# LEGAL AFFAIRS

## Exit Letterman Laughing? Evaluating Producers' and Performers' Rights to TV Comedy Routines

by Beverly E. Loew

## I. Introduction

Since the announcement that David Letterman would move from NBC to CBS, NBC has claimed that it has intellectual property rights to the ideas, characters and segments that Letterman developed and used on NBC's Late Night with David Letterman. The network claimed ownership of the rights to Late Night and all of the elements developed at NBC and threatened to sue

Letterman if he used his Top Ten list, Stupid Pet Tricks and some other popular segments and characters from Late Night on CBS' Late Show with David Letterman.

News reports portrayed the controversy as little more than a sophomoric slap fight between the big, bad network and its wronged employee. One commentator noted that "at issue, if anything so frivolous can be called an issue," is whether a performer can use material created for a program owned by one network on a competing network.1

But while NBC, CBS and Letterman appear to have taken the "high road," as Letterman predicted,2 and have resolved their differences privately, and the conflict presumably will not be revisited should the marriage between CBS and Letterman sour,3 this issue is important to other performers. The Late Night property dispute raises serious questions about the relationships between comedic performers4 and their production companies ("producers") regarding rights to comedic material.

## II. The Death and Resurrection of Peggy, the Foul-Mouthed Chambermaid and other Late Night Elements

Late Show with David Letterman premiered on CBS on August 30, 1993. Since then, viewers have been entertained by such familiar Letterman comedy bits as the Top Ten List, still direct from the home office, relocated to Sioux City, Iowa; Viewer Mail, a regular Friday night feature on Late Night, which is now the CBS Mailbag and appears only occasionally; and Stupid Human Tricks. Popular character Larry "Bud" Melman now uses his real-life name, Calvert De Forrest; Late Night's Peggy, the Foul-Mouthed Chambermaid, has been resurrected as Helen, the Ill-Tempered Ticket Lady; Donny, the CBS Usher Who Likes to Suck Up, is another reincarnated Late Night character; Late Night's Thrill Cam and Monkey Cam have evolved into Roof Cam; Pea Boy has appeared as himself.5 Paul Shaffer and the World's Most Dangerous Band has a new moniker--Paul Shaffer and the CBS Orchestra. Letterman has also created new segments and characters for Late Show, including Meet the Neighbors, Car Phone Night, Regis Roulette, and Ben, the Guy Who Really Loves Milk.

Letterman and CBS have made some concessions to the ownership claims of NBC--note that character and segment names have been changed to protect against litigation.6 Additionally, there are reports that NBC and CBS have agreed as to which elements stay with NBC and which either belong to or can be used by Letterman; the terms of the agreement were not made public.7 Letterman has publicly laid claim to the Top Ten List, which he says he stole from USA Today and uses on Late Show, and Stupid Pet Tricks, an idea he developed with comedy writer Merrill Markoe and used on The David Letterman Show, a morning show that Letterman produced and owns.8

## III. Comic Injustice: Legal, Business and Policy Issues Surrounding the Control of Letterman's Comedy Routines

The characters and segments created for television programs generally belong to the shows' owners; NBC Productions owns Late Night with David Letterman. But if a writer or performer can circumvent an owner's rights with mere cosmetics, like the Letterman elements' name changes, then, at first blush, the property rights of the owner do not appear to be very valuable.

And what about Dave? Isn't it unfair if NBC can prohibit Letterman from performing the comedy sketches that he made so famous--comedy routines that he developed and which are identified with him?

A. Posture

The NBC/Letterman dispute became public when NBC West Coast president Don Ohlmeyer said, "We are prepared to do whatever needs to be done to protect our format rights and our copyright.... We're looking forward to competing with [Letterman's] show--we're not looking forward to competing with a show that we own. [If CBS wanted to] buy Late Night with David Letterman, then they should have dealt with NBC Productions."9

In a press conference before Letterman's CBS debut, NBC president Bob Wright responded to the notion that NBC's position on the Late Night elements was based on something less than prudent business practice.

Wright tried to articulate NBC's stand, telling reporters, "This is not about Dave; it's about intellectual properties and copyright protection. . . . [W]e are telling CBS that there are certain intellectual properties that do not travel with Dave, and we have to work that out."10 Wright added, "We have to enforce or take positions. If somebody comes to us and says that they are absolutely going to take something that we have a claim on, that puts us in the corner of having to defend it. . . . You cannot give away intellectual property or you will lose the right to protect the rest of what you have."11

Why all the fuss and bother over such silliness as Pea Boy, the fat, green sprite who races through the audience and pelts it with frozen vegetables? There are a number of reasons, beyond pure vindictiveness, why NBC would want to protect its rights to the Late Night elements.

NBC may have thought that its position regarding the Late Night elements was better supported legally and that, if successful in prohibiting Letterman's use of his signature comedy routines on CBS' Late Show, it could weaken a force that could irreparably damage NBC's stronghold in late night television.12 Further, NBC planned to enhance its investment in Late Night by exploiting its rights to the show and apparently did not want competing formats running on CBS for fear that it might dilute Late Night's value.13 And it seems that NBC believed that it should be compensated financially by Letterman and CBS for its investment in Late Night with David Letterman's eleven-year run.

Nevertheless, NBC seemed to be playing intellectual property hardball in response to Letterman's spin on the crumbling relationship between him and the network in the year preceding his departure. Letterman, with the inimitable style that devotees find so amusing and that made him famous, used Late Night as a forum for his displeasure with his employer and turned the Tonight Show succession situation and other GE/NBC blunders into fodder for his comic gristmill.14

Letterman's defection to CBS followed a public sparring match between NBC and Letterman that began when NBC chose Jay Leno to succeed the retiring Johnny Carson on the Tonight Show in early 1992. Letterman, who hosted Late Night in the time-slot following the Tonight Show since 1982, wanted Carson's job and had been talked about as a possible successor. Letterman's Late Show now challenges NBC's Tonight Show with Jay Leno each week-night at 11:30 p.m., the time-slot that Letterman coveted.

NBC's last minute rush to stake its claim to the Late Night elements could not make up for the fact that the network underestimated Letterman's power as a late-night drawing card, his ability to draw the more mainstream audience that the Tonight Show attracts in the 11:30 p.m. time-slot. Letterman would not have jumped ship in the first place if NBC were so diligent in protecting its assets. NBC apparently made the decision to replace Carson on the Tonight Show with Jay Leno rather than Letterman because the network believed that Leno would benefit the network over the long term; this assessment was presumably predicated on Letterman remaining at Late Night in the time-slot following Leno's.15

It also appears that NBC underestimated Letterman as a performer and creator. Letterman is a critically and publicly acclaimed creative performer who is credited with reinventing the talk show; it is entirely possible that he would have been as successful on CBS without the Late Night elements, and it appears that he was prepared to give them up. Letterman told reporters, "I have a feeling that there is an infinite number of ideas."16 He also said, "If NBC is adamant, if they're holding firm about something, you know, it's not going to break my heart."17 Letterman was apparently confident in his ability to create new material and undoubtedly capable of developing his old shtick in ways that would not offend NBC.

B. Legal Issues

CBS President Howard Stringer insisted that Letterman "can always rename the old, with a Top Nine List or Dumb Animal Endeavors,"18 and the parties seemed to agree on this tack with regard to both segments and characters.19 Neither party can assert absolute control over the performance rights to the comedy elements, but Letterman seems to have fared better than his former employer.

Although NBC holds the copyright to Late Night with David Letterman and has rights of authorship with regard to the characters and segments of the show, the law offers NBC little protection over the Late Night comedy elements. Though NBC can protect the content of old Late Night shows, and arguably the characters and segments themselves, the network arguably cannot prohibit Letterman's use of similar ideas or formats on Late Show.

It is well settled that mere concepts are not protectible under copyright and trademark. Copyright only protects works that have been reduced to a tangible medium of expression,20 and while trademark allows a registrant the exclusive use of a registered term or symbol,21 it generally affords no protection against the existence of similar goods or services, provided that the competing goods or services are not marked in a way that would cause a likelihood of confusion, deception or mistake as to their origin.22

It seems that NBC did not consider the nature of the property in dispute when it launched its attack for the Late Night elements. The Late Night characters and segments are inherently different from others in television, like series television properties that have fully developed story lines and characters. Unlike the characters and segments developed on series television or more traditional variety shows, the disputed Late Night elements essentially have no life beyond Letterman. Both the segments and the characters stood alone, they were not involved in any long-term plot, they did not even interact with each other. The Late Night characters existed purely to complement and interact with Letterman; they were solely vehicles to showcase Letterman's wit.

As such, the figures were easy to translate into non-offensive form. The Letterman/CBS strategy, which

NBC apparently bought, was to change the name and look of the characters while maintaining the same basic theme; for example, Late Show's Helen, the Ill-Tempered Ticket Lady, showers Letterman with vile, bleeped-out obscenities in the same manner as Peggy, the Foul-Mouthed Chambermaid, did on Late Night.

The segments were handled in much the same way as the characters. However, the segments, namely the Top Ten List and Stupid Human Tricks, have even retained their Late Night names. Though NBC might challenge Letterman's use of the segments and characters under trademark and unfair competition law,23 the elements' names are arguably not protectible because they are generic or merely descriptive.24

Moreover, Letterman's characters and segments constantly changed over the eleven years that he hosted Late Night and no Top Ten List, Stupid Pet Trick, or Viewer Mail segment was ever the same. Though the

Top Ten List and other segments will no doubt remain regular features on Letterman's Late Show, the content of the segments will not mirror those previously aired on Late Night.

So, copyright and trademark, without more, did not provide either NBC or Letterman with the result they would have liked. Rather, existing law anticipated that parties would resolve issues such as these privately, through contract.25

NBC's position is based upon the employment contracts that the parties negotiated. The agreements apparently included "work for hire" provisions which gave NBC, as Letterman's employer, the rights of author to Letterman's comedy routines and ownership of Late Night with David Letterman. However, without sufficiently detailed employment contract provisions accompanying the "work for hire" clause, both NBC and

Letterman are left with something less than a satisfying resolution to their property claims.

It looks as if neither party sufficiently anticipated who would get custody of the comedy brainchildren if they ever divorced. Among the issues that NBC and Letterman should have considered -- their positions under copyright and trademark given the unique nature of the property being negotiated, which party could best exploit the various ancillary rights to the property, and for how long specific rights should be assertible.

C. Business / Policy Issues

"Producers of film or television projects generally anticipate owning all of the material under the `work made for hire' provisions of the Copyright Act. Producers also attempt to purchase in perpetuity pre-existing comedic material which is incorporated into their television or film projects."[26] Producers have a great deal of power, particularly with less established performers, to accomplish this acquisition.[27]

These performers often either cannot or do not sufficiently challenge producers' clout at the bargaining table. As a result, unmodified "work for hire" provisions in comedic performers' employment contracts are probably more prevalent than they should be.

### 1. Producer Control

Even though it is projected that many more participants will jump into the network and cable broadcast arena, creating much more air time to fill with entertainment programming, including variety and stand-up comedy,[28] it is unlikely that producers will lose their clout with regard to performers; there are thousands of aspiring and established performers vying to fill broadcasters' air time. As more broadcast avenues open up for comedic performers, it is possible that disputes like NBC's and Letterman's will have an even greater opportunity to arise.

Moreover, although "[television] production has historically been a big source of profit for Hollywood's major studios...recent regulatory changes make it easier for [the networks] to make their own shows."29 The Federal Communications Commission recently eased the Financial Interest and Syndication Rules ("Fin-Syn") that apply to the networks,30 and a federal judge lifted the antitrust consent decrees that the networks and the Justice Department signed in 1974.31 Fin-Syn limited the networks' ability produce, syndicate, and participate in the ownership of prime-time television shows.

Networks are producing more of their own programming.32 But the "increasingly intense battle between networks and suppliers over who creates programming"33 affects more than who will control lucrative syndication rights to television productions; performers will be affected as well. The issue of producer control of comedic performers' material is magnified when the producer is also a broadcaster.

The NBC/Letterman divorce would not have involved a custody battle for the Late Night elements if Late Night had been produced by an independent producer rather than a network. Then, when the contract ended between NBC and the independent producer, barring any limiting provisions, the producer could simply have found another broadcast outlet for Letterman and his routines. Instead, since NBC was both producer and broadcaster, when the relationship between NBC and Letterman crumbled, it appeared that NBC held a monopoly of sorts to Letterman's repertoire, controlling both his material and his ability to find an alternative forum for his work.

It looks as if NBC was primarily trying to protect its eleven-year investment in Late Night with David Letterman. A producer should have the fire-power necessary to protect his investment in his projects and needs to be concerned with the possibility of others appropriating the material content of his shows, since competing uses might dilute the value and integrity of his properties and may lead to lost profits.34 Producers should recognize, however, that it is possible to exploit their rights to comedic material without unduly burdening comedic performers and that these performers have countervailing policy arguments of their own.

2. Performer Control

"A [comedic performer] not free to repeat and exploit his...own material is denied the ability to pursue the comedic craft."35 There are economic and public policy bases for protecting Letterman's performance rights to his comedy routines, such as the recognition of an individual's right to reap the rewards from his endeavors.36

Performance rights are, or should be, of primary importance to the comedic performer. A comedic performer's material is his livelihood; the performer may spend years and resources developing his shtick. Like Letterman, some performers achieve wild success; most either find only moderate success or are forced to give up their aspirations because of lack of available work and resources. The risks associated with developing a career as a comedic performer are great; the risks should be compensated by not only financial reward, but also by the right to exploit the material and reputation the performer develops.

Many performers become synonymous with the characters they portray; similarly, a comedic performer may become identified with and inseparable from his comedy routines,[37] which may include characters. But where many performers give life to characters that exist within the context of some greater work, the characters that a comedic performer portrays or segments he develops are individual to him.[38]

It seems unfair to deny a performer the right to exploit the material he developed and which is associated with him since the material often defines the performer's identity. A performer should have the right to control the use of his personality against unwanted associations, since overexposure, competing or undesirable uses can diminish the performer's commercial value.[39] It can be argued that the comedic performer is the best person to protect his comedic creations from diminution in value.[40]

Performers also recognize the unique nature of comedy material and the importance of preserving performance rights. Jay Leno, commenting on the uncertain fate of his new competitor's comedy material, said, "It's Dave's bit, let him do his bit."41 In addition, Letterman's Late Night successor, Conan O'Brien, commented that he would develop his own routines for his show: "I'm going to do my own show. I'm my own personality."42 O'Brien further stated, "I don't think anybody wants to see me do [Letterman's] things."43 Leno's and O'Brien's statements indicate that other performers recognize the importance of vesting performance rights with a comedic performer given the unique relationship between the performer and his material and demonstrate the reluctance of performers to use material developed by and associated with others.

Finally, the public's perception of the relationship between a comedic performer and his material indicates the need for vesting rights to comedic material with its performer. When confronted with the Top Ten List or Stupid Pet Tricks, the public arguably would identify the comedy bits with Letterman, not NBC. Late Night comedy bits are commonly referred to as Letterman signature bits or Letterman trademarks for a reason--Letterman and his staff44 created and developed the segments and Letterman gave them life; the public, who has watched Letterman perform his routines for years, recognizes them as his.

Accordingly, if NBC uses the comedy routines to which it laid claim by licensing or incorporating the characters and segments into other projects, the public would be more likely to associate the NBC-sanctioned uses with Letterman rather than the network. Although there are arguments that would indicate that NBC's future use of the segments be protected, it seems that Letterman stands to lose a lot more than NBC from the overexposure or misuse of any protectible material.

### 3. Evaluating NBC's and Letterman's Positions

NBC seemed to miss a vital point regarding the Late Night elements when Letterman packed his bags and headed down the street to CBS--the contractual relationship between NBC and Letterman had ended. Although it is important to protect the producer while he is committed to a project, a producer's right to control comedic material should be limited to some extent to the producer's commitment to the show and its performer.

The NBC executives' public pronouncements regarding their concern over the elements amounted to something akin to overkill; the network required a smaller arsenal of property protection to preserve its rights to Late Night with David Letterman since it would no longer produce the show. Even though Letterman now appears on CBS, NBC can continue to exploit valuable rights to Late Night with David Letterman, whether or not Letterman continues to perform his Late Night shtick, through such vehicles as syndication, video, and merchandising. The network could have maintained and exercised its rights to Late Night without challenging Letterman to a duel over performance rights, a battle that it largely lost.

In fact, it is entirely possible that because of Letterman's rising star, Late Night's value in syndication and video was enhanced, not diminished. Despite NBC's position concerning the performance rights to Late Night, the network wasted little time in exploiting its rights to the show; the alleged competing program, identical format, diminution in value theory appears to be largely unfounded.45 NBC has already sold Late Night into the syndication and home video markets;46 even with very similar formats running on Late Show, E! Entertainment Television and GoodTimes Home Video were quick to enter into agreement with NBC for the rights to Late Night with David Letterman.47 Moreover, even during Letterman's run on NBC, the network entered into a deal, albeit a short-lived one, with the Arts and Entertainment network for broadcast rights to Late Night shows.48

So, it can hardly be said that NBC did not reap the rewards of its long association with Letterman and his show. Even aside from NBC's recent exploitation of Late Night in the syndication and home video markets, the show was certainly profitable to NBC in the eleven years that it ran.

And although Letterman appears to have emerged from this controversy creatively unfettered, he is the one who stands to lose the most from NBC's use of Late Night. While it can be argued that Letterman's continued use of his shtick would not have harmed NBC's rights to Late Night, it can also be argued that NBC's exploitation could damage Letterman.49

At least some of Letterman's superstar status may be attributable to the careful development of his personality over the course of his career. Letterman has closely guarded his personal life and, to date, he has not engaged in any commercial endorsements beyond the promotion of his own work,50 with the possible exception of baseball cap and cigar manufacturers, and then only inadvertently. In retrospect, Letterman, who has recently seen his name and work exploited probably beyond his wildest imagination, undoubtedly would have liked to maintain at least a modicum of control over their exploitation.

4. Rethinking the Relationship

Producers should recognize the importance of performer control of the performance rights to and the exploitation of their comedic material. This does not mean that producers should roll over and play dead when negotiating "work for hire"; rather, producers should recognize that their relationships with comedic performers will exist for some limited duration and be sensitive to the special needs of these performers given their unique relationships with their material.

Since comedic performers' material takes many different forms and the nature of every production is different, there is no ideal formula for negotiating these contracts. NBC and Letterman, however, could certainly have done a better job of defining their rights. But, in their defense, Late Night was the first-of-its-kind; not every possible dispute could have been anticipated.

NBC had a great deal at stake when it first began production of Late Night with David Letterman. The network had no guarantee that Late Night would be a success. It devoted air time, a studio and office space to the show and it paid for the development of material, including Letterman, his creative team, and all the accoutrements. NBC should have recognized that Letterman's reputation as a performer was also at risk; the quality and performance of the material would no doubt be attributed to him.

Assuming that Letterman's ownership of Late Night was not an attractive option for either party, the network and the performer could have modified their "work for hire" arrangement by including provisions that limited NBC's right to works conceived through Letterman's creative forces. The provisions could have limited NBC's right to use the works developed for purposes consistent with its business, namely producing and broadcasting a late-night variety/talk show, while allowing Letterman to retain other rights, in particular, those necessary to protect the value of his name and work.50

In this vein, NBC could have allowed Letterman to own the comedy material, while retaining copyright to the extent necessary to protect the network's investment and the material content of each show that the network produced. NBC's position regarding the material should have been maintained during its association with Letterman in order to protect the network's interest in Late Night.

Alternatively, NBC could have retained ownership of Letterman's material during the relationship while providing him with an option to purchase the performance rights when the relationship ended, subject to the payment of pre-negotiated compensation by the performer or his future employer. Under this alternative, Letterman should have been allowed to retain the rights to any material he developed before his association with NBC and Late Night, with any pre-existing material specifically excluded from the purchase option.52

Furthermore, there certainly should have been limits to Letterman's use of the material outside the scope of the production of Late Night during his relationship with NBC; NBC had the integrity and value of their production to protect. This could have been easily accomplished, by requiring approval from the network for any such use, with approval not unreasonably withheld.53 If it was truly essential for NBC to protect against competing uses of the material by Letterman at the termination of their relationship, then the network could have insisted upon some form of a "non-compete" clause in the contracts, limiting Letterman's post-Late Night use of the show's elements for some reasonable period of time.

Finally, NBC and Letterman should have better defined their respective rights regarding the promotion and exploitation of Late Night through such vehicles as merchandising, licensing, and derivative works.54 These rights could have been vested with NBC for the duration of the relationship with Letterman being compensated for such exploitation through pre-negotiated royalty provisions. The contracts between NBC and Letterman, however, could have provided for Letterman's reasonable approval for the exploitation of the rights to Late Night after their relationship ended.

## IV. Conclusion

The result of this highly publicized posturing over property rights? "NBC loudly threatened to sue if David Letterman took his Top Ten list, Stupid Pet Tricks, and other `intellectual property' of the network to CBS. Dave did, NBC didn't."55 NBC's rush to control performance rights to Late Night as Letterman rode off into the sunset56 and late-night television history had too little fire-power too late in the game. Also, to some unquantifiable extent, and in part due to the spin Letterman put on the dispute,57 the network ended up looking just a little petty.

So, it appears that Letterman had the last laugh. He cashed in on the value of his celebrity and the Tonight Show succession. He waved goodbye to his long-time employer and marched down the street, repertory largely intact, to his greener pasture--CBS. Once there, like cream, he rose to the top of the late-night pack.58

But, despite Letterman's apparent successes, an important lesson lurks beneath the surface of one of the top entertainment stories of 1993, one that should be noted by other performers like him. Producers can maintain their ability to exploit their interests in projects without placing undue burdens on comedic performers and their material; these performers, even those without established entertainment track records, should challenge producers' bargaining table clout when the issue involves the ownership and exploitation of the performers' material.

NBC was quick to point out that it had important rights to protect when their long association with Letterman ended, notably the value of Late Night with David Letterman in the syndication and home video markets. But Letterman had competing interests, namely the protection of his value and integrity as a performer. Because of the apparent nature of the NBC/Letterman contracts, Letterman's interest was overlooked. Despite Letterman's present celebrity, not to mention his paycheck,59 it seems that even frequent royalty payments cannot compensate for the power NBC wields over the value of Letterman's personality.

## NOTES

1. Richard Corliss, Stupid Talk Show Tricks: NBC & CBS Squabble in a Corporate Custody Battle over David Letterman's Shtick, Time, August 2, 1993, at 55.

2. Mike Duffy, Letterman Offers Glimpse of New Show, Detroit Free Press, July 21, 1993, at C1.

3. CBS' Late Show with David Letterman is produced and owned by Letterman's production company, World-wide Pants.

4. For the purposes of this article, a "comedic performer" is a performer who performs his own, individual comedy routines, as opposed to a performer who performs in comedic works.

5. Pea Boy-like segments have also appeared on Late Show, notably, a pack of dalmatians let loose in the theater, Regis Philbin running through the aisles and showering the audience with confetti.

6. At a CBS news conference, Letterman and his staff conceded that NBC had the right to specific characters from Late Night, such as Larry "Bud" Melman and Pea Boy. Bill Carter, Out of the Corners: Letterman-Leno Preliminary, New York Times, July 21, 1993, at C24.

7. John Lafayette, CBS Strikes Gold with Letterman, Electronic Media, September 6, 1993, at 1.

8. John Carman, Letterman Tips Hand in Fight with NBC, Claiming `Stupid Pet Tricks' as His Alone, Chicago Tribune, July 24, 1993, at 27. Additionally, the pre-Late Night development of Stupid Pet Tricks by Letterman and Markoe was noted in People magazine in 1986. See Jane Hall, Late Night Letterman, People, July 14, 1986, at 88.

9. Lisa de Moraes, NBC's Letterman Warning: Ohlmeyer Says New CBS Show Better Not Be a Late Night Knockoff, Hollywood Reporter, July 9, 1993.

10. Greg Braxton, Dave v. NBC: Paging Judge Wapner; CBS' New Late-Night Talk-Show Host is Relaxed Despite Threats from Former Employer to Lay Claim to `Intellectual Properties,' Los Angeles Times, July 21, 1993, at F1.

11. Mike Hughes, Meanwhile, in L.A., Gannett News Service, July 21, 1993, available in LEXIS, Nexis Library, Gannett File.

12. The Tonight Show dominated the late-night television market for thirty years. Tonight and Late Night were virtually the only game in late-night entertainment for eleven years. Daniel Cerone and Greg Braxton, In Good Humor, Letterman, Leno Begin Late Night Joust, Los Angeles Times, August 31, 1993, at B1.

13. NBC has entered into a five-year deal with E! Entertainment Television for the exclusive rights to Late Night with David Letterman that includes 509 shows and nine anniversary specials. Letterman's NBC Show Lives on E!, Daily Variety, November 4, 1993, at 13. In addition, NBC and GoodTimes Home Video have agreed to a ten-year deal for the exclusive worldwide video and laserdisc rights to Late Night. Stephen

Galloway, NBC's Letterman to GoodTimes Video, Hollywood Reporter, December 6, 1993.

14. See generally Tom Shales, Goodbye, Dave and Hurry Back, Washington Post, June 25, 1993, at C1; John Logan, Dave's Departure: This is Letterman's Last Week on NBC's Late Night, Philadelphia Inquirer, June 21, 1993, at E1.

15. NBC signed Leno after CBS made a serious attempt to offer him an 11:30 p.m. show that would compete with Carson's Tonight Show. But NBC "wanted both stars, not one or the other." Bill Carter, Behind the Headlines in the Leno-Letterman War, New York Times Magazine, January 30, 1994, at 28, 32.

16. Hughes, supra note 11.

17. Jon Burlingame, The Late Night Wars: Leno and Letterman Jab the Network Suits, Newsday, July 21, 1993, at 80.

18. Hughes, supra note 11.

19. NBC, CBS and Letterman appear to have centered their negotiations over the Late Night elements on just how specific Letterman could be in recreating his signature comedy concepts on Late Show. Carter, supra note 6. Note that NBC president Bob Wright commented, "They can certainly do things like that. But they can't do those things." Corliss, supra note 1.

20. 17 U.S.C.S. section 102(a) (Law. Co-op. 1993); see 17 U.S.C.S. section 102(b) (Law. Co-op. 1993) (copyright does not extend to ideas or concepts embodied in such works); see also 17 U.S.C.S. section 101 (Law. Co-op. 1993) (definition of "fixed" work).

21. 15 U.S.C.S. section 1057(b),(c). Trademark includes any word, symbol, name, device or combination thereof, adopted and used to identify and distinguish one's products from others. 15 U.S.C.S. section 1127 (Law. Co-op. 1993).

22. 15 U.S.C.S. section 1125(a) (Law. Co-op. 1993) (false designations or origin and false descriptions forbidden); see also 15 U.S.C.S. section 1114(1)(a),(b) (Law. Co-op. 1993).

23. "Any person who...uses in commerce any word, term, name symbol, or device, or any combination thereof, or any false designation of origin...which--is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his...goods, services or commercial activities by another person...shall be liable in a civil action by any person who believes that he...is or is likely to be damaged by such act." 15 U.S.C.S. section 1125(a) (Law. Co-op. 1993). See also 15 U.S.C.S. section 1127 (Law. Co-op. 1993) (intent of Lanham Act to protect persons engaged in commerce against unfair competition).

24. If a mark is the generic name of a product, a registrant cannot acquire incontestability, 15 U.S.C.S. section 1065(4) (Law. Co-op. 1993); but an infringing party can avoid liability for infringement if incontestability applies when the mark is useful only to describe the product, is used fairly and in good faith. 15 U.S.C.S. section 1115(b)(4) (Law. Co-op. 1993). In order for a mark to be protectible, it must be distinctive, not merely descriptive. 15 U.S.C.S. section 1052(e)(1) (Law. Co-op. 1993).

25. See 17 U.S.C.S. section 102(b) (Law. Co-op. 1993) ("work for hire" provision of the Copyright Act); 17 U.S.C.S. section 101 (Law. Co-op. 1993) (definition of "works made for hire").

26. Peter Martin Nelson & Dawn Friedman, Tips for Protecting Comedic Material: Retaining Joke Rights, Ent. Law & Fin., April 1993, at 1.

27. While David Letterman is by no means an unestablished performer, it is possible that the "work for hire" agreement between him and NBC went unchallenged when he was first hired for Late Night and went unchanged as his star rose.

28. The emergence of stand-up comedy programming coincided with the growth of the cable television industry. The cable networks sought to capture viewers without spending much money, and stand-up turned out to be a successful option. Edward A. Gargan, The Devolution of Humor, Los Angeles Times, January 27, 1991, at 10. There is even a cable channel, Comedy Central, that is devoted exclusively to comedy programming. Comedy Central's lineup includes stand-up and improvisation shows, first-run shows such as Mystery Science Theater, and re-runs of classic comedy series.

29. John Lippman, Networks Tap Into Television Production, Los Angeles Times, June 4, 1993, at D1.

30. See Memorandum Opinion and Order, Evaluation of the Syndication and Financial Interest Rules, MM Docket 90-162, 8 FCCRcd 3282 (1993).

31. United States v. National Broadcasting Co., Nos. CV74-3601-R, CV74-3599-R, 1993 WL 523457 (C.D. Cal. Nov. 11, 1993); see also John Lippman, Networks Can Own TV Show, Judge Rules, Los Angeles Times, November 14, 1993, at A1.

32. Last fall, the networks prime-time schedules included approximately 27% in-house productions, up from 15% five years ago. Including news programs, CBS led the way with 39%, ABC followed with 35%, NBC produced 25%, and Fox produced 20% of its own schedule. Lippman, supra note 29.

33. Lippman, supra note 29.

34. But see infra text accompanying note 39 and note 40 and accompanying text.

35. Nelson & Friedman, supra note 26.

36. Lugosi v. Universal Pictures, 160 Cal.Rptr. 323, 603 P.2d 425, 441 (Cal. 1979) (Bird, C.J. dissenting). Though the right of publicity is limited to protecting a personality's name, likeness, distinctive style, characters the personality created and portrayed from misappropriation for commercial, advertising and trade uses, the economic and public policy bases for developing the right apply to protecting a comedic performer's rights to his routines. ". . . [E]ach person has a `right to enjoy the fruits of his own industry,' the right to decide how and when the commercial value of his identity will be exploited." Id.

37. Nelson & Friedman, supra note 26.

38. Even though Letterman did not portray the Late Night characters himself, the characters' existence was predicated upon their interaction with him; and, with the possible exception of Larry "Bud" Melman, the Late

Night characters are arguably not sufficiently developed to stand on their own.

39. See Lugosi v. Universal Pictures, 160 Cal.Rptr. 323, 603 P.2d 425, 438-44 (Cal. 1979) (Bird, C.J. dissenting).

40. Properties like the Late Night elements have a short shelf-life; characters in Letterman's repertory, such as the Ill-Tempered Ticket Lady, Pea Boy, or the Chris Elliott characters can arguably be thrust upon television viewers some limited number of times before viewers no longer find them funny. These properties need to be handled delicately in order to preserve their comedic values. Letterman, a performer who has spent many years successfully gauging what the viewing public wants to watch, arguably has more of the artistic sensitivity necessary to preserve the Late Night elements than NBC.

41. Braxton, supra note 10.

42. Jim McFarlin, Round One: NBC's Unknown Talk host Conan Comes Out Joking--And Hoping, Gannett News Service, July 22, 1993, available in LEXIS, Nexis Library, Gannett File.

43. Jon Burlingame, Conan's Brand New Traditional Show, Newsday, July 21, 1993, at 17.

44. Though the Late Night staff of writers were NBC employees, they were loyal to Letterman; when the performer made the jump from NBC to CBS his staff went with him. Shirley Wilson, The Move to CBS: Letterman Maintains Longtime Staff, Detroit Free Press, August 29, 1993, at 2.

45. See supra text accompanying note 13.

46. See supra note 13.

47. E! Entertainment's programming executive, "who believes that classic Dave will help recruit new viewers to the network," said, "Now that they can be seen in primetime, Letterman's infamous antics will rekindle

fond memories for long-time fans, while offering new admirers the chance to catch up on some truly ingenious and hilarious television." Late Night with David Letterman Moves to Primetime on E! Entertainment Television Beginning Monday, Dec. 27, PR Newswire, available in LEXIS, Nexis Library. GoodTimes' president noted, "It is a rare opportunity in home video to obtain the rights to a property that comes with its own built in audience. David Letterman is a one-of-a-kind performer and we are excited to be bringing a collectible slice of entertainment history to a worldwide audience." Galloway, supra note 13.

48. Brian Lowry, Wright on Rumors: Wrong, Daily Variety, July 21, 1993, at 1.

49. See supra part III.C.2.

50. "[Letterman] has endorsed nothing, joined no known political groups or causes, evaded People and Entertainment Tonight..... For many years he entered the

news only on the barely plausible pretext of a crazy woman breaking into his home. Knowing American pop culture's tendency to glaze over its personalities, he makes himself known only through the distorted lens of his little talk-show kingdom." Alex Ross, The Politics of Irony: Limbaugh, Letterman and Bill Clinton, New Republic, November 8, 1993, at 22.

51. See Rochelle Cooper Dreyfuss, The Creative Employee and the Copyright Act of 1976, 54 U.Chi.L.Rev 590, 639 (Spring 1987). See also supra note 36, text accompanying note 39, and note 40 and accompanying text.

52. See supra note 8 and accompanying text; see generally Nelson & Friedman, supra note 26.

53. See Nelson & Friedman, supra note 26.

54. See generally id.

55. The Year That Was 1993: Withering Hypes, Intellectual Poverty, Entertainment Weekly, December 31, 1993/January 7, 1994, at 78.

56. See the final minutes of Late Night with David Letterman (NBC television broadcast, June 26, 1993).

57. See generally Carter, supra note 6 and Burlingame, supra note 17 for Letterman's commentary on the dispute.

58. See The 25 Most Intriguing People of 1993, People, December 27, 1993/January 3, 1994, at 58.

59. Letterman's three-year deal with CBS is reported to be worth $14 million per year. Duffy, supra note 2.

Ms. Loew is an assistant vice president of a major Wall Street investment bank in New York. J.D. to be awarded 1994, New York Law School; B.A. cum laude 1986, Wheaton College, Norton, Mass.

[ELR 15:11:3]

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# The Tonya Harding Case: A Look at the Law of Amateur Sports Governance

## by Robert L. Bard and Lewis Kurlantzick

Analysis of the relationship between American figure skater Tonya Harding, the United States Figure Skating Association (USFSA), and the United States Olympic Committee (USOC) -- in particular the authority of these bodies to bar her from future participation in skating competitions -- requires an understanding of the extremely complex structure that governs amateur sports. At the top of the Olympic structure is the International Olympic Committee (IOC), which controls the Olympic games. The IOC in turn charges the various national

Olympic committees with determining which athletes will compete in the Olympics.

In the United States that governing body is the USOC. Under the Amateur Sports Act of the 1978, 38 U.S.C. sections 371-396, the USOC is entrusted with oversight of all matters relating to American participation in both the Olympic and Pan American games. Further the Act instructs the USOC to recognize an appropriate national governing body in each sport. The USFSA is the recognized body for figure skating. Operating under the umbrella of the international skating federation and the USOC, it is empowered by the Amateur Sports Act to determine eligibility standards for participation in "amateur athletic competitions" and to select the athletes who represent the United States in the Olympics and Pan American games.

These complicated arrangements generate a distinctive governance of a sport, particularly where the sport is international and the requested regulation is to be carried out by an American court. The crucial legal issues are when, under what legal theories, and under what standard of review an American court should set aside a decision by one of these governing bodies.

## USOC Decision

Within this framework the USOC's decision to permit Harding to skate and to remit the question of possible disciplinary action to the USFSA is to be applauded in light of Harding's lifelong investment in the sport, her achievement in making the team, the potential economic benefits to her of participation, the ability to strip her later of any medal she might have won, and the inadequate time available for a considered decision. Certainly it is uncomfortable to permit an athlete who might be guilty of serious misconduct to compete in the Olympics. But all the alternatives are worse. Only by treating Tonya Harding with scrupulous fairness could American sports authorities protect the integrity of amateur sport.

A determination by the USOC to accelerate the process leading to the possible ban of Harding would have guaranteed a hasty decision as well as unbearable pressure on Harding to both compose an effective defense and train for the competition; in addition, it would have increased the chances that the proceeding would have distracted attention from the Games themselves. A decision to move quickly would have been particularly unwise in light of the fact the Committee's administrative board appeared to be making up its procedures and standards on the fly.

It is obvious that Harding could have been gravely injured by denying her the opportunity to compete. Less obviously, perhaps, both fans and competitors would have been injured if the quality of the competition were compromised by disqualification of one of the two best American skaters. And no one would have been more injured than Nancy Kerrigan should she have won her medal in a field denuded of her chief American rival.

## USFSA Proceedings

Of course the charges against Ms. Harding must be adjudicated. That responsibility now rests with the USFSA, which already has set its process in motion.

[Editor's note: The day before this issue of the Entertainment Law Reporter went to press, a Federal District Court in Portland, Oregon, issued a temporary restraining order that prohibited the USFSA from conducting a hearing that had been scheduled for March 10th. Harding's lawyers had argued that she had not had adequate time to prepare for the hearing. According to news accounts, the TRO is to last for at least 10 days. It appears that as a result of the TRO, Harding will be able to participate in the world championships beginning March 20th in Japan.]

One oft-voiced misconception is that the governing body needs to withhold action until resolution of any possible criminal proceeding against Harding. These two processes are designed to uphold different interests, and, in addition, the outcome of a criminal proceeding might not be dispositive.

The criminal law seeks to vindicate the state's interest in protecting the physical security of its citizens and punishing those who conspire to violate that security. The athletic organization's interest is in determining the characteristics of its members and in excluding those who prove unqualified. Moreover, since in a criminal trial the prosecutor must prove a defendant's guilt beyond a reasonable doubt, a not guilty verdict does not necessarily mean that the defendant is innocent.

If the USFSA decides to discipline Harding and, accordingly, disqualifies her from skating in the world championships following the Olympics, she could try to obtain a judicial restraining order against the ruling. Her attempt, though, would face formidable obstacles and likely prove unsuccessful. As is often the case, the key question is not simply what particular decision should be made, i.e., did Harding violate the ethical code and if so, how should she be sanctioned, but rather who is entitled to make the decision and under what procedures. Neither statutory nor constitutional law offers aid to Harding.

The Constitution, and its requirements of due process and equal protection, play no role here both because Harding's interest in skating, though economically consequential, is not deemed the kind of property or liberty right which triggers constitutional (or statutory) protection and because, in any case, the constitutional directives apply only to "state action" and precedents make it clear that the USFSA is not to be regarded as a governmental actor. DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (D.D.C. 1980).

Potentially more promising for Harding is a principle recognized by some state courts in dealing with the law of private associations. The principle is that when an association that has broad power to control individuals' access to economic opportunities in a field is considering action which will have significant economic impact on an individual in that industry, that individual should be given the opportunity to address the contemplated action prior to a decision being made. See, e.g., California State Univ. Hayward v. National Collegiate Athletic Ass'n, 47 Cal.App.3d 533, 121 Cal.Rptr. 85 (Ct.App. 1975). Following that notion, Harding's likelihood of success would depend on the extent to which she had been offered a fair chance to respond to the charges against her.

## Reynolds and Gault Cases

Other athletes have mounted successful challenges to governing body actions. For example, Butch Reynolds, the world class 400 meter runner, was banned by the track federation for two years in 1990 for a positive drug test. In response Reynolds obtained an injunction, convincing an arbitrator that carelessness in the handling of the urine samples cast serious doubt on the validity of the drug test attributed to him. Reynolds v. International Amateur Athletic Federation, 1992 U.D.Dist.LEXIS 8625 (S.D.Oh. 1992). Similarly, in 1992 Willie Gault and others convincingly claimed that the bobsled association had denied them a fair chance to qualify as competitors in the Winter Olympic Games. Accepting their grievance, an arbitrator determined that the selection process was flawed and ordered that another qualifying competition be held. Gault v. United States Bobsled Federation, 179 A.D.2d 881, 578 N.Y.S.2d 683 (1992).

While the Reynolds and Gault cases are not reassuring with respect to the care and integrity of sports associations' behavior, they offer little support for someone in Harding's position, as her case does not involve defects in the testing or selection process. If the USFSA carefully follows its internal rules and if it affords her a fair chance to present proofs and arguments before an impartial decision-maker so as to minimize error and to insure respect for Harding, neither an arbitrator nor a court is likely to upset its decision, even a decision that, independent of whether Harding was innocent of involvement in the assault on Kerrigan, her failure to report what she subsequently learned of the assault alone disqualifies her.

Robert Bard and Lewis Kurlantzick are Professors of Law at the University of Connecticut School of Law where Professor Kurlantzick regularly teaches a seminar on "Sports and the Law."
[ELR 15:11:12]

## RECENT CASES

**Trial courts should use discretion "evenhandedly" in deciding whether to award attorney's fees to successful copyright defendants, Supreme Court rules in case in which singer-songwriter John Fogerty was absolved of infringement allegations**

John Fogerty -- once the lead singer and songwriter for "Creedence Clearwater Revival" -- has emerged victorious, so far, from the legal thicket he entered back in 1970 when he wrote a song entitled "Run Through the Jungle" and sold its copyright to a predecessor of the music publishing and record company Fantasy, Inc. Copyright infringement litigation brought against him by Fantasy has cost Fogerty a million dollars in attorney's fees. Now the Supreme Court has ruled that the District Court in which that litigation took place should give "evenhanded" consideration to Fogerty's request that he be awarded a judgment against Fantasy for those fees.

Fantasy's infringement claim was triggered by a song written by Fogerty in 1985 entitled "The Old Man Down the Road" which Fogerty recorded for Warner Brothers Records. According to Fantasy, "Old Man Down the Road" was merely "Run Through the Jungle" with new words. But a jury returned a verdict in favor of Fogerty, absolving him of allegations that he had infringed the copyright to the older song.

After his successful defense of Fantasy's infringement action, Fogerty made a motion for attorney's fees pursuant to section 505 of the Copyright Act which provides that "the court may . . . award a reasonable attorney's fee to the prevailing party . . . ." The District Court denied the motion, however, and the 9th Circuit Court of Appeals affirmed, on the grounds that the 9th Circuit uses a "dual standard" for awarding fees in copyright cases. (ELR 15:1:7)

Under the "dual standard," prevailing plaintiffs are generally awarded attorney's fees as a matter of course, while defendants must show that the original suit was frivolous or brought in bad faith. This "dual standard" also had been used in the 2nd, 7th and D.C. Circuits. On the other hand, the 3rd, 4th and 11th Circuits use an "evenhanded" standard that treats prevailing plaintiffs and defendants alike for the purpose of deciding whether to award attorney's fees.

The Supreme Court agreed to hear Fogerty's appeal in order to resolve this conflict among the circuits. And it has ruled that prevailing plaintiffs and prevailing defendants must be treated alike under section 505 of the Copyright Act.

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Court had construed virtually identical language from Title VII of the Civil Rights Act of 1964 to support different treatment of plaintiffs and defendants. While normally, fee-shifting statutes with similar language should be interpreted alike, the Court noted that the goals and objectives of the Copyright and Civil Rights Acts are not similar. The Civil Rights Act provides incentives for the bringing of meritorious lawsuits by impecunious "private attorney general" plaintiffs who can ill afford to litigate their claims against defendants with more resources. However, the Copyright Act's primary objective is to encourage the production of original literary, artistic, and musical expression for the public good; and plaintiffs, as well as defendants, "can run the gamut from corporate behemoths to starving artists."

Moreover, the Court reasoned that because copyright law ultimately serves the purpose of enriching the public through access to creative works, it is peculiarly important that the law's boundaries be demarcated as clearly as possible. Thus, defendants seeking to advance copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate infringement claims.

The legislative history of the Copyright Act did not support a dual standard, because neither of the studies submitted to Congress while it considered revisions to the Act, nor the cases referred to in those studies, support the view that there ever was a settled construction in favor of the dual standard.

Though Fogerty is winning this case so far, he may have to revisit the legal jungle before this case is over, because the Supreme Court did not award him a complete victory. Forgerty had argued that section 505 enacted the "British Rule" which provides for automatic recovery of attorneys' fees by the prevailing party. If this were so, Fogerty would have automatically been entitled to recover his fees. But the Supreme Court held that the word "may" in section 505 clearly indicates that trial courts are to have discretion in awarding fees.

Thus, the case has been remanded to the District Court where Fogerty's fee request is to be given "evenhanded" consideration. While there is no precise rule or formula for making fee determinations under section 505, the Court indicated that trial courts could consider such factors as whether the case was frivolous, the parties' motivation, the reasonableness of the positions taken by the parties (on both the law and the facts), and the need to compensate injured parties and deter infringements.

Fogerty v. Fantasy, Inc., 1994 U.S.Lexis 2042 (Sup.Ct. 1994) [ELR 15:11:14]

## FCC's ban on "indecent" broadcast programming violates First Amendment

Action for Children's Television and other broadcasters, authors, program suppliers, listeners and viewers challenged the constitutionality of a Federal Communications Commission order, issued at the direction of Congress, banning the broadcasting of "indecent" material during the hours from 6:00 A.M. to midnight. The broadcasting parties claimed that section 16(a) of the

Public Telecommunications Act of 1992 and 18 U.S.C. section 1464 violated the First Amendment.

A Federal Court of Appeals, in agreeing with the broadcasters, relied on two prior decisions of the court addressing similar challenges to FCC orders restricting the broadcasting of indecent material, Action for Children's Television v. Federal Communications Commission, 852 F.2d 1332 (D.C.Cir. 1988) and Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C.Cir. 1991; ELR 13:10:7), cert. denied, 112 S.Ct. 1281 (1992).

Judge Patricia M. Wald stated that the Commission's goals of protecting "the right of all members of the public to be free of indecent material in the privacy of their homes" was insufficient to support the challenged restriction. The Commission's interests in "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts, and in "ensuring the well being of minors" regardless of parental supervision were compelling interests, but the Commission and Congress "failed to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards."

Judge Wald discussed the development of federal law prohibiting the broadcasting of indecent material, and observed that the Commission now defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

Judge Wald expressed reluctance to recognize any generalized government interest in protecting adults from indecent speech, "primarily because the official suppression of constitutionally protected speech runs counter to the fundamental principle of the First Amendment" - uninhibited debate on public issues.

The court then stated that the government failed to demonstrate that its 6:00 A.M. to midnight ban was the least restrictive means to advance its interests in the protection of children. The government did not properly weigh viewers' and listeners' First Amendment rights when balancing the competing interests in determining the widest safe harbor period consistent with the protection of children, announced Judge Wald, who continued that the court was "at a loss to detect any reasoned analysis supporting the particular safe harbor mandated by Congress."

It was further found that there was no evidence that the government tailored its protection of children narrowly to avoid unnecessary infringement on First Amendment rights of adult listeners and viewers. It did not appear to the court that the challenged regulation was imposed solely on the basis of a judgment that fewer children would be in the broadcast audience between the hours of midnight and 6:00 A.M. than at other times.

The court vacated the Commission's 1993 Order; held section 16(a) of the Public Telecommunications Act of 1992 unconstitutional; and directed the Commission to redetermine, after a full and fair hearing, the times at which indecent material may be broadcast.

Judge Harry T. Edwards concurred in the judgment to reverse, but expressed the view that the government's asserted interest in facilitating parental supervision of their children was "irreconcilably in conflict" with the asserted independent interest in shielding children from exposure to indecent programming.

Judge Edwards also stated that although the court found the 6:00 A.M. to midnight indecency ban unconstitutional, he did not understand the majority to hold the Commission obliged to continue with its efforts to regulate indecent programming. There was no legal requirement, in Judge Edwards' view, that the Commission pursue this matter further by "full and fair hearing" - the Commission may proceed by any lawful administrative means it deems appropriate.

The full D.C. Circuit Court of Appeals has agreed to rehear this case en banc.

Action for Children's Television v. Federal Communications Commission, 11 F.3d 170, 1993 U.S.App.LEXIS 30125 (D.C.Cir. 1993) [ELR 15:11:15]

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**FCC ban on indecent programming on cable access channels is unconstitutional**

Alliance for Community Media, a group of cable programmers and organizations of listeners and viewers, sought review of two orders issued by the Federal Communications Commission regulating indecent programming on cable "access" channels.

A Federal Court of Appeals held that the First Amendment prohibits the government from banning all indecent speech from access channels and also prevents the government from "deputizing" cable operators with the power to effect such a ban. The court, however, declined to rule definitively on the constitutionality of a blocked access channel pending further action by the Commission addressing the underinclusiveness of the applicable regulations.

Judge Patricia M. Wald noted that in passing the Cable Communications Policy Act of 1984, Congress sought, among other things, to "assure that cable communications provide...the widest possible diversity of information sources and services to the public." The 1984 Act required cable operators to set aside "leased access" channels for commercial use by any entity not affiliated with the cable operator and authorized franchising authorities to require cable operators to provide channels for public, educational and governmental use. And because the 1984 Act barred cable operators from exercising any editorial control over either type of access channels, it granted cable operators immunity from liability for any access channel programming.

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. Section 10 of the Act permits a cable operator to prohibit indecent programming an all access channels, and compels those cable operators who do not bar indecent programming on leased channels to place such material on separate channels that the subscriber can only view by prior written request.

The implementing regulations, with respect to leased access, allow the cable operator to prohibit any programming which it reasonably believes is indecent; requires programmers to identify any part of their own programming they consider indecent; and requires cable operators either to keep such programming from being transmitted or to place all such programming on blocked channels to which a subscriber can request access in writing.

Judge Wald stated that the government may not constitutionally authorize a cable operator to ban indecent material from access channels, observing that "even where it is the decision of a private person which ultimately triggers the abridgement of speech, or effects the challenged discrimination, the state may nevertheless be held responsible if it significantly encourages the private actor to commit the infringement." Section 10 "significantly" encourages cable operators to ban indecent material, and any ban by a cable operator thus would constitute "state action," declared the court.

It was found that the purpose of the regulations was to limit children's access to indecent material; that the regulations facilitated the identification of material the government sought to suppress - in the case of political, educational and governmental access, by expressly permitting the cable operator to require such identification; and that the government, in all, "first strips a cable operator of editorial power over access channels, then singles out the material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only."

The court referred to Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504 (D.C.Cir. 1991), cert. denied, 112 S.Ct. 1281 (1992), which held that in attempting to regulate indecency in broadcasting, Congress could not constitutionally enact a complete ban on such material. There was no evidence, stated Judge Wald, why the context of cable television should require a different conclusion. It was further noted that Congress itself judged a channel-block to be an adequate means of furthering its compelling interest; thus, the authorization of a complete ban by cable operators apparently was not the only effective means of furthering that interest.

In turning to the issue of the segregation and blocking requirement for indecent material on leased access channels, the court expressed the view that the requirement, as applied only to leased access channels, was inadequately justified, but expressed no opinion as to the "general viability of a segregation and blocking approach in regulating indecent material in the cable medium."

Section 10 singled out programmers on leased access channels for regulation, while leaving similar programmers on commercial channels unregulated. The exclusive focus on leased access for the regulation of indecent speech had "a limited relation at best to the goal of limiting children's exposure to 'indecent' programming." Section 10 did not substantially advance that interest, observed Judge Wald, since the identical kind of programming may be transmitted freely on regular commercial channels. The government did not sufficiently justify why free access by programmers should trigger the regulation of indecency.

The matter was remanded to the Commission for reconsideration of the underinclusiveness of the remaining regulatory scheme in light of the court's invalidation of the provision authorizing cable operators to ban indecent material from all access channels.

The full D.C. Circuit Court of Appeals has agreed to rehear this case en banc.

Alliance for Community Media v. Federal Communications Commission, 10 F.3d 812, 1993 U.S.App. LEXIS 30126 (D.C.Cir. 1993) [ELR 15:11:15]

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**FCC prevails in broadcasters' action challenging indecency forfeiture procedures**

Action for Childrens Television, along with other broadcasters and interested listeners/viewers, challenged the procedures under which the Federal Communications Commission regulates indecent broadcasting. The broadcasters claimed that the Commission did not guarantee prompt judicial review of forfeiture orders.

Under the Communications Act of 1934, the Commission is authorized to take appropriate action when licensees broadcast "obscene, indecent, or profane" material in violation of 18 U.S.C. section 1464. Federal District

Court Judge Lamberth described the Commission's procedures upon receiving a complaint from a viewer or listener that a licensee has broadcast an indecent program, and determined that "there are few if any checks on the duration of a forfeiture proceeding." There is no statute or regulation imposing time limits on the Commission's processing of indecency complaints, requiring expedition in such processing, imposing time limits on the United States Attorney's filing of forfeiture actions, or requiring expeditious filing of forfeiture actions.

Judge Lamberth initially found that the court possessed jurisdiction over the broadcasters' claim challenging the facial validity of the forfeiture provisions of the Communications Act, rejecting the Commission's argument that the broadcasters were attacking the Commission's method of enforcing its broadcast indecency policies - such a challenge would be within the jurisdiction of the Court of Appeals.

The court also found that the broadcasters were not first required to bring to the Commission the claim that the forfeiture provisions served to create an informal censorship scheme. The broadcasters based their claim on First Amendment case law, not section 326, noted Judge Lamberth.

In their second claim, the broadcasters argued that the Commission violated 504(c) of the Communications Act by relying on unadjudicated forfeiture orders to increase penalties in later proceedings against the same broadcasters.

The court, in finding that it did not have jurisdiction over this claim, noted that it would possess jurisdiction over a Commission matter if that matter involved the review of a forfeiture order or a challenge to the facial validity of a statute. The Commission has "special expertise" in determining whether it has violated the statute that governs its conduct, and the court declined to initially preempt the Commission's "opportunity to demonstrate its expertise when such a specialized issue is involved." The court, accordingly, granted the Commission's motion to dismiss the broadcasters' second claim.

Returning to the remaining constitutional claim, the court agreed with the Commission that the listener and viewer parties lacked standing, and granted the Commission's motion to dismiss those parties, including Action for Childrens Television, the American Civil Liberties Union and People for the American Way.

The court also granted the Commission's motion to dismiss from the case the broadcasters who had not been involved in a forfeiture proceeding. Although the broadcasters stated that forfeiture orders imposed on other broadcasters chilled the exercise of their First Amendment rights, it has been ruled that the chilling effect of certain laws on a parties' First Amendment rights does not meet the requirements for standing. Furthermore, the purported chilling effect of a law may supply the reason why that law is invalid, commented Judge Lamberth, but not the harm which entitles a party to challenge it. The broadcasters were not threatened with forfeiture proceedings, and the record did not substantiate the assertion that they "conformed their conduct out of fear of forfeiture orders."

With respect to the remaining three parties, the court ruled that Infinity Broadcasting Corporation had standing but that Greater Media, Inc. did not, and that comity prevented its review of Evergreen Media Corporation's claim. The Commission had instituted three indecency forfeiture proceedings against Greater Media, all for radio station KLSX-FM, but the procedures were not final. Two of Infinity's three forfeiture proceedings also were far from final resolution, noted the court, but in Infinity's last proceeding, the Commission had issued a forfeiture order in October 1992. Infinity filed a still-pending motion for reconsideration. The court found that the Commission's action, taken after Infinity waited two years for the forfeiture proceeding to conclude, was "significant enough to make Infinity's constitutional claim ripe for review."

The Commission pointed out that Evergreen was a party to a forfeiture action in a Federal District Court in Illinois. The broadcaster's challenge to the indecency forfeiture at issue in that case was closely related to the constitutional claim in the instant matter and could be raised in the Illinois litigation. Considerations of comity, stated Judge Lamberth, precluded the court from resolving the claim.

Infinity claimed that 47 U.S.C. section 503(b)(3) and (4) were facially invalid in creating a system of prior restraint and censorship without providing for prompt judicial review. The court found that Infinity did not demonstrate that there were no circumstances under which the challenged sections could function constitutionally.

Judge Lamberth commented that although Infinity based its First Amendment claim on Bantam Books v. Sullivan, 372 U.S. 58 (1963), there were significant distinctions between Bantam Books and the instant case, including the mediums of expression at issue. Broadcasts receive limited First Amendment protection as compared to publications, noted the court, and "the need for broadcast regulation becomes particularly acute when the broadcast involved includes indecent speech." Contrary to Infinity's assumption, stated the court, "there is no identity of First Amendment protection across mediums of expression, especially when the medium involved is one that the Supreme Court places at the bottom of the protection spectrum."

It was further found that the factors which served to invalidate the enforcement scheme in Bantam Books were not present in the scheme at issue. There was no evidence that the Commission was trying to avoid judicial review of its indecency forfeiture orders; the Commission provides targeted broadcasters with notice; the Commission has announced a judicially approved definition of indecent broadcasting and must explain why the subject broadcast was indecent before issuing a forfeiture order; and the Commission's "supposed system of informal censorship" does not completely ban indecent broadcasts, but allows the broadcast of indecent speech during particular times of the day. Infinity may feel a chill because of the Commission's forfeiture scheme, stated Judge Lamberth, but that chill was temporal only and was not unconstitutionally inflicted. The court therefore granted the Commission's motion for summary judgment on Infinity's constitutional claim.

Action for Childrens Television v. Federal Communications Commission, 827 F.Supp. 4, 1993 U.S.Dist. LEXIS 8445 (D.D.C. 1993) [ELR 15:11:17]

## "Indecency" of challenged broadcast material must first be reviewed in forfeiture proceeding against radio station

The Federal Communications Commission issued a Notice of Apparent Liability in the amount of $6,000 for the broadcast, by Evergreen Media Corporation, of obscene, indecent or profane language in violation of 18 U.S.C. section 1464. The action was taken on the basis of comments aired during WLUP-AM's Steve and Garry Show. An order of forfeiture was issued in January

1991, and the Commission denied Evergreen's motion to reconsider.

One of the challenged comments, as described by Federal District Court Judge Nordberg, was broadcast on March 30, 1989 at about 5:10 P.M. during a discussion between members of the show about the appearance of Vanessa Williams on a television show. The discussion included a description of photographs of Williams which appeared in Penthouse magazine.

On the afternoon of August 19, 1987, a caller presented a song parody called "Kiddie Porn," and a second caller told a joke at the expense of homosexuals.

Judge Nordberg, after finding that the court possessed jurisdiction to hear Evergreen's counterclaim and after reviewing relevant case law, declared that it could not find that the Commission was entitled to judgment as a matter of law on any of the constitutional challenges in the counterclaim, other than those dismissed (a vagueness challenge and an overbreadth challenge, in part). It remained to be decided whether the enforcement of the Commission's definition of indecency was unconstitutional as applied to the broadcast material in question because such enforcement allegedly was not specifically tailored to serve the commission's interests. The court also must decide whether the enforcement practice has been arbitrary and capricious so as to constitute a violation of due process, and whether enforcement would constitute an equal protection violation.

Notwithstanding the above, it was pointed out that the first issue to be decided will be whether the challenged broadcast material was "indecent." Evergreen may assert the remaining constitutional defenses to section 1464 "if necessary, but it is not yet necessary," concluded Judge Nordberg, in denying the parties' motions for summary judgment.

United States v. Evergreen Media Corporation of Chicago, AM, 832 F.Supp. 1183, 1993 U.S.Dist. LEXIS 11735 (N.D.Ill. 1993) [ELR 15:11:18]

## Walt Disney Company loses trade dress infringement claim over video packaging for animated films

In 1992, GoodTimes Home Video agreed to finance, in return for exclusive distribution rights in the Western Hemisphere, the production of seven animated films based on children's literature in the public domain.

The Walt Disney Company, which has released 17 videocassettes in its Classic Animated Features line, claimed that the packaging used by GoodTimes for a full-length animated version of the Aladdin story violated Disney's trade dress for its videos.

Federal District Court Judge Miriam Goldman Cedarbaum noted that Disney was seeking to protect the overall look of the video packaging of the Classic Animated Features works, arguing that the packages had "a consistent and uniform look which consumers associate with Disney." Disney was required, stated the court, to establish that its video packages had a consistent overall look, and, in order to warrant protection under section 43(a) of the Lanham Act, that the trade dress was capable of identifying Disney as the source of the videos and that GoodTimes' trade dress was likely to mislead consumers into believing that GoodTimes' "Aladdin" was the Disney version.

Judge Cedarbaum observed that the format of each of Disney's video packages differed in such features as the size, style, and color of title lettering. The company did not use the word "classic" consistently, and changed the location of the word and the size of type. The packages all displayed the name Walt Disney "in clear legible letters above the title," but the characters depicted in the package illustrations varied as to placement, size, and color. The packaging did not expressly identify the films as members of a series; the phrase "Classic Animated Feature" did not appear on any of the packages; and although a logo featuring the phrase "The Classics" enclosed in a diamond appeared on the spine of almost all of the videos, it was not easily seen by consumers.

The court determined that Disney's video packages did not have a consistent overall look and that the company did not have a protectible trade dress. The similar features, such as the use of a white "clamshell" container, the title of a public domain story placed on the top third of the package, the name "Walt Disney" above the title (although not always in the same style or color of lettering), and the three-dimensional character depiction, were not sufficient to provide an identifiable trade dress.

GoodTimes also established that each of the features used by Disney was purely functional and that Disney's arrangement of these features therefore was not protectible. The court, accordingly, refused to grant Disney an injunction barring GoodTimes from using the challenged videocassette packaging and entered judgment for GoodTimes on the trade dress claim as well as on Disney's state law claims.

The Walt Disney Company v. GoodTimes Home Video Corp., 830 F.Supp. 762, 1993 U.S.Dist. LEXIS 11959 (S.D.N.Y. 1993) [ELR 15:11:18]

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**Court considers crime victim's claims against CBS arising from broadcast of "Street Stories" segment**

Yolanda Baugh and her daughter, Donyelle Baugh, sued CBS and other parties in connection with the April 9, 1992 broadcast of a segment of "Street Stories," a weekly news magazine. The segment concerned a crisis intervention team, run by a county District Attorney, which provided emergency assistance for crime victims.

The broadcast included footage of an unidentified woman speaking with a victim advocate soon after an incident of domestic violence. The woman was Yolanda Baugh; Baugh's face was obscured, but Donyelle Baugh's face was not obscured. And some viewers with cable television had access to a Sacramento CBS affiliate which broadcast the unobscured version of the segment.

Baugh stated that she allowed the crisis team into her home upon receiving confirmation of their identity from police officers; that it was stated that the camera crew was filming a segment on the victim advocate for the

District Attorney's office; and that the camera crew did not mention the Street Stories program or that the film would be used commercially in any way. Baugh expressed no objection to the filming as long as she was not included in the footage; a crew member, according to Baugh, said "Okay."

When Baugh learned, on March 23rd, of the upcoming broadcast, she unsuccessfully attempted to prevent the use of the film.

In her lawsuit, Baugh alleged that the CBS parties appropriated her likeness for commercial purposes in violation of California Civil Code section 3344(a).

A Federal District Court found that the CBS parties were immune from liability because the challenged material was used in connection with a news account. While Street Stories was not a traditional news show, noted Judge Fern M. Smith, it was a "news or public affairs" broadcast in the broad sense and was entitled to protection. The court rejected Baugh's argument that CBS, by mixing the footage with other episodes in the broadcast, sensationalized the event and forfeited its news account protection.

Also rejected was Baugh's contention that the issue of "newsworthiness" should be submitted to a jury. Even if it were assumed that Street Stories "did not fit the traditional notion of news, it undoubtedly is protected under the category of public affairs. . ." stated Judge Smith in dismissing Baugh's claim for appropriation of likeness.

The court then denied the CBS parties' motion to dismiss Baugh's claim for the disclosure of private facts. The issue of domestic violence and the work of the crime victims advocate may have been newsworthy, but the court declined to find, in the instant proceeding, that Baugh's personal involvement in an incident of domestic violence was newsworthy as a matter of law. The broadcast went "far beyond" the disclosure of facts publicly available in the police report, and Baugh presented a question of fact as to whether the broadcast disclosed matters which a reasonable person might not want disclosed.

Judge Smith found that the Uniform Single Publication Act barred any claims based on the broadcast of Baugh's story, and dismissed Baugh's claims for intrusion on seclusion, trespass, unfair competition, fraud and intentional and negligent infliction of emotional distress to the extent they relied on the actual broadcast of the Street Stories segment. The claims remained viable to the extent they relied on a tortious physical intrusion into Baugh's home, declared the court. Assuming, for purposes of the proceeding, the truth of Baugh's assertion that she did not knowingly consent to the CBS parties' entry into her home, the initial intrusion, if an intrusion occurred, might not be privileged under the Act. The statute does not grant complete protection for any tortious act committed by investigative news reporters simply because they eventually publish a story based on their investigations, stated Judge Smith.

The court dismissed Baugh's trespass claim, finding that the camera crew acted within the scope of Baugh's consent while the crew was on the premises. Broadcasting the video may have exceeded the scope of Baugh's consent, but the broadcast occurred after the crew's departure from Baugh's property. Judge Smith commented that California cases do not indicate that consent must be "knowing or meaningful." If consent was fraudulently induced, continued the court, but was given nonetheless, there would be no claim for trespass, although a party may have a remedy based on fraud or intentional misrepresentation.

Also dismissed was Baugh's claim for intrusion on seclusion.

In dismissing the claims alleging unlawful business practices in violation of Cal. Bus. & Prof. Code, sections 17200 and 17203, the court noted that it had eliminated the basis for liability under section 17200, i.e., the original trespass at Baugh's home.

Section 17203 authorizes injunctions and restitutionary relief. Baugh claimed that she was not seeking damages and was pursuing restitutionary relief for the value of what was taken. The court questioned the validity of the theory, noting that Baugh was seeking a remedy for the embarrassment and emotional distress caused by the CBS broadcast, and did not argue that she could have sold her story to another network and that the broadcast effectively misappropriated the value of her story. The court, accordingly, dismissed Baugh's claim under the section.

Judge Smith then denied the CBS parties' motion to dismiss Baugh's claim for intentional infliction of emotional distress, although dismissing the claim for negligent infliction of emotional distress. At this stage of the proceedings, the court determined that it could not say that the CBS parties' behavior was not outrageous as a matter of law. However, in the absence of a special duty to Baugh, recalled the court, the decision to proceed with the broadcast could not provide the basis for a negligence claim.

The court denied the CBS parties' motion for a more definite statement of Baugh's fraud claim. The failure to identify the persons making some of the purported misrepresentations was excusable, stated the court, for the camera crew at Baugh's home failed to provide their names.

Group W and KPIX argued that they acted only as a conduit for the network's broadcast; that their personnel were not involved in the videotaping at Baugh's home; and that they did not edit, review or in any way control the network's production of Street Stories or its broadcast. Judge Smith expressed reluctance to grant summary judgment to the broadcasters until Baugh conducts sufficient discovery to determine who supplied the camera crew and to determine the identity of each person who appeared at Baugh's home. The broadcasters' motion for dismissal or summary judgment therefore was denied. If "immediate and inexpensive" discovery does not show involvement by Group W or KPIX employees, stated Judge Smith, Baugh was directed to dismiss the broadcasters within 60 days after the disclosure of the identity of the camera crew.

Baugh v. CBS, Inc., 828 F.Supp. 745, 1993 U.S.Dist.LEXIS 8865 (N.D.Ca. 1993) [ELR 15:11:19]

## Court denies injunctive relief to televangelist in libel action involving "Prime Time Live" broadcast

On November 21, 1991, ABC's "Prime Time Live" broadcast a report on the ministry of Robert G. Tilton, a Dallas televangelist; in July 1992, ABC broadcast a shortened version of the prior piece, together with a follow-up segment. In the report, Diane Sawyer noted that some of the items mailed to church "partners" was from that "holy place Taiwan." Tilton claimed that he personally prayed over prayer requests; Sawyer stated that most of the prayer requests were thrown in the trash by a bank before Tilton saw them. And Sawyer questioned Tilton's statement in a church magazine that he provided financial support to an orphanage in Haiti.

Tilton sought a temporary restraining order against Capital Cities/ABC Inc. to prevent the purportedly imminent rebroadcast of any allegedly defamatory material. Tilton claimed that he was not seeking the prior restraint of any new material, but was attempting to enjoin the showing of the previously broadcast segments.

A Federal District Court in Oklahoma found that if Tilton succeeds on the merits of his lawsuit, a damage award would be adequate compensation for any financial injury allegedly resulting from the challenged broadcasts. Tilton also claimed that the broadcasts violated his First Amendment rights. The provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" does not, stated Judge Brett, "contemplate a private libel suit against a non-governmental entity broadcasting for a profit."

Judge Brett determined that Tilton did not show an exception to the policy barring prior restraints on the press; did not establish that an injunction would be in the public interest; and did not demonstrate a substantial likelihood of succeeding on the merits. The application for a temporary restraining order was denied.

In July 1993, the court, after an evidentiary hearing, denied Tilton's motion for a preliminary injunction.

Judge Brett noted that although the evidence established that the "holy water" sent to partners was from the River Jordan in Israel,

the broadcast did not say the holy water came from Taiwan - it said that some of the other items mailed to "partners" by Tilton came from that "holy place Taiwan."

The court then carefully described Tilton's procedure for handling prayer requests, and found that the evidence did not establish that ABC and its personnel knew or should have known that certain prayer requests were not routinely forwarded to Tilton personally to pray over.

With respect to the Haiti orphanage, the court found that it appeared that ABC made a reasonable, although unsuccessful, effort to locate the Haitian orphanage with which the Tilton Ministries was associated and did support.

Judge Brett, in denying the requested preliminary injunction, stated that Tilton did not demonstrate that there was a substantial likelihood of recovery on the merits of the libel claims; that money damages would provide an adequate remedy at law; that the First Amendment provides protection against government action, not the action of the private parties, such as Capital Cities/ABC; and that laws interpreting the First Amendment generally afford broadcasters protection against prior restraint.

Tilton v. Capital Cities/ABC Inc., 827 F.Supp. 672; 827 F.Supp. 674 (N.D.Okla. 1993) [ELR 15:11:20]

## Newspaper's publication of photograph of hospital patient walking with Hedda Nussbaum does not violate New York Civil Rights Law

In September 1988, Pamela J. Howell was a patient at a private psychiatric facility in New York. Hedda Nussbaum also was a patient at the facility; Nussbaum was the former lover of convicted murderer Joel Steinberg, who was facing trial at the time for the 1987 death of six year old Lisa Steinberg.

A New York Post photographer apparently trespassed on the grounds of the hospital and took outdoor pictures of a group that included Nussbaum and Howell. The hospital's medical director asked the newspaper not publish any patient photographs. But the Post, on the front page of the next day's edition, featured two photographs

- one was a photograph of Nussbaum taken shortly after her arrest in connection with Lisa's death and the other was the photograph, taken at the hospital, of Nussbaum walking with Howell. An accompanying article discussed Nussbaum's physical and mental rehabilitation.

Howell's name was not mentioned in the photo caption or article, but her face was discernible. According to Howell, it was imperative to her recovery that the hospitalization remain a secret from all but her immediate family. Howell proceeded to sue the Post and other parties for violating sections 50 and 51 of the New York Civil Rights Law, intentional and negligent infliction of emotional distress, trespass, harassment and prima facie tort.

New York Court of Appeals Court Judge Judith S. Kaye reviewed the development of the tort of intentional infliction of emotional distress and of sections 50 and 51 of the Civil Rights Law, and noted that a claim grounded in the right to privacy must fall within sections 50 and 51. The court then found that there was a real relationship between the article and the photograph of Howell, and that the civil rights cause of action was properly dismissed.

It was further found that insofar as Howell's claim was based on the publication of her photograph, the publication was qualifiedly privileged and there were no circumstances that would defeat the privilege. Even if the Post parties were aware that publication would cause Howell emotional distress, publication, without more, stated the court, would not ordinarily lead to liability for intentional infliction of emotional distress.

The court concluded by rejecting Howell's contention that the manner in which her photograph was obtained constituted extreme and outrageous conduct as contemplated by the tort of intentional infliction of emotional distress. The photographer's conduct did not "remotely approach the required standard," stated Judge Kaye in affirming the appellate court decision with respect to the individual parties (the New York Post, subsequent to oral argument, filed a Chapter 11 bankruptcy petition which operated as an automatic stay of the proceeding as to the newspaper.)

Howell v. New York Post Company, Inc., 612 N.E.2d 699, 1993 N.Y.LEXIS 658 (N.Y. 1993) [ELR 15:11:21]

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**Court rules on defamation claims arising from Vincent Bugliosi book about murder trial**

In the summer of 1974, Stephanie Stearns and Buck Duane Walker sailed from Hawaii to Palmyra Island on a sailboat called the "Iola." Palmyra Island, a possession of the United States located in the North Pacific Ocean, is uninhabited. When Stearns and Walker reached the island, according to Federal District Court Judge David Alan Ezra, they realized they had packed inadequate food and supplies for their return voyage and that their sailboat was in very poor condition for such a voyage.

A second sailboat, the "Sea Wind," arrived at the island from San Diego, with a crew of Muff and Mac Graham.

In about October 1974, Stearns and Walker sailed the "Sea Wind" into Hawaii; the boat had been repainted since it left San Diego and the Grahams were not aboard. Stearns and Walker, who stated their belief that the Grahams had died in a boating accident, later were charged, tried and convicted in a Hawaii state court for the theft of the "Sea Wind."

In 1981, the bones of Muff Graham were found washed up on Palmyra Island. Stearns and Walker were indicted for the murder of Graham in a Federal District

Court in Hawaii. The court appointed Earle Partington to represent Buck Walker; Stearns was represented by Vincent Bugliosi and other counsel. Following the trials of Walker, who was convicted, and Stearns, who was acquitted, Bugliosi, together with Bruce Henderson, wrote "And the Sea Will Tell," an account of the Graham murder and Bugliosi's role in defending Stearns against the murder charge.

In February 1991, CBS Inc. broadcast a television miniseries based on the book.

Partington sued Bugliosi, the publisher of the book and various CBS parties for defamation.

Partington first claimed that the effect of the false statement that "Partington was a former state prosecutor in South Africa" was the equivalent of having been called a prosecutor in Nazi Germany. Judge Ezra stated that although it was "questionable" whether the statement bore the suggested equivalency, the statement implied that Partington "was in some positive manner associated with the South African government." At the time of the publication of the book, noted the court, the South African government "was widely recognized to be racist and violative of basic human rights." The association with South Africa thus might have the effect of harming Partington's reputation or lowering his esteem in the community.

Bugliosi noted that Partington was a prosecutor in South Rhodesia which, it was argued, was similar to being a prosecutor in South Africa. Judge Ezra, however, stated that the effect of Partington's position in South Rhodesia would be relevant to damages, not to liability. The court took judicial notice of the fact that any violations of human rights that may have occurred in South Rhodesia were not as well-known as those that occurred in South Africa.

Judge Ezra then found that the statement was libelous per se and that Partington was not required to allege special damages.

With respect to the question of Partington's status as a public figure, the court, after careful analysis, determined that Partington was a public figure for the purpose of the Walker trial. Judge Ezra declined to grant Bugliosi's motion for summary judgment, finding that Partington adequately alleged actual malice on the part of Bugliosi, but granted the motion for summary judgment on behalf of the other parties, with leave to Partington to amend his complaint to allege actual malice on the part of the remaining parties. It will remain for a jury to determine whether any of the parties acted with actual malice in making the challenged statement.

The court dismissed Partington's claims with respect to various other purportedly defamatory statements, finding that the statements either were protected expressions of opinion or were not reasonably susceptible of a defamatory interpretation.

Partington v. Bugliosi, 825 F.Supp. 906, 1993 U.S.Dist.LEXIS 8645 (D.Hawaii 1993) [ELR 15:11:22]

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**Art restorer may proceed with libel and contract claims arising from response to his work on Barnett Newman painting**

The Stedelijk Museum of Amsterdam purchased, from the estate of artist Barnett Newman, the painting "Who's Afraid of Red, Yellow and Blue III"; the 18 feet long and eight feet high painting, as described by New York appellate court Judge Edward J. Greenfield, was almost entirely red with a narrow vertical blue stripe on the left side and a narrower vertical yellow stripe on the right.

The painting, which the museum purchased for $75,000, was valued at $3.1 million in 1986 when a viewer slashed the work with horizontal and vertical gashes measuring more than 50 feet, and virtually destroyed the piece.

The museum agreed to pay $270,000 to Daniel Goldreyer to restore the painting. Goldreyer had been Newman's conservator and collaborator for more than 25 years. Goldreyer agreed to use his "best efforts" to restore the painting, retaining its texture, color and brilliance. The museum formed a committee to inspect the restoration work in New York as it proceeded.

In three years, when the work was completed, the director of the museum expressed "complete and unequivocal approval" of the restoration. Although Elisabeth Bracht, the chief in-house conservator at the museum apparently had reservations about Goldreyer's efforts, the museum, in August 1991, accepted the work. A letter agreement stated, in part, that the museum would give "full credit and publicity" to Goldreyer for the conservation and restoration of the painting.

When the painting was placed back on display at the museum, a controversy arose as to whether Goldreyer's work had restored or, as claimed by Bracht and an individual identified as Van de Wetering, had destroyed the painting. Van de Wetering accused Goldreyer of using a paint roller to cover the canvas, instead of repainting the slashes with two million red dots of paint, and purportedly called Goldreyer "a fraud who fooled the Stedelijk Museum in a shameless manner."

A government forensic laboratory, in response to a request by the museum director, Dr. Wim Beeren, examined the painting. The laboratory's report on its findings occasioned the comments challenged by Goldreyer in the instant proceeding.

Goldreyer first claimed that Beeren breached his contractual obligation to inform the public that the conservation was performed in a satisfactory manner and failed to correct inaccurate statements about the laboratory report.

Goldreyer also alleged that Van de Wetering and Bracht interfered with contractual relations, induced a breach of contract by Beeren, and disseminated false and derogatory information about the restoration in order to induce a breach.

Goldreyer sued the Amsterdam newspaper, De Telegraaf, for libel arising from the allegedly false report that the restorer overpainted Newman's work with a roller and alkyd paint.

Goldreyer also sued Time International for libel for its December 31, 1991 article on the controversy entitled "Was a Masterpiece Murdered?" Goldreyer claimed that the article was defamatory in stating that the restorer had used the same paint material used by house painters and in stating that "the painting no longer exists." The January 6, 1992 issue of Time repeated the essence of the story.

And the Dow Jones Co., Inc., the publisher of the Wall Street Journal, was sued for publishing an article headed "For That Price, Why Not Have the Whole Museum Repainted?" The article questioned whether the restorer used house paint and a roller to repair the work and asked "should the accused restorer be extradited?" Goldreyer claimed that the question implied that he had committed a crime.

Goldreyer sued Suzanne Schnitzer for defamation based on the art critic's purported comment to Time Magazine that the restoration, if rehung, should be accompanied by a sign reading: "Newman According to Goldreyer."

Judge Greenfield first found that Beeren's activities in New York provided an "ample" basis for jurisdiction. The contract was negotiated and executed in New York, the work was performed in the state and Beeren made seven inspection visits to New York, paid for, and received, the completed painting in the state.

The court ordered further discovery prior to ruling on jurisdiction with respect to Bracht and Van de Wetering.

Judge Greenfield dismissed the complaint against the Amsterdam newspaper and its editor and writer, finding that the parties did not transact business within the state and that the relevant jurisdictional statute excepted from long arm jurisdiction a cause of action arising from defamation allegedly committed outside the state. The fact that a minimal number of copies of the publication might be present in New York did not meet the long-arm requirement that a non-domiciliary must derive substantial revenue from its business dealings in the state.

With respect to Beeren's personal liability, the court observed that in a receipt signed by Goldreyer and Beeren, the museum's name was deleted in the provision dealing with the public defense of the restoration; one of the pertinent documents specified that Beeren personally would certify the success of the restoration. There was no question, stated Judge Greenfield, that Beeren "manifested an intention to substitute his own responsibility in this provision for that of his principal, the Museum." This was an assumption of individual liability by Beeren of the obligation to defend the restoration; if Goldreyer establishes a breach of the obligation to defend the integrity of the restoration, then damages would result from Beeren's failure to act as required, stated the court.

In turning to the claim of tortious interference with contractual relations, Judge Greenfield noted that Goldreyer might have problems of proof with respect to Bracht and Van de Wetering's knowledge of the contract between Goldreyer and Beeren, but that any such problems would await trial. The court also ordered discovery to proceed on the issue of whether pressure by Bracht and Van de Wetering caused Beeren to express no affirmative opinions about the restoration.

With respect to the libel claims, Judge Greenfield observed that the Time International piece referred to the restoration of the Newman painting as "controversial," and quoted Van de Wetering's comment that "Goldreyer covered the entire canvas using a roller," and that the restorer was "a fraud who fooled the Stedelijk Museum in a shameless manner." The article reported that the Dutch forensic laboratory "concluded that Goldreyer had not matched the original oils," and "used alkyd, a synthetic paint commonly used on window frames," and further stated that "Whatever happens, for the burghers of Amsterdam the glow is gone from Newman's once warmly wonderful masterpiece..."

After discussing the contents of the Wall Street Journal article, the court recalled that section 74 of the New York Civil Rights Law provides, in part, that a civil action cannot be maintained for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

Judge Greenfield found that the Time article, in stating that the alkyd was a synthetic paint "commonly used on window frames" did not accurately report on the forensic laboratory's findings. Although alkyd was found, Goldreyer noted that Newman frequently had used alkyd paint as a preservative and that the restorer had informed Beeren, in writing, of the use of the material. The Time article did not merely state that alkyd was found, but suggested that this was inappropriate, noted the court, and a "cheap, unprofessional and inartistic way to restore a painting, conclusions not found in the report."

Judge Greenfield further observed that the museum and Beeren not only accepted the restoration as satisfactory, but also, in a report to the City Council of Amsterdam, stated that the concept and expression of the painting had been retained on a very high level and that it was a "very marvelous piece of work and was in accordance with the express wishes of Newman's widow."

The laboratory findings did not justify the conclusion in the Time article that the restorer used "an inappropriate type of paint." The reference to alkyd put a damaging "spin" on the report, stated the court, in finding that it could not be concluded as a matter of law that the article, which went "well beyond the objective findings of the laboratory constituted a fair report."

As to the portions of the news stories which were not drawn from the forensic report, the court found that the statements that the painting was "murdered" and that "the painting no longer exists." could be construed as going beyond an opinion that the restoration was unskillful - the statements appeared to the court to assert as a fact that the original work was "utterly destroyed." The statements were not entitled to immunity as a matter of law and a jury must determine whether the statements were libelous.

The Time International headline "Was a Masterpiece Murdered?" was not immune merely because it was phrased as a question, continued the court, which recalled that rhetorical devices do not enable a party to escape a charge of libel.

The Wall Street Journal's headline question also was sarcastic in tone and implied that the price charged for the restoration was way out of line, stated Judge Greenfield. The lead of the article asked "Did a New York Art Restorer Use Housepaint and a Roller Brush to Repair a

Million Dollar Painting," and the article asked whether Goldreyer should be extradited.

The challenged statements were highly derogatory of Goldreyer's restoration efforts; the statements were not immunized as opinion by their attribution to others, i.e., that "some thought" that Goldreyer "had used a roller to slap housepaint on it." And the reference to extradition clearly implied criminality, stated Judge Greenfield, especially given the context of the article which implied fraud, not merely artistic differences of opinion.

The fact that the allegedly defamatory statements could be considered humorous was not a defense as a matter of law, for a jury might find that the statements were untrue and defamatory.

In all, the challenged articles could be viewed as possibly implying assertions of provably false facts. Goldreyer did not need to allege special damages since the use of language which tended to expose him to contempt and ridicule and harm him in the practice of his profession could be considered defamatory per se.

The court then found, with respect to the statement attributed by Time to Schnitzer that the question of whether or not Schnitzer made the comments presented questions of fact and credibility as between Time, Inc. and Schnitzer and did not warrant a dismissal of the complaint on the ground, as argued by Schnitzer, that she never made the statement attributed to her.

The statement went beyond the assertion of critical or artistic opinion, stated the court -- it was not the "subjective esthetic judgment of a critic as to whether the work of art was good or bad"; rather, "it proclaim[ed] that the public must be warned, not that this is a good or bad painting . . . but that it is not genuine and that it [was] substantially altered. . . ." A jury must determine whether Schnitzer's statement, if made, was a statement of fact as to the continued authenticity of the Newman painting or was merely an art critic's personal perspective.

Daniel Goldreyer Ltd. v. Van de Wetering, New York Law Journal, p. 27, col. 3 (N.Y.Cnty., Dec. 6, 1993) [ELR 15:11:22]

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## Briefly Noted:

### "Let the Good Times Roll" Dispute.

As reported at ELR 9:3:13, 9:5:11, Shirley Goodman sued Audrey Lee and Nikki Lee, the widow and surviving child of Leonard Lee, claiming rights in the song "Let the Good Times Roll." Goodman and Lee recorded the song when they performed professionally as the duo of "Shirley and Lee." Lee obtained a copyright to "Let the Good Times Roll" solely in his name; after Lee's death in 1976, his wife and son received the writer's royalties and obtained a renewal of the copyright in the song.

Goodman sued the Lees for declaratory judgment to establish her claim of co-authorship and sought an accounting.

After various proceedings (described in a per curiam opinion of a Federal Court of Appeals in Louisiana), a Federal District Court jury found that Goodman was the co-author of the song; the District Court entered a "judgment" (quotes by the Court of Appeals) declaring that Goodman "was entitled to one-half of the income from the song from 1956 to date, together with prejudgment interest thereon, and all costs." The court did not state a set amount of income or damages, but did order the Register of Copyrights to indicate that Goodman was the co-author and joint owner of the copyright registration and renewal in "Let the Good Times Roll."

When the Lees appealed the denial of various post-trial motions, the Court of Appeals first denied Goodman's motion to dismiss the Lees' appeal as untimely.

The court then considered whether, in the absence of a determination of damages, the District Court had entered a final judgment so as to establish jurisdiction of the Lees' appeal. Goodman argued that she asked only for an accounting and waived other damage claims, but the court stated that the waiver was "ambiguous and equivocal at best" and that it therefore was required to evaluate the finality of the District Court's judgment.

The Court of Appeals stated that the award sought by Goodman could not be made by a "mechanical determination." It was noted that the parties had not agreed upon or approved a gross amount; and that Goodman had not presented corroborating documents, identified third party users who paid royalties, or obtained other information about royalty payments for the song. In all, Goodman sought money damages yet to be determined by the District Court; the determination of royalty payments was not "ministerial" or "mechanical;" and the judgment of the District Court was not final. The Court of Appeals, being without jurisdiction in the matter, dismissed the appeal.

Goodman v. Lee, 988 F.2d 619, 1993 U.S.App. LEXIS 8409 (5th Cir. 1993) [ELR 15:11:25]

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**Insurance Coverage.**

Caterpillar, Inc., the copyright owner of "Numerical Parts Record" and "Parts Book Library," claimed that R.J.Weber Co. distributed, without permission, copies of the works. Sentry Insurance had insured Weber against claims based on personal and advertising injuries. Sentry sought a declaratory judgment that it had no duty to defend Weber. A Federal District Court granted summary judgment in favor of Sentry, finding that the copyright infringement action was not related to Weber's advertising activity.

A Federal Court of Appeals has affirmed the District Court decision. The court noted that the policy covered a copyright infringement action only if Weber infringed a copyright in the course of its advertising - the relevant clause was not a policy limitation or exclusion.

Weber did not identify any connection between Caterpillar's claims and Weber's advertising activity; the policy did not cover Caterpillar's claim; and Sentry had no duty to defend Weber in the underlying action, concluded the court.

Sentry Insurance v. R.J.Weber Company, Inc., 2 F.3d 554, 1993 U.S.App. LEXIS 23455 (5th Cir. 1993) [ELR 15:11:25]

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## IN THE NEWS

### Jury awards Vanna White $403,000 in damages in action over Samsung Electronics advertisement

A Federal District Court jury in Los Angeles has awarded Vanna White damages of $403,000 in an action against Samsung Electronics arising from the company's advertisement featuring a robot which resembled White.

After lengthy litigation (ELR 15:4:8; 14:4:3), a Federal Court of Appeals had allowed White to proceed with right of publicity and Lanham Act claims against Samsung.

White, according to news reports, testified that the advertisement, which depicted a futuristic "Wheel of Fortune" set, would reduce her potential endorsement income, as well as damaging her image. [April 1994][ELR 15:11:26]

## Juries reject copyright infringement claims against Michael Jackson

Michael Jackson has prevailed in two separate copyright infringement actions involving some of the most popular recordings ever made.

In one case, a Federal District Court jury in Los Angeles rejected a copyright infringement claim brought by Reynaud Jones and Robert Smith against Michael

Jackson and others. Jones claimed that "We Are the World" was based on his 1977 song "What Will Become of the Children." And it was alleged that Lionel Richie, the co-writer of "We Are the World," songwriter Rod Temperton, and record producer Quincy Jones also used part of Reynaud and Jones' demo tape in "Thriller" and "The Girl is Mine." Reynaud and Jones testified that had left the demo tape with the Jackson family.

In the other case, a Federal District Court jury in Denver found that Michael Jackson's song "Dangerous" did not infringe a song written by Crystal Cartier. Cartier alleged that Jackson had heard a demonstration tape of her song, but Jackson denied hearing Cartier's song and testified that he wrote the music and lyrics to "Dangerous." [April 1994][ELR 15:11:26]

## Dispute between music companies and record store owners over sale of used CDs is settled

In August 1993, the Independent Music Retailers Association, on behalf of more than 300 store owners who sell used compact discs, filed a class action claim against the distribution entities associated with Sony Music, Warner Elektra Atlantic, EMI Music and MCA Music Entertainment Group. The association claimed that the companies conspired to restrain trade and restrict the availability of used CDs. The companies, according to a news report, had withheld millions of dollars in advertising support from the record store owners.

It has been reported that the parties have settled the lawsuit. The details of the settlement were not released, but the music companies most likely will be making payments, in an undisclosed amount, to the store owners. The agreement does not include payments to Wherehouse Entertainment, the first major chain to sell used CDs; Wherehouse filed a separate lawsuit against the music companies and was separately reimbursed for lost advertising funds.

The settlement also does not affect the Federal Trade Commission's ongoing antitrust investigation of the music companies in connection with allegations of price-fixing in the market for new compact discs. [April 1994][ELR 15:11:26]

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## Dispute over "Honey, I Blew Up the Kid" is settled

As reported at ELR 15:9:28, a Los Angeles trial court jury awarded $300,000 to Paul Alter who claimed that his treatment "Now, That's a Baby" was the basis for the Walt Disney Co. film "Honey, I Blew Up the Kid."

According to news reports, Alter and Disney have settled the matter; the terms of the settlement were not disclosed, but Disney has agreed to drop any motions for a new trial. [April 1994][ELR 15:11:26]

## Broadcast networks and cable companies adopt proposals to reduce violent programming

In early February 1994, the broadcast television industry announced that it would form an independent monitoring board to evaluate the amount of violence in entertainment programming. Cable companies, including Disney, HBO, MTV, and Playboy, endorsed the monitoring board proposal and also agreed to begin rating programs for violence and to develop technology that would permit parents to block children's access to such programs.

The broadcast and cable companies apparently sought to avoid the prospect of federal legislation. [April 1994][ELR 15:11:27]

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## Guggenheim Museum settles lawsuit against good faith purchaser of stolen Chagall work

As reported at ELR 13:5:16, the New York Court of Appeals decided that the Solomon R. Guggenheim Foundation (the operator of the Guggenheim Museum) could seek to recover a Marc Chagall gouache from a good faith purchaser.

Sometime in the mid-1960s, the 1912 work, a study for Chagall's oil painting, "Le Marchand de Bestiaux," was stolen from the museum. Solomon R. Guggenheim had donated the gouache to the museum in 1937.

Rachel Lubell and her husband, now deceased, purchased the work in 1967 from an art gallery for $17,000. Lubell claimed that before the museum demanded the return of the gouache in 1986, she had no reason to believe that the work had been stolen. The museum, for several years, did not report the theft of the work.

According to news reports, the museum and Lubell have reached a settlement whereby Lubell will retain the gouache, but will pay an undisclosed amount to the Guggenheim. Before the settlement was filed, it was indicated that the museum would receive $212,000, including $134,000 from the art dealers who sold the work and $78,000 from Lubell. [April 1994][ELR 15:11:27]

## Rulings are issued in California employment and sales tax matters

In January 1994, a Los Angeles trial court held that Louis Albert Niemeyer, an assistant cameraman, and Thomas Frederic Coleman Jr., a grip, who worked for a commercial production company were independent contractors, not employees. The court noted that Niemeyer rented his equipment and performed his tasks, "which required certain expertise, without elementary guidance. He was paid a flat rate, whether he worked a full day or not, and had to fulfill a contract. Coleman also had "a certain skill and knowledge necessary to perform his job requirements, and also worked on a per diem basis." Certain other unspecified categories of workers also were found to be independent contractors.

However, the court ruled that William Joseph Powloski, a production assistant for the company who "proceeded under the complete direction of the Colman Group, guided in most every detail of his job" was an employee and that the company was liable for the payment of state unemployment and disability taxes. According to Schuyler M. Moore of Stroock & Stroock & Lavan (310) 556-5813, the decision in The Colman Group v. California EDD, may apply, in certain circumstances, to television and film production. And although dealing with California taxes, the case may be precedential and perhaps binding for federal tax purposes, according to Mr. Moore, because federal tax law and California tax law apply the same common law test.

In November 1993, the California State Board of Equalization, in Appeal of Jet Sets, granted a refund of previously imposed sales taxes to a set construction company for art direction services rendered after January 1, 1988. The Board also concluded that standby labor (when repairs are made to the set during shooting) was nontaxable because it was strictly repair labor, and that strike labor (disposing of the set after shooting) was nontaxable because it was optional. The decision will apply to all set construction companies in California, stated Mr. Moore. [April 1994][ELR 15:11:27]

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## WASHINGTON MONITOR

### Congress eliminates Copyright Royalty Tribunal and jukebox compulsory license

Congress has enacted the Copyright Royalty Tribunal Reform Act of 1993, and it was signed by President Clinton on December 17, 1993. The Act more than lives up to its name, for it does not merely "reform" the workings of the Copyright Royalty Tribunal. It eliminates the Tribunal entirely.

Since 1978, the Tribunal had been responsible for adjusting the license fees due under the compulsory license provisions of the Copyright Act, and it was responsible for allocating those license fees among copyright owners when they disagreed (as they often did) about how those fees ought to be divided among them. The Tribunal's responsibilities and duties have been transferred by the Reform Act to ad hoc copyright arbitration royalty panels to be administered by the Library of Congress and the Copyright Office. Immediately after enactment of the Reform Act, the Copyright Office adopted the full text of the Tribunal's rules and regulations, with only slight technical changes, for use on an interim basis. More recently, the Copyright Office published a set of its own proposed rules and conducted a public meeting to discuss them.

The Reform Act also repeals the jukebox compulsory license (which had been found in section 116 of the

Copyright Act). The jukebox license has been replaced with negotiated or arbitrated licenses which are to be reached using procedures that were set forth in section 116A of the Copyright Act (now renumbered as section 116).

Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198); Copyright Arbitration Royalty Panels; Rules and Regulations, 58 Fed.Regis. 67690 (Library of Congress; Copyright Office 1993), 59 Fed.Regis. 2550 (Library of Congress; Copyright Office 1994) [ELR 15:11:28]

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**Copyright Office issues regulations concerning statements to be filed under Audio Home Recording Act**

The Copyright Office has issued additional regulations governing its administration of the Audio Home Recording Act of 1992. That Act requires royalties to be paid by those who manufacture, import or distribute digital audio recorders or tape. (ELR 14:7:13, 14:11:19) These royalties must be accompanied by quarterly and annual accounting statements. In response to comments from those interested in the content of the accounting statements, the Copyright Office has revised the initial edition of the quarterly statement, has adopted an annual statement form, and has revised its regulations concerning the content of those statements.

Digital Audio Recording Device and Media; Statements of Account, 59 Fed.Regis. 4586 (Library of Congress; Copyright Office 1994) [ELR 15:11:28]

## Music public performance fees payable by public broadcasting stations licensed to colleges are increased slightly

In what may have been its last official act before going out of existence, the Copyright Royalty Tribunal increased the public performance royalties payable by public broadcasting entities licensed to colleges, universities or other nonprofit educational institutions (not affiliated with National Public Radio), for their use of copyrighted published nondramatic music. Effective as of January 1, 1994, the royalty rate to be paid by such broadcasters shall be $200 annually for compositions in the ASCAP repertory, $200 annually for compositions in the BMI repertory, $47 annually for compositions in the SESAC repertory, and $1 for the performance of any other such composition. The increase is the result of an annual cost of living adjustment and amounts to approximately 2.6%.

Cost of Living Adjustment for Performance of Musical Compositions by Public Broadcasting Entities Licensed to Colleges and Universities, 58 Fed.Regis. 63294 (Dec. 1, 1993) [ELR 15:11:28]

## DEPARTMENTS

### In the Law Reviews:

Federal Communications Law Journal, published by Indiana School of Law-Bloomington and the Federal Communications Bar Association, has published Volume 46, Number 1 with letters of welcome from

President Bill Clinton and Governor Birch Bayh and the following articles:

Cable Television Regulation: Promoting Competition in a Rapidly Changing World by Representative Edward J. Marley, 46 Federal Communications Law Journal 1 (1993)

The Cable-Telco Cross-Ownership Prohibition: First Amendment Infringement Through Obsolescence by Representative Michael G. Oxley, 46 Federal Communications Law Journal 7 (1993)

Shifting Foundations: The Regulation of Telecommunications in an Era of Change by Commissioner Andrew C. Barrett, 46 Federal Communications Law Journal 39 (1993)

Reinventing Rate Regulation by Nicholas W. Allard, 46 Federal Communications Law Journal 63 (1993)

Cable Television Subscriber Equipment: Lessons from the Common Carrier Experience by David Alan Nall, 46 Federal Communications Law Journal 125 (1993)

The Television Violence Act of 1990: A New Program for Government Censorship? by Julia W. Schlegel, 46 Federal Communications Law Journal 187 (1993)

Seton Hall Journal of Sport Law has published Volume Four, Number One with the following articles:

The Practical Impact and Historical Significance of the National Football League Free Agency Compromise after McNeil v. National Football League, by Bernard

Pellegrino and Seth Josephson, 4 Seton Hall Journal of Sport Law 1 (1994)

Reconstruction: Baseball's New Future by Depak Sathy, 4 Seton Hall Journal of Sport Law 27 (1994)

"Batter-Up!": Are Youth Baseball Leagues Overlooking the Safety of Their Players? by Daniel Nestel, 4 Seton Hall Journal of Sport Law 77 (1994)

The NCAA's Involvement in Setting Academic Standards: Legality and Desirability by Michael R. Lufrano, 4 Seton Hall Journal of Sport Law 97 (1994)

University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity? by James S. Thompson, 4 Seton Hall Journal of Sport Law 143 (1994)

"Fore!" May Be Just Par for the Course by Karen M. Vieira, 4 Seton Hall Journal of Sport Law 181 (1994)

Injunctive Relief for Trademark Infringement Is Not Available When Likelihood of Confusion Does Not Exist As to the Source of the Goods or Services or When an Entity Abandons a Trademark - Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd. by Mark A. Robinson, 4 Seton Hall Journal of Sport Law 205 (1994)

The Jock Tax: State and Local Income Taxation of Professional Athletes by Elizabeth C. Ekmekjian, 4 Seton Hall Journal of Sport Law 229 (1994)

The Need to Regulate Sports Agents by Alec Powers, 4 Seton Hall Journal of Sport Law 253 (1994)

Major League Baseball and Its Antitrust Exemption by Allan Selig, 4 Seton Hall Journal of Sport Law 277 (1994)

Baseball Economics and Antitrust Immunity by Andrew Zimbalist, 4 Seton Hall Journal of Sport Law 287 (1994)

The Virginia "Son of Sam" Law: An Unconstitutional Approach to Victim Compensation, 2 William and Mary Bill of Rights Journal 495 (1993)

The Impact of NAFTA on Intellectual Property by Sheldon Burshtein and Gervas Wall, 13 The Licensing Journal 16 (1993)
[ELR 15:11:30]