RECENT CASES

Philadelphia Symphony Orchestra does not own copyright interest in Disney film "Fantasia," and Orchestra's breach of contract claim requires trial, federal court in Philadelphia rules; similar case between Disney and estate of conductor Leopold Stokowski is to be heard in New York City rather than Philadelphia

Disney's 1991 homevideo release of the film "Fantasia" -- a half century after its theatrical debut in 1940 -- has triggered litigation over whether Disney is legally obligated to share its homevideo profits with others. So far, similar lawsuits claiming a portion of those profits have been filed by the Philadelphia Symphony Orchestra, which performed the film's soundtrack music, and by its one-time conductor, the late Leopold Stokowski. A separate case also has been filed by the publisher of Igor Stravinsky's "The Rite of Spring," one of the many compositions in that soundtrack.

The Orchestra has asserted a variety of claims against Disney, including those for breach of contract, violation of the Lanham Act, infringement of its right of publicity, and violation of its right to share in the film's profits as a matter of copyright law. The copyright claim is based on the Orchestra's contention that it was the joint author of "Fantasia" along with Disney, and therefore Disney has an obligation to account to it for half the film's profits.

A Federal District Court in Philadelphia has denied a request for summary judgment made by the Orchestra. With respect to the copyright claim, the court has ruled that the Orchestra was not the joint author of the film, even though it performed the music on the film's soundtrack. The court acknowledged that the Orchestra's performance was rendered with the intention that it be combined with Disney's animation to create the film. "However," said the court, "a magnificent performance does not a joint author make."

In this case, the court found that the evidence was clear that the Orchestra's performance was a work for hire, using the standards applied under the Copyright Act of 1909. This was so, because the recordings were done at Disney's "instance and request"; Disney was the motivating factor in the creation of the recordings and controlled the Orchestra; and because Disney selected the music to be performed, paid the Orchestra for the use of the recordings it made, provided the instruments and recording personnel used to make the recordings, and paid all expenses of the rehearsals and recordings. Moreover, agreements signed by Orchestra members acknowledged that they had been "employed" by Disney.

The court also denied the Orchestra's summary judgment motion on its breach of contract and other claims, because the 1939 contract between Disney and the Orchestra may have authorized Disney to release "Fantasia" in homevideo formats, even though homevideo had not yet been invented at that time. The contract granted Disney the right to use the recordings of the Orchestra's performance, as well as its name, in connection with a "feature picture." The Orchestra argued that "feature picture" means "a feature-length theatrical motion picture intended to be exhibited in theaters outside the home," and not homevideo cassettes or discs. The court disagreed however. It noted that in other cases, the terms "feature film" and "feature picture" have been defined to mean movies that are "four or more reels in length" other than those that are "strictly educational, religious or commercial" and other than serials. The terms "feature picture" and "feature film" also have been used to describe the contents of program libraries for television stations and cable networks, and thus the court concluded that "the common usage of the phrase `feature film' does not necessarily imply a presentation in a theater outside of the home."

Leopold Stokowski conducted the Orchestra while it performed for the film's soundtrack. And in a separate case, his estate also has made claims for a share of the film's profits. The estate filed its suit in New York City. Disney had already filed a declaratory relief suit against the Stokowski estate in Philadelphia where the Orchestra's suit is pending. Disney asked the New York court to transfer the estate's lawsuit to Philadelphia, or to stay it; but the New York court declined to do either. Applying standards used to decide change of venue motions, the New York court found that it was the proper venue to hear the case, despite the existence of the Orchestra's similar case in Philadelphia. Shortly thereafter, the

Philadelphia court transferred Disney's suit against the Stokowski estate to New York, so it could be joined with the estate's suit against Disney.

Philadelphia Orchestra Ass'n v. Walt Disney Co., 821 F.Supp. 341, 1993 U.S.Dist.LEXIS 5737, 7655 (E.D.Pa. 1993); Muller v. Walt Disney Productions, 822 F.Supp. 1033, 1993 U.S.Dist.LEXIS 7122 (S.D.N.Y. 1993); Walt Disney Co. v. Muller, 1993 U.S.Dist.LEXIS 13057 (E.D.Pa. 1993)[ELR 15:7:3]

Agreement permitting "television viewing" of "Curious George" animated films did not authorize homevideo distribution; author did not "unreasonably" withhold consent for separate merchandise licenses when she rejected proposals for merchandise she thought would be "junkie"

An agreement between the author of "Curious George" books and the defendant which granted the defendant the right to produce animated "Curious George" films and to distribute them "for television viewing" did not authorize the defendant to issue a homevideo license to Sony Corporation, a Federal Court of Appeals has held.

The agreement permitting distribution of the films "for television viewing" was entered into in 1979, prior to the advent of homevideo technology, and thus the court inferred that the parties had not specifically contemplated homevideo viewing of "Curious George" films. The court therefore surveyed various methods that earlier cases have used to interpret copyright licenses in light of uncontemplated "new uses." "These fine-tuned interpretive methods have led to divergent results in cases considering the extension of televison rights to new video forms," the court observed. Focusing on the homevideo cases in particular, the court concluded that "[a]lthough the question is extremely close," the agreement permitting "television viewing" did not authorize homevideo licenses.

The court distinguished earlier homevideo cases which reached the opposite conclusion, because those cases involved licenses which made explicit mention of methods of exhibition that might be invented in the future. Instead, the court relied on cases that had found that "television viewing" and "videocassette viewing" are not the same thing. The court also relied on the fact that the agreement was drafted by the defendant, while the author was "an elderly woman" who was apparently unrepresented by counsel.

A separate merchandising agreement between the author and the defendant gave the author the right to approve any merchandise manufacturing licenses the defendant might grant to other companies, though the agreement provided that the author would not withhold her consent "unreasonably." The author did withhold her consent from some proposed merchandise licenses because she thought the proposed merchandise would be "junkie." The defendant alleged that she had done so "unreasonably," and it asserted a counterclaim for damages it allegedly suffered as a result.

The court ruled that the agreement's prohibition of "unreasonable" product disapproval required that the author "articulate some material reason, subjective or otherwise, for disapproving a product." In other words, the author "could not withhold product approval without ascribing a reason, nor for reasons immaterial to the `Curious George' mark, its proposed use or commercial potential, or unrelated to [the author's] artistic and reputational identification with the mark and ancillary products." Moreover, "the reason for withholding approval could not be so preclusive as to frustrate the fundamental contractual assumptions" on which the contract was based. In this case, that would mean that the author "could not impose standards which would effectively eliminate all potential for profitable use of the `Curious George' property," because the author's agreement with the defendant entitled her to minimum royalty payments, and that "plainly implied a mutual understanding that some licensing of the `Curious George' character would be acceptable, in order to enable sales from which royalties might be generated." If there were material grounds for withholding approval, they would have to be communicated within a reasonable time and manner making it possible for the proposed licensee to rework the product in order to get the author's approval.

The court then reviewed the instances in which the author had withheld her consent, and it found that she had not been unreasonable in doing so.

Rey v. Lafferty, 990 F.2d 1379, 1993 U.S.App.LEXIS 6430 (1st Cir. 1993) [ELR 15:7:4]

"Twin Peaks" copyrights were infringed by unauthorized "guide" book; fair use defense is rejected, and statutory damages are awarded for each episode summarized in book

The Second Circuit Court of Appeals has affirmed a District Court ruling that the copyrights to the television series "Twin Peaks" were infringed by an unauthorized book entitled "Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What" which contained detailed plot summaries of eight of the series' episodes. (ELR 14:2:3)

The appellate court has held that the guide book was an unauthorized derivative work based on the series, because the book contained "a substantial amount of material" from the series "transformed from one medium to another." Substantial similarity was found, because the book contained "extensive direct quotations" amounting to at least 89 lines of dialogue (i.e., "fragmented literal similarity") plus a 46-page detailed recounting of every intricate plot twist and element of character development in the same sequence as in the series (i.e., "comprehensive nonliteral similarity").

The court rejected the defendants' fair use arguments, finding that each one of the four fair use factors weighed against fair use. The character of the use was an abridgment that served no "transformative function" and elaborated detail far beyond what was required for any legitimate purpose. The nature of the copyrighted work was fiction. The amount of what was copied was substantial. And the effect on the value of the copyrighted work was negative, because the defendants' book competed with "Twin Peaks" books that had been licensed by the plaintiff.

The plaintiff elected to recover statutory damages, and the District Court awarded $120,000 at the rate of $15,000 per episode. On appeal, the defendants argued that Copyright Act 504(c) limits statutory damages to $20,000 for "all infringements involved in the action, with respect to any one work," and thus damages should have been no greater than $20,000. The appellate court held, however, that each episode of the series was a separate work, even though the plot continued from episode to episode; and thus the District Court's award of $15,000 for each one of the eight episodes was proper.

The District Court also had held that the trademark to the title of the series was infringed by the book. The Court of Appeals reversed on this issue, because the District Court had failed to apply the trademark infringement factors required by Polaroid Corp. v. Polarad

Electronics, 287 F.2d 492 (2d Cir.), cert. denied, 368 U.S. 820 (1961). The application of such factors was said to be especially important in literary title cases such as this one, because in Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) (ELR 10:4:13), the court had held that an author has a significant First Amendment interest in choosing an appropriate title for his or her work, and thus literary titles do not violate the Lanham Act "unless the title has no artistic relevance to the underlying work whatsoever, or, if has some artistic relevance, unless the title "explicitly misleads as to the source or the content of the work." Since the title of the defendants' book "is of some artistic relevance," the case was remanded for a determination of whether the book's title "explicitly" misled potential customers as to the source of the book.

It should be noted that the Second Circuit began its copyright infringement analysis by noting the suggestion made in Nimmer on Copyright and in Professor Alan

Latman's posthumously-published article "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum.L.Rev. 1187 (1990), that a copyright plaintiff first should prove copying by direct evidence of copying or by evidence of access and "probative similarity"; and if copying is proved, the plaintiff should then prove "substantial similarity." This suggestion was in fact adopted by the Second Circuit in Laureyssens v. Idea Group, Inc., 964 F.2d 131 (2d Cir. 1992) (ELR 14:11:6). In this case, however, the Second Circuit said "Since a showing of substantial similarity will necessarily include the lesser showing of probative similarity, there seems little harm in combining the copying and infringement inquiries, as we have done in the past." No mention of Laureyssens is made!

Twin Peak Productions v. Publications International, 996 F.2d 1366, 1993 U.S.App.LEXIS 13454 (2d Cir. 1993) [ELR 15:7:4]

Court affirms decision that owner of early "George Thorogood and the Destroyers" tapes has no copyright interest in tapes

As reported at ELR 13:4:7, John Forward, in 1976, arranged and paid for two recording sessions for a band comprised of musicians George Thorogood, Jeff Simon and Ronald Smith; Forward, a music fan and record collector, retained the tapes of the sessions.

The band, under the name "George Thorogood and the Destroyers," eventually released several successful albums.

In 1988, when the band objected to Forward's decision to sell the 1976 tapes to a record company for commercial release, Forward sought a declaratory judgment that he was the owner of the copyright in the material.

A Federal District Court ruled that the band owned the copyright in the tapes and enjoined Forward from commercially exploiting the
tapes.

A Federal Court of Appeals has affirmed the District Court's decision, noting that the court had found that the band allowed Forward to keep the tapes solely for his personal enjoyment and had never surrendered the copyright.

Judge Boudin also agreed with the District Court's finding that the evidence did not support Forward's claim to ownership under the "work for hire" doctrine. Although Forward booked and paid for the studio time, he neither employed nor commissioned the band members nor did he compensate or agree to compensate them - nothing suggested that the tapes were prepared for the use and benefit of Forward. Judge Boudin commented that "Forward was a fan and friend who fostered this effort, not the Archbishop of Saltzburg commissioning works by Mozart."

The court concluded by upholding the finding that Forward made no musical or artistic contribution to the tapes so as to warrant a claim of co-ownership as a "joint author" of the tapes.

Forward's petition for rehearing or suggestion for rehearing en banc were denied.

Forward v. Thorogood, 985 F.2d 604 (lst Cir. 1993) [ELR 15:7:5]

Antonio Carlos Jobim may proceed with copyright infringement action involving renewal rights to five songs

In 1958 and 1960, composer Antonio Carlos Jobim entered into a series of contracts with a Brazilian publisher, Editoria Musical Arapua. Arapua obtained United States copyrights for five songs composed by Jobim and subsequently assigned its copyrights to Bendig Music. Bendig, in turn, assigned the rights in one of the songs, "Desafinado," to Hollis Music, Inc. In 1987 and 1988, Jobim assigned the United States copyright renewal rights for the songs to Corcovado Music Corp. Corcovado claimed that the receipt of payments by the Bendig parties after the expiration of the original term copyrights constituted copyright infringement.

A Federal District Court granted the Bendig parties' motion to dismiss on the ground that the 1958/1960 contracts required interpretation by a Brazilian court, and that a forum selection clause in the contracts required Jobim and Arapua to resolve any disputes in the courts of Brazil.

Corcovado argued that it never entered into any agreement with the Bendig parties; that none of the parties to the action was a citizen of Brazil; and that the action involved copyright law.

Federal Court of Appeals Judge Feinberg agreed that the action arose under the Copyright Act, and that the Jobim-Arapua contracts were relevant only as a defense to the infringement claim. Judge Feinberg proceeded to find that Jobim did not, as a matter of law, convey renewal rights to Arapua in 1958 or 1960.

The court referred to case law indicating that a contract conveying original term copyrights without mentioning future rights does not as a matter of federal copyright law convey renewal rights. Jobim's contracts did not mention renewal rights, and the composer therefore retained renewal rights to the songs and could validly assign them to Corcovado.

The court rejected the argument that Brazilian law would apply to the interpretation of the Jobim-Arapua contracts, stating, in part, that "United States renewal copyrights reflects vital policy of United States copyright law."

The judgment of the District Court was reversed and the matter was remanded for further proceedings.

Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679 (2d Cir. 1993) [ELR 15:7:6]

Court of Appeals reverses dismissal of copyright suit against author and publisher of William Burroughs biography, because District Court failed to determine whether quotations from plaintiff's letters were protected expression

Beat poet Harold Norse has brought another in a lengthening line of infringement lawsuits alleging that the copyrights in personal letters were infringed by their quotation in biographies. In this case, the defendants are the author and publisher of a biography of writer William Burroughs. The alleged infringement consists of the admitted copying of a total of 48 words from letters that Norse had deposited at a university library, all 48 of which appear (though not in succession) in one paragraph of the defendants' book. Norse also asserted claims for defamation, unfair competition, and breach of contract. The District Court granted summary judgment to the defendants on all claims.

The District Court dismissed the copyright claim on the grounds that the defendants' book was not substantially similar to the plaintiff's letters. In doing so, it cited Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989) (ELR 11:6:13), which had affirmed a defense summary judgment on the grounds that the admittedly copied words at issue there were not protected by copyright. In this case, the Ninth Circuit has reversed the summary judgment, because the District Court had not determined whether the 48 copied words were protected by copyright, and "[t]hus, Narell does not control this case. . . ." The Ninth Circuit said, ". . . a substantial similarity analysis may be useful in a copyright case when the alleged infringer denies that he in fact copied the plaintiff's work. . . . But here the substantial similarity analysis is inapposite to the copying issue because appellees admit that they in fact copied phrases from Norse's letters." The appellate court therefore remanded the case to the District Court so it could determine whether the copied words were protectible expression. If so, the appellate court suggested that the District Court use the fair use doctrine to determine whether the copying "is substantial enough to be actionable."

The Ninth Circuit affirmed the dismissal of the defamation claim on the grounds that the quoted portion accurately described Norse's feelings at the time he wrote the quoted letter. The court also affirmed dismissal of Norse's unfair competition claim, on the grounds it is preempted by federal copyright law. Dismissal of Norse's two contract claims were affirmed as well. One claim was based on the library's agreement with the author; it was dismissed because the agreement was to protect the library and did not give Norse any rights as a third-party beneficiary. Dismissal of Norse's claim that the book's author breached an oral agreement to mention Norse's memoirs in the book was affirmed for lack of any damages.

Comment: The court's ruling on the copyright claim is puzzling, and is correct if, but only if, the court was using the term "substantial similarity" to mean that form of similarity which combined with evidence of access gives rise to an inference of copying. However, if the court really meant to say that copying of protected expression automatically amounts to infringement, without proof that the defendant's work also was substantially similar to the plaintiff's, this opinion is gravely in error. This case is a classic example of the confusion created to which the late Professor Alan Latman referred in his posthumously-published article "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum.L.Rev. 1187 (1990). Professor Latman suggested that the term "probative similarity" be used to describe the type of similarity that is relevant when deciding whether copying occurred, and that "substantial similarity" be used to describe the degree of similarity that must exist to find infringement in those cases where copying of protected expression has been found. The Second Circuit is beginning to avoid such confusion by its adoption of Professor Latman's suggested terminology. See Laureyssens v. Idea Group, 964 F.2d 131 (2d Cir. 1992) (ELR 14:11:6).

Norse v. Henry Holt and Co., 991 F.2d 563, 1993 U.S.App.LEXIS 7873 (9th Cir. 1993) [ELR 15:7:6]

Sculptor Jeff Koons found liable for copyright infringement in connection with two more sculptures from his "Banality" exhibit at the Sonnabend Gallery; courts again reject Koons' fair use defense

Sculptor Jeff Koons has enjoyed remarkable success with his works in the marketplace, but virtually none in the courthouse. So far, he has been held liable for copyright infringment three times, each in connection with a different sculpture created by him for a "Banality Show" exhibit at the Sonnabend Gallery which opened in 1988. Koons is part of a contemporary artistic movement -- sometimes referred to as "Pop Art" -- which takes images from popular culture and "re-contextualizes" them in a work of art in an effort to convey a certain message or idea to the viewer. Andy Warhol's reproduction of Campbell's soup cans is an example of this movement. The message Koons attempted to convey in his Sonnabend Gallery exhibit was related to the asserted banality of modern society.

The first of the three cases to go to judgment involved Koon's sculpture "String of Puppies" which he had copied from a photograph entitled "Puppies" by Art Rogers. In that case, the Second Circuit Court of Appeals rejected the sculptor's fair use defense, holding that although a parody does not have to be only of the copied work (and may also be a parody of modern society), "the copied work must be, at least in part, an object of the parody . . . , otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large. . . . " Rogers v. Koons, 960 F.2d 301 (2d Cir.) cert. denied, 113 S.Ct. 365 (1992) (ELR 14:6:14).

The two other cases against Koons were held in abeyance while the Rogers decision was pending. Now they too have been decided. In one, a Federal District Court has held that United Feature Syndicate's copyright to the "Garfield" comic strip character "Odie" was infringed by Koons' sculpture "Wild Boy and Puppy," because the puppy in the sculpture was virtually identical to "Odie," had admittedly been copied from a "Garfield" comic, and was substantially similar to the copyrighted "Odie" despite the presence of two other characters in the sculpture. The court rejected the defendant's fair use defense, applying the same analysis as that used in Rogers v. Koons.

In the third case, a different District Court has held that Barbara Campbell's copyright to her photograph "Boys with Pig" was infringed by a Koons sculpture entitled "Ushering in Banality." This court too rejected the Koons' fair use defense, saying "This case needs little discussion, for it is substantially identical to Rogers v. Koons. . . ."

The only success Koons has enjoyed in court thusfar has been in subsequent proceedings in Art Rogers' lawsuit. Rogers sought to have Koons held in contempt on account of his violation of the judgment in that case; and Rogers sought an award of attorneys' fees on account of that contempt. The District Court denied Rogers' request for attorneys' fees, saying that fees could be awarded only if Rogers could show that Koons' contempt was "willful." The court ruled that an evidentiary hearing would be necessary to determine whether Koons had acted willfully, so Rogers may get his fees yet.

United Feature Syndicate, Inc. v. Koons, 817 F.Supp. 370, 1993 U.S.Dist.LEXIS 3479 (S.D.N.Y. 1993); Campbell v. Koons, 1993 U.S.Dist.LEXIS 3957 (S.D.N.Y. 1993); Rogers v. Koons, 1993 U.S.Dist.LEXIS 3376 (S.D.N.Y. 1993) [ELR 15:7:7]

Small restaurant is exempt from need to obtain public performance licenses for radio play of songs, even though radio is connected to nine ceiling speakers

A Federal District Court in Wisconsin has added insult to injury by denying the request of several music publishers for a default judgment against a restaurant that had not answered their complaint for copyright infringement. The defaulting defendant was a "small restaurant in Racine," having 16 tables and 15 booths and a radio over which it plays a Milwaukee FM station.

An investigator determined that the restaurant's radio played songs recorded by James Taylor, Lionel Ritchie, Billy Joel, the Pointer Sisters, the Eagles, and the Temptations; and because the restaurant did not have a public performance license, the music publishers who own the copyrights to those songs filed suit.

The court refused to enter the restaurant's default even though it did not answer the complaint, because the court ruled that the restaurant is exempt from the requirement that it obtain public performance licenses by virtue of 110(5) of the Copyright Act. That is the section that exempts public performances by "a single receiving apparatus of a kind commonly used in private homes." The restaurant's radio is a Realistic Model No. STA-700 AM/FM receiver-amplifier sold in Radio Shack stores.

The publishers contended that the exemption was inapplicable because the restaurant's radio is connected to nine 8-inch speakers in its ceiling. But the court was unpersuaded. It observed that 110(5) of the Copyright Act does not mention "speakers," and instead refers only to "a single receiving apparatus of a kind commonly used in private homes." In any event, the court observed that "Sophisticated `home entertainment' systems today often have multiple speakers to permit sound to be heard in various areas of a home. Although nine speakers in a home would be quite a few, that number would not be unprecedented."

The court's opinion is quite conversational in tone, and the court openly acknowledged its unfamiliarity with copyright law. "When I heard this case . . . at a scheduled default judgment hearing . . .," the judge confessed, "I expressed surprise that the situation as presented violated the law." The court noted that the radio station had "presumptively paid a licensing fee to play its music." And then the court revealed its lack of familiarity with who actually receives public performance royalties by expressing its opinion that "One would think that Lionel Ritchie, Billy Joel, the Eagles, and the other artists here should be content with only one payment per performance."

Cass County Music Co. v. Vasfi Muedini, 821 F.Supp. 1278, 1993 U.S.Dist.LEXIS 4562 (E.D.Wisc. 1983) [ELR 15:7:8]

Copyright Rules for ex parte seizures are inconsistent with Copyright Act and unconstitutional, Federal District Court holds; seizure orders denied in case brought by movie studios and homevideo distributors against stores dealing in allegedly pirated videocassettes

In an opinion showing remarkable and arguably commendable sensitivity to constitutional rights and Congressional authority, a Federal District Court has denied a request by movie studios and homevideo distributors for ex parte seizure orders directed at two retail video stores which were selling and renting allegedly pirated video cassettes. The court denied the plaintiffs' request, even though their applications for seizure orders complied with requirements of the Copyright Rules portion of the Rules of Practice adopted by the United States Supreme Court, and even though those rules require the issuance of seizure orders where their requirements have been satisfied.

The court, however, noted that the rules were first adopted in 1909 and amended most recently in 1966. Since then, two things of significance have occurred: Congress rewrote the Copyright Act in 1976, and the Supreme Court has held that the constitution imposes limits on the manner in which ex parte orders may be granted.

The court held that the mandatory nature of the Rules conflicts with 503(a) of the Copyright Act of 1976, because 503(a) permits, but does not require, judges to issue seizure orders. "Moreover," said the court, "a literal reading of the rules would result in procedures of dubious constitutional validity in light of Supreme Court decisions handed down since the time of the rules' adoption." The court therefore concluded that "compliance with Supreme Court rules is not a sufficient basis on which to justify an ex parte impoundment under section 503(a)."

The court reviewed the constitutional requirements for ex parte seizures, as the Supreme Court articulated them in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and concluded that the ex parte impoundment procedure under the Copyright Rules is "constitutionally infirm in multiple respects." Moreover, the court ruled that while the plaintiffs had showed they were likely to prevail on the merits, they had "not gone far enough" in their application to satisfy constitutional requirements. Among other things, they had not shown why a temporary restraining order would be insufficient in this case. Also, the requested seizure order would have violated the 4th Amendment, the court held.

While this opinion does not preclude ex parte seizure orders in all piracy cases, it does require copyright owners to submit more thorough applications than before --

applications which will satisfy multi-prong constitutional requirements. In some cases, particularly against pirates who have not been sued before, copyright owners may not have first-hand knowledge of all of the information they need to satisfy those requirements. In such cases, copyright owners may have to begin by seeking temporary restraining orders; and if and when, pirated merchandise is hidden or destroyed before contested hearings are held, those facts may then be used to obtain ex parte orders the next time piracy suits are brought against those same defendants.

Paramount Pictures Corp. v. Doe, 821 F.Supp. 82, 1993 U.S.Dist.LEXIS 5872 (E.D.N.Y. 1993) [ELR 15:7:8]

Author of sexual abstinence educational materials prevails in copyright infringement action

In the early 1980s, Coleen Mast developed a sexual abstinence education program called "Sex Respect." Mast began working with the Committee on the Status of Women, and the Committee, in 1985, obtained a grant of over $275,000 in federal funds to carry out a pilot expansion of the program in selected public schools.

In July 1985, Mast entered a contract whereby United Communications of America agreed to publish Sex Respect workbooks, and teacher and parent handbooks. A dispute arose between Mast and the publisher; in the settlement of the dispute, Mast obtained control over the manuscripts and United Communications assigned the copyrights in the books to Respect Incorporated.

The Committee, which had ordered books directly from Respect, obtained permission from its grantor, the United States Department of Health and Human Services, to reprint and distribute the books. The Committee printed over 160,000 books, but continued to order additional books from Respect until the spring of 1987, when a dispute arose over price.

In a copyright infringement action brought by Mast, a Federal District Court first ruled that no reasonable fact-finder could accept the Committee's argument that Mast was an employee and that the Committee, on this basis, owned the copyright under the "work made for hire" provision of the Copyright Act of 1976. Senior District Court Judge Milton I. Shadur cited numerous factors indicating that Mast was not the Committee's employee.

The court then found that Mast and the Committee had not agreed in writing that Mast's text would be a work made for hire, and that the Committee had no rights under the work made for hire provision.

Judge Shadur also rejected the Committee's argument that it was a joint author of the copyright - the record indicated that Mast never intended to make anyone else a joint author - and rejected the Committee's claim that a federal regulation granted it, derivatively through the Department of Health and Human Services, an unrestricted right to reproduce and distribute the works.

The court concluded that Respect owned the copyrights to the material in issue and granted the company judgment as a matter of law on the copyright infringement claim.

In a subsequent ruling, Judge Shadur issued a permanent injunction against future infringements by the Committee and granted Respect's motion for an accounting of the Committee's profits and for the imposition of a constructive trust.

Respect Inc. v. Committee on the Status of Women, 1993 U.S.Dist.LEXIS 1911, 815 F.Supp. 1112; 1993 U.S.Dist.LEXIS 4275, 821 F.Supp.531 (N.D.Ill. 1993) [ELR 15:7:9]

Insurance companies must defend Microsoft Corporation on copyright infringement claims brought by Apple Computer

Federal Insurance Company and Great Northern Insurance Company issued several insurance policies to Microsoft Corporation. When Apple Computer sued Microsoft, along with Hewlett-Packard Company, the insurers sought a declaration that the policies did not give rise to a duty to defend and/or indemnify Microsoft in the action. According to Federal District Court Judge Carolyn R. Dimmick, the critical issue was whether the complaint in the underlying action included claims for damages from "advertising injury;" the parties agreed that the insurance companies could have a duty to defend and to indemnify Microsoft if the action involved advertising injury.

The court focused on the broadest policy definition of advertising injury, which provided that such injury would arise "out of one or more of the following offenses committed during the policy period occurring in the course of your advertising activities: ...any infringement of copyright or title or of slogan..."

Apple claimed that Microsoft's distribution and sale of Windows 2.03 and the copying and adaptation of the Macintosh audiovisual works exceeded limited license rights granted to Microsoft by Apple and infringed Apple's copyrights. Apple also claimed that Microsoft committed contributory infringement when it "aided and assisted Hewlett-Packard in using Windows 2.03 in conjunction with New Wave," a software program developed and marketed by Hewlett-Packard to run in conjunction with Microsoft Windows.

Judge Dimmick ruled as a matter of law that pursuant to the plain meaning of the applicable policy definition, the insurance companies had a duty to defend Microsoft against claims for advertising injury if Apple claimed that the alleged offense occurred in the course of Microsoft's advertising activities, i.e., if Apple alleged that Microsoft advertising infringed Apple copyrights.

Apple, in addition to claiming that Microsoft's distribution and sale of Windows and the copying of the Macintosh audiovisual works exceeded license rights, also had alleged that Microsoft infringed Apple's copyrights by marketing, distributing and licensing Windows. The term "marketing" related specifically to promoting goods in the form of advertising, stated Judge Dimmick. Thus, the insurance companies did not prove as a matter of law that the injury complained of was not covered by the applicable policy. Apple alleged facts, that, if proven, could render the insurance companies liable for indemnification based on copyright infringement in Microsoft advertising, stated the court, although pointing out, in a footnote comment, that such claims were likely to make up a only small portion of the claims brought by Apple against Microsoft. Microsoft was entitled to partial summary judgment since the insurance companies were, as a matter of law, required to defend any claims brought by Apple that would trigger coverage under the policy.

In a subsequent ruling, Judge Dimmick denied the insurance companies' motion for reconsideration.

In May 1993, a Federal District Court (see below) issued various rulings in the Apple-Microsoft matter.

Federal Insurance Company v. Microsoft Corporation, 1993 U.S.Dist.LEXIS 5467; 1993 U.S.Dist.LEXIS 5468 (W.D.Wash. 1993) [ELR 15:7:9]

Court issues rulings in Apple Computer's copyright infringement case against Microsoft and Hewlett-Packard

As described at ELR 14:8:11, Apple Computer, in 1988, sued Microsoft Corporation and Hewlett-Packard Company claiming that Microsoft's Windows 2.03 computer software and Hewlett-Packard's NewWave computer software infringed copyrights held by Apple. The copyrights protected the audiovisual works comprising part of the graphical user interface of Apple's Macintosh computer.

An earlier dispute concerning Microsoft's Windows 1.0 software had been resolved by a 1985 agreement whereby Apple granted to Microsoft a non-exclusive license to some of the graphic elements contained in Windows 1.0.

However, in 1989, a Federal District Court in California found that the agreement was not a complete defense to Apple's action because it was limited to the visual displays in Windows 1.0 and did not cover the displays in Windows 2.03 that were not in the prior work.

In August 1992, Judge Vaughn R. Walker determined that the majority of the allegedly similar items were unprotectible due to merger, scenes a faire, functionality and unoriginality.

In May 1993, the court, upon conducting an intrinsic analysis test with respect to the remaining allegedly similar items, granted Hewlett-Packard and Microsoft's motions for summary judgment for lack of virtual identity as to five features, but denied Hewlett-Packard's motions for summary judgment for lack of substantial similarity as to the design animation features described as "zooming rectangles" and icon dimming, and as to the "waste basket" icon in NewWave Developer's Release.

The court then declared that since Microsoft's Windows consisted only of elements that were either unprotectible, licensed, or protectible but lacking sufficient similarity to Apple's works, a jury would have to apply the virtual identity standard when comparing the similarities of Microsoft's works as a whole to Apple's.

Judge Walker proceeded to find, as a matter of law, that the remaining unadjudicated items, even if found substantially similar, did not significantly alter the works as a whole - the four possibly infringing elements of NewWave were relatively minor in the context of the entire work and the collective impact of the items was de minimis. Therefore the virtual identity standard also would apply in comparing Hewlett-Packard's works as a whole to Apple's, stated the court.

It was noted that the critical factor in deciding whether to apply a virtual identity standard was whether the work was capable of only a narrow range of expression.

The works at issue were not factual works per se, but were works whose ideas could be expressed in limited ways, observed the court, in reaffirming that the jury should apply the virtual identity standards in comparing the works as a whole.

Judge Walker next found that Apple raised questions of material fact concerning the extent and nature of Microsoft's involvement in the development of Hewlett-Packard's NewWave and the nature of the licensing agreement between the parties so as to warrant the denial of Microsoft's motion for summary judgment on Apple's contributory infringement claim.

Apple also raised questions of material fact concerning the extent and nature of Hewlett-Packard's involvement in the development of Windows and whether the company's contributions, if any, actually affected the graphical user interface of Windows to warrant the denial of

Hewlett-Packard's motion for summary judgment that it was not jointly and severally liable with Microsoft.

In turning to Apple's claim the Windows 2.03 and 3.0 infringed seven of Apple's separately registered audio-visual works, including MacPaint, MacDraw, and Macintosh Finder, Judge Walker observed that, in Windows 2.03, all of the MacPaint based alleged similarities were determined to be licensed. The remaining alleged similarities were outside the "content area," i.e., the area inside the title bar and scroll bars of a window, and did not arise out of the application programs; thus, concluded the court, the copyrighted application programs MacDraw, MacPaint and MacProject could not be infringed.

After further consideration, Judge Walker stated that no jury could reasonably conclude that there was substantial similarity between Windows 2.03 and MacDraw, MacProject, LisaDraw and LisaProject, noting that Apple's argument that Window's underlying idea, "which is to provide a graphical user interface based on a desktop metaphor, and MacDraw's underlying idea, which is to provide drawing capabilities to the user, are substantially similar is ridiculous. The same can be said about MacProject, LisaDraw and LisaProject." The court granted Microsoft's motion for summary judgment based on MacPaint, MacDraw, MacProject, Macintosh Finder and LisaDraw as to Windows 2.03.

The court found that Microsoft also was entitled to summary judgment on Apple's claims against Windows 3.0 based on MacPaint, MacDraw, MacProject, Macintosh Finder, LisaDraw and LisaProject.

According to news reports, Apple, in June 1993, agreed not to oppose Microsoft's motion for summary judgment in order to appeal Judge Walker's rulings rather than to proceed with a scheduled jury trial in the District Court.

Apple Computer, Inc. v. Microsoft Corporation, 821 F.Supp.616, 1993 U.S. Dist.LEXIS 6787(N.D.Cal. 1993) [ELR 15:7:10]

Court upholds constitutionality of New York "ticket scalping" law

A New York trial court has enjoined The Concert Connection from offering to resell tickets to concerts and sporting events for more than the maximum premium price. The state Attorney General claimed that the Connecticut company violated New York's "ticket scalping" statute, 25.01 of the Arts and Cultural Affairs Law.

Judge Aldo A. Nastasi found that the court possessed jurisdiction over the company and its president - The

Concert Connection supplied goods in New York to New York consumers.

It was noted that under the statute, the "maximum premium price" was set at the price printed on the admission ticket plus the greater of either $5 or ten percent of such ticket price, plus lawful taxes. The statute defined "resale" as any ticket sale other than a ticket sale by an entertainment venue operator, and included sales by telephone, mail or fax where either the buyer or the seller was located in the state of New York.

The evidence indicated that The Concert Connection offered to resell tickets and/or resold tickets to entertainment events to residents of New York; that the company resold tickets at prices exceeding the established price by as much as 800 percent; and that the company did not personally use the tickets or fall within a statutorily exempt group.

Judge Nastasi rejected the argument that the statute was an unconstitutional violation of due process and equal protection, noting that the United States Supreme Court had upheld the constitutional validity of the statutory predecessor to the challenged statute. The statute applied equally to all ticket sellers, both in New York and outside of the state; did not disadvantage consumers in other states; and distinguished sellers seeking to recover their expenses from resellers attempting to make an unlawful profit.

People v. The Concert Connection, New York Law Journal, p. 27, col. 1 (Westchester Cnty., April 28, 1993) [ELR 15:7:11]

Court orders New York City to issue permit to traditional sponsor of St. Patrick's Day parade and not to require inclusion of any contingent not approved by the sponsor

Federal District Court Judge Kevin Thomas Duffy was asked to decide whether the city of New York could compel the Ancient Order of Hibernians, a private and long-standing sponsor of New York's St. Patrick's Day Parade, to include in the parade and under their own banner, the Irish Lesbian and Gay Organization, an organization whose tenets allegedly would be inconsistent with the message of the parade's sponsors.

The court, although noting that the facts of the matter were "in a total state of flux," reviewed the history of the parade, and observed that the Order and a Parade Committee had financed the parade exclusively by private donations; the city provided police and sanitation services. The Order adopted rules to prevent any group or person from using the parade as a forum to pursue any political, social or commercial position inconsistent with the "message, values and viewpoint" of the Order, or, as stated by Judge Duffy, whose "purposes, principles or agenda are inconsistent with the teachings of the Roman Catholic Church." Decisions on parade participants were left to the discretion of the Order.

In 1991, ILGO marched in the parade, not as an affiliated unit, but as guests of a Hibernian unit. The Order declared that individual members of ILGO would be welcome to march in the parade without a banner as guests of the various parade contingents.

Judge Duffy commented that "the true reason the AOH and the Parade Committee seek to exclude ILGO is because ILGO would insist on marching under a separate banner that would, in effect, identify the AOH as condoning sexual practices contrary to the message that the

AOH believes the Parade should convey." The court therefore stated that it would not address the arguments regarding ILGO's exclusion on the basis of a waiting list or as a consequence of its behavior in the 1991 parade.

ILGO was not permitted to march as an affiliated unit in the 1992 parade, but was permitted to hold its own demonstration in a specified area just prior to the parade and was given a special place on Fifth Avenue cordoned off by the police from which to "review" the parade.

In October 1992, the City Human Rights Commission agreed with an Administrative Law Judge that the parade was a public accommodation subject to the Human Rights Law and that the Order had violated the Human Rights Law by excluding ILGO in 1991. The Commission, contrary to the finding of the Administrative Law Judge, declared that the application of the Human Rights Law would not violate the sponsor's First Amendment rights. It was stated that the Order did not demonstrate that the application of the Human Rights Law's prohibition against discrimination on the basis of sexual orientation to its parade procedures would unconstitutionally infringe upon the Order's rights of free speech.

The Commission found that the parade was a secular event celebrating "a broad range of values surrounding Irish heritage," and that including the ILGO would not impair the Order's right of association.

In November 1992, three organizations, including the Order, applied to the New York City Police Department for a parade permit; the Police Commissioner awarded the permit for the St.Patrick's Day Parade to the St.Patrick's Day Parade Committee, Inc. (not to be confused with the Parade Committee).

In January 1993, the Order sued various city parties seeking injunctive relief under 42 U.S.C. 1983 to bar the city from depriving the Order of its rights under the First and Fourteenth Amendments by refusing to issue the

Order a permit to conduct the 1993 St. Patrick's Day Parade.

Judge Duffy stated that the City's Human Rights Commission's initial inquiry should have been whether the parade and its message constituted speech protected by the First Amendment. If a parade constitutes protected free speech, it cannot be a public accommodation.

A parade, announced the court, is, by its nature, "a pristine form of speech...The public thoroughfares of our nation are the public fora in which the issues of the day can be debated and where individuals seek to engage in basic expressive activity...Every parade is designed to convey a message...As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression."

The Order, as the sponsor of the parade, sought to honor the patron saint of Ireland and to proclaim allegiance to the Roman Catholic Church and its teachings.

It appeared to Judge Duffy that the Administrative Law Judge and the Human Rights Commission "dramatically changed in content" the message of the parade. But the city parties could not do so without violating the First Amendment rights of the parade sponsors, stated the court.

The manner and means by which a message is conveyed also are matters of constitutionally protected free speech. In requiring the Order to include ILGO, the city parties violated the Order's rights to free speech.

A municipality may regulate the time, place and manner of a parade as long as the restrictions are justified without reference to the content of speech, are narrowly tailored to serve a significant governmental interest, and provide alternative channels for the communication of information. The city attempted to change the message of the parade and the way that message would be conveyed. Imposing such conditions, stated the court, did not constitute permissible time, place or manner restrictions. Since there was no "content neutral" justification for the city's action which could excuse the infringement, the conditions violated the First Amendment.

The court found it unnecessary to rule on the issue of whether the activities of the city parties violated the Order's right of freedom of association and also declined to rule on whether the city violated the Order's religious freedom.

In all, the ruling of the Human Rights Commission violated the First Amendment by rejecting the message that the Order claimed for the parade and by substituting its own version of what the Commission thought the message of the parade was or should be. And by forcing the inclusion of ILGO in the parade, the Commission sought to dictate how the parade sponsors would express their thoughts.

Emphasizing that "no one can force the inclusion of ILGO in the AOH Parade," Judge Duffy concluded that the Order was entitled to a permit to conduct the 1993 New York St. Patrick's Day Parade, along with an order directing the city not to interfere with the conduct of the parade by requiring the inclusion of any contingent which was not approved by the Order and the Parade Committee. The order, stated the court, was preliminary in nature and covered only the 1993 parade.

New York County Board of Ancient Order of Hibernians v. Dinkins, 1993 U.S.Dist.LEXIS 2269, 814 F.Supp. 358 (S.D.N.Y. 1993) [ELR 15:7:12]

Unconstitutionality of Long Beach parade permit ordinance is affirmed

Long Beach Lesbian and Gay Pride, Inc. is a nonprofit corporation devoted to producing an annual parade and "festival;" the parade "commemorates the lesbian and gay rights movement, publicly espouses such rights, and celebrates the participants' pride in their orientation..." The corporation has conducted the parade annually since 1984.

Between 1984 and 1989, the corporation obtained permits for the parade from the city manager, and paid service charges to the city ranging from about $5,600 to about $18,600.

In 1985, the corporation challenged the constitutionality of the parade permit ordinance. A trial court declared that the ordinance was void because the discretionary permit approval provision violated the First Amendment to the United States Constitution and article I, section 2 of the California Constitution, and could not be severed from the rest of the chapter. The court stated that the remaining challenged sections of the ordinance were not unconstitutional, facially or as applied.

A California appellate court, in upholding the trial court's decision, observed that parades, such as those sponsored by the corporation, "constitute activity squarely within the protection of the First Amendment's guarantees of freedom of speech and assembly."

The ordinance stated that the city manager or his/her designee "may issue a permit...if it is determined that the following criteria have been met:..." The trial court ruled that the use of the word "may," as opposed to "shall or some other imperative," granted the city manager unbridled discretion to deny or reject a special event application even if all the criteria set forth were met. Upon finding that the "pivotal permit-granting function" was unconstitutionally structured, the remaining sections of the ordinance had "no verbal anchor or basis," agreed Judge Fukuto.

The court then carefully considered the corporation's challenge to other provisions of the ordinance.

Long Beach Lesbian and Gay Pride, Inc. v. City of Long Beach, 1993 Cal.App.LEXIS 275, 14 Cal.App.4th 312, 17 Cal.Rptr.2d 861 (Ca.Ct.App.1993) [ELR 15:7:13]

Bankruptcy Court ruling that parties did not enter contract for purchase of cable television sports news network is upheld

In December 1990, Mizlou Communications instituted a Chapter 11 reorganization in bankruptcy court. Subsequently, Mizlou initiated an adversary proceeding against Landmark Communications and Sports News Network, seeking a declaration that a contract existed between Mizlou and the Landmark/Sports News parties and a determination that there was a breach of that contract.

United States Bankruptcy Judge Francis G. Conrad granted the Landmark/Sports News' parties motion for summary judgment and dismissed the complaint. Soon after, Mizlou consented to the conversion of its reorganization case to a liquidation proceedings pursuant to Chapter 7 of the Bankruptcy Code.

Mizlou had operated a sports news network on cable television. In October 1990, Mizlou and Landmark entered negotiations regarding Landmark's possible purchase of Mizlou's assets and business. In December 1990, Landmark formed Sports News Network, a wholly owned subsidiary, to acquire Mizlou's assets and operate a broadcast sports news business. Various acquisition documents were drafted.

Mizlou required authorization from the bankruptcy court to sell substantially all of its assets outside the ordinary course of its business. In early January 1991, United States Chief Bankruptcy Judge Burton J. Lifland signed an order in which it was stated that the parties "have agreed to terms of an asset purchase agreement." Although Mizlou was not yet authorized to enter into any contract, the company argued that the circumstances attendant to its application to the bankruptcy court demonstrated that the contract became effective no later than January 9.

Landmark and Sports News argued that language in the contract documents demonstrated their intent not to be bound prior to the execution of the documents. Federal District Court Judge Peter K. Leisure agreed with the Landmark/Sports News parties, stating that Mizlou did not identify a "point in time where the purchasers expressed an intent to waive the execution requirement and be bound prior to execution." The court, upon reviewing a number of the contract provisions, concluded that the provisions clearly and unambiguously demonstrated the parties' intent not to be bound prior to the formal execution of the contract documents.

Judge Leisure observed that there was no partial performance of the purported contract; that Mizlou did not treat the contract terms as fixed and final on January 9; that, given the magnitude and complexity of the transaction, a writing would be expected; and that the bankruptcy court did not err in finding that no contract existed between Mizlou and Landmark/Sports News and awarding summary judgment for the latter parties.

In re Mizlou Communications Co., Inc. v. Landmark Communications, Inc., 1993 U.S.Dist.LEXIS 1454 (S.D.N.Y.1993) [ELR 15:7:13]

Michigan court rules on claims against "Magic" Johnson alleging wrongful transmission of HIV virus

An individual identified as Jane Doe alleged that Earvin ("Magic") Johnson, Jr. wrongfully transmitted the HIV virus to her through consensual sexual contact. Doe claimed that Johnson "knew or should have known" that he had a high risk of becoming infected with the HIV virus because of his "sexually active, promiscuous lifestyle." According to Doe, Johnson should have warned her about his past lifestyle, informed Doe that he "may have HIV," informed Doe that he did in fact "have HIV," not engaged in sexual contact with her, or used a condom or other method to protect her from the HIV virus. Doe stated that as a result of the wrongful transmission of the virus, she was subjected to physical, emotional and financial distress.

Federal District Court Judge Richard A. Enslen stated that it was clear to the court that causes of action based on the negligent transmission of an infectious disease, as well as the failure to disclose a disease are cognizable under the law.

After careful consideration, the court determined that a party charged with the transmission of the HIV virus would have a legal duty to, at the very least, disclose the fact that she may have the HIV virus, if: the party has actual knowledge that s/he has the HIV virus; the party has experienced symptoms associated with the HIV virus; or the party has actual knowledge that a prior sex partner has been diagnosed as having the HIV virus. Under these circumstances, the burden on the individual in revealing his or her HIV virus information would be minimal when compared to the high risks of the disease.

To the extent that Doe alleged that Johnson had actual knowledge that he had the HIV virus on certain specified dates; that Johnson had experienced symptoms associated with the virus prior to the specified dates; or that Johnson had actual knowledge that a prior sex partner had been diagnosed as having the virus, the court found that the complaint stated a claim and denied the motion to dismiss.

The court declined to find that legal claims can be stated for the wrongful transmission of the HIV virus on negligence or fraud theories on the sole basis that a party has engaged in "high risk" activity or was a member of a "high risk" group. Without more, a party who has had unprotected sexual encounters with multiple partners does not have a legal duty to inform others of his/her past sexual activity, although the fact that one may have engaged in "high risk" activity is relevant to a claim for wrongful transmission of the HIV virus.

Judge Enslen then found that Doe alleged a cause of action for the wrongful transmission of an infectious disease under a battery theory. However, the court declined to extend the doctrine of strict liability to sexual activity, stating that sexual activity is not an inherently or abnormally dangerous activity, and granted Johnson's motion to dismiss this cause of action. The court also granted Johnson's motion for a more definite statement as to the claim alleging intentional infliction of emotional distress as to the infant Doe.

Doe v. Johnson, 1993 U.S.Dist.LEXIS 4367, 817 F.Supp. 1382 (W.D.Mich. 1993) [ELR 15:7:14]

Dismissal of defamation claims against Colorado broadcaster is reversed

The Living Will Center sells products and services, as described by Colorado appellate court Judge Briggs, relating to "advance decisions and directions for health care." The center provides a $29.95 package consisting of a Colorado living will form, a durable power of attorney for health care form, and other relevant forms. Customers also receive updated information about developments relating to living wills.

NBC Subsidiary KCNC-TV aired a newscast segment about the center; reporter Suzanne McCarroll stated that some individuals concerned with medical ethics believe that merchandising living wills is "really exploiting people's fear of death." The president of the center acknowledged that his forms were the same as the forms distributed without charge by many hospitals and libraries, but noted that the center provided additional material to purchasers.

A Denver doctor, identified by the station as a medical ethicist, initially commented "I think it's a scam," and then declared that individuals purchasing the center's material would find themselves to have been "totally taken."

The broadcast listed other sources for the living will forms, and concluded by pointing out that the center's president was not a doctor or lawyer, but an "entrepreneur."

A subsequent telecast summarized the first report and listed other sources for the forms provided by the center.

In an action for defamation, the center claimed that within 24 hours after the telecasts, its dollar sales volume dropped 65 percent and never recovered.

A trial court determined that, as a matter of law, the telecasts related to a matter of public interest, thus warranting the application of the requirements of falsity and actual malice or reckless disregard of the truth. The court concluded that the substance of the telecasts was true, and that the statements that the center's business was a "scam" and that people were being "taken" were constitutionally protected opinion supported by disclosed facts.

A Colorado appellate court has reversed the trial court's decision, finding that the court erred in concluding that the substance of the telecasts neither contained nor implied any provably false factual connotation.

Judge Briggs referred to Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990: ELR 12:2:8; 12:6:19) in which the United States Supreme Court concluded that, regardless of characterization as opinion or fact, a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least when a media party is involved.

The words "scam" and "taken" in the first broadcast, considered alone, would not necessarily imply facts susceptible of being proved false, stated the court. However, a jury could properly find that the substance of the statements, considered together with the other assertions in the telecast, was that a company with no expertise was packaging and selling materials which were unnecessary or which consumers could obtain elsewhere for little or no cost. Judge Briggs observed that the telecast considered neither the contents or purpose of the center's quarterly newsletter, nor the central registry which would be used to alert purchasers of developments concerning living wills. A jury could find the implication of the various statements to be that no reasonable consumer informed of the content and purpose of the forms would find them useful and could further find this connotation to be false, declared the court.

There is no requirement that there be a disclosure of every fact involved in an investigative story, but the telecast implied that the content and purpose of everything in the center's package that might be worth paying anything for, as well as the facts relevant to the center's knowledge and expertise in the area, had been fully disclosed. Under the record before the court, a jury could properly find that implication to be false, stated Judge Briggs, who therefore found that the telecast was not within the protection of the First Amendment for statements containing no provably false factual connotation. The case should not have been dismissed on the basis of lack of provable falsity, determined the court, which then reached the same conclusion with respect to the second telecast and remanded the matter for further proceedings.

Judge Rothenberg, in dissent, agreed with the trial court that the doctor's use of the words "scam" and "taken" in the context of the broadcast were rhetorical hyperbole and protected opinion, not assertions of fact; the doctor's expertise was disclosed as well as his interest and concern in the area. Although two discrepancies existed between the trial court's findings and the information presented by the center, Judge Rothenberg, stating that the discrepancies were relatively minor, would have affirmed the dismissal of the center's claims.

The Living Will Center v. NBC Subsidiary (KCNC-TV), Inc., 1993 Colo.App. LEXIS 43 (Colo.App. 1993) [ELR 15:7:15]

Skating instructor may proceed with 1983 claims against city arising from denial of access to skating rink

Barbara Mertik, a professional ice skating instructor who provided figure skating lessons to students at a municipal ice skating rink used by a private ice skating club, was denied access to the skating rink. Mertik sued the club and the city of Parma Heights under 42 U.S.C. 1983 alleging the violation of her procedural and substantive due process rights under the Fifth and Fourteenth Amendments.

A Federal Court of Appeals noted that Mertik had been charged with gross sexual imposition by a former student. The allegations on which the charge was premised were false, and the charge was set aside nolle prosequi in a Parma trial court. No other such allegations had ever been made against Mertik in her 25 years as a professional figure skating coach.

In July 1991, when Mertik attempted to begin a lesson at a skating rink, the manager of the rink ordered Mertik off the ice.

A Federal District Court dismissed Mertik's claims under 1983 and remanded the balance of the case to state court.

Senior Federal District Judge Joiner, sitting by designation, found that Mertik was not entitled to relief under 1983 against the skating club - there was no allegation that the club acted in concert with any state actors, or that any policy under which the club may have operated was an exercise of power specifically authorized by the state.

Judge Joiner then observed that Mertik alleged the existence of valid contracts with her students, which contracts were in force at the time that Mertik was allegedly ordered off the ice. Mertik further alleged that she complied with all of the conditions required to maintain her staff privileges with the club; the court found that Mertik thus sufficiently alleged the existence of a contract right with the club. In all, Mertik alleged a sufficient contractual interest in continuing to teach at the city's rink to constitute a property interest under the Fourteenth Amendment, and the court, accordingly, reversed the District Court's dismissal for failure to state a claim for violation of procedural due process rights based on the alleged infringement of a property right.

Mertik also alleged that she was deprived of a constitutionally protected liberty interest founded upon her right to live and work free from governmentally imposed stigma. According to Mertik, certain city employees publicized the false allegations of child abuse, thereby depriving her of employment opportunities and harming her reputation.

Judge Joiner stated that the court would view the alleged stigmatizing statements "as having been made in the context of the termination of a mutually beneficial business relationship in which the governmental benefit, the right to use the city's rink, played an integral role." Mertik sufficiently alleged that the reasons for the city's decision to ban her from the rink were publicly disseminated, and the court found that Mertik alleged sufficient facts to implicate a liberty interest protected by the due process clause of the Fourteenth Amendment.

Mertik also was entitled to attempt to prove her claim that she was entitled to pre-deprivation process and the District Court's dismissal on this issue was reversed.

The court concluded by rejecting Mertik's claim that the city's conduct violated substantive due process rights.

Federal Court of Appeals Judge Kennedy agreed with the majority that Mertik had a property interest and that the city interfered with her contracts with her students and with the skating club. Judge Kennedy also agreed that Mertik had a property interest in continued access to the public facilities required for her employment, and a liberty interest. But Judge Kennedy agreed with the District Court that there was no failure of procedural due process since the deprivation was "random and unauthorized" so that a pre-deprivation hearing was impracticable and thus not required.

Mertik v. Blalock, 983 F.2d 1353 (6th Cir. 1993) 16

Pending Canadian proceeding requires dismissal of former hockey players' action over NHL pension fund

As reported at ELR 14:2:12, a group of former professional hockey players filed a class action lawsuit against the National Hockey League and other parties alleging, among other claims, the violation of the Employee Retirement Income Security Act in connection with the funding, administration and management of the NHL Pension Plan and Trust. The players questioned the allocation of surplus funds from the pension plan to the accounts of member clubs of the League, rather than to the accounts of retired participants in the plan.

The NHL parties sought to dismiss the action on the ground that another previously filed lawsuit addressing the same issues was pending in Canada.

A Federal District Court refused to dismiss the players' action.

Federal Court of Appeals Judge Seitz, in an interlocutory appeal, noted that although the claims asserted before the court were based primarily on ERISA, whereas the claims in the Canadian action were based on Canadian law, both actions involved the validity of the terms of the pension plan and their general application to the trust funds and sought similar relief. The District Court therefore was required to yield its jurisdiction. Judge Seitz rejected the argument that dismissal would result in the loss of ERISA claims which were subject to the federal courts' exclusive jurisdiction, and reversed the District Court decision.

Judge Alito, in dissent, stated that ERISA was meant to govern the NHL's pension plan and that the majority "abrogated federal statutory rights" in requiring the pension plan beneficiaries to rely on Canadian law. It made no difference to Judge Alito whether Canadian law was similar to "or even in some sense better than ERISA. What matters is that Congress wanted ERISA to govern the NHL pension plan, but the majority...frustrated the implementation of that intent."

A petition for rehearing by the court in banc was denied.

Dailey v. National Hockey League, 1993 U.S.App. LEXIS 2507, 987 F.2d 172 (3d Cir. 1993) [ELR 15:7:16]

Forest Service may not enjoin environmental group's use of "Smokey Bear" in political ad

A provision of the Conservation Act of 1974 prohibits the use of the character or name "Smokey Bear" except pursuant to regulations issued by the Secretary of Agriculture. The Chief of the Forest Service of the Department of Agriculture may authorize the use of Smokey Bear for non-commercial use, without charge, when such use is essentially a public service contributing to education concerning the prevention of forest fires.

Lighthawk, the Environmental Air Force, brought a declaratory judgment action claiming that the Forest Service could not prevent the organization from publishing a newspaper advertisement in which Lighthawk criticized the Forest Service's management of public lands. The ad featured a drawing of Smokey Bear with a chainsaw partially hidden behind his back. Printed below the caricature was the slogan "Say it ain't so, Smokey."

A Federal District Court in Washington has granted summary judgment in favor of Lighthawk on the ground that the proposed application of the statute and the Forest Service regulation abridged Lighthawk's First Amendment rights.

Judge Carolyn R. Dimmock stated that the statute and regulation cited by the Forest Service were content based restrictions of protected speech; that the use of a cartoon-like caricature of Smokey Bear did not diminish the value of the speech involved; and that the statute and regulation as applied to Lighthawk were presumptively invalid and subject to the highest level of scrutiny.

The court then found that the Forest Service did not demonstrate a compelling government interest that was narrowly drawn such that the application of the statute and regulation would be ruled constitutional.

"Conveying the message of forest fire prevention and maintaining the value of the character Smokey Bear to aid this effort are certainly important," declared Judge Dimmock, "but are not compelling in the context of First Amendment rights."

The fact that the Forest Service owns the Smokey Bear symbol and has an important interest in protecting the value of the character did not serve as a compelling interest justifying a content-based regulatory scheme. It was further noted that the application of the statute and regulation to Lighthawk's political advertisement undermined the importance of the government interest. The use of Smokey Bear in political speech and parody would be unlikely to diminish the value of the character for forest fire prevention purposes, stated the court.

Judge Dimmock also commented that the statute and regulation "could certainly have been more narrowly drawn so that the Forest Service could prohibit only those uses that would have a high propensity to weaken the value of the symbol." Alternatively, stated the court, the statute and regulation could have been written to prohibit only unauthorized commercial uses - the statute and regulation "go too far by prohibiting all uses, whether commercial, or non-commercial and purely expressive."

The court concluded by declining to rule the statute and regulation facially unconstitutional, noting that no determination was made as to the constitutionality of the statute to commercial uses and, with respect to the regulation, that some non-commercial uses of Smokey Bear might not be eligible for the same level of protection as Lighthawk's purely expressive use.

Lighthawk, The Environmental Air Force v. Robertson, 1993 U.S.Dist.LEXIS 1522, 812 F.Supp. 1095 (W.D.Wa. 1993) [ELR 15:7:17]

Talent agency must arbitrate dispute concerning enforcement of SAG and AFTRA regulations

The Screen Actors Guild has adopted a series of regulations, known collectively as Rule 16(g), which create a system of licensing for talent agents. The American Federation of Television and Radio Artists established a similar licensing system, known as Rule 12-B. Under the regulations, union members who utilize the services of an agent not franchised by the union may be subject to union discipline.

In May 1990, Characters, Inc., received SAG and AFTRA franchises. Subsequently, Characters complained that Central Productions and Casting, Inc., a competitor in the Baltimore-Washington talent market, was acting as a talent agency, casting company and payroll service.

According to Characters, AFTRA, by allowing Central to perform these functions, was not strictly enforcing adherence to the terms of Rule 12-B. AFTRA apparently informed Rosetta McPherson, the majority owner of Characters, that the AFTRA local did not require strict adherence to the terms of the regulations.

Characters eventually sued Central and other parties alleging, among other claims, conspiracy to monopolize the Baltimore-Washington talent market by failing to enforce the cited regulations with respect to Central.

A Federal District Court has ruled that the arbitration clauses in the cited regulations applied to the instant dispute and dismissed Characters' antitrust claims based on the interpretation of the regulations against the SAG and AFTRA parties.

Characters also alleged that Talent Payroll Services, which was managed by Central, along with the co-owners of Central conspired to monopolize the

Baltimore-Washington talent market by, as quoted by Judge Norma Holloway Johnson, "threaten[ing] producers desiring to do work in the Baltimore-Washington talent market with withholding talent unless only [Central's] talent is employed[;] [Central] casts the project and Payroll Service is hired for paying the talent."

The unions pointed out that they did not enforce the regulations in the Baltimore-Washington market because it would not be "in the best interests" of their membership; that other franchised agents in the market were providing threefold services in the same manner as Central; and that Characters was offered the opportunity to conduct a similar threefold business. It was "equally significant," stated the court that Central's share of the relevant market was less than four percent - a four percent share of the market was ruled "grossly insufficient to establish monopoly power in that market." The court therefore granted summary judgment in favor of the

Central parties with respect to Characters' antitrust claim.

Judge Holloway concluded by dismissing Characters' claims alleging defamation and interference with the right of contract.

Characters, Inc. v. Central Productions and Casting, Inc., 1993 U.S.Dist.LEXIS 4091 (D.D.C. 1993) [ELR 15:7:18]

Muzak licensee loses action challenging new agreement

Wisconsin Music Network had a forty-seven year relationship with Muzak Limited Partnership. A 1980 license agreement between the parties provided, in part, that if Muzak failed to give notice two years prior to

March 31, 1989 that it intended not to renew the agreement, Muzak was required to offer Wisconsin Music the agreement which it was then offering to like situated licensees.

When the agreement with Wisconsin Music expired, Muzak was involved in negotiations with the International Planned Music Association; the negotiations resulted, in September 1990, in a new system-wide license agreement. In January 1991, Muzak offered the new agreement to Wisconsin Music. In a letter sent to the company, as well as to all similarly situated affiliates, Muzak advised Wisconsin Music that if the company did not sign the new agreement, Muzak would assume that Wisconsin Music did not plan to continue the relationship. In June 1992, Muzak advised Wisconsin Music of its intention to terminate the relationship sixty days from receipt of the letter, unless the new agreement was signed. Wisconsin Music subsequently sought an injunction to prevent the termination of the relationship.

Wisconsin Music alleged, among other claims, that Muzak "terminated" the company without good cause in violation of the Wisconsin Fair Dealership Law.

A Federal District Court in Wisconsin noted that the 1980 agreement between the parties expired "upon appearance of the new agreement;" that the proposed changes in the new agreement did not discriminate against Wisconsin Music in violation of Wisconsin law; that the multi-territory account provision of the new agreement was an essential and reasonable program and did not violate federal antitrust laws; and that certain pricing provisions did not constitute antitrust violations. Muzak showed good cause for nonrenewal because of Wisconsin Music's failure to comply with the new agreement, stated the court, and, in the absence of a showing of any likelihood of success on the merits, the company was not entitled to the requested injunctive relief.

Wisconsin Music Network, Inc. v. Muzak Limited Partnership, 822 F.Supp. 1332 (E.D.Wisc. 1992) [ELR 15:7:18]

Magistrate recommends that brewer prevail on First Amendment claim challenging government's ban on "The Original Crazy Horse Malt Liquor" label

Hornell Brewing Company produces and markets alcoholic and non-alcoholic beverages, including "The Original Crazy Horse Malt Liquor." In February 1992, the Bureau of Alcohol, Tobacco and Firearms issued a Certificate of Label Approval to Hornell's bottler authorizing the bottling and distribution of the Crazy Horse product.

In April 1992, then Surgeon General Antonia Novello criticized the choice of the name Crazy Horse for a malt liquor. Crazy Horse was a "highly revered Oglala Sioux leader," according to Federal District Court Magistrate Judge Joan M. Azrack. Eventually, a United States Senate Committee adopted a resolution directing Hornell to negotiate with Sioux leaders and enter into a binding agreement abandoning the use of Crazy Horse as a brand name.

Hornell claimed that the company attempted to negotiate an agreement but that the Sioux's insistence on a general ban of Native American names and symbols in connection with the sale of all commercial products and services was beyond the scope of Hornell's authority.

In October 1992, the Congress enacted 633 of Public Law 102-393, notifying the Bureau of Alcohol, Tobacco and Firearms to deny any application for a certificate of label approval, including a certificate of label approval already issued, which authorized the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product.

Hornell sued various government officials challenging the constitutionality of 633.

Judge Azrack agreed with Hornell that the statute violated the First Amendment. Conducting a traditional commercial speech inquiry, the magistrate stated that the Crazy Horse label, as commercial speech, was entitled to First Amendment protection because it concerned lawful activity and was not misleading.

Judge Azrack recalled that "the desire to protect society or certain members of society from the purported offensiveness of particular speech is not a substantial interest which justifies its prohibition." The government claimed, however, that it had a substantial interest in protecting the health, safety and welfare of Native Americans by preventing "the enhanced appeal of alcohol use among Native Americans due to the use of the name Crazy Horse on a malt liquor." There was no evidence indicating the sales figures for Crazy Horse, or the market share of the product, noted the magistrate, "let alone how much is consumed by Native Americans or whether alcohol consumption by Native Americans has increased since Crazy Horse was introduced." Nevertheless, the magistrate agreed that the government had a substantial interest in preventing the enhanced appeal of alcohol use among Native Americans.

Judge Azrack proceeded to find that although the government parties asserted a substantial interest, they did not establish that 633 directly advanced the interest of preventing enhanced alcohol use among Native Americans. It was observed that the legislative record as to the offensiveness of the Crazy Horse label suggested that

Native Americans might be discouraged from consuming an alcoholic beverage that dishonored the name of a revered leader.

Judge Azrack also found 633 was more extensive than necessary to serve the interest asserted by the government.

The magistrate, although not convinced that strict scrutiny should be applied to all content-based restrictions of commercial speech, nonetheless, citing R.A.V. v. St. Paul, 112 S.Ct. 2538 (1992), proceeded to conduct a strict scrutiny analysis. For purposes of the analysis, Judge Azrack deferred to the interest asserted by the government. After again agreeing that the government has a compelling interest in preventing the enhanced use of alcohol among Native Americans, the magistrate again found that there was no evidence that 633 would advance the interest in any way and that the proscription of speech was not narrowly tailored.

Judge Azrack "respectfully recommended" that 633 violated the First Amendment and that Hornell was entitled to summary judgment on this claim. The finding was sufficient to strike the statute and grant summary judgment on behalf of Hornell, but Judge Azrack continued, for purposes of the Report and Recommendation, to analyze the company's other claims.

Upon careful review, Judge Azrack rejected Hornell's equal protection and due process claims; found that 633 was not a bill of attainder and did not constitute a taking of property without just compensation in violation of the Fifth Amendment; and that Congress did not violate the principles of separation of powers in enacting 633.

Hornell Brewing Co., Inc. v. Brady, 1993 U.S.Dist.LEXIS 4662 (E.D.N.Y. 1993) [ELR 15:7:19]

Denial of cable company's request for access to condominium common areas is upheld

As reported at ELR 12:9:15, a Federal District Court in Maryland ruled that Media General Cable was not entitled to install its cable wires in compatible easements in the Sequoyah Condominiums' common areas. Sequoyah contained more than 1,000 individual units consisting of three building types. The unit owners, via a governing council, had entered an exclusive contract with the operator of a satellite master antenna television system.

Media General, noting the presence of the compatible easements at Sequoyah, claimed a right of access to the development's common areas under section 621(a)(2) of the Cable Act.

The District Court stated that the utility easements to which Media General sought access were conveyances between or among private parties and were neither "public rights-of-way" nor "dedicated" easements and held that the company was not entitled to access to Sequoyah under the Act. The placement of the cable system via the easements would be a taking per se, according to the court, for "the placement of cable or conduit in or along an easement is plainly a physical occupation of the easement space." To the extent the easements at Sequoyah were private property, Media General's construction of its system through those easements under the Act would be a taking for which just compensation would be required.

Federal Court of Appeals Chief Judge Ervin, in affirming the District Court's decision, stated that the wording of section 621 (a)(2) was sufficient to support the court's decision, but also cited the Cable Act's legislative history and the opinion in Cable Holdings of Ga., Inc. v. McNeil Real Estate, 953 F.2d 600 (ELR 14:3:12), reh'g en banc denied, 988 F.2d 1071 (11th Cir. 1992), cert.

denied, 113 S.Ct. 182 (1992; ELR 14:6:18). Chief Judge Ervin affirmed the holding that the Cable Act did no more than to authorize a franchisee to use public lands, namely public rights of way and easements that have been dedicated to public use - the court did not find it necessary to determine the takings question.

Senior District Court Judge Kaufman, sitting by designation, disagreed with the conclusion that the only compatible easements covered by section 621(a)(2) were those dedicated for a public use. Judge Kaufman would have found that the section covered easements of the type granted by Sequoyah to the utility companies and the satellite master antenna provider; that the use proposed by Media appeared to be compatible with those easements; and that if Media exercised the rights which Judge Kaufman believed the company possessed under the Cable Act, a taking would be involved which would require payment of just compensation by Media to Sequoyah and/or one or more of the easement grantees.

Judge Kaufman would have ordered further proceedings to determine the physical and/or economic damage if Media were granted the requested relief.

Media General Cable of Fairfax, Inc.v. Sequoyah Condominium Council of Co-Owners, 1993 U.S.App.LEXIS 6373, 991 F.2d 1169 (4th Cir. 1993) [ELR 15:7:20]

Gannett Company prevails in action brought by publisher of football newspaper

In 1983, Gannett Company, Inc. acquired a one year option to purchase Pro Football Weekly, Inc.'s stock at an agreed-upon price. Gannett lent the newspaper publisher a total of $450,000 and provided the services of a consultant for the newspaper's summer subscription drive. The newspaper continued to have financial problems, and, in April 1985, Gannett decided not to exercise its option. Soon after, Pro Football Weekly ceased publishing its newspaper and filed for bankruptcy.

In a subsequent lawsuit, a Federal District Court granted Gannett's motion for a directed verdict on the company's counterclaim seeking about $320,000 in damages against the publisher for the remaining amounts due on the loans.

A jury then found in favor of Pro Football Weekly on a general verdict form and assessed about $2.05 million in damages; with respect to the publisher's breach of fiduciary duty and unjust enrichment claims, the jury assessed damages of about $105,000 and $35,000 respectively, but denied Pro Football Weekly's fraud claim.

The court granted Gannett's motion for a directed verdict on Pro Football Weekly's breach of fiduciary duty and unjust enrichment claims and entered judgment in favor of Gannett on the fraud claim. A Federal Court of Appeals has upheld the District Court's decision.

Senior Judge Harlington Wood, Jr., after stating that it was "obvious that the jury inconsistently assessed damages," found that the evidence supported Gannett's argument that it did not control the summer subscription mailing and that the company was entitled to a directed verdict on the breach of fiduciary duty claim (Pro Football Weekly, on appeal, had objected only to the directed verdict on this claim).

Pro Football Weekly, Inc. v. Gannett Company, Inc., 1993 U.S.App.LEXIS 4537, 988 F.2d 723 (7th Cir. 1993) [ELR 15:7:20]

Anheuser-Busch's claims against humor magazine's parody ad are dismissed

The back cover of the April 1989 issue of "Snicker" magazine featured a mock advertisement for a fictional product called Michelob Oily. The ad, which included the phrases "One Taste and You'll Drink it Oily" and "Michelob Oily," followed by a registered trademark symbol, also stated "At the rate it's being dumped into our oceans, lakes and rivers, you'll drink it oily sooner or later, anyway." At the side of the page, in small type, the magazine printed the words "Snicker Magazine Editorial by Rich Balducci. Art by Eugene Ruble. Thank goodness someone still cares about quality (of life)."

Anheuser-Busch had used the slogan "Somebody still cares about quality" and the trademark "One Taste and You'll Drink it Dry" to advertise and sell its products.

The mock ad also depicted a human hand holding a crumpled Michelob Dry can. As described by Federal District Court Judge Hamilton, the thumb of the hand partially obscured the word "Dry." The ad showed oil spilling from a spigot inserted in the can, which was a photograph of an actual Michelob Dry can. At the center of the page was a drawing of an oil-drenched eagle exclaiming "Yuck!" The design strongly resembled, but was not identical to, one of Anheuser-Busch's logos. The bottom left hand corner of the ad depicted a six pack of beer; the bottom right-hand corner showed two beer bottles and a mug of beer. "Michelob Oily" was written on all of the bottles and on the mug.

Balducci Publications stated that it produced the ad parody to express an opinion regarding the dangers of pollution in the nation's waterways, and, in so doing, used some of the marks without alteration and without permission.

Judge Hamilton noted that the parties agreed that Anheuser-Busch's trademarks were strong and that there was a great similarity between the marks and the parody ad's rendition of the marks. However, stated the court, the humor magazine and Anheuser-Busch's beers were not in "competitive proximity;" Balducci did not intend to pass off "Snicker" magazine as an Anheuser-Busch product; and Anheuser-Busch did not present convincing evidence, given that the allegedly infringing use occurred in an editorial context, that the use of the marks created actual confusion in the marketplace.

In all, the court concluded that Anheuser-Busch did not establish that the ad parody created a likelihood of confusion and entered judgment in favor of Balducci on the brewer's claim for trademark infringement under 32(1) of the Lanham Act.

The court also rejected Anheuser-Busch's claim under 43(a) of the Act, observing that the ad parody was not connected with the sale of a product, and entered judgment for Balducci on the brewer's state law infringement, unfair competition, and anti-dilution claims.

Anheuser-Busch, Inc. v. Balducci Publications, 1993 U.S.Dist.LEXIS 2150, 814 F.Supp. 791 (E.D.Mo. 1993) [ELR 15:7:21]

Secured creditors may not assert liens against debtor's broadcast licenses

The secured creditors of Tak Communications asserted liens against the broadcasting licenses issued to Tak by the Federal Communications Commission. After Tak filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code, the creditors brought a proceeding in the bankruptcy court seeking to have their liens declared valid. The bankruptcy court granted summary judgment in favor of Tak and its official committee of unsecured creditors, concluding that the FCC prohibits creditors from holding security interests in broadcast licenses. A Federal District Court decision affirming the bankruptcy court's decision has been upheld by a Federal Court of Appeals.

Judge Ilana Diamond Rovner stated that the District Court correctly rejected the secured creditors' argument that FCC policy does not preclude third party lenders from holding security interests in broadcast licenses.

Judge Rovner then discussed In re Ridgely Communications, Inc., 139 B.R. 374 (Bankr.D.Md.1992), a case decided after the District Court issued its decision. The Ridgely court recognized the narrow right of a creditor to claim proceeds received by a debtor licensee from a private buyer in exchange for the transfer of the license to that buyer, with the right to receive such proceeds being a private right of the licensee that constitutes a proprietary interest in which a creditor may perfect a security interest. The court emphasized that its holding did not grant a broad right to claim blanket security interests in broadcasting licenses or to use a secured interest to force the debtor to transfer a license to the creditor or a third party.

Judge Rovner stated that the District Court had not rejected the idea that a broadcasting license may fall within the range of assets that qualify as property of the estate, but reiterated that although a license may constitute property of the estate within the meaning of the Bankruptcy Code, this would not necessarily mean that a creditor may hold a security interest in the license.

Judge Rovner agreed with the District Court that the FCC "consistently and unequivocally" has refused to recognize security interests in broadcast licenses, and that the FCC rather than the courts must decide whether to permit such interests.

Matter of Tak Communications, Inc., 1993 U.S.App.LEXIS 2027, 985 F.2d 916 (7th Cir. 1993) [ELR 15:7:21]

American Family Publishers' sweepstakes envelope violates North Carolina's unfair and deceptive trade practices statute

In about December 1990, Tonya Sharpe and five other individuals received a mailing from American Family Publishers describing the company's sweepstakes procedures and containing a magazine subscription solicitation.

The Sharpe parties brought an action in a North Carolina trial court alleging that American's sweepstakes solicitation violated state law and constituted fraud; the action was removed to a Federal District Court.

Judge Terrence W. Boyle noted that the Sharpe parties did not claim that they were the winners of the ten million dollar sweepstake prize, and thus could not have suffered legal damages by the nondelivery of the prize. It appeared to Judge Boyle that while certain printed representations on the sweepstakes envelope might reasonably lead a person to believe that she/he was a contest winner, the mailing explained that addressees were only potential winners and were required to submit an entry form to be eligible to win the contest. The materials inside the envelope were sufficiently clear, stated Judge Boyle, that no party could reasonably rely on such material in incurring damages based on the supposed belief that she/he already was the winner of the contest.

The court, accordingly, granted American's motion for summary judgment on the Sharpe parties' fraud claim.

Judge Boyle then reviewed North Carolina's unfair and deceptive trade practices statutes, which state, in part, that the use of any language that has a tendency to lead a reasonable person to believe he/she has won a contest or anything of value, including but not limited to "congratulations" and "you are entitled to receive," shall be considered a representation of the type governed by the statute. Although the court did not agree that "congratulations" and "you are entitled to receive" would be barred from any possible sentence in a sweepstakes solicitation under the statute, in the instant context it was "clear" that "congratulations" and some of the other words used by American were presented in a way that would "tend to lead a reasonable person to believe they had won a prize."

According to Judge Boyle, the messages on the exterior of the envelope were carefully worded to qualify the language declaring that the recipient "is a millionaire" and "has won $10 million" on "returning the winning number" and "returning the winning entry," so that none of the statements was actually false, but there was "an unmistakable emphasis in print size, color and presentation on words suggesting that the recipient has already won." The court specifically ruled that in examining material in connection with the statute, an envelope must be considered separately from its contents. The language on the envelope, stated Judge Boyle, was "clearly intended to lead the recipient to believe that he may have already won the contest. Such representations on the envelope are deceptive because when the recipient looks inside, he learns that he has not in fact won, but must send in an entry form in order to win." The court therefore held that the representations on the mailing envelope containing American's sweepstakes solicitation, when considered in context, violated North Carolina law.

The court next held that the statute was an appropriate restriction on commercial speech, both on its face and as applied to American's sweepstakes material. It was observed that when commercial speech takes on the character of deception - either by explicitly misrepresenting facts or implicitly because of the setting in which it is presented - it loses its protected status under the First Amendment and is exposed to regulation.

The individual parties did not present sufficient evidence of an actual injury to permit them to pursue a private cause of action for the violation of the statute, declared Judge Boyle. However, the finding that American's sweepstakes solicitation violated state law was ruled sufficient to justify granting summary judgment and injunctive relief to the intervening state parties.

Sharpe v. American Family Publishers, 1993 U.S.Dist.LEXIS 6292 (E.D.N.C. 1993) [ELR 15:7:22]

Colorado and Pennsylvania courts order colleges to reinstate women's sports teams

Jennifer Roberts and other former members of the Colorado State University women's varsity softball team, which was terminated on June 1, 1992, sought reinstatement of the team and damages.

A Federal District Court, after careful review, determined that "the current rate of female participation in athletics at CSU is not substantially proportionate to female undergraduate enrollment...a disparity between female athletic participation and female undergraduate enrollment of 10.6 percent is not acceptable under Title IX absent a showing [of effective accommodation]."

Judge Weinshienk also found that female participation rates at the school, for at least the last decade, were not substantially proportionate to the school's female undergraduate enrollment, and that the "mere fact that CSU now offers women's teams" was not evidence of program expansion for women, particularly since the actual number of athletic participation opportunities for women at CSU had steadily declined over the preceding twelve years and no new varsity teams for women were added during that time.

The court then stated that it was "convinced" that CSU did not seriously consider the representation of female athletes when budget cuts became necessary. Upon comparing the decline in women's participation opportunities with the decline in men's participation opportunities, the court found that women were disproportionately impacted by the general reduction in athletic participation opportunities at the school.

Judge Weinshienk further determined that the lower participation rates and decreasing participation opportunities for women did not indicate a good faith effort by school officials to increase athletic opportunities for female student athletes.

The court, finding that the school failed to demonstrate that the interests and abilities of women were being fully and effectively accommodated by the school's athletic program, and stating that a financial crisis would not justify gender discrimination, concluded that the decision to terminate the women's softball team violated Title IX. Colorado State University, declared Judge Weinshienk, "may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interest and abilities of its female students." The court therefore issued a permanent injunction requiring school officials to reinstate the women's intercollegiate softball program and to provide the women's softball team with all of the incidental benefits accorded other varsity teams at the school.

A Federal District Court in Pennsylvania also considered a Title IX challenge involving women students at Indiana University of Pennsylvania who alleged discrimination on the basis of gender in the school's intercollegiate athletic program, and sought to have the women's gymnastics and field hockey teams reinstated and to prohibit the school from eliminating any more women's teams.

The court found that by eliminating the two women's teams, the school had denied benefits to women athletes who compete interscholastically; that the harm arising from the lost opportunities for the athletes were likely to be irreparable; and that the school would not be irreparably harmed if the women's field hockey and gymnastics teams were reinstated.

Judge Cohill concluded that the women athletes demonstrated that the school discriminated against women athletes on the basis of gender by failing to provide women students with opportunities to participate in intercollegiate athletics proportionate to the percentage of women in the undergraduate student body, and by not expanding its athletic opportunities to respond to the developing interest of its women students.

It also was found that it would be in the public interest to grant the preliminary injunction, in that "the public has a strong interest in the prevention of any violation of constitutional rights."

Roberts v. Colorado State University, 814 F.Supp. 1507 (D.Colo. 1993); Favia v. Indiana University of Pennsylvania, 812 F.Supp. 578 (W.D.Pa. 1993) [ELR 15:7:22]

Jury award of about $15 million in libel action over television news report is upheld

In May 1982, WKBW-TV incorrectly reported that John Prozeralik had been abducted and beaten, possibly as a result of owing money to organized crime. The station subsequently announced the name of the actual victim, David Pasquantino.

When Prozeralik filed a defamation action, a trial court jury awarded him about $18.5 million in compensatory and punitive damages. The court reduced the award for financial loss by remittitur, leaving the amount of about $15.5 million.

A New York appellate court has affirmed the judgment entered on the jury verdict, finding that the circumstances surrounding the broadcasts established, with convincing clarity, that the station made the false statements concerning Prozeralik with actual malice. Judge Green observed that the reports naming Prozeralik as the victim of the beating were not based on a misunderstanding, but occurred as the result of "groundless speculation and conjecture in the Channel 7 newsroom." Prozeralik's name was falsely associated with organized crime because it "was the first name that came to mind" when the station learned that the victim was a prominent restaurateur.

The station also was held responsible for the republication of the defamatory statement by WKBW radio.

Judge Green further found that WKBW-TV acted with actual malice in broadcasting a purported retraction on its evening news reports. The retraction stated that the

F.B.I. had confirmed that the victim was Prozeralik, but, although there were conflicting accounts concerning the communication between a station reporter and the agency, the witnesses agreed that the F.B.I. never named Prozeralik as the victim.

The court rejected the argument that the jury's award of $4 million for humiliation, mental anguish and injury to Prozeralik's reputation was excessive, as well as the argument that any award of punitive damages in a public figure libel case violated the free press guarantees of the federal and state constitutions. Punitive damages may be awarded, stated the court, where actual malice has been demonstrated by clear and convincing evidence. And the $10 million punitive damages award represented "an appropriate amount to deter Capital Cities from repeating its reckless conduct."

Judge Lawton, in dissent, noted that a WKBW reporter claimed that an F.B.I. agent, when asked to confirm that

Prozeralik was the victim, purportedly replied, "Okay. You can go with that unless I call you back." The import of the reporter's testimony, stated Judge Lawton, was that the agent confirmed that Prozeralik was the victim. By ruling as a matter of law that the station's evening broadcasts were false, the trial court removed form the jury's consideration "the crucial issue of the substance of the [reporter-agent] conversation," noted Judge Lawton, and thus "usurped the jury's responsibility to resolve issues of credibility and seriously undermined [the reporter's] credibility." Because the issue of the reporter's credibility was "inextricably linked" with Prozeralik's causes of action, Judge Lawton would have found that a new trial was required.

The dissent also would have concluded that Prozeralik failed to meet the burden of showing by clear and convincing evidence that the retractions were made with actual malice - the broadcasts stated that Prozeralik was not the victim of the beating and station officials apparently still believed at the time of the broadcasts that the F.B.I. agent may have misled the reporter.

Furthermore, the award of $4 million for damages to Prozeralik's reputation and the award of $10 million in punitive damages were excessive, according to Judge Lawton, who questioned whether punitive damages were available in the absence of proof of common law malice. In any event, the dissent stated that the $10 million award was "unconscionable and dramatically exceeds awards made in comparable defamation actions brought by public figures in New York."

Prozeralik v. Capital Cities Communications, Inc., 1993 N.Y.App.Div.LEXIS 1269, 593 N.Y.S.2d 662 (N.Y.App. 1993) [ELR 15:7:23]

Seizure of newspaper photographs taken in violation of California court rule is upheld

California Rules of Court, rule 980, prohibits photography or electronic media coverage of courtroom proceedings unless authorized by written order. The Marin Independent Journal requested a trial court to authorize courtroom photography in a case arising from the tragic shooting death of a young boy at a local music festival. The court denied the request on the ground that the publication of photographs might interfere with the process of obtaining the identification of a suspect in the case.

When the newspaper's reporter and photographer appeared at the arraignment, the judge's bailiff again informed them that the court had not granted permission to take photographs. According to the photographer, the courtroom bailiff, with a "wink and a nod," indicated that the photographer could sit in the jury box. The newspaper argued that this "nonverbal" communication from the bailiff constituted an official communication that the rule 980 request was approved. The photographer took three still pictures of the suspect, but, upon objection by the prosecution and the defense, the court ordered his bailiff to seize the film.

The newspaper filed an unsuccessful motion seeking the return of the film. The suspect subsequently was released for lack of evidence.

A California appellate court has denied the newspaper's petition for an extraordinary writ to compel the trial court to grant the motion to return the film.

Judge Haning stated that the seizure did not violate the newspaper's constitutional rights under the circumstances of the case and that the court's conduct was justified because the photographs were acquired in violation of law. The trial court had not restricted the newspaper from publishing an account of the proceedings. Furthermore, since courtroom photography can be completely banned by a trial court, Judge Haning "seriously question[ed] whether confiscation of photographs which should never have been taken and which could have been, as they were in this case, totally disallowed, is a prior restraint of protected speech."

Even assuming that the seizure was a prior restraint, the trial court action was justified, stated Judge Haning, because the photographs were obtained unlawfully in a deliberate violation of a rule of court. The court emphasized that the ruling was narrowly limited to the instant circumstances, i.e., "the authority of the court to enforce its own lawful rules in such fashion as to secure the purpose of those rules, and especially when they involve the litigants' rights to a fair trial."

Marin Independent Journal v. Municipal Court, 16 Cal.Rptr.550 (Ca.Ct.App. 1993) [ELR 15:7:24]

Voice-over performer may proceed with handicap discrimination claim, but court dismisses common law and New York Civil Rights Law claims

The character "Punchy," a registered trademark of Hawaiian Punch, was developed, in 1961, by an advertising agency hired by the original manufacturer of the beverage. Ross Martin first performed the voice of the character, followed by Len Maxwell.

Proctor & Gamble acquired Hawaiian Punch in 1990 and hired N.W. Ayer, Inc. to produce a new commercial. The company asked Maxwell to perform the voice-over for "Punchy." The contract stated, in part, that "performer acknowledges that performer has no right, title or interest of any kind or nature whatsoever in or to the commercial(s), a role owned or created by the producer belonging to producer and not performer."

When N.W. Ayer produced additional commercials and did not hire Maxwell, the performer sued the company alleging employment discrimination because of physical disability (Maxwell uses a wheelchair), unlawful and tortious appropriation of property rights, conversion and unjust enrichment, and deception of the public through the imitation of Maxwell's voice.

New York trial court Judge Lobis dismissed Maxwell's claims for unjust enrichment, misappropriation and conversion, as well as the performer's claim under New York's Civil Rights Law, noting that the state has not yet recognized a common law remedy for voice imitation or a cause of action for voice imitation under the statute. And there is no common law right of privacy or common law action for infringement of the rights of publicity in New York, recalled the court.

Judge Lobis found that disputed issues of fact precluded granting summary judgment to the N.W. Ayer parties on Maxwell's employment discrimination claim. The producer claimed that Maxwell was not hired for the second commercial because the performer demanded double scale and other conditions. Maxwell submitted evidence that he was willing to work on the second commercial for regular scale, and there was evidence that the N.W. Ayer parties did not contact Maxwell to audition for any additional commercials.

The court also refused to dismiss the employment discrimination claim against Proctor & Gamble - the company had the power and authority to both hire and fire the person employed to perform the voice-over for the commercial, indicating sufficient control to make the company an employer of Maxwell.

Maxwell v. N.W. Ayer, Inc., New York Law Journal, p. 21, col. 5 (N.Y.Cnty., Sep. 22, 1993) [ELR 15:7:25]

Briefly Noted:

Copyright/ASCAP.

Several composers and their music publishers brought a copyright infringement action alleging that their songs had been publicly performed without a license during a dance at the defendant's country club. The District Court struck the defendant's affirmative defense and counter-claim and granted summary judgment to the plaintiffs. (ELR 13:11:8) The stricken affirmative defense and counterclaim were based on the allegation that the plain-tiffs' licensing agent, ASCAP, had violated the terms of its 1950 antitrust consent decree. That decree provides that if ASCAP and prospective licensees are unable to agree on a license fee, a reasonable license fee shall be set by the District Court for the Southern District of New York. The Court of Appeals affirmed, holding that the Southern District of New York was the only proper forum for determining whether ASCAP had violated the consent decree, and the procedure set forth in the decree for setting license fees was the defendant's only remedy.

Bourne v. Hunter Country Club, Inc., 990 F.2d 934, 1993 U.S.App.LEXIS 7147 (7th Cir. 1993) [ELR 15:7:25]

Copyright Infringement/Music.

A Federal District Court in Puerto Rico has granted summary judgment to Pedrosillo Music, Inc. and other parties in a copyright infringement action against Radio Musical, Inc., the owner of radio station WBRQ-FM. Pedrosillo claimed that WBRQ failed to obtain a license to perform copyrighted works in the ASCAP repertory, including songs owned by Pedrosillo.

The court found that it was not necessary for Pedrosillo to show that Radio Musical profited from the allegedly unauthorized performance in order to set forth a cause of action for copyright infringement. It was found that Pedrosillo established the elements of copyright infringement as a matter of law, and Judge Laffitte then determined that Thomas Carrasquillo, a shareholder of Radio Musical and the president of the station, had primary responsibility for the control, management, operation and maintenance of the affairs of WBRQ and would be jointly and severally liable with Radio Musical for the copyright violations.

Judge Laffitte, noting that Radio Musical had been sued four times for copyright infringement and that the instant action was the second lawsuit for willful copyright infringement in the last three years, stated that it was "amply demonstrated" that Radio Musical continued to perform music in ASCAP's repertory without obtaining or maintaining the proper licenses. The court therefore granted Pedrosillo an injunction prohibiting Radio Musical from performing the company's copyrighted songs without proper authorization and also enjoined Radio Musical from further infringements of any copyrights licensed through ASCAP.

The court awarded Pedrosillo statutory damages for each of the seven alleged infringements for a total award of $70,000, as well as reasonable costs and attorneys' fees.

Pedrosillo Music, Inc. v. Radio Musical, Inc., 1993 U.S.Dist.LEXIS 2862, 815 F.Supp. 511 (D.Puerto Rico 1993) [ELR 15:7:25]

Sculpture/Copyright.

A plastic female mannequin head known as a "Mara Sculpture" may be eligible for copyright protection, even though it was designed and is sold to perform a useful function, because its sculptural features may be capable of being identified separately from and existing independently of its utilitarian function. Therefore, a Federal District Court judge has vacated a prior summary judgment dismissing the plaintiff's copyright claim, and has reinstated that claim. According to the plaintiff, the Mara Sculpture is used as a hairstand in beauty schools and salons. The court noted that the Mara Sculpture is little different from traditional sculptures, and thus is art; and its functional feature as a hairstand could be conceptually separated from its artistic features, because it would work as a hairstand even if it were merely an oval without any of its artistic facial features. The defendant, on the other hand, argued that the Mara Sculpture is also used for displaying makeup and jewelry, and since its facial features are important for that function, its utilitarian functions cannot be separated from its artistic functions. In making this argument, the defendant relied on Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985), which had denied copyright protection to mannequin torsos whose aesthetic features -- life-size breasts and shoulders -- were "inextricably intertwined" with their utilitarian purpose, namely the display of clothes. The District Court ruled that Carol Barnhart did not require summary judgment to be granted for the defendant in this case, because the utilitarian purpose of the Mara Sculpture was in dispute, and thus "the mannequin head here may have aesthetic features that are separable from its function."

Pivot Point International v. Charlene Products, Inc., 816 F.Supp. 1286, 1993 U.S.Dist.LEXIS 3188 (N.D.Ill. 1993) [ELR 15:7:26]

Copyright Infringement.

Little Brown's exclusive right to distribute two books it had published -- Vineland and Masquerade -- was infringed by the resale of copies of those books by a paper recycling company which had contracted with the publisher to destroy the books and recycle the paper from which they had been made. The agreement between the publisher and the recycling company was held to a bailment, so that title to the books remained with the publisher and the recycling company had a duty to deal with the books only as required by their agreement. Though the arrangement between the two companies had worked as agreed for several years, one shipment of books was resold by the recycling company to another company which also resold it to another which eventually resold the books to the public as books, rather than as recycled paper. Since the purpose of the bailment had not been adhered to, the bailment contract was breached and the publisher's exclusive book distribution rights were infringed as well.

Little, Brown and Co. v. American Paper Recycling Corp., 824 F.Supp. 11, 1993 U.S.Dist.LEXIS 8027 (D.Mass. 1993) [ELR 15:7:26]

Copyright Infringement/Costs of Suit.

The District Court has granted Gordon Lish's motion to tax his costs, and denied a motion by Harper's Magazine for its costs, even though prior to trial Harper's had made a Rule 68 offer to allow judgment to be taken against it for $250, and even though after trial, the court awarded Lish no damages at all. (ELR 15:5:3) Rule 68 of the Federal Rules of Civil Procedure provides that if the plaintiff obtains a less favorable judgment after such an offer, the plaintiff is not entitled to its post-offer costs. The court granted Lish his costs because Harper's offer had recited that it was not to be construed as an admission of liability, and Lish had rejected the offer for that reason. The court ruled that the judgment Lish had obtained -- which found Harper's liable for copyright infringement -- was more favorable than $250 without a finding of liability would have been. This was so, said the court, because the judgment was a "vindication of Lish's authorial right to control the first publication of his Letter," and because the judgment gives Lish the benefit of permitting him to use the precedent established by the court's infringement finding in "future instances."

Lish v. Harper's Magazine Foundation, 148 F.R.D. 516, 1993 U.S.Dist.LEXIS 6485 (S.D.N.Y. 1993) [ELR 15:7:26]

Copyright and Trademark Infringement; $24 Million in Damages and Worldwide Injunction.

Nintendo has been awarded statutory damages of $2.8 million at the rate of $100,000 for each one of 28 of its copyrights that were infringed by the defendants' manufacture and sale of counterfeit copies of Nintendo video games. It also has been awarded an additional $21.2 million in damages on account of the defendants' infringement of Nintendo's trademarks. The court has issued a worldwide injunction barring further copyright or trademark infringements. (The defendants defaulted and did not appear for the remedies phase of this case. Perhaps for this reason, the court did not consider whether it had jurisdiction to issue a worldwide injunction against copyright infringement, and thus it cited no authority in support of its authority to do so.)

Nintendo of America, Inc. v. NTDEC, 822 F.Supp. 1462, 1993 U.S.Dist.LEXIS 11538 (D.Ariz. 1993) [ELR 15:7:27]

Vicarious Copyright Liability.

Liability for the unlicensed broadcast of songs has been imposed on the president and secretary-treasurer and sole shareholders of the corporation that owns the unlicensed radio station. Liability was imposed on them even though one worked only two days per week and the other spends most of his time practicing law and serving as an elected member of a state commission, even though they had instructed their disc jockeys not to play ASCAP licensed songs, and even though the particular infringing broadcasts took place while the station's air time was leased to ministers who were not employed by the station. The court concluded that the station's owners/officers were vicariously liable, because both elements of the vicarous copyright liability test were satisfied: they had the right and ability to control infringing activity by their station, yet had permitted the ministers to select their program's content; and though the station was paid by the ministers on a per minute basis, the station's owners had a direct financial interest in the station's profitability.

Realsongs v. Gulf Broadcasting Corp., 824 F.Supp. 89, 1993 U.S.Dist.LEXIS 8292 (M.D.La. 1993) [ELR 15:7:27]

Arbitration.

In 1988, James Snyder, known as "Jimmy the Greek," gave an interview, unconnected with his employment as a television football analyst and commentator at CBS Inc., to WRC-TV in Washington, D.C. During the interview, Snyder commented about the role of black athletes in sports. In response, as described by Federal

Court of Appeals Judge Feinberg, CBS fired Snyder and issued a statement condemning his comments as "reprehensible."

About three years later, Snyder sought arbitration by the American Arbitration Association of various claims arising from the interview. Snyder's demands for arbitration were based on arbitration clauses in two AFTRA collective bargaining agreements.

A Federal District Court denied Snyder's motion to compel arbitration and granted a motion by the WRC parties to dismiss for lack of personal jurisdiction.

A Federal Court of Appeals has affirmed, albeit on different grounds, the District Court's decision. Judge Feinberg noted that the collective bargaining agreements indicated that an individual artist-employee was not entitled to proceed to arbitration "unless and until he receives AFTRA's endorsement." AFTRA had rejected Snyder's request to endorse his arbitration demands against the CBS and WRC parties; Snyder thus had no right to compel them to submit to arbitration.

CBS, Inc. v. Snyder, 1993 U.S.App.LEXIS 5816, 989 F.2d 89 (2d Cir. 1993) [ELR 15:7:27]

Video Advertising.

Richard B. Osborn, acting pro se, sued Emporium Videos, alleging fraud and unfair trade practices in the sale of an "adult video." Osborn claimed that the video's box inaccurately characterized the performance of "Busty Belle" as the "star" of a video titled "Belle of the Ball." According to Osborn, Belle appeared in scenes lasting a total of about nine to ten minutes during the seventy-five minute length of the video. Osborn sought about $50,000 in damages, including the cost of the video.

A Wyoming trial court, acting on its own motion, ordered a dismissal for failure to state a claim upon which relief could be granted.

The Wyoming Supreme Court has reversed the trial court's ruling, stating that the sua sponte dismissal resulted in a lack of notice and opportunity to be heard - the record did not show that the trial court provided Osborn with notice of its anticipated dismissal motion, and Osborn was denied an opportunity to either amend the complaint or respond to the court's concerns regarding the sufficiency of the pleading. The court's failure to state the reasons for the dismissal would require the Supreme Court to provide "purely conjectural support" to uphold the action.

Chief Judge Macy, in dissent, stated that Osborn's failure to state a claim occurred because the facts of the case "simply cannot be forged into a claim or controversy." It was clear to Judge Macy from the complaint that "the real culprit was Osborn's endogenous salaciousness - a condition which can cause one to purchase a video which is touted, or 'puffed,' in words which pictures simply cannot equal..."

Osborn v. Emporium Videos, 848 P.2d 237, 1993 Wyo.LEXIS 47 (Wyo. 1993) [ELR 15:7:27]

School Athletics.

The Texas University Interscholastic League regulates junior and senior high school athletic comptitions in the state. One of the league's rules restricts participation in varsity games to students who are less than nineteen years old.

Bruce Buchanan, whose learning disabilities required him to repeat two grades, turned nineteen years old before he entered the twelfth grade. The league refused to waive the over-nineteen rule for Buchanan and for another student, Philip Bomar, who also was learning disabled.

After a trial on the consolidated cases against the league, a trial court enjoined the enforcement of the rule at issue.

A Texas appellate court has upheld the trial court's decision that the over-nineteen rule violated Section 504 of the federal Rehabilitation Act and the court's finding that the students were eligible to play football during the 1991 season. Judge Kidd rejected the league's argument that the rule did not discriminate solely on the basis of the students' handicaps; noted that the students were not involved in redshirting and did not present a danger to other student athletes by reason of being of above average size; and stated that instituting a waiver procedure for the over-nineteen rule might be a "reasonable accommodation" to insure that handicapped persons achieve meaningful access to the competitions regulated by the league.

University Interscholastic League v. Buchanan, 1993 Tex.App.LEXIS 355, 848 S.W.2d 298 (Tex.App. 1993) [ELR 15:7:28]

Women's Ice Hockey.

At ELR 15:2:22, it was reported that a Federal District Court in New York ordered Colgate University to grant varsity status to the school's women's club ice hockey team, finding that Colgate's disparate treatment of men and women ice hockey players violated Title IX of the Education Amendments of 1972.

In April 1993, a Federal Court of Appeals ruled that the controversy was moot, vacated the judgment of the District Court and remanded the matter with instructions to dismiss the case.

Judge McLaughlin noted that the school's ice hockey season had ended on February 28, 1993, and that each of the complaining players would graduate before the beginning of the 1993-1994 academic year, at which time the District Court's order was scheduled to take effect.

The court rejected the claim that the action was within the exception to the mootness doctrine for those situations "capable of repetition, yet evading review." In the absence of a class action the exception was unavailable unless certain requirements, not present in the instant case, were met. The players were not entitled to litigate the claim of students unnamed and unrepresented in the action, and the complaint had sought damages and injunctive relief solely on behalf of the individual players, not as representatives of the women's ice hockey club team or other "similarly situated" individuals.

Cook v. Colgate University, 1993 U.S.App. LEXIS 9695, 992 F.2d 17 (2d Cir. 1993) [ELR 15:7:28]

Title IX.

A Federal Court of Appeals has affirmed a District Court decision granting a preliminary injunction ordering Brown University to reinstate its women's gymnastics and volleyball programs to full intercollegiate varsity status pending the resolution of a Title IX claim.

Judge Selya reviewed Brown's 1991 decision to drop, for financial reasons, four sports from its intercollegiate varsity athletic roster: women's volleyball and gymnastics, men's golf and water polo. The teams were permitted to continue playing as "intercollegiate clubs."

The court then carefully considered the scope of Title IX coverage; rejected Brown's constitutional challenge to the statutory scheme; and, upon concluding that the District Court's interim solution was fair and lawful, remanded the matter for further proceedings.

Cohen v. Brown University, 1993 U.S.App.LEXIS 7912, 991 F.2d 888 (1st Cir. 1993) [ELR 15:7:28]

Athlete Eligibility.

A Federal District Court has granted Herman Jordan a permanent injunction barring the Indiana High School Athletic Association from implementing an association decision rendering Jordan ineligible to participate in interscholastic athletic competition on his high school basketball team. It was found that applying the eight-semester rule to Jordan violated the Indiana Constitution and was "arbitrary and capricious."

Jordan v. Indiana High School Athletic Association, Inc., 813 F.Supp. 1372 (N.D.Ind. 1993) [ELR 15:7:28]

Student Athlete Eligibility.

The superintendent of a New York school district refused to sign a waiver certifying that Jon Sutterby transferred to his present school without inducement or recruitment or to seek an athletic advantage; without the waiver, Sutterby was not eligible to play basketball at the school to which he transferred. A New York trial court has found that Sutterby failed to exhaust the available administrative remedy of petitioning the school board to require the superintendent to sign the waiver and therefore dismissed the student's petition without prejudice and without costs.

Sutterby v. Zimar, 1993 N.Y.Misc.LEXIS 55, 594 N.Y.S.2d 607 (Yates Cnty. 1993) [ELR 15:7:28]

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