LEGAL AFFAIRS

Revising the "Jump Ship" Clause: How California Legislators and the Music Industry Raised the Ante for Record Companies Seeking Injunctions Against Defecting Artists

By William I. Hochberg

In a case of shaky missteps followed by fancy legislative footwork, California lawmakers increased from $6,000 to $50,000 the annual minimum compensation required to enjoin artists from walking away from recording and other entertainment contracts, and then, following an intensive industry backlash, withdrew the original bill and passed a substantially scaled-down version. (See Cal. Civ. Code section 3423; Cal. Code Civ. Proc. section 526.)

The previous incarnation of the bill, spearheaded by the Beverly Hills Bar Association, would have raised the annual guaranteed compensation figure to $50,000 per artist. (See ELR 14:9:20 and 15:4:23). The bill was signed into law without objection by the entertainment industry, whose lobbyists had apparently been caught unawares.

"Through a quirk of process, no one contacted the recording or film or television industries and the [original] bill went through without any comment," said George Kieffer, of Manatt, Phelps & Phillips, representing the Recording Industry Association of America, Inc. (RIAA). Kieffer subsequently served on the legislative workgroup panel which changed the law.

The RIAA apparently did not realize the impact of the former bill until it was signed into law, but succeeded, with others in the industry, in persuading the Joint Committee on the Arts, headed by State Senator Henry J. Mello (D-Watsonville) to support the repeal of the original bill and the redrafting and passage of the new version. The workgroup panel, including representatives of entertainment companies, music attorneys and other entertainment constituents hammered out the compromise measure over a six-month period.

The new law

The final version of the bill provides that companies in California may seek injunctive relief for breaches of contracts entered into after January 1, 1994 only after complying with the so-called "$9,000 PLUS" provision, as codified in newly amended Section 3423 of the California Civil Code and Section 526 of the California Code of Civil Procedure, signed into law in October by

Governor Pete Wilson. The new law does not affect a company's right to sue for damages even if it is precluded from seeking the injunction remedy because of a failure to pay the minimums.

As shown in the tables below, the law requires a company to contractually guarantee $9,000 in annual income on the first contract year, with step-ups to $12,000 on the second year and $15,000 on years three to seven. Such monies must be guaranteed (i.e. advances) and not contingent (i.e. royalties). In addition, in years four and five, the company must have actually paid additional sums of $15,000 per year, and in years six and seven additional sums of $30,000 per year. This so-called "Plus" compensation may include contingent royalties, as long as the monies were actually paid. Payments of guaranteed or contingent monies in excess of a statutory minimum for any particular year may be carried forward to meet future years' minimums.

The bill also provides an alternative means of obtaining injunctive relief for companies which did not make the annual guaranteed payments to an artist who then becomes extraordinarily successful in a later year. The so-called "Superstar Insurance" clause would, for example, allow a company that did not make guaranteed payments in years 1-3 and which released an extremely successful album in year 4 to seek an injunction against the artist by making a lump sum payment on the courthouse steps which, when added to any previous payments, would total $510,000. (See table below.)

Impact of law

In its current and final form, the bill (SB 487) is seen as impacting the record industry more profoundly than the film and television industries, because film and television talent usually earn more annual income under their contracts than is required under the law, whereas budding recording artists often do not. The exceptions are companies producing television pilots and low budget films, where relatively small up-front investments in talent are often involved.

Opponents of the original bill warned that it would have caused record companies to flee California or sign artists in other jurisdictions, thus depriving the state of tax revenues and jobs, not to mention lost business for California-based entertainment firms.

In order to seek injunctive relief against every member of a musical group, each member of that group must receive the specified sums. Record companies are expected to blunt the effect of this aspect of the provision by guaranteeing the statutory amounts only to key and leading members of a group. Arguably, such a tactic would effectively bind an entire band because essential members would be bound while lesser members would probably not want to abandon the group.

Ironically, while one might expect the California law to make injunctive relief more difficult to obtain in California than in other jurisdictions, the opposite may be true. Without such a law, judges likely would adhere to their traditional reluctance to grant injunctions in the context of personal services contracts. Indeed in the other major music industry jurisdictions -- New York and Tennessee -- no laws similar to the California bill are in effect or even under consideration, according to Paul Minicucci, consultant to the Joint Committee on the Arts, and coordinator of the statutory renegotiation effort. On the other hand, companies subject to New York or Tennessee law could at least threaten to seek injunctions against jumping artists, even if the companies had failed to make any minimum annual payments, while the

California law prevents such legal posturing unless a company has paid its dues.

David Altschul, senior vice president of business and legal affairs at Warner Bros. Records, says the California law should not cause smaller record companies to flee the state. "The fact that there are statutory prerequisites in California probably gives you a somewhat better shot of getting an injunction in California than in New York," he says. This may be due to a broader judicial acceptance of the concept of injunctions to prevent breach of personal services contracts in California than elsewhere, because lawmakers in Sacramento have specifically addressed the issue and set forth a "bright line test."

Kieffer, of Manatt, Phelps & Phillips, also feels artists may escape injunctions more easily in New York than California. "In New York they go under common law and case law and in the end they have reached the same or better conclusions than under the California law," Kieffer says. "Many feel New York law is better because there are no minimums and the court may be more apt to look at other factors than simply how much money was paid to the artist in determining whether an injunction may be appropriate."

It is also important to note that under the California law a judge might still impose additional bonding requirements over and above the minimum payments set forth in the statute, according to the circumstances of a particular case. Thus, the statutory minimums may actually represent a floor, not a ceiling, for obtaining injunctions.

What impact, if any, the $9,000 Plus law will have remains unclear. The major record companies probably will not change their policies appreciably, although there may have been some pressure to close deals which were still pending before the end of 1993, when the new law kicks in, according to Doug Mark, head of Business Affairs at Giant Records. "We're rushing to get our contracts done before the end of the year, so we have them under the $6,000 provision," he says. While the new law may have prompted record companies to close existing deals before the end of the year, Mark and others say it did not cause a feeding frenzy at record labels who might have wished to find and sign new recording artists before the end of the year.

"There are going to be windows where record companies will review sales levels and make tough decisions as to whether to play it safe and guarantee money, or risk not enjoining an artist," Mark says. "For the new artists and superstar artists there will not be much of a difference. It's the mid-level artists in the 200,000 - 300,000 units category of most concern."

In the case of a musical group, the law requires that each member must be paid the minimum annual salaries to bind that member. This effect may cause record companies to choose more selectively who to guarantee income to, Altschul points out. "When we sign groups, it has always been our practice not to make guarantees to every member," says Altschul. "We identify key members. So, there will probably be more heightened scrutiny than before."

Smaller independent record companies may attempt to circumvent the California statute by employing choice of law and choice of forum provisions specific to jurisdictions outside of California.

Jim Cooperman, Senior Director of Business and Legal Affairs at Relativity Records, says his company has always favored entering into contracts with New York jurisdiction and choice of law clauses, even with bands whose members are from California. "Most small record companies may try to avoid the application of this law," Cooperman says. However, he acknowledges that a contract with a California artist which is signed in California may become subject to California law if a judge determines that the locus of the contract is California notwithstanding the choice of New York law and jurisdiction provisions.

"I'm glad its not $50,000, that was a cause of great concern," adds Cooperman. "A label like ours, which is able to spend a third to a tenth of what major labels pay [for talent] would be precluded from signing bands in California" under the earlier version of the law. However, the current version of the law, "while it does increase the stakes, does not make the numbers so large as to preclude us from doing deals with California-based artists."

Commenting on the legislative sea change, David Altschul, of Warner Bros. Records, said opposition to the original bill came from many quarters in the music industry, including attorneys and managers representing talent, who "had a fear that if the $50,000 provision went into effect, it would have had a meaningful impact on the number of artists signed in California."

Interpretations of prior law

The $6,000 figure of the original incarnation of the law was arrived at in 1919, and the figure is equivalent to $140,000 in 1992 dollars. The law was first intended to address circumstances existing at the birth of the film industry, when studios had actors under strict exclusive contracts. However, over time the provision came to be applied more to the recording industry than to film and television contracts, because in both the motion picture and television industries salaries are well in excess of $6,000 per year.

Caselaw which interpreted the former $6,000 provision appears to remain applicable to the revised version for the most part.

For example, the issue of how to determine what portion of a record company's total advances may be considered as "guaranteed payments" in order to satisfy the law was addressed in MCA Records, Inc. v. Newton-John, 90 Cal.App.3d 18, 153 Cal.Rptr. 153 (1979) (ELR 1:1:4). It is standard practice for major record companies to advance an artist a so-called "recording fund" including the reasonable costs of recording an album in addition to the guaranteed advance against royalties. Olivia Newton-John was given complete discretion over how to allocate the total funds. The Court of Appeal held that Newton-John could be enjoined by MCA from rendering personal services to others. MCA had paid her nonreturnable advances of $250,000 per album for each of four albums received during the first two years, and an additional $200,000 nonreturnable advance for two additional albums. Newton-John failed to deliver the final two albums and both parties filed breach-of-contract actions against one another. Newton-John argued that MCA was denied injunctive relief because it failed to guarantee a minimum annual compensation of $6,000. She argued that she expended in excess of $194,000 in recording costs, and her "net" compensation was thus less than $6,000 annually. However, the Court found that Newton-John's exclusive control of production costs left her "free to record in as tight-fisted or as open-handed a manner, costwise, as she chose." Thus, the Court held, the "minimum compensation" referred to in the statute does not mean "net profits" after exhaustion of a recording fund, but is calculated based on a "reasonableness" standard with respect to recording costs. In passing judgment, the Court noted that MCA had paid Newton-John approximately $2,500,000 in royalties and nonreturnable advances.

Caselaw also provides that a record company cannot meet its obligation by making an option to pay an artist the statutory annual minimums but not actually providing a contractual guarantee of such payments. In Motown Record Corp. v Tina Marie Brockert, 160 Cal.App.3d 123, 207 Cal.Rptr. 574 (1984) (ELR 6:5:5) ("Teena Marie"), the appellate court held that a contract provision granting such an option did not meet the statutory threshold for injunctive relief. The Court made three important rulings with regard to the availability of injunctive relief in entertainment personal services contracts: (1) that a guarantee of the minimum compensation set forth in Section 3423 must be an express term in the written contract between employer and employee; (2) that only performers of "star" quality could be enjoined under Section 3423 (i.e. the statute should apply to the "prima donnas" but not the "spear carriers" Id. at 583); and (3) an option to meet the statutory minimum violated the concept of fundamental fairness embodied in section 3423, adding that adding that such options in effect give record companies the ability to purchase injunctive relief "on the courthouse steps" (Id. at 132, 207 Cal.Rptr. at 580). It appears that the "distinctive-in-the-field" requirement no longer applies under the new law. The requirement would seem to give new and less successful artists the ability to "walk" on a contract without fear of injunction, and it would appear to have a chilling effect upon record company investments in marketing and promotion of new and unknown artists. Although the Teena Marie case specifically interpreted the original legislative intent as making available injunctive relief only against performers who have achieved fame and success, many in the industry feel that the legislative update of the law makes clear that the law applies across the board to artists at all levels of success.

Commenting on the overall process of arriving at the final bill, Kieffer says: "After a rocky start all the parties spent a tremendous amount of time over six months to work out a compromise aimed at meeting the needs of artists and small companies, as well as the large companies. Great credit goes to the Beverly Hills Bar Association for reconsidering the issue."

Clause A: "The Nine Thousand Plus Installment Plan"

Contract Year	Guaranteed Money	+	Contingent Money "Actually Paid"
1	$ 9,000	PLUS	0
2	$12,000	PLUS	0
3	$15,000	PLUS	0
4	$15,000	PLUS	$15,000

5	$15,000	PLUS	$15,000 (cumulative)
6	$15,000	PLUS	$30,000 (cumulative)
7	$15,000	PLUS	$30,000 (cumulative)

Clause B: "Superstar Insurance"

Contract Year	Ten-fold Lump Sum		Prior year(s) Aggregate		Total Sum to be paid for injunction
1	$ 90,000	PLUS	0	=	$ 90,000
2	$120,000	PLUS	$ 90,000	=	$ 210,000
3	$150,000	PLUS	$210,000	=	$360,000
4	$150,000	PLUS	$360,000	=	$510,000
5	$150,000	PLUS	$510,000	=	$660,000
6	$150,000	PLUS	$660,000	=	$810,000
7	$150,000	PLUS	$810,000	=	$960,000

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[ELR 15:8:3]

RECENT CASES

Court refuses to reinstate "Un Lugar En El Munda" Oscar nomination for Best Foreign Language Film; Motion Picture Academy changes guidelines for category

In August 1992, the Academy of Motion Picture Arts and Sciences invited Uruguay, along with several other foreign countries, to submit films for consideration for the 1992 Oscar nomination for Best Foreign Language Film.

The director of Cinemateca Uruguaya, Manuel Martinez Carril, submitted "Un Lugar En El Munda" ("A Place in the World") as Uruguay's entry for the Oscar. Carril certified that creative talent of Uruguay exercised creative control of the film. Along with his submission, Carril provided a publicity flyer which described the film as "[t] best Argentine cinema" and commented on the film's setting in the mountains of Argentina.

The Academy announced the nomination of the film for the Oscar. In response to inquiries from the press, the Academy learned that Adolfo Aristarain, an Argentine citizen and resident, directed, wrote and co-produced the film. Only two individuals among the creative talent claimed a connection with Uruguay - one of the main actors claimed dual Uruguayan/Argentine nationality, and Kathy Saavedra, Aristarain's wife and the film's costume director, was a Uruguayan citizen. Saavedra also contributed to the film's original story. The Academy determined that the contributions of these individuals were not sufficient to constitute creative control by Uruguayan creative talent as required by Academy rules; disqualified the film from consideration for the Oscar; and revoked the film's nomination.

Cinemateca, Aristarain and Saavedra brought a lawsuit seeking to enjoin the Academy from revoking the nomination.

Cinemateca claimed that the Academy's solicitation and acceptance of the film as an entry for nomination, combined with the actual nomination of the film, created a contract between Cinemateca and the Academy, a contract which the Academy breached when it revoked the nomination.

Federal District Court Senior Judge A. Andrew Hauk agreed with the Academy that the Oscar "is an award and not a contest where a contract arises between contest entrants and the sponsor." An award recognizes an achievement that was accomplished not for a contest, but for independent reasons, stated Judge Hauk.

Even if a contract had arisen in connection with the nomination, the court found that a breach had not occurred. If the Academy Awards are viewed as a contest, the Academy rules would be part of the contract. Since Cinemateca did not comply with the rules in that Uruguayan creative talent did not exercise creative control over the film, the Academy did not breach any contract by revoking the nomination.

Cinemateca also failed to establish the elements required for its estoppel claim.

In all, Cinemateca was unlikely to succeed on the merits and failed to show the existence of serious questions going to the merits, and the court therefore denied the request to enjoin the Academy from revoking the nomination.

Judge Hauk, although understanding that the Academy's actions, would deprive the Cinemateca parties of "the financial and professional opportunities that follow an Oscar nomination, as well as the chance to win the Oscar itself," stated that this did not constitute irreparable harm since the film did not qualify as a Uruguayan submission.

Furthermore, any injury to Cinemateca was outweighed by the hardship to the Academy if the court were to intervene and force the Academy to reinstate the nomination. The court's intervention "would diminish the Academy's autonomy and discretion" in carrying out its goals of recognizing industry artists for outstanding achievement. And the Academy had cited the administrative burdens involved in reinstating the nomination, noted the court, in denying Cinemateca's request for a preliminary injunction, and dismissing the complaint with prejudice.

In August 1993, the foreign-language film committee of the Academy stipulated that at least two out of the three people in key creative categories - director, writer, producer - must be citizens of the nation submitting the film for an Oscar nomination. According to news reports, the rules also require that a "substantial portion" of the actors must be from the country of origin of the film.

Cinemateca Uruguaya v. The Academy of Motion Picture Arts and Sciences, Case No. CV 93-1270-AAH (C.D.Ca., April 26, 1993) [ELR 15:8:7]

Mariah Carey's stepfather loses action against singer over purported license to market "Mariah dolls"

Joseph Vian was Mariah Carey's stepfather at the time Carey allegedly orally granted Vian a license to market "Mariah dolls" - statuettes of the singer which would play her most popular songs. (When Vian sued Carey for breach of contract, he was in the process of being divorced from Carey's mother, according to Federal District Court Judge Michael B. Mukasey.)

Vian, a designer and distributor of gift and novelty items, claimed that on at least three occasions, he stated to Carey, "Don't forget the Mariah dolls," and "I get the Mariah dolls." Carey purportedly responded "Okay" or smiled and nodded. Carey agreed that Vian had mentioned the dolls, but testified that she thought Vian was joking.

Judge Mukasey stated that Vian did not present evidence that Carey intended, by a nod of her head or by using the expression "okay," to enter into a complex commercial licensing agreement involving the dolls. It did not appear, from the informal context in which the statements allegedly occurred, that there was any reason for Carey to think Vian was "entirely serious, let alone that he intended to bind her to an agreement."

The court further noted that no price or royalty term was mentioned, nor was the duration or geographic scope of the license, nor was Carey's right to approve the dolls. The purported contract also lacked the necessary consideration - it was "impossible," stated the court, to interpret Vian's gifts to Carey as consideration for a contract, particularly when Vian was acting in a quasi-parental relationship to Carey.

In all, there was no triable issue of fact as to the existence of a contract.

Even assuming a valid contract with Carey, Vian did not allege recoverable damages. Thus, there was no triable issue of fact on lost profits, even if there were a contract between Vian and Carey; the court, accordingly, granted Carey's motion for summary judgment.

Vian v. Carey, 1993 U.S.Dist.LEXIS 5460 (S.D.N.Y. 1993) [ELR 15:8:8]

HBO prevails in dispute over closed-circuit television rights to championship boxing match

In June 1985, Don King and Butch Lewis, doing business as Dynamic Duo, granted HBO the right to telecast the September 1985 championship boxing fight between Larry Holmes and Michael Spinks. Dynamic Duo reserved closed-circuit exhibition rights and authorized J&J Sports Productions to market the closed-circuit telecast. J&J granted Personal Preference Video the right to broadcast the fight on a pay-per-view basis to homes equipped with satellite dishes.

When HBO notified Personal Preference that its telecast would breach HBO's contract with Dynamic Duo, and when J&J advised the company that it did not have the authority to convey home satellite rights to Personal Preference, Personal Preference agreed to stop marketing the telecast. Personal Preference then sued HBO claiming tortious interference with the Personal Preference-J&J contract. A Federal District Court jury in Texas returned a verdict in favor of Personal Preference, awarding the company $350,000 in actual damages and $200,000 in punitive damages.

A Federal Court of Appeals has reversed the judgment entered on the jury verdict.

Personal Preference argued that the contract's use of the term "closed-circuit television" referred to a particular means of transmitting a television or radio signal to specific viewers, and that the right it acquired from J&J was within the closed-circuit right retained by Dynamic Duo in its contract with HBO.

HBO claimed that the closed-circuit right retained by Dynamic Duo only encompassed the right to telecast the fight to paying audiences in commercial establishments, such as theaters, arenas, and bars. The company presented witnesses who testified that, in the boxing industry, closed-circuit rights do not include the right to telecast to homes.

Judge Reavley, after stating that the jury should not have been involved in interpreting the Dynamic Duo-HBO contract, determined, based on the parties' objective intent as evidenced by the contract language as a whole and the industry meaning of the term closed-circuit, that the contract was susceptible to only one reasonable interpretation, i.e., that HBO held the exclusive right to telecast the fight live to home viewers.

HBO's interference with the Personal Preference-J&J contract was justified as a matter of law, held the court. Judge Reavley commented that if Texas law requires a party to prove good faith, even in asserting a valid superior right, HBO acted in good faith to protect its own contractual interest.

Personal Preference Video, Inc. v. Home Box Office, 986 F.2d 110, 1993 U.S.App.LEXIS 4803, pet.reh.den., 1993 U.S.App.LEXIS 11096 [ELR 15:8:8]

Court affirms ruling that claims of investors in "First Blood" limited partnership are time-barred

As described at ELR 12:10:10, First Blood Associates, a limited partnership, was formed in 1981 for the purported purpose of acquiring all right, title and interest in the Sylvester Stallone film, "First Blood." Stanley B. Block and other owners of limited partnership interests in First Blood sued the partnership, alleging securities fraud and common law fraud, claiming that First Blood's placement memorandum contained false and misleading statements.

A Federal Court of Appeals has affirmed the District Court decision dismissing the investors' federal securities fraud claim as time barred and dismissing their state law claims for lack of pendent jurisdiction.

Judge Roger J. Miner noted that the investors contended that there were inconsistencies between the placement memorandum and a purchase agreement entered into by First Blood with respect to the partnership's ownership of the film. It appeared to the investors that First Blood did not acquire all rights in the film and failed to acquire the necessary rights for the limited partnership to earn a profit from the distribution and other uses of the film. And it was argued that because of First Blood's failure to disclose that it did not acquire all the rights in the film, First Blood could never earn a profit, thereby causing the Internal Revenue Service to disallow the tax deductions claimed by one of the investors on the ground that the partnership investment was a tax-motivated, and not a profit-motivated, transaction. The investors stated that they received less than $11,000 in distributions on each $200,000 limited partnership unit, and demanded, in part, recovery of the amounts invested in First Blood.

With respect to the statute of limitations defense, the court pointed out that prior to the decision in Ceres Partners v. GEL Associates, 918 F.2d 349 (2d Cir. 1990), a 10(b) claim accrued when a party "had actual knowledge of the alleged fraud or knowledge of facts which in the exercise of reasonable diligence should have led to actual knowledge;" the statute of limitations period was determined by looking to the law of the forum state. The parties agreed that the action would be time barred under the applicable statutes of limitations in the states where the investors resided if the action accrued in October 1982, the date when the last investor purchased shares in First Blood.

The investors argued that the action did not accrue until late 1984 when they first realized that they were not receiving the expected return on their investments.

Judge Miner agreed with the District Court's finding that, in October 1982, the investors "possessed all the knowledge necessary to provide them with sufficient inquiry notice that the Memorandum contained material misstatements with respect to First Blood's ownership of the rights to the film and the questionable profitability of their investments." Among other factors, the court noted that the memorandum included numerous warnings that the investment presented a substantial risk of adverse tax consequences; given the sophistication of the investors, stated Judge Miner, an examination of the memorandum should have revealed that this investment was tax-motivated and not intended to turn a profit. And an examination of the purchase agreement, which was frequently mentioned in the memorandum, would have revealed that First Blood did not own all the rights to the film.

Block v. First Blood Associates, 1993 U.S.App.LEXIS 4852, 988 F.2d 344 (S.D.N.Y. 1993) [ELR 15:8:9]

Record producer may proceed with breach of contract claim against Motown Records

As described by Federal District Court Judge Robert P. Patterson, Jr., Motown Record Corporation, in October

1965, hired Michael Gentile as a record producer. Motown agreed to pay Gentile royalties, with the amount of payment depending on whether the "A" side, the "B" side, or both sides of a record contained one or more songs produced by Gentile. Royalties were payable "solely with respect to single records," and Gentile was to be paid no royalty on records manufactured or sold outside the United States, or for the first 50,000 records sold and paid for in the United States.

Motown also agreed to pay Gentile a $200 per week advance against royalties during the term of the contract, which was to be six months and which would "expire automatically and without notice unless extended..." Motown was entitled to extend the term of the contract upon notifying Gentile, as specified in the contract.

The contract prohibited oral modification of its terms, and was to be governed by Michigan law.

Gentile claimed in about March 1966, Berry Gordy, then the president and owner of Motown, asked Gentile to produce albums in New York and to manage Motown's New York office. According to Gentile, Berry verbally agreed that Gentile would receive royalties for this work at the same rate as stated in the contract and "on a worldwide basis in perpetuity."

Gentile stopped working for Motown in 1968. He received royalty statements until December 1986. At that point, the royalties due Gentile for worldwide sales allegedly exceeded the $200 per week advances Motown had paid to the record producer. Gentile received no further royalty statements or payments.

In August 1992, Gentile sued Motown for damages and declaratory judgment, alleging fraud, breach of contract, promissory estoppel, reformation. The court dismissed the complaint for damages, with leave to replead a breach of contract claim based on the theories of reformation and modification of contract.

Judge Sweet noted that under Michigan law, reformation of contract requires either fraud or mistake by the parties at the time they executed their agreement. Gentile's amended complaint did not contain such allegations, and the court granted Motown's motion to dismiss the claim.

Judge Sweet then denied Motown's motion to dismiss the breach of contract claim, commenting that it appeared that Gentile might be able to demonstrate that the contract, as verbally modified, satisfied the Michigan statute of frauds.

The court also denied Motown's motion to dismiss Gentile's declaratory judgment action.

Gentile v. Motown Record Corporation, 1993 U.S.Dist.LEXIS 4739 (S.D.N.Y.1993) [ELR 15:8:9]

Video distributor may raise economic duress defense in performer's action claiming royalties

In 1986, Esquire Associates granted Kartes Video the right to manufacture and distribute the "Great Body" series of videotapes. The parties agreed that Deborah Crocker, who performed in and choreographed the videos, would receive a royalty of $.05 on each tape sold by Kartes. Esquire subsequently agreed that it would be liable for the royalty, which was to be paid to Crocker by Kartes. Kartes later agreed to pay Crocker an additional royalty in the amount of $.45 for each "Great Body" tape sold by Kartes.

Polaris Media Group purchased certain assets from Esquire that included all of Esquire's interest in the Great Body video series. In mid-1988, Kartes promised to deliver to Polaris the master tapes for the video series upon Polaris's payment of certain money due. Polaris also agreed to pay Deborah Crocker $.25 per unit of the tapes sold by the company, beginning August 31, 1988.

When Crocker, as a third party beneficiary, sued Polaris, the company, among its defenses, claimed economic duress and sought to void any obligation it might have to pay Crocker the additional royalty of $.20 over and above the $.05 that Polaris was obligated to pay the performer under her agreement with Esquire. Polaris stated that it was in a weak financial position at the time Kartes made its demands, and claimed that Kartes not only refused to deliver the master tapes to Polaris, but that James Kartes, as described by Federal District Court Judge Kimba M. Wood, "threatened to destroy the master tapes if Polaris did not agree to pay [Crocker] the increased royalty."

Judge Wood noted that under New York law, an agreement may be voided for duress if a party establishes that it was forced to agree to an unlawful demand in order to obtain property that rightfully belonged to it. The party also must prove that resorting to legal remedies would have been impracticable or futile under the circumstances. Polaris argued that the master tapes became Polaris's property when the Esquire/Kartes agreement was breached by the transfer of Kartes's stock from the Scripps-Howard Company to James and Nancy Kartes individually. Judge Wood stated that Crocker did not present evidence from which the court could conclude that Kartes did not breach the Esquire/Kartes agreement. Given that Polaris had a "colorable" claim that the Esquire/Kartes agreement granted Polaris "immediate and unfettered access" to the master tapes upon Kartes's breach, Polaris raised a material issue for resolution at trial with respect to whether the master tapes rightfully belonged to Polaris as of March 1988.

Even if Kartes breached the Esquire/Kartes agreement and had no lawful basis for retaining the master tapes, Polaris could not establish duress unless it also could prove that legal or other redress was unavailable or ineffective. The court found "unavailing" Polaris's argument that the company's weak financial condition prevented it from filing suit against Kartes. However, Judge Wood agreed that Polaris raised a genuine issue of fact as to whether Kartes threatened to destroy the master tapes unless Polaris acceded to its demand for an increased royalty for Crocker.

In all, Crocker was not entitled to a dismissal of Polaris's defenses as a matter of law. It will remain for a jury to determine, among other issues, whether Kartes's behavior during the parties' negotiations was inconsistent with the alleged threat to destroy the master tapes.

Crocker v. Polaris Media Group, Inc., 1993 U.S.Dist.LEXIS 5745 (S.D.N.Y. 1993) [ELR 15:8:10]

Photographer may sue agency for using improper copyright notice, but loses claim alleging breach of license

Kip Rano, sometime in or before 1978, granted Sipa Press a non-exclusive license to reproduce and distribute Rano's photographs. Sipa agreed to store and develop the negatives and to pay Rano fifty percent of the net royalties from the use of his works.

In 1986, Rano notified Goskin Sipahioglu, one of the owners of Sipa, that he was changing agencies and requested the return of his negatives. Rano subsequently sued the agency and Sipahioglu, alleging copyright infringement and various state law claims.

A Federal District Court in California dismissed Rano's pendent claims for malicious conversion and intentional interference with economic relationship and granted Sipahioglu's motion to dismiss for lack of personal jurisdiction. The court then granted Sipa's motion for summary judgment, holding that all but one of Rano's claims were breach of contract claims. The claim that Sipa failed to affix a proper copyright notice on slide mounts for Rano's photographs was a copyright claim, but was found meritless, as a matter of law, because the notice provided by Sipa was adequate to protect Rano's copyright. The court dismissed the remaining pendent state law claims for lack of subject matter jurisdiction.

On appeal, Rano argued that upon his termination of the licensing agreement, the agency's subsequent use of his negatives constituted copyright infringement. Federal

Court of Appeals Judge Brunetti noted that under California law, agreements of non-specified duration are terminable at the will of either party. However, section 203 of the Copyright Act provides that licensing agreements are terminable at the will of the author only during a five year period beginning at the end of the thirty-five years from the date of the execution of the license unless the agreement specifies an earlier termination. Section 203 applies to non-exclusive, as well as exclusive licenses executed by an author on or after January 1, 1978.

Judge Brunetti rejected Rano's contention that section 203 would not apply because the licensing agreement at issue was oral, stating that the agreement was evidenced by several letters signed by the parties, and that the parties performed under the agreement for about eight years.

Holding that section 203 preempts California termination at will rule would not mean that licensees would be able to breach a licensing agreement "with impunity," observed Judge Brunetti. Rano would be able to claim copyright infringement if Sipa exceeded the scope of the licensing agreement, breached a covenant or condition, or breached the agreement "in such a substantial and material way as to justify rescission." And Rano could bring a breach of contract claim in state court.

Judge Brunetti found that Rano did not provide evidence sufficient to withstand summary judgment on the claim that Sipa materially breached the licensing agreement and that the breach gave Rano the right to terminate the agreement. Sipa paid Rano almost one hundred percent of the royalties due the photographer up to approximately the time Rano sought to terminate the licensing agreement, excluding certain United States publication royalties, for which Rano received about eighty-six percent of the royalties due. The letters memorializing the oral contract between the parties did not provide for the return of Rano's negatives on demand, and Rano did not provide evidence to support his claim that he was due credit for a particular photograph of Sarah Ferguson - Sipa provided evidence that the photograph was taken by another journalist.

Even if Rano's allegations had merit, the court stated that it would not conclude that Sipa materially breached the licensing agreement "in light of the fact that the parties enjoyed a harmonious eight-year relationship."

Judge Brunetti reversed the District Court's grant of summary judgment on the issue of Sipa's alleged use of an improper copyright notice on the negatives the agency distributed to various publications, stating that the court was unable as a matter of law to find that there was no material issue of fact as to whether the notice was adequate.

The court concluded by agreeing with the dismissal of the claims against Sipahioglu, and suggesting that the

District Court, on remand, in addition to reviewing Rano's copyright infringement claim as to copyright notice, should reconsider exercising pendent jurisdiction over Rano's state law claims for malicious conversion and breach of contract.

Rano v. Sipa Press, Inc., 987 F.2d 580, 1993 U.S.App.LEXIS 5812 (9th Cir. 1993) [ELR 15:8:11]

Dispute over merchandising rights "Heathcliff" character requires further discovery

In 1973, George Gallagher (sometimes known as George Gately or George Gately Gallagher) granted The McNaught Syndicate the right to copyright, distribute and market, for a ten year period, the cartoon character "Heathcliff the Cat." In 1982, McNaught exercised a contractual right to extend the term by an additional ten years.

In April 1984, McNaught entered an agreement with DIC Animation City, Inc. and Lexington Broadcasting Services for the production of a series of 65 animated programs featuring Heathcliff. McNaught granted DIC the right "to exploit directly or by licenses and sub-licenses any Merchandising Rights in the Series...from this date forward in perpetuity throughout the universe."

In March 1986, McNaught and Gallagher signed an agreement in which Gallagher acknowledged that McNaught, DIC and Lexington Broadcasting planned to produce twenty-one additional Heathcliff television programs. Gallagher expressly released any claims that he might have had against McNaught, DIC and Lexington "that McNaught's entering into the [first and second agreements]...was wrongful or violated any right of or agreement with [Gallagher]." Gallagher, however, reserved all rights that he had pursuant to the syndication Agreement and "any other agreements...entered into by McNaught concerning the property to which [Gallagher] is or may be a third-party beneficiary..."

In June 1989, McNaught and Gallagher entered two additional agreements which provided that McNaught would assign and Gallagher would assume all of McNaught's rights and liabilities under a number of agreements involving Heathcliff, including the agreements with DIC and Lexington. DIC granted its approval of the assignment and assumption agreements.

DIC eventually sued McNaught and Gallagher, claiming an unlimited right to merchandise derivative works featuring Heathcliff. A Federal District Court in New York denied DIC's motions for summary judgment and for an order enjoining Gallagher from asserting any right to engage in such merchandising.

Judge Louis J. Freeh stated that there was no dispute that in 1986, Gallagher released McNaught, DIC and Lexington from "any claims" that he might have that the two production agreements violated any of the artist's rights. By the express language in the 1986 agreement, Gallagher waived any right to challenge McNaught's broad grant to DIC of the right to merchandise the Heathcliff television show, declared the court.

Judge Freeh further found that even if Gallagher had not signed the second syndication agreement and had not agreed to the broad release language, the artist, by assuming all of McNaught's rights and liabilities to DIC under the 1989 agreements, adopted those agreements in their entirety, including the broad grant of merchandising rights in the Heathcliff television show.

The court agreed with Gallagher that factual issues remained regarding DIC's merchandising rights under the production agreement in which DIC apparently received only the right to "produce and exploit" the Heathcliff television series, not Heathcliff himself. DIC claimed that the agreement's definition of merchandising rights included the right to merchandise "goods, wares and items of tangible personal property of all type,...and all other manner of reproduction and use of the Series or any element or portion thereof..."

The express language of the agreement did not necessarily support DIC's interpretation of the production agreement, stated Judge Freeh. Since the agreement did not establish whether the parties distinguished between merchandising for Heathcliff and merchandising for the Heathcliff television series, the court noted that extrinsic evidence of the parties' intent and conduct in connection with the contract might be considered, and ordered further discovery in the matter.

DIC Animation City, Inc. v. The McNaught Syndicate, Inc., 1993 U.S.Dist.LEXIS 3120 (S.D.N.Y. 1993) [ELR 15:8:11]

Injunctive relief granted to publisher of "Dark Future" books is affirmed by British court

In December 1992, a British High Court Judge of the Chancery Division granted Games Workshop an interlocutory injunction to restrain Transworld Publishers from advertising, exhibiting, or distributing publications bearing the words "Dark Future" as part of the title of a book or as part of the name of a series.

Games Workshop, since 1988, has distributed the role-playing game called "Dark Future: The Game of Highway Warriors." The company registered the words "Dark Future" as a trademark in relation to games, and miniatures and models, and also registered "Dark Future" as a separate trademark for use on books and magazines.

In August 1992, Transworld began publishing a series of books using the words "Dark Future" in the title.

The Court of Appeal agreed with Judge Mowbray that the use of "Dark Future" as the title of a series of books was significantly different from its use as the title of a single book, and that Games Workshop raised a serious question to be tried concerning whether Transworld's use of "Dark Future" on its series constituted trademark infringement.

The Court of Appeal stated that it was unnecessary, in light of the finding on the question of trademark infringement, to express a view on Games Workshop's passing off claim. Nevertheless, the court inferred from the volume and value of the sales of Games Workshop's products, as well as from certain advertising, that

Games Workshop has acquired "a sufficiently substantial reputation and goodwill in the name 'Dark Future'..." The court was prepared to accept that Games Workshop also raised a serious question to be tried on this issue and that Games Workshop's reputation and goodwill could be damaged by the complained-of activities.

Judge Balcombe concluded by upholding the finding that damages would not be an adequate remedy for Games Workshop if the court denied interlocutory injunctive relief.

Games Workshop Limited v. Transworld Publishers Limited, Court of Appeal (Civil Division) U.K. (1993) (available in LEXIS, UK;ENG library) [ELR 15:8:12]

"The Arabic Channel" is ruled a generic term not subject to trademark protection

GMT Productions used the unregistered mark "The Arabic Channel" in connection with the sale and advertising of its Arabic language programming. GMT applied to the United States Department of Commerce, Patent and Trademark Office to register a service mark combining a graphic design resembling a television camera, upon which was superimposed the letters "TAC," followed by the words, "The Arabic Channel," written in upper case letters. The agency granted registration of the mark, but required GMT to include in its application a disclaimer stating: "No claim is made to the exclusive right to use the words 'The Arabic Channel' apart from the mark as shown."

GMT claimed that despite the disclaimer, consumers identified the mark "The Arabic Channel" with GMT, and that such consumer identification resulted in secondary meaning so as to entitle the mark to protection under the Lanham Act.

Cablevision of New York City offered for sale a cable television service known as "The International Channel;" the company presented Arabic language programming for about one hour per day.

When GMT sued Cablevision under the Lanham Act, a Federal District Court in New York granted Cablevision's motion for summary judgment. Judge Conboy found that "The Arabic Channel" was a generic term, not subject to trademark protection. "The Arabic Channel" describes a general category of services, namely, channels that broadcast in the Arabic language, noted the court. Furthermore, to allow one company the exclusive right to call itself "The Arabic Channel" would prevent potential competitors from adequately describing their services. In order not to weaken the ability of competitors to enter the market, the court expressed the view that the mark "The Arabic Channel" must remain in the public domain.

The use of the word "the" before an unprotectible mark did not convert the generic term into a descriptive one, stated Judge Conboy, who, although recognizing the difficulty in choosing between the generic and descriptive categories, concluded that "The Arabic Channel" was within the generic category. Thus, any showing of secondary meaning would not be relevant since such proof could not transform a generic term into a subject for trademark.

The court granted summary judgment to Cablevision as to GMT's Lanham Act claim; declined to exercise jurisdiction over GMT's state law claims; and found no evidence of bad faith by GMT to support sanctions or an award of attorneys' fees to Cablevision under Rule 11 of the Federal Rules of Civil Procedure.

GMT Productions v. Cablevision of New York City, Inc., 816 F.Supp. 207, 1993 U.S.Dist.LEXIS 3206 (S.D.N.Y. 1993) [ELR 15:8:13]

Court issues rulings in breach of contract action involving use of "Advanced Dungeons and Dragons" trademark

TSR, Inc. owns the trademarks "Dungeons and Dragons" and "Advanced Dungeons and Dragons;" the role-playing games were co-created by TSR co-founder E. Gary Gygax. The company placed its trademarks on the rules and accessories for the game, as well as on "adventure modules."

In 1982, Mayfair Games, Inc. began marketing items under the trademark "Role Aids" for use in playing Advanced Dungeons and Dragons. When TSR claimed that

Mayfair's use of the trademarks was improper and infringing, the parties, in 1984, signed an agreement governing Mayfair's future use of the trademarks. Mayfair acknowledged TSR's ownership of the trademarks at issue and agreed not to contest their validity; Mayfair also agreed to restrictions on its use of the trademarks in connection with Role Aids modules, advertising and promotional materials.

In response to a 1991 lawsuit brought by TSR, a Federal District Court in Illinois noted that Mayfair admitted that certain company products violated the terms of the agreement. After careful review, the court rejected Mayfair's laches and waiver defenses, and stated that TSR was entitled to a judgment as a matter of law to the extent of the acknowledged breaches.

In turning to the alleged violations denied by Mayfair, Judge Milton I. Shadur pointed out that the agreement unambiguously set forth color contrast standards for the use of the trademarks at issue; it was found that the cover of Mayfair's "Demons" module did not comply with the terms of the agreement.

However, the court determined that Mayfair was entitled to the dismissal of TSR's claim that the agreement was breached by the "To Hell and Back Again" product description sheet.

Judge Shadur stated that rescission of the settlement agreement would be an inappropriate remedy. Mayfair had observed the requirement of indicating TSR's non-sponsorship of the Role Aids modules; at the same time, Mayfair kept the Advanced Dungeons and Dragons name before consumers, with TSR identified as the source of the game. And Mayfair did not challenge TSR's trademarks, thus promoting the "continued entrenchment" of Dungeons and Dragons and Advanced Dungeons and Dragons "as fixtures in the consuming public's minds."

The court then commented on the "apparent overreaching by TSR in...prohibiting Mayfair's truthful advertising of the fact that Role Aids products may be utilized by members of the consuming public in conjunction with rival role-playing games as well as with Advanced Dungeons and Dragons." The restraint served to inhibit not only Mayfair's market among consumers who might purchase role playing games from TSR's competitors, but also lessened the demand for those competitive games among purchasers of Mayfair's Role Aids products. Judge Shadur, who did not find it necessary to decide the issue, nevertheless stated that such anti-competitive measures did not appear to have any "rational support in TSR's legitimate goals for protecting the integrity of its own trademarks."

The court deferred ruling on injunctive relief or damages pending further submissions by the parties.

TSR, Inc. v. Mayfair Games, Inc., 1993 U.S.Dist.LEXIS 3355 (N.D.Ill. 1993) [ELR 15:8:13]

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Court upholds jury findings in dictionary dispute, but reduces damage award to about $2 million

In 1991, Random House began publishing the "Random House Webster's College Dictionary." Merriam-Webster's most recent dictionary, published in 1983, contained a title page reading "Webster's Ninth New Collegiate Dictionary."

Merriam-Webster claimed that Random House's use of the words "Webster's" and "College" in combination constituted trademark infringement, and set forth a trade dress infringement claim.

A Federal District Court jury awarded damages of $1.7 million to Merriam-Webster on the company's Lanham

Act trade dress infringement claim, and the court sustained the award (ELR 13:9:19). The jury also awarded Merriam-Webster $500,000 in punitive damages on the company's common law trade dress infringement claim. The court subsequently doubled the damage award and entered judgment requiring Random House to pay a total of about $4.05 million to Merriam-Webster.

Federal District Court Judge McKenna has rejected Random House's request for judgment notwithstanding the verdict or a new trial. It was observed that the jury was presented with extensive evidence of the dictionaries' common color; the similar typography of the word "Webster's" as used on the Random House dictionary's face and spine and as used on the Merriam-Webster dictionary; the prominence of the title, "Webster's College Dictionary," in contrast to "Random House," which was smaller and less eye-catching; and that the word

"Webster's" was featured in bold white vertical type down the spine on a red background.

Judge McKenna also noted that the jury expressly found that the Merriam-Webster dictionary had acquired secondary meaning, and stated that the evidence supported the jury's finding that Merriam-Webster's total trade dress had acquired secondary meaning. Merriam-Webster sufficiently established actual confusion, stated the court. The fact that the company did not conduct a survey of consumer confusion was not dispositive.

Judge McKenna determined that the lost profit evidence presented by Merriam-Webster was "sound," and that the jury was entitled to rely upon the evidence in calculating the company's lost profits. The jury could have reasonably inferred that Merriam-Webster's shortfall in sales was caused by Random House's infringing dictionary, noted the court, and the profit per dictionary calculation also was reasonable.

The court proceeded to find that the jury improperly awarded Merriam-Webster $l.045 million representing Random House's net profits since it was not clear that the jury believed that Random House acted with the requisite "willful deception." The court vacated the award and announced that Merriam-Webster would be entitled to a new jury trial solely on the issue of whether Random House's conduct constituted "willful deception" such that Merriam-Webster should be awarded Random House's profits.

Judge McKenna pointed out that under the Lanham Act, Merriam-Webster was entitled to recover both Random House's profits and any damages sustained by Merriam-Webster. The court also stated that its decision to double Merriam-Webster's lost profits would stand notwithstanding that the award of Random House's profits was vacated pending a further jury determination since the purpose of doubling the award was deterrence.

And the evidence was found sufficient to support the award of punitive damages. A revised judgment therefore was entered in the amount of about $2 million.

The court next found that the evidence was sufficient to sustain the jury's findings on the trade dilution issues, and that the injunction entered by the court specifically prohibited only certain infringing uses of the word "Webster's" or the combination of the generic term "Webster's" and the word "college."

The court rejected Merriam-Webster's argument that Random House did not meet its burden of proof that the word "Webster's" was generic for dictionaries. It was noted that there was ample evidence suggesting that Webster's was a "common descriptive name" and that the jury correctly concluded that the name was generic, given the many types of reference materials employing the term. Judge McKenna concluded by agreeing with the jury decision denying Merriam-Webster an award of attorneys' fees under the Lanham Act.

Merriam-Webster, Inc. v. Random House, Inc., 815 F.Supp. 691 (S.D.N.Y. 1993) [ELR 15:8:14]

Newspaper may pursue claim alleging infringement of column title

The San Jose weekly tabloid "Metro," published by Metro Publishing, contains news and feature stories focusing on entertainment and the arts and includes a column called "Public Eye," devoted, according to Federal Court of Appeals Judge Betty Fletcher, to "local political gossip and intrigue."

The San Jose Mercury News, in June 1991, began distributing a weekly tabloid known as "eye;" "eye" contained, along with other features, the entertainment listings which had appeared in the newspaper's Friday edition "Weekend" section. The Mercury News, in addition to including "eye" as a Friday insert in the newspaper, distributed the tabloid free to the public from newspaper racks bearing the "eye" logo. The racks were of the same type and located in the same sorts of establishments as Metro's racks, observed Judge Fletcher.

When Metro sued Mercury News, a Federal District Court denied Metro's motion for a preliminary injunction, except with respect to barring Mercury News from placing its publication in Metro newsracks. It did not appear to the court that Metro had a trademark in the name of the column and thus, despite evidence of consumer confusion, the court found that Metro did not show a likelihood of success on the merits of its trademark infringement claim. (Metro also had sought relief for trade dress infringement claim, but did not pursue, on appeal, the denial of the claim).

Judge Fletcher agreed with Metro that the District Court erred in ruling that the title of a newspaper column cannot acquire trademark status. "A column name, because it serves to identify the column as the product of a particular writer or paper and to distinguish it from surrounding copy and the features of competing publications, is entirely consistent" with the definition of a trademark under the Lanham Act, stated the court.

Judge Fletcher noted that titles of newspaper and magazine columns have been registered as trademarks by the United States Patent and Trademark Office, and that "reader recognition of and loyalty to a particular column are things of value in the newspaper publishing world and, under appropriate circumstances, merit protection under the Lanham Act."

The court, accordingly, reversed and remanded the matter for reconsideration of Metro's motion for a preliminary injunction.

Metro Publishing, Ltd. v. San Jose Mercury News, 1993 U.S.App.LEXIS 4136, 987 F.2d 637 (9th Cir. 1993) [ELR 15:8:15]

Civil rights worker loses libel action based on statements in Rev. Ralph Abernathy's autobiography

As reported at ELR 12:10:14, the late Rev. Ralph Abernathy's 1989 autobiography, "And the Walls Came Tumbling Down," contained a passage describing certain events on the night before the assassination of Dr. Martin Luther King, Jr. Rev. Abernathy, Dr. King and Bernard Lee were invited to dinner at the home of a friend of Dr. King; after dinner, according to Rev. Abernathy, he and Lee fell asleep. "When I awoke," continued the book, "I saw an empty living room, except for Bernard stretched out on the sofa. Shortly thereafter, Martin and his friend came out of the bedroom."

Adjua Abi Naantaanbuu, although not named in the book, claimed that she was the person referred to as the "friend" of Dr. King and the hostess of the dinner, and that the book defamed her by conveying the false impression that she "engaged in adulterous behavior and sexual relations with Dr. Martin Luther King on the last night of his life."

In 1990, a Federal District Court denied a motion to dismiss the complaint.

In 1993, Federal District Court Judge Charles H. Tenney granted the author, publisher, and editor's motion for summary judgment.

Assuming, for purposes of the opinion, that the disputed passage was "of and concerning" Naantaanbuu, Judge Tenney initially found that Naantaanbuu was a private figure and that the information contained in the challenged excerpt was a matter of legitimate public concern.

It then was noted that the publisher had no reason to doubt the accuracy of the information or the reputation of the writer, and that the publisher followed its established editorial procedure to insure a thorough review. Naantaanbuu did not rebut HarperCollins' showing that it did not act with gross irresponsibility, and the court granted the publisher's motion for summary judgment.

After pointing out that book editors are held to the same standard as a book's publisher, the court declared that it was not grossly irresponsible for the editor to have relied on Abernathy's statements, made at the time the book was written, "to the effect that Abernathy was now telling the full story." The editor did not have reason to doubt Abernathy's credibility and thus had no further obligation to investigate. The court, accordingly, granted the editor's motion for summary judgment.

In granting summary judgment to the Rev. Abernathy's estate, Judge Tenney stated that Naantaanbuu did not produce information demonstrating the possibility that Abernathy acted with some degree of culpable conduct, for "even if Abernathy may have misinterpreted what he saw, that misinterpretation would not rise to the level of gross irresponsibility."

Naantaanbuu v. Abernathy, 1993 U.S.Dist.LEXIS 3394, 816 F.Supp. 218 (S.D.N.Y. 1993) [ELR 15:8:15]

Florida school bus driver's libel and invasion of privacy claims against broadcaster are dismissed

Sunbeam Television, in February 1990, stated on various news programs that Melvina Lorraine Woodard had "served four years in jail for murder when using the name Melvina Lorraine Johnson." Apparently, Woodard was convicted in 1972 of attempted murder and was sentenced to four years in jail, but served about two years.

Woodard, a school bus driver, sued Sunbeam and reporter Jon Steinberg, for defamation and invasion of privacy. A Florida trial court granted summary judgment to the Sunbeam parties.

In upholding the trial court decision, the appellate court referred to the news media's qualified privilege to accurately report on information received from government officials. The privilege includes broadcasting the contents of official documents, even if the documents contain erroneous information, as long as the report is reasonably accurate and fair.

Steinberg obtained the information about Woodard from law enforcement authorities. An official report stated that Woodard was convicted of "homicide-willful kill" and received a four year sentence; the report also stated that Woodard was paroled after serving about two years of the sentence. Steinberg's report conveyed "a substantially correct account" of the official report, stated Judge Goderich, who then observed that the reporter had no duty to determine the accuracy of the information contained in the official records before broadcasting his report.

Woodard had claimed that Steinberg invaded her privacy by asking her when she stopped using the name Johnson, and by identifying Woodard as "Melvina Lorraine Johnson a/k/a/ Melvina Lorraine Woodard." The fact that Woodard changed her name (after a divorce) was a matter of public record, as was her conviction. Woodard was unable to show that the Sunbeam parties broadcast private facts.

Furthermore, the publication of private facts is not an invasion of privacy when the facts also are of public concern. Steinberg's report was prompted by the passage of legislation requiring school boards to conduct background checks on all new employees - the statute did not address existing employees. The public had a right to know that many school bus drivers had criminal records, observed the court, and Woodard did not show that the matters broadcast were not of public concern.

Woodard v. Sunbeam Television Corp., 616 S.2d 501 (Fla.App. 1993); 1993 Fla.App.LEXIS 2991 (Fla. App. 1993) [ELR 15:8:16]

Author of book about TWA takeover prevails in libel action

One of the corporate takeover battles recounted by Moira Johnston in the 1986 book "Takeover: The New Wall Street Warriors - The Men, The Money, The Impact," was the struggle for control of TWA between Carl Icahn and Frank Lorenzo. Brian Freeman, as described by New York appellate court Judge Theodore R. Kupferman, was the financial advisor of the International Association of Machinists, one of the two labor unions which took part in the negotiations over TWA's ownership. In setting forth the events at a critical August 1985 meeting of the TWA Board of Directors, Johnston stated: "Brian Freeman, the lawyer who represented the machinists, compounded the threats of strike, warning that being sold into bondage to Lorenzo would provoke night time trashing of airplanes and other sabotage."

Judge Kupferman found that there was no constitutional malice since Johnston had two sources for the statement, properly researched the incident described and, "at most, [arrived at] a possibly mistaken inference..." The court further found that an objective consideration of the function of Freeman at the meeting would lead to the conclusion that the statement attributed to Freeman was "a privileged description of the attitudes of the union membership he represented, and not a blanket endorsement of illegal activity by a lawyer." It did not appear to the court that there was a high degree of awareness of the probable falsity of the statement in the publication, or that Johnston had, or should have had, serious doubts as to the truth of the statement.

Judge Kupferman therefore granted Johnston's motion for summary judgment and dismissed Freeman's defamation claim.

Judge Ross, in dissent, would have found that Freeman raised questions which might indicate to a jury that Johnston exhibited actual malice in writing the allegedly defamatory statement.

Freeman v. Johnston, New York Law Journal, p. 21, col. 3 (N.Y.App., Aug. 23, 1993) [ELR 15:8:16]

Publisher and author prevail in libel and invasion of privacy action

A Federal District Court in Illinois has granted a motion for summary judgment sought by Alfred A. Knopf, Inc. and Nicholas Lemann, the publisher and author of "The Promised Land: The Great Black Migration and How It Changed America," in a libel action bought by Luther and Dorothy Haynes.

Federal District Court George M. Marovich noted that one of the life stories recounted in the book was that of Ruby Daniels, the former wife of Luther Haynes.

Dorothy Haynes claimed that the book portrayed her as an adulteress by falsely asserting that she had an affair with Luther while they both lived in a housing project in Chicago. Luther Haynes stated that the book falsely asserted that he neglected his obligations to his family and that he lost a job for drinking.

The Haynes also alleged false light invasion of privacy and invasion of privacy through public disclosure of private facts.

The court found that the Haynes failed to present any argument to support Dorothy Haynes' false light and libel claims and Luther Haynes' false light claim; that truth was a defense to Luther Haynes' libel claim - the public record supported the "gist" of the challenged passages; and that the Haynes did not establish that the facts published in the book were "truly private" so as to maintain their invasion of privacy claim. The intervening thirty years "[did] not erase the contents of the public record," declared Judge Marovich. Certain facts that may have been truly private appeared to the court to have been statements of Ruby Haynes' opinion and, as such, were not highly offensive.

The tort of invasion of privacy through the public disclosure of private facts involves the context of information as well as the information itself, observed the court, and, when taken in context, the references to Luther and Dorothy Haynes in "The Promised Land" were not highly offensive.

Haynes v. Alfred A. Knopf, Inc., 1993 U.S.Dist.LEXIS 2880 (E.D.Ill. 1993) [ELR 15:8:17]

Filmmakers obtain attorneys' fees and costs in dispute with USIA

In the ongoing dispute (ELR 9:9:8; 13:12:12) involving various independent filmmakers, including Bullfrog Films, Inc., and the United States Information Agency concerning the constitutionality of agency regulations to implement an international film distribution treaty, a Federal Court of Appeals found, in part, that a Federal District Court had abused its discretion in holding that Bullfrog was not entitled to attorneys' fees because the government's position was substantially justified.

In response to a renewed motion for attorneys' fees under the Equal Access to Justice Act, Federal District Court Judge Tashima found that the Bullfrog parties were entitled to fees for their initial lawsuit and for a subsequent proceeding.

The Bullfrog parties qualified as the prevailing parties in the subsequent proceeding because remedial legislation, although not sought by the USIA, was enacted, in large part, due to the filmmakers' lobbying and litigation efforts. The litigation was "at least a material factor in bringing about the enactment of Section 207," stated Judge Tashima.

One of the challenged regulations authorized the USIA to label certain materials as "propaganda" even though the materials were educational and had been certified as such. The agency argued that the regulation was substantially justified because the labelling of films as "propaganda," in some circumstances, would be constitutional. Judge Tashima pointed out that "because a position or practice is not unconstitutional does not mean that, in all circumstances, it is substantially justified" - affixing a propaganda label on educational material was not required either by the treaty or its enabling statute and served to contravene the purpose of certification under the Beirut Agreement.

In the initial proceeding, the court advised the agency to avoid content-based judgments. Nevertheless, the agency, by using the "propaganda" regulation, "sought to place its content-based disapproval on films which the Constitution required it to certify as educational." There was no justification, declared Judge Tashima, for the USIA reaching beyond its duty under the Beirut Agreement in this regard, and "its action was entirely gratuitous and not substantially justified," ruled the court.

Judge Tashima, after careful evaluation, awarded the filmmakers attorneys' fees in the amount of about $160,000 and costs and expenses of about $15,000.

Bullfrog Films, Inc. v. Catto, 815 F.Supp. 338, 1993 U.S.Dist.LEXIS 3171 (C.D.Ca. 1993) [ELR 15:8:17]

Antietam officials may not bar women from portraying soldiers in Civil War re-enactments

The Volunteer in the Parks Act of 1969 authorizes the Secretary of the Interior to use the services of volunteers in "interpretive functions." A regulation issued under the statute directs park administrators to achieve the greatest degree of historical accuracy that is reasonably practicable when conducting such functions.

Lauren Cook was a member of the 21st Georgia Volunteer Infantry, a group of Civil War history enthusiasts, who, outfitted in period clothing, would enact simulated maneuvers and combat in National Park Service-sponsored events held at battlefield parks. Cook claimed that the administrators of Antietam did not allow her to portray a male soldier in certain events, and thus engaged in gender-based discrimination in violation of the equal protection component of the due process clause of the Fifth Amendment.

The Federal District Court for the District of Columbia has granted Cook's motion for summary judgment.

Judge Royce C. Lamberth, in a lengthy opinion, reviewed the various interpretive presentations covered by the regulation, and then discussed Cook's use of costuming techniques to achieve an accurate portrayal of a male soldier. Cook agreed that National Park Service officials may legitimately require volunteers to mask inaccurate physical characteristics, including gender, at Service-sponsored events, but complained that Antietam officials categorically bar women from military roles despite the accuracy of the impression which might be created by an individual woman.

Judge Lamberth recalled that classifications based on gender are suspect and, because they are so likely to be irrational, are presumed invalid. A gender classification can be sustained only if the government makes "an exceedingly persuasive" showing that the classification is "substantially related" to the achievement of "important governmental objectives."

A heightened scrutiny evaluation occurs only when a party establishes purposeful discrimination on the basis of an inherently suspect characteristic. The statute and regulation at issue were gender-neutral, and Cook challenged, not their validity, but the manner in which Antietam officials administered the interpretive program. In particular, the Antietam officials, in certain event agreements entered into with the commander of the 21st Georgia, referred to the gender of the participants in the events, rather than the gender of the character role to be played. Judge Lamberth held that the agreements created gender-based classifications for military as well as civilian roles, and found that the policy at issue was facially non-neutral and subject to the application of a heightened scrutiny standard.

The government did not rebut the presumption of invalidity raised by the evidence and Cook was entitled to judgment as a matter of law, declared the court.

After conducting an analysis of Cook's claims under a separate equal protection standard, the court issued a declaratory judgment that the policy of categorically barring women from portraying male soldiers in Living History events at Antietam National Battlefield Park constitutes unconstitutional discrimination against women. The court enjoined the Secretary of the Interior and National Park Service officials from "forbidding, hindering, or discouraging individuals from participating in Living History events at Antietam because of their gender," and enjoined the officials from retaliating against the Georgia unit because of Cook's lawsuit. The officials also may not exclude "or even approach individuals for accuracy reasons if even one of the claimed inaccuracies allegedly results from the individual's failure to effectively disguise his or her gender and the officials are not similarly treating individuals with non-gender-related inaccuracies."

Judge Lamberth suggested that the Secretary of the Interior may wish to consider amending the regulation either to expressly forbid the use of suspect characteristics such as gender as a ground for discrimination in casting, or specify the circumstances in which such discrimination is permissible, accompanied by a detailed justification for such a practice.

The court, accordingly, entered judgment for Cook on the Antietam claims, and for the National Park Service parties on certain non-Antietam claims.

Cook v. Babbitt, 819 F.Supp. 1, 1993 U.S.Dist.LEXIS 3166 (D.D.C. 1993) [ELR 15:8:18]

Reinsurer's claims against National Football League are dismissed, but company may replead breach of contract and breach of fiduciary duty claims

As reported at ELR 14:6:13 (in connection with a separate proceeding), fourteen teams of the National Football League and the League Management Council, in 1984, created a "captive mutual insurance company" in Bermuda named NFL Insurance Ltd.; the parties planned to self-insure the league's football players and employees for employment related injuries. NFLIL, in order to reinsure the teams' workers' compensation insurance, contracted with various insurers to write policies in different states. The company agreed, within specified limitations, to reimburse the licensed insurers for claims paid to injured employees of the participating teams.

When NFLIL incurred significant financial deficiencies, the Bermuda Supreme Court appointed joint liquidators to conduct a winding-up proceeding. In late 1991, the liquidators purported to issue a call on the participating teams in the amount of about $14.5 million, and sued the participating teams seeking to recover for all calls allegedly issued by the NFLIL and all deficiencies in the reserve fund.

The liquidators claimed that the NFL parties were obligated to replenish the company's $314,000 reserve fund when the company was operating at a deficit.

A Federal District Court in New York noted that under Bermuda law, members of a mutual company, in the event the company is wound up, are liable only for the premiums due to the company on the date of the commencement of the winding-up.

Judge Peter K. Leisure proceeded to consider whether contributions to maintain the reserve fund at a level such that the company's assets equal the sum of its liabilities and the required reserve fund may be described as "premiums." The NFL parties argued that NFLIL was designed to be "non-assessable" in that the participating teams intended that they could not be compelled to make further contributions to NFLIL beyond the initial payments required to fund the reserve. The NFL parties never paid any premiums directly to NFLIL, and the liquidators did not claim that the NFL parties failed to make any premium payment owed indirectly to NFLIL through one of the fronting companies. The funds allegedly owed were "reserve premiums," i.e., "the premiums paid or payable to the Company toward establishing or maintenance of...the Reserve Fund."

Judge Leisure noted that the NFLIL's bylaws did not provide for the company to issue a call on the member teams to contribute additional funds in order to balance their accounts, and cited Bermuda law directing that a reserve fund "shall be treated in all respects as if it were share capital." The reserve premium, stated the court, would best be characterized as a contribution to the capital structure of NFLIL rather than a "premium" in the typical meaning of that term. The reserve premiums were the start-up costs associated with the formation of NFLIL as a mutual company under Bermuda law. Contrary to NFLIL's contentions, a deficiency in the reserve fund would not be improper or unlawful unless the company's funds were spent other than in the course of its business.

The funds in the reserve fund were spent in the normal course of NFLIL's business, and no distributions were made to the participating teams, noted the court. None of the member teams owed any further capital contributions to NFLIL, as each paid the reserve premium owed to the company. The court, accordingly, dismissed NFLIL's first cause of action.

Judge Leisure dismissed NFLIL's second and third causes of action in which it was argued that participating teams essentially were guarantors of NFLIL's liability to its creditors. The court emphasized that assessing the members of a limited liability company with unlimited liability "would destroy the limited liability characteristics of mutual companies in Bermuda."

NFLIL's claim that the participating teams agreed, at a March 1989 meeting, to contribute additional capital was ruled "insufficient." The court pointed out that NFLIL did not establish any mutual consideration supporting the purported contract, but granted leave to NFLIL to replead the claim.

In turning to NFLIL's claim that the directors and officers of NFLIL breached their fiduciary duties to the company, the court stated that the directors could not be held liable due to the alleged failure to take certain actions that were not within the powers granted them as directors. But Judge Leisure granted NFLIL permission to amend the cause of action to include alternative theories of liability against individual directors of NFLIL for their alleged failure to maintain proper corporate records.

N.F.L. Insurance Ltd. v. B&B Holdings, Inc., 1993 U.S.Dist.LEXIS 3312 (S.D.N.Y. 1993) [ELR 15:8:19]

Briefly Noted:

Skiing Injuries.

In January 1992, Luis Sanchez, Jr. was seriously injured while skiing at Sunday River Ski Resort in Maine.

During a ski run, Sanchez struck a patch of ice and fell; as he fell, his right leg hit an unmarked tree stump protruding from the snow.

Sanchez alleged, among other claims, that Sunday River was negligent in its operation and maintenance of the ski area by failing to groom and clear the ski trail of the stump, and by failing to mark or pad an obstruction in the trail.

Federal District Court Chief Judge Gene Carter noted that Maine's Skiers' and Tramway Passengers' Responsibilities Act limits the scope of liability of ski area operators. The statute provides, in pertinent part, that "each skier who participates in the sport of skiing shall be deemed to have assumed the risk of the dangers inherent in the sport and assumed the legal responsibility for any injury to his person or property arising out of his participation in the sport of skiing."

The statute excepts from the assumption of risk "injury or death...actually caused by the negligent operation or maintenance of the ski area by the ski area operator, its agents or employees." Sanchez's first two claims were permitted by statute, stated Judge Carter, who then dismissed, as time-barred, claims brought by Sanchez's parents alleging loss of companionship. The court also dismissed the parties' breach of contract claims.

In a subsequent ruling, the court denied Sunday River's motion for summary judgment with respect to the negligence claims, stating that issues of fact were raised as to whether the tree stump was a danger inherent in the sport of skiing under the statute.

In a separate action against Sunday River, James Finnern claimed that he was injured as a result of the resort's negligent maintenance of a tree and failure to post a warning sign alerting skiers to the presence of a converging trail.

A Federal Court of Appeals affirmed a District Court decision that, as a matter of law, the location (near the tree line and the border of the slope) of the tree at issue involved design issues, not issues of operation or maintenance; Sunday River could not be held liable for such decisions under Maine law.

In a footnote comment, the court noted that the instant case appeared to be "unlike" the decision in Sanchez, noting, without passing any judgment, that Sanchez involved a tree stump located thirty feet into the skiing area of a slope; the court had found that it was possible to argue that maintenance and operation considerations should have resulted in the removal or marking of the stump.

The court also agreed with the District Court's grant of summary judgment for Sunday River on Finnern's convergence sign claim.

Sanchez v. Sunday River Skiway Corp., 1192 U.S.Dist.LEXIS 15616, 802 F.Supp. 539 (D.Me.1992), 810 F.Supp. 17 (D.Me.1993); Finnern v. Sunday River Skiway Corporation, 984 F.2d 530 (1st Cir. 1993) [ELR 15:8:19]

Ballerina Injury.

As reported at ELR 14:1:16, Shenikwa Dawn Nowlin, a law school student and former ballerina, was in New York in 1983 visiting her college friend Andre Robertson, then a shortstop for the New York Yankees. During a pre-dawn drive, Robertson struck a concrete wall, and Nowlin sustained injuries which rendered her a paraplegic.

A trial court jury apportioned liability 67 percent against the city, and 33 percent against Robertson, and returned a verdict of about $14.3 million, of which about $7.75 million was for past and future pain and suffering. In response to the trial court's indication that the award was excessive, the parties stipulated to reducing the pain and suffering component to $2.5 million, for a total award of about $9 million.

An appellate court reduced the economic loss component from about $6.6 million to $5 million, and otherwise affirmed a total award in the amount of $7.5 million.

The New York Court of Appeals has agreed that the city's claimed lack of responsibility was correctly rejected and affirmed the amended judgment.

Nowlin v. City of New York, New York Law Journal, p.25, col.1 (N.Y., April 6, 1993) [ELR 15:8:20]

Boxing Manager.

In November 1986, Gerald Cooney entered an agreement with Butch Lewis Productions to participate in a heavyweight boxing match against Michael Spinks. Lewis agreed to pay Cooney $2.5 million for the fighter's participation in the match and in pre-match promotional activities. The contract, among other provisions, contained an indemnification clause. Dennis Rappaport, Cooney's former manager, signed the contract, along with Butch Lewis Productions and Cooney.

In December 1986, the Hilton Hotels Corporation sued Cooney, Rappaport, Spinks, Butch Lewis Productions, Don King Productions, Inc. and Don King, for breach of contract, and alleged that Rappaport wrongfully interfered with its contractual rights and conspired with others to do so. Hilton brought its action in Nevada; another action was brought in New York against all of the parties in the Nevada action except Rappaport, who intervened and filed cross-claims.

In the instant proceeding, Rappaport sued Butch Lewis Productions seeking reimbursement for his attorneys' fees in connection with both previous actions. A New York trial court agreed with Rappaport that res judicata was not available as a defense; the claims previously asserted by Rappaport were for contribution and implied indemnity as distinguished from the claim of contractual indemnity.

The court, however, dismissed the complaint on the basis of Rappaport's lack of capacity to enforce the indemnity provision of a contract to which he was not a party. And in the absence of clearly expressed contractual language evidencing an intent to benefit Rappaport or to permit his enforcement of the contract, Rappaport was not entitled to seek enforcement as a third party beneficiary.

Rappaport v. Butch Lewis Productions, Inc., New York Law Journal, p.29, col.3 (Queens Cnty., April 9, 1993) [ELR 15:8:20]

Jockey Student Injury.

Joo Leong Tan enrolled in the World Jockey Racing School, operated by Kristyn Goddard. Tan was injured when a horse he was exercising stepped on an object; the horse's front legs gave way and the horse went down on the track.

A trial court found that a contract signed by Tan was not sufficiently clear to operate as a general release. However, the court found that Tan reasonably and impliedly assumed the risk of the kind of injury he had suffered and granted summary judgment to the Goddard parties.

After reviewing the decisions in Knight v. Jewett, 3 Cal.4th 296 (1992; ELR 14:9:13) and Ford v. Gouin, 3 Cal.4th 339 (1992; ELR 14:9:17), cases which were decided after the trial court issued its ruling, California appellate court Judge Epstein noted that coaches and instructors owe a duty of due care to persons in their charge. Under the circumstances of the case, as reasonably construed in Tan's favor, the school's riding instructor owed Tan a duty of ordinary care such that the horse assigned to Tan was safe to ride under the conditions set by the instructor for that activity.

The court found that there was a triable issue of material fact as to the instructor's breach of duty, with Goddard's liability based on a theory of respondeat superior. Given the decisions in Knight and Ford, Tan's recovery was not barred by the doctrine of implied reasonable assumption of risk, and Judge Epstein, accordingly, reversed the trial court's decision.

Tan v. Goddard, 1993 Cal.App.LEXIS 89, 17 Cal.Rptr.2d 89 (Ca.Ct.App. 1993) [ELR 15:8:21]

Radio Station License.

The Federal Communications Commission granted a construction permit for a new FM radio station in Richmond, Virginia to James River Communications Corporation. The Commission resolved a financial qualification issue in James River's favor and declined to designate other issues for hearing. A Federal Court of Appeals, finding that competing applicants for the station were entitled to a hearing before an Administrative

Law Judge on various issues, vacated and remanded the matter to the Commission.

Judge Sentelle noted that an administrative law judge had denied a motion for summary decision against James River sought by a competing applicant, in which motion it was alleged that James River had not been continuously financially qualified since the filing of its application and had failed to report material information concerning its financial qualifications. The commission's Review Board affirmed the administrative law judge's resolution of the financial and reporting issues and the award of a 100 percent integration credit to James River.

Judge Sentelle stated that "substantial and troubling questions of material fact remain concerning whether James River was continuously financially qualified;" that the commission's decisions refusing to open the issue of misrepresentation were collectively in error; and that a real party-in-interest issue raised by the competing applicants warranted a full hearing on remand as well.

Chief Judge Mikva, in dissent, suggested that the court's action was "an important and dangerous incursion into the realm of administrative agency discretion" which did not accord the proper deference due to an agency and which ignored and misinterpreted relevant precedent of the commission and the court. Chief Judge Mikva noted that the commission was entitled to substantial deference with respect to findings that were "reasonable and supported by substantial record evidence."

Weyburn Broadcasting Limited Partnership v. Federal Communications Commission, 1993 U.S.App.LEXIS 2207, 984 F.2d 1220 (D.C.Cir. 1993) [ELR 15:8:21]

Disc Jockey Discrimination Claim.

Wayne Thompson, who worked as a disc jockey for Price Broadcasting Company, sued his former employer for race discrimination for allegedly discharging him in violation of Title VII of the 1964 Civil Rights Act.

A Federal District Court in Utah has found that Thompson failed to show discriminatory intent on the part of Price. Although Thompson met the burden of establishing a prima facie case of discriminatory discharge and a prima facie cause of action for retaliatory discharge, Price presented a legitimate nondiscriminatory reason for firing Thompson. Thompson, citing apparently hazardous weather conditions, had refused to report for work. But the disc jockey did not show by a preponderance of the evidence that Price's reason for discharging him was a pretext, and judgment was entered for Price.

Thompson v. Price Broadcasting Company, 1993 U.S.Dist.LEXIS 3360, 817 F.Supp. 1538 (D.Utah 1993) [ELR 15:8:21]

Rule 11.

In December 1991 and January 1992, KFOR-TV broadcast a series of news stories concerning the presence of animal tuberculosis in elk and other animals at Arbuckle Wilderness Park. Arbuckle Wilderness and Gerald Hagee sued the station for libel in an Oklahoma trial court; the action was removed to a Federal District Court.

Arbuckle then sought to add Dr. Robert Hartin and Mark Mesesan to the action. Dr. Hartin was the State Veterinarian for the state of Oklahoma and an administrator for the state Department of Agriculture. Mesesan was the former reporter at KFOR who reported most of the Arbuckle Wilderness stories.

Arbuckle claimed that Hartin and Mesesan participated in a conspiracy "to abuse, discredit and vilify" Hagee and to injure Hagee's business interests.

The court questioned Arbuckle's attorney, Gregory Meier, concerning the status of any legal and factual inquiries undertaken with respect to the conspiracy allegation. Meier apparently conceded that he had no evidence of a conspiratorial agreement, and Judge Wayne E. Alley found that the lack of adequate research prior to filing the amended complaint constituted a violation of Rule 11. It did not appear to Judge Alley that there was any factual basis suggesting a "meeting of the minds" between Dr. Hartin, Mesesan and KFOR-TV to defame and tortiously interfere with Hagee's business interests. The court concluded that sanctions were warranted, but ordered the parties to provide further information concerning the specific sanction to be imposed.

Arbuckle Wilderness, Inc. v. KFOR-TV, Inc., 149 F.R.D. 209, 1993 U.S.Dist.LEXIS 8835 (W.D.Okla. 1993) [ELR 15:8:21]

Cable Signal Interception.

A Federal District Court Magistrate Judge found that James McGinn was liable for damages under sections 553 and 605 of the Cable Act for intercepting cable television services. The court determined that McGinn placed pirate equipment in three converter boxes, which were installed in his home by American Cablevision of

Queens, in order to intercept, without authorization or payment, premium channel signals.

Magistrate Judge Azrack, relying on section 553, permanently enjoined McGinn from intercepting or receiving unauthorized cable television services, and awarded American Cablevision damages in the amount of $250 per converter box, per month that McGinn received the unauthorized service, for a total of $8,250.

American Cablevision of Queens v. McGinn, 1993 U.S.Dist.LEXIS 4156, 817 F.Supp. 317 (E.D.N.Y. 1993) [ELR 15:8:22]

Antitrust/Football Players.

In May 1993, a Federal District Court in Washington, D.C. considered several post-trial motions in the class action antitrust suit brought by about 235 National Football League players against the League and its member teams. At issue was the League's policy of paying each player $1000 per week for "development squad" services.

The court had granted summary judgment to the players with respect to the League parties' liability for violating the Clayton Act. In September 1992, after denying the League parties' motion for reconsideration of the summary judgment ruling, the court held a trial. The jury, which returned a special verdict in favor of the players, found that each class member had been injured and entered the dollar amount of each class member's damages. The court trebled the damages and entered judgment of about $30,350,000.

Judge Lamberth denied the League's motion for judgment as a matter of law or for a new trial.

The court then issued a permanent injunction barring the League parties from establishing a uniform regular-season salary for any category of players. However, Judge Lamberth declined to reconsider the court's order granting a stay of execution of the judgment without requiring the League parties to post a bond or any other security.

Brown v. Pro Football, Inc., 812 F.Supp. 237 (D.D.C.1992); 821 F.Supp. 20, 1993 U.S.Dist.LEXIS 6516 (D.D.C.1993) [ELR 15:8:22]

Teacher Dismissal.

The Tangipahoa Parish School Board dismissed Ponchatoula High School teacher Hayward West on charges of incompetency arising out of the showing of two "R" rated films, "Quest for Fire" and "Witchboard," to his students. A Louisiana trial court decision upholding the dismissal has been reversed by an appellate court.

The court stated that although the facts presented to the school board would support a finding that West was "incompetent to select appropriate films for viewing by students, there was no showing made that his performance as a school teacher was otherwise deficient." While agreeing that West should have been disciplined in some manner "for subjecting his students to the nudity, vulgarity, violence and explicit scenes displayed in the two films shown," dismissal, in light of West's excellent teaching record, was too harsh a remedy. The matter was remanded to the trial court with directions to have the school board consider whether any further disciplinary action should be taken.

West v. Tangipahoa Parish School Board, 1993 La.App.LEXIS 1014 615 So.2d 979 (La.App. 1993) [ELR 15:8:22]

Teacher Dismissal.

The Rapides Parish School Board suspended tenured teacher Annie Roberts without pay for the first semester of the 1989-1990 school year and placed her on probation for the remainder of the school year for showing "Child's Play," an "R" rated film, to her seventh grade reading class.

A Louisiana appellate court has upheld a trial court's ruling finding that the school board's action was rationally based on substantial evidence.

Judge Guidry noted that Roberts had not previewed the film before watching it in class, and that the showing of the film was not part of Roberts' lesson plan on the day in question. Roberts stated that she was not aware of the "R" rating; that there was no indication on the videocassette cartridge of the film's rating; and that she stopped the videotape after a scene featuring "profanity and lewd language."

In all, the foul language and violent scenes included in the film provided a rational basis for the conclusion that Roberts "willfully neglected her duty and was incompetent" in showing the film to seventh graders.

It was further found, contrary to Roberts' argument, that although, at the time of the alleged transgression, there was no specific school board policy covering the showing of films in the classroom, Roberts was not prosecuted under the policy subsequently enacted by the school board. The lack of an official policy did not relieve Roberts of "a general obligation to screen the content of materials prior to exposing students to them."

Judge Guidry stated that a teacher need not have violated a specific school board policy in order to be found guilty of willful neglect of duty.

Roberts v. Rapides Parish School Board, 1993 La.App.LEXIS 1410, 617 S.2d 187 (La.App. 1993) [ELR 15:8:22]

Jurisdiction.

Grand Entertainment Group, claiming that Star Media Sales failed to deliver the rights to 450 foreign films, sued the company for breach of contract and fraud.

Grand attempted to effect service on certain Spanish parties in Madrid, Spain in July 1987. The parties failed to respond, and a Federal District Court entered a default judgment in favor of Grand. A magistrate judge subsequently recommended the entry of a default judgment exceeding $34 million; the Spanish parties did not receive notice of the hearing and did not attend.

When Grand filed a motion to approve the magistrate judge's report, the Spanish parties filed a motion seeking, on various grounds, to open or set aside the default. The District Court conditionally granted Grand's motion, stating that the default would be lifted if the Spanish parties satisfied certain conditions. The parties did not comply with the conditions. Eventually, the court granted Grand's motion for entry of a default judgment in the amount of about $11 million plus attorneys' fees and costs in the amount of about $56,000.

A Federal Court of Appeals first found that the Spanish parties had the minimum contacts with Pennsylvania that were necessary to permit the District Court to exercise jurisdiction, and noted that the instant dispute arose directly out of the contacts at issue. Judge Hutchinson further found that the burden of defending the action in Pennsylvania would not deprive the Spanish parties of the right to fair play and substantial justice.

In turning to the question of the validity of service, the court noted that the District Court had found that the receptionist served with process by Grand at the Spanish parties' office building was a person in charge of the office or usual place of business as required by the Pennsylvania statute. But the receptionist did not work in the offices of the Spanish parties and was not employed by them, noted Judge Hutchinson, who was "unwilling" to say that service on a building receptionist with no employment ties to the Spanish parties satisfied the state's purpose of providing notice of the beginning of litigation. Service on the receptionist thus was insufficient under Federal Rule of Civil Procedure 4(e) incorporating Pennsylvania Rule of Civil Procedure 402.

The court, after careful review, found that the Spanish parties, who had "consistently and strenuously" objected to the District Court's assertion of personal jurisdiction, were not properly served under either Spanish, federal, or Pennsylvania law. The District Court lacked jurisdiction to enter any judgment against the Spanish parties, and Judge Hutchinson reversed the court's order denying reconsideration of the default judgment entered in the matter and remanded the case with instructions to vacate the default judgment.

Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 1993 U.S.App.LEXIS 5031 (3d Cir. 1993) [ELR 15:8:23]

Jockey Injury/Statute of Limitations.

As reported at ELR 14:5:17, the Oregon Supreme Court remanded for further consideration a negligence action brought by Jerald E. Ailes, a professional jockey who was injured while racing a horse at Portland Meadows racetrack. The trial court had denied Portland Meadows' motion to dismiss the action based on the statute of limitations. The jury then returned a verdict in favor of Ailes, but, before judgment was entered, the court granted the race track operator's motion for judgment notwithstanding the verdict, finding that the action was time-barred.

An appellate court reversed the trial court's decision on the basis of Ailes' argument that Portland Meadows had "waived" its right to seek judgment notwithstanding the verdict on statute of limitations grounds because the race track operator had not raised the defense as a ground for a directed verdict.

On remand, Judge De Muniz determined that there was "little dispute" that a judgment notwithstanding the verdict may be granted only "when a motion for a directed verdict which should have been granted has been refused and a verdict is rendered against the applicant." And the error was apparent on the face of the record, stated Judge De Muniz - it was not necessary to go outside the record to find that the trial court erred by considering the statute of limitations as a basis for granting the judgment notwithstanding the verdict, when it had not been raised by a motion for directed verdict.

However, the court, in the exercise of its discretion, declined to consider the unpreserved error. The issue of whether the statute of limitations had run, or was tolled, was raised and litigated by the parties in a motion to dismiss at the beginning of the case. Ailes knew the issue was in the case, observed Judge De Muniz, and could be raised again at different stages of the case; Ailes was not taken by surprise or "blind sided" by the post-trial motion raising the defense. The statute of limitations was not tolled, and Ailes' action was barred, concluded the court.

Ailes v. Portland Meadows, Inc., 848 P.2d 138 (Ore.App. 1993) [ELR 15:8:23]

"Pet of the Year" Prizes.

In April 1989, Laura Lynn Lewis signed a Penthouse Magazine "Pet of the Year" Candidate's Agreement. Lewis, who was chosen Pet of the Year for 1990, claimed that she was not awarded all of the prizes she was promised and that those that were offered were overvalued.

A Federal District Court in Texas, in a decision issued in April 1992, but only recently published, granted summary judgment to the Penthouse parties. Chief Judge Norman W. Black noted that Penthouse was required to provide the Pet of the Year with the prizes actually made available to Penthouse; the agreement did not guarantee delivery and contained no representations or warranties regarding the retail value of any gifts.

Penthouse paid Lewis an annual salary of $25,000 for her performance and was obligated to use its "best efforts" to enable Lewis to receive each prize indicated in the magazine. When a Heritage Legacy automobile was not delivered, Penthouse sued the supplier and eventually obtained access to the car; Lewis's attorney rejected the tender.

There was no evidence, stated Judge Black that Penthouse intended, in April 1989, not to deliver the prizes. The fact that former contest winners have sued

Penthouse did not indicate an intent to defraud - such lawsuits would deter Penthouse from intentionally harming future winners, suggested the court.

Lewis v. Penthouse International, Ltd., 825 F.Supp. 131, 1992 U.S.Dist.LEXIS 21541 (S.D.Tex.1992) [ELR 15:8:24]

Age Discrimination/Radio Announcer.

William Bills, who was fired from his position as a morning announcer on WFOG, sued Sunshine Wireless Company, the owner of the radio station, under the Age Discrimination in Employment Act of 1967. WFOG had undertaken programming adjustments in 1991, and informed the station announcers that they would be placed on probation; Bills received specific suggestions for improving his performance, but was fired about two months later.

A Federal District Court in Virginia granted Sunshine's motion for summary judgment, finding that Bills did not produce any evidence of age discrimination and that the announcer did not demonstrate that, at the time of discharge, he was meeting his employer's expectations. The fact that Bills had good ratings may have meant that the station possibly "made a poor business decision in choosing to fire him," but the court declined to grant relief for an error in business judgment.

The court granted Sunshine's motion for summary judgment with respect to Bills' age discrimination and defamation claims.

Bills v. Sunshine Wireless Company, Inc., 824 F.Supp. 60 (E.D.Va. 1993) [ELR 15:8:24]

Cable Television/Signal Interception.

Television Signal Corporation, doing business as Viacom Cable, sued Warren and Donna Chapman, doing business as Union Jack Pub, alleging the violation of Section 553 of the Cable Communications Policy Act of 1984.

Viacom had obtained the exclusive Northern California area rights to cablecast the December 1991 heavyweight prize fight of Forman vs. Ellis and to telecast, over its pay-per-view system, the December 13, 1991 prize fight of Toney v. McCallum. The agreements forbade Viacom from making the fights available to commercial customers such as bars, restaurants, hotels and clubs, and obligated the company to take all reasonable steps to prevent unauthorized broadcasts of the events.

Viacom claimed that the Union Jack Pub showed the fights, without authorization, on the pub's television, a charge denied by the Union Jack parties.

A Federal District Court in California, although finding that Viacom was an "aggrieved party" and had standing to sue under the Cable Act, and that satellite transmissions were covered by the statute, held that a question of fact was raised as to whether or not the pub intercepted Viacom's signal and showed the fights; the court denied Viacom's motion for summary judgment on this issue.

Television Signal Corporation v. Chapman, 1993 U.S.Dist.LEXIS 3000 (N.D.Ca. 1993) [ELR 15:8:24]

Attorneys' Fees.

As reported at ELR 13:12:17, a Federal District Court in Missouri enjoined the enforcement of a state statute restricting the display and sale, to individuals under seventeen, of videocassettes depicting violence "in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen."

In April 1992, the court awarded the Video Software Dealers Association parties a total of about $118,000 as reasonable attorneys' fees and costs. In March 1993, the court, in response to a claim for additional attorneys' fees and costs incurred in litigating the original fees and costs motion, granted the Association parties $10,000 (rather than the requested $30,000).

Video Software Dealers Association v. Webster, 817 F.Supp. 808, 1993 U.S.Dist.LEXIS 4653 (W.D.Mo. 1993) [ELR 15:8:24]

Bob Marley Estate.

A Federal District Court jury ruled in favor of J. Reid Bingham, an administrator of the Estate of Bob Marley, in an action against Marvin Zolt and David J.Steinberg.

Judge Conboy, in upholding the judgment entered on the jury verdict, found that the estate's RICO claims, as well as its common law claims for fraud and breach of fiduciary duty, were not barred by the applicable statute of limitations; that the estate's claims were not barred by the doctrines of waiver and estoppel; and that various jury instructions were not erroneous.

With respect to damages, the court noted that the estate received $800,000 on its RICO claims, which was trebled by the court to $2.4 million. Given this "substantial increase," a punitive damage award would not be appropriate if based on the RICO violations, stated Judge Conboy. Since it appeared to be impossible to determine on which claims the jury based its award of punitive damages, the court announced that it would reduce the punitive damages award, "in the interests of reasonableness and fairness," to $250,000, as opposed to the previous figure of $1 million.

The court, after reducing the estate's requested total by fifteen percent, awarded attorneys' fees and costs in the amount of about $3 million.

Bingham v. Zolt, 823 F.Supp. 1126, 1993 U.S.Dist.LEXIS 8237 (S.D.N.Y.1993) [ELR 15:8:25]

Calder Mobile.

In 1959, Alexander Calder created "Rio Nero," a black hanging mobile which was constructed of sheet metal and steel wire and contained 27 hanging blades or elements. In 1962, gallery owner Klaus Perls sold the mobile to an individual identified only as Anspach. Perls later reacquired the mobile and sold it to Lionel Bauman. Bauman died in 1987; his will bequeathed the mobile to his daughter.

In 1990, The Greenberg Gallery, along with three other gallery parties, paid $500,000 to acquire the mobile. When the galleries asked Perls to inspect the work, Perls compared the mobile to his gallery's archival photograph and concluded that the mobile was not the authentic Calder, but a copy of the original Rio Nero work.

In response to the galleries' action for rescission, Federal District Court Judge Oberdorfer, after carefully reviewing the testimony of expert witnesses, concluded that the record and circumstantial evidence surrounding the mobile created a strong presumption that the piece was the original Rio Nero, and entered judgment for the Bauman parties.

The Greenberg Gallery, Inc. v. Bauman, 817 F.Supp. 167; 1993 U.S.Dist.LEXIS 4067 (D.D.C.1993) [ELR 15:8:25]

Libel.

A Federal District Court in Texas has granted summary judgment to William Morrow & Co., Inc. in a libel action brought by Richard Waring. Waring claimed that the book "Sleeping With the Devil" described him as "an informant, snitch and contact cultivated in the shadows of the night" and gave the impression that Waring had information that could put his life in danger. (The court had dismissed Waring's complaint against the author without prejudice for failure to obtain service.)

Chief Judge Norman W. Black found that the challenged statements were "unambiguously nondefamatory." According to Judge Black, the book described Waring as a private investigator who obtained information regarding a planned homicide and reported the information to a friend with the police department in order to prevent the proposed victim's death, with the knowledge that such actions could place his own life in danger. The statement was not capable of a defamatory meaning, ruled the court.

The court also granted the publisher's motion for summary judgment on the basis of substantial truth.

Waring v. William Morrow & Company, Inc., 821 F.Supp. 1188, 1993 U.S.Dist.LEXIS 7510 (S.D.Tex.1993) [ELR 15:8:25]

Workers Compensation.

Gregory L. Potts worked as a grip in the film production industry, and was responsible for setting up and moving cameras and lighting equipment. Grips work under a "key" or lead grip and a director; the director supervises the key grip, who, in turn, hires grips and implements the director's instructions.

The Oregon Workers Compensation Board determined that Potts' injury was compensable because he was an employee at the time of the injury.

An Oregon appellate court, in upholding the Board's decision, noted that Potts had little control in determining the hours he worked or the way in which he completed his work. He was told when to be on the set and when to take breaks, and where to place lights, cameras and related equipment. Substantial evidence, stated Chief Judge Richardson, supported the Board's finding that Potts was not free from the direction and control of the employer at the time of his injury (which was not identified by the court).

Liberty Northwest Insurance Corporation v. Potts, 119 Ore.App. 252, 850 P.2d 1135, 1993 Ore.App.LEXIS 608 (Ore.App. 1993) [ELR 15:8:25]

New York Civil Rights Law.

A New York trial court has dismissed an action brought by Irene Wallace against WWOR-TV.

Wallace claimed that her daughter, Adena Cambridge, displayed Wallace's photograph on the Channel 9 television program "9 Broadcast Plaza." Cambridge and her daughter participated in a discussion of mother-daughter relationships. Adena Cambridge, as described by Judge Gloria Cohen Aronin, stated that she did not get along with Wallace because, among other reasons, Wallace was "dominating," and "a powerful person."

In finding that Wallace did not state a cause of action under Civil Right Law sections 50 and 51, Judge Aronin noted that the display, without consent, of Wallace's photograph occurred during a broadcast on a matter of public interest. The fact that WWOR-TV may have realized financial gain from the broadcast did not alter the newsworthy content of the program.

Although Wallace "may feel aggrieved by her daughter's publicly aired views of their poor family relationship, and display of her photograph at that time," stated the court, and Wallace "may, as alleged, have incurred ridicule and shame as a result thereof," Wallace did not state a claim under sections 50 and 51. The court declined to impose sanctions on Wallace.

Wallace v. WWOR-TV, New York Law Journal, p.23, col.1 (Kings Cnty., Sep. 9, 1993) [ELR 15:8:26]

Age Discrimination.

Ann Marie Lindsey and Linda York worked as head waitresses at the Prive Corporation, doing business as Cabaret Royale. When Lindsey sought a promotion to a position as a topless dancer, the general manager of the club told her that she was "too old" to be a dancer. Lindsey subsequently resigned.

The club fired York for violating the club's prohibition against leaving with customers. York claimed that younger waitresses were not disciplined for the identical behavior.

Lindsey and York, who were over forty years old at the time of the challenged incidents, sued the club under the Age Discrimination in Employment Act.

A Federal District Court in Texas granted the club's motion for summary judgment, finding, in part, that Lindsey did not demonstrate that she was qualified to be a dancer. According to the club, dancers were required to be "beautiful, gorgeous, and sophisticated," and Lindsey did not meet this standard.

A Federal Court of Appeals has vacated the District Court decision, agreeing with Lindsey that the court erred in requiring Lindsey to prove as part of her prima facie case that she met the club's subjective criteria. The court declined to "second guess" the club's opinion that Lindsey was not qualified enough to be an entertainer at the Cabaret Royale, for the club was entitled to determine who met its criteria. However, the record contained genuine issues of material fact; Lindsey and York both established prima facie cases of age discrimination; and it will remain for the trier of fact on remand, noted the court, to determine the issue, not of beauty, but of truthfulness.

Lindsey v. Prive Corporation, 987 F.2d 324, 1993 U.S.App.LEXIS 7011 (5th Cir. 1993) [ELR 15:8:26]

Previously Reported:

The United States Supreme Court has let stand the decisions in Conard v. University of Washington (ELR 14:12:14) and in Globe International Publishing v. Peoples Bank & Trust (ELR 15:2:25).

In September 1993, the Federal Court of Appeals for the Ninth Circuit orederd a rehearing by the en banc court in Subafilms, Ltd. v. MGM-Pathe Communications Co. (ELR 15:1:3).

A Federal Court of Appeals has affirmed, substantially for the reasons stated by Federal District Court Judge McKenna, the decision granting summary judgment to Bantam Doubleday Dell Publishing Group, Inc. and other parties in a trademark infringement action brought by the Girl Scouts of the United States and the Boy Scouts of America (ELR 15:5:6). The District Court correctly analyzed the factors relevant to evaluating the likelihood of confusion, stated the Court of Appeals. In its per curiam ruling, the court agreed with the District

Court's conclusion that there was no likelihood of confusion, and with the District Court's dismissal of the state law claims. Girl Scouts of the United States v. Bantam Doubleday Dell Publishing Group, Inc., 996 F.2d 1477, 1993 U.S.App.LEXIS 15991 (2d Cir. 1993)
[ELR 15:8:26]

NEW LEGISLATION & REGULATIONS

Football player obtains ruling on Virginia tax liability

The Virginia Tax Commissioner, in a letter ruling, considered the applicability of the state's individual income tax to a nonresident.

The taxpayer, an unidentified professional football player, signed a contract with a team for the years

1992-1995. The player stated that he would be present in Virginia for no more than 183 days during any taxable year, but planned to maintain a residence in the state during the time the contract was in effect. The player also noted that he maintained a permanent residence in another state, where he voted, held a driver's license, registered his cars, belonged to various organizations, and attended graduate school. The player expected to return to the other state upon completion of his employment with the team.

Commissioner Forst stated that if the facts presented did not change, the player would not be considered a domiciliary resident of Virginia for the years in question. It was emphasized that if the player was in Virginia for more than 183 days during any particular taxable year (whether or not he was actually working), he would be considered a Virginia resident for such year.

The commissioner then declared that the player's signing bonus would not be considered Virginia source income if the bonus "was not predicated upon the performance of service in Virginia." The taxpayer was required to produce evidence that the payment of the signing bonus was not based upon the players' future performance in Virginia and elsewhere - such evidence might include the contract between the taxpayer and the team if the contract specifically stated that the taxpayer would not be obligated to pay back the signing bonus in the event that he did not satisfactorily perform under the contract. In the absence of the required evidence, the signing bonus would be included in the basis upon which the department would determine Virginia source income.

Virginia Department of Taxation, 1993 Va.Tax LEXIS 17 [ELR 15:8:27]

Russian President Yeltsin signs copyright law

In July 1993, Russian President Yeltsin signed a law entitled "On Copyright and Neighboring Rights." The law, which was expected to become effective in mid-August 1993, grants record companies the right to control reproduction and distribution of their works for a term of fifty years; the record companies also will have the ability to prohibit rental of their works.

According to the Recording Industry Association of America, the law, for the first time, provides copyright protection to sound recordings.

[ELR 15:8:27]

IN THE NEWS

CBS and Viacom settle royalty dispute

As reported at ELR 15:4:22, a New York appellate court, in CBS Inc. v. Viacom International, Inc., 1993 N.Y.App.Div.LEXIS 2396, affirmed a trial court decision (ELR 14:3:14) holding that a 1970 syndication agreement between the parties did not include cable retransmission royalties and that CBS was entitled to all such royalties.

According to a news report, CBS and Viacom have settled all pending litigation between them concerning the payments allegedly due from Viacom's domestic syndication and international distribution of CBS produced television shows. Viacom apparently has agreed to a one-time settlement payment, but the terms of the settlement were not disclosed. [January 1994][ELR 15:8:28]

Jury awards $114 million to former owner of New England Patriots

A Federal District Court jury has awarded former New England Patriots owner William Sullivan $114 million ($38 million which was tripled under federal antitrust law) in Sullivan's action against twenty-one National Football League member teams.

As reported at ELR 15:2:23, Sullivan, in 1987, sought to sell a forty-nine percent interest in the Patriots to an investment banking company which was not engaged in the operation or management of professional football teams. Sullivan claimed that the League and the teams prevented the sale by selectively enforcing an NFL rule which prohibits the sale, in whole or in part, of an interest in an NFL franchise to any company not engaged in the business of professional football. A Federal District Court, in 1992, ruled that a finder of fact, applying the rule of reason, would have to decide whether, under the circumstances of the case, the League rule imposed an unreasonable restraint on trade.

Sullivan claimed that the conduct of the NFL teams forced him to sell the Patriots for, according to Sullivan, a low price of $80 million.
[January 1994][ELR 15:8:28]

DEPARTMENTS

In the Law Reviews:

Villanova Law Review has published Volume 38, Number 2, a Symposium on Congress, the Courts and Computer Based Communications Networks: Answering Questions about Access and Content Control with the following articles:

Introduction by Henry H. Perritt, Jr., 38 Villanova Law Review 319 (1993)

Dispute Resolution in Electronic Network Communities by Henry H. Perritt, Jr., 38 Villanova Law Review 349 (1993)

Law in a Digital World: Computer Networks and Cyberspace by Ethan Katsh, 38 Villanova Law Review 403 (1993)

Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide? by David R. Johnson and Kevin A. Marks, 38 Villanova Law Review 487 (1993)

Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services by Angela J. Campbell, 38 Villanova Law Review 517 (1993)

The International Legal Information Network (ILIN) - A Practical Application of Perritt's Tort Liability, the First Amendment, and Equal Access to Electronic Networks by Kathleen Price, 38 Villanova Law Review 555 (1993)

Antitrust Law and Open Access to the NREN by John M. Stevens, 38 Villanova Law Review 571 (1993)

Putting a "Chill" on Contract Murder: Braun v. Soldier of Fortune and Tort Liability for Negligent Publishing by Brian J. Cullen, 38 Villanova Law Review 625 (1993)

Cardozo Arts & Entertainment Law Journal has published Volume 11, Number 1 with the following articles:

The Art of Appropriation: Puppies, Piracy, and Post-Modernism by Lynne A. Greenberg, 11 Cardozo Arts & Entertainment Law Journal 1 (1992)

500 Years After Columbus: Promoting and Protecting Multiculturalism in the Arts by Sherri L. Burr, 11 Cardozo Arts & Entertainment Law Journal 35 (1992)

Protecting Native American Culture by Leonard D. DuBoff, 11 Cardozo Arts & Entertainment Law Journal 43 (1992)

International Dimensions by Teresa McGuire, 11 Cardozo Arts & Entertainment Law Journal 59 (1992)

The Legality and Efficacy of the National Basketball Association Salary Cap by Jeffrey E. Levine, 11 Cardozo Arts & Entertainment Law Journal 71 (1992)

The Case for Televised Executions by Gil Santamarina, 11 Cardozo Arts & Entertainment Law Journal 101 (1992)

DAT's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991 - Merrie Melodies or Looney

Tunes? by Gary S. Lutzker, 11 Cardozo Arts & Entertainment Law Journal 145 (1992)

Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits by A. Dean Johnson, 21 Florida State University Law Review 135 (1993)

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: How the Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law, 42 Catholic University Law Review 651 (1993)

Suppressing Violent and Degrading Pornography to "Prevent Harm: in Canada: Butler v. Her Majesty the Queen, 19 Brooklyn Journal of International Law 627 (1993)

United Kingdom Character Rights and Merchandising Rights Today by Jon Holyoak, September The Journal of Business Law 444 (1993)

The European Intellectual Property Review, published by Sweet & Maxwell Ltd., Freepost, Andover, Hants SP10 5BR, England, has available Volume 15, Number 10 and 11 with the following articles:

The New Challenges of Digitisation by Nicholas Higham, 15 European Intellectual Property Review 355 (1993)

The Dead Hand of European Copyright by Patrick Parrinder, 15 European Intellectual Property Review 391 (1993)

Who Framed Article 18? The Protection of Pre-1989 Works in the USA under the Berne Convention by Olivia Regnier, 15 European Intellectual Property Review 400 (1993)

Intellectual Property Protection: A Developing Country Perspective by Jay Erstling, 5 Sri Lanka Journal of International Law 21 (1993)

The Journal of Arts Management, Law and Society, available by calling 1-800-365-9753, has published a symposium on Cultural Democracy as its Volume 23 with the following articles:

Introduction by Judith Huggins Balfe, 23 The Journal of Arts Management, Law and Society 91 (1993)

Social Activism, Aesthetic License, and Cultural Protest by Kent Goshorn, 23 The Journal of Arts Management, Law and Society 93 (1993)

Democratic Culture and the Arts: Constructing a Usable Past by Joli Jensen, 23 The Journal of Arts Management, Law and Society 110 (1993)

Cultural Democracy, Issues of Multiculturalism, and the Arts by John Laughton, 23 The Journal of Arts Management, Law and Society 121 (1993)

Museums as Interpreters of Culture by Bonnie G. Kelm, 23 The Journal of Arts Management, Law and Society 127 (1993)

Minorities and Distributional Equity at the National Endowment for the Arts by Samuel Gilmore, 23 The

Journal of Arts Management, Law and Society 137 (1993)
[ELR 15:8:29]