RECENT CASES

Writing teacher prevails in copyright infringement action against Harper's Magazine, but court vacates $2,000 damage award

In December 1990, Harper's Magazine published a piece entitled "A Kind of Magnificence;" the table of contents listed Gordon Lish as the author. Lish is a well-known writer, editor and teacher of creative writing. The article contained excerpts from a letter sent by Lish to prospective students introducing them to his fall 1990 writing class; the material was published without Lish's consent. Federal District Court Judge Morris E. Lasker described the background leading to Harper's publication of the letter, including the fact that the publisher's deletions - totalling about 48 percent of the excerpt - were not marked by ellipses.

The court then considered whether the publication constituted fair use of the copyrighted letter. The letter, according to the court, contained a variety of material ranging from "the logistics of the class, instructions as to how students are expected to behave in class, to passages of exuberant rhetoric exhorting students to heroic efforts. The letter was interesting both for its factual and stylistic content."

Judge Lasker determined that the letter was not obtained in bad faith; the fact that Harper's did not request or receive Lish's permission was not relevant to the issue so long as the appropriation met the standard of fair use, stated the court, citing Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991; ELR 12:11:5). It also was found that Harper's did not engage in bad faith in editing the letter.

With respect to the nature of the use of the letter, Harper's claimed that the publication was for the protected purpose of criticism, commentary and news reporting - to provide an "inside look" at Lish's class. Judge Lasker observed that the letter itself, although not accompanied by criticism or commentary, was newsworthy because of the "notoriety" of the Lish writing classes and of Lish's "persona."

Harper's asserted that it printed the "expressive content" of the letter to demonstrate Lish's character or teaching style, as distinct from his mode of expression. Judge Lasker, however, commented that Harper's knew that its readers would be as interested in reading the letter as an example of Lish's manner of expression as in gaining information about the writing class.

Using copyrighted work to demonstrate an author's writing style is "condemned," stated the court, citing Salinger v. Random House, Inc., 811 F.2d (2d Cir.; ELR

8:9:3; 8:7:12), cert. denied, 484 U.S. 890 (1987; ELR 9:5:17) and New Era Publications Int'l., ApS v. Henry Holt and Co., 873 F.2d 576 (2d Cir.1989; ELR 10:12:17), cert. denied, 493 U.S. 1094 (1990; ELR 11:5:10; 11:11:15). The Second Circuit apparently will permit the limited direct quotation of an author when necessary to report a fact accurately and fairly. But Harper's published a substantially greater portion of the letter than was required to achieve that purpose, stated Judge Lasker. Harper's used an "unprecedented" amount of unpublished material - over 1,200 words which amounted to 52 percent of the original - such a taking "was far more than that necessary to report factual information fairly and accurately."

The fact that Harper's was a non-profit educational organization did not preclude a finding of "commercial use;" non-profit organizations do not have a special immunity from determination of copyright violations, stated the court, in concluding that the magazine's use of the letter was of a commercial nature.

In turning to the fair use factor denominated "the nature of the copyrighted work," Judge Lasker declared that the letter was predominantly inspirational and creative in nature, rather than factual. Harper's argued that the work was a published "form letter," serving to promote Lish's classes. The court stated that whether a work is published or not does not depend on a distinction between whether it is "literature" or "promotion," but rather on the restrictions imposed as to the publication of the work. The tone of the letter emphatically stressed confidentiality within the class; the distribution of the letter to class members did not amount to public dissemination; and, in all, that there were "implicit restrictions with respect to disclosure" of the letter's contents.

Lish also prevailed on the third fair use factor - the "amount and substantiality of the portion used." Harper's admitted that it took the "heart" of the letter, and, again, about 52 percent of the letter was used - a use of unpublished expressive material which, in the court's view, was "unprecedented not only in the percentage, but in the absolute amount of the taking."

Lish did not prove any effect on either the present or future value of the letter.

The court concluded that Lish prevailed on the issue of fair use and established his copyright infringement claim.

Lish also claimed that Harper's, in editing the letter and listing his name in the table of contents, made it appear that Lish wrote the piece, and, in so doing, violated section 43(a) of the Lanham Act. Judge Lasker found that the evidence did not support the claim of false designation of origin. The material was not false on its face and although substantial deletions were made, the published version was taken from the original - no words were added and no phrases were changed. Lish did not submit a reader survey or other evidence establishing the reaction of the magazine's readers to the respective versions of the letter. Lish thus did not prove by a preponderance of the evidence that Harper's version of the letter substantially distorted the original.

Judge Lasker dismissed Lish's defamation cause of action; the published version of the letter, again, was representative of the original, and there was no evidence of damage to Lish's reputation.

Lish's cause of action for intentional infliction of emotional distress also was dismissed.

The court concluded that, "approaching the market value concept as closely as is possible...," Lish was entitled to actual damages of $2,000 for the violation of his copyright.

On reconsideration, the court eliminated the $2,000 damage award.

Lish v. Harper's Magazine Foundation, 807 F.Supp. 1090 (S.D.N.Y. 1992) [ELR 15:5:3]

Author of "Mary Ellen's Best of Helpful Hints" prevails in copyright infringement action against unauthorized distributor of "premium" copies

In 1976, Mary Ellen Pinkham and her mother, Pearl Higginbotham, coauthored and copyrighted "Mary Ellen's Best of Helpful Hints;" the book was revised in 1979, and the authors obtained a new copyright.

In 1983, Pinkham authorized Jay Columbus and Victor Benedetto, who did business as Camex, Inc., to promote various books as "premium" items offered to consumers in conjunction with the promotion of other products.

The Sara Lee Corporation agreed to "test market" copies of the book as a premium item to promote L'eggs hosiery. Pinkham approved the initial test market sale, and complied with Camex's request for the book's printing film.

Sara Lee purchased about 13,000 copies of "Mary Ellen's Best of Helpful Hints." Apparently Columbus told Pinkham that Sara Lee would not be purchasing additional copies of the book. Camex paid Pinkham fifty percent of the profits realized from the sale of the 13,000 copies. Pinkham sought the return of the printing film, but was told Camex did not have the film.

In April 1987, Pinkham learned that Camex had printed and sold to Sara Lee about 300,000 additional copies of the book.

In response to Pinkham's action for copyright infringement, a Federal District Court granted partial summary judgment against the Camex parties, finding no evidence that Pinkham had authorized the sale of the additional copies to Sara Lee and that Camex therefore had infringed the copyright in the 1979 edition of Pinkham's book. The court refused to grant summary judgment with respect to Sara Lee, concluding that the defense of apparent authority was available to the company and that there remained certain factual issues relating to the defense.

Camex, in a later unsuccessful motion for summary judgment, argued that the copyright notice in the 1976 edition of Pinkham's work was inadequate and that the contents of the book were in the public domain. Camex also argued that there was no valid copyright with regard to the portions of the 1979 work which were derived from the 1976 edition of Mary Ellen's Best of

Helpful Hints, and that it was an innocent infringer due to the defective copyright.

A Federal Court of Appeals first reversed the ruling denying summary judgment against Sara Lee. Sara Lee claimed that it relied on Camex's broad apparent authority when (through a broker) it purchased copies of Pinkham's book from Camex.

Judge John R. Gibson held that the apparent authority defense was not available to Sara Lee, referring to the principle that a party's intent is not relevant to copyright infringement. The court stated that Sara Lee's reliance on the apparent authority defense of general agency law was "misplaced."

It was further found that the record, in any event, did not support an inference of apparent authority. Sara Lee purchased the books through a broker, had no contact with Pinkham or Camex, and never saw a letter which the company claimed was the principal basis for

Camex's apparent authority. Judge Gibson vacated the order of the District Court denying summary judgment on the apparent authority issue and remanded the issue to the court for a determination as to whether summary judgment in favor of Pinkham was appropriate.

Judge Gibson, after careful review, then rejected Camex's claim that Pinkham authorized the company to reproduce and distribute the roll-out of 300,000 copies of the book; found that the District Court did not err in granting partial summary judgment on the infringement issue in favor of Pinkham; and concluded that both Columbus and Benedetto were personally involved and met the standards for imposing vicarious liability.

Camex also had argued that the copyright notice in the 1976 edition of the book incorrectly named "Mary Ellen Enterprises" as the copyright proprietor and that the copyright notice was improperly placed on the page preceding the title page of the 1976 edition. The District

Court did not err, stated Judge Gibson, in holding that the notice in the 1976 edition was sufficient to fulfill the purposes of the then applicable 1909 Copyright Act. It was observed that the notice in the 1979 version of the book fully complied with the applicable requirements.

Pinkham v. Sara Lee Corporation, 983 F.2d 824 (8th Cir. 1992) [ELR 15:5:4]

Register of Copyrights must again review refusal to register copyright for video game

In 1987, the Copyright Office refused to register a copyright in Atari Games' "Breakout" on the ground that the audiovisual game did not contain sufficient original visual or musical authorship.

A Federal District Court entered summary judgment for the Register of Copyrights, noting, according to then Federal Court of Appeals Judge Ruth Bader Ginsburg, that Breakout presented a "rare" instance of "expressive value so slight as to be insufficient for copyright purposes."

Judge Ginsburg, as reported at ELR 12:6:12, stated that the court was unable to determine what standard the Copyright Office used to deny registration to the video game, vacated the District Court's judgment, and re-manded the case to the court with instructions to return the matter to the Copyright Office for further consideration.

On remand, the Register again refused registration, and the District Court again granted summary judgment to the Register.

The Federal Court of Appeals has held that the rejec-tion of "Breakout" was unreasonable given that Feist

Publications, Inc. v. Rural Telephone Service Co., 111 S.Ct. 1282 (1991; ELR 12:12:17) confirmed that the requisite level of creativity for copyrightability is extremely low.

Judge Ginsburg, in describing the game, noted that the Register, in the second refusal to register Breakout, characterized the representations of the wall, ball, and paddle involved in the game as "simple geometric shapes and coloring," which "per se are not copyrightable." It also was found that there was "no original authorship in either the selection or arrangement of the images or their components."

The Register did not claim that audiovisual works require a different level of creativity from other works. However, an audiovisual work is, among other components, "a series of related images," noted the court, and the interrelationship of the successive Breakout screens is "crucial." The Register may have asserted correctly that the individual graphic elements of each screen were not copyrightable, but the game would be copyrightable "if the requisite level of creativity is met by either the individual screens or the relationship of each screen to the others and/or the accompanying sound effects."

It appeared to the court that the Register "may have so trained his observation on the details of the individual screens that he neglected genuinely to consider the sequential aspect of the work." Judge Ginsburg, after referring to various features of the game, including the placement and design of the scores, the changes in speed, the use of sounds, and the use of synchronized graphics and sounds, stated that the court did not question the Register's position that "simple geometric shapes and coloring alone are not per se copyrightable," nor did the court hold that all video games are per se copyrightable. But it was not the Register's responsibility "to shape the protection threshold or ratchet it up" beyond the "minimal creative spark required by the Copyright Act and the Constitution," declared the court, citing Feist.

The court reversed the District Court decision and remanded the matter with instructions to return Atari's application to the Register for renewed consideration.

Atari Games Corporation v. Oman, 979 F.2d 242 (D.D.C. 1992) [ELR 15:5:5]

General publication of photograph without copyright notice divests photographer's copyright

Seiji Kakizaki photographed Bettina Riedel and gave one print of the work to Riedel for her to use on a postcard invitation to the opening of her clothing store. The print did not contain a copyright notice, but the invitations included the phrase "Photo by Seiji Kakizaki."

Kakizaki claimed the Riedel repeatedly used the photographic image without his authorization subsequent to the initial mailing and sued Riedel alleging copyright infringement and other claims.

Federal District Court Judge Martin noted that under the Copyright Act of 1976, copyright protection attached to the photograph at the moment it was created by Kakizaki so that it could be viewed and reproduced. The copyright was subject to being divested by a publication of the photograph without proper copyright notice. Judge Martin observed that the recipients' use of the photographs was not restricted in any way, and stated that Riedel's distribution of the work as authorized by Kakizaki was a general publication which destroyed the copyright in the work.

A work that is generally published by authority of the copyright owner, without the proper notice, will lose its copyright unless registration of the work "has been made before or is made within five years after the publication without notice." Kakizaki did not register the photograph until 1992, more than five years after the work was published without notice in 1982. The court also found that there was no "express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies...they bear the prescribed notice."

Section 405(a)(1) of the Copyright Act prevents the divestment of copyright in a work if "the notice has been omitted from no more than a relatively small number of copies...distributed to the public." Judge Martin determined that Kakizaki did not raise a sufficient factual issue as to the number of copies involved to preclude granting summary judgment on behalf of Riedel on the copyright infringement claim.

The court dismissed Kakizaki's unjust enrichment, misappropriation and conversion, and injury to reputation claims as preempted by the Copyright Act.

Kakizaki v. Riedel, 811 F.Supp. 129 (S.D.N.Y. 1992) [ELR 15:5:5]

NFL Properties may not enjoin distribution of football player trading cards

Playoff Corporation planned to market football trading cards depicting professional football players in game settings in which the players would wear their uniforms, and, sometimes, helmets.

National Football League Properties, the exclusive licensing representative for NFL trademarks, licenses the NFL marks as well as the names, likenesses and personal data of some players; the National Football League Players Association licenses the names, likenesses and personal data of other players, but does not license the actual NFL marks.

Playoff agreed to pay the Players Association $1.9 million for a license to use the names, likenesses and data of Association players. NFL Properties refused to grant Playoff a license.

Playoff then changed the appearance of its cards, removed the "Team NFL" logo, added disclaimers to its packaging, and removed team names. The cards continued to display players in their uniforms, although Playoff, according to Federal District Court Judge Kendall, attempted to minimize the appearance of team and NFL logos on the uniforms and helmets.

Judge Kendall, in considering NFL Properties' claims against Playoff, noted that the NFL marks were strong; that Playoff would be using the same design as NFL Properties; that Playoff's cards were at least substantially similar to other football trading cards; that cards are distributed through the same retail outlets to the same purchasers, and compete in the same market; and that Playoff did not intend to appropriate NFL Properties' marks or to capitalize on the company's good will.

The court rejected Playoff's defense of fair use - the defense is available, stated the court "only when the allegedly infringing term is used not as a trademark but fairly and in good faith to describe to users the goods and services of a party." The defense also was unavailable because even if the marks were used descriptively, the marks themselves were not descriptive marks.

It appeared that Playoff might fulfill the fair use test set forth in New Kids on the Block v. News America

Publishing, Inc., 971 F.2d 302 (9th Cir. 1992; ELR 14:9:6), noted Judge Kendall, but it would remain for the Fifth Circuit to adopt the holding or rationale, or both, of that case.

In all, NFL Properties made the requisite showing of substantial likelihood of success on the merits.

However, the court then found that NFL Properties did not show that the failure to issue preliminary injunctive relief would cause the company irreparable harm. Monetary damages would adequately compensate NFL Properties, and the harm to Playoff upon the issuance of an injunction would greatly outweigh the harm to NFL Properties should the court decline to issue an injunction, declared Judge Kendall, who therefore denied NFL Properties' motion for a preliminary injunction.

National Football League Properties v. Playoff Corporation, 808 F.Supp. 1288 (N.D.Tex. 1992) [ELR 15:5:6]

Girl Scouts and Boy Scouts lose trademark infringement action against publisher and author of "Pee Wee Scouts"

A Federal District Court in New York has granted summary judgment to Bantam Doubleday Dell Publishing Group, Inc. and Judy Delton, the publisher and author of the "Pee Wee Scouts" series of children's books, in a trademark infringement action brought by the Girl Scouts and Boy Scouts organizations.

Judge McKenna granted the Bantam parties' motion for summary judgment on the basis of Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.1989; ELR 10:4:13), in which the court attempted to balance the public interest in avoiding consumer confusion with the public interest in free expression. It was observed that the Lanham Act would not restrict the Bantam parties' rights "to author and publish books on a particular organization resembling those founded by [the scouting parties]," and that "as a general rule, one may write fiction about virtually any (emphasis by the court) topic, involving any public or private organization, corporation, or person so long as it is not defamatory."

Judge McKenna pointed out that the Rogers opinion related to the title of Delton's books. In considering the scouting groups' additional contention that the impression given by the books as a whole was misleading, the court referred to Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490 (2d Cir. 1989), a decision which extended the test balancing First Amendment interests and trademark infringement claims to the parody context.

The fact that Delton's works were fictional children's books, rather than works involving social and personal commentary or parody, did not mean that the books merited less First Amendment protection; the central issue, according to Judge McKenna, again was "whether the risk of confusion as to the source of [the Bantam parties'] merchandise [was] greater than the public interest in artistic expression." The analysis and outcome might differ because of the nature of the different modes of artistic expression, but the balancing test would be the same, declared the court.

Judge McKenna, stating that the court, in light of Cliffs Notes and Rogers, possibly was not required to examine the eight factors relevant to the likelihood of confusion issue, nevertheless chose to review the relevant factors, "bearing in mind, however, First Amendment considerations so as to give due weight to the fact that the goods at issue are artistic expression, even if some degree of consumer confusion exists."

After evaluating the strength of the scouting groups' marks, the similarity of the marks, the competitive proximity of the products, the bridging the gap factor, actual confusion, good faith, the quality of the goods, and the buyers' sophistication, the court concluded that the likelihood of confusion was "at best minimal and, in any event, not significant enough to overcome the First Amendment concerns implicated here."

Judge McKenna, among other considerations, determined that the terms "scout" and "scouting" had not acquired secondary meaning in the context of children's books; that a consumer would see no indications on the Delton books' covers or in the content of the books that the works were sponsored or related to the scouting groups; and that the Bantam parties did not appropriate any of the scouting groups' "emblems and badges," descriptive or designating marks" or "words or phrases." The scouting groups submitted no evidence indicating that they had received "confused consumer-initiated inquiries or comments" as to the source of the Pee Wee Scout books, and a consumer survey failed to demonstrate significant "actual" confusion. The court reiterated that the scouting groups did not have the exclusive right to generate fiction about the organizations they founded; the fact that the scouting groups were well known did not prohibit the Bantam parties from capitalizing on the groups' "mystique," as long as the public was not unduly confused as to the source.

Judge McKenna concluded by rejecting the scouting groups' anti-dilution and common law unfair competition claims.

Girl Scouts of the United States of America v. Bantam Doubleday Dell Publishing Group, Inc., 808 F.Supp. 1112 (S.D.N.Y. 1992) [ELR 15:5:6]

American Federation of Musicians obtains summary judgment in action concerning hiring of local musicians for theatrical tours

As reported at ELR 15:1:16, local unions belonging to the American Federation of Musicians sometimes negotiate collective bargaining agreements with particular employers. The agreements may specify the minimum number of local union musicians who shall be hired to play for engagements in establishments covered by the agreement within the jurisdiction of the local union. The clauses, referred to as "local union minimums," apply to all performances in such establishments, including performances under the Federation's Pamphlet B which covers theatrical tours.

When a Pamphlet B production takes place in a venue covered by local union minimums, the producer may be required to employ the number of musicians specified by

Pamphlet B plus the total number of local musicians set by the local's minimum.

In 1991, the Federation engaged in bargaining with the League of American Theaters and Producers; the parties considered Rule 61 which deals with the requirements for the minimum number of musicians in those theaters where there is an existing contract between a local union and the theater where the performances are to take place. It was agreed, subject to ratification, to revise Rule 61 by providing that upon the expiration of contracts between local unions and covered theaters, the local union might continue to set minimums in collective bargaining, but that those minimums would not exceed sixteen local musicians for Pamphlet B touring theatrical musicals. The revised rule also set forth various situations when local minimums would not apply and when touring musicians might be counted against the local minimums.

In response to a lawsuit filed by several local unions alleging the breach of the Federation's bylaws under section 301(a) of the Labor Management Relations Act, a Federal District Court in Pennsylvania found that the locals did not show immediate, irreparable injury.

Judge Katz subsequently found that the Federation was entitled to summary judgment on the section 301(a) claim, stating that the Federation's interpretation of its bylaws to allow for the designation of a maximum number of local musicians in the Pamphlet B productions was not patently unreasonable. There was authority to make the designation in both the plain language of the bylaws and the Federation's past practice, noted Judge Katz, and the Federation acted reasonably to resolve the competing interests of local and touring musicians.

The court also entered judgment against the local in connection with the claim that the Federation's failure to permit local musicians to vote on the ratification of the

Pamphlet B agreement violated the Labor Management Reporting and Disclosure Act. It was found that although venue was proper for the section 301 claim, venue was not properly asserted as to the ratification claim, which the court dismissed without prejudice.

Philadelphia Musical Society, Local 77 v. American Federation of Musicians, 812 S.Supp. 509 (E.D.Pa. 1992) [ELR 15:5:7]

Court affirms jury verdict awarding about $382,000 in damages to news anchor for intentional misrepresentation by broadcaster

In 1986, Ruth Ann Spencer Hanks (referred to by the court as Spencer) signed a three year contract to work as a television news anchor at KSTP-TV, owned by

Hubbard Broadcasting, Inc. The contract, in part, contained a "window" period from July 1, 1988 to June 30, 1989, allowing Spencer to leave during the last year of the contract if she received a written offer from a network affiliate or from a station in one of the ten largest television markets, subject to Hubbard's right to meet the offer.

After the station hired a new co-anchor in September 1988, Spencer's role was reduced. In February 1989, the station dismissed Spencer, purportedly for having secretly tape recorded a meeting with a station official (during the course of the meeting, Spencer revealed that she was recording the meeting). The station paid Spencer the remaining compensation due under the contract.

Spencer, who was out of work from July 1989 to March 1990, sued Hubbard in March 1989 for breach of contract and intentional misrepresentation.

A trial court jury awarded Spencer about $82,000 in compensatory damages for intentional misrepresentation. The jury found that Hubbard made false representations of material facts to Spencer with respect to planning to promote her as an anchor and with respect to its intentions concerning her role as a co-equal anchor. The jury subsequently returned a verdict awarding Spencer $300,000 in punitive damages, stating that Hubbard's actions showed a willful indifference to Spencer's rights.

A Minnesota appellate court upheld the judgment entered on the jury verdict, stating that under state law a party may properly recover under a breach of contract and fraud theory in an employment context. Spencer's employment contract did not mention whether Hubbard would promote her or whether her role would be reduced in comparison to a co-anchor. The representations made to Spencer in these areas were not contract related, stated Judge Amundson, even though the original relationship between the parties arose pursuant to a contract. The trial court properly allowed the intentional misrepresentation claim to go to the jury.

Judge Amundson then found that the jury could have reasonably found that the statements of Hubbard managers were statements of objective fact, not just statements of future intention.

The court determined that there was sufficient evidence to show that Spencer did not pursue her contractual window in reliance upon the station's representations; affirmed the special verdict that Spencer justifiably acted in reliance upon Hubbard's false representations; and affirmed the compensatory and punitive damage awards.

Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302 (Minn.App. 1992) [ELR 15:5:8]

Illinois Supreme Court rules that individual may proceed with claims arising from disc jockeys' comments

As reported at ELR 14:2:15, Anthony Kolegas, the producer of a classic cartoon festival, sued Heftel Broadcasting Corporation and other parties in connection with certain statements made by radio station WLUP-AM disc jockeys Tom and Beth Disa. An Illinois trial court granted the Heftel parties' motion to dismiss the complaint. An appellate court reversed that portion of the trial court's order which dismissed the defamation count, but affirmed the dismissal of all other counts.

Illinois Supreme Court Judge Bilandic first concluded that the Disas' statements could be found to be defamatory per se, in that the statements implied that Kolegas lacked integrity in performing his professional duties and also prejudiced him in his business. The statements, continued the court, "also implicitly accused Kolegas of lying and of attempting to deceive WLUP, and the public at large, about the festival and the fact that it would benefit a charitable organization." Judge Bilandic did not find that there was a reasonable innocent construction for the statements which would remove them from the defamatory per se category.

It then was found that the Disas' statements about Kolegas' business activities were not entitled to constitutional protection - the statements were not mere "imaginative expression" or "rhetorical hyperbole," but were intended to be taken literally. The fact that the Disas may have meant the comments as jokes, rather than as factual assertions was "inapposite." In all, an average listener could have interpreted the challenged remarks as defamatory statements of fact, and a factfinder must determine whether the remarks actually were understood as harmless jokes or as defamatory statements.

The court then found that, accepting Kolegas' statement as true, the promoter adequately stated a cause of action for invasion of privacy by placing the Kolegas family before the public in a false light. Kolegas did not waive any expectation of privacy when he called the radio station - his public statement that his wife and son were afflicted with neurofibromatosis did not automatically give the Disas the right to make or broadcast statements depicting Kolegas and his family in a false light. The court declined to find, as a matter of law, that the Disas' statement would offend only a hypersensitive individual.

Judge Bilandic next determined that Kolegas adequately stated a cause of action for reckless infliction of emotional distress, and remanded the case for further proceedings.

Judge Freeman, in a special concurrence, agreed with the court's conclusion, but expressed concern with the analysis of the claim alleging reckless infliction of emotional distress. Judge Bilandic stated that the Disas' use of the media transformed their offensive remarks into extreme and outrageous conduct, whereas had the same remarks been made privately, the majority might have considered them "mere insults."

For Judge Freeman, upon the "introduction of the concept of an audience in the determination of whether remarks constitute extreme and outrageous conduct, it may seem to matter little that what is said may be merely insulting...The more extensive the broadcast the more extreme and outrageous the remarks, otherwise nonactionable if made privately, appear. That may invite a less than rigorous analysis of the content of what is broadcast." Judge Freeman cautioned that "it is essential that the public nature of the objected-to remarks does not overshadow a critical analysis of their content."

Judge Freeman had no reservations about characterizing the challenged remarks as "something more than mere insults."

Kolegas v. Heftel Broadcasting Corporation, 607 N.E.2d 201 (Ill. 1992) [ELR 15:5:8]

Original owner of Monet painting, allegedly stolen during World War II, may recover work from good faith purchaser

Gerda Dorothea DeWeerth sought to recover a painting by Claude Monet entitled "Champs de Ble a Vetheuil." The work was purchased in good faith in 1957 by Edith Marks Baldinger from Wildenstein & Co.

In 1987, Federal District Court Judge Vincent L. Broderick ordered the return of the painting to DeWeerth; the decision was reversed by a Federal Court of Appeals which found that Judge Broderick had misapplied New York law.

In 1991, the New York Court of Appeal ruled in Guggenheim v. Lubell, 77 N.Y.2d 311 (ELR 13:1:11; 13:5:16), that state law requires, and, according to the court's ruling, would previously have also required, a result which was "consonant" with Judge Broderick's original determination.

In late 1992, Judge Broderick, in view of the Guggenheim decision, granted DeWeerth's Rule 60 motion for relief from final judgment, stating that the decision represented a material change of circumstances.

Judge Broderick recalled that DeWeerth's father purchased the Monet in about 1908, and that DeWeerth inherited the work in 1922. In 1943, DeWeerth sent the

Monet to Southern Germany for safekeeping. However, the painting subsequently disappeared. DeWeerth unsuccessfully attempted to locate the work.

In 1956, Wildenstein acquired the Monet from a Swiss art dealer, and Baldinger then purchased the work. The painting was publicly exhibited on only two occasions, and there were only four published references to the Monet in art literature.

In 1981, DeWeerth discovered that the Monet had been included in a 1970 Wildenstein exhibition. A New York trial court ordered the gallery to reveal identity of the possessor of the Monet. Upon demand by DeWeerth, Baldinger refused to return the work.

Judge Broderick, in his earlier decision, had inferred that the Monet was stolen from its shelter in Germany. Judge Broderick then applied New York law, which holds that not even a bona fide purchaser can acquire valid title from one who acquired title from a thief. The court held that DeWeerth had a right of title superior to that of Baldinger.

The Court of Appeals found that DeWeerth's claim was barred by the three year limitations period and also held that a party seeking the recovery of stolen property in New York had a "duty of reasonable diligence in attempting to locate stolen property" and that absent a showing that such diligence had been exercised, an owner's otherwise timely lawsuit would be time barred. It was acknowledged that this due diligence requirement had not previously been applied by New York courts.

In Guggenheim, the New York Court of Appeal ruled that there was no duty of due diligence, under New York law, upon owners attempting to recover stolen property from subsequent good faith purchasers. The court explicitly held that the due diligence requirement announced by the Federal Court of Appeals in DeWeerth was contrary to state law.

After careful consideration of various procedural matters, Judge Broderick turned to Baldinger's laches claim. The court emphasized that Baldinger would be entitled "to pursue responsibility for lack of care in purchasing and reselling the art up the chain of possession." DeWeerth had made a "diligent although fruitless effort" to locate the Monet, and any delay did not put Baldinger in the position of facing the loss of an asset without recourse, given the presence of Wildenstein in the case.

Deweerth v. Baldinger, 804 F.Supp. 539 (S.D.N.Y. 1992) [ELR 15:5:9]

Court rejects bookstore owner's challenge to federal obscenity statute

Kathleen L. Eckstein owned a bookstore in Falls Church, Virginia. In April 1992, several FBI agents executed a search warrant at the bookstore for materials allegedly violating the federal obscenity laws, 18 U.S.C. section 1460 et seq. The search warrant authorized the agents to seize copies of thirteen sexually explicit magazines that a magistrate had found probable cause to be obscene; the search warrant also authorized the seizure of other magazines or books depicting "explicit sexual acts." The agents seized about 137 adult magazines, in addition to the thirteen magazines identified in the search warrant.

The United States Attorney for the Eastern District of Virginia notified Eckstein that she would not be prosecuted for any past violations of the obscenity statutes, but that if she continued to sell material in violation of the statutes, she could expect to be prosecuted. The United States Attorney refused to provide Eckstein with an opinion concerning the legality of specific materials, but referred to the general obscenity standards set forth in Miller v. California, 413 U.S. 15 (1973).

Eckstein, in the absence of specific guidance as to which magazines she could safely sell, removed all sexually explicit material from the bookstore, and filed a lawsuit seeking injunctive and declaratory relief.

Federal District Court Judge Ellis first found that Eckstein, who alleged the loss of about forty percent of her revenue and the "imminent demise of her business" in order to avoid the threat of prosecution, had standing to challenge the alleged vagueness of the statute. But the court rejected the vagueness argument, finding that the statute, by incorporating the Miller standard, defined obscenity clearly enough to provide Eckstein with a reasonable opportunity to know which sexually explicit magazines she would be prohibited from selling in the future. The risk of prosecution, stated the court, "is a risk that must be borne by all who choose to sell sexually explicit materials. Dissemination of such materials tests the limit of First Amendment protection and, for that reason, is an activity not to be pursued by the faint-hearted."

Judge Ellis further found that the seizure of two copies of each of thirteen specified magazines did not violate Eckstein's constitutional rights. However, the seizure of the additional magazines, if based on the search warrant, was unconstitutional due to the "fatal" overbreadth of the warrant - the language allowed the seizure of all sexually explicit material, without regard to whether the material might be obscene. By failing to distinguish between obscene material and non-obscene sexually-explicit material, the warrant gave de facto discretion to the executing officers to determine the obscenity of specific items.

The government argued that the magazines were obtained with the consent of the manager of the bookstore. In view of the factual question raised as to the voluntary nature of the consent, the court refused to dismiss the issue.

Judge Ellis then determined that Eckstein, regardless of whether the magazines were seized pursuant to the warrant or pursuant to the manager's consent, was entitled to their return.

The court then found that the United States Attorney's letter was not an attempt to pressure Eckstein into a certain course of action "by a means separate and independent from the judicial system." The burden of defending against a single, legitimately instituted, criminal obscenity prosecution is not, by itself, a constitutionally objectionable prior restraint, noted the court. The search warrant upon which the investigators relied was overly broad and the implementation of the warrant may have been an actionable wrong for which Eckstein would be entitled to damages. But Eckstein could not successfully claim that the seizure restrained her from doing any business whatsoever with regard to sexually explicit materials. In all, Eckstein was not entitled to recover any damages other than those "directly flowing" from the deprivation of the publications that were actually seized.

Judge Ellis determined that the government parties' activities did not result in a prior restraint of Eckstein's First Amendment rights or a constructive taking of Eckstein's inventory.

The court declined Eckstein's request to adjudicate the obscenity or non-obscenity of each of the sexually explicit magazines in the bookseller's inventory, noting that Eckstein might be investigated or indicted in the future for violating section 1466 based on the unknown content of future editions of the magazines.

Eckstein v. Cullen, 803 F.Supp. 1107 (E.D.Va. 1992) [ELR 15:5:10]

Court issues rulings in contempt proceeding involving use of doll designer's name

In February 1992, a Federal District Court in Pennsylvania entered a preliminary injunction which, in part, barred Robin F. Woods and the Alexander Doll Company from promoting or advertising that any dolls, manufactured by Alexander, for which Woods provided any services, were collectible, might or would increase in value, were part of a collection or a limited production run, were serialized or numbered, were accompanied by a certificate of authenticity or other documentation, were signed or otherwise identified with

Robin F. Woods, or were only available from an exclusive source, or a limited number of sources, at retail.

The injunction, according to Federal District Court Judge Lee, was based on the restrictive covenant against competition agreed to between Woods and Robin Woods, Inc. as part of the consideration for the investment in the company made by the Pittsburgh Seed Fund. Woods agreed not to provide services to any other organization in connection with products competing, directly or indirectly, with the products of Robin Woods, Inc.; the company's business was defined in the agreement as the "business of manufacturing, marketing and selling collectible dolls."

Judge Lee noted that injunctive relief also was based on a provision in purchase agreement warranting that Robin Woods, Inc. possessed all right, title and interest in certain intangible property, such as trademarks, service marks and copyrights. The name "Robin Woods" had acquired a secondary meaning in the doll industry and to the doll buying public, observed the court. At the time of the injunction there was a great likelihood of public and industry confusion as to the source of "Robin Woods" dolls, and it was found that the trade name and other marks, although unregistered, were entitled to protection under the Lanham Act.

Robin Woods, Inc. subsequently filed a motion for contempt, claiming that the Woods parties willfully violated the court's order in promoting and advertising a 1992 line of dolls, known as "Let's Play Dolls." The dolls, designed by Woods, were promoted as the work of "Alice Darling."

Judge Lee found that there was no likelihood that the introduction of the "Let's Play Dolls" line of dolls into the market in 1992 caused confusion among retailers or consumers; that the Woods parties did not appropriate the goodwill associated with the trade name "Robin

Woods" and the other protected "Robin Woods" trademarks; and that the dolls designed by Woods for the "Let's Play Dolls" line were not collectibles and were not substantially similar to the dolls identified as collectible dolls in the court's February 1992 order.

It was found, however, that the Woods parties violated the court's order in advertising that the dolls manufactured by Alexander were designed by Woods; in identifying "Alice Darling" as Mrs. Woods and as the designer of "Let's Play Dolls;" and in certain other respects arising from the identification of Woods' services on behalf of the Alexander's dolls.

Judge Lee determined that Robin Woods, Inc. did not establish that the Woods parties violated the February 1992 order, except as to the identification of Woods, as noted above, and that any competition created by the "Let's Play Dolls" line was in the play doll market and was prohibited neither by the agreement of the parties nor by the terms of the preliminary injunction.

After careful consideration of the issue of personal-name-as-trademarks and after applying the ten factor test to determine the likelihood of consumer confusion, the court found that there was no likelihood of confusion between Robin Woods, Inc.'s business of manufacturing and selling collectible dolls and the Woods parties' business of manufacturing and selling play dolls. Woods' agreement with the company did not preclude the designer from taking advantage of her own individual reputation and the injunction did not prohibit Woods from all association with her given name for all time. The Woods parties did not attempt to arrogate the goodwill of the company and did not falsely designate any of their products as associated with those of Robin Woods, Inc.

Robin Woods, Inc. did not establish that any of its lost sales, orders or profits were caused by the Woods parties' post-injunction conduct or by any confusion that conduct might have caused - the evidence disclosed several other causes of the company's losses. The court therefore determined that Robin Woods, Inc. was entitled to attorneys' fees associated only with the contempt litigation and to about $107,000 as the cost of management's time and expense in preparing for such litigation.

Robin Woods, Inc. v. Woods, 815 F.Supp. 856 (W.D.Pa. 1992) [ELR 15:5:11]

Radio station license proceeding is remanded for review of integration of ownership factor

In January 1989, Flagstaff Broadcasting Foundation submitted an application to the FCC to build and operate a new FM radio station in Flagstaff, Arizona. The principals of the Foundation, as described by Federal Court of Appeals Chief Judge Mikva, were "low to middle-income women of color who have devoted most of their adult lives to community activism and civic duty. They have all held management positions in community-related organizations ...three of the women [were] long-time residents of Flagstaff."

The women proposed to serve not only as owners of the radio station, but also as the Board of Directors, with the responsibility for establishing station policies and supervising its staff.

The Commission denied Foundation's application and granted the application of the intervenor, Flagstaff Broadcasting Partnership on the basis that Partnership received a one hundred percent "integration" credit; Foundation had received no integration credit.

Integration is one of six criteria the Commission applies when considering competing applications for broadcasting licenses. According to the Commission, a station owner is "integrated" into management when his/her involvement amounts to "full-time active participation in day-to-day operations."

The Administrative Law Judge determined that Foundation's principals would not be integrated since they planned to serve as directors rather than full-time managers.

When Foundation questioned the reasonableness of the integration policy, the Commission responded that it did not consider "the delegation management function to employees as the functional equivalent of integration;" this statement, declared Judge Mikva, did not constitute a rational explanation for the Commission's adherence to the integration policy or an explanation of why Foundation's alternative means of furthering the policy was unacceptable.

The court reminded the Commission that, on remand, Foundation was entitled to a reasoned response to its claim that its proposal would further the stated objectives of the integration policy better than competing broadcasters.

Flagstaff Broadcasting Foundation v. Federal Communications Commission, 979 F.2d 1566 (D.C.Cir. 1992) [ELR 15:5:12]

Court orders trial on whether wiretap laws apply to certain modified satellite television descramblers

As reported at ELR 14:5:9, Stephen L. Shriver and other parties were indicted under certain provisions of the wiretap laws, 18 U.S.C. section 2510 et seq., as amended by the Electronics Communications Privacy Act of 1986 and Section 705(a) of the Communications Act of 1934, 47 U.S.C. section 605(a), for allegedly conspiring to manufacture and sell electronic devices known as "modified descramblers." The government claimed that the descramblers were used for the surreptitious interception of wire, oral or electronic communications.

A Federal District Court, before trial, granted the Shriver parties' motion to dismiss the counts arising out of the wiretap laws, finding that the descramblers were not within the spectrum of prohibited devices and that the challenged conduct was governed exclusively by Section 705.

A Federal Court of Appeals has reversed the District Court's decision and remanded the matter with instructions for an evidentiary hearing. The court considered whether, in expanding the scope of the wiretap laws to cover satellite transmissions, Congress meant to prohibit the interception thereof by modified descramblers. It was found that under the plain meaning of section 2511, the intentional use of modified descramblers was prohibited.

In turning to section 2512, the Shriver parties argued that the modified descrambler, despite its illegitimate purpose, still was primarily useful for the legitimate reception of satellite transmissions for which the owner already had paid or for transmissions not requiring authorization.

The court pointed out that section 2512 applies to only "a relatively narrow category of devices whose principal use is likely to be for wiretapping or eavesdropping [or intercepting electronic communications]...[the] crucial test is whether the design of the device renders it primarily useful for surreptitious listening" (emphasis quoted by the court). Section 2512 requires a factual inquiry into the actual design of the device allegedly manufactured or sold by a party charged under the statute; without such an inquiry, it would be impossible to determine whether the device is or is not covered by the statute, stated the court, in concluding that the applicability of section 2512 to a particular device is a question of fact that must go to trial.

United States v. Shriver, 989 F.2d 898 (7th Cir. 1993) [ELR 15:5:12]

Court orders CBS to turn over unbroadcast tape of Secret Service search to criminal suspect

The government accused Babatunde Ayeni, together with other parties, of conspiring to commit and committing credit card fraud. Ayeni subpoenaed an unbroadcast videotape produced by CBS News during a lawful search of his apartment by Secret Service agents.

A Federal District Court in New York has denied CBS' motion to quash the subpoena, although allowing CBS to block out the identity of a confidential source. CBS also was directed to obscure, upon request, the identity of Ayeni's wife and child, who were present during the search but were not parties to the action.

A CBS News camera crew for the show "Street Stories," hosted by Ed Bradley, had accompanied the agents searching Ayeni's apartment and filmed for about twenty minutes.

Ayeni argued that the videotape might contain information relevant to his motions to dismiss the indictment and to suppress certain evidence, and to his defense at trial.

CBS consented to an in camera review of the tape. As described by Judge Jack B. Weinstein, the tape tracked the agents' search, often focusing in on specific pieces of paper, including personal letters, banking documents and a paycheck stub indicating Ayeni's employer and salary. The comments of an agent who apparently was in charge could be heard on the CBS tape; the agent, while standing in the apartment, described the methods used in credit card fraud. According to Judge Weinstein, "the imputation of [Ayeni's] guilt is unmistakable." After having found no evidence of credit card fraud, the agent left the apartment, expressing "a continued belief that [Ayeni] is a participant in the conspiracy."

Judge Weinstein, after noting that the First Amendment privilege for newsgathering is not absolute, found that the tape was relevant to Ayeni's constitutional right to a jury trial. The tape contained potentially exculpatory evidence, indicating that an "exhaustive search" of the apartment did not reveal "a shred of evidence of credit card fraud." The value of the tape to Ayeni's case, in terms of its potential effect on a jury would be "extremely high," observed Judge Weinstein. The tape would provide Ayeni "a window through which he could demonstrate to the jury with extraordinary clarity the government's zeal to arrest him and its failure to produce any evidence after tearing apart his home."

"By inviting CBS to accompany it on its search, the Secret Service may well have provided a basis for a finding of not guilty," observed Judge Weinstein, who continued by commenting that "the criminal may go free, not because the constable has blundered, but because the Secret Service and CBS have abused criminal process in a way the average citizen may find unacceptable."

It also was apparent to the court that the material was not unobtainable from any other source.

Judge Weinstein then stated that any First Amendment privilege operated "weakly, if at all," in this case. CBS entered Ayeni's home without his consent, and participated in the execution of a search warrant, in effect, under color of official right. Ayeni's wife believed the camera crew to be a part of the government team. CBS had not identified itself or requested permission to be present. That CBS both trespassed upon Ayeni's home and engaged in conduct, "with the connivance of the government, directly contrary to Fourth Amendment principles," were significant factors in the court's evaluation of CBS's newsgathering privilege. The First Amendment "is a shield, not a sword," recalled the court. To both approve CBS's violation of Ayeni's privacy and rule that he would not be permitted to use the private images that were taken from him in the course of that violation would be "intolerable."

Although emphasizing that the issue was between Ayeni and CBS, the court declined to ignore the government's role in the matter, noting, in particular, that inviting private citizens whose presence is not necessary to the execution of the warrant to join the search party is "a failure of public trust - one that indicates a disregard of the important values at stake when the government enters a person's home." The Secret Service agents apparently disregarded the direction of the United States Attorney not to permit CBS's participation in the search. While not rising to the level of misconduct required to dismiss an indictment, the Secret Service's behavior "cannot be tolerated," declared Judge Weinstein,
who concluded by ordering the United States Attorney to bring the matter and the court's opinion to the

attention of the highest authority in the United States Secret Service.

United States of America v. Sanusi, 1992 U.S.Dist. LEXIS 17741, 20 Med.L.Rptr. 2054 (E.D.N.Y. 1992) [ELR 15:5:13]

California reporters' "shield law" applies to freelance writers

Robert Anthony Von Villas and Richard Herman Ford were convicted of charges of conspiracy to commit murder and attempted murder and of armed robbery, and were sentenced to prison.

In affirming the trial court judgment, a California appellate court considered an issue relating to an article about the case written by Jan Golab; the article, entitled

"The Dark Side of the Force," was published in the March 1985 issue of Hustler magazine. When Von Villas and Ford served a subpoena duces tecum on Golab demanding the production of notes and taped interviews, Golab moved to quash the subpoena.

The court granted Golab's motion to quash with respect to the unpublished material gathered for the Hustler article and ruled that Golab, a freelance writer, qualified for the "shield" protection under Article I, Section 2, subdivision (b) of the California Constitution and Evidence Code section 1070. The court stated that the material would not provide any impeaching evidence and that certain tapes did not contain inconsistent statements by a prosecution witness not already made available to Von Villas and Ford from the record. There was "no reasonable possibility" that any of Golab's material would exonerate Von Villas or Ford. In balancing Golab's rights to maintain the confidentiality of his unpublished information with the rights of Von Villas and Ford to a fair trial, the judge ruled that Golab's rights would prevail.

The appellate court found that the "shield law" encompassed Golab, a freelance writer. Although Golab was not "connected with or employed" by a magazine, the shield protected the writer both before and after the execution of the written Hustler contract, stated the court.

Furthermore, the trial court had confirmed that the unpublished material would not be used to impeach any prosecution witness. Since the objective of Von Villas and Ford was to acquire material to impeach a key prosecution witness, the trial judge appropriately granted the motion to quash.

Even assuming that Von Villas and Ford were successful in making a sufficient showing to overcome the shield claim, it was clear to the appellate court that the alternative sources available supported the trial court's decision to grant the motion to quash.

The court concluded that it was bound by the decision in Delany v. Superior Court, 50 Cal. 3d 785 (ELR 12:3:15; 12:6:19) and rejected the argument that the right to a fair trial was of such magnitude that upon a threshold showing that information held by a newsperson and not available from other sources would assist the defense, the newsperson's interests must cede to a party's right to a fair trial. To accept such an argument "would fly in the face of the Delaney majority decision," concluded the court.

The California Supreme Court denied Von Villas and Ford's petitions for review.

People v. Von Villas, 1992 Cal.App.LEXIS 1212, 10 Cal.App.4th 201 (Cal.App. 1992), hearing den., 1993 Cal.LEXIS 170 (Cal. 1993) [ELR 15:5:14]

Briefly Noted:

Pepsi Jingle.

Arthur Takeall, a Maryland ventriloquist, claimed that he wrote the slogan "You got the right one, Baby, uh-huh!" which was used as part of an advertising campaign for Diet Pepsi.

Federal District Court Judge Smalkin first declined to hold, on summary judgment, that the slogan so lacked originality as to be unworthy of copyright protection.

The court then determined, as a matter of law, that Takeall's work was not so widely disseminated as to support a reasonable factfinder's conclusion, by a preponderance of the evidence, that Pepsico's creative staff had access to such work.

Takeall claimed that when he sought corporate sponsorship of his anti-drug campaign, he submitted proposals to several Pepsi-affiliated companies. But Judge Smalkin stated that Takeall produced no evidence from which it could be found that the creators of the Pepsi jingle had direct or indirect access to the slogan, even taking into account the "striking similarity" between the slogan and Takeall's work.

The court, in granting Pepsico's motion for summary judgment, rejected Takeall's state law claims for breach of contract and unjust enrichment as well as claims alleging reverse confusion, passing off, and unfair competition.

Takeall v. Pepsico, Inc., 809 F.Supp. 19 (D.Md. 1992) [ELR 15:5:14]

Jurisdiction.

Dan Seals sued Steve Callis to recover the balance due on a contract by which Seals agreed to perform with his band in Columbia, Missouri.

A Missouri appellate court has affirmed a trial court decision in favor of Seals for about $3,400. The court rejected Callis' claims that a forum selection clause in the contract required that the action be brought in Tennessee. It was noted that Seals subjected himself to the jurisdiction of the Missouri court when he filed suit and when the case was tried there. Seals waived venue in Tennessee, and Callis showed no prejudice resulting from the lawsuit being filed and tried in Callis' home county.

The trial court had personal and subject matter jurisdiction, concluded Judge Turnage.

Seals v. Callis, 848 S.W.2d 5 (Mo.App. 1992) [ELR 15:5:14]

Copyright Infringement/Music.

A Federal District Court in Mississippi has granted summary judgment to Almo Music Corp. and to several other copyright owners in an action alleging that Columbus radio station WACR-FM, without authorization, broadcast fourteen copyrighted musical compositions. T&W Communications, the owner of the station, did not respond to the Almo parties' motion, and also had failed to respond to requests for admissions.

The court noted that WACR was not licensed to perform the songs and that the Almo parties established each of the elements of infringement. The court found that T&W's conduct revealed a willful violation of the copyright laws; awarded statutory damages of $28,000; granted injunctive relief restraining T&W from infringing on the Almo parties' copyrights in the subject musical works; and awarded costs and attorneys' fees.

Almo Music Corp. v. T&W Communications Corp., 798 F.Supp. 392 (N.D.Miss. 1992) [ELR 15:5:15]

Cable Rates.

The Cable Act of 1984 prohibited municipalities or other cable franchising authorities from regulating cable television service rates after December 29, 1986. Local regulation of cable service rates was allowed in those areas "not subject to effective competition," as defined in regulations issued by the Federal Communications Commission. Some local rate regulation of pre-existing cable systems was allowed for the first two years after the effective date of the Cable Act.

The Commission found that five Illinois municipalities, among other communities, were within areas with effective competition. The municipalities had entered agreements, prior to the enactment of the Cable Act, to receive cable television service from Sammons Communications; the agreements generally required the municipalities' approval of increased service rates.

Sammons, during early 1987, increased its cable service rates in the municipalities; the company did not obtain approval of the increases.

The municipalities sued Sammons and other cable operators, alleging breaches of franchise contract provisions restricting rate increases to cable subscribers.

Federal District Court Judge Norgle first referred to the decision in ACLU v. FCC, 823 F.2d 1554 (D.C.Cir. 1987, cert. denied, 485 U.S.959) in which it was found that the Commission's signal availability standard, the basis for determining whether there was effective competition within an area, was "arbitrary and capricious."

Under the Commission's new standard, implemented in late 1988, the municipalities were not considered areas with effective competition.

Sammons claimed that it was entitled to retain the proceeds from the rate increases imposed between January 1987 and November 1988.

Judge Norgle pointed out that the cable operators had agreed to rate regulation by the municipalities under their franchise agreements; had not relied, in deciding to do business in the municipalities, on the Cable Act or the initial FCC regulations which deregulated the franchises at issue; and would not suffer any undue injustice or hardship from the retroactive application of the ACLU decision. The franchise agreements entitled the cable operators to reasonable rate increases; forcing the operators "to rebate to subscribers any portion of the disputed increases which may have been excessive would not be unjust," stated Judge Norgle, "but would simply be forcing them to abide by the bargain they struck in the franchise agreements."

In all, the court declined to find, for purposes of summary judgment that the ACLU decision or the Commission's maintenance of its initial effective competition rules while those rules were being revised, was anything more than a temporary "safe harbor" for the cable rate increases imposed by Sammons.

The court also denied the municipalities' motion to remand the matter to state court.

Ottawa, Illinois v. Sammons Communications, Inc., 795 F.Supp. 261 (N.D.Ill. 1992) [ELR 15:5:15]

Cable Television.

Manhattan Cable Television alleged that The Cable Doctor, Inc. installed an additional outlet for a Manhattan Cable subscriber for a fee which allowed the subscriber to receive the cable signal provided by Manhattan Cable on a second television set at the subscriber's home. Manhattan Cable's services include providing cable programming for one television set, and, for an additional fee, providing cable programming for additional televisions at the subscriber's home.

Manhattan Cable alleged that Cable Doctor's unauthorized installation of an additional outlet violated section 605(a) of the Communication Act of 1934 and section 553(a)(1) of the Cable Communications Policy Act of 1984.

In granting Cable Doctor's motion to dismiss Manhattan Cable's complaint, a Federal District Court in New

York found that Cable Doctor's conduct was not within the scope of section 605(a). The provision states that "no person receiving, assisting in receiving, transmitting, or assisting in transmitting any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents,...or meaning thereof except through authorized channels of transmission or reception, (1) to any person other than the addressee."

Judge Lasker noted that the installation of a second outlet for the reception of a signal at a subscriber's home did not involve the interception and descrambling of encoded cable programming.

With respect to section 553(a)(1), the court found that legislative history and case law indicated that the section also did not cover Cable Doctor's conduct. And the company's activities did not violate New York state law, concluded Judge Lasker.

Manhattan Cable Television, Inc. v. The Cable Doctor, Inc., 802 F.Supp. 1103 (S.D.N.Y.1992) [ELR 15:5:15]

Cable Television Access.

An Illinois appellate court has affirmed a trial court decision granting Continental Cablevision's motion for a preliminary injunction which, in part, enjoined various condominium associations from interfering with the servicing of existing customers, and granting an order which conditionally approved a plan to install cable television for another resident.

Continental and Triumvera Homeowners' Association had reached an agreement whereby the company was allowed to enter onto the common areas of the Triumvera property, install a cable television system and maintain its equipment and services. Apparently Triumvera terminated the agreement for alleged non-performance on the part of Continental.

Presiding Judge Egan found that the state's Cable Access statute was constitutional. The statute, among other provisions, states that where a county grants a franchise to construct, operate or maintain a cable television system within a designated franchise area, no property owner may forbid or prevent any occupant of any building from receiving cable television service from the cable company. The court found that Continental sufficiently established the elements necessary to warrant the issuance of a preliminary injunction.

Continental Cablevision of Cook County, Inc. v. Miller, 606 N.E.2d 587 (Ill.App. 1992) [ELR 15:5:16]

Descrambler Seizure.

The United States government filed a forfeiture complaint against Anthony E. Goldberg alleging that certain electronic devices seized at his premises were unlawfully modified satellite decoders, manufactured and sold for the purpose of illegally intercepting encrypted signals of premium pay television programming networks such as HBO and ESPN.

A Federal District Court in Ohio granted Goldberg's motion to dismiss, holding that the Electronic Communications Privacy Act of 1986 did not extend to satellite descramblers.

A Federal Court of Appeals has reversed the District Court's decision. Judge Siler noted that the statute prohibits the internal interception of electronic communications; does not except the unauthorized receipt of satellite television transmissions from its coverage; and imposes no "surreptitiousness" requirement. Thus, Goldberg, in manufacturing and using modified descramblers for the purpose of intentionally intercepting satellite television programming, violated section 2511 of the statute.

After careful consideration, the court concluded that Goldberg was subject to criminal prosecution under the statute and that the seized property was subject to forfeiture.

United States of America v. One Macom Video Cipher II, SN A6J050073, 1993 U.S.App.LEXIS 1607, 985 F.2d 258 (6th Cir. 1993) [ELR 15:5:16]

Satellite Descramblers.

A Federal Court of Appeals has affirmed a decision of a panel of the court holding that a cloned satellite television descrambling device, which enabled satellite television viewers to receive premium channel broadcasts without paying the required subscription fees, fell within the criminal prohibition on surreptitious interception devices of 18 U.S.C. section 2512(1)(b).

Mark Splawn allegedly cloned computer chips, which stored the electronic addresses from authorized descrambling devices, and inserted them into other descrambling devices. Splawn, according to Judge Baldock, then sold the unauthorized descrambling devices which would permit satellite television viewers to receive premium channel broadcasts without paying the required subscription fee. The panel affirmed Splawn's convictions, but invited rehearing en banc due to contrary decisions from other circuits as to whether

Congress intended the Wiretap Law to extend to Splawn's conduct.

Judge Baldock, after reviewing the statutory language and case law, concluded that cloned satellite television descramblers were within the plain meaning of devices prohibited under section 2512(1)(b), and that the fact that Splawn's conduct was specifically prohibited under 47 U.S.C. section 605 was not a barrier to Splawn's prosecution under section 2512(1)(b).

United States v. Splawn, 982 F.2d 414 (10th Cir. 1992) [ELR 15:5:16]

Satellite Descramblers.

A jury found Duane Davis guilty of manufacturing and selling a device used for the unauthorized decryption of satellite cable programming; unauthorized reception of encrypted radio communications; copyright infringement; manufacturing and selling an electronic device primarily useful for the surreptitious interception of electronic communications; and interception of encrypted electronic communications.

A Federal Court of Appeals, in affirming Davis' convictions of violating various federal statutes, first described the operation of microprocessor chips in descrambling programming and various methods of video piracy. Davis apparently used a combination of methods to illegally modify and sell VideoCipher II units.

Judge Beam found that Davis' conduct was covered by the Electronic Communications Privacy Act of 1986, and that Davis could be prosecuted under the Act, as well as under the Communications Act of 1934.

In dissent, Judge John R. Gibson expressed the view that Davis' conduct in selling descramblers was not covered by the Wiretap Act. Judge Gibson would have reversed Davis' convictions for violations of certain provisions of the statute.

United States v. Davis, 978 F.2d 415 (8th Cir. 1992) [ELR 15:5:16]

Broadcasting/Title VII.

Upon charges filed with the Equal Opportunity Commission by Debra Holden, the commission claimed that Louisiana Network, Inc. violated Title VII of the Civil Rights Act by paying Holden and other black "anchor reporters" less than white "anchor reporters" on the basis of their race. United States Magistrate Judge Stephen

C. Riedlinger, in his capacity as special master, recommended the entry of judgment in favor of Louisiana Network. It was found that although Holden and other black reporters for the company's radio station were paid less than three white reporters, the black reporters were not similarly situated in terms of their past work experience. The special master determined that the commission did not prove that a discriminatory reason more likely than not motivated Louisiana Network's salary considerations or that the broadcaster's reasons for the salary differences were pretextual.

Chief Judge John V. Parker, stating that the special master's report was legally correct and that the factual findings were not clearly erroneous, adopted the report; entered judgment in favor of Louisiana Network; and dismissed the matter.

Equal Employment Opportunity Commission v. Louisiana Network, Inc., 809 F.Supp. 1210 (M.D.La. 1992) [ELR 15:5:17]

Tax/Dealer "Tokes."

Wilmar Allen worked as a blackjack dealer in Las Vegas. As described by Federal Court of Appeals Judge Politz, casino dealers "traditionally receive tokes from patrons playing at their tables. Tokes take the form of bets placed by the patron for the dealer's benefit. Dealers typically pool and split the tokes received on each shift."

A Federal District Court granted summary judgment to the Internal Revenue Service, finding that tokes, like tips, are compensation for services, but are not gain from wagering transactions.

Judge Politz agreed that tokes are not wagering transactions for the dealer - the dealer "has no part in deciding to make the wager, and stands to lose nothing by it" - and that Allen therefore was not entitled to set off his gambling losses against any such gain.

Allen v. U.S. Government Department of Treasury, 976 F.2d 975 (5th Cir. 1992) [ELR 15:5:17]

Art.

In August 1964, a rare 17th century bronze statue was stolen from a New York art gallery. As described by Federal District Court Judge Robert L. Carter, Roland Hartman, then an art and antiquities dealer, acquired the bronze in 1965, from a fellow art dealer, for about $50,000. Apparently Hartman subsequently was informed that the statue was a stolen work, but Hartman never reported the transaction to any law enforcement agency and took the bronze along when he moved to California.

Hartman claimed that in 1980 he asked his son, Donald Hartman, to take the statue to New York, to sell the statue, and to share with Hartman the profits from the sale. The statue was sold at Sotheby's in November 1986 for $720,000. Hartman alleged that Donald told him that the proceeds of the sale would be held in escrow for three years.

Hartman sued Donald and Robert Harris, who purportedly received the sale proceeds as Donald's agent, to recover his share of the profits.

Donald argued that a contract to perform illegal acts would be void and unenforceable. Hartman stated that he was unsure about whether the bronze was stolen until the time of his deposition in the case. But the court pointed out that the evidence indicated that Hartman knew that the statue had been stolen when he entered into the agreement with Donald to sell it. This knowledge, stated Judge Carter, established the requisite mental state for a violation of the federal, California and New York statutes; the 1980 agreement therefore was void and unenforceable, as was any alleged agreement based on Donald's statements in 1986 concerning the escrow of the sale proceeds.

The court granted Donald and Harris' motions for summary judgment as to Hartman's contract and fraud claims, expressing regret that Donald, "who openly admits violating at least three criminal statutes and unabashedly uses these illegal acts to shield himself from liability, will benefit from this determination."

Hartman v. Harris, 810 F.Supp. 82 (S.D.N.Y. 1992) [ELR 15:5:17]

Art.

Opal Mennella agreed to purchase, from gallery owner Kurt E. Schon, a portrait painted by Sir Anthony Van Dyck. Mennella paid $50,000 to Schon, with the $300,000 balance to be paid in June 1988. By the end of the year, Mennella had paid only an additional $90,000. At that point, she demanded the authentication of the painting. Although Schon forwarded an expert's appraisal stating that the portrait was one of five copies by Van Dyck, Mennella sought to void the sale and recover the sum paid to Schon.

Schon eventually sent the painting to Christie's in London, where, in November 1989, it sold for more than $1.4 million.

Mennella, without knowledge of the London sale, filed an action for rescission of the sale and damages, alleging, in part, that the painting was a fraud. After being advised of the London sale, Mennella claimed that her purchase was complete, and that the London sale constituted a conversion.

A Federal District Court found that Mennella, although entitled to her payments and interest from the day of her demand, was not entitled to the proceeds of the London sale.

Federal Court of Appeals Judge Politz concluded that title to the painting passed to Mennella in April 1988. However, Mennella's refusal to perform amounted to anticipatory repudiation, stated the court, and her failure to pay the balance in the extended period allowed by Schon constituted an active repudiation of the contract.

Judge Politz next found that Schon "validly dissolved the contract by notice of default after it became obvious that Mrs. Mennella would not perform," and that Schon had legal title to the painting when it was sold in London.

The court concluded by stating that Mennella was entitled to the full return of her payments with legal interest from the date of the London sale of the portrait.

Mennella v. Schon, 979 F.2d 357 (5th Cir. 1992) [ELR 15:5:17]

"Fairness Doctrine."

In an action brought by the Arkansas AFL-CIO, Federal Court of Appeals Judge Beam first reviewed the background of the fairness doctrine and the repeal of the doctrine, in the late 1980s, by the Federal Communications Commission.

The instant matter arose from a dispute relating to the coverage of a ballot issue voted upon in Arkansas in November 1990. The AFL-CIO parties filed a complaint requesting a ruling that KARK-TV was not complying with the fairness doctrine in its coverage of the ballot issue. The Commission rejected the complaint.

Judge Beam, in affirming the Commission's decision, found that the case was not moot; that the court had jurisdiction to hear the appeal; and that the elimination of the fairness doctrine was "an appropriate agency response to changed circumstances."

Judge Gibson, in dissent, expressed the view that the Commission "erred in departing from the congressionally mandated fairness doctrine," and would have reversed the Commission's ruling.

Arkansas AFL-CIO v. Federal Communications Commission, 980 F.2d 1190 (8th Cir. 1992) [ELR 15:5:18]

"Green Marketing."

The Association of National Advertisers sued Daniel Lungren, in his official capacity as Attorney General of the State of California, challenging section 17508.5 of the state's Business and Professions Code, which regulates certain environmental claims used in advertising, i.e., "green marketing."

Federal District Court Judge Patel noted that the statute which added the challenged provision made it "unlawful for any person to represent that any consumer good which it manufactures or distributes is 'ozone friendly,' or any like term which connotes that stratospheric ozone is not being depleted, 'biodegradable,' 'photodegradable,' 'recyclable,' or 'recycled' unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission."

It was observed that the statute did not restrict non-commercial speech - advertisers were not prevented from commenting on environmental policy - and that the regulated speech was entitled to the qualified protection accorded commercial speech.

Judge Patel then commented that certain environmental advertisements were "at least potentially misleading to the public," thus justifying some form of regulation, and determined that the statute was "within constitutional parameters in restricting commercial expression."

The court found that in reviewing a commercial speech prohibition for facial vagueness which imposes criminal sanctions, the question is "whether the law affords fair notice to a businessperson of ordinary intelligence as to what conduct is illegal." The absence in the statute of any standard for establishing the meaning of "conveniently recycled" warranted the finding that that portion of section 17508.5 was unconstitutionally vague. Since the remainder of the statute was a constitutionally permissible regulation of commercial speech, only subsection (d) was invalid, concluded the court, in granting partial summary judgment for Lungren.

Association of National Advertisers, Inc. v. Lungren, 809 F.Supp. 747 (N.D.Ca. 1992) [ELR 15:5:18]

Radio Station License.

The Federal Communications Commission denied the application of Sarasota-Charlotte Broadcasting Corporation to operate a new FM radio station in Englewood, Florida and granted the application of Sandpiper Broadcasting, Inc. The Commission compared the applicants' proposed integration of ownership and management, and gave Sarasota no integration credit because the Equal Employment Opportunity statement filed as part of the company's application identified a non-owner as general manager. Sarasota subsequently identified its owner as the overall manager of the new station, but the Commission rejected this submission as "an impermissible variance" from the company's application and an improper upgrading of its comparative showing.

A Federal Court of Appeals has concluded that the Commission's peremptory rejection of Sarasota's integration proposal was arbitrary and capricious, reversed the Commission order, and remanded the case for further proceedings during which the Commission might accept and fully consider evidence relating to the integration of ownership and management by Sarasota.

Sarasota-Charlotte Broadcasting Corp. v. Federal Communications Commission, 976 F.2d 1439 (D.D.C. 1992) [ELR 15:5:18]

Freedom of Information Act.

In June 1992, The Nation magazine asked the CIA, the Department of Justice, the Department of Defense and the Department of State to release certain documents concerning H. Ross Perot, who, at the time, was an independent candidate for President. Various government agencies, citing privacy exemptions, asked the magazine to provide authorization for the release of any records. The Nation advised the agencies that it could not obtain Perot's consent and requested expedited processing for all non-exempt records.

Federal District Court Judge Joyce Hens Green found that the Nation did not establish a substantial likelihood of success on the merits. The magazine argued that it sought access to records necessary to inform the public about political candidates; that this objective was an "exceptional need or urgency;" and that the agencies should temporarily abandon their first-in, first-out processing scheme to give top priority to processing the magazine's request. The court stated that such a finding is "neither warranted under the applicable law, nor is it wise."

The Nation cited the apparent expedition by the State Department of Freedom of Information Act requests for information concerning the draft status, citizenship and student visa status of then-Governor Clinton. Judge Green stated that the expedition of the Clinton requests was not warranted and violated State Department regulations. If any documents relating to the Clinton requests had been released, if the Department of State continued to provide expedited review of Clinton requests after it discovered its alleged mistakes, or had the Department not returned the Clinton requests to the proper places in the "queue," it was likely, according to the court, that the Freedom of Information Act, the Administrative Procedure Act, the First Amendment, "or a combination thereof," would have required the State Department to expeditiously process the magazine's request.

The court also found that the magazine parties, in addition to failing to show a substantial likelihood of success on the merits, did not establish that the absence of emergency relief would cause irreparable injury; that granting the relief sought would harm third parties by delaying the processing of many other requests made before that of the Nation; and that the public interest did not favor the entry of a temporary restraining order.

The Nation Magazine v. Department of State, 805 F.Supp. 68 (D.D.C.1992) [ELR 15:5:19]

Political Advertising.

Daniel Becker, a candidate for the United States Congress in Georgia, attempted to purchase air time on WAGA-TV for paid political advertising. A segment of Becker's advertising videotape was entitled "Abortion in America: The Real Story." WAGA argued that the videotape was indecent and sought a temporary restraining order and petition for declaratory judgment that the station was not required to air the material during the time requested by Becker, i.e., between 4:00 and 5:00 P.M. on Sunday, November 1, 1992, immediately following the broadcast of the Atlanta Falcons-Los

Angeles Rams football game. WAGA offered to air the videotape between 12:00 midnight and 6:00 A.M.

Federal District Court Judge Robert H. Hall, after finding that the court possessed jurisdiction in the matter, found that the Federal Communications Commission's prohibition against the broadcasting of indecent material constituted an exception to the Commission's requirements of reasonable access, equal opportunities and no censorship.

Judge Hall next found that the videotape was indecent under 18 U.S.C. section 1464. The segment at issue depicted the actual surgical procedure for abortion and did so in a manner which was patently offensive according to contemporary community standards, stated the court, which proceeded to find that "the images, words, and depictions in the videotape would be readily understandable to children in the audience."

The court stated that WAGA presented sufficient evidence to support the conclusion that the videotape should be shown between 12:00 midnight and 6:00 A.M. in order to accommodate the interest in protecting children from indecent materials and Becker's right to broadcast his political advertisement.

The court's order and the station's conduct in accordance with the order would not constitute a prior restraint on Becker's speech in violation of the First Amendment in that the order "merely channels what is decidedly indecent material to a time slot that sufficiently reduces the chances of injury to the 'psychological well-being' of minors in the community."

Judge Hall, accordingly, granted injunctive relief restraining the Becker parties from requiring WAGA to air the videotape at any time other than the "safe harbor" hours; the court declined to enjoin any further activities by the FCC.

Gillett Communications of Atlanta, Inc. v. Becker, 807 F.Supp. 757 (N.D.Ga. 1992) [ELR 15:5:19]

Broadcasting/Candidate Access.

In August 1992, Griffin Television co-sponsored a political debate in conjunction with the Oklahoma League of Women Voters. Republican congressional candidates were given free access to station KWTV.

Charles Lamb, a Democratic congressional candidate contended that Griffin refused to grant Democratic candidates an equal opportunity to appear and debate, thus violating section 315(a) of the Communications Act of 1934.

A Federal District Court in Oklahoma has granted Griffin's motion to dismiss for lack of subject matter jurisdiction, stating that it is "well established" that there is no private cause of action of alleged violations of section 315(a), because the Federal Communications Commission has primary and exclusive jurisdiction.

Lamb v. Griffin Television, Inc., 804 F.Supp. 1430 (W.D.Okla. 1992) [ELR 15:5:20]

Adult Use Businesses.

The operators of video rental stores in Monticello, Minnesota challenged ordinances regulating the location, advertising and licensing of adult use businesses.

A Federal District Court has found that the city failed to show that its regulatory scheme was narrowly tailored to apply only to the category of businesses shown to produce certain unwanted secondary effects of adult uses. The record did not indicate that all businesses dealing in sexually explicit material, regardless of the degree to which they deal in such material, create adverse effects such as crime and urban blight, and the licensing requirement, as it related to adult use/accessory businesses, such as video rental stores, therefore was ruled unconstitutional.

The court next found that the licensing procedure was unconstitutional in that the ordinance did not set forth the criteria for persons and places eligible for licenses; did not contain narrow, objective and definite standards to control the licensing authorities; and did not preserve the status quo during the licensing application process.

The ordinance also prohibited adult use/accessory businesses from using "both internal and external advertising and signing of adult material and products." The city's total ban on speech that was not misleading and did not concern unlawful activity violated the First

Amendment, concluded the court, in granting the video parties' motion for summary judgment and enjoining the city from enforcing the challenged sections of the ordinance.

Wolff v. City of Monticello, 803 F.Supp. 1568 (D.Minn. 1992)

Trade Name Infringement.

James and Linda Bingham sold auto racing and sports car equipment under the trade names "Winner's Circle" and "Winner's Circle Speed and Custom." Inter-Track Partners obtained an Illinois service mark registration for the mark "The Winner's Circle," and opened an off-track betting parlor and restaurant under that name.

In response to the Binghams' action for trade name infringement, an Illinois trial court entered judgment on behalf of Inter-Track.

In reversing the trial court decision, Judge McCuskey found that the Binghams' mark was "suggestive," and thus subject to protection - the name required "the operation of a person's imagination" to connect it with the Binghams' goods and services. The party who first uses a term in a particular market obtains the exclusive right to use a suggestive term as a trade name; state registration of a trade name does not establish any substantive rights, stated the court.

Judge McCuskey then found that there was substantial evidence of actual confusion; that based upon the similarity of the marks and Inter-Track's attempted concurrent use of the mark in the same market, a likelihood of confusion would exist between the businesses; and that the matter would be remanded for a determination of the Binghams' protected "trade area."

The court declined to order the cancellation of Inter-Track's Illinois registration of the service mark; it did not appear that the mark was obtained fraudulently or contrary to trademark law.

Judge McCuskey further found that the trial court erred in refusing to enjoin Inter-Track's use of the trade name and in refusing to award attorneys' fees; the court awarded the Binghams attorneys' fees of about $44,000.

Bingham v. Inter-Track Partners, 600 N.E.2d 70 (Ill.App. 1992) [ELR 15:5:20]

"John 3:3" Sign Display.

On January 4, 1992, the Washington Redskins hosted a National Football League football game at R.F.K. Stadium in Washington, D.C. Edwin Thate, Jr. attended the game and placed a scripture sign with the reference "John 3:3" on the railing at the 20 yard line. The stadium manager removed the sign during half-time.

Federal District Court Judge Joyce Hens Green, in entering a consent decree, final judgment and order to resolve an action brought by Thate, noted that Thate's sign was not obscene, vulgar, indecent, inflammatory, or in bad taste and did not pose a sight line problem or obstruct the vision of those on or off the playing field or provide free advertising for commercial products or services.

Judge Green enjoined the District of Columbia Armory Board from taking any action to prevent Thate, or any other person, from displaying the type of sign and/or any banner such as "John 3:16," or other similar religious messages or references, or from otherwise obstructing the display of such signs, provided that the signs would not interfere with any person's view of the event occurring at the stadium or otherwise interfere with play, or stadium equipment.

The Armory Board agreed to place a nondiscrimination clause in all future leases of the R.F.K. Stadium with the Redskins, and to pay damages to Thate in the amount of $3,500, as well as about $31,000 in costs and attorneys' fees.

Thate v. District of Columbia Armory Board, 804 F.Supp. 373 (D.D.C. 1992) [ELR 15:5:20]

"John 3:16" Sign Display.

On October 17, 1990, the Cincinnati Reds played the Oakland Athletics in Game Two of the World Series. The Reds' banner policy did not specifically prohibit religious signs at Riverfront Stadium, but stated that banners and signs must be in good taste, may not interfere with the sight-line of the batter, pitcher or umpire looking down the foul line, and may not obstruct the view of anyone in the stands. According to the team, the policy has been understood to mean that all allowable signs must be game-related. After Game One of the 1990 World Series, Major League Baseball informed the Reds not to allow any banners with a religious content to be displayed in the stadium.

The Reverend Guy Anthony Aubrey arrived at Game Two with a John 3:16 sign. The message on the two foot by three foot sign stated: "[f]or God loved the world so much that he gave his only Son so that anyone who believes in him shall not perish but have eternal life."

Aubrey claimed that security personnel grabbed the sign away from him while he was on his way to hang the sign in a permissible location. The city asserted that Aubrey was holding up his sign behind home plate. Various security officers informed Aubrey that he could not display his sign because it was not related to baseball.

When Aubrey sued the city, a Federal District Court, emphasizing the limited nature of its holding, found that the Reds' banner policy, as written, was substantially overbroad and vague on its face. It also was found that the city's policy with respect to enforcing the banner policy was affirmatively linked to the alleged denial of Aubrey's constitutional rights.

The court, accordingly, granted Aubrey's motion for partial summary judgment and denied the motions for summary judgment brought by the city, the Reds, and a private security company.

Aubrey v. City of Cincinnati, 1993 U.S.Dist.LEXIS 3151, 815 F.Supp. 1100 (S.D.Ohio 1993) [ELR 15:5:21]

Libel.

In the ongoing dispute between Kennett Love and Jonathan Kwitny (ELR 14:5:18; 13:12:17; 11:3:14), Love brought a defamation action arising from Kwitny's 1987 appearance on a cable television program hosted by Diane Abrams.

During an interview conducted by Abrams, Kwitny mentioned that a Federal District Court had dismissed certain libel causes of action brought by Love. Love claimed that Kwitny's book, "Endless Enemies," falsely suggested that during the 1953 coup in Iran, Love, then a reporter for the New York Times, engaged in certain activities on behalf of the United States government.

A New York appellate court has affirmed a trial court decision granting the motions brought by Kwitny and the Abrams parties to dismiss Kwitny's claims.

The court noted that Kwitny relied on an unpublished paper written by Love in 1960, in which paper Love discussed the role of the United States government in restoring the Shah in Iran in 1953 and also relied on Love's articles in the New York Times about the coup as well as subsequent interviews with the journalist. In view of the material written by Love, the court found that Kwitny did not act in a grossly irresponsible manner in describing Love's conduct in 1953. It also was found that certain challenged statements constituted the nonactionable expression of opinion.

The fact that Love had brought an earlier action against Kwitny did not serve to substantiate Love's contention that Kwitny acted with actual malice when he republished the allegedly defamatory statements. Love did not establish the factual falsity of any of the statements attributed to him by Kwitny, again because such statements were derived from Love's own writing.

The producers and host of the cable program had no substantial reason to question the accuracy of anything Kwitny said on the program, particularly since the Federal District Court action already had been dismissed when Kwitny appeared on the program.

The court affirmed the dismissal of Kwitny's counterclaim, stating that there was no evidence that the instant action was begun or continued in bad faith.

Love v. Kwitny, 587 N.Y.S.2d 433 (N.Y.App. 1992) [ELR 15:5:21]

Athlete Suspension.

As described by Federal Court of Appeals Judge Beam, Luiet Jamal Coleman, a varsity basketball star at the University of Missouri, stole about $700 by using forged bookstore refund slips. Coleman admitted the thefts, and pleaded guilty to a misdemeanor charge of stealing.

A school conduct committee, after a hearing, suspended Coleman for one semester. The university chancellor upheld the suspension.

In response to Coleman's action under 42 U.S.C.section 1983, alleging the violation of his constitutional rights, a Federal District Court issued preliminary and permanent injunctive relief prohibiting the suspension, finding in a written order, that the university disciplinary proceeding was "arbitrary and capricious" and violated Coleman's constitutionally protected right to due process and equal protection.

In reversing the District Court's ruling, Judge Beam found it impossible to determine from the record any evidence that the imposed discipline resulted in arbitrary and capricious treatment or violated any of Coleman's constitutional rights; the matter was remanded with instructions to dissolve the injunction, to vacate all other substantive orders, and to dismiss the case with prejudice.

Coleman v. Monroe, 977 F.2d 442 (8th Cir. 1992) [ELR 15:5:21]

Student Athlete Eligibility.

A Federal Court of Appeals has affirmed, on different grounds, a District Court order permanently enjoining the Indiana High School Athletic Association from declaring Ryan Crane ineligible to play high school athletics. The association had declared Crane ineligible pursuant to its transfer eligibility rules.

Crane, in accordance with a change in custody arrangements, transferred high schools between his freshman and sophomore years. As a transfer student, he was ineligible to participate in athletics for one year. The principals of both schools recommended that the association declare Crane eligible for all interschool athletics, finding that there was no evidence that the student transferred for athletic reasons.

The association, without making any explicit findings about whether Crane's transfer was for athletic reasons or the result of undue influence, rejected the recommendations and declared Crane eligible only for junior varsity athletics; Crane's new school did not have a junior varsity golf team. After losing an appeal of the decision, Crane claimed that the association's action violated the equal protection clause of the Fourteenth Amendment and Indiana state law. The association removed the action to the Federal District Court for the Southern District of Indiana.

The court found that the association's application of the transfer eligibility rules violated Crane's equal protection and due process rights and entered a permanent injunction prohibiting the association from declaring Crane ineligible to play high school athletics based on his transfer.

In affirming the decision, Judge Manion found that the matter was not moot, and then stated that the District Court erred in not resolving Crane's state law claim before declaring the transfer eligibility rules unconstitutional. Judge Manion found that the association had no consistent interpretation of the challenged rules, and acted arbitrarily and capriciously in violation of Indiana law. The court did not reach the question of whether the rules violated equal protection or due process.

Judge Manion concluded that the District Court properly granted Crane injunctive relief upon finding that money damages would provide inadequate compensation for lost athletic opportunities.

Judge Posner, in dissent, stated that the association's decision was rational and that Crane did not have a claim under state law. Judge Posner would have reversed the decision of the District Court with instructions to enter judgment for the association.

Crane v. Indiana High School Athletic Association, 975 F.2d 1315 (7th Cir. 1992) [ELR 15:5:22]

Soccer Player Suspension.

In a decision issued in June 1991, but only recently published, an Ohio appellate court has reversed a trial court decision enjoining the Major Indoor Soccer League, and other soccer entities from enforcing a one year suspension against Hector Marinaro, a player for the Cleveland Crunch.

According to the court, Marinaro, as a member of the Canadian National Soccer Team, participated in a 1986 tournament in Singapore. While in Singapore, Marinaro and other members of the team purportedly were paid about $15,000 each, with the alleged understanding that they would be expected to throw games.

The Canadian Soccer Association held a hearing, at which the players stipulated to certain facts concerning the payments in Singapore, but denied having the intent to throw games. The players were suspended for one year.

The Federation Internationale de Football Association requires that national associations recognize each other's suspensions. The Cleveland team eventually was notified of the Canadian ruling and informed Marinaro of the suspension.

The appellate court noted that the trial court's primary reason for granting the injunction was the Major Indoor Soccer League's failure to comply with the provisions of the collective bargaining agreement between the league and the Major Indoor Soccer League Player's Association. But the court determined that the provisions of the agreement did not cover Marinaro's "unique" situation. The discipline procedure provided under the agreement dealt solely with incidents arising from league games and did not provide Marinaro with protection from the suspension. The trial court therefore erred in issuing an injunction based on the provisions of the collective bargaining agreement.

The court further found that Marinaro's action made equitable relief improper - Marinaro engaged in "reprehensible" conduct that was directly related to the subject matter of the lawsuit and was barred from relief by the "clean hands doctrine."

The judgment of the trial court was reversed and the matter was remanded for further proceedings consistent with the appellate court's opinion.

Marinaro v. Major Indoor Soccer League, 610 N.E.2d 450 (Ohio App. 1991) [ELR 15:5:22]

Jockey/Trainer Suspensions.

The Louisiana Racing Commission issued a thirty day suspension of Charles W. Phelps, Sr.'s license as an owner/trainer and denied Phelps access to all facilities under the supervision of the commission; Phelps allegedly had tested positive for drugs upon being tested at the Evangeline Downs race track.

A trial court reversed the commission's decision.

A Louisiana appellate court has reversed the trial court's decision and has upheld the constitutionality of the commission's human drug testing rules.

In a separate opinion, the court considered a trial court decision dismissing the petition for review brought by Kenneth Bourque. The commission suspended Bourque's jockey's license for fifteen years. The appellate court remanded the case to the commission for rehearing, stating that Bourque's right to due process was violated in that he was denied the opportunity to cross-examine the only evidence introduced against him, specifically, a positive test result for the use of cocaine.

Phelps v. Louisiana State Racing Commission, 611 S.2d 739; Bourque v. Louisiana State Racing Commission, 611 S.2d 742 (La.App. 1992) [ELR 15:5:23]

Horse Ownership.

A New York appellate court has affirmed a trial court judgment entered on a verdict finding that Maryann Werronen was the sole owner of the horse Daisy's Dream. Werronen, pursuant to an oral agreement, paid Ronald Taylor $5,500 for the horse and agreed to pay Taylor fifty percent of any purses won by Daisy's Dream and fifty percent of the net profit from the sale of the horse. Werronen also agreed to pay Taylor one half of his usual day rate for training Daisy's Dream.

Judge Casey rejected Taylor's claim that the provisions of the partnership law would apply to the transaction between the parties, and found that the evidence supported the jury's verdict.

Werronen v. Taylor, 589 N.Y.S.2d 666 (N.Y.App. 1992) [ELR 15:5:23]

Insurance/Choice of Law.

In 1982, Fireman's Fund Insurance Co. issued a policy to Schuster Films, Inc. that included coverage for loss of negative film.

In February 1986, when Schuster sought to assemble and edit the footage that had been shot for, as described by Federal District Court Judge Mukasey, a 3-D "rock musical epic," it was discovered that a film processing facility had lost or destroyed the 38,000 feet of film that had been processed and stored there. Schuster, in a June 1987 letter to Fireman's Fund, stated that the loss had occurred "in or about June 1983."

In response to Fireman's Fund's action seeking a declaratory judgment that it had no liability under the policy, the court, applying New York choice of law principles, found that the record did not establish the parties' intent as to governing law, and that it appeared that New York had a stronger interest in applying its law to the insurance contract at issue. It was observed that the contract was delivered to a New York insured and that the policy covered risks not limited to any principal location, but including risks in New York. Although Fireman's Fund is a California corporation and a California agent issued the policy, Fireman's Fund does business throughout the country. New York's interest in the matter was further confirmed, stated the court, upon examining the disputed issues of how promptly an insured must give notice of loss and whether an insurance company must show prejudice before denying coverage because of late notice.

California cases have held that before an insurer may rely on failure to give timely notice as the basis for denying coverage, it has the burden of asserting and proving prejudice from such failure. By contrast, even where an insurance contract is silent, New York law will imply an obligation to notify the insurer within a reasonable period of time. Judge Mukasey cited New York's interest in enforcing the notice-of-occurrence rule, and stated that there was no discernible California policy that would be offended by enforcing such a rule in the instant matter - California "has no interest in making its insurance companies conform elsewhere to a standard they must meet when dealing with California insureds.

The delay of sixteen months after Schuster learned of the loss was "facially unreasonable," and the court, accordingly, entered judgment for Fireman's Fund.

Fireman's Fund Insurance Co., Inc. v. Schuster Films, Inc., 811 F.Supp. 978 (S.D.N.Y. 1993) [ELR 15:5:23]

Invasion of Privacy.

Umar Sharrif and Barry Martyn were professional musicians who performed at a concert in Germany in 1987. During the concert, the stage on which the musicians were performing collapsed unexpectedly, causing them to fall. Sharrif and Martyn claimed that an unauthorized video of the incident was shown on "Germany's Funniest

Home Videos" and on "America's Funniest Home Videos," and that the broadcasts violated their right to privacy.

A Louisiana appellate court has reversed a trial court decision dismissing the musicians' action. Sharrif and Martyn claimed that the video portrayed them as comedians, rather than as serious musicians; that the tape was inaccurate as it portrayed a traumatic incident as a comical or staged event; and that the tape unreasonably placed them in a false light before the public. Accepting the musicians' allegations as true, the appellate court declared that it was unable to find that Sharrif and Martyn failed to state a cause of action of invasion of privacy and remanded the matter for a determination by the trier of fact as to whether the publicity generated by the videotape would be understood as portraying the musicians in an objectionable way.

Sharrif v. American Broadcasting Company, 613 S.2d 768 (La.App. 1993) [ELR 15:5:23]

Defamation/Eric Foretich Claim.

Eric Foretich claimed that the television program "People Magazine on TV," broadcast in August 1989, contained defamatory statements concerning the custody dispute between Foretich and his ex-wife Jean Elizabeth Morgan. Morgan had alleged that Foretich sexually abused their daughter Hilary and his daughter Heather by his former wife, Sharon Sullivan. The parties stipulated that Foretich, Morgan and Sullivan were public figures for the purpose of the litigation.

When Foretich sued Morgan, Sullivan and various media parties, a trial court granted a motion for judgment on the pleadings. The judge relied on a transcript of the program, and did not view the videotape of the program to which the complaint referred.

A District of Columbia appellate court noted that the trial judge considered material outside of the pleadings in granting the motions, and should have treated the motions under the summary judgment rules. But the trial court's failure to do so was harmless error since the court afforded Foretich a full opportunity, prior to a hearing on the motions, "to amass evidence to show the existence of material disputed facts" and to demonstrate that the Morgan parties were not entitled to judgment as a matter of law.

Chief Judge Rogers then stated that in a defamation action based on a television broadcast, "only highly unusual circumstances could explain a failure to view the television broadcast before ruling on a dispositive motion. This is such a case." Foretich did not indicate how the "intonation or shading" of Sullivan's appearance or the behavior of the participants or the style of presentation of the program would indicate, upon viewing the videotape, that the fifteen challenged statements were capable of a defamatory meaning, separate and apart from the claim that Foretich had sexually abused his daughters. (Foretich had declined to prove that he did not abuse his daughters, noted the court.) In the circumstances of the case, the judge's failure to view the videotape of the television program was ruled harmless.

The trial judge examined whether any of the fifteen statements were "capable of carrying a defamatory meaning independent of the core assertion that [Foretich] decided not to prove false, namely, the defamatory statement that he sexually abused his daughters," and found that none were. Chief Judge Rogers stated that the trial court did not err in concluding that the challenged statements were "not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense," and denied Foretich's motion to vacate the judgment.

Foretich v. CBS, Inc., 619 A.2d 48 (D.C.App. 1993) [ELR 15:5:24]

Jurisdiction/"Freddy Krueger" License.

In August 1987, New Line Releasing, Inc. granted Marty Toy the exclusive right to manufacture, distribute and sell certain products bearing the likeness of the film character "Freddy Krueger." New Line claimed that Marty exercised an option to renew the agreement, but failed to pay the guaranteed sum of $108,333 required in the first year of performance under the renewed agreement.

Marty moved to dismiss for lack of subject matter jurisdiction, asserting that New Line manufactured diversity by assigning the rights and obligations of New Line-NY to New Line-Cal.

Judge John F. Keenan noted that New Line-NY was dissolved after it had assigned all of its rights and obligations to New Line-Cal, and that it was not necessary for the court to inquire into the motive behind the assignment. The court therefore found that the parties were diverse.

Judge Keenan then stated that Marty failed to show that New Line acted in bad faith in valuing the claim, and accepted New Line's allegation that the amount in controversy exceeded $50,000. Marty had alleged that the company never renewed the agreement and that there was no amount in controversy.

New Line International Releasing, Inc. v. Marty Toy (USA), Inc., 1993 U.S.Dist.LEXIS 1268 (S.D.N.Y. 1993) [ELR 15:5:24]

WASHINGTON MONITOR

FCC issues interim report on "migration" of sports programming from broadcast television to cable TV

The FCC has issued an Interim Report to Congress regarding the "migration" of sports programming from broadcast television to cable TV. The FCC's study of sports programming migration was initiated earlier this year (ELR 14:11:20), as required by the Cable Television Consumer Protection and Competition Act of 1992.

Most of those who responded to the FCC's Notice of Inquiry contended that sports programming has not migrated from broadcast to cable television. This was the position taken by cable programmers and sports leagues which argued that there is now more sports programming on broadcast television than there ever has been before.

On the other hand, independent television stations contended that the trend in the distribution of sports programming has been away from broadcast television, particularly at the local level. Independent TV stations claimed that this trend is detrimental to themselves and to the more than 40% of the nation's population that does not subscribe to cable. Independent stations and others contended that taxpayers should be entitled to enjoy sports on free, over-the-air television, because taxpayers have helped finance professional sports teams through tax advantages and the construction of new stadiums, because sports teams enjoy special status under the antitrust laws, and because there is significant public involvement in college funding. Independent TV stations also expressed concern that because cable television receives revenue from two sources -- advertising and subscriptions -- cable TV will consistently be able to outbid broadcasters -- who are supported by advertising revenue alone -- for sports programming.

In its Interim Report, the FCC made several tentative findings: first, that professional football and college basketball have not migrated to cable television and are in little danger of doing so; second, that while some professional basketball, baseball and hockey games have migrated to cable TV at the local level, it appears that such migration has been slight; third, that the record with respect to migration of Major League Baseball games to cable is mixed and varies from market-to-market; and fourth, that college football games previously available to broadcast TV do not appear to have moved to cable.

The FCC's Interim Report makes no recommendations, because its study is not yet complete. By law, the FCC has until July 1, 1994 to issue a Final Report, and it will be issuing a Notice of Further Inquiry seeking additional information on at least two issues. It will be seeking comments on migration trends in local markets for professional baseball and hockey; and it will be seeking additional comment on whether arrangements between college football conferences and ABC, ESPN and regional cable sports networks have a "preclusive effect" on the televising of games by local broadcast stations.

FCC Inquiry into Sports Programming Migration, PP Docket No. 93-21, 1993 FCC LEXIS 3486 (1993) [ELR 15:5:25]

Federal Communications Commission adopts regulations concerning "indecent programming" on access channels; Federal Court of Appeals stays effective date pending review

As reported at ELR 15:1:24, the Federal Communications Commission, in February 1993, adopted a First Report and Order to implement section 10(b) of the Cable Television Consumer Protection and Competition Act; the provision requires cable operators to block indecent programming on commercial leased access channels of cable systems unless subscribers specifically request access to such programming in writing.

In March 1993, the Commission, in a Second Report and Order, adopted rules to implement section 10(c) of the Act, enabling cable system operators "to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

Cable operators will have broad discretion to prohibit materials in any of the categories listed in the statute. The Commission also stated that the term "obscene" should be construed by cable operators under the standards of Miller v. California, 413 U.S.15 (1973); that the term "sexually explicit conduct" should be given the same meaning as the term "indecent," and that the term "promoting or soliciting unlawful conduct" would refer to the dissemination of information or material that would constitute unlawful solicitation of a crime or that would otherwise be illegal under federal, state, or local law.

A Federal Court of Appeals in the District of Columbia has stayed the scheduled effective date of the rules implementing sections 10(b) and 10(c).

Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 (Indecent Programming and Other Types of Materials on Cable Access Channels), 1993 FCC LEXIS 2688 [ELR 15:5:25]

FCC orders Time Warner not to reposition WNYC on company's Manhattan cable systems

WNYC Communications Group filed a complaint seeking to insure the continued carriage of WNYC, a local noncommercial educational station, on channel 3 on those cable systems serving Manhattan operated by Time Warner New York City Cable Group. Time Warner had repositioned WNYC to channel 31. Time Warner noted that WNYC was licensed to operate on channel 31 and that the station was carried on that channel on Time Warner's cable systems serving other New

York City boroughs. Apparently, WNYC was carried on channel 3 in Manhattan because at the time the Manhattan systems were originally constructed in the 1960s, the systems did not have 31 channels.

The Mass Media Bureau of the Federal Communications Commission has upheld WNYC's complaint against Time Warner. It was noted that section 615(g)(5) of the Cable Act, as implemented by the Commission's rules, requires that the signals of noncommercial educational broadcast stations carried on a cable television system pursuant to the must-carry requirements must appear on the cable system channel number on which the qualified local noncommercial educational station is broadcast over the air or on the channel on which it was carried on July 19, 1985, at the election of the noncommercial educational station. The station elected to continue to be carried on cable channel 3, and, stated the Commission, "the decision as to cable channel position rests with WNYC-TV."

The Commission observed that WNYC clearly was a qualified noncommercial educational television station within the meaning of the Cable Act and Commission rules - the station was owned and operated by a municipality, and transmitted predominantly noncommercial programs for educational purposes. The Commission rejected Time Warner's argument seeking to limit the definition of "educational" to instructional and related programming. For purposes of the applicable statute, a "broad, inclusive definition of 'noncommercial programs for educational purposes'" would be appropriate, stated the Commission. It was further observed that Congress had specifically identified WNYC-TV as an example of a qualified noncommercial educational television station.

The Commission cited the public interest in granting the station's petition, and ordered Time Warner to carry the signal of WNYC-TV on cable channel 3 of the company's cable systems serving the borough of Manhattan.

In re Complaint of WNYC Communications Group against Time Warner New York City Cable Group Request for Carriage, 1993 FCC LEXIS 2522 [ELR 15:5:26]

NLRB rules that National Football League violated federal labor law during the 1987 strike

The National Labor Relations Board has ruled that the National Football League violated federal law during and at the end of the 1987 strike by the NFL Players Association.

The NLRB's opinion recites the pertinent facts in great detail and length. (The Board's own decision is 20 pages, to which are attached the 106-page decision of an administrative law judge which the Board affirmed.) The Board's ruling dealt with several separate actions taken by the league in connection with that strike.

The issue of greatest probable interest to the entertainment industry as a whole was the NFL's refusal to pay the salaries, during the strike, of 26 players who had been injured before the strike began, unless those players would cross the Players Association picket line or otherwise disavow the strike. The League's position was that these players were on strike just like their teammates, and thus were not entitled to be paid. The NLRB disagreed however and ruled that the failure to pay the 26 injured players was a violation of federal labor law. The Board interpreted the standard NFL Player Contract to mean that the right of injured players to be paid during the time they were injured and unable to play was a right that accrued at the time they were injured; and though players could lose that right if they refused to participate in rehabilitation programs, their contracts did not require them to cross picket lines or disavow their support for the strike in order to paid while injured.

The Board also found that the Dallas Cowboys violated federal labor law when it threatened a player with the loss of deferred compensation because he went on strike. The player's individual contract provided that he would lose certain deferred compensation if he "retired." But the Board ruled that the player's participation in the strike was not "retirement."

Another violation found by the Board involved the NFL's decision, at the end of the strike, that striking players could not play in the first set of post-strike games because they had not returned to their teams early enough in the week.

National Football League Management Council and National Football League Players Ass'n, 309 NLRB No. 10, 1992 NLRB LEXIS 1203 (1992) [ELR 15:5:26]

Member of The Kingsmen obtains cancellation of clothing distributor's registration of the mark "Louie Louie"

In late 1963, the musical group "The Kingsmen" recorded and released the song "Louie Louie." In 1990, Richard Peterson, a member of the group, sought to cancel a trademark registration issued to Roland Kosser for the mark "Louie Louie." Kosser had registered the mark in 1985 for use in connection with clothing items.

The Trademark Trial and Appeal Board has found that Peterson established a claim under section 2(a) of the Lanham Act in that Kosser's registration might falsely suggest a connection with Peterson and The Kingsmen. Evidence, such as the staging of the Kingsmen/Louie Louie concerts and the repeated announcement of "Louie Louie by The Kingsmen" in radio marathons, sufficed, for the Board, to prove that Louie Louie "is not just a song associated with The Kingsmen, but is their identity."

The public, upon seeing Louie Louie used on sportswear, would incorrectly assume that the sportswear was connected with The Kingsmen, stated the Board, in canceling Kosser's registration of the mark.

In dissent, Board member Cissel noted that in In re Sauer (see below), the Board had decided that the evidence established that the term in question was a recognized, well-known name, and that the matter sought to be registered was a name or an identity of the person with whom the mark suggested a false connection.

Cissel would not have concluded that the record before the Board proved that the name of the song was a "name" of The Kingsmen or was an "identity" of the group. The Kingsmen were associated with the song as its originators, but the evidence did not persuade Cissel that the song was exclusively associated with the group. Even if the song were so associated, it did not appear to Cissel, again, that the evidence showed that Louie Louie was a name or identity of The Kingsmen so as to warrant the cancellation of Kosser's registration.

Peterson v. Kosser, Trademark Trial and Appeal Board, Cancellation No. 19,374 (August 1993) [ELR 15:5:27]

Trademark registration is denied for "Bo Ball"

Debbie Sauer applied to register the mark "Bo Ball" for "an oblong shaped ball made of white leather with red stitching at the seams." Sauer disclaimed the word "Ball" and the configuration of the goods apart from the mark as shown.

Registration was refused under section 2(a) of the Lanham Act on the basis that the mark falsely suggested a connection with Bo Jackson, and under section 2(c) of the Act based on the argument that the mark consisted of the name identifying Jackson and thus could not be registered by Sauer without Jackson's written consent.

The Trademark Trial and Appeal Board has upheld the refusal of registration on both of the cited grounds.

Sauer argued that "Bo" was the given name of several widely recognized celebrities and would not necessarily be understood as referring to Bo Jackson. Board member Cissel observed that the record did not show that any of the other individuals was as famous as Bo

Jackson or had ever commercially exploited his or her nickname in connection with the sale of products.

It was further noted that the design of the ball appeared to combine a baseball and a football, being oblong like a football, but with exposed stitching like a baseball. Bo Jackson is known as both a baseball player and a football player - the use of the name "Bo"as part of a mark suggesting both kinds of balls "plainly would be recognized by prospective purchasers of such goods as a reference to Bo Jackson."

In re Debbie Sauer, 1993 TTAB LEXIS 12 (Trademark Trial and Appeal Board, April 23, 1993) [ELR 15:5:27]

DEPARTMENTS

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[ELR 15:5:29]