the networks to actively syndicate any off-network programming, including in-house productions. For both in-house and outside productions, networks must use an independent syndicator to distribute off-network programming in which they have acquired ownership interests. The independent syndicator must be completely insulated from the network with respect to any programming distributed for the network, such that there are no

contractual arrangements or understandings between the network and the distributor regarding the subsequent sale or scheduling of the syndicated program that would have the direct or indirect effect of affiliate favoritism.

The Commission expressed the opinion that the syndication restraints would encourage source, outlet and program diversity, particularly outlet diversity. The principle goal of network syndication restraints has been to provide alternative, non-network broadcast outlets with access to quality programming. Although the Commission anticipates that outlet diversity could be maintained upon the removal of the remaining syndication restraints, the Commission seeks greater certainty that the removal of all restrictions will not harm local independent stations. Thus, the Commission will monitor network activities with respect to the acquisition of back-end rights in off-network programming and may consider

"abuse in that area to weigh against future repeal of the syndication restraints."

In turning to warehousing, a network practice of withholding programs from the syndication market, the Commission retained the 1991 rule which essentially prohibited a network from holding a program out of syndication for more than four years. A network will be required to release a program, for which it holds the syndication rights, into the syndication market four years after the program's network debut or within six months following the end of the network run, which-ever is sooner.

The Commission will continue to permit networks to hold financial interest and syndication rights in domestic first-run syndication only in programming produced solely in-house. And for first-run syndication of programs distributed entirely outside of the United States, the Commission will continue to allow the networks to

acquire financial interests and syndication rights in any programming, whether produced solely in-house, as a co-production or by an outside entity.

The exemption for "emerging networks" will apply regardless of the number of hours of prime time programming that such entities provide.

After reviewing the reporting requirements, the Commission reiterated that it will retain the restrictions on active network syndication of off-network programs and on substantial network involvement in the first-run market until two years after the District Court in the consent decree litigation issues a decision modifying the relevant restrictions of the consent decrees. No later than eighteen months after an order is entered as to the consent decree restrictions, the Commission will begin a final review of the remaining rules. The burden of proof in the review will be on the parties supporting the retention of restrictions. Unless the Commission issues an order to

the contrary, all financial interest and syndication restrictions will expire six months after the Commission begins its review.

Chairman James H. Quello issued a separate concurring statement.

Commissioner Andrew C. Barrett also issued a separate statement, supporting the decision to retain a "more simplified, but direct form of restrictions on network syndication activities."

In dissent, Commissioner Ervin S. Duggan stated that the elimination of the financial interest rule would violate "the principle of phased deregulation."

Federal Communications Commission, In the Matter of Evaluation of the Syndication and Financial Interest Rules, 1993 FCC LEXIS 2362 (MM Docket No. 90-162, April 1, 1993) [ELR 15:4:23]

FCC clarifies must-carry and retransmission consent provisions

In late May 1993, the Federal Communications Commission issued a Clarification Order concerning certain aspects of the recently adopted (ELR 15:1:25) mandatory television broadcast signal carriage and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992.

In a synopsis of the order, the Commission noted the concern expressed by the Association of Independent Television Stations and the National Association of Broadcasters that cable operators have been delaying discussions with broadcast stations under the assumption that, if they did not resolve certain signal quality or copyright issues prior to the implementation date of the provisions, then the cable operators would be relieved of their obligation to carry such broadcast signals for the

entire three year period designated in the 1992 Act. The Commission announced that a local broadcast station does not forfeit its must-carry rights in these circumstances. And, where the station does not initially meet the criteria for must-carry status, it subsequently may assert its rights once it satisfies the requisite conditions.
The Commission then acknowledged that there was some confusion regarding the initial notices relating to signal delivery. However, the Commission expects the parties, in order to avoid depriving stations of the statutorily mandated must-carry rights, to cooperate in providing detailed descriptions of signal processing equipment.

After addressing additional questions concerning signal quality, the Commission stated that cable operators must provide specified information regarding copyright liability. However, cable operators are "not required to make

legal judgments pertaining to the amount of indemnity involved."

Federal Communications Commission, Cable Act of 1992 - Must-Carry and Retransmission Consent Provisions, 58 FR 32449 (June 10, 1993) [ELR 15:4:25]

FCC adopts rules to prevent unfair or discriminatory practices in the sale of cable programming

The Federal Communications Commission, pursuant to the Cable Television Consumer Protection and Competition Act of 1992, has adopted rules prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.

The prohibition in Section 628(b) against "unfair methods of competition" and "unfair or deceptive acts or

practices" will apply to all cable operators, all satellite broadcast programmers and vertically integrated satellite cable programmers. Other sections of the statute will apply to specified entities and business relationships.

The rules set forth the elements necessary to establish a prima facie claim of discrimination, and the defenses available to programmers. The Commission has concluded that exclusive arrangements between vertically integrated programmers and cable operators in areas not served by a cable operator are illegal per se and may not be justified under any circumstances. And exclusive contracts in areas served by cable (except those contracts entered into prior to June 1, 1990) may not be enforced unless the Commission first determines that the contract serves the public interest.

The Commission has developed an expeditious complaint process, and although any differential in the price paid by one distributor as compared to its competitor

may form the basis for a complaint, the Commission will adopt penalties for filing frivolous complaints. The full Commission report appears at 58 Fed.Regis. 27658.

Federal Communications Commission, Rules Adopted to Prevent Unfair or Discriminatory Practices in the Sale of Cable programming, 1993 FCC LEXIS 1671 (MM Docket No. 92-265, April 1, 1993) [ELR 15:4:25]

FCC adopts rules to implement buy-through restrictions of 1992 Cable Act

Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier "as a condition of access to video programming offered on a

per channel or per program basis." Section 3 adds a new section, 623(b)(8), to the Communications Act of 1934.

In March 1993, the Commission adopted rules to implement the statutory "buy-through" prohibition.

The practice of channel tiering involves the packaging and sale of channels of programming for separate or incremental charges. The purpose of Section 3 is to increase options for consumers who may not wish to purchase upper cable tiers but wish to subscribe to premium or pay-per-view programming.

The Commission noted that the statute mandates immediate compliance only by those systems that can comply without system rebuilding or reconfiguration and that can do so without imposing large costs that would require the cable operator to increase its rates. Systems subject to compliance during the statutory ten year transition period include all systems with "the capacity to offer basic service and all programming distributed on a

per channel or per program basis without also providing other intermediate tiers of service either: 1) by controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or 2) through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided."

The Commission commented that the technological feasibility of complying with the buy through prohibition may be considered a category of service reasonably warranting separate rates and terms and conditions of service, notwithstanding the statutory requirement of a geographically uniform rate structure.

It was emphasized that basic tier subscribers who "buy-through" are entitled to the same rate structure for

those premium or pay-per-view services as subscribers purchasing intermediate services or tiers. The Commission rejected the National Cable Television Association's claim that different rates may not be discriminatory if they are based on differences in the costs of transmission. Discounts and similar pricing differentials are permissible as long as a basic-only subscriber may take advantage of such pricing differentials.

The Commission agreed that a cable operator may charge basic only subscribers for the converter necessary to enable them to purchase per channel or per program offerings, but the charge should not be more than the charge levied on subscribers to other service tiers.

With respect to waiver requests in those circumstances other than a general waiver or exception to the prohibition for systems that lack the technical capability to comply, the Commission stated that there may be a basis for a waiver of some type for smaller systems from the

necessity for reconstructing to achieve compliance by the end of the ten year transition period, but this is a matter the Commission believes "is better addressed at a point in time closer to that compliance date."

Federal Communications Commission, In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Buy-Through Prohibition, 1993 FCC LEXIS 1686 (MM Docket No. 92-262, Mar. 11, 1993) [ELR 15:4:26]

Copyright Office seeks comments on proposed regulations under Audio Home Recording Act

The Audio Home Recording Act (ELR 14:7:13; 14:11:19), in part, imposes an obligation to make royalty payments on persons who import and distribute in the

United States, or manufacture and distribute in the United States, any digital audio recording device or digital audio recording medium. Importers and manufacturers also must file accounting statements with the Copyright Office.

In accordance with section 1003 of the statute, the Copyright Office of the Library of Congress has proposed regulations to provide for the verification and audit of the accounting statements; to protect the confidentiality of the information contained therein; and to provide for the limited disclosure of the statements to interested copyright parties, as defined by the Copyright Office.

The general public may not obtain access to the accounting material filed with the Copyright Office for digital audio recording products. The proposed regulations will govern access to such information by specified copyright parties.

The Copyright Office has sought public comments and proposals as to the form and content of regulations governing the verification and audit of accounting statements.

Further information may be obtained from Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington D.C. 20540 (202) 707-8380.

Library of Congress, Copyright Office, Digital Recording Devices and Media, Auditing of, and Confidential Access to, Statements of Account, 58 FR 27251 (May 7, 1993) [ELR 15:4:27]

Library of Congress announces criteria for including films in the National Film Registry

In 1990, the Librarian of Congress issued final regulations establishing criteria for the selection of films for the National Film Registry; the regulations were issued pursuant to the National Film Preservation Act of 1988. The Act expired in September 1991 and President Bush subsequently signed the National Film Preservation Act of 1992, reauthorizing the National Film Preservation Act for an additional four years. Under the Act, the Librarian of Congress, in consultation with a newly formed National Film Preservation Board, will continue selecting up to twenty-five films a year for inclusion in the National Film Registry.

The 1992 Act changed certain criteria used to select films for the Registry. Films will continue to be selected "on the basis of their historical, cultural and aesthetic significance" and must be at least ten years old. However, films no longer have to be feature-length and are

not required to have had a theatrical release in order to be included.

One of the guidelines for selecting films for inclusion in the National Film Registry defines "film" as a "motion picture," as defined in the Copyright Act. "Motion pictures," under the Act, are "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds..." The term "film" does not include any work not originally fixed on film stock.

Films may not be considered for inclusion in the Registry if no element or copy of the film exists. A film will not be denied inclusion in the Registry because the film already has been preserved or restored.

A film is not eligible for inclusion in the Registry until ten years after the film's first publication. "Publication" is defined in the Copyright Act as "the distribution of copies or phonorecords of a work to the public by sale

or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies...to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."

The guidelines also include revised procedures for the public to recommend films for inclusion in the Registry.

For further information, contact: Eric Schwartz, Counsel, the National Film Preservation Board, Library of Congress, Washington, D.C. 20540 (202)707-8350. [ELR 15:4:27]

IN THE NEWS

Daughter of Hank Williams, Sr. settles litigation over royalties

It has been reported that Cathy Yvonne Stone, who performs under the name Jett Williams, has settled her lawsuit (ELR 14:6:8; 14:8:19) against Hank Williams, Jr., Billie Jean Williams Berlin, and various music publishers.

Although the amount of the settlement was not announced, Stone, according to news reports, apparently will receive a share of the songwriting royalties of her father, the late Hank Williams, Sr. [September 1993] [ELR 15:4:28]

California Supreme Court lets stand $2 million jury verdict to actor in action involving "Like a Virgin" film project

Actor Max Baer Jr., former co-star of the "Beverly Hillbillies" television series, sued Capital Cities/ABC alleging that the company's executives interfered with his plan to purchase the film rights to the song "Like A Virgin." Baer claimed that he was negotiating with songwriters Tom Kelly and Billy Steinberg when ABC-TV, claiming to have made a prior offer to the writers, notified Baer of its interest in the work. Baer argued that ABC had not entered a contract with the writers, and that the network interfered with his prospective economic advantage.

A Los Angeles trial court jury awarded the actor damages of $2 million (ELR 12:12:19).

The California Supreme Court has denied ABC's petition for review of an appellate court order affirming the judgment entered on the verdict. [September 1993][ELR 15:4:28]

"Infomercial" producer will pay $275,000 to consumers to settle FTC charges

The Federal Trade Commission has announced that Michael S. Levey has agreed to pay $275,000 to reimburse consumers for presenting allegedly false claims in infomercials about purported cures for overweight, baldness and impotence and in an infomercial concerning the Magic Wand kitchen mixer.

The weight-loss product, known as the EuroTrym Diet Patch was featured on an infomercial entitled "The Michael Reagan Show." Reagan hosted the program and endorsed the product.

Levey, the producer of the infomercials at issue, agreed, according to news reports, to settle FTC charges that the advertisement falsely claimed that the diet patch reduced appetite and promoted weight loss.

The Commission also complained the infomercials for Foliplexx and Y-Bron falsely claimed that the products would cure baldness and impotence, respectively.

Levey produced the infomercials between 1987 ad 1989 at Twin Star Productions, a company in which he owned stock.

Michael Reagan was not named in the Commission's complaint. The settlement did not involve an admission by Michael Levey of any legal violations.

In 1990, Twin Star had agreed to pay $1.5 million in consumer reimbursement to settle an enforcement action brought by the FTC arising from the broadcast of various infomercials, including the presentation of a weight loss product on "The Michael Reagan Show" (ELR 12:1:21). At that time, the Commission claimed that the marketer's product claims were "false, misleading and deceptive;" emphasized that advertisers must distinguish genuine television programs from paid commercials in

order to avoid consumer confusion; and noted that the products in issue had not been approved by the Food and Drug Administration. [September 1993][ELR 15:4:28]

DEPARTMENTS

In the Law Reviews:

William and Mary's Marshall-Wythe School of Law has published Volume 2, Issue 1 of its Bill of Rights Journal with a symposium on "Censorship and Music: Rock, Rap and the First Amendment" with the following articles:

Where They're Calling From: Cultural Roots of Rap by Jimmie L. Briggs, Jr., 2 William and Mary Bill of Rights Journal 151 (1993)

The Music of Murder by Dennis R. Martin, 2 William and Mary Bill of Rights Journal 159 (1993)

Content Restrictions and National Endowment for the Arts Funding: An Analysis from the Artist's Perspective, 2 William and Mary Bill of Rights Journal 165 (1993)

Takin' the Rap: Should Artists Be Held Accountable for Their Violent Recorded Speech? by Peter D. Csathy, 24 University of West Los Angeles Law Review 43 (1993)

Strict Scrutiny Sounds the Death Knell for New York's Son of Sam Law by Connie Koshiol, Spring Southern Illinois University Law Journal 599 (1993)

Mexico's Intellectual Property Law by Panelists M. Sean McMillan, Carl Middlehurst, and Jorge Santistevan, 15 Loyola of Los Angeles International and Comparative Law Journal 975 (1993)

Seton Hall Journal of Sport Law has published Volume 3 with the following articles:

A Tribute to Arthur Ashe by Donald L. Dell, 3 Seton Hall Journal of Sport Law 1 (1993)

AIDS and Athletics by Matthew J. Mitten, 3 Seton Hall Journal of Sport Law 5 (1993)

Cross-Training Sports Litigation and the Conflict of Laws by Brian N. Eisen, 3 Seton Hall Journal of Sport Law 41 (1993)

Best Interests or Self Interests: Major League Baseball's Attempt to Replace the Compulsory Licensing Scheme with Retransmission Consent by David Prebut, 3 Seton Hall Journal of Sport Law 111 (1993)

The College Athletic Scholarship: A Contract That Creates a Property Interest in Eligibility by John S. Mairo, 3 Seton Hall Journal of Sport Law 149 (1993)

Butch Reynolds and the American Judicial System v. the International Amateur Athletic Federation - A Comment on the Need for Judicial Restraint by Vernon A. Nelson, Jr., 3 Seton Hall Journal of Sport Law 173 (1993)

Compensatory Damages Are Available in Intentional Sexual Discrimination Cases (Franklin v. Gwinnett

County Public Schools) by John Tortora, 3 Seton Hall Journal of Sport Law 197 (1993)

The College v. the Coach by Michael S. Selvaggi, 3 Seton Hall Journal of Sport Law 221 (1993)

Are the Rights of Athletes Swept Under the Carpet? by Nicholas P. Ruggiero, 3 Seton Hall Journal of Sport Law 237 (1993)

The "Son of Sam" Law: Differing Viewpoints by Stephen L. Wasby, 3 State Constitutional Commentaries and Notes 17 (1992)

In re De Laurentiis Entertainment Group: Sacrificing Confirmed Chapter 11 Plans to Delinquently Asserted Setoff Rights by Brett Ludwig, 77 Minnesota Law Review 871 (1993)

The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law by Michael G. Anderson and Paul F. Brown, 24 Loyola University Chicago Law Journal 143 (1993)

The Questionable Utility of Copyright Notice: Statutory and Nonlegal Incentives in the Post-Berne Era by Thomas P. Arden, 24 Loyola University Chicago Law Journal 259 (1993)

Two Pesos, Inc. v. Taco Cabana, Inc.: The Supreme Court's Expansion of Trade Dress Protection Under Section 43(a) of the Lanham Act, 24 Loyola University Chicago Law Journal 285 (1993)

An Examination of the Right to Jury Trial Where Copyright Statutory Damages are Elected by Ted J. Feldman, 21 Hofstra Law Review 261 (1992)

Symposium: The First Amendment and the Media: Controversial Issues in the 1990s, 3 Fordham Entertainment, Media and Intellectual Property Law Forum 201 (1993)

Copyrighting Newscasts: An Argument for an Open Market by Michael W. Baird, 3 Fordham Entertainment, Media and Intellectual Property Law Forum 481 (1993)

Test of a Taking: An Analysis of the 1984 Cable Act's "Mandatory Access" Provision by Marybeth W. Fahey, 3 Fordham Entertainment, Media & Intellectual Property Law Forum 525 (1993)

Private Ownership of Public Image: Popular Culture and Publicity Rights by Michael Madow, 81 California Law Review 125 (1993)

A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property by Wendy J. Gordon, 102 The Yale Law Journal 1533 (1993)

The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody, 54 Ohio State Law Journal 227 (1993)

The Limits of Copyright: Property, Parody, and the Public Domain by Marlin H. Smith, 42 Duke Law Journal 1233 (1993)

Making Sense of Copyright Law Relating to Parody: A Moral Rights Perspective by Moana Weir, 18 Monash University Law Review 194 (1992)

The Second Circuit's Attempt to Define Copyright Protection for Computer Software: Is the Abstraction-Filtration-Comparison Test a Workable Solution?, 66 St. John's Law Review 1127 (1993)

Parody Protection Under the Fair Use Doctrine - The Eveready Standard: It Keeps Going, and Going, and Going..., 66 St. John's Law Review 1169 (1993)

Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan by C. Thomas Dienes & Lee Levine, 78 Iowa Law Review 237 (1993)

Abandoning Copyrights to Try to Cut Off Termination Rights by Robert A. Kreiss, 58 Missouri Law Review 85 (1993)

Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU? by Arthur R. Miller, 106 Harvard Law Review 977 (1993)

Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective, 106 Harvard Law Review 1075 (1993)

The Brooklyn Journal of International Law has published a symposium on the Impact of European Integration on Intellectual Properties with the following articles:

An Introduction to the European Economic Community and Intellectual Properties by Beryl R. Jones, 18 Brooklyn Journal of International Law 665 (1992)
[ELR 15:4:29]