LEGAL AFFAIRS

"Solons Clobber NFL": The 20th Anniversary of the TV Sports Blackout Bill

by Philip R. Hochberg

September 14 - just after the beginning of this year's National Football League season - marked the twentieth anniversary of perhaps the most damaging interview in sports history.

No, not the gramatically correct, but factually inaccurate "The Giants is dead" (Charley Dressen on the 1951 New York Giants, who came from 13 1/2 games back to win the pennant.) Nor "Is Brooklyn still in the league?" (Bill Terry on the 1934 Dodgers who knocked Terry's

Giants out of the pennant.) No, this one was in the Washington Post in the summer of 1973 when the late Bob Cochran, then the NFL's Broadcast Coordinator, told the Post that the League intended to continue blacking out Redskin home games not only in Washington, but in Baltimore, as well.

Sold-out Redskin games - they had only been selling out for a half-dozen seasons at that point - were occasionally seen on Baltimore stations and could be picked up in Washington. But Cochran indicated that practice would end.

He said the League was "well within [its] rights to order the blackout by the Baltimore station. Nor are we going to listen to fan mail saying, 'I want this' and 'I want that!' In this society, people are wanting to get something they shouldn't necessarily have to get...they're so spoiled."

When asked why the Redskin home games should not be seen in Baltimore, Cochran replied, "That's our business." He said he had made the decision and had no intention of changing his mind.

The 93rd Congress helped him change his mind.

The legislation - Public Law 93-107 - was passed in almost record time, nine weeks from introduction to hearings to mark-up to passage in both Houses to Conference to Presidential signature, the Friday before the start of the 1973 NFL season. As Rep. Jack Kemp said, the bill went through as fast as the 1964 Gulf of Tonkin Resolution.

The law changed the viewing habits of the nation. Few can remember that prior to 1973, home games, sold out or not, just weren't televised by the NFL. Instead neutral games were brought into the market, a policy the NFL continues today when there is no sell-out.

Pressure had actually begun a year before when the NFL was asked by President Richard Nixon, through his Attorney General, to lift the blackouts in the 1972 play-off games. Commissioner Pete Rozelle said no.

Cochran's interview changed the entire equation. Here was a sports league, not only facing down the President of the United States, but telling the world that it and it alone would make any decisions dealing with television. Meanwhile, the three national television networks - the principal proponents of the bill - couldn't have been happier.

The networks saw it as a three-fold gain: they could substitute more popular sold-out home games for the neutral games: they could get that better product at no increase in the price of their existing contracts; and they were determined to deny sports leagues the chance to sell games to cable and pay TV.

Indeed, if the networks could get sold-out home games on TV for one year, it would trigger an obscure FCC regulation that would have barred sold-out home games from pay for five seasons.

Even beyond that, the networks were betting that once sold-out NFL home games appeared on local television, the League would find itself hard-pressed to take them off.

While the Senate version would have required any team with a single game on local or network television to make available any sold-out game to local TV, the House bill applied only to games that appeared on the networks - a huge difference to Major League Baseball, the National Basketball Association, and the National Hockey League, since they sold out many games, but had less than three per cent on the networks.

On Friday, September 14, President Nixon signed Public Law 93-107, less than 48 hours before the beginning

of the 1973 NFL season. Passage of the legislation was front-page news in NFL cities.

Few people today realize that the law requiring that blackouts be lifted on those sold-out network games expired at the end of 1975 and that the professional leagues have "voluntarily" lifted the blackouts for the past seventeen years. "Voluntary," as in, "If you don't lift the blackouts, we'll simply make the law permanent."

The impact of the law? Certainly, the networks got what they wanted - at least what they wanted in 1973 - in terms of the more attractive games, a change in their contract terms without paying anything additional for it, and denying games to cable and pay. They short-circuited any thoughts that the NFL might have had about cable. In fact, it wasn't until 1987 that even a limited cable deal was worked out by pro football.

The NFL obviously lost business opportunities. No-shows increased, especially at late-season, bad weather

games, resulting in concession and parking losses. In the next series of televison contracts, however, it's safe to assume that at least some of the loss was recouped in rights payments. Moreover, at the present billion dollars plus a year for TV rights, the NFL's contract negotiators have shown their continuing skills.

And the public got something too, in fact, "something for nothing." It's never very hard to justify taking someone else's property as long as it doesn't cost you anything. As former Senator Russell Long used to say, "Don't tax you, don't tax me, tax that guy behind the tree."

But was it all a win-win situation? Was there any downside to Public Law 93-107? Here's a modest response: Requiring the NFL to lift the blackouts has led to a Congressional attitude that anything innovative that football might consider in the new media by definition is suspect. And that, it is suggested, has really retarded

benefits for the public. For example, what's wrong with the idea that a Redskin fan living out of town should be able to buy the Washington games on pay cable? Right now that fan is shut out of most Redskin games, a victim of geography. If you're willing to pay $5 or $10 or $20 to watch a game that's otherwise available, why not have the opportunity? But all the NFL has to do is consider it and Congress raises its collective eyebrow and warns the NFL ("Don't even think about it without clearing it here first"), remembering its success of twenty years ago.

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RECENT CASES

Claim against Tommy Tune for failing to provide services in "Busker Alley" is rejected by arbitrator due to producer's failure to obtain required capitalization

In May 1991, Tommy Tune agreed to play the leading role in Kim Poster's production of the musical play "Busker Alley." Tune subsequently declined to provide his services because Poster allegedly did not comply with the capitalization clause of the contract and did not provide Tune with appropriate assurances of her ability to perform under the contract.

The contract provided, in part, that Poster, by August 1, 1991, would provide Tune with evidence that Poster had obtained sixty percent of the capitalization, i.e., $4.5 million, required by the producer's agreement with

the investors in the play, and that in the absence of such evidence, Tune would have the right to terminate the agreement.

In his decision denying Poster's claim, arbitrator Daniel G. Collins observed that the purpose of the capitalization clause was to condition Tune's commitment to perform in "Busker Alley" on the likelihood that the play would be produced as planned - the clause gave Tune considerable discretion as to what would constitute satisfactory evidence of such capitalization. It thus did not seem reasonable to the arbitrator to conclude that Sam Cohn, Tune's agent, would have orally agreed that Poster, rather than Tune, would determine which individuals or institutions would be acceptable investors for Tune's purposes.

Professor Collins determined that "Tune retained discretion under the parties' understanding to determine what reasonably constituted evidence of requisite

capitalization in all cases other than where an investor's positive credentials were known to Cohn...;" found that Tune reasonably concluded that Poster had failed to present acceptable evidence of the required capitalization; and concluded that Tune was justified under the capitalization clause in terminating the contract.

Professor Collins further found that under the doctrine of insecurity, and apart from the specific termination provision contained in the capitalization clause, Tune was justified in terminating the contract on August 1st.

In the Matter of the Arbitration between The Busker Alley Company and The Tuneful Company (Aug. 24, 1993) [ELR 15:6:5]

"Six Degrees of Separation" civil rights and invasion of privacy dismissal affirmed by New York appellate court

A New York appellate court has affirmed a trial court ruling (ELR 14:2:5) dismissing David Hampton's $60 million lawsuit against playwright John Guare and other parties alleging the violation of sections 50 and 51 of the New York Civil Rights Law and the purported invasion of Hampton's common law right of privacy.

Guare's play, "Six Degrees of Separation," was "inspired," in part by reports of Hampton's practice of persuading affluent New Yorkers to allow him into their homes and to give him money and other valuables; Hampton pretended that he was acquainted with the college-age children of the family, and that he was the son of the actor Sidney Poitier. Hampton, who, according to the appellate court, was repeatedly arrested for

criminal impersonation, larceny and related offenses, eventually was convicted of attempted burglary.

The appellate court agreed that Hampton failed to state a cognizable claim for commercial misappropriation under sections 50/51 because Hampton's name, portrait or picture were not used in the play, and works of fiction and satire do not fall within the narrow scope of the statutory phrases "advertising" and "trade." There is no common law right of privacy in the state, continued the court, and the preemptive effect of the Civil Rights Law also barred Hampton's claims alleging common law conversion, common law tort and unjust enrichment. It was noted that Hampton had no property interest in his image, portrait or personality outside the protections granted by the Civil Rights Law.

Hampton v. Guare, 1993 N.Y.App.Div.LEXIS 7205 (N.Y.App. 1993) [ELR 15:6:5]

Court rejects screenwriter's challenge to Writers Guild arbitration procedures in "Godfather III" credit dispute

In 1985, Nick Marino and Thomas Wright wrote a treatment for "Godfather III." Paramount Pictures Corporation purchased the treatment, and then hired Marino to write a screenplay based on the treatment. Marino completed the screenplay in 1985, but Paramount did not produce it at that time.

In 1987, Marino wrote a second treatment and sent it to executives at a production studio owned by Francis Coppola; the studio did not purchase the treatment.

In 1989 and 1990, Coppola and Mario Puzo co-wrote a screenplay for "Godfather III;" the film was produced and completed in 1990.

Prior to the release of the film, the Writers Guild notified Marino that it would conduct an arbitration to determine the writing credits for "Godfather III." Marino was informed that Coppola and Puzo were awarded sole writing credit. When Marino requested a hearing before the Guild's Policy Review Board, it was discovered that one of the three arbiters had not read Marino's 1985 treatment. After reading the treatment, the arbiter reaffirmed the prior conclusion. The Board informed Marino that the arbitration decision was final.

Marino brought a state court action seeking to vacate the arbitration. The action was removed to a Federal District Court on the grounds that the proceeding was governed by a collective bargaining agreement and was preempted by federal labor law. The District Court granted the Guild's motion for summary judgment.

Federal Court of Appeals Judge Fernandez, in affirming the District Court decision, noted that Marino

claimed that he was precluded from learning the qualifications or partiality of the arbiters. The Guild's confidentiality policy, which was upheld in Ferguson v. Writers Guild of America West, Inc., 226 Cal.App.3d 1382 (1991; ELR 13:1:10), allows participating writers to strike a reasonable number of names from the list of arbiters. Marino and Wright struck 85 names from the list. The three arbiters were chosen from the remaining names; each arbiter candidate had been screened for potential bias by an arbitration coordinator, noted the court.

Judge Fernandez commented on the practical difficulties involved in having the arbiters' names disclosed and on the fact that the procedures that reflected and dealt with these concerns "had existed for decades." Marino's attack on the anonymity of the arbiters was a bias claim "at root," observed the court, and the claim was waived when Marino failed to protest the procedure before the

arbiters were selected and issued their decision. The court stated that it attempted to "focus on fairness to all involved, including the arbiters and all of the other union members and officers who have relied on the arbitration process for so long."

The court, after emphasizing that it was not holding that every possible procedural defect must be raised in advance or waived, turned to Marino's claim that the Guild's handling of the "Godfather III" proceeding breached its duty of fair representation.

Judge Fernandez rejected Marino's claims concerning various aspects of the proceeding, finding that there was nothing to indicate that the decision was "discriminatory or made in bad faith." The court concluded by adverting to the fact that the procedures adopted by the Guild "were designed to make the difficult screen credit decision in a speedy and fair fashion," and declined to find

that "the procedures designed for speed overwhelmed the ideal of justice."

Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1993 U.S.App.LEXIS 10885 (9th Cir. 1993) [ELR 15:6:5]

Former agent's breach of contract action against members of "Blondie" is dismissed

In February 1977, Peter Leeds, as the principal of American Entertainment Management Corp., became the manager of the rock group known as Blondie. The group included Deborah Harry, Chris Stein, James Mollica and Clement Bozewski. In September 1977, Blondie signed publishing and recording agreements with Chrysalis Records, Inc. and recorded three albums.

In 1979, the group decided to terminate the relationship with Leeds and, pursuant to a settlement, agreed, in part, to pay Leeds a commission, based upon the group's "gross earnings from any and all sources... as received by 'Blondie' or by any or all of us performing under the name 'Blondie' or as a group, or individually. ...the commision shall be paid on gross earnings which result from or relate to (1) any contract in existence as of the date of commencement of this agreement or which is executed prior to February 9, 1985, and any renewal, extension, substitution or modification of any such contract, or (b) [sic] any of our services or talents or any product thereof, or of any property created by any or all of us in whole or in part prior to February 9, 1985."

After signing the settlement agreement, Blondie recorded three additional albums on the Chrysalis label; Leeds received commissions on the albums. Blondie disbanded in 1982.

In 1986, Harry signed recording and publishing agreements, and, with Stein, wrote songs which Harry then recorded as a solo artist.

In 1983, Leeds sued the Blondie parties for breach of the settlement agreement. Leeds claimed that he was entitled to commissions on all payments made to Harry and Stein under the January 1986 agreements as well as commissions on domestic and foreign royalties paid to them by ASCAP from July 1985.

A New York trial court determined that there was no basis for finding that any of the Blondie parties agreed to compensate Leeds on future income not related to Leeds' efforts on their behalf. The settlement agreement was between Leeds and Blondie; the cut-off date was February 9, 1985; and the later contracts entered into by the Blondie parties were not "extensions, modifications or substitutions" of any earlier contracts.

Judge Beverly S. Cohen denied Leeds' motion for an order granting partial summary judgment and granted the cross motion by Harry and Stein for summary judgment dismissing claims asserted against them which arose from agreements executed or activities undertaken by them after February 9, 1985, other than as members of the group Blondie.

Leeds v. Blondie Music, Inc., New York Law Journal, p. 22, col. 3 (N.Y.Cnty., July 9, 1993) [ELR 15:6:6]

Decision awarding $1.25 million to Vestron in breach of contract action against ITC over "Strawberry Fields" project is reversed

In April 1985, Vestron, Inc. entered an agreement with ITC Productions, Inc. and Computer Graphics

Laboratories, Inc. to create an animated film, tentatively titled "Strawberry Fields," featuring music written by John Lennon and Paul McCartney. ITC proposed to invest $1.25 million and to obtain and supply the "Beatles masters;" Computer Graphics was to supply the "storyboard," the animation and production, and Vestron agreed to invest $1.25 million, to be paid in installments to Computer Graphics, in exchange for home video distribution and pay television rights.

By 1978, as described by a New York appellate court, it became apparent that ITC would be unable to obtain the Beatles masters. Vestron stopped its payments to Computer Graphics. In July, and again in September, 1987, ITC advised Vestron that if Vestron wished to drop out of the project, ITC was prepared to reimburse the company's investment of about $740,000 and to assume Vestron's financial obligations and rights under the

1985 agreement. ITC expressed concern with Vestron's cessation of payments.

The parties subsequently agreed that ITC would provide cover versions of ten specified Beatles songs. However, a dispute then arose concerning Computer Graphics' ability to create a film of "minimally acceptable production quality."

In June 1988, Vestron purported to accept ITC's September 1987 buyout offer on the ground, among others, that the cover versions of the Beatles songs did "not represent an adequate substitute for the Beatles masters that were originally projected to be part of this program." ITC responded that Vestron had continued to work with ITC on the revised project and had effectively "rejected" the buyout offer by a lack of timely acceptance.

Vestron sued ITC, alleging breach of the September 1987 buyout offer, as purportedly accepted by Vestron in June 1988 and breach of the 1985 agreement.

The trial court granted Vestron's motion for summary judgment on the ground that ITC had not provided either the Beatles masters under the 1985 agreement, or the cover versions under the 1987 agreement.

In reversing the trial court's decision, the appellate court pointed out that an ITC executive stated that the company had submitted eight cover versions of the Beatles songs by June 1988 and that Vestron had approved the material. It could not be concluded as a matter of law, stated the court that the "almost casual" mention in the August 1987 letter stating that ITC would provide cover versions at the rate of "approximately one master per month" restricted ITC to a strict timetable so as to warrant the grant of a $1.25 million judgment in favor of Vestron. And it was "far from clear" to the court that the proposed schedule was not adhered to even in a strict sense, because the commitment, "further loosened as it was by the phrase 'would be workable,'" did not

mature until June 1988 at the earliest; Vestron's purported acceptance of the buyout offer was dated June 8, 1988.

The court cited factual questions as to whether Vestron, by its conduct, justified ITC's conclusion that the buyout offer had been rejected and whether a fair reading of the offer permitted a construction that the offer would remain open for over eight months, particularly given ITC's concern over the "uncertain" status of the project.

A factual issue also was raised, stated the court, as to whether Vestron by its conduct waived, or was estopped from insisting upon, compliance with the requirement set forth in the 1985 agreement that ITC supply Beatles masters for the project. Summary judgment therefore should have been denied on Vestron's second cause of action as well.

Vestron, Inc. v. ITC Productions, Inc., 1993 N.Y.App.Div.LEXIS 5019, 597 N.Y.S.2d 382 (N.Y.App. 1993) [ELR 15:6:7]

United States Supreme Court finds that restrictions on lottery advertising do not violate First Amendment

Under 18 U.S.C. sections 1304 and 1307, newspapers and broadcasters may advertise state-run lotteries if the newspaper is published in, or the broadcast station is licensed to, a state which conducts a state-run lottery.

As reported at ELR 15:2:28 and 12:10:17, Edge Broadcasting Corporation operates a radio station in North Carolina; the station, located about three miles from the border between Virginia and North Carolina, broadcasts to an audience comprised of almost ninety-

three percent of Virginians. Edge derives ninety-five percent of its advertising revenue from Virginia sources.

North Carolina has criminalized the participation in, or advertising of, nonexempt raffles and lotteries, whereas Virginia has legalized lotteries under a state monopoly.

Edge sought a declaratory judgment that the federal statutes, together with corresponding FCC regulations, violated the First Amendment and the Equal Protection Clause.

A Federal District Court decision holding that the statutes unconstitutionally infringed Edge's commercial speech was affirmed by a Federal Court of Appeals.

The United States Supreme Court, in reversing the Court of Appeals' decision, cited the decision in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) as setting forth "the general scheme for assessing government restrictions on

commercial speech." The court assumed that Edge, if allowed to, would air nonmisleading advertisements about the Virginia lottery, a legal activity. And, with respect to the second Central Hudson factor, the court was "quite sure" that the government has a substantial interest in supporting the policy of nonlottery states, as well as not interfering with the policy of states that permit lotteries. It also was found that the statutes were no broader than necessary to advance the government's interest, thus meeting the fourth part of the Central Hudson test.

The Court of Appeals had affirmed the District Court's holding that the statutes were invalid because, as applied to Edge, they failed to advance directly the governmental interest supporting them. According to the Court of Appeals, the 127,000 people residing in Edge's listening area in North Carolina received most of their radio, newspaper and television communications from Virginia-based media. Prohibiting Edge from advertising

Virginia's lottery, stated the Court of Appeals, would be "ineffective in shielding North Carolina residents from lottery information;" the statutes thus were found to infringe commercial free speech.

Justice White noted that the third Central Hudson factor asks whether a regulation "directly advances the governmental interest asserted." The lower courts asked the wrong question in ruling on the factor, because although the validity of the statutes' application to Edge was not an irrelevant inquiry, that issue arose under the fourth Central Hudson test factor.

There was "no doubt" that the statutes directly advanced the governmental interest at stake, stated Justice White. Congress chose to support the anti-gambling policy of various states by forbidding stations in those states from airing lottery advertising. The congressional policy of balancing the interests of lottery and nonlottery states was the substantial governmental interest that

satisfied Central Hudson, the interest "which the courts below did not fully appreciate," stated Justice White. It also was the interest directly served by applying the statutory restriction to all stations in North Carolina, even if, as applied to Edge, there was only a marginal advancement of that interest.

The court turned to the fourth factor, the validity of applying the statutory restriction to Edge, and determined that the fact that Edge's signals with lottery ads were heard in North Carolina violated the substantial federal interest in supporting North Carolina's laws making lotteries illegal.

Justice White emphasized that evaluating the validity of the restriction was related to the general problem of accommodating the policies of both lottery and nonlottery states, not to whether the restriction furthered the government's interest in an individual case.

The court also declared that the courts below were wrong in holding that, as applied to Edge itself, the restriction was ineffective and provided only remote support to the government's interest. It was observed that Edge's potential North Carolina audience included about 127,000 residents of the state. And although these residents also may listen to Virginia media that regularly carry lottery ads, the lower courts' findings represented "too limited a view of what amounts to direct advancement of the governmental interest that is present in this case."

To the extent that the lower courts assumed that the statutes would have to effectively shield North Carolina residents from information about lotteries to advance their purpose, the courts were mistaken, stated Justice White. Congress, based on the premise that the advertising of gambling serves to increase the demand for the advertised product, was entitled to determine that the

broadcast of promotional advertising of lotteries undermined North Carolina's policy against gambling, even if the North Carolina audience was not wholly unaware of the lottery's existence. In all, the restriction, even as applied only to Edge, directly advanced the governmental interest within the meaning of Central Hudson, and did not violate the First Amendment.

Justice Souter, with whom Justice Kennedy joined, agreed with the court that the restriction was constitutional, even if the restriction were evaluated "as applied to Edge itself." Justice Souter, however, would have found it unnecessary to decide whether the restriction might be reviewed "at a more lenient level of generality," and took no position on that question.

Justice Stevens, with whom Justice Blackmun joined in dissent, stated that the ban on speech imposed for the purpose of manipulating public behavior "was in no way proportionate to the Federal Government's asserted

interest in protecting the antilottery policies of nonlottery states." Justice Stevens would have held that suppressing truthful advertising regarding a neighboring state's lottery was a "patently unconstitutional means of effectuating the Government's asserted interest in protecting the policies of nonlottery states." For Justice Stevens, "unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure" would not withstand scrutiny under the First Amendment. Justice Stevens stated that no such interest was asserted in this case.

The court had concluded that a state's interest in discouraging lottery participation by its citizens was substantial, but Justice Stevens disagreed. A state may have an interest in discouraging its citizens from participating in state-run lotteries, but it would not necessarily follow that its interest was substantial enough to justify an infringement on constitutionally protected speech. The

federal government and the states, according to Justice Stevens'"simply do not have an overriding or 'substantial' interest in seeking to discourage what virtually the entire country is embracing, and certainly not an interest that can justify a restriction on constitutionally protected speech as sweeping as the one the court today sustains."

United States v. Edge Broadcasting Co., 1193 U.S. LEXIS 4402 (June 25, 1993) [ELR 15:6:7]

Author must return advance of $166,000 to publisher upon cancellation of prospective book on former President and Mrs. Bush

In May 1991, Little, Brown and Company agreed to publish a book by Edward Klein, to be titled "A Day in the White House with George and Barbara Bush." In his

proposal to the publisher, Klein had stated that he had secured complete access to, and the cooperation of, President George Bush and Mrs. Bush and the White House staff. Klein agreed to deliver the finished manuscript on or before January 1, 1992, with the understanding that time was of the essence of the agreement. The agreement further provided that Klein's failure to comply with the delivery terms would be "just cause" for Little, Brown to terminate the contract and to recover any advance payments.

Klein was to receive a total of $500,000, in three installments, payable as follows: on the publisher's receipt of a copy of the executed contract; on delivery of the final, acceptable manuscript of the book; and on publication of the first edition of the book.

The publisher paid the initial installment to Klein in May 1991. White House officials subsequently notified Klein that neither the President nor his staff would

participate in, or endorse, the book project prior to the 1992 election.

In November 1991, the publisher canceled the contract and demanded the repayment of the advance. In its action against the author for breach of contract and unjust enrichment, Little, Brown argued that the cooperation of the Bushes and their staff, along with the delivery date terms, formed the "essence" of the contract, such that when the Bushes refused cooperation, Klein could not have submitted a satisfactory manuscript by the contractual deadline.

Klein argued that the contract terms were ambiguous regarding whether and to what extent the White House's cooperation was necessary, and questioned the January 1, 1992 delivery date. The author also suggested that based on prior interviews with Mrs. Bush and with administration members, Klein, with further research, could have written a publishable and marketable book.

Klein also contended that the postponement of the cooperation of the Bushes was an unforeseen event - an "act of God" - that made performance impossible.

New York trial court Judge Peter Tom found that the contract provisions "clearly and plainly" manifested the intention of the parties that the book would be based on access to and the cooperation of George and Barbara Bush and the White house staff, that the manuscript would be delivered at the specified time, and that Klein's failure to follow the terms of the contract would be just cause for termination and the recovery of the advance.

Judge Tom agreed with Little, Brown that the company had the right, but not the obligation, to publish the book after 1992 if Klein failed to timely deliver the manuscript. It was determined that Klein's failure to obtain the cooperation of the specified parties prior to the deadline constituted a material breach of the contract,

giving Little, Brown the right to rescind and to recover the advance payment.

The court rejected the force majeure argument - the Bushes' withdrawal of their cooperation was a foreseeable event which Klein could have provided for in the contract, but failed to do so. Even assuming the doctrine of impossibility or frustration of purpose could be applied, this would only serve to excuse Klein from performing under the contract; Little, Brown still was entitled to a refund of the advance under the express terms of the contract, declared the court, in granting the publisher's motion for summary judgment.

Little, Brown and Company v. Klein, New York Law Journal, p. 21, col. 5 (N.Y.Cnty., Aug. 17, 1993) [ELR 15:6:9]

Former surfer loses claim against documentary producer alleging unauthorized use of his name and likeness

In 1987, Frontline Video, Inc. produced a video documentary, "The Legends of Malibu," about the early days of surfing. The program, along with footage of famous surfers, contained the audio portion of an interview with Mickey Dora; the interview was heard in the background as photographs of Dora appeared.

Dora claimed that he was neither interviewed nor photographed by Frontline and that he did not consent to the use of his name, photograph, likeness, or voice.

A California appellate court has upheld a trial court decision granting Frontline's motion for summary judgment.

Judge Nott, in reviewing Dora's common law claim alleging the appropriation of the former surfer's name or

likeness, observed that one type of appropriation involves the right of publicity, and the other type of appropriation "brings injury to the feelings...concerns one's own peace of mind, and...is mental and subjective." It seemed to the court that Dora's action was based on the latter aspect of appropriation, but Judge Nott did not further distinguish the claims, stating that in the instant case the analysis under both theories would be the same.

Whether Dora was considered a celebrity or not, continued the court, whether he was seeking damages for injury to his feelings or for the commercial value of his name and likeness, the public interest in the subject matter of the program provided a constitutional protection against liability.

The court rejected the argument that the program did not meet the criteria for newsworthiness as set forth in Maheu v. CBS, Inc., 201 Cal.App.3d 662 (1988; ELR 10:1:4), pointing out that the Maheu factors related to a

cause of action for the public disclosure of private facts, not a cause of action for appropriation of name and likeness. The court stated that its ruling would not change even if it were to apply the Maheu standard. The program, about a group of individuals who contributed to the "development of a lifestyle that has become world-famous and celebrated in popular culture," had a "social value." Furthermore, Dora did not establish that the program disclosed any private facts about him. And although Dora has attempted to avoid publicity, almost all of the footage of Dora was taken while he was either surfing or on the beach - one's voluntary action in a public place waives one's right of privacy as "there can be no privacy in that which is already public," recalled Judge Nott.

The court found that the publication of the audio taped interview was constitutionally protected in the absence of a showing that Frontline knew that its statements

were false or published them in reckless disregard of the truth.

Judge Nott, in turning to Dora's claim under Civil Code section 3344, noted that the statute provides, in part, that "a use of name, voice,...photograph, or likeness in connection with any news, public affairs, or sports broadcast or account,...shall not constitute a use for which consent is required under subdivision (a)." Judge Nott questioned the trial court's finding that the program was a sports or news account, but stated that the documentary qualified as a public affairs broadcast. The court declined to limit the term "public affairs" to topics that might be covered on public television or public radio, and announced that surfing "has created a lifestyle that influences speech, behavior, dress, and entertainment...[and] has also had a significant influence on the popular culture..." In all, the use of Dora's name

and likeness was among the uses exempt from consent under section 3344(d).

Dora v. Frontline Video, Inc., 1993 Cal.App. LEXIS 473, 18 Cal.Rptr. 790 (Ca.Ct.App.1993) [ELR 15:6:10]

Newspaper's subscribers may be treated as depreciable asset, rules United States Supreme Court

On May 31, 1977, the Herald Company purchased substantially all the outstanding shares of Booth Newspapers, Inc, the publisher of newspapers in eight Michigan communities. Herald allocated $67.8 million of adjusted basis in the Booth shares to an intangible asset denominated "paid subscribers." There were 460,000 identified subscribers to the Booth newspapers as of the date of sale.

On its federal income tax returns for the years 1977-1980, the Herald claimed depreciation deductions on a straight-line basis for the amount allocated to paid subscribers. The Internal Revenue Service disallowed the deductions on the ground that the concept of paid subscribers was indistinguishable from goodwill; that the value of paid subscribers was nondepreciable under the applicable regulations; and that any such value would be added to basis.

When the Newark Morning Ledger Co., as successor to the Herald, sued to recover taxes and interest, the company presented testimony concerning how long the average at-will subscriber of each Booth newspaper as of May 31, 1977 would continue to subscribe.

The government argued that the only value attributable to the asset in question was the cost of generating 460,000 new subscribers through a subscription drive.

Under this "cost approach," the government estimated the value of the asset to be about $3 million.

A Federal District Court ruled in favor of the Ledger, finding that the "paid subscribers" asset was not "self-regenerating" - it had a limited useful life the duration of which could be calculated with reasonable accuracy. The court further found that the value of "paid subscribers" was properly calculated using the "income approach" and that the asset was separate and distinct from goodwill.

A Federal Court of Appeals reversed the District Court's decision, finding that the "paid subscribers" asset was the "essence of goodwill," with "goodwill" being defined as "the expectancy of continued patronage."

By a 5-4 vote, the United States Supreme Court has ruled that intangible assets - such as a subscriber list - may be depreciated if their value and useful life can be determined accurately.

Justice Harry A. Blackmun noted that section 167(a) of the Code allows, as a deduction for depreciation, a reasonable allowance for the exhaustion and wear and tear, including obsolescence, of property used in a trade or business or of property held for the production of income. It was observed that "goodwill" is not defined in the Code or in any Treasury Department regulations, and that it is often difficult for taxpayers to separate depreciable intangible assets from goodwill.

However, stated Justice Blackmun, "if a taxpayer can prove with reasonable accuracy that an asset used in the trade or business or held for the production of income has a value that wastes over an ascertainable period of time, that asset is depreciable under section 167, regardless of the fact that its value is related to the expectancy of continued patronage." The significant question for purposes of depreciation is whether the asset is capable of being valued and whether that value diminishes over

time. Justice Blackmun cautioned that the taxpayer's burden of proof is not insignificant.

In the instant case, the 460,000 paid subscribers constituted a finite set of subscriptions existing on a particular date, with each subscription having a limited useful life that could be estimated with reasonable accuracy, and with a value diminishing over an ascertainable period of time. The "paid subscribers" asset did not consist of a mere list of names and addresses; the asset had substantial value "over and above that of a mere list of customers" in that the "paid subscribers" had provided a regular and predictable source of income over an estimable period of time. The cost of generating a list of new subscribers was an "irrelevant" measure of value in that such cost represented the value of an entirely different asset, stated Justice Blackmun.

The District Court had found that the aggregate fair market value of the "paid subscribers" of the Booth

newspapers as of May 31, 1977 was about $67.8 million, with an adjusted income tax basis of about $71 million, and the Newark Morning Ledger was entitled to depreciate this adjusted basis using a straight-line method over the stipulated useful lives.

Justice David H. Souter, with whom Chief Justice William H. Rehnquist, and Justices Byron R. White and Antonin Scalia joined in dissent, stated that the "paid subscribers" asset was "unmistakably a direct measurement of goodwill," and that there was no showing of any particular lifespan for the goodwill Ledger acquired.

Justice Souter pointed out that the 460,000 subscribers as of the date of sale were "at-will subscribers;" that the value of their expected future patronage was capitalized as the asset Ledger sought to depreciate; that the "paid subscribers" asset was simply the goodwill associated with those subscribers; and, again, that goodwill is non-depreciable as a matter of law.

According to Justice Souter, Ledger's concept of goodwill would be "a residual asset of ineffable quality, whose existence and value would be represented by any portion of a business's purchase price not attributable to identifiable assets with determinate lives." Justice Souter questioned the court's decision to abandon the "settled construction" of the goodwill regulation and the corresponding section of the tax code.

It appeared to Justice Souter that Ledger's entire case rested on confusing subscription duration with goodwill on the date of sale, and "only that confusion could suggest that Ledger has shouldered its burden of estimating the lifespan of the asset purchased from Booth."

Newark Morning Ledger Co. v. United States, 1993 U.S.LEXIS 2979 (U.S. Supreme Court, April 20, 1993) [ELR 15:6:10]

United States Supreme Court upholds decision that Cincinnati ordinance prohibiting the distribution of commercial handbills on public property violates First Amendment

As reported at ELR 13:12:11, a Federal Court of Appeals upheld a District Court decision finding that a Cincinnati ordinance banning the distribution of commercial publications from freestanding newsracks located on public property violated the First Amendment.

The United States Supreme Court, in a 6-3 decision, has affirmed the Court of Appeals decision.

Discovery Network provides educational, recreational, and social programs to adults in the Cincinnati area. The company advertises the programs in a free magazine that it publishes nine times a year; in addition to promotional material pertaining to Discovery's courses, the magazine includes information about current events. About one-

third of the magazines were distributed through the 38 newsracks that the city authorized Discovery to place on public property in 1989.

In 1990, the city notified Discovery and other parties that it was revoking permits to use dispensing devices on public property and ordered the removal of the newsracks.

The District Court found that the number of newsracks dispensing "commercial handbills" was "minute" compared with the total number of newsracks on the public right of way, and that ordering the removal of such newsracks minimally affected public safety.

The Court of Appeals agreed that not only did the city's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but that in this case, the burden placed on speech was not justified by the

"paltry gains in safety and beauty achieved by the ordinance."

Justice John Paul Stevens stated that the record supported the finding that the city did not establish a "reasonable fit" between "its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." The city could have addressed its concern about newsracks by regulating their size, shape, appearance, or number.

Justice Stevens cautioned that the court did not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. On the record before the court, Cincinnati failed to make such a showing.

The court then rejected the argument that the prohibition was a permissible time, place and manner regulation.

Justice Harry A. Blackmun, in a concurring opinion, expressed the view that the court has provided insufficient protection for truthful, noncoercive commercial speech concerning lawful activities. For Justice Blackmun, the instant case demonstrated that there is no reason to treat truthful commercial speech as a class that is less "valuable" than noncommercial speech. Justice Blackmun would have subjected Cincinnati's ban on commercial newsracks to the same scrutiny the court would apply to a regulation burdening noncommercial speech, stating that it was "highly unlikely" that according truthful, noncoercive commercial speech the full protection of the First Amendment would erode the level of that protection.

Chief Justice William H. Rehnquist, joined by Justices Byron R. White and Clarence Thomas, in dissent, stated that the court's decision was inconsistent with prior precedent; that Cincinnati's prohibition against the newsracks directly advanced its safety and esthetic interests; and that the fact that there may have been other less restrictive means by which Cincinnati could have addressed its safety and esthetic concerns did not render the prohibition against the newsracks at issue unconstitutional.

Chief Justice Rehnquist observed that the court consistently has distinguished between commercial and noncommercial speech for the purpose of determining whether the regulation of speech is permissible, and questioned the majority's holding that in attempting to alleviate its newsrack problem, Cincinnati could not choose to proceed incrementally by burdening only commercial speech at first. Cincinnati burdened less

speech than necessary to fully accomplish its objective of alleviating the problems caused by the proliferation of newsracks on its street corners, stated Chief Justice Rehnquist, who would have held that the city's actions were permissible.

City of Cincinnati v. Discovery Network Inc., 1993 U.S. LEXIS 2401 (U.S. Supreme Court, March 24, 1993) [ELR 15:6:11]

RICO forfeiture provision does not violate First Amendment rights of individual convicted of violating federal obscenity laws, but United States Supreme Court remands Eighth Amendment claim

Ferris J. Alexander, Sr., the owner of several stores and theaters dealing in sexually explicit materials, was

convicted on, inter alia, seventeen obscenity counts and three counts of violating the Racketeer Influenced and Corrupt Organizations Act. The obscenity convictions, based on the jury's findings that four magazines and three videotapes sold at several of Alexander's stores were obscene, served as the predicate acts for the three RICO convictions. In addition to imposing a six year prison term and a $100,000 fine, a Federal District Court in Minnesota ordered Alexander to forfeit, pursuant to 18 U.S.C. section 1963, certain assets that were directly related to his racketeering activity, including Alexander's wholesale and retail businesses and almost $9 million in "moneys acquired through racketeering activity."

The United States Supreme Court has denied Alexander's claim that the forfeiture violated his First Amendment rights, but remanded for reconsideration Alexander's claims under the Eighth Amendment.

Chief Justice William H. Rehnquist rejected the argument that the forfeiture constituted an unconstitutional prior restraint on speech, rather than a permissible criminal punishment. Alexander argued that the effect of the RICO forfeiture order was no different from an injunction prohibiting the publication of expressive material, and that the order imposed a complete ban on his future expression because of previous unprotected speech.

Chief Justice Rehnquist commented that accepting Alexander's argument "would virtually obliterate the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments." The RICO forfeiture order did not forbid Alexander from engaging in any expressive activities in the future, or require him to obtain prior approval for any such activities. The assets ordered forfeited were directly related to Alexander's past racketeering violations - the RICO statute is "oblivious" to the expressive or nonexpressive nature of

the assets forfeited. And the government had established beyond a reasonable doubt the basis for the forfeiture - Alexander had a full criminal trial on the merits of the obscenity and RICO charges.

The court then observed that Alexander did not challenge either the jail sentence or the $100,000 fine as violating the First Amendment and pointed out that case law clearly establishes that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct. Alexander argued that RICO's forfeiture provisions were overbroad in that they were not limited solely to obscene materials and to the proceeds from the sale of such materials. But the RICO statute did not criminalize constitutionally protected speech, stated Chief Justice Rehnquist and was materially different from the statutes at issue in overbreadth cases.

The court next rejected Alexander's "chilling effect" argument, stating that the threat of forfeiture would have no more of a chilling effect on free expression than the threat of a prison term or a large fine.

With respect to Alexander's claim that the forfeiture order violated the Eighth Amendment, either as a "cruel and unusual punishment" or as an "excessive fine," Chief Justice Rehnquist noted that the Court of Appeals considered both components of the claim together and found that the Eighth Amendment did not require any proportionality review of a sentence less than life imprisonment without the possibility of parole. But that finding related only to the prohibition against cruel and unusual punishment.

Chief Justice Rehnquist suggested that the Court of Appeals consider, in light of the extensive criminal activities which Alexander apparently conducted through the racketeering enterprise over a substantial period of

time, the question of whether or not the forfeiture was "excessive."

Justice David H. Souter agreed with the court that Alexander did not demonstrate that the forfeiture qualified as a prior restraint, and that the case should be remanded for a determination as to whether the forfeiture violated the excessive fines clause of the Eighth Amendment. However, Justice Souter agreed with Justice Kennedy that the First Amendment would forbid the forfeiture of Alexander's expressive material in the absence of an adjudication that it was obscene or otherwise of "unprotected character."

Justice Kennedy, with whom Justices Blackmun and Stevens joined in dissent (and with whom Justice Souter joined in part), expressed the view that the court's decision was "a grave repudiation of First Amendment principles..." Although agreeing that obscenity is expression which can be regulated and punished, within proper

limitations, and that the court has upheld stringent fines and jail terms as punishments for violations of the federal obscenity laws, Justice Kennedy stated that the "fundamental defect" in the majority's reasoning was failing to recognize that the forfeiture at issue could not be equated with traditional punishments such as fines and jail terms.

It was observed that RICO was amended in 1984 to include obscenity as a predicate offense, with the result being, according to Justice Kennedy, to "render vulnerable to government destruction any business daring to deal in sexually explicit materials." The purpose of the forfeiture in this case was to destroy an entire speech business and all its protected titles - the public thus was deprived of access to lawful expression, "censorship all too real," stated the dissent.

Justice Kennedy, after reviewing the historical development of the concept of prior restraint, stated that it

was "a flat misreading of our precedents to declare as the majority does that the definition of a prior restraint includes only those measures which impose a 'legal impediment' ... on a speaker's ability to engage in future expressive activity." According to Justice Kennedy, the majority did not consider that the applicability of First Amendment analysis to a governmental action depends "not alone upon the name by which the action is called but upon its operation and effect on the suppression of speech." In some instances, the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may be to raise the same concerns as in prior restraint cases: "the evils of state censorship and the unacceptable chilling of protected speech."

The operation and effect of RICO's forfeiture remedies differs from a heavy fine or a severe jail sentence because RICO's forfeiture provisions are different in

purpose and kind from ordinary criminal sanctions, stated the dissent, noting that any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction. Under section 1863, a trial court is required to forfeit not only the unlawful items and any proceeds from their sale, but a party's entire interest in the enterprise involved in the RICO violations and any assets affording the party a source of influence over the enterprise.

Justice Kennedy continued by observing that the forfeiture provisions authorize the seizure of speech presumed to be protected along with the instruments of its dissemination, and in an indirect way threaten all who engage in the business of distributing adult or sexually explicit materials with the same disabling measures. When a RICO forfeiture arises from a previous speech offense, the punishment "serves not only the government's interest in purging organized crime taint, but also its interest in

deterring the activities of the speech-related business itself. The threat of a censorial motive and of on going speech supervision by the state justifies the imposition of First Amendment protection," stated the dissent.

Justice Kennedy again emphasized that when imposing punishment for violation of the federal obscenity laws, the operation of RICO's forfeiture provisions is an exercise of government censorship and control of protected speech as condemned in prior restraint cases.

Apart from prior restraint considerations, Justice Kennedy commented that the destruction of books and films that were not obscene and were adjudged to be so, and the forfeiture of expressive materials that had not been adjudged to be obscene was unconstitutional. Justice Kennedy would have found it unnecessary to reach the Eighth Amendment question.

Alexander v. United States, 61 LW 4796, 1993 U.S.LEXIS 4409 (U.S.Supreme Court, June 38, 1993) [ELR 15:6:12]

Hearst Corporation is not entitled to $62 million tax refund for donating newsreels to UCLA

During 1981, 1982, and 1985, the Hearst Corporation donated items from the Hearst Metrotone News Film Library to the University of California at Los Angeles. In its tax returns for those years, Hearst reported the total fair market value for the library as about $62 million. The Internal Revenue Service recognized and allowed about $1.8 million.

United States Court of Federal Claims Senior Judge Kenneth R. Harkins, in dismissing Hearst's claim for a refund, noted that the company began producing its

newsreels in 1918. In 1978, Hearst attempted to determine the total size, location and condition of the film library, and subsequently conducted negotiations which resulted in a decision to donate the library to UCLA. The library contained about 27 million feet of film, consisting of released and unreleased footage and cuts, and also included nonfilm memorabilia. The amount of a contribution in property other than money is valued at "the fair market value of the property at the time of the contribution." Fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

Hearst argued that the library was donated in four separate gifts (two in 1985), each with a separate valuation date established by the acceptance letters of the

University Regents, and that each gift constituted a separate charitable contribution.

The Internal Revenue Service contended that for purposes of Internal Revenue Code section 170(a)(1), there was only one gift, and that the valuation date for all of the library property should have been November 30, 1981. After that date, stated the IRS, that price at which the property would change hands could no longer be determined since the "property" no longer existed as an integral whole and "clearly was not for sale."

Judge Harkins observed that at all times, Hearst "fully intended to keep the Library intact and to donate the entire Library to one donee." Structuring the donation in four portions embodied legal safeguards designed to maximize tax benefits, stated the court. However, both Hearst and UCLA intended the donation to be a gift of the entire library, and the library should have been valued at the last time it was a whole property, with the

valuation date being the date of the Regents' first acceptance letter, i.e., December 2, 1981 (the difference between the date selected by the IRS and by the court was described as "de minimis.")

In seeking to establish the fair market value of the library, the court adverted to testimony analyzing six sales transaction of film and newsreel collections that occurred between 1972 and 1989. But the transactions identified for comparison to the donation of the library lacked comparability due to differences in time, in size, and in scope, stated Judge Harkins.

The conclusions of another report, using the income approach as a technique to estimate fair market value, were "the product of highly speculative and optimistic assumption that maximized each step in the calculations."

After questioning the assumptions of a third report, the court stated that the record on the fair market value

issue did not disclose a specific amount which would be obvious and reasonable beyond question. About ninety-eight percent of the 21.4 million feet of unreleased film in the library consisted of cuts that had been edited out of released news stories, or of vault material never used in any story; the film footage "had no utility without examination, selection, and rearrangement." Furthermore, in 1972, when Hearst purchased MGM's position in the newsreel company, Hearst placed a book value of about $600,000 on the library.

Judge Harkins concluded that Hearst did not show that the total amount that the IRS allowed for the contribution of the library was unreasonable or otherwise unlawful; having failed to establish the fair market value of the library, the company was not entitled to a refund for a charitable contribution during the years in issue.

The Hearst Corporation v. The United States, 1993 U.S.Claims LEXIS 32 (U.S.Ct.Fedl.Clms. 1993) [ELR 15:6:14]

Washington, D.C. court transfers football players' antitrust actions against NFL to Minnesota

Marvin Tice and other football players sued the National Football League and its member teams for antitrust violations. The Tice parties sought to represent a class of all professional football players who received less than their contract-based salary during the past several preseasons (due to the NFL's policy of paying all players a fixed salary during the preseason rather than their contract-based salary) and then were unable to make up the difference during the regular season because they were cut.

Federal District Court Judge Lamberth, taking note of the lawsuits brought by various groups of players against the NFL, observed that the Federal District Court for the District of Minnesota has been engaged in coordinating a global settlement of the litigation. Although the instant case had not been a part of the negotiations for the global settlement, the NFL and the representative of certain players advised the court that the case would have to be included in the global settlement in order to achieve such a settlement.

Judge Lamberth, expressing "great reluctance," granted Pro Football, Inc.'s motion to transfer the case to the District of Minnesota. The court stated that it was "troubled by the manner in which the NFL and the players have approached this case in their settlement negotiations." However, Judge Lamberth stated confidence that Judge Doty will address the many serious issues

remaining in the case and insure that the players have been "adequately represented and fairly treated."

Judge Lamberth, in a footnote comment, referred to the court's January 1993 decision to transfer to Minnesota a case brought by Albert Lewis; the case was transferred "only for purposes of participation in the global settlement." Lewis and other players claimed damages under the antitrust laws arising out of the NFL's "Plan B" right of first refusal/compensation system during the 1989 NFL season.

In an earlier ruling in the Lewis matter, the court had rejected the NFL's motion to dismiss Lewis' action and stated that the equities favored maintaining the action in the District Court for the District of Columbia.

Tice v. Pro Football, Inc., 1993 U.S.Dist.LEXIS 1440, 812 F.Supp. 255 (D.D.C.1993); Lewis v. National

Football League, 813 F.Supp. 1 (D.D.C. 1992) [ELR 15:6:15]

Laches bars the "Crests" from seeking licensing royalties

The "Crests" singing group entered a recording contract with Coed Records, Inc. in the 1950s; the contract, according to a Philadelphia trial court judge, has not been located. In 1967, Coed sold the master recordings to Post Records, owned by Anthony Petito.

Jay Carter, a member of the group, successfully sued Post and Petito in the 1970s for royalties on the MCA Records release of the group's 1958 song "Sixteen Candles." The song was used in the film "American Graffiti."

In 1981, the group attempted to notify Petito of its demand for royalties, but Petito never received the letters.

The group filed a lawsuit in 1989. An agent for the group apparently alleged that the delay occurred because Petito "fraudulently led him to believe" that an entity known as Collectables, Inc. owned the masters.

The court, although rejecting Post's claim that title passed to the company by adverse possession, found that Post had acquired title to the masters by contract. It then was found that the Crests did not prove any contract provision entitling them to royalties at the rate of fifty percent of licensing income.

The court agreed that the group's claim for royalties at the rate of five percent of ninety percent of net retail list price times quantity sold would have been valid, but found that the group members failed to prove that they exercised due diligence in investigating their claim. The court denied the claim of fraud; stated that the group

members had knowledge that recordings of the Crests were being sold to the public; and found that the group failed to bring a timely action despite the fact that they were aware of such sales. No circumstances were shown which would excuse the group's delay in bringing a lawsuit. The record company was prejudiced by the group's failure to bring a timely action and the court, accordingly, entered judgment on behalf of Post and Petito.

Carter v. Post Records, Case No. 890905677 (Philadelphia Ct.Cmmn.Pleas, June 14, 1993) [ELR 15:6:15]

Lack of jurisdiction bars claim against Jackie Gleason's heirs for exhibition of "The Lost Honeymooners" skits

As reported at ELR 13:6:8, a 1954 trust agreement, executed by various film producers and distributors, governed performances by instrumental musicians belonging to the American Federation of Musicians. Each producer agreed to pay to the trust a portion of the revenues derived from the broadcast of films containing performances by instrumental musicians rendered between February 1, 1954 and January 31, 1959, whenever such films were exhibited on television by the producers or their assignees. The purpose of the trust was to generate a fund to pay for free musical performances throughout the country as a public service.

Jackie Gleason Enterprises, a party to the trust, was dissolved in 1958; the company's assets were distributed to the sole shareholder, Jackie Gleason. The assets included a collection of kinescope recordings of programs originally broadcast live as "The Jackie Gleason Show."

The programs included brief comedy skits referred to as "The Lost Honeymooners."

In 1985, Jackie Gleason granted Viacom International the exclusive broadcast rights to "The Lost Honeymooners" kinescopes.

Kenneth Raine filed a lawsuit in 1985 alleging that Gleason and Viacom were bound by the trust agreement and were required to pay a portion of the revenue derived from all broadcasts of "The Lost Honeymooners." The complaint against Viacom was dismissed.

In 1987, Jackie Gleason died and Marilyn Gleason was substituted in the action. However, when Jackie Gleason's estate was wound up in probate count in Florida, Marilyn Gleason was discharged as the personal representative. The trial court then dismissed Raine's case because there no longer was a defendant.

Raine apparently brought another action against Marilyn Gleason, and against Jackie Gleason's two

daughters as successors to Jackie Gleason's obligations under the trust agreement.

A New York trial court noted that the Gleason parties were not signatories of the trust or the Viacom agreement. Furthermore, the mere receipt by a nonresident of payments from a contract performed by others in New York was not an act by the recipient in New York sufficient to confer jurisdiction under the state's long-arm statute. The minimum contacts required by due process for asserting jurisdiction over a nonresident thus were lacking, and the court granted the Gleason parties summary judgment dismissing the complaint for lack of jurisdiction.

Raine v. Gleason, New York Law Journal, p. 27, col. 3 (N.Y.Cnty., July 15, 1993) [ELR 15:6:16]

Court considers dispute between owners of Hard Rock Cafe and Planet Hollywood restaurants

Peter Morton, the owner of the rights to the Hard Rock Cafe trademark in the western half of the United States, and other parties associated with the Hard Rock Cafe sued various parties associated with the Planet Hollywood restaurant chain. The Morton parties claimed that the Hard Rock Cafe restaurants presented an overall motif arising from, as described by Federal District Court Gadbois, "the combination of the service of American cuisine, the display of entertainment memorabilia, the loud broadcast of contemporary music, the availability of souvenir merchandise bearing the Hard Rock Cafe logo, and a multiple floor layout with vaulted and handpainted ceilings." It was argued that these elements were distinctive and constituted protectable trade dress.

Judge Gadbois first considered the Morton parties' claim under section 2 of the Sherman Act alleging conspiracy and attempt to monopolize the market for entertainment/music themed restaurants in the United States. According to Morton, the Planet Hollywood parties intended to control prices or destroy competition by coercing the Morton parties to sell their interests in the Hard Rock enterprise at "far below fair market value." It was alleged that the Planet Hollywood parties engaged in anticompetitive acts such as misappropriating Hard Rock trade secrets and the Hard Rock format and threatening to open Planet Hollywood restaurants near each of the existing Hard Rock Cafe restaurants, thus "adversely affecting and destroying" these businesses.

Even if the Planet Hollywood parties committed all of the alleged acts, their conduct was not anticompetitive, stated the court, for "Planet Hollywood's entry into the relevant market increases, rather than decreases,

competition." Planet Hollywood did not commit anti-competitive acts; there was no antitrust injury; and Judge Gadbois granted Planet Hollywood's motion to dismiss Morton's claims under section 2 of the Sherman Act and a parallel state claim under the Cartwright Act.

With respect to Morton's cause of action for trade dress infringement under section 43(a) of the Lanham Act, the Planet Hollywood parties claimed that the "American-style, entertainment-theme motif" was the actual benefit a customer would seek to purchase and thus was unprotectable because it was functional.

The court declined to dismiss Morton's claim, stating that functionality is a question of fact. However, Judge Gadbois, "to save the time of all parties involved and the resources of the litigants," ordered the Morton parties to prepare a more definite statement than the statement set forth in the complaint specifying the facts underlying Morton's likelihood of confusion claim.

Morton further alleged that the purportedly confusingly similar trade dress and motif of the Planet Hollywood restaurants diluted the distinctive quality of the Hard Rock Cafe restaurants in violation of California law.

Judge Gadbois noted that section 14335(a) of the California Business and Professions Code provides injunctive relief only for the infringement of a mark registered under state or federal law. The court, observing that the Morton parties did not allege the infringement of a registered mark and that case law has not extended the application of the statute to trade dress, granted, with prejudice, the Planet Hollywood parties' motion to dismiss.

The court next refused to dismiss breach of fiduciary claims against Robert Earl, one of the developers of the Planet Hollywood restaurants, and against Rank America, again, however, ordering the Morton parties to

prepare a more definite statement specifying the facts relevant to the parties' alleged fiduciary duties.

The Morton parties also may proceed on a claim alleging the misappropriation of Hard Rock trade secrets, ruled the court, declining to state that the Morton parties could not prove any set of facts that would establish the existence of "information...that derives independent economic value...from not being generally known to the public."

The court rejected Planet Hollywood's argument that Morton did not allege "misappropriation." An agreement between the two former owners of the Hard Rock Cafe enterprise delineated the rights of each party in the restaurant's marks, noted Judge Gadbois. And since the "marks" were likely to encompass any trade secrets, the court found it "reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation

of the trade secrets 'of another.'" Judge Gadbois commented that the Planet Hollywood parties did not cite any authority indicating that the misappropriation of a trade secret by a joint owner of that trade secret does not constitute the misappropriation of the trade secret "of another." In the circumstances of the case, it was possible, according to the court, that the Morton parties could prove a set of facts establishing that the Planet Hollywood parties misappropriated Morton's trade secrets by using them when Planet Hollywood "knew or should have known that they were acquired under circumstances giving rise to a duty to maintain their secrecy or limit their use."

Judge Gadbois again ordered the Morton parties to present a more definite statement specifying the facts underlying the claim for misappropriation of trade secrets, particularly with respect to Morton's efforts to

maintain the secrecy of the information constituting the alleged trade secrets.

The court concluded by denying Planet Hollywood's motion to dismiss Morton's unfair competition claim under California law, and by dismissing the Morton parties' cause of action for tortious interference with prospective economic advantage.

Morton v. Rank America, Inc., 812 F.Supp. 1062 (C.D.Ca.1993) [ELR 15:6:16]

Licensor of "The Totally Rad Soaker" water gun loses trademark infringement claim against distributor of "Super Soaker"

Talk to Me Products, Inc., the licensor of "The Totally Rad Soaker," a battery-operated water gun, brought a

trademark infringement action against Larami Corporation, the distributor of an air pressure water gun known as "Super Soaker."

Larami challenged Talk to Me's prior use of the "Soaker" mark. Talk to Me, on July 31, 1990, filed an intent-to-use application to register the trademark "The Totally Rad Soaker" with the United States Patent and Trademark Office. On August 20, 1990, the Trademark Office issued a Notice of Publication for the trademark, but Larami filed a notice of opposition. In view of the agency's lack of further action, "Soaker" was not a registered trademark, noted Federal District Court Judge Charles S. Haight, Jr.

Talk to Me claimed that its application to register the mark established priority rights pursuant to section 1057(c) of the Trademark Law Revision Act of 1988.

Judge Haight found that the cited provision did not support Talk to Me's claim; an application may confer a

right of priority, but such right "is only triggered by registration." The "Totally Rad Soaker" mark was not registered, and until registration, Talk to Me was not entitled to rely on the constructive use provision. The court stated that the legislative history of the Trademark Law Revision Act indicated that the pending status of Talk to Me's application meant that the company did not have any rights under section 1057(c).

In seeking protection under section 43(a) as a qualifying unregistered trademark, Talk to Me claimed the first actual use of the "Soaker" mark. The court cited the proposition that "the prior user is not necessarily the one who made the first sale, but the one who received the first order for trademarked goods." Talk to Me made a single sale of the "Totally Rad Soaker" on May 15, 1990, but the court found that the interstate shipment of a single product was "plainly inadequate to establish priority of use." Larami shipped its product on August 24,

1990; Talk to Me received its first order, apart from the May 15th shipment, on August 28, 1990. In addition to finding that Talk to Me failed to show first use, Judge Haight based the court's holding on the ground that Talk to Me did not establish secondary meaning.

After reviewing the classification of trademarks, the court declared that "Soaker" was a descriptive mark, since, "in the context of a water gun, the term...describes an essential 'purpose or utility' of the product." Judge Haight stated that "Soaker" describes "what a water gun is and does."

Given the finding that "Soaker" was descriptive, Talk to Me was required to demonstrate secondary meaning. But the company failed to address the issue of whether the mark acquired secondary meaning prior to Larami's August 24th shipment. Since Talk to Me did not show that "Soaker" either was inherently distinctive or had

acquired secondary meaning, the court granted Larami's motion for summary judgment.

A Federal Court of Appeals has affirmed the District Court's decision. "substantially for the reasons stated in Judge Haight's opinion." It was observed that since Talk To Me failed to show a triable issue as to its claimed priority of use of the "Soaker" mark, the dismissal of its New York unfair competition claim was proper.

Talk to Me Products, Inc. v. Larami Corporation, 804 F.Supp. 555 (S.D.N.Y. 1992); 1993 U.S.App. LEXIS 10528, 992 F.2d 469 (2d Cir. 1993) [ELR 15:6:17]

Absence of fiduciary relationship between artist and collector precludes fraud and breach of trust claims

In 1984, a party identified only as Saatchi paid $300,000 to purchase twelve paintings, known as "Young Islands," by Agnes Martin. The parties agreed that the paintings would never be broken up and sold individually; that if the works were sold in the future, it was mutually understood that the works would be sold only to an institution; and that if it was not possible to place the works in an institution, they would be offered back to Agnes Martin through the Pace Gallery at the price paid, plus reasonable interest for the period of time the paintings were in Saatchi's collection.

In 1989, Saatchi sold six of the twelve paintings to a Swiss collector named Amann. Upon Pace's protest, Saatchi transferred the remaining six works to the same collector.

Pace sued Saatchi for breach of contract and unjust enrichment, seeking the difference between the $300,000 paid to the gallery and the $2.2 million paid by Amann.

Pace, also claiming fraud and breach of trust, sought compensatory damages of $2 million, expenses of $50,000 and "at least $10 million" in punitive damages.

According to Pace, Saatchi's breach of the contractual conditions breached a "trust relationship" that existed apart from the contract, and the sale of the paintings, as quoted by a New York trial court, "threaten(s) the integrity and ethics of the art world and the reputation of" Agnes Martin. The fraud claim was based, in part, on these allegations.

Judge Shainswit found that there was no basis, in fact or law, for either the claimed fiduciary relationship or the alleged fraud, stating that the parties entered "a simple contract for the sale of goods." There was no "enduring" previous relationship between Saatchi and either Pace or Martin; no breach of duty distinct from the contract obligations; no fiduciary relationship arising from the fact that Martin trusted Saatchi to honor the terms of

their contract; and no fraud arising from statements made by Saatchi six years after the sale. Even if Saatchi were found to have violated the requirement that the paintings be kept together and that they be offered to an institution or to Pace (assuming that the Amann Foundation was not an "institution" within the meaning of the contract), Pace's recourse was set forth in the contract.

The court struck Pace's third cause of action and the claim for punitive damages. Judge Shainswit cautioned that the court was not expressing a viewpoint on Pace's claims for breach of contract and unjust enrichment, nor on the measure of damages for alleged breach of contract.

Pace Gallery of New York, Inc. v. Saatchi, New York Law Journal, p.22, col.5 (N.Y.Cnty., July 22, 1993) [ELR 15:6:18]

Swedish finance company may attach Rubens painting

Between October 1989 and February 1990, as described by New York appellate court Judge Betty Weinberg Ellerin, Fortune Finans AB, a Swedish finance company, allegedly loaned art dealer Lennart Andersson about $4.7 million to purchase artwork. Andersson then borrowed (according to news reports) $1 million each from Kaj Sigstam, the predecessor in interest of Capstan Invest Ab, and from Carl Horn to purchase, for resale, a painting entitled "Die Landschaft Mit Dem Regenbogem" ("Landscape With Rainbow"), by Peter Paul Rubens. Andersson executed promissory notes in favor of Sigstam and Horn and an agreement, dated March 16, 1990, granting the Horn parties a security interest in the painting. The painting was delivered to Judson Art

Warehouse in New York; the warehouse did not have notice of the Horn parties' security interests.

After Andersson defaulted on his loans to Fortune, Fortune sought to enjoin Judson from releasing the paintings owned by Andersson in which Fortune had been granted a security interest. The Rubens was not among those paintings, but, in order to secure sufficient assets to satisfy a potential judgment on its loan, Fortune applied for an order to attach Andersson's other assets in New York.

A trial court issued orders of attachment and the sheriff levied upon assets owned by Andersson, including the Rubens painting.

In July 1990, the Horn parties sought to modify the orders of attachment to exclude the Rubens, alleging that they had properly perfected a security interest in the painting under Swiss law and that, since they had not been aware of the removal of the work to New York,

the security interest remained in effect for four months following the arrival of the painting in New York in March. On July 11, 1990, the Horn parties perfected a security interest in the Rubens under New York law.

The trial court found that the Horn parties were unaware that the Rubens was going to be moved to New York and that their security interest remained perfected for four months following the arrival of the painting. The court therefore held that the Horn parties had priority over Fortune, that the Rubens should be excluded from the orders of attachment, and that the Horn parties would be permitted to remove the Rubens from the warehouse, providing that any excess proceeds from its sale would be deposited with the court.

Judge Ellerin rejected the trial court's interpretation of the relevant statute as automatically providing the Horn parties with a four month grace period, measured from the time that the painting was placed with Judson, within

which to perfect their security interest in New York. Judge Ellerin found that the "critical question" was the remaining duration of the period of perfection in Switzerland - if the perfection of the security interest terminated under Swiss law prior to the expiration of the four month grace period, such grace period expired with it. It was noted that Judson was unaware of the Horn parties' security interest during the period in question. The court determined that under Swiss law, the perfection of the Horn parties' security interest expired upon the transfer of the Rubens to Judson in New York without notice to Judson of their interest. The Horn parties did not demonstrate that the perfected Swiss security interest still was viable after the painting was in Judson's possession, and thus were not entitled to the protection of the grace period.

Upon rejecting other claims raised by the Horn parties, the court reversed the trial court's decision.

Fortune Finans AB v. Andersson, New York Law Journal, p.21, col.3 (N.Y.App., July 22, 1993) [ELR 15:6:19]

New York Landmark Commission ruling ordering removal of sculpture from historical district is upheld

Terry Fugate-Wilcox created a sculpture entitled "Weathering Triangle;" the piece consisted of a 15 foot equilateral triangle of cement embedded with various metals designed to create colors as they aged. The sculpture was erected in June 1984 on a small plot located in the Greenwich Village Historical District; the land was bought at a public auction in 1979 by Valerie Shakespeare. Since its installation, the piece has been

obscured as it became covered with advertising handbills.

The city of New York sought to have the sculpture removed, claiming that Shakespeare did not receive the approval of the Landmarks Preservation Commission for the continuous display of the work.

The Commission had found that the sculpture "did not relate architecturally to the design and scale of the ground floor of the adjacent buildings or to the surrounding district..." and required the removal of the piece by December 15, 1984.

Shakespeare argued that the parcel of land was not a "landmark site" or an "improvement parcel," and was not subject to the Landmarks Act.

A New York trial court, first noting that the aesthetic value of the sculpture was not at issue, stated that Shakespeare did not present evidence to refute the fact that her parcel of land was situated within a historic

district. Acting Judge Salvador Collazo noted that Shakespeare displayed the sculpture, without the required approval, for over eight years and "displayed contempt and disregard for both the Landmarks Commission and the residents of the Greenwich Village Historic District by refusing to remove the sculpture."

Shakespeare did not demonstrate why the subject parcel was exempt from the Landmarks Act or how the regulation of the land constituted a taking. The Commission's ruling that the sculpture was "incongruous and inappropriate" for display in the historic district was not arbitrary and capricious, concluded Judge Collazo, in granting summary judgment in favor of the city.

City of New York v. Shakespeare, New York Law Journal, p. 22, col. 5 (N.Y.Cnty., July 13, 1993) [ELR 15:6:19]

Briefly Noted:

Sony/Columbia Pictures Merger.

Joseph Siegman, a former shareholder of Columbia Pictures Entertainment, challenged the legality of the 1989 merger between Columbia and Sony USA, and the sufficiency of the disclosures made in connection with the merger.

In 1989, a Delaware Court of Chancery denied Siegman's motion for a preliminary injunction seeking to bar the merger (ELR 12:7:17). In January 1993, the court, after upholding its previous ruling concerning the meaning of the statutory phrase "prior to such date," found that material issues of fact as to when Sony became an interested shareholder within the meaning of the Delaware Takeover Statute and as to whether Siegman

acquiesced in the merger precluded granting the parties' cross-motions for summary judgment.

In April 1993, the court denied Columbia Pictures' motion for separate trials on liability and damages; allowed Siegman to conduct discovery on the issue of damages; and issued rulings on Siegman's requests to redepose witnesses.

Siegman v. Columbia Pictures Entertainment, Inc., 1993 Del.Ch.LEXIS 1; 1993 Del.Ch.LEXIS 61 (Del.Ch. 1993) [ELR 15:6:20]

MCA Shareholders.

A Delaware Chancery Court has approved the settlement of a class action challenging the acquisition of MCA, Inc. by Matsushita Electrical Industrial Co., Ltd.

Vice Chancellor Hartnett noted that three purported class action suits were filed against MCA and its directors following Matsushita's September 1990 announcement that it was negotiating a possible acquisition of MCA. Although no acquisition agreement had been reached, the complaints alleged that MCA and other parties breached their fiduciary duty to the shareholders by failing to implement a market check procedure to ensure that maximum shareholder value was realized.

MCA and Matsushita entered a merger agreement in November 1990; Matsushita agreed, among other terms, to make a cash tender offer for all of MCA's outstanding shares at $66 per share.

A class action then was filed in a Federal District Court in California alleging that certain aspects of the tender offer violated federal securities laws. The tender offer materials also were challenged in an action brought in Delaware; the action did not allege the breach of

federal securities laws because such claims are within the exclusive jurisdiction of the federal courts.

In 1990, the Delaware chancery court rejected a stipulation and agreement of compromise and settlement. In February 1993, the court determined that a proposed settlement in the amount of $2 million (less any award of attorneys' fees) should be approved as being in the best interest of the class; the settlement would bar further proceedings under the federal securities laws, except as to those parties opting out of the class.

It was noted that the claims brought in the Delaware action were "extremely weak..." and that a Federal District Court, after a full hearing, had rejected the federal claims. The court awarded a total of $250,000 in attorneys' fees and expenses.

In re MCA, Inc., 1993 Del.Ch.LEXIS 28 (Del.Ch. 1993) [ELR 15:6:20]

Horse Racing/Simulcasts.

William Burns, who voted against off track betting in the Rhode Island general election held in November, 1990, challenged a state agency's license to two businesses seeking to "simulcast" out-of-state horse racing.

Burns brought a declaratory judgment action seeking to have the court declare that before the agency could license simulcasting at any gambling establishments, the question of the propriety of simulcasting needed to be placed on a public referendum in the city or town where the gambling facilities were located.

A trial court decision affirming the agency's licensing decision has been upheld by the Rhode Island Supreme Court.

It was initially found that Burns did not have standing in that he did not allege his own personal stake in the controversy that distinguished his claim from the claims of the public at large. The court nevertheless concluded that the question of whether the public was entitled to vote at a public referendum on the licensing of simulcasting was an issue that should be heard by the court.

After determining that the exhaustion of remedies requirement did not apply in this case, the court concluded that licensing conducted by the agency pursuant to the applicable statute did not require voter approval.

Burns v. Sundlun, 617 A.2d 114 (R.I. 1992) [ELR 15:6:20]

Horse Racing/Simulcasts.

Burrillville Racing Association owned and operated the Lincoln Greyhound track and an off-track betting office in Lincoln, Rhode Island. The off-track betting office accepted wagers on simulcasts of races run at distant tracks. Lincoln was unable to obtain approval to simulcast horse races from Sterling Suffolk Race Course, the operator of the Suffolk Downs race track in Massachusetts, about fifty miles away from Lincoln. The federal Interstate Horseracing Act of 1978 requires an off-track betting office to obtain the approval of "all currently operating tracks within 60 miles," or, if there are no such tracks, "the closest currently operating track in an adjoining State."

Sterling sought a preliminary injunction to restrain Lincoln from accepting interstate wagers on horseracing without Sterling's authorization.

A Federal District Court in Rhode Island found, after careful consideration, that Sterling did not have standing

to bring a claim under the federal Interstate Horseracing Act of 1978; that Sterling's RICO claim had no merit in the instant proceeding; and that it was unlikely that Sterling would be able to prove that Lincoln violated the Massachusetts Consumer Protection law. Judge Lagueux therefore denied Sterling's motion.

The court then determined that Lincoln was entitled to summary judgment with respect to the two federal claims and declined to exercise jurisdiction over the state law claim.

A Federal Court of Appeals has affirmed the District Court's decision.

Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc., 802 F.Supp. 662 (D.R.I.1992); 1993 U.S.App. LEXIS 6017, 989 F.2d 1266 (1st Cir. 1993) [ELR 15:6:21]

Ad Campaign/Laches.

Chase Manhattan Corporation claimed that a commercial produced for Northwestern Mutual Life Insurance Corporation infringed upon a Chase advertising campaign featuring several Benny Goodman songs from the 1930s, including "Moonglow." The commercials at issue were first broadcast during the Winter Olympics in February 1992. Chase filed a lawsuit in July 1992, but did not seek preliminary injunctive relief until January 1993.

Federal District Court Judge Constance Baker Motley has found that laches barred Chase's motion for a preliminary injunction. Judge Motley stated that there was "a fatal lack of diligence on the part of Chase," particularly since a trial was scheduled for May 1993. It also was found that Northwestern would be prejudiced if the court were to grant the motion, since, among other factors, the company's trial preparation time would be

reduced due to the need to defend Chase's preliminary injunction motion.

The court rejected Chase's argument that the delay in bringing the preliminary injunction motion was excusable.

Chase Manhattan Corporation v. Northwestern Mutual Life, 1993 U.S.Dist. LEXIS 2271 (S.D.N.Y. 1993) [ELR 15:6:21]

"Kiss Me Kate" Memorabilia.

A New York Surrogate Court has ruled that theater researcher Miles Kreuger was not required to turn over to the estate of Bella Spewack certain papers and memorabilia from the musical production "Kiss Me Kate."

The executor of the estate claimed that Kreuger stole the material from Spewack, one of the authors of the play, when he was employed by her over thirty years ago.

Kreuger denied that he was employed by Spewack, stating that he met the author when he wrote album liner notes for "Kiss Me Kate," and that Spewack gave him material concerning the work.

Surrogate Eve Preminger stated that, assuming that the executor's factual allegations were true, the action to recover property allegedly stolen in 1959 was time barred. None of the purported "acts of commission or omission" by Kreuger, which allegedly constituted the willful concealment of his theft and of the existence of a cause of action, rose to the level of conduct which would warrant the intervention of a court of equity, stated Surrogate Preminger, in granting Kreuger's motion to dismiss the conversion action and any independent fraud action.

Matter of Bella Spewack, New York Law Journal, p. 27, col. 1, (N.Y.Surrogate Ct., April 16, 1993) [ELR 15:6:21]

Copyright Infringement/Stuffed Toy Dogs.

Gund, Inc. alleged that a stuffed plush toy dog known as "Skippy," manufactured and distributed by Applause, Inc., infringed Gund's copyright in a stuffed plush toy dog known as "Muttsy."

Judge Shirley Wohl Kram found that Gund established access to the copyrighted work, but concluded that Skippy and Muttsy were not substantially similar and that any similarity between the two dogs "would appear to the ordinary observer to result solely from the fact that both are more or less nonnaturalistic, reclining, huggable, floppy dogs."

The two dogs were similar in shape and shared certain features, such as plastic eyes partially covered by fur, long tails and ears, and plastic noses, but their "total concept and feel" were substantially different. The dogs displayed a different overall look; Muttsy was a skinny dog with "a greater degree of floppiness;" and the faces of the dogs were very different, stated Judge Kram, in concluding that Gund could not establish a likelihood of success on the merits and in denying the company's motion for a preliminary injunction and recall.

Gund, Inc. v. Applause, Inc., 809 F.Supp. 304 (S.D.N.Y. 1993) [ELR 15:6:21]

DeKooning Artwork.

Philip Pavia claimed that in 1987, Willem and Elaine deKooning commissioned him to cast and mold several works of art from models that deKooning allegedly created as a series known as "Leda and the Swan." Pavia cast about 38 sculptures in bronze. In 1988, Pavia sold one of the sculptures to an individual who subsequently placed the work for sale at auction with Christie's, Inc. Christie's sold the piece in 1989 for $30,000.

The general counsel for Willem deKooning's estate (deKooning was judicially declared incompetent after his wife's death in 1989) notified Christie's that the sculpture sold at auction was not the work of Willem deKooning, but was created by his daughter Lisa; Christie's then rescinded the sale.

In response to Pavia's lawsuit against John Eastman, one of the co-conservators of deKooning's estate, and other parties, a New York trial court first found that the

estate of Elaine deKooning was a necessary party and directed Pavia to join the estate.

Judge Karla Moskowitz then determined that Pavia sufficiently alleged a cause of action for declaratory relief with respect to the ownership of the sculptures and whether the sculptures were deKooning originals.

Pavia's quantum meruit claim sought $1 million in compensation for his work in casting and sculpting the 38 sculptures and for other services. The court stated that Pavia would have to prove that deKooning's wife and daughter and John Eastman, to whom Pavia gave several of the sculptures, were acting as agents or as the coconservator for deKooning when they accepted the sculptures. The court denied the estate's motion to dismiss the quantum meruit claim, and similarly denied a motion to dismiss Pavia's unjust enrichment claim.

The court rejected Pavia's claims alleging defamation and injurious falsehood.

Pavia v. Eastman, New York Law Journal, p. 22, col. 1, (N.Y.Cnty., April 20, 1993) [ELR 15:6:22]

Auction/Declaration of Independence.

In June 1991, Visual Equities, Inc. purchased a copy of the Declaration of Independence for about $2.4 million at public auction at Sotheby's. In May 1993, the company consigned the document for sale at auction. Prior to the auction, Visual Equities and Sotheby's had set a reserve price at $1.8 million; the highest bid at the auction was $1.75 million. Shortly after the auction, Sotheby's notified Visual Equities that a collector had offered $1.5 million for the document. Visual Equities apparently agreed to the sale.

In late May, Visual Equities learned that Sotheby's, in January 1993, had completed negotiations for a $1.5 million loan to the New York Historical Society, with the Society's art as collateral. The Society's collection included a copy of the Declaration of Independence.

According to Visual Equities, Sotheby's damaged the sale of the company's document by not disclosing the information that the Society's document was "overhanging the market." Visual Equities claimed that Sotheby's failure to disclose that it was involved in the Society's impending sale, and the sale's likely effect on the market, constituted a breach of fiduciary duty and fraud.

Judge Myriam J. Altman noted that although the facts presented did not allow a finding that Visual Equities had a clear right to the requested injunctive relief, a balancing of the equities would justify maintaining the status quo pending the resolution of the factual dispute between the parties. The court therefore continued a

temporary restraining order preventing Sotheby's from completing the sale of the document pending a hearing. Visual Equities was required to post an undertaking in the amount of $1.5 million.

Visual Equities Inc. v. Sotheby's, Inc., New York Law Journal, p. 24, col. 2 (N.Y.Cnty., July 1, 1993) [ELR 15:6:22]

Jurisdiction/Actress Contract.

In 1990, the casting director for Theatre Arts of West Virginia, after spending four days auditioning actors in New York for the theater's summer productions, hired Melinda Berk. Berk arrived in West Virginia for rehearsals, but left the company after a dispute arose over casting.

When the actress sued Theatre Arts for breach of contract, a New York trial court found that the theater's acts in New York constituted the minimum contacts necessary to permit the court to exercise its long-arm jurisdiction. Judge Louis B. York noted that the relevant contacts included the offer of employment over the telephone, the mailing of the employment contract to New York, Berk's signing of the contract in New York, and, most significantly, the audition activities. The theater argued that Berk's audition was only fifteen minutes and that the actress was not offered a job at that time. But the acts in New York "substantially advanced the contract negotiations," and the audition was "at the very least an extremely crucial part" of the transaction between the parties, stated the court.

Judge York further observed that the theater "clearly took advantage of the unique talent pool available to it"

in New York, thereby availing itself of the benefits and privileges of conducting business in the state.

The New York contacts were "an integral part of the contractual negotiations," emphasized the court; the additional contacts, such as the telephone call and mailing, though not sufficient by themselves, served to support the court's finding of jurisdiction.

Berk v. Theatre Arts of West Virginia, Inc., 1993 N.Y.Misc.LEXIS 184, 598 N.Y.S.2d 418 (N.Y.Cnty. 1993) [ELR 15:6:22]

Employee Discharge/Arbitration.

KTVI-TV, Inc. fired Richard Kurre, citing the unacceptable quality of his performance. Kurre and the International Brotherhood of Electrical Workers, the

exclusive bargaining agent for certain station employees, filed a grievance alleging that KTVI terminated Kurre because of his age in violation of the parties' collective bargaining agreement.

The station refused to arbitrate, contending that the relevant bargaining agreement clause excluded arbitration of any discharge characterized by the station as a discharge for unacceptable quality of performance.

A Federal Court of Appeals in Missouri has ruled that the bargaining agreement's arbitration clause permitted arbitration of the real reason for Kurre's discharge, and that KTVI should be compelled to arbitrate the question.

Although agreeing with KTVI that a party who has not agreed to arbitrate a dispute cannot be forced to do so, there was a presumption of arbitrability in the case because the parties' agreement contained an arbitration clause. The agreement excluded arbitration when the actual reason for an employee's discharge was quality of

performance characterized by KTVI as unacceptable. But the clause did not "unambiguously give KTVI unfettered discretion to avoid arbitration by classifying a discharge as one for quality of performance when the union contends the discharge was for another reason."

In all, when KTVI gives quality of performance as the reason for discharging an employee and the union challenges the reason, the disputed reason is arbitrable, stated Judge Fagg. A discharge based on quality of performance cannot be arbitrated when the union agrees that is the reason for the employee's discharge. But when the union disagrees with the given reason, an arbitrator must decide whether the quality of performance is the true reason for the employee's discharge. The arbitrator may only determine whether the quality of the employee's performance was the reason for the challenged discharge, and cannot extend the arbitration to decide whether KTVI had a sound basis for its evaluation of the

employee. Judge Wollman, dissenting from the court's decision affirming the District Court order compelling arbitration, stated the view that the union expressly bargained away the right to arbitrate any and all disputes over discharges based upon a member's job performance. It appeared to Judge Wollman that once a discharged employee challenges the station's reason for discharge, it would be "inevitable" that the arbitrator would have to make findings regarding the quality of the discharged employee's job performance - "the very issue that the parties expressly agreed would not be subject to arbitration." In the absence of arbitration, employees still would have a remedy for alleged age-based discharges under statute and common law, stated the dissent.

International Brotherhood of Electrical Workers, Local No. 4 v. KTVI-TV, Inc., 1993 U.S.App.LEXIS 1760, 985 F.2d 415 (8th Cir. 1993) [ELR 15:6:23]

Damages/"World's Oldest Newspaper Carrier."

As reported at ELR 13:11:10, the October 2, 1990 issue of the "Sun" used a photograph of Nellie Mitchell to illustrate an article entitled "World's oldest newspaper carrier, 101, quits because she's pregnant!" The fictitious story purported to report on an individual who had been a newspaper carrier in Australia for 94 years. Mitchell, who, at the time of the publication, was 96 years old, had operated a newsstand and delivered newspapers in her Arkansas community for almost fifty years.

A Federal District Court in Arkansas denied Globe International Publishing's motion for summary judgment

with respect to Mitchell's claims. A jury awarded Mitchell compensatory damages in the amount of $650,000 and punitive damages of $850,000.

A Federal Court of Appeals upheld the judgment entered on the jury's verdict as to liability and punitive damages (ELR 15:2:15), but remanded the matter for "a substantial remittitur of compensatory damages."

On remand, Federal District Court Chief Judge H. Franklin Waters expressed the view that the jury was better situated to determine the "worth" of the loss of reputation and mental suffering caused to Mitchell by the newspaper, and noted the difficulty of calculating damages based upon such intangibles. However, commenting that a reduction of $500,000 most likely would meet the Court of Appeals' requirement of a "substantial" reduction, Judge Waters awarded Mitchell $150,000 in compensatory damages.

Mitchell v. Globe International Publishing, Inc., 1993 U.S.Dist.LEXIS 4199, 817 F.Supp. 72 (W.D.Ark. 1993) [ELR 15:6:23]

Noncompetition Agreement.

In February 1992, New River Media Group terminated David Collins Knighton's employment as a radio disc jockey and operations manager of Radio Station WPSK in Pulaski. The parties entered into a written noncompetition agreement which provided, in part, that Knighton, in consideration of receiving $2,000, would not, for a period of twelve months, engage in a business that competed with New River within sixty air miles of the company's broadcast station. It also was agreed that in the event Knighton breached the covenant, New River would be entitled to an injunction restraining him from

engaging in the competing business. Two weeks after signing the agreement, Knighton was hired at another radio station within the sixty mile radius of New River's station; both stations played country music and attracted the same advertisers.

Knighton returned the $2,000 check to New River, but the company sought to enjoin the disc jockey from working at the Radford station. Knighton filed a cross complaint, alleging that the agreement was "unreasonable and oppressive."

A Virginia trial court jury returned a verdict in favor of Knighton in the amount of $15,000 and the trial court entered judgment on the verdict.

The Supreme Court of Virginia has reversed the trial court judgment, finding that the agreement was "no greater than [was] necessary to protect" New River's business interests; was reasonable in terms of the geographical and time limits imposed; and was not

unreasonable with respect to public policy. The court vacated the judgment in favor of Knighton and remanded the matter to the trial court for the entry of a decree enjoining Knighton from violating the noncompetition agreement for a period of twelve months from the date of entry of the decree, and directing New River to pay $2,000 to Knighton.

New River Media Group, Inc. v. Knighton, 1993 Va.LEXIS 70, 429 S.E.2d 25 (Va. 1993) [ELR 15:6:24]

Satellite Dish.

Leon Neufeld installed a ten-foot-wide receive-only satellite dish in the front yard of his home in Baltimore. Neufeld was notified that the satellite dish violated then-existing zoning ordinances. The city subsequently

enacted an ordinance imposing stricter limitations on the placement and size of satellite dishes. After eleven criminal convictions, Neufeld dismantled the satellite dish, and challenged the ordinances on various grounds.

A Federal District Court found that Neufeld lacked standing to challenge his convictions under the satellite dish zoning ordinance, because the dish independently violated the setback ordinance. The court denied Neufeld's motion for partial summary judgment on various other claims related to the city's actions. However, the court granted Neufeld's motion for partial summary judgment to the extent that Neufeld sought a declaratory judgment that the ordinance was preempted by regulations of the Federal Communications Commission. It was found that preventing individuals living in residential districts from installing satellite receive-only antennas between eight and twelve feet in diameter imposed an unreasonable limitation on the reception of

satellite delivered signals; the court, accordingly, enjoined the enforcement of the ordinance.

Neufeld v. City of Baltimore, 1993 U.S.Dist.LEXIS 5701, 820 F.Supp. 963 (D.Md. 1993) [ELR 15:6:24]

Gaming Regulations.

The Nevada Gaming Control Board notified employees of the Hotel Employees and Restaurant Employees International Union that they were required to comply with the reporting and disclosure requirements of the gaming control statutes and regulations. The union and certain individual employees challenged the regulations.

A Federal District Court held that the action was not ripe for review on the ground that no proceedings had been initiated before the Gaming Commission to

disqualify any parties for failing to comply with the disclosure requirements.

Federal Court of Appeals Judge Hug noted that the question at issue was whether international union personnel who perform local union functions may be regulated, and held that the facial preemption challenge to the reporting and disclosure requirements of the regulatory system, as applied to labor unions and union personnel, was ripe for review. The impact of the reporting and disclosure regulation was "sufficiently direct and immediate as to render the issue appropriate for judicial review..."

After careful analysis, the court concluded that the Nevada statutory system on its face was not inconsistent with federal labor policy; that the regulation of international union employees who provide service to the local unions in their representation of gaming employees was not barred; and that the registration requirement was not

an unlawful prior restraint. However, any further First Amendment challenges to the Nevada law, as applied to the activities of the union employees, was not ripe for review, stated the court.

Hotel Employees and Restaurant Employees International Union v. Nevada Gaming Commission, 984 F.2d 1507 1993 U.S.App. LEXIS 1202 (9th Cir. 1993) [ELR 15:6:24]

Libel.

A New York trial court has ruled that attorney Michael Armstrong may proceed with a libel action against Simon & Schuster, Inc., James B. Stewart, and aurie P. Cohen, the publisher, author and researcher/reporter of the book "Den of Thieves." The book, an account of the

insider trading debacle involving individuals such as Michael Milken, Ivan Boesky, Martin Siegel and Dennis Levine, included a statement purportedly describing an affidavit prepared for the signature of Craig M. Cogut by Armstrong, the attorney for Lowell Milken.

Judge Davis found that the passages, as printed in the hardcover edition of the book and, as revised, in the paperback edition, were susceptible of defamatory meaning. The average reader, "at a minimum," would be left with the impression that Armstrong "deliberately prepared a false affidavit to aid one client and asked another client to assist with the lies; the latter client recognizing [Armstrong] was not acting in his best interest, and unwilling to go along with the lies then obtained new counsel to prepare a new affidavit. The paperback publication compound[ed] this impression by suggesting that the later affidavit contained the truth." Judge Davis observed that the challenged statements, if true, would

constitute violations of the attorney ethics rules and of criminal laws of subornation of perjury.

The court rejected the argument that the "single instance rule" would apply. Under the rule, a statement charging another with a single professional dereliction, because it might not necessarily charge general incompetence, ignorance or lack of skill, would not be deemed actionable without the pleading of special damages. However, Armstrong was not required to plead special damages, since the alleged defamatory words tended to show "a lack of character or a total disregard of professional ethics."

Judge Davis rejected the argument that the statements were expressions of opinion; declined to rule on the issue of the applicability of the attorney-client privilege; and denied the motion to dismiss the complaint.

Armstrong v. Simon & Schuster, Inc., New York Law Journal, p. 25, col. 3 (N.Y.Cnty., May 28, 1993) [ELR 15:6:24]

Previously Reported:

Correction re "Lion Sleeps Tonight". Advisory Editorial Board member Alvin Deutsch, whose firm represented the successful defendants in the Folkways Music Publishers v. Weiss case, has written to call our attention to two factual errors that appeared in Court of Appeals' opinion in the case and therefore in our report in the September 1993 edition (ELR 15:4:13). One error was minor: the opinion, and therefore our report, identified defendant June Peretti as one of the "Songwriters" who co-wrote the song "The Lion Sleeps Tonight"; in fact, she is the widow of one of the co-writers, Hugo

Peretti, but was not a herself co-writer of the song. The second factual error is more significant. The Court of Appeals' opinion stated that in settlement of a 1961 claim by Folkways that "The Lion" infringed its copyright to the song "Wimoweh," "The Songwriters allegedly executed five documents, including acknowledgments of the infringement. . . ." This statement appears to have been based on a sentence in the District Court opinion stating that the Songwriters had signed such an acknowledgment. In fact, however, the document acknowledging the infringement was signed only by the Songwriters' music publishing company -- not by any of the Songwriters individually. Moreover, one of the Songwriters had submitted a sworn affidavit stating "We were never accused of infringing any copyright, nor were we asked to execute any document acknowledging a violation of anyone's alleged rights in the underlying music, and we never signed such a

document." When this error was called to the attention of the District Court, Judge John F. Keenan issued a letter-order clarifying his opinion, saying, ". . . the Court did not imply, nor should the reader infer, that the Court had made a finding that [the Songwriters], or any one of them, had acknowledged any infringement." Mr. Deutsch points out that since the Songwriters did prevail in the case and were thereby granted ownership of the renewal term to the copyright to "The Lion Sleeps Tonight," "any such finding [that the Songwriters acknowledged they had infringed the copyright to "Wimoweh"] would have been inconsistent with the facts."

WASHINGTON MONITOR

FCC imposes $600,000 in fines due to airing of apparently indecent material by the "Howard Stern Show"

In August 1993, the Federal Communications Commission sent to Mel Karmazin, the president of Infinity Broadcasting, a letter constituting "Notice of Apparent Liability for a Forfeiture." The letter referred to a previously issued notice which was sent to Americom Las Vegas, the licensee of a Nevada radio station concerning various broadcasts of certain "apparently indecent material" on the "Howard Stern Show." The Commission asked Karmazin whether four stations owned by Infinity had aired the same material that was the subject of the notice to Nevada station KFBI. Karmazin responded that it could be assumed that the substance of the shows broadcast by KFBI also was broadcast by the four Infinity stations and that the material would have been aired

by the stations from about 6:00 A.M. to about 10:00 A.M.

The Commission based its authority to take administrative action on 18 U.S.C. Section 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

It was noted that the Commission has defined indecency as language or material that, in context, depicts or describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

The excerpts at issue appeared to the Commission to be indecent in violation of section 1464 in that they contained language that described sexual and excretory activities and organs in patently offensive terms. The material aired at times when there was a reasonable risk

that children might have been in the audience, and therefore was legally actionable.

In determining the appropriate remedy for the apparent violations, the Commission referred to Infinity's past record of airing indecent programming, which resulted, in one instance, in the imposition of liability amounting to $600,000.

However, in mitigation, the Commission adverted to the broadcaster's ongoing efforts to have the show comply with existing indecency restrictions, such as the use of "delay" mechanisms and management's continuous monitoring of the show. It was observed that the programming cited in the notice, with two exceptions, aired in November 1992, before Infinity implemented its review procedures.

The Commission, "in the interest of proceeding cautiously" with respect to enforcement and in light of Infinity's compliance efforts, declined to adopt more

serious sanctions, and, pursuant to Section 503(b) of the Communications Act of 1934, as amended, declared that the four Infinity licensees each would be liable for $125,000 for "their apparent willful and repeated violations of 18 U.S.C. Section 1464..." The Commission commented that any future infractions by Infinity "would place Infinity's continuing fitness as a Commission licensee in question."

Notice of Apparent Liability for a Forfeiture, Federal Communications Commission, 1993 FCC LEXIS 4217 (Aug. 12, 1993) [ELR 15:6:26]

"Old Glory Condom Corp" may register trademark including design of condom decorated with stars and stripes

The Trademark Trial and Appeal Board has reversed an examining attorney's refusal to register the mark "Old Glory Condom Corp" (and design) for "prophylactics (condoms)."

The design feature of the Old Glory Condom Corp.'s mark consisted of a pictorial representation of a condom decorated with stars and stripes in a manner suggesting the American flag. The design, although included in the trademark, was not applied to the condoms themselves. Registration was refused under Section 2(a) of the Trademark Act on the ground that the mark consisted of immoral or scandalous matter and was likely to offend "a substantial composite of the general public."

Chairman Sams noted that in deciding whether a mark is scandalous under Section 2(a), the Board has asked whether the mark could be characterized as "[g]iving offense to the conscience or moral feeling" or "shocking to the sense of decency or propriety." It appeared from the

case law that marks have been found scandalous when conveying, in words or in pictures, vulgar imagery.

Chairman Sams pointed out that the Trademark Office has registered many trademarks and service marks that include imagery of the American flag. Although citizens may disapprove of any commercial use of the American flag or American flag imagery, "such uses have been sufficiently common that there can be no justification for refusing registration of [Old Glory's] mark simply on the basis of the presence in that mark of flag imagery," stated Chairman Sams.

Chairman Sams declined to find that a mark containing a pictorial representation of a condom should, simply because of that fact, be refused registration as scandalous. The examining attorney apparently objected to the mark's linking of flag imagery and a pictorial representation of a condom - "precisely why this combination of

images is scandalous the examining attorney fails to articulate," noted Chairman Sams.

The evidence did not support the examining attorney's conclusion that the flag imagery would give offense in a manner that would be characterized as scandalous under Section 2(a), declared Chairman Sams, who then pointed out that the condoms were packaged so as to emphasize the company's commitment to the sale of high quality condoms as a means of promoting safer sex and eliminating AIDS and the company's belief that the use of condoms is a "patriotic" act. The company's seriousness of purpose was a factor to consider in assessing whether the mark was offensive or shocking, and this factor, along with the above-noted considerations, resulted in a finding that the mark was not "scandalous."

In re Old Glory Condom Corp., 1993 TTAB LEXIS 3, Trademark Trial and Appeal Board (1993) [ELR 15:6:26]

Artist not entitled to deduct expenses because artistic activities were a hobby rather than for profit

John D. Bowles worked as a studio photographer and photography teacher since 1973; he began deducting art-related expenses on his federal tax return at that time, but never made a profit or broke even on his art work.

The Internal Revenue Service determined that Bowles was not entitled to claim deductions with respect to his drawing and photography because he did not engage in these activities with an actual and honest objective of making a profit.

Special Trial Judge Goldberg agreed that Bowles "did not carry on his artistic endeavors with the objective of earning a profit," noting that Bowles' losses for only six of the twenty years of his career totalled over $31,000. The court also observed that Bowles did not engage in systematic efforts to sell his works and offset current expenses. In all, Bowles' artistic activities constituted a hobby, declared Judge Goldberg, in upholding the disallowance of the photographer's claimed deductions for such activities.

The court then found that Bowles was not entitled to claim deductions for a home office for the 1988 tax year. Bowles had listed home office expenses in the amount of about $1,000, representing one-seventh of the expenses of his house, for an office used for preparing lesson plans, for drawing, and for storing his photography equipment. Judge Goldberg determined that the office was not Bowles' principal place of business - there

was no showing that the photographer maintained the office for the convenience of his employer.

Bowles v. Commissioner of Internal Revenue, 1993 Tax Ct. Memo LEXIS 223, T.C.Memo 1993-222 (U.S.Tax Ct., May 20, 1993) [ELR 15:6:27]

IN THE NEWS

ASCAP and Television Music License Committee agree on license fees to be paid for music performance rights

After weeks of intense negotiations, ASCAP and the Television Music License Committee have reached an agreement concerning license fees to be paid by local television stations for use of ASCAP-licensed music in

syndicated and locally-produced programs. The agreement comes in the wake of a precedent-setting federal "rate court" decision by Magistrate Judge Michael Dolinger which established the formula by which such fees are to be calculated. (ELR 15:4:12) The agreement covers fees payable by stations for the period from 1983 through 1994, and it will foreclose any appeal from Judge Dolinger's decision as it applies to those years. (ASCAP reportedly has reserved its right to appeal the decision as it applies to fees payable in 1995.)

The agreement provides that the "interim" blanket and per program licenses -- as adjusted -- will remain in effect through the end of 1994. Judge Dolinger's opinion established a formula, but not an exact dollar amount, for the adjustments. In their just concluded agreement concerning the exact dollar amount of the adjustment, the stations have agreed to pay ASCAP the interim amount plus $4 million for 1993 and the interim amount

plus $10.65 million for 1994. The "adjustments" will be allocated among television stations pursuant to a formula to be developed by the Committee and submitted to Judge Dolinger for approval.

According to the Television Music License Committee, the fees to be paid by stations for 1983 through 1994 amount to a savings for them of $240 million over that period as compared to license fees that would have been payable if the so-called "Shenandoah" license fee formula had been applied to the period. (The "Shenandoah" formula was one agreed to by the stations and ASCAP in 1969 in settlement of a rate-making proceeding initiated by a broadcaster named Shenandoah Valley Broadcasting, Inc.) In the rate-making proceeding that resulted in Judge Dolinger's recent decision, ASCAP had argued for a formula that would have resulted in license fees greater than those payable under the Shenandoah formula. Judge Dolinger's decision and the just-concluded

agreement with ASCAP are therefore considered by television stations to be a major victory. [November 1993][ELR 15:6:28]

Jury rejects singer's claim against Virgin Records in connection with Paula Abdul album

A Federal District Court jury has rejected background singer Yvette Marine's claim that she sang co-lead vocals on Paula Abdul's album "Forever Your Girl."

Marine alleged that Virgin Records engaged in "false and deceptive packaging," claiming that her voice, although uncredited, was combined with Paula Abdul's voice on certain songs on the album, but that the company misrepresented the composite to the public as that of one singer - Paula Abdul. [November 1993][ELR 15:6:28]

DEPARTMENTS

In the Law Reviews:

The Entertainment Law Review, published by Sweet & Maxwell, Freepost, Andover, Hants, SP10 5BR England, has issued Volume 4, Issue 4 with the following articles:

Euro-US Co-production: Are These Differences So Irreconcilable? by Giovanni A. Pedde, 4 Entertainment Law Review 95 (1993)

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A Knight Without Armour in a Savage Land: Victor DeCosta and Intellectual Property Law in the United States by Leslie A. Kurtz, 4 Entertainment Law Review 103 (1993)

An Up-and-Coming Right - The Right of Publicity: Its Birth in Italy and Its Consideration in the United States by Silvio Martuccelli, 4 Entertainment Law Review 109 (1993)

Record Fine for Plagiarism of a Reality Show: Is It Safer under French Law to Sue for Unfair Competition Rather Than for Copyright Infringement? by Elisabeth Logeais, 4 Entertainment Law Review 116 (1993)

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Judging Others: From Music to Real Life by Edward Rothstein, 27 International Society of Barristers Quarterly 417 (1992)

Football Coaches and Contracts: Ethical Practices and Common Sense by Joe Yukica, 27 International Society of Barristers Quarterly 419 (1992)

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Chinese Intellectual Property - Some Global Implications for Legal Culture and National Sovereignty by Michael D. Pendleton, 15/4 European Intellectual Property Review 119 (1993)

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Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright by

Gerald Dworkin, 15/5 European Intellectual Property Review 151 (1993)

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Interactive Multimedia: What Is It, Why Is It Important and What Do I Need to Know About It? by Michael D. Scott and James N. Talbott, 11 Computer/Law Journal 585 (1992)

Cable News Network v. Video Monitoring Systems: Justice or Injunctive Relief against Copyright Protection?, 5 DePaul Business Law Journal 335 (1993)

Should the United States Have a Cultural Policy? by John Frohnmayer, 38 Villanova Law Review 195 (1993)

Congress Clears the Way for Copyright Infringement Suits Against States: The Copyright Remedy Clarification Act by Jennifer J. Demmon, 17 The Journal of Corporation Law 833 (1992)

Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America by John Wertheimer, 37 The American Journal of Legal History 158 (1993)

Computer Software Copyright Protection: How Does It Feel? by Arlen L. Tanner, 61 UMKC Law Review 723 (1993)
[ELR 15:6:29]