LEGAL AFFAIRS

A Split Decision in Student Athlete Drug Testing Cases: California and Colorado Supreme Courts Disagree about Constitutionality of Drug Tests for Student Athletes

by Eileen L. Selsky

At virtually the same time, the California Supreme Court and the Colorado Supreme Court both considered the constitutionality of requiring student athletes to consent to drug-testing in order to compete in intercollegiate sporting events. The result: a split decision. Moreover, the United States Supreme Court declined an opportunity to resolve the conflict when it denied a petition for certiorari in the Colorado case.

In Hill v. National Collegiate Athletic Association, the California Supreme Court rejected the claim of Stanford students that the drug-testing program of the NCAA, a testing program involving monitored urinalysis of athletes, violated the state constitution. In doing so, the court took the opportunity to set forth a new standard for evaluating claims under the "Privacy Initiative."

By contrast, in University of Colorado v. Derdeyn, the Colorado Supreme Court found that the University of Colorado's failure to obtain the voluntary consent of student athletes for its program of conducting random, suspicionless urinalysis drug testing violated the Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution.

The facts of the California case

In the California case, J. Barry McKeever, a Stanford University football player, signed an NCAA consent form for the 1986-1987 school year and underwent drug testing in connection with his participation in the 1987 Gator Bowl. The NCAA requires student-athletes to sign consent forms each school year or face exclusion from intercollegiate athletic competition. Neither McKeever nor Jennifer Hill, the co-captain of the Stanford women's soccer team in her senior year, signed consent forms for the drug testing program in 1987-1988.

McKeever, Hill, and other student athletes at Stanford, sued the NCAA, contending that the drug testing program violated their right to privacy under Article I, section 1 of the California Constitution. The provision states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." The phrase "and privacy" was added to the constitution by an initiative (the Privacy Initiative or Amendment) adopted by state voters in 1972.

Lower court proceedings

A Santa Clara trial court issued an injunction barring the NCAA from enforcing the drug testing program against Stanford or its students, wherever the testing might be conducted. The court concluded that the NCAA did not show that it had a compelling interest in the testing program based on evidence of actual use of each of the banned drugs by a significant number of the male and female athletes in each of the NCAA sports; that the NCAA did not show that each of the categories in its 58 page list of banned prescription and over-the-counter drugs had a performance-enhancing effect; or that there was no less intrusive alternative than monitored urinalysis.

The trial court decision was upheld by an appellate court (ELR 12:7:6). Survey results appeared to the court to support the contention that athletes do not use drugs any more than other students; the court also stated that the evidence "demonstrated that there was no drug involvement in any sport except football, and that the problem related only to steroid use and involved a small minority of the football players."

California Court upholds NCAA drug tests

California Supreme Court Chief Judge Malcolm Lucas, in a decision joined by five justices, reversed the judgment of the appellate court and directed entry of final judgment in favor of the NCAA. Judge Lucas described how the NCAA randomly selects student athletes competing in postseason championships and football bowl games and requires the athletes to provide samples of their urine under closely monitored conditions. Urine samples are analyzed for proscribed substances and athletes testing "positive" are subject to discipline.

Judge Lucas pointed out that student athletes "undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms . . . they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics."

A student athlete's "already diminished expectation of privacy" is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs, declared Judge Lucas, citing the association's interests in insuring "fair and vigorous competition," as well as protecting the health and safety of student athletes. The NCAA's rules provide for advance notice to athletes of testing procedures and for written consent to testing; for the random selection of athletes actually engaged in competition; for monitored collection in order to avoid substitution or contamination; and for various procedures designed to safeguard the confidentiality of the testing process and its outcome. In all, the NCAA's program did not violate the athletes' constitutional right to privacy.

Judge Lucas then discussed the events leading to the NCAA's adoption of drug testing and the nature of the testing program, recalling that the trial court had found, in part, that there was no "compelling need" for drug testing to protect the health of college athletes or the integrity of athletic competition. The trial court determined that the NCAA had failed to show that drug education and testing based on reasonable suspicion were inadequate to control drug use by athletes.

Judge Lucas, in considering an issue of first impression in the court, i.e., whether the Privacy Initiative would govern the conduct of private, nongovernmental entities such as the NCAA, rejected the NCAA's argument that the Privacy Initiative did not extend to actions against nongovernmental entities. Judge Lucas referred to the ballot arguments pertaining to the initiative, to appellate court rulings applying the state constitutional right to privacy against private parties, and to the NCAA's role in generating, retaining and using personal information about student athletes to support the finding that the association was subject to the Privacy Initiative.

The next issue of first impression addressed by the court was the standard for determining an invasion of privacy under Article I, section 1. It was observed that the right to privacy derives from a common law right "protecting a diverse set of individual interests from interference by nongovernmental entities" and from a federal constitutional right, derived from various provisions of the Bill of Rights "that took distinct shape in United States Supreme Court decisions in the 1960s safeguarding the rights of individuals and private entities from government invasion."

After reviewing the development of the common law right to privacy, a "legally amorphous" tort based on social custom and psychological well-being, and the federal constitutional right to privacy, the court remarked that the diversity of federal constitutional "privacy" interests has left the federal right to privacy "without any coherent legal definition or standard." The United States Supreme Court apparently has not applied a strict scrutiny standard for all privacy-based interests at all conceivable levels of intrusion, stated Judge Lucas.

Seeking to determine the elements of a cause of action for invasion of the state constitutional right to privacy, Judge Lucas recalled that the lower courts accepted Hill and Stanford's argument that the NCAA was required to justify any conceivable impact on the student athletes' privacy interest by a "compelling interest" and to establish that the drug testing program was the "least restrictive" alternative furthering the NCAA's interests. But in Judge Lucas' view, neither the language nor history of the Privacy Initiative supported a standard whereby every assertion of a privacy interest under Article I, section 1 must be overcome by a "compelling interest."

The court, upon careful consideration, announced that a party alleging the violation of the state constitutional right to privacy must establish a legally protected privacy interest; a reasonable expectation of privacy in the circumstances; and conduct constituting a serious invasion of privacy. Whether a legally recognized privacy interest is present in a case is a question of law to be decided by the court. The remaining elements are "mixed questions of law and fact." If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on a privacy interest, the question of invasion may be adjudicated as a matter of law.

In the instant case, the court agreed with the student athletes that the NCAA's drug testing program impacts legally protected privacy interests. By monitoring an athlete's urination, the program intrudes on a human bodily function that is generally performed in private, and by collecting and testing an athlete's urine and inquiring about his/her ingestion of medications and other substances, the NCAA obtains information that is regarded as personal and confidential.

In the context of participating in intercollegiate athletic activity, particularly in postseason championship events, there is close regulation of the physical fitness of student athletes - required physical examinations and other special dietary and fitness regulations are "routine aspects" of a college athlete's life. An athlete, faced with such regulation, has a diminished expectation of personal privacy in his/her bodily condition, stated the court, and drug testing programs involving athletic competition have routinely survived Fourth Amendment "privacy" challenges.

A student athlete's expectation of privacy is further reduced because the NCAA provides advance notice of its banned substances rules and testing procedures and obtains the informed, written consent of each student athlete. The fact that an athlete who refuses consent to drug testing is disqualified from NCAA competition does not render the athlete's consent to testing involuntary. Athletic participation is not a government benefit or an economic necessity, stated Judge Lucas, and if the student athletes and Stanford, knowing the rules, "choose to play the game, they have, by social convention and legal act, fully and voluntarily acquiesced in the application of those rules. To view the matter otherwise would impair the privacy and associational rights of all NCAA institutions and athletes."

However, the NCAA's use of "particularly intrusive" monitored urination procedures warranted further inquiry, stated the court, even with decreased student athlete expectations of privacy.

Upon reviewing the stated interests in maintaining the testing program, the court declared that the evidence demonstrated, as a matter of law, the constitutional validity of the NCAA's program.

The NCAA, as a private organization, acting in a situation involving decreased expectations of privacy, was not required to justify its conduct as the "least offensive alternative" possible under the circumstances, noted Judge Lucas. The alternative proposed by Hill and

Stanford - educational programs and suspicion-based drug testing, differed "in kind and character" from random drug testing, and the NCAA was not constitutionally compelled to adopt these programs to further its interests in the integrity of athletic competition and in the health and safety of student athletes. The NCAA introduced substantial evidence that urine samples can be altered or substituted to avoid positive findings and that athletes actually had attempted to do so. And the student athletes failed to demonstrate with substantial evidence the presence of fully viable alternatives to monitoring. Thus, since direct monitoring apparently is necessary to accomplish accurate testing, the NCAA is entitled to use it, ruled the court. Any further consideration of less intrusive alternatives to direct monitoring was left to the judgment of the NCAA and then to future litigation, if any.

In upholding the NCAA's drug testing program, the court cautioned that it expressed no views about the legality of blanket or random drug testing conducted by employers, or by other kinds of entities.

Judge Lucas, responding to the dissenting opinion, expressed a preference "to avoid the continuing uncertainty and confusion inherent in the rigid application of a `compelling interest' test to a multi-faceted right to privacy." A standard which provides for weighing the interests at stake would be preferable to a "vague and ambiguous" standard of "a compelling interest." For Judge Lucas, the NCAA, as a sponsor of athletic competition, was well within its legal rights in adopting a drug testing program designed to eliminate the actual or potential influence of drugs in competitive sports. The dissent's position - that the Privacy Initiative would prevent a private voluntary organization from regulating college sports in the interest of fair competition - was not supported "in logic, reason, or social reality, let alone in the language or history of the statute," stated Judge Lucas.

In granting judgment to the NCAA, the court noted that it did not decide whether the recognition of a state constitutional right to privacy would violate the commerce clause of the federal Constitution. The case was remanded with instructions to direct entry of a final judgment in favor of the NCAA, and the NCAA was entitled to recover its costs.

Concurring opinions

Judge Joyce Kennard concurred in the majority opinion but would have directed the appellate court to remand the case for further consideration by the trial court. In Judge Kennard's view, the parties and the trial court were not given a full opportunity to litigate the matter under the new legal standard announced by the court - the student athletes did not have a fair opportunity to offer evidence of their reasonable expectations of privacy and the NCAA, on remand, would have an opportunity to show that the drug testing program was justified by "countervailing interests."

Judge Ronald George concurred in the majority's initial conclusion that the privacy provision of Article I, section 1 affords protection to individuals with respect to the actions of a private entity, as well as the actions of a governmental entity and also concurred in the ultimate conclusion that, in view of the interests served by the NCAA's drug testing program and the comparatively minor intrusion upon privacy interests of the program in the context of competitive, intercollegiate athletics, the random drug testing program did not violate the California Constitution.

Judge George did not agree with the court's "novel general legal standard" for evaluating privacy claims arising under the California Constitution and would have retained the established analytical framework for evaluating constitutional privacy claims. It appeared to Judge George that the new legal structure might weaken the protection afforded the California constitutional right to privacy by making it more difficult to prove a violation of the right. For Judge George, the significant consideration would be not whether a private or public entity was involved, but the nature and extent of the intrusion upon privacy resulting from the challenged conduct and the nature and strength of the justifications supporting that conduct.

Judge George challenged the majority's reading of the court's prior decisions and referred to a series of cases in which the compelling interest standard was applied to evaluate the constitutionality of various measures under the California privacy clause. The lower courts may have interpreted the compelling interest standard as imposing an extraordinarily heavy burden of proof and justification upon the NCAA to establish the validity of its drug-testing program. However, although agreeing that the lower courts erred in imposing such a heavy burden upon the NCAA, Judge George would have found that the error was in the courts' understanding and application of the compelling interest standard, not in the viability of the standard itself. The standard does not place an unreasonable burden upon a party to justify any intrusion on privacy, stated Judge George - a court applying the standard would be expected to use a balancing test taking into account the nature and the degree of the intrusion, i.e., whether the extent of an intrusion is justified by a sufficiently compelling interest served by the intrusive action.

Under a proper application of the traditional constitutional balancing test, the NCAA drug testing program would be valid, according to Judge George, who stated that the NCAA satisfied its burden of presenting a sufficiently compelling interest to justify the limited intrusion upon the privacy concerns of the student athletes and therefore concurred in the majority's determination that the lower courts erred in enjoining the program.

Dissenting opinion

Judge Stanley Mosk, in dissent, declared that the majority "all but abrogate[d] the right of privacy" under Article I, section 1. After carefully reviewing the arguments in the ballot pamphlet concerning the privacy proposition, Judge Mosk concluded that the status of the right to privacy is "fundamental," and that the right should be abridged only when there is "compelling public need." A party would be required to prove his/her right to privacy and the interference therewith by meeting a preponderance of the evidence burden of proof, and any justification of the conduct would have to be proved under the same burden.

Judge Mosk next set forth the terms of the NCAA's drug testing program as it stood in 1987-1988, noting, in particular, that the banned drugs and other substances represented the majority of the drugs found in the United States and that almost all of them were lawful. In agreeing with the lower court's rulings, Judge Mosk, noted that the fact that student athletes are regulated and supervised and function in a communal environment does not make them subject to urinalysis, withdraw their authority to control their own medical treatment with lawful drugs and other substances, or prepare them to be watched by a stranger as they urinate.

In Judge Mosk's view, there was no compelling public need that would justify the abridgement of the right to privacy of Stanford student athletes arising from the NCAA drug testing program. Judge Mosk reviewed the trial court's findings concerning the lack of drug abuse among student athletes and stated that in view of the findings, the interests underlying the NCAA program in avoiding or minimizing the harm threatened by the use of drugs by student athletes would not be "compelling." And even if such interests were considered compelling, the trial court had found that visually monitored urine collection was not required and that the NCAA's drug testing program was "not effective in reaching its stated goals of clean and equitable postseason competition and protecting the health and safety of student-athletes."

The trial court also had determined that the drug testing program was not immunized by the commerce clause; the appellate court and Judge Mosk agreed.

Judge Mosk concluded by reiterating the significance of the compelling public need standard and the importance of applying the standard to nongovernmental actors and against all abridgments of the right to privacy; and by describing the majority decision as taking away from Stanford student athletes, and all other Californians, the right to privacy guaranteed by the California Constitution.

The facts of the Colorado case

The University of Colorado began a drug testing program in 1984. The program was amended several times, but participation was mandatory in that the failure to sign a form consenting to random urinalysis under the program, meant that a student would be barred from participating in intercollegiate athletics at the school.

The drug testing originally required a urine test for certain proscribed drugs at each athlete's annual physical, and random urine tests thereafter. Counseling was mandated following a first positive result. The penalty for a second positive test included a seven day suspension from participating in intercollegiate athletics and the penalty for a third positive test included a minimum one year suspension. No specific monitoring procedures were prescribed for the collection of the urine samples.

The proscribed drugs were amphetamines, barbiturates, cocaine, methaqualudes, opiates, morphine, codeine, PCP and analogues and marijuana. The athletes were required to give their consent to releasing test results to the head athletic trainer at the university, the students' parents, legal guardians or spouse, the head coach of the student's team, the school's athletic director and to the student drug counseling program.

At some point, the school changed the program and provided that the penalty for a first positive test would be suspension for "the current competitive season." The penalty for a second positive test was changed to include permanent suspension from "any activity sponsored by the University of Colorado Athletic Department." Following a first positive test, the athlete also had to complete a substance abuse rehabilitation program as a condition for further participation in intercollegiate athletics.

The amended program also provided that "the collection of the specimen will be observed . . . and the athlete may be asked to disrobe in order to protect the integrity of the testing procedure."

Test results still were to be sent to the team physician, who, according to the amended program, then would inform the head athletic trainer of any positive result. The trainer would advise the athletic director of the results;

the athletic director, in turn, would notify the athlete's head coaches. The athlete also was required to participate in a conference call with his/her parents concerning the positive test results.

The university still did not provide general or specific assurances of the confidentiality of the test results.

In a third amended program, which became effective in August 1988, the school added alcohol, "over-the-counter drugs" and "performance enhancing substances such as anabolic steroids" to the list of drugs for which students could be tested. The term "athlete" was defined to include "all student participants in recognized intercollegiate sports, included but not limited to student athletes, cheerleaders, student trainers and student managers." Random "rapid eye examination" testing was substituted for random urinalysis, and a urinalysis was performed only at the athlete's annual physical examination or after a "finding of reasonable suspicion that an athlete has used drugs." Failure to perform adequately on an REE was considered "prima facie reasonable suspicion of drug use [except with regard to steroids]," and the student was required to provide a urine specimen for testing purposes if the student did not perform adequately on the eye exam. Furthermore, if a student exhibited "physical or behavioral characteristics indicating drug use including, but not limited to: tardiness, absenteeism, poor health habits, emotional swings, unexplained performance changes, and/or excessive aggressiveness," this was also considered reasonable suspicion of drug use, and the student was required to take a urine test.

Athletes were directed to provide a urine specimen in a private and enclosed area while a monitor remained outside. The monitor then would receive the sample from the athlete and check the sample for "appropriate color, temperature, specific gravity and other properties" to determine that no substitution or tampering occurred.

The athletes were required to give their consent to having the test results released to specified parties, again with no general assurances of confidentiality.

In October 1986, intercollegiate student athletes filed a class action challenging the constitutionality of the drug testing program as it then existed. The representative student, at the time of trial, was a 31-year-old Army veteran who had been a member of the school's track and field and cross-country teams in 1986-1988. Since the school refused to agree that it would not return to the policy which was initially challenged by the athletes, the court concluded that the legality of the prior testing program was not moot and that the athletes could amend the complaint to add allegations concerning any amended policy. The athletes filed an amended complaint in March 1989 seeking relief from the school's random drug testing programs, "past, present and future." Thus, an issue in the ensuing trial was the constitutionality of every version of the school's drug testing program.

Lower court proceedings

A Colorado trial court found that obtaining a monitored urine sample is a substantial invasion of privacy; that the REE did not function as a "reasonable suspicion" of drug use and that the other reasonable suspicion criteria were "incapable of indicating drug use to any degree." Testing, rather than drug education, was the major focus of the program, stated the trial court and there was no evidence that the university instituted the program in response to any actual drug abuse problem among its student athletes. The governmental interest asserted by the school on behalf of the program was compliance with

NCAA required testing, a concern for the students' health and safety, and a need to promote fair competition. These interests were not sufficiently compelling to outweigh the school's intrusion on the reasonable privacy expectations of the students, stated the trial court, and the random urinalysis drug testing of athletes without individualized suspicion therefore was ruled unconstitutional.

A Colorado appellate court affirmed the trial court decision and permanently enjoined the university from requiring any urine samples from student athletes for the purpose of drug testing (ELR 14:5:14).

Colorado Court invalidates drug testing

The Colorado Supreme Court preliminarily pointed out that it was undertaking to review random, suspicionless urinalysis drug testing of student athletes as that testing was conducted pursuant to any of the university's drug testing programs to the date of the trial. It also was observed that the Fourth Amendment protects individuals from unreasonable searches conducted by the government even when the government "acts as the administrator of an athletic program in a state school or university."

In considering the extent of any intrusion on the student athletes' privacy interests, the court declined to find that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment. The university argued that student athletes routinely provide urine samples as part of an annual, general medical exam and regularly undergo close physical contact with trainers. However, stated Judge Lohr, testimony was presented that samples for random urinalysis drug testing were not collected "in a medical environment by persons unrelated to the athletic program."

The university also claimed that the student athletes' expectations of privacy with regard to urinalysis were diminished because they had to submit to the NCAA's random urinalysis drug testing program as a condition of participating in NCAA competition. Judge Lohr commented that the fact that the students were required to consent to the NCAA program might reduce the intrusiveness of having to submit to another testing program. But testimony was presented to the trial court that the intrusive aspect of the university program was that "it transformed what might otherwise be friendly, trusting and caring relations between trainers and athletes into untrusting and confrontational relations."

The court rejected the university's argument that the student athletes' expectations of privacy with regard to urinalysis were diminished because the positive test results were confidential and were not used for the purposes of criminal law enforcement. And, in a footnote comment, the court declared that it found nothing in the university's characterization of a locker room as an area of "communal undress" that would suggest that student athletes would not be offended by monitored urination for a drug test.

In all, Judge Lohr agreed with the trial court's conclusion that the university's random, suspicionless urinalysis drug testing was a significant intrusion.

In considering the university's asserted interest in the drug testing program, it was noted that in many of the cases in which drug testing has been upheld, courts have characterized the relevant government interests as "compelling." Judge Lohr, rather than characterizing the school's interests, chose to compare them with other types of interests that have been held sufficient to justify similar intrusions. Courts have upheld suspicionless urinalysis drug testing of pilots, aviation mechanics, aircraft attendants, police and guards, and employees holding top secret national security clearances.

The university asserted no significant public safety or national security interests. Absent a showing that the athletes had a greatly diminished expectation of privacy or that the program was not significantly intrusive, the majority of cases indicated that the school's program was not a reasonable exercise of state power under the Fourth Amendment, despite the fact that the school's interest in protecting the health and safety of its intercollegiate athletes, like its interest in protecting all of its students, was "unquestionably significant."

Based on a balancing of the privacy interests of the student athletes and the governmental interests of the school, the school's random, suspicionless urinalysis drug testing program was found unconstitutional under the Fourth Amendment if the testing was conducted according to the procedures used in any of the school's drug testing programs to the date of trial. The program also was unconstitutional under the Colorado Constitution.

With respect to the issue of consent, Judge Lohr concluded that the trial court made a factual finding that the university's student athletes did not voluntarily sign consent forms and, as an alternative ground for its decision, applied the doctrine of "unconstitutional conditions," i.e., that no consent can be voluntary under the Fourth Amendment where the failure to consent results in a denial of a government benefit such as participation in intercollegiate sports at a state university.

The court recalled that the consent at issue is the consent to an otherwise unconstitutional search, and that to be voluntary such a consent must be "freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." After carefully reviewing the circumstances of obtaining consent, Judge Lohr found that the record supported the trial court's finding that the university failed to bear its burden to prove that consents obtained pursuant to its random, suspicionless urinalysis drug testing program for the certified class of intercollegiate student athletes were voluntarily given.

Since the court upheld the trial court's finding that the school failed to prove voluntary consent, Judge Lohr stated that it was "unnecessary and inappropriate" to review the trial court's result under the doctrine of unconstitutional conditions.

Dissenting opinion

Chief Judge Rovira, in dissent, assumed, for purposes of the case, that nonconsensual, random, suspicionless urinalysis drug testing of student athletes is unreasonable under the Fourth Amendment. The dissent questioned the majority's construction of the basis for the trial court's ruling concerning the question of voluntariness and declared that the ruling required reversal on the basis of the unconstitutional conditions doctrine.

Chief Judge Rovira disagreed with the majority's "conclusory" statement that if participation in athletics and receipt of an athletic scholarship are conditioned on a student's consent to drug testing, then "the pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing . . . is obvious." If the trial court regarded the factual questions of voluntariness as a sufficient basis for ruling that consent to the university's drug testing program was per se invalid, that ruling was not supported by the evidence, according to the dissent. There was no evidence in the record which provided, or could provide, the factual basis for the finding that consent is not voluntary for persons who were not yet student athletes at the school and had not been informed of, nor "consented" to, the school's drug testing program.

It appeared to Judge Rovira that the trial court did not rely on the factual question of voluntariness as the basis to conclude that the consent given by any member of the student athlete class was involuntary, but rather, must have relied on the unconstitutional conditions doctrine - only that legal finding logically would apply to both present and future student athletes.

The doctrine, in the context of individual rights, provides that, on at least some occasions, receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon a right guaranteed under the Constitution. In Judge Rovira's view, the instant case was not one of the occasions in which the receipt of a governmental benefit could not be conditioned on an individual's agreement to waive such a right. Judge Rovira would have held that a court should balance the asserted governmental interest in conditioning the benefit against the individual's interest in not being requested to waive Fourth Amendment rights in order to receive that benefit. For Judge Rovira, "the greater the benefit the greater the coercion that is brought to bear by conditioning that benefit on the waiver of a constitutional right." While the university's drug testing program conditioned the receipt of a governmental benefit on the waiver of constitutional right, the opportunity to participate in intercollegiate athletics "is undoubtedly a benefit of far less import when compared to other governmental benefits, the conditioning of which have been sanctioned by the Court." Given the governmental benefit at issue, requiring student athletes to waive Fourth Amendment rights was "relatively insignificant," stated the dissent. In all, requiring student athletes to consent to the drug testing program as a condition of participating in the university's athletic program did not impose an unconstitutional condition on the receipt of that governmental benefit.

Judge Erickson joined in Judge Rovira's dissent. Although agreeing with the majority that the collection and testing of urine is a "search" subject to the reasonableness requirement of the Fourth Amendment and of article II, section 7 of the Colorado Constitution, Judge Erickson would have found that the university's suspicionless drug testing program was reasonable and therefore constitutionally permissible.

Judge Erickson would have concluded that the university's testing program served important and valid public interests, including protecting the health and safety of intercollegiate student athletes and preventing drug use by other students who look to student athletes as role models.

Furthermore, stated Judge Erickson, the student athletes subject to the testing had diminished privacy expectations with respect to the intrusions of a urine test. Judge Erickson cited the fact that student athletes are subject to regular and routine physical exams, voluntarily submit to extensive regulation of their personal behavior, and participate in a communal locker room. After reviewing these factors, Judge Erickson observed that there are distinctive circumstances that diminish student athletes' expectations of privacy. And the university designed the testing program to minimize the impact on the athletes' privacy interests, according to Judge Erickson, such that the procedures involved in testing did not carry "the grave potential for arbitrary and oppressive interference with an individual's privacy interests that the Fourth Amendment was designed to prevent."

To achieve the important interests asserted by the university, it was necessary to accurately detect drug use among the student athletes, stated Judge Erickson and the university's efforts to achieve its goals would be impaired if it were required to cite specific facts giving rise to a reasonable suspicion before testing a student athlete. This circumstance, combined with the diminished privacy interests of the student athletes, required Judge Erickson to conclude that suspicionless drug testing of student athletes in this limited context was a reasonable search.

Upon noting that a warrantless search based on voluntary consent would be constitutionally permissible even absent reasonable suspicion, Judge Erickson commented, as opposed to the majority's characterization of the trial court order, that the trial court concluded as a matter of law that no student athlete could validly consent to the drug testing program.

Judge Erickson would have found that the university could validly condition a student athlete's participation in intercollegiate athletics on a student athlete's knowing and voluntary consent to a drug testing program. Judge Erickson stated that the trial court made no findings of fact regarding the validity of consent given by any individual member of the class, but apparently relied on the unconstitutional conditions doctrine to conclude as a matter of law that no student athlete could validly consent to a drug testing program. It was observed that the trial court permanently enjoined the university from requiring any urine samples from student athletes for the purposes of drug testing. The order struck down drug testing programs as they related to all student athletes, not just class members. Thus, even if the university could demonstrate that any of its present or future student athletes voluntarily consented to the drug testing program, the university still would be enjoined from conducting any testing program.

Only with the assistance of the unconstitutional conditions doctrine could the trial court have declared that all student athletes, including prospective athletes, were incapable of giving consent as a matter of law, stated Judge Erickson, who disagreed with the majority's "unnecessary deference" to the trial court's legal conclusions, and would have reached the unconstitutional conditions issue.

The consent to random drug testing was not per se invalid for all student athletes at the university simply because it was a condition of representing the school in intercollegiate athletics, concluded Judge Erickson. Student athletes could withhold their consent or individually challenge the voluntariness of their own consent. In all, in the instant case, the suspicionless drug testing of the student athletes was a reasonable search under federal and state law for Judge Erickson, who also would have concluded that the university may validly condition student athletes' participation in intercollegiate athletics on a knowing and voluntary consent to the drug testing program.

Chief Judge Rovira joined in Judge Erickson's dissent.

Hill v. National Collegiate Athletic Ass'n, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 1994 Cal.LEXIS 9 (Cal. 1994); University of Colorado v. Derdeyn, 836 P.2d 929, 1993 Colo.LEXIS 887 (Colo. 1993), cert.denied, 1994 U.S.LEXIS 3355, 62 U.S.L.W. 3722 (1994)

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The Tonya Harding Case: A Comment on the Further Developments

by Robert L. Bard and Lewis Kurlantzick

The legal tale of Tonya Harding was marked by two major developments in recent months, and the fate of the lead character in the saga came to at least a temporary denouement. On March 16 Harding pleaded guilty to the felony charge of hindering the prosecution of those responsible for the clubbing attack on Nancy Kerrigan. As part of the plea bargain, Harding resigned from the United States Figure Skating Association (USFSA), thereby effectively ending her amateur skating career. (Might a prosecutor be exceeding his authority in exacting a resignation from a private association as a plea bargain sanction?) Had she not resigned, the Association would have faced the question of whether to suspend or expel her. The interesting hypothetical question, and one of import for other athletes, is what would have happened had Harding not resigned and chosen to contest an expulsion by seeking an injunction against the Association's disciplinary ruling.

Power of Private Associations

In fact, the question is not entirely hypothetical. Despite her resignation, the USFSA plans to hold a hearing, probably this summer, to determine if further action against Harding is warranted. Possible responses include stripping her of the national title she won in Detroit after Kerrigan was forced out of the competition and requiring the return of training grants. If the USFSA carefully follows its internal rules and affords Harding an adequate opportunity to present proofs and arguments before an impartial decision-maker, neither an arbitrator nor a court would be likely to upset its decision. Moreover, the USFSA would be entitled to use Harding's guilty plea as an admission of culpability with respect to the Association's charges against her.

Though Tonya Harding has chosen a course of action that will facilitate the imposition of further sanctions against her by the USFSA, the issue of the power of pri-

ship confers important economic benefits, remains important and only partially resolved. As we previously observed, the Constitution offers no help to the athlete, as the constraints of the due process and equal protection clauses do not apply to the "private" sports governing bodies. The law of private associations may offer procedural aid in requiring that when a licensing organization which controls access to employment opportunities in a field is considering action which will have a substantial economic impact on an individual in that field, that person should have the chance to speak to the contemplated action before a decision is made. (This principle also derives some support from antitrust cases involving sports organizations' determinations of eligibility for competition. See, e.g., Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n., 561 P.2d 499, 504 n.12 (1977).) The likelihood of a successful challenge by an athlete, then, would depend on the extent to which she had been provided a fair chance to respond to the charges against her.

Restraining Order vs. USFSA

A week prior to pleading guilty Harding sought and received from an Oregon federal judge a restraining order delaying a USFSA disciplinary hearing scheduled for March 10. Judge Owen Panner ruled that Harding lacked sufficient time to prepare an adequate defense for the hearing and that therefore judicial intervention was appropriate. This position is consistent with the principle we previously noted, that when a private association with broad power over individuals' opportunities in an industry is considering negative action with serious economic consequences for an individual, the person should have a chance to make her case before a decision is made.

Though some commentators argued that the USFSA needed to withhold action until resolution of the possible criminal matter, we disagreed because the two processes are meant to vindicate different interests and the outcome of a criminal proceeding would not necessarily decide the issue facing the governing body. However, a solicitous association might still choose to defer to the criminal proceeding out of concern that an athlete before a disciplinary panel would be pressed to respond to evidence offered which would be inadmissible in court, such as hearsay, in a way which then might be usable against her in a subsequent criminal case; i.e., the concern is that an athlete might be unable to fully defend herself in the association proceedings because of the possible effect of what she said there on her position in the expected criminal action. To the extent that such a concern operated in Harding's situation, it is no longer an obstacle as her plea bargain provides that she cannot be prosecuted further in the Kerrigan case by any jurisdiction. Indeed, the plea is a confession which eases the burden of proof for a body seeking to sanction Harding further, as it can be utilized in any subsequent disciplinary action by the Association.

Importance of Judicial Review

The question remains of whether the current law strikes the proper balance between the right of private associations to hold their members to certain standards and the understandable desire of association members to be protected against arbitrary action by associations involved in amateur (and professional) sports. Though Tonya Harding is not a particularly sympathetic case, her treatment, nevertheless, makes us uneasy about the capacity of private associations with jurisdiction over highly publicized athletic activities to resist putting considerations of public image ahead of insuring justice to individual athletes. After all, the USFSA was ready to conduct disciplinary hearings against Tonya Harding without giving her adequate time to prepare a defense, and it required judicial intervention to block the Association's actions. Similarly, the United States Olympic Committee (USOC) initially sought to exclude her from Olympic participation via a hasty process which would not have permitted Harding the chance to compose an effective defense. Therefore we would favor serious judicial review of the disciplinary proceedings of any association where the stakes are high for both the association and the member under attack. Almost every association concerned with both sports and television would fall into this category.

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RECENT CASES

Musicians may proceed with wrongful interference with contract claim against Shirley Bassey, British court rules

In late 1990, a company known as "Dreampace" asked a record producer identified as "Mr. Millar," to work on an album with singer Shirley Bassey. During the course of negotiations, Bassey personally guaranteed the performance by her own management company, SSM Productions Inc., of its agreement with Dreampace.

In January 1991, Bassey withdrew from the project and refused to perform her contract with Dreampace.

Millar and other parties who had been engaged to provide services in connection with the production of the album sued Bassey and Dreampace. A Chancery Division judge rejected the wrongful interference with contractual relations claim against Bassey on the ground that the Millar parties failed to allege or to establish that Bassey had acted with an intention to cause loss or damage to them or that her actions were directed at them.

For purposes of the appeal, it was assumed that Dreampace had hired Millar and the musicians; that Bassey knew the Millar parties were entitled to have Dreampace perform its contractual obligations, including an obligation to secure Bassey's participation; that Bassey was contractually bound to Dreampace to take part in the production of the album; and that the Millar parties suffered losses as a result of Dreampace's failure to perform.

Judge Beldam stated that Bassey may not have wished, "nor may it have been her primary purpose, to induce or cause Dreampace to break its contracts" with the producer and musicians, but unless Bassey fulfilled her obligations to Dreampace, it was "inevitable (not just likely or foreseeable)" that Dreampace could not fulfill its obligations.

The court reviewed the development of the tort of interference by a third party with contractual relations, beginning with the 1853 decision, Lumley v. Gye. It then was noted that in the instant case, the Millar parties established that Bassey voluntarily broke her agreement with Dreampace knowing of the parties' contracts and that the performance of those contracts would be impossible if Bassey refused to perform the obligations under her agreement with Dreampace. According to Judge Beldam, "she must have realised that her talents were essential and irreplaceable, she must have intended that Dreampace would be unable to fulfill its obligations to [the musicians]." In such circumstances, it seemed to the court unnecessary to assert a specific intention to interfere with the performance of the contracts which must necessarily have followed from Bassey's refusal to perform her obligations to Dreampace.

Judge Beldam, observing that there remained unresolved questions of fact, concluded that the Millar parties' pleadings raised an arguable case warranting further proceedings.

Judge Peter Gibson stated the view that it must be shown that a party charged with violating the economic interests of another intended to interfere with those interests, rather than showing that the interference was what probably would result from the party's conduct. It appeared to Judge Gibson that, without limiting the scope of the tort by the requirement of actual intention, freedom of action would be unduly restricted by liability for incidental consequences. "Interference with contracts may flow from competition and is the normal and expected consequence of industrial action...It would not be right for the law to discourage competition by encouraging actions by unsuccessful competitors or to allow tort actions by those who suffer only incidentally from another person's activities," stated Judge Gibson.

The Millar parties did not plead that Bassey, by her conduct, intended to break or otherwise interfere with, and, with that intention, did break or otherwise interfere with a contract to which Millar was a party. Thus, the Chancery Court judge correctly struck the claim against Bassey, declared Judge Gibson.

Judge Ralph Gibson agreed with Judge Beldam that the action should proceed to trial. Bassey had agreed to make the album at issue and insofar as her act or omission caused Dreampace to break its contract with the Millar parties, Bassey did not have the right to refuse to act. Judge Gibson stated that the appeal should be allowed to consider the nature of the intention which would satisfy the requirement that Bassey's conduct be "directed against" the Millar parties.

Millar v. Bassey, [United Kingdom] Court of Appeal (Civil Division) [Available in LEXIS Intlaw Library, UKCase File] July 12, 1993 [ELR 16:1:13]

Model may proceed with New York Civil Rights Law and defamation claims against producer of sexually explicit commercial satire

In 1988, Angie Geary appeared in a commercial for Wasa Crispbread, a bread product from Sweden. The commercial, as described by Federal District Court Judge Kimba M. Wood, juxtaposed pictures of various types of bread with a scene of Geary "in a towel, apparently emerging from a morning shower to a kitchen where she finds a male companion in a bathrobe, apparently washing his breakfast dishes." Geary and her companion embrace as an announcer comments on the different bread products and the values of "the Swedish way."

Al Goldstein, the executive producer of the sexually explicit late-night cable television program "Midnight Blue," asked his staff to create a segment for the program based on the commercial. The adaptation's first half maintained the voiceover's first paragraph and the portions of the commercial in which Geary appeared, but where the original commercial cut to pictures of various types of bread, the adaptation cut to videotape of scantily clad couples engaging in sexual acts. The original voiceover continued in the second half of the adaptation, with a pornographic visual; the adaptation then used the commercial's video with the tag line, "Wasa Crispbread. You can have it in America."

After Goldstein broadcast the adaptation at least six times in late 1989, Geary learned that the producer of the commercial pulled it from national television, ending Geary's royalty income.

In considering Geary's claims under section 51 of the New York Civil Rights Law, Judge Wood noted that the statute covers "only reasonably inferable associations between [a party] and the user of her image. When the use of a person's name is connected with something absurd, the courts apparently reason, no inference of association - and consequently, no harm - can possibly follow."

New York courts also have imposed upon claimants a prohibition on recovery for non-commercial uses of a person's likeness, i.e., a "public interest exception." If a court finds that a factual issue exists as to the application of the exception, a finder of fact must resolve the issue, observed Judge Wood.

The court then found that the adaptation, as a form of humor or entertainment, was not thereby entitled to a blanket exemption from the statute. And Goldstein did not argue that Geary was a public figure whose actions were inherently of interest to the public, so as to bring the adaptation within the public interest exception.

Judge Wood next declined to find, as a matter of law, that no reasonable person could believe that Geary was associated with or derived benefit from the Goldstein parties' use of her name and likeness. It was not true, stated that court, that a reasonable viewer would necessarily understand that Goldstein was satirizing a commercial or that Geary had no association with the adaptation. The adaptation did not include a disclaimer indicating that it was a satire, and there was no basis to assume, declared the court, "that even a substantial portion of the adaptation's viewers had seen the original commercial and knew that the adaptation was not an original production or understood that it was a parody." Average, reasonable viewers could have inferred that

Geary had a connection with, or derived benefit from the adaptation. The commercial was not so "disdainful" of Geary to require an inference that she had no involvement with the piece.

The court further found that there was no objective indication that would require a fact finder to conclude that producers of the adaptation intended it to have editorial content. A reasonable viewer might not understand that portions of the adaptation originated with a nationally broadcast commercial - the alleged target of the editorial comment. Judge Wood found that there was a factual dispute over whether the adaptation was within the public interest exception and denied Goldstein's motion to dismiss this aspect of Geary's privacy claim.

Judge Wood agreed with the Goldstein parties that New York does not recognize an independent cause of action for the common law "false light" tort, and dismissed that portion of Geary's privacy claim that purported to state such a claim.

In refusing to dismiss Geary's defamation claim, the court noted that many decisions have held that the implication derived from photographs can be actionable, and refused to distinguish the implication occasioned by an image in a photograph from the implication made, in the instant case, by the juxtaposition of two images in a videotape, as long as the implication is itself one that a reasonable person would draw and the implication is actionable. Judge Wood found that the adaptation was subject to the defamatory implication that Geary willingly participated in a pornographic video segment, and concluded that Geary stated a cause of action for defamation subject to resolution by a finder of fact.

Geary v. Goldstein, 831 F.Supp. 269, 1993 U.S.Dist. LEXIS 11994 (S.D.N.Y. 1993) [ELR 16:1:14]

Confidential source may proceed with promissory estoppel claim against Glamour Magazine

As reported at ELR 14:11:15, the September 1988 issue of Glamour magazine contained an article, written by Claudia Dreifus, about sexual abuse by therapists. Jill Ruzicka's experience as a victim of sexual abuse was discussed in the article. Ruzicka had agreed to be interviewed for the article upon the condition that she would not be identified or made identifiable. Dreifus, although referring to Ruzicka as "Jill Lundquist," stated in the article that "Lundquist" was a Minneapolis attorney who had served on a Minnesota task force that dealt with therapist-patient abuse, and mentioned "Lundquist's" lawsuit against the allegedly offending psychiatrist.

A Federal District Court in Minnesota granted summary judgment to Conde Nast Publications, the owner of Glamour, and to Dreifus on Ruzicka's breach of contract and other state laws claims (ELR 12:6:7). A Federal Court of Appeals (ELR 13:12:14) affirmed the District Court's judgment with respect to the contract and tort claims, but remanded the matter for consideration of Ruzicka's claim under principles of promissory estoppel.

On remand, the District Court granted summary judgment to the Glamour parties, finding that Ruzicka had not established a clear and definite promise to support recovery on a promissory estoppel theory, and that because the promise was indefinite, Ruzicka did not show that enforcement was necessary to prevent an injustice.

A Federal Court of Appeals, in August 1993, reversed the District Court's judgment and remanded the matter for a plenary trial.

Senior Judge Lay first stated that for purposes of the court's review, the promise at issue would be that Ruzicka not be identified or identifiable.

Judge Lay then disagreed with the District Court that Minnesota law requires a higher specificity of a promise under promissory estoppel than under contract law. However, even assuming that promissory estoppel requires the terms of a promise "to be more distinct and specific than that required to enforce an oral contract," a principle the court found "doubtful" under Minnesota law, the promise made by Dreifus was sufficiently specific and distinct to comply with such a standard, declared Judge Lay. There was nothing vague or ambiguous about the promise and there was no need to further define a term that would be readily understandable by the reasonable person.

The court noted that Ruzicka claimed that she had not revealed her participation on the task force or other identifying facts to Dreifus. The existence and scope of the promise, as well as Ruzicka's reliance upon it, were issues requiring additional fact-finding, ruled the court. And enforcement of the promise would not be unjust to the media parties, since if the disclosure of the identity of a confidential source was valuable to the story, the payment of compensatory damages for disregarding a promise of confidentiality, according to Cohen v.Cowles Media Co., 111 S.Ct. 2513 (1991; ELR 13:3:11) would be "a cost of acquiring newsworthy material to be published at a profit..."

Ruzicka v. Conde Nast Publications, Inc., 999 F.2d 1319, 1993 U.S.App. LEXIS 20130 (8th Cir. 1993) [ELR 16:1:15]

Marvel Comics has protectible interest in "Plasmer" name for comic book series, but may not enjoin distribution of "Warriors of Plasm" series

Marvel Comics filed trademark applications for the word "Plasmer" in both the United States and the United Kingdom in anticipation of issuing a new "Plasmer" comic book series. Marvel sought injunctive and declaratory relief in a trademark infringement and unfair competition action against Defiant, a division of Enlightened Entertainment Ltd., which has used the name "Plasm" and "Warriors of Plasm" to identify its own comic book series.

Federal District Court Judge Michael B. Mukasey found that Marvel stated a claim for relief. Although Marvel had not completed the registration of the trademark and had not sold copies of the comic book, the company demonstrated its intent to adopt the trademark and established the necessary "use in commerce." There was sufficient publicity, stated the court, to identify or distinguish the "Plasmer" series or at least create an association of the goods with Marvel.

The court denied Marvel's request for declaratory judgment.

In October 1993, the court, in a ruling issued from the bench,
rejected Marvel's request for a preliminary injunction. According to a news report, the court, "noting the relative sophistication of comic book buyers and great differences in appearance and content between the two books," found little likelihood of confusion.

Marvel Comics Limited v. Defiant, a Division of Enlightened Entertainment Ltd., 837 F. Supp. 546, 1993 U.S.Dist. LEXIS 12116 (S.D.N.Y. 1993) [ELR 16:1:15]

Court upholds deficiency assessed against Walt Disney Inc. based on recapture of investment tax credits after corporate reorganization

The Commissioner of Internal Revenue assessed a federal income tax deficiency of about $450,000 for Walt Disney Incorporated's tax year ending January 28, 1982. The Tax Court held that there was no deficiency because, under the terms of Treas.Reg. sections 1.1502-3(f)(2) and (3), there was no "disposition" within the meaning of 26 U.S.C. section 47(a)(1)(1976) and Disney was not required to "recapture" the investment tax credit taken on any of the assets involved in the transaction at issue.

A Federal Court of Appeals has reversed the Tax Court's ruling. As described by Judge Rymer, Retlaw, a California corporation and a predecessor of Walt Disney, was formed by Walter E. Disney before his death. The company's main businesses and assets included the commercial rights to the name "Walt Disney," licensed by Retlaw to Walt Disney Productions; the miniature railroad and the monorail system at Disneyland; two television broadcasting stations; a 14,000 acre cattle ranch; and several agricultural properties.

In July 1981, Walt Disney Productions agreed, following Retlaw's divestiture of the latter three categories of assets (the "non-Disney assets), to acquire all the common stock of Retlaw in exchange for $46.2 million worth of Productions' common stock.

The exchange of stock was subject to various conditions such as the approval of the acquisition by Productions' shareholders and the absence of pending or threatened litigation. Retlaw also agreed that prior to closing, it would transfer to a newly-formed, wholly-owned subsidiary known as "Flower Street" all of the non-Disney assets. Retlaw then would distribute the stock of Flower Street pro rata to Retlaw's shareholders.

In response to a request by Retlaw and Productions, the Internal Revenue Service, in October 1981, determined that the exchange of Retlaw's assets for all the stock of Flower Street, followed by the distribution of the Flower Street stock to the Retlaw shareholders would qualify as a tax-free reorganization within section 368(a)(1)(D) of the Internal Revenue Code ("D" reorganization), and that the subsequent exchange of all the Retlaw stock for Productions stock would be a reorganization within the meaning of section 368(a)(1)(B) ("B" reorganization).

In December 1981, Retlaw transferred its non-Disney assets to Flower Street in exchange for 4,500 shares of authorized but unissued Flower Street common stock. The transferred assets included "section 38 assets," tangible personal property upon which Retlaw had taken an investment tax credit. Retlaw authorized the distribution of the Flower Street stock pro rata to the Retlaw shareholders, but specified that the distribution could only be made concurrently with the closing of Productions' proposed acquisition of Retlaw.

As a result of its acquisition by Productions, Retlaw's taxable year, which had begun on March 29, 1981, ended on January 28, 1982, the date of the approval of the acquisition by Productions' shareholders. In a consolidated return, Retlaw failed to recapture the investment tax credits it had taken on the section 38 property included among the non-Disney assets transferred to Flower Street. The Internal Revenue Service determined a deficiency accordingly.

Judge Rymer, after referring to Revenue Ruling 82-20 and the case of Salomon, Inc. v. United States, 976 F.2d 837 (2d Cir. 1992), noted Disney's argument that the ruling did not apply because 59 days elapsed between the transfer by Retlaw of its non-Disney assets to Flower Street and the distribution of the Flower Street stock to the Retlaw shareholders. Disney claimed that during this time, Flower Street maintained an independent, self-sufficient corporate existence; that conditions remained in order for Retlaw to complete the spin-off; and that the transfer by Retlaw and the distribution of the Flower Street shares were two separate and distinct transactions which, in combination, amounted to a divisive "D" reorganization.

The court rejected Disney's attempt to distinguish Revenue Ruling 82-20, stating that although there may have been conditions which could have prevented the completion of the reorganization, the transaction was closed as planned. The spin-off of Flower Street did not "immediately" follow the consolidated group asset transfer, but "the time interval separating the two steps of a 'D' reorganization is a proxy for the determination of whether the transferor initially possessed an intent to transfer the section 38 assets to a third party outside the consolidated group." In the instant circumstances, the spin-off of Flower Street was sufficiently proximate, declared Judge Rymer.

After finding that Revenue Ruling 82-20 was not unreasonable or inconsistent with the Internal Revenue Code, Judge Rymer rejected Disney's argument that there was no evidence that, on January 28, 1982, any of the section 38 property included among the non-Disney assets transferred to Flower Street two months earlier was still subject to investment tax credit recapture at all. The absence of evidence with respect to the proper amount of Disney's tax deficiency required the affirmance of the Commissioner's deficiency determination, ruled the court.

Walt Disney Incorporated v. Commissioner, Internal Revenue Service, 4 F.3d 735, 1993 U.S.App. LEXIS 21901 (9th Cir. 1993) [ELR 16:1:16]

Transamerica may include in its basis for films estimated future participation and residual payments due performers, creators and unions

As reported at ELR 9:10:15, a Federal District Court in California ruled that United Artists Corporation was not entitled to include in its basis for films released in the years 1971 through 1973, for purposes of computing depreciation deductions, the estimated future participation and residual payments to be made to the films' performers, creators and various unions out of the proceeds from ticket sales to the general public.

A Federal Court of Appeals has reversed the District Court's decision granting summary judgment to the Internal Revenue Service.

As described by Judge Procter Hug, Jr., United Artists contracted with third parties for the production of the films it distributed. The company agreed to pay certain producers, writers, directors, actors and others a flat amount plus a percentage, known as a "participation," of the film's future gross receipts or net profits. The company also was required, under collective bargaining agreements, to pay residuals to talent guilds, i.e., a percentage of revenues received from the television exhibition of films. United Artists' profit on the distribution of a film, according to Judge Hug, would be the revenue earned from exhibition, less the costs incurred under the contracts for production and the company's distribution expenses. The Internal Revenue Code provides that taxpayers may not deduct the cost of purchasing or producing a capital asset, in this case, a film, in the year in which the costs are incurred. The costs must be allocated by means of depreciation expense over the period during which the capital asset will produce income.

Rev. Rul. 60-358 allows depreciation expenses, for television films, to be calculated on a formula based upon the forecast of future income. In Rev. Rul. 64-273, the Internal Revenue Service acknowledged that this method of calculating depreciation also would apply to motion picture films.

Under this method, the taxpayer must forecast the total amount of income that a film will produce over its entire lifetime. The taxpayer then may take a depreciation deduction each year in proportion to the amount of income received in that year relative to the total amount of income forecasted.

Judge Hug found that the costs of the participations and residuals "in actuality, are clearly costs of producing the film and not expenses incurred in distribution." Transamerica, which owned United Artists during the years in issue, followed generally accepted accounting principles in using the income forecast method to spread these costs proportionately over the flow of the net income derived from the film. The government and Transamerica agreed that the amount of participations and residuals could be accurately calculated from the net income projection.

However, the government argued that because the amounts of the participations and residuals were uncertain, they should not be included in the cost to be depreciated, but should be deducted as expenses when due and payable under the various contracts. The government approach, declared Judge Hug, would not result in spreading the costs of production evenly over the flow of income.

The court next rejected the government's argument that the participations and residuals could not be included in the cost basis for depreciation because such payments were contingent on whether a film made a net profit. The reason for not allowing contingent liabilities to fund part of the cost basis for depreciation, stated Judge Hug, did not apply to the instant situation where the Internal Revenue Service has required an income forecast formula for depreciation. The government cited cases in which the inclusion of contingent liabilities in the cost basis would permit depreciation deductions on costs that might never be incurred.

The government also noted that the disallowance of contingent liabilities forming a part of the cost basis for depreciation was similar to the disallowance of contingent liabilities as ordinary expenses under 26

U.S.C.section 461, which provides that ordinary expenses generally are not deductible by an accrual taxpayer until all events that determine the fact of liability have occurred and the amount of liability can be determined with reasonable accuracy. The District Court found this analogy appropriate in determining what liabilities can be included in the cost basis for depreciation, noting that although the amount of liability could be accurately determined in this case, the "fact of liability" could not.

But the government cited no case applying the "all-events" test under section 461 to the determination of what liabilities may be included in the cost basis for depreciation under section 1012. And the District Court, according to Judge Hug, overlooked the important point "that the deduction of an expense that may never be incurred cannot occur under the income forecast formula" - it is the Rev.Rul. 60-358 formula, mandated by the

Internal Revenue Service, "that provides this certainty. Thus, the purpose of the all-events type of requirement is fulfilled."

Producers of motion picture and television films cannot delay reporting income until after the costs of production are recovered, but must spread those costs over the flow of the income to be derived; the Internal Revenue Service provides a formula for doing so. The amount of the participation and residual costs is not a distribution expense, emphasized the court, and remains a part of the total estimated net income, one element of the formula designed to assure a depreciation deduction that is proportionate to the flow of net income. Under the Internal Revenue Service formula, "it is mathematically impossible for total depreciation to exceed the total costs of producing the film, including the participations and residuals."

The government also argued that the participation and residual costs could be overstated, resulting in disproportionately high depreciation for the total cost of the film in early years. Judge Hug commented that the only way there could be an overstated amount of participations and residuals would be if the projected lifetime net income is overstated, and this was precluded by the operation of the formula.

In all, the inclusion of participations and residuals in the cost basis was justified - the inclusion of the costs would not result in a total depreciation deduction in excess of actual costs and would not result in a disproportionate depreciation deduction in early years, concluded the court, in remanding the matter to calculate the refund due Transamerica.

Judge Cynthia Holcomb Hall, in dissent, adverted to the principle that liabilities which can only be calculated on the basis of future events are contingent and cannot be included in a cost basis. Since Transamerica was only required to pay participations and residuals if the film in question made a profit, Judge Hall stated that contingent liabilities were involved.

Judge Hall expressed concern with the timing of the deductions, i.e., the time value of money, and mentioned the lack of situations where a taxpayer may take a deduction before it is actually incurred (absent express statutory authorization).

Judge Hall would have affirmed the District Court's decision by holding that Transamerica was not entitled to include participations and residuals in the cost basis figure for the purpose of calculating the depreciation deductions of its films.

Transamerica Corp. v. United States, 999 F.2d 1362, 1993 U.S.App. LEXIS 18577 (9th Cir. 1993) [ELR 16:1:17]

Disallowance of investment tax credit deductions in connection with master recording leasing program is upheld

Encore Leasing Corporation leased master recordings of previously released pop and gospel albums. In its 1982 prospectus, the company focused primarily on the tax advantages of investing in the Encore program. The prospectus, according to Federal Court of Appeals Chief Judge J. Clifford Wallace, did not describe the specific master recordings Encore intended to lease or the non-tax, economic profitability of the leasing program.

August C. Wolf paid $10,000 to Encore's president to purchase a one-seventh share in an Olivia Newton-John master recording. Wolf invested in the master through a partnership promoted by Encore named O.J.N.

Recording Enterprises. Along with Wolf, the managing partner, there were 14 other partners in the enterprise. In mid-1982, OJN received a capital contribution from the partners; paid Encore $66,000; entered into a lease, prepared by Encore, for the master, and executed with Encore a form titled "Election to Pass Investment Tax Credit from Lessor to Lessee." Encore passed through to OJN the investment tax credit for the master based on a fair market value of $1.2 million.

Judge Wallace pointed out that the lease between OJN and Encore was not an exclusive lease; that Wolf signed the lease without seeking review of its terms; and that Wolf did not receive any appraisals until October 1982. Although the Encore prospectus provided that the appraisals were not to be used to establish the value of the master for tax purposes, one appraisal report received by the company was for $1.8 million; the other for $1.6 million. The actual fair market value of the master was

$25,000, noted the court, if OJN's rights to the master were exclusive. Because OJN did not have exclusive rights to the master, the actual fair market value was much lower.

Wolf entered a "vanity publishing agreement" to produce copies of the album; the agency sold only 13 albums from 1982 through 1984. Judge Wallace commented that OJN would have had to sell 122,571 records in order to realize a profit on the lease fee it paid to Encore.

Wolf reported adjusted gross income of about $75,000 on his federal income tax return for the taxable year 1982. After deductions and credits, Wolf reported no tax liability and received a refund of about $1500. The tax benefits he received from OJN in 1982 alone, remarked Judge Wallace - a loss of about $6700 and investment tax credit of about $17,000 were practically double his cash investment.

Wolf also had claimed investment tax credit carry-backs and sought refunds for the years 1979, 1980 and 1981. The Commissioner of Internal Revenue disallowed Wolf's investment tax credit deductions and assessed additions to tax, increased interest rate, and penalties. The Tax Court affirmed the Commissioner's actions and imposed an additional penalty on Wolf for persisting in frivolous litigation.

In affirming the Tax Court ruling, Judge Wallace stated that Wolf did not show that the Tax Court clearly erred in finding that the expectation of large tax losses, rather than the realization of an economic profit, was the dominant motivation of the Encore project. The factors supporting the Tax Court's findings included the high nominal purchase price of the master, which was not shown to have any relationship to fair market value; the emphasis on projected tax losses in the marketing of the program; the fact that Wolf, despite a complete lack of experience in the recording industry, relied exclusively on the promoters' representations concerning the quality and marketability of the master.

Among other findings, it was determined that Wolf was liable for both valuation overstatements and claiming deductions that were disallowed under section 183; the Tax Court's imposition of an increased interest rate on "any substantial underpayment attributable to tax motivated transactions" thus was not clearly erroneous. And "Wolf's insistence on putting the IRS to the task of going to court, knowing all along that his positions were frivolous, warrants sanctions in this case," concluded the court.

Wolf v. Commissioner, Internal Revenue Service, 4 F.3d 709, 1993 U.S.App.LEXIS 21652 (9th Cir. 1993) [ELR 16:1:18]

Tax Court decision on fair market value of disputed Charles Russell work is upheld

In 1969, George and Emelia Doherty bought the painting "Attacking Stagecoach," which, as described by Federal Court of Appeals Judge William C. Canby, Jr., "may or may not have been painted by Charles M. Russell." The Dohertys donated an undivided forty percent interest in the painting to the Charles M. Russell Museum in Great Falls, Montana in the 1982 tax year and the remaining sixty percent in the 1983 tax year. In those years, they claimed charitable contribution tax deductions in the amounts of $140,000 and $210,000, respectively. The Commissioner of Internal Revenue claimed that the fair market value of the painting at the time of the contribution was only $100; the Dohertys had paid $10,000 for the work. The Tax Court determined that the fair market value at the time of contribution was $30,000.

Judge William C. Canby, Jr., in affirming the Tax Court decision, noted that the determination of the painting's fair market value was based in part on the fact that a lower price generally is assigned a painting of disputed authenticity. The Dohertys argued that the authenticity of the work had not been questioned prior to the time that they donated the painting to the museum and that such doubt arose only when the Commissioner evaluated the validity of the deduction.

The court declined to accept the Dohertys' argument, stating that to do so would mean that taxpayers would be entitled to the undisputed acceptance of their valuation of a work of art "merely by avoiding others' scrutiny of the work prior to its donation." The facts concerning the authenticity of the work existed at the time of the contribution, and would have affected the bid of a willing buyer, noted the court - the government's expert based his conclusion as to the authenticity of the painting on the condition and quality of the painting itself, not on subsequently revealed information regarding Russell's works.

Judge Canby concluded by noting that the Tax Court fully discussed the basis for its determination of fair market value.

Doherty v. Commissioner Internal Revenue Service, 1994 U.S. App.LEXIS 1958 (9th Cir. 1994) [ELR 16:1:19]

Court dismisses discrimination claim brought against LL Cool J by former law firm

Giaimo & Vreeburg, the former attorneys for James Todd Smith, professionally known as "LL Cool J," sued the performer to recover unpaid legal fees and damages, alleging that they were improperly discharged on the basis of their race in violation of 42 U.S.C. section 1981 and state law. The attorneys claimed that LL Cool J dismissed them because of his alleged decision to hire only members of the black race to perform professional services.

A New York appellate panel, in a 3-2 decision, agreed with a trial court decision finding that the attorneys failed to state a claim under section 1981. Presiding Judge William C. Thompson noted that the United States Supreme Court has held that the protection of section 1981 extends only to the making and enforcement of contracts, and that "the weight of authority" is that termination of a contract is not covered by section 1981. (The court pointed out that in 1991, Congress amended the Civil Rights Act by extending its protection to the termination of a contract. By its terms, the amended provision became effective in November 1991, about two years after the alleged termination in the instant case; Giaimo & Vreeburg did not argue that they were entitled to the retroactive application of the statute, and most federal circuit courts have held that the amendment is not to be retroactively applied.)

It also was found that New York's Human Rights Law applies only to employees, and not to an attorney-client relationship, and that the attorneys' claims under that statute and under New York's Civil Rights Law were properly dismissed.

According to a news report, claims for $27,000 in unpaid legal fees and LL Cool J's counterclaims for $135,000 in alleged overbilling and damages were not part of the appeal and remain to be adjudicated.

Judge David S. Ritter agreed with the dismissal of the attorneys' state law claims, but expressed the view that Giaimo & Vreeburg stated a viable claim under the Federal Civil Rights Act of 1868, in that they were denied the opportunity to enter into "new and distinct" contractual relations with LL Cool J solely on the basis of race. The attorneys alleged that they entered into separate, discrete agreements with the performer each time a business transaction required legal services, and it appeared to Judge Ritter that such a claim was actionable. The fact that Giaimo & Vreeburg had on ongoing relationship with LL Cool J and were continually available did not preclude them from asserting that new employment opportunities would arise, for, again, "each business transaction in which legal services was provided required a new agreement with distinct rights, duties, and obligations." The attorneys raised factual issues requiring resolution and Judge Ritter would have reinstated the civil rights cause of action.

In October 1993, the New York Court of Appeals, by the court sua sponte, dismissed the attorneys' appeal on the ground that the order appealed from did not finally determine the action within
the meaning of the Constitution.

Giaimo & Vreeburg v. Smith, 599 N.Y.S.2d 841, 1993 N.Y.App.Div. LEXIS (N.Y.App. 1993), 82 N.Y.2d 803, 1993 N.Y. LEXIS 3838 (N.Y. 1993) [ELR 16:1:19]

Appellate court affirms Associated Press victory in copyright infringement case brought by publisher of baseball pitching statistics

Those who think that statistics is a dry science, and that those who practice it must be coldly rational, have never met George Kregos. Mr. Kregos has two passions in life: professional baseball and suing the Associated Press. In a best-out-of-four series, Kregos has gone down swinging, and the sports statisticians at AP have broken out the champagne to toast their victory.

Kregos compiles and publishes a form containing nine categories of baseball pitching statistics -- statistics which he alleges the AP copied from him in violation of his copyright. At the outset of the case, AP challenged the copyrightability of the Kregos' forms; and a District Court dismissed the case on the grounds the forms were not protected by copyright. (ELR 12:3:12) However, the Second Circuit Court of Appeals reversed and remanded for trial, holding that the forms might be sufficiently creative and original to be eligible for copyright. (ELR 13:10:12).

Following remand, however, the District Court again granted summary judgment to AP, this time on the grounds that of the ten categories of performance statistics compiled by AP, five were different from those used by Kregos; and "no reasonable person could conclude that the inclusion of five different statistics out of the ten used by the 1986 AP form still leaves it substantially similar to the Kregos form." (ELR 14:8:10)

Back the case went to the Court of Appeals. But this time, the appellate court affirmed the dismissal of the case, on the grounds that the two forms were not substantially similar, that the statute of limitations had barred certain of Kregos' claims, and because other of his claims were preempted.

The Court of Appeals found that the defendant had used six (rather than five) statistics used by the Kregos, but held that the difference between the Kregos and AP forms was nevertheless not "trivial." The appellate court therefore agreed with the District Court that AP's form was not substantially similar to the Kregos'.

Kregos's claim that his copyrights to forms containing baseball pitching statistics were infringed by pitching statistics published by AP in 1984 was barred by the statute of limitations, despite the Kregos' claim that the filing of his lawsuit was delayed for two years by then-pending Copyright Office action on his registration application. The court rejected the argument that AP's 1986 publication of baseball statistics amount to a continuing infringement, because the court found that AP's 1986 publications were "distinct" in form from its 1984 publications, and thus were a separate infringement if an infringement at all. The appellate court affirmed this ruling and also rejected Kregos' arguments that the statute of limitations should be equitably tolled on account of alleged misrepresentations made to him by the defendant's lawyer and by one of the defendant's suppliers.

Finally, the Court of Appeals held that Kregos' unfair competition claim against AP was preempted by federal copyright law, because his unfair competition claim under New York law did not require proof of any element apart from those necessary to prove copyright infringement.

The Supreme Court denied Kregos' petition for certiorari.

Comment: In deciding the infringement issue, the court's use of a more than "trivial" difference test for "substantial similarity" confuses the standard for copyrightability of derivitive works with the "substantial similarity" standard that is used to determine infringement. For this reason, the court's choice of language is unfortunate, even though the result would have been the same had the court used the the proper "substantial similarity" language.

Kregos v. Associated Press, 3 F.3d 656, 1993 U.S.App.LEXIS 22413 (2d Cir. 1993), cert. denied, 1994 U.S.LEXIS 1454 (S.Ct.1994) [ELR 16:1:20]

Federal court in Texas does not have personal jurisdiction over a California-based music publisher, in declaratory relief action seeking declaration that ZZ Top song "La Grange" does not infringe copyright to Besman and Hooker song "Boogie Chillen"

A Federal Court of Appeals has affirmed a ruling that a Federal District Court in Texas did not have personal jurisdiction over La Cienega Music Company, a California-based music publisher. The ruling was issued in a declaratory relief action filed in Texas by music publisher Bill Ham, in which Ham sought a declaration that his song "La Grange," written by ZZ Top, did not infringe the copyrights owned by La Cienega Music in the songs "Boogie Chillen" and "Boogie Chillen No. 2" which were written by Bernard Besman and John Lee Hooker. The suit was triggered by infringement assertions made by La Cienega in a letter mailed to Ham in Texas.

The appeals court held that personal jurisdiction in Texas was lacking even though La Cienega had issued licenses (through BMI) authorizing public performances of its songs in Texas, even though recordings of its songs were sold in Texas, and even though La Cienega had written a letter to the plaintiff in Texas making its infringement claims. The court based its decision on the grounds that Ham's declaratory relief action did not arise from La Cienega's contacts with Texas. That is, Ham had not shown any injury from La Cienega's exploitation of its songs in Texas.

In a footnote, the court noted that personal jurisdiction might have existed if Ham had claimed that La Cienega's songs infringed Ham's copyright. But La Cienega's claim that its copyrights were infringed by Ham's song was not sufficient to confer personal jurisdiction.

Ham v. La Cienega Music Co., 4 F.3d 413, 1993 U.S.App.LEXIS 27284 (5th Cir. 1993) [ELR 16:1:21]

New trial is ordered in Jeffrey Masson's libel action against writer of New Yorker article

As reported at ELR 15:3:27, a Federal District Court jury in San Francisco concluded Janet Malcolm's 1983 New Yorker article about Jeffrey M. Masson libeled the psychoanalyst, and that Malcolm, as an independent contractor rather than an employee of the magazine, was liable for any damages. The jury did not reach a verdict on the amount of damages.

The jury agreed, according to Federal District Court Judge Eugene F. Lynch, that all five of the challenged quotations were false and defamatory, but that Malcolm was aware only that two of the quotations defamed Masson and acted with knowledge of falsity or reckless disregard as to the falsity of those two statements.

In September 1993, Judge Lynch, in ruling on the parties' post-trial motions, first noted the lengthy course of the litigation (ELR 10:12:10; 11:4:7; 11:9:20; 12:2:18; 14:1:3), and then discussed evidence related to the New Yorker's conduct in the matter. Judge Lynch stated that it appeared from the jury's finding of no liability with respect to one of the quotations, that, in the jury's view, "neither the knowledge that Malcolm was editing quotations nor the knowledge that that quotation was not on tape gave the New Yorker knowledge of falsity or reckless disregard of truth or falsity. It likewise appears that in the jury's view, nothing that occurred prior to publication, including the fact-checking incident...constituted proof by clear and convincing evidence that the New Yorker knew that quotations were false or acted with reckless disregard as to the falsity of quotations."

Upon its independent review of the evidence, the court found that the New Yorker neither knew that the quotations were false, nor acted with reckless disregard as to falsity.

Judge Lynch then reaffirmed the finding that awareness of defamatory meaning was properly an element of the case, and was an element of constitutional law rather than of state law. The purpose of the awareness element is to ensure that liability is not imposed upon a party who acts without fault, noted the court, and this would be true regardless of whether the challenged statement is directly or indirectly libelous. The court stated that, upon retrial, it would address the question of a reformulation of the jury instruction, as well as reconsidering the issue of the appropriate standard of proof.

The court next found that Masson waived his objection to the court's failure to give a reckless disregard instruction with respect to awareness of defamatory meaning. However, because the waiver question was "close," Judge Lynch assumed, for the sake of discussion, that there was no waiver of the argument on this element and considered the contention that the jury should have been instructed that liability could be established by a showing of reckless disregard of defamatory meaning. Judge Lynch, upon setting forth the relevant meaning of reckless disregard and the appropriate standard for such a finding in the constitutional context, noted that constitutionally, in order to ensure that no blameless person be held liable, it must be shown that a party was actually and subjectively aware of a defamatory meaning or a potentially defamatory meaning.

Assuming, again only for the sake of argument, that Masson did not waive the above-cited objection, the court found that the analyst presented no evidence to support a jury verdict that the New Yorker, through its employees, acted with reckless disregard. The court, accordingly, denied Masson's motion for a new trial against the magazine on the grounds of an erroneous instruction regarding reckless disregard or awareness of defamatory meaning.

Turning to the issue of Malcolm's employment status, the court, again after careful consideration, stated that Masson did not cite any authority to support a finding that an agency relationship could serve to impute liability to a publisher in the absence of an employment relationship. Furthermore, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) prohibits liability based solely upon an agency relationship, recalled the court, in denying Masson's motion for a new trial on this ground.

Judge Lynch also rejected the argument that the jury's finding that Malcolm was an independent contractor was against the clear weight of the evidence. The court declined to hold that, without more, an editor who suggests changes in a submitted manuscript is "exercising control over the manner and means of accomplishing the desired result."

The court dismissed the case against the New Yorker, but stayed enforcement of the judgment pending the final resolution of the case between Masson and Malcolm.

Due to the jury's failure to reach a unanimous decision on the issue of damages, the court ordered a new trial. It was clear to the court that the issues of damages and liability were "so interwoven that a new trial on all issues is warranted."

Masson v. The New Yorker Magazine, Inc., 832 F.Supp. 1350, 1993 U.S.Dist. LEXIS 12767 (N.D.Ca. 1993) [ELR 16:1:21]

Newspaper prevails in action involving parody "letter to the editor"

The March 27, 1991 issue of the San Francisco Bay Guardian included an April Fool's Day parody section. A purported letter to the editor concerning rent control was signed by "Adam Sparks." An individual named Adam Sparks, who did not write the letter, sued the newspaper alleging libel, invasion of privacy, false light and infliction of emotional distress.

A San Francisco trial court denied the newspaper's motion for summary judgment, stating that there was a triable issue of fact as to whether the challenged statements were protected as parody.

The appellate court, in issuing a peremptory writ of mandate directing the trial court to vacate its order denying summary judgment and to enter a new order granting the motion, referred to the cases of Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254 (1986; ELR 8:8:16; 8:9:11) and Polygram Records, Inc. v. Superior Court, 170 Cal.App.3d 543 (1985; ELR 8:4:14). In the instant case, the full context in which the letter appeared indicated to Judge Perley that the average reader, as a matter of law, would recognize that the letter was a part of the parody, was "a fake and a joke," and was not actually written by Adam Sparks. The fact that Sparks provided declarations of certain individuals who stated that they did not recognize the letter as a joke did not raise a question of fact as to the view of the average reader.

Judge Perley stated that the letter did not defame Sparks by false attribution or the presentation of false facts, and commented that "If a parody could be actionable because, while recognizable as a joke, it conveyed an unfavorable impression, very few journalistic parodies could survive. The butt of the parody is chosen for some recognizable characteristic or viewpoint which is then exaggerated. It is not for the court to evaluate the parody as to whether it went 'too far.' As long as it is recognizable to the average reader as a joke, it must be protected or the rather common parody issues of newspapers and magazines must cease to exist."

San Francisco Bay Guardian v. The Superior Court of the City and County of San Francisco, 17 Cal.App.4th 655, 1993 Cal.App.LEXIS 788 (Cal.App. 1993) [ELR 16:1:22]

Court affirms rejection of defamation claim based on "20/20"'s reference to individual as a "hitman"

In April 1980, the ABC television program "20/20" broadcast a segment entitled "Injustice for All." The segment included excerpts from reporter Geraldo Rivera's curbside questioning of William Brooks about Brooks' suspected role as a "hit man" for James Barbuto, an Ohio judge. The report also included negative comments from five individuals concerning Brooks and his alleged involvement with Barbuto. Before the segment was aired, a grand jury indicted Brooks and Barbuto on charges related to obstruction of justice arising from alleged witness intimidation and other charges. Brooks pleaded guilty to the obstruction of justice charges and was subsequently convicted.

As recounted by Federal Court of Appeals Judge Ryan, police, over the years, had taken Brooks into custody 20 times on suspicion of various activities, several of which resulted in formal charges for which he was convicted. Adverse publicity, noted the court, had "severely compromised" Brooks' reputation prior to the broadcast.

Brooks claimed that the ABC parties libeled him by broadcasting derogatory and allegedly false remarks.

A Federal District Court denied Brooks' motion to amend his complaint and granted summary judgment to the ABC parties (ELR 12:8:16), finding that although there remained issues of material fact as to whether the challenged statements were true, Brooks was libel-proof. The court described Brooks' "long criminal history in Akron;" stated that Brooks' reputation in Akron at the time of the broadcast was "severely tarnished;" and found that any harm to Brooks' reputation from the broadcast was minimal.

A Federal Court of Appeals affirmed the denial of Brooks' motion to amend, but found that the District

Court erred in granting summary judgment to the ABC parties based on the status, or lack thereof, of Brooks' reputation, since such a determination was a jury question.

On remand, the District Court granted the ABC parties' motion for summary judgment with respect to Brooks' "visual image" claim, ruling that the visual image of Brooks fleeing from 20/20's cameras did not provide the basis for a defamation claim.

The remaining issues in the case went to trial. The ABC parties, at the conclusion of Brooks' evidence, moved for a directed verdict and the District Court granted the motion.

On appeal, the court affirmed the decision granting the ABC parties' motion for a directed verdict, finding no evidence as to their negligence in publishing the 20/20 segment. Certain evidence concerning Rivera's conduct was "anything but clear and convincing evidence of negligence," stated Judge Ryan - Rivera's limited comments to Brooks did not demonstrate that his report was intentionally misleading or that he failed to investigate its truthfulness.

Judge Ryan concluded by finding that the District Court's decision to exclude expert testimony was not an abuse of discretion, and that the District Court did not err in granting partial summary judgment on Brooks' visual image claim.

Brooks v. American Broadcasting Companies, Inc., 999 F.2d 167, 1993 U.S.App. LEXIS 18001 (6th Cir. 1993) [ELR 16:1:23]

New York Court of Appeals reverses $15.5 million judgment in defamation action and orders new trial

In May 1982, Capital Cities Communications' WKBW-TV incorrectly reported that John Prozeralik had been abducted and beaten, possibly as a result of owing money to organized crime. A radio station owned by Capital Cities also broadcast the news report. In a subsequent retraction, the station announced the name of the actual victim, David Pasquantino, and stated "The FBI earlier today said and confirmed the victim was Prozeralik, but our independent investigation is revealing he was not involved..." (emphasis by the New York Court of Appeals).

When Prozeralik filed a defamation action, a trial court jury awarded him about $18.5 million in compensatory and punitive damages. The court reduced the award for financial loss by remittitur, leaving the amount of about $15.5 million, of which $10 million was punitive damages.

A New York appellate court affirmed the judgment entered on the jury verdict (ELR 15:7:23), finding that the circumstances surrounding the broadcasts established, with convincing clarity, that the broadcaster made the false statements concerning Prozeralik with actual malice.

New York Court of Appeals Judge Joseph W. Bellacosa noted that the trial court instructed the jury that the initial broadcast and the retraction were false as a matter of law. The jury instruction was erroneous, stated Judge Bellacosa, and required the reversal of the appellate court decision and a new trial.

Capital Cities showed that the jury instruction "impermissibly impinged on the jury's resolution of credibility and actual malice" by essentially directing the jury to accept an FBI agent's version of a telephone conversation with the television station's reporter. There was no error in instructing the jury that the initial broadcasts were false as a matter of law, but Capital Cities was entitled to a factfinder's resolution as to whether the FBI agent "said" or "confirmed" that Prozeralik was the victim or whether the reporter could have reasonably understood him to say so.

The court, contrary to the dissenting appellate court judges and the partial dissent of Judge Levine, denied Capital Cities' motion to dismiss the case. The parties stipulated that Prozeralik was a public figure who would have to prove, with evidence of convincing clarity, that the challenged statements were made with actual malice. Judge Bellacosa concluded that Prozeralik met the burden "of establishing actual malice sufficient to allow the jury (had it been instructed correctly)" to find that Capital Cities acted with a high degree of awareness of "probable falsity" or entertained "serious doubts" as to the truth of the broadcasts.

A jury could have inferred, stated Judge Bellacosa, that WKBW knew or suspected that Prozeralik was not the victim - the actual victim was correctly identified by name in the broadcast of a rival television station the night before WKBW's broadcast. It appeared, from the testimony of Capital Cities' witnesses, that the station employees speculated about Prozeralik's name, "without any basis or source whatsoever," because they believed that the abduction victim was a Niagara restaurateur. But Prozeralik had no connection to the crime, the criminal or the story, and the court reiterated that the issue of actual malice should have been submitted to the jury.

The court next expressed its disagreement with the trial court's instruction on punitive damages, "so as to provide guidance on the new trial and to settle the issue for future cases." Actual malice would be "insufficient by itself to justify an award of punitive damages, because that malice focuses on [a party's] state of mind in relation to the truth or falsity of the published information." This does not, according to Judge Bellacosa, measure up to the level of outrage or malice underlying the public policy allowing an award of punitive damages.

The evidence, on the current record, did not support the conclusion that the broadcasters' reports arose out of "hatred, ill will, spite, criminal mental state or that traditionally required variety of common law malice." Prozeralik may attempt to make such a showing in the new trial.

Judge Levine agreed with the majority that the trial court's erroneous jury instruction required reversal, but would have dismissed Prozeralik's action for failure to prove actual malice. After reviewing the evidence, Judge Levine stated that apart from the FBI agent's testimony, the evidence "was of minimal if nonexistent probative value" to establish that at the time of the television station's initial broadcast, the reporter made the challenged statement with a high degree of awareness of the probable falsity of that statement, or that she entertained serious doubts as to its truth. The reporter, according to Judge Levine, did not rely on the speculations of her "news staff colleagues," but sought confirmation from the FBI as to the identity of the victim. And Prozeralik did not prove by clear and convincing evidence that the conditions surrounding the disputed telephone conversation were such that the reporter "simply could not (emphasis by Judge Levine) have misunderstood" the FBI agent.

Judge Levine also would have found that the misdescription in WKBW's retraction statement, which was prepared by the station's news director, would not establish actual malice.

Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466, 1993 N.Y.LEXIS 3943 (N.Y. 1993) [ELR 16:1:23]

Court upholds ruling that Rodney Dangerfield may seek identities of confidential sources quoted in allegedly libelous article

A Federal Court of Appeals has denied a writ of mandamus directing a Federal District Court to vacate its discovery order (ELR 15:4:18) compelling Star Editorial to disclose, to Rodney Dangerfield's attorney, the identities of its confidential sources of information for an article about the performer.

An article in the September 11, 1990 edition of the Star purporting to describe Dangerfield's conduct at the Caesar's Palace Hotel, was based, in part, on allegations made in a counterclaim filed by the owner of Caesar's Palace in response to a breach of contract and negligence action brought by Dangerfield.

The performer admitted that allegations taken from court documents were privileged under the judicial proceedings privilege, but that his libel claim derived from statements in the article quoting unnamed employees of the hotel. The statements referred to incidents of "wild drunken conduct" by Dangerfield.

Dangerfield deposed many of the non-confidential sources for the article identified by the newspaper, although he did not depose the reporter who interviewed the employees quoted in the article.

The District Court had observed that when a public figure brings a libel action against a media party, the balance weighs in favor of the disclosure of the identity of an informant, for it otherwise would be difficult to establish proof of malice. Judge Procter Hug, Jr. also referred to the District Court's determinations that the information sought went to "the heart of the claim;" that the Star reporter was not truly an alternate source of the information and that Dangerfield had exhausted all alternate sources of obtaining the needed information; that the order was intended to protect the sources by restricting disclosure to counsel and only for purposes of the litigation; and that the testimony of Dangerfield and fifteen persons identified by the newspaper as alternate sources indicated no knowledge of the events described in the article. The newspaper admitted that one of the reported incidents did not occur, commented the court, in denying the petition.

Star Editorial, Inc. v. United States District Court for the Central District of California, 7 F.3d 856, 1993 U.S.App.LEXIS 26664 (9th Cir. 1993) [ELR 16:1:24]

Contempt order entered upon author's failure to comply with discovery order is reversed

Ronald Watkins' nonfiction book, "Birthright," about the Shoen family feud over the control of the U-Haul Company and about the as yet unsolved murder of Eva Berg Shoen, was scheduled for publication in late 1993. Eva was the wife of Sam Shoen, the eldest son of Leonard Shoen, the founder of U-Haul.

Leonard Shoen agreed to cooperate with Watkins by providing source material for the book in exchange for a share of royalties. Mark and Edward Shoen, the two sons engaged in the feud with Leonard, sued their father, alleging that he made statements linking Mark and Edward to Eva's murder. It was not alleged that Leonard made any of the allegedly defamatory statements to Watkins, but the sons served the author with a subpoena duces tecum, ordering him to appear at a deposition, testify, and produce any notes, documents, electronic recordings, or any other records in his possession "relating to the death of Eva Berg Shoen."

A Federal District Court denied Watkins' motion for a protective order under Arizona's "press shield" law. In a footnote comment, Federal Court of Appeals Judge William A. Norris mentioned an Arizona appellate court decision which had construed the application of the shield law to exclude investigative book authors such as Watkins.

Watkins appeared at the deposition, but refused to produce any documents or recordings or to answer any questions concerning his interviews with Leonard Shoen.

The Shoen brothers filed a motion to compel the production of documents and testimony. The District Court denied Watkins' motion to quash, and granted the motion to compel, ruling that although Watkins had standing to invoke a qualified First Amendment journalist's privilege, the privilege, in the circumstances of the case, would have to yield to the Shoen brothers' interests.

Watkins refused to appear at a second deposition and the District Court held him in contempt.

A Federal Court of Appeals agreed with Watkins that the discovery order violated his qualified First Amendment privilege, and vacated the order holding Watkins in contempt.

Judge Norris explained that the journalist's privilege "is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" Before weighing the privilege in light of the opposing need for disclosure, the court considered two threshold questions of first impression in the circuit, i.e., whether Watkins, as an investigative book author, had standing to invoke the journalist's privilege, and whether the privilege operated to shield information provided by a source without an expectation of confidentiality.

Judge Norris found "persuasive" von Bulow v. von Bulow, 811 F.2d 136 (2d Cir.), cert denied 481 UlS. 1015 (1987), in which the court reasoned that the purpose of the journalist's privilege was not solely to protect newspaper or television reporters, but to protect the activity of "investigative reporting" more generally. The critical question for the court in deciding a claim invoking the journalist's privilege would be, as in von Bulow, whether the author had "the intent to use material - sought, gathered or received - to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process." Watkins "easily" passed this test and had standing to invoke the journalist's privilege.

It then was noted that the three circuits that have addressed the second threshold issue have held that the privilege protects a journalist's resource materials regardless of whether the materials contain confidential information. Judge Norris agreed that the journalist's privilege would apply to resource materials even in the absence of the element of confidentiality, but that such absence may be considered as a factor that diminishes the journalist's, and the public's, interest in non-disclosure.

Judge Norris then found that the Shoen brothers, who had not taken Leonard Shoen's deposition, did not show that the information sought was not obtainable from another source, and failed to demonstrate a compelling need, at the current stage of the litigation, for Watkins' materials.

Judge Kleinfeld concurred in the result of the matter, but would have reached the result on a nonconstitutional ground. In Judge Kleinfeld's view, the majority's approach would "reduce the reliability of verdicts and judgments in litigation." The District Court should have exercised its discretion under the criteria of Rule 26 of the Federal Rules of Civil Procedure, stated Judge Kleinfeld, and should have found that Leonard Shoen was a "more convenient, less burdensome" source of the material sought. Judge Kleinfeld would have reversed and remanded on the ground that the District Court abused its discretion by failing to require the Shoens to seek the information regarding the content of the Watkins interviews from Leonard Shoen before approaching Watkins.

Shoen v. Shoen, 5 F.3d 1289, 1993 U.S.App. LEXIS 24685 (9th Cir. 1993) [ELR 16:1:25]

Jingle writer loses action challenging court's jurisdiction in dispute involving distribution of ASCAP royalties

Songwriter Steve Karmen challenged an ASCAP decision to accord a three percent "use credit" to jingles.

As described by Federal District Court Judge William C. Conner, Section XI of the 1941 Consent Decree between the United States and ASCAP, as amended in 1950, requires that ASCAP make distributions to its members on a basis "which gives primary consideration to objective surveys designed to determine the number of performances of their compositions." The system of distribution is explained in Attachments to a 1960 Order of the court further amending the Consent Decree.

When Karmen joined ASCAP, jingles were given a one percent "use credit" under the Weighting Formula. In 1981, the government approved an increase in the use value from one percent to three percent.

ASCAP's Board of Review denied Karmen's request to increase the weight for jingles. A panel of the American Arbitration Association affirmed the decision of the Board.

When Karmen sought review in the District Court, Judge Conner rejected the songwriter's due process claim, but remanded the matter to the panel for further consideration because there was no indication that the panel knew it could hear improperly excluded evidence or re-evaluate the Board's factfinding (ELR 11:6:21).

After further proceedings, the panel concluded that the rule in question was void as arbitrary, and remanded the matter to the ASCAP Board for further consideration.

In 1992, the District Court found that the panel's decision was final in that it exhausted the panel's mandate and held that Karmen lacked standing to invoke the power of the court to set the proper weight for jingle performances.

Karmen subsequently asked the court to vacate the 1992 order on the ground that the court lacked subject matter jurisdiction with respect to Karmen's application to vacate the arbitration panel's award.

Judge Conner stated that Karmen's obligation to arbitrate disputes under ASCAP's Articles of Association and membership agreement was compelled by the court's 1960 Order; the authority of the arbitration panel was stated in the Articles of Association "in precisely the same language as in the Order." Karmen's application did not merely raise questions of contract interpretation and enforcement under state law, but required a court to construe and enforce the terms of the Consent

Decree as amended by the court's 1960 Order, according to Judge Conner. The court heard Karmen's petition under its exclusive jurisdiction to decide claims governed by the Consent Decree and orders amending the decree.

It also was noted that the ultimate relief sought by Karmen - to have the panel legislate a new weight for jingles or direct ASCAP's Board of Director to do so, or to have a court set a new weight - "would directly interfere with the regime established under the Consent decree and the court's 1960 Order. The Weighting Formula challenge by Karmen was the "linchpin" of the royalty distribution system established pursuant to the 1960 Order, and to permit another court or an arbitration panel to adjust performance weights on an ad hoc basis "would frustrate the rights and expectations of ASCAP's members under the Consent Decree and 1960 Order, and interfere with the entire system implemented under this Court's jurisdiction."

The court obtained jurisdiction over Karmen's application "by virtue of its exclusive jurisdiction to decide claims governed by the Consent Decree and the Court's subsequent Orders amending the Decrees," reiterated Judge Conner.

United States v. American Society of Composers, Authors and Publishers, In the Matter of the Application of Steve Karmen, 832 F.Supp. 82, 1993 U.S.Dist. LEXIS 12381 (S.D.N.Y. 1993) [ELR 16:1:26]

Decision upholding Muzak's revised license agreement is affirmed

As reported at ELR 15:7:18, Wisconsin Music Network was the licensee of the Muzak subscription programmed music service in the Milwaukee area for almost fifty years. Muzak licensees, who sell the company's program within their territories and install and service the equipment needed to receive and distribute the product, pay Muzak a ten percent royalty on the sale of the program.

A 1980 license agreement between the parties expired in March 1989. In January 1991, Muzak offered a newly negotiated system-wide license agreement to Wisconsin Music. The agreement included a Multi-Territory Accounts program, a national marketing plan created to enable Muzak to better compete for national accounts.

When Wisconsin Music and Muzak failed to agree on the terms of a new agreement, Wisconsin Music sought an injunction to prevent the termination of its relationship with Muzak.

A Federal District Court decision denying Wisconsin Music's request has been affirmed by a Federal Court of Appeals.

Judge Flaum agreed that the inclusion of the multi-territory program in the Muzak license agreement was not a per se violation of federal antitrust laws, and that the District Court correctly analyzed the program under the rule of reason. The multi-territory accounts program did not impose fixed resale prices, stated the court; the evidence demonstrated that contract prices varied among national customers and that the prices would be determined through negotiations among the customer, Muzak representatives and several licensees. The program was not "manifestly anti-competitive," and the District Court had concluded that the program enhanced competition by increasing the available choices for music service customers.

Wisconsin Music expressed concern with the program's restriction on contract terms, particularly the price term, it must offer to a multi-territory account-listed customer who has chosen to negotiate with an "assigned person" for all of its outlets. A Muzak licensee must either abide by the multi-territory account contract in dealing with a local outlet or give up that customer. A licensee may not independently approach a local outlet which has chosen to use the national contract, in order to negotiate different terms. Wisconsin Music argued that in requiring licensees to accept the multi-territory program, Muzak violated the antitrust laws by requiring the licensees to follow the national contract terms, including the price term, or to give up the local outlet to a neighboring licensee which would provide the service according to the national terms. It was further argued that under the multi-territory program, Wisconsin Music would lose price flexibility with respect to one-third of its accounts.

The court pointed out that Muzak was entitled to offer a single price to all locations of a national chain through a national accounts program. Local compliance was required to assure national customers of the value of "single-point negotiations."

Muzak demonstrated that without the multi-territory program or its equivalent, the company could not effectively compete with other subscription programmed music service companies for the business of national companies. The single contract offered customers the benefits of "a consistent music format, centralized billing, standardized rates, efficiently executed negotiations, and other economies of scale." The price terms of multi-territory contracts are negotiated with customers within general pricing guidelines - neither Muzak nor the multi-territory committee set uniform price terms for all multi-territory contracts.

In all, the District Court correctly found that the program did not unreasonably restrain competition.

Judge Flaum also affirmed the finding that the new terms of the license agreement did not violate Wisconsin's Fair Dealership Law; the terms were "essential and reasonable" because they enabled Muzak to offer a national service responsive to consumer demand.

Wisconsin Music Network, Inc. v. Muzak Limited Partnership, 5 F.3d 218, 1993 U.S.App. LEXIS 23742 (7th Cir. 1993) [ELR 16:1:27]

Owner of copyrighted poster may sue student art contest winner and contest sponsor, but court rejects infringement claims against coordinator and printer

Pat Singer's copyrighted work, "Times Square," has been published as a poster, a greeting card, and a post card.

Oscar Maldonado, at the time an eighth-grade student, submitted to the Citibank 1991 Calendar Contest an illustration of a street scene that, as described by Federal District Court Judge John F. Keenan, "appeared to have been closely modeled" after Singer's work. Maldonado's illustration was selected as a prize winner and was published in the calendar. Maldonado admitted to having had access to a copy of Singer's "Times Square," to having copied certain elements of the work, and to having used the work's general theme "as an inspiration."

In late 1990, Maldonado informed a Citibank employee and a principal of Cosgrove Associates Inc., an art agency, that his illustration was derived, in part, by copying another work of art.

Cosgrove had hired Ventura Associates to act as a contest coordinator, including verifying compliance of all submitted entries with the contest rules. Cosgrove also had hired Case Hoyt to print, bind and deliver the finished calendar to Cosgrove.

Judge Keenan first found that there was no factual dispute regarding the validity or ownership of Singer's copyright.

The court then noted that there was direct evidence of copying - Maldonado admitted to have copied such elements as the billboards for two stage productions; taxicabs in the lower front half of the works; a red hydrant in front of a building with "curly lines;" a red van in the middle left; and the manner in which the streets narrowly converge. However, the court declined to find that the only reasonable conclusion an average observer might draw from inspecting the two works was that Maldonado's illustration was appropriated from Singer's work and therefore denied both parties' motions for summary judgment.

Judge Keenan determined that all parties, except Maldonado, would be judged under the standards for third party liability rather than direct liability. Given the finding with respect to Singer's claim against Maldonado, the court rejected the cross-motions for summary judgment brought by Singer, Citibank, and Cosgrove.

It then was found that Case Hoyt and Ventura Associates had no vicarious liability; the companies had no contact with Maldonado and did not exercise any control over the challenged work. It was immaterial, stated the court, whether Case Hoyt or Ventura derived some benefit from the alleged infringement given their lack of supervisory or other control.

Singer also failed to show that Case Hoyt or Ventura knew or had reason to know of the infringing nature of Maldonado's work - at most, observed Judge Keenan, Ventura had a contractual obligation to Citibank; it did not have a legal obligation to Singer to prevent all potential infringement. The companies' roles "were so limited in responsibility and scope as to make knowledge of the infringement all but impossible...At no point did Ventura judge the works with respect to quality or content in order to identify and eliminate infringing works. Case Hoyt was merely the printer, and thus had no opportunity to know of the infringement," noted the court, in rejecting a claim of contributory infringement and finding that Singer did not establish that there was a material issue of fact as to whether Ventura or Case Hoyt knew or had reason to know of the work's infringing nature.

Singer v. Citibank, N.S., 1993 U.S.Dist. LEXIS 6907 (S.D.N.Y. 1993) [ELR 16:1:27]

Montgomery cable company may sue existing franchisee and program suppliers alleging violations of antitrust laws and intentional interference with business relations

As reported at ELR 15:2:13, several cable television companies, including Storer Cable Communications, sued the city of Montgomery, Alabama, challenging the legality of two regulatory ordinances. A Federal District Court found that federal law preempted certain aspects of the ordinances, but otherwise upheld their validity.

Storer had obtained a franchise from the city in 1976 and was the only cable franchisee until 1990 when the city granted a franchise to Montgomery Cablevision. In response to the lawsuit, Montgomery Cablevision intervened and filed a counterclaim against the cable companies and against Tele-Communications, Inc., Turner Broadcasting Systems, Inc. and Turner Cable Network

Sales, Inc. Montgomery Cablevision charged the cable parties with violating sections 1 and 2 of the Sherman Act, as well as state and local law.

Chief Judge Myron H. Thompson denied the cable parties' motion to dismiss Montgomery Cablevision's counterclaim.

Montgomery Cablevision, as recounted by the court, had unsuccessfully attempted to obtain affiliation contracts to carry the Turner Network program service and ESPN's NFL Football Package. In August 1990, Storer Cable had entered exclusive contracts to receive Turner and ESPN programming. Montgomery Cablevision claimed that the exclusive contracts placed the company at a competitive disadvantage with regard to Storer; that Montgomery had encountered substantial difficulty in signing up subscribers and obtaining financing; and that the company suffered a reduction in the value of its business exceeding $3 million.

Montgomery further contended that the exclusive dealing arrangements among the cable parties restrained competition among cable operators in the Montgomery market in price, service, quality of transmission and facilities, and cable programming. It was alleged that Storer had entered into the exclusive contracts with Turner Network and ESPN with "the specific intent and purpose of protecting its monopoly on the provision of cable television services in the Montgomery area and of foreclosing competition in this area" and that the cable program suppliers and distributors assisted Storer Cable in its efforts to monopolize the Montgomery market for cable television service and to restrain competition.

After careful review of the applicable principles of antitrust law, Judge Thompson found that Montgomery's counterclaim sufficiently alleged the existence of "a contract, combination..., or conspiracy" in restraint of trade. Although Montgomery used the term "contract" or "agreement," rather than "conspiracy," to refer to the exclusive dealings arrangements among the cable parties, the terms served to describe the requisite agreement between two or more parties to restrain trade.

Based on the facts alleged by Montgomery, it was "plausible to infer," continued the court, that either Turner Network or Turner Cable Network Sales agreed with Storer Cable to enter into an exclusive contract in restraint of trade. The participation of Tele-Communications and Satellite Services was allegedly "vertically integrated or otherwise financially or managerially related..." with Storer Cable.

The court further found that Montgomery sufficiently identified relevant markets. With regard to the intrabrand level of competition, the cable parties did not seriously dispute that the relevant market was the retail cable television sales market in the Montgomery area.

In turning to the interbrand market, Judge Thompson noted that Montgomery argued that the broadest relevant market would be the cable programming market, but that because of the "highly differentiated content of cable programs," there may be economically significant submarkets. The program suppliers and distributors responded that Montgomery alleged only that the suppliers and distributors had market power over their own products and that a market cannot be defined by a company's own product.

The court disagreed, referring to the decision in Eastman Kodak Co. v. Image Technical Serv., Inc., 112 S.Ct. 2072 (1992) which held that, in some instances, "one brand of a product can constitute a separate market" for antitrust purposes. Montgomery alleged that ESPN's football package and the Turner Network program service "are not available from any other cable programming source and are widely demanded by cable consumers."

The cable parties argued that the proper market was the market of "passive visual entertainment," which would include programming for satellite television, video cassette recordings, and free over-the-air television, and that in such a market, Montgomery would not be able to prove that the cable parties had sufficient market power to foreclose market alternatives and to create an unreasonable restraint on trade.

Judge Thompson stated that, given the structure of the cable television industry and factors relating to submarkets, Montgomery might establish that the relevant market at the interbrand level of competition would be no broader than the market for cable programming and might be as narrow as the markets for Sunday night football and for the Turner Network. Montgomery might be able to prove that for consumers of these programs, there may be no comparable alternative programming available. A factual inquiry into the "commercial realities" faced by consumers will be required to determine the proper market definition, stated the court, which determined that Montgomery had presented sufficient facts indicating "plausible" relevant markets.

It appeared to the court that if there are separate markets for Sunday night NFL football and the major television events broadcast on the Turner Network, as argued by Montgomery, then Turner Network and ESPN likely would possess sufficient market power to foreclose market alternatives. The court declined to state that there was no set of facts that would show that the cable parties had sufficient market power in the relevant markets so as to foreclose market alternatives.

The court next concluded that Montgomery sufficiently alleged an anti-competitive effect as a result of the exclusive dealing arrangements among the cable parties. It was alleged that competition in the market for cable television services was "all but eliminated" - Storer provided cable television services to 92 percent of the homes in the Montgomery area. And Montgomery claimed that the exclusive contracts negatively effected the intrabrand market in reinforcing Storer Cable's almost total market power by discouraging competition in providing cable television services.

According to Montgomery, the fact that the programming of Turner Network and ESPN was "so highly desirable and non-interchangeable" meant that the exclusive contracts threatened Montgomery's existence. And the failure of the company would eliminate its support for alternative programming for consumers, as well as potentially superior service technology and channel capacity.

Montgomery also might be able to establish that the exclusive dealing arrangements were entered into for the benefit of and at the request of Storer Cable, stated the court, in concluding that Montgomery, in all, alleged sufficient facts to state a claim against the cable parties for violating section 1 of the Sherman Act.

Judge Thompson then found that Montgomery stated a claim of monopolization, attempted monopolization and conspiracy to monopolize in violation of section 2 of the Sherman Act.

If it is shown that Storer served 92 percent of all cable television subscribers in the Montgomery area, the company's control over the retail cable sales market would satisfy the first element of a section 2 monopolization claim. Montgomery also presented facts which would support the claim that Storer entered the exclusive contracts with the specific intent to maintain its monopoly over the relevant market.

Judge Thompson, upon thorough review, also found that Montgomery's counterclaim sufficiently stated a claim against Storer for attempting to monopolize the retail cable sales market in the Montgomery area in violation of section 2 of the Sherman Act as well as alleging sufficient facts to support a claim of conspiracy to monopolize.

The court concluded that Montgomery sufficiently stated claims for relief under Alabama's antitrust laws, both statutory and common law, and under City of Montgomery Ordinance 48-90. Montgomery also may pursue a claim for intentional interference with business relations with regard to those individuals who have subscribed to its services, and may seek punitive damages arising from the alleged intentional interference with its subscribers. Judge Thompson declined to decide in the instant proceeding whether Montgomery stated a claim of intentional interference with business relations as to potential subscribers, a claim presenting "novel and close issues of first impression under state law..."

Storer Cable Communications, Inc. v. The City of Montgomery, Alabama, 826 F.Supp. 1338, 1993 U.S.Dist. LEXIS 9197 (M.D.Ala. 1993) [ELR 16:1:28]

Jury trial is not required in action seeking statutory damages for allegedly unauthorized broadcasts of boxing matches

That's Entertainment, Inc. owned interests in the closed-circuit telecasts of two boxing matches between top-ranked heavyweights, Mike Tyson versus Charles Ruddock and Evander Holyfield versus George Foreman. Storer Cable Communications, Inc., a cable television service in Kentucky entered into a license agreement with That's Entertainment to provide closed-circuit service to pay-per-view subscribers for the Tyson/Ruddock fight of March 1991. Storer Cable declined further participation, and That's Entertainment directly marketed and distributed closed-circuit service for the Holyfield/Foreman fight of April 1991.

That's Entertainment sued various bars and restaurants, claiming that the establishments, without subscription or authorization, unlawfully viewed and published the closed-circuit telecasts to their patrons in violation of section 553 of the Communications Act of 1934 and section 605 of the Public Telecommunications Act of 1988.

In ruling on the issue of whether the restaurant parties were entitled to a jury trial on That's Entertainment's claim for statutory damages, Federal District Court Judge Heyburn expressed the view that an award of statutory damages under the piracy statutes would be restitutionary. Restitution is an equitable remedy in the form of a money judgment, and was particularly appropriate in the instant matter where That's Entertainment's loss, although not definable in terms of actual loss, was more than the restaurant parties' gain. If That's Entertainment were held to a common law remedy of conversion, the measure of damages typically would be the amount of the company's actual loss. Restitution, noted the court, refers not to a party's actual loss "so much as the tortiousness of...conduct, that is, culpability bears directly upon the amount of the award."

That's Entertainment was seeking not merely to vindicate a monetary loss but to prevent the restaurant parties' violation of property rights in closed-circuit signals, observed the court. Restitution would remedy a loss not quantifiable in terms of actual loss. And statutory damages, declared Judge Heyburn, serve the same function as restitution. The discretionary nature of a statutory damages award also supported a restitutionary characterization, concluded the court, in finding that the statutory damages provisions of sections 553 and 605 were restitutionary, and were an equitable remedy to which the Seventh Amendment did not apply.

Storer Cable Comm. v. Joe's Place Bar & Restaurant, 819 F.Supp. 593, 1993 U.S.Dist. LEXIS 5586 (W.D.Ky. 1993) [ELR 16:1:30]

Dispute between Orion Pictures and Showtime is remanded to bankruptcy court

In 1986, Showtime Networks, a subscription cable service, agreed to license all films distributed by Orion Pictures, provided the films met certain criteria pertaining to advertising expenditures and theatrical release. The agreement contained a "key man" clause that conditioned Showtime's performance on Orion's continued employment of at least two of four named Orion executives in their then-current or substantially similar positions.

In late 1991, Showtime notified Orion that, due to management changes at Orion in 1990 and 1991, Orion was in violation of the key man clause as of April 2, 1991.

In December 1991, Orion filed for reorganization under Chapter 11 of the United States Bankruptcy Code. Showtime subsequently notified Orion that because it believed Orion had not complied with the key man clause, Showtime would not license the various films it was otherwise obligated to accept under the agreement.

In March 1992, Orion filed a motion to assume the agreement in the bankruptcy court. Orion also filed an adversary proceeding in the bankruptcy court against Showtime alleging anticipatory breach of the agreement; Orion sought an order permitting the company to assume the agreement, as well as declaratory relief and specific performance of Showtime's obligations to make payments under the agreement, or, alternatively, $77 million in damages for breach of contract.

Showtime, in a Federal District Court, sought to withdraw the reference of the adversary proceeding to the bankruptcy court. Orion then filed an amended complaint in the adversary proceeding, which omitted the claim for damages, but retained the other demands for relief. The District Court denied Showtime's motion to withdraw.

In May 1992, the bankruptcy court ruled that Orion had not violated the key man clause and that Orion would benefit by assuming the agreement.

The court then held that "because full relief has been granted to Orion in the context of the Motion [to Assume], the Adversary Proceeding is hereby dismissed without prejudice as moot."

The District Court upheld the bankruptcy court's order.

Federal Court of Appeals Judge Walker held that it was error for the bankruptcy court to decide a disputed factual issue between the parties to a contract in the context of determining whether the debtor or trustee should be permitted to assume that contract. A motion to assume, observed Judge Walker, "should be considered a summary proceeding,... to review the trustee's or debtor's decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate." Motions to assume serve the limited purpose of "ensuring that valuable property is being preserved and burdensome property discarded."

Judge Walker also pointed out that allowing a bankruptcy court to decide a disputed legal contract issue in the course of deciding a motion to assume could usurp a party's Seventh Amendment right to a jury trial. In holding that contract issues may not be decided as part of a motion to assume, the court eliminated the possibility of such constitutional problems. Bankruptcy courts may hear motions to assume and may try related adversary proceedings simultaneously, but, reiterated the court, adversary proceeding issues may not be decided as part of a motion to assume.

The court vacated the bankruptcy court's holding on the key man issue; vacated the grant of the motion to assume; and remanded the matter to the bankruptcy court for further proceedings.

Judge Walker then found that, contrary to the bankruptcy court's reference to the "mootness" of the adversary proceeding, the court actually had dismissed the declaratory judgment complaint. The District Court decision affirming the decision thus was a final judgment and the Court of Appeals had jurisdiction to consider the District Court's denial of the motion to withdraw since the motion was contained in that judgment.

The District Court erroneously concluded that the adversary proceeding was a core matter, stated Judge Walker. Rather, this "breach-of-contract action by a debtor against a party to a pre-petition contract, who has filed no claim with the bankruptcy court, [was] non-core." Judge Walker vacated the District Court's denial of the motion to withdraw and remanded the matter.

The Court of Appeals also vacated the bankruptcy court's dismissal of the adversary proceeding, together with all orders of the bankruptcy court entered in the adversary proceeding after the District Court's denial of the motion to withdraw.

In re Orion Pictures Corporation, 4 F.3d 1095, 1993 U.S.App. LEXIS 24116 (2d Cir. 1993) [ELR 16:1:30]

Court reverses decision granting summary judgment to Nike in action over use of "swoosh" stripe on "Mike" shirt

A Federal Court of Appeals has reversed a District Court decision (ELR 15:4:16) granting Nike, Inc.'s motion for summary judgment in a trademark infringement action against "Just Did It" Enterprises. Michael Stanard, conducting business as "Just Did It," distributed clothing bearing the logo, "Mike," and displaying a "swoosh" stripe identical to Nike's trademarked design.

Judge Manion stated that the primary consideration in the case was parody, agreeing with the District Court that parody is not an affirmative defense but an additional factor in analyzing the likelihood of confusion. Customer confusion, declared Judge Manion, "need not be restricted to a mistake regarding the source of the goods; the court should also consider whether the customer would believe that the trademark owner sponsored, endorsed or was otherwise affiliated with the product."

The court, after examining the size of the word "Mike" and Stanard's mail order form, declined to find, as a matter of law, that the parody and the trademark were so similar as to confuse consumers. A jury could (emphasis by the court) find that "Mike" and "Nike," in text, meaning, and pronunciation, were not so similar as to confuse consumers. A jury also could find that ordering a shirt from "Just Did It" Enterprises would not confuse a consumer, given that Nike uses "Just Do It" only as its slogan, not as a business name.

It also was possible for a jury to find that Stanard utilized a completely different marketing channel from Nike, and targeted a specific audience of consumers named Mike.

Judge Manion commented that Nike's trademarks are widely recognized and deserve protection. With respect to the issue of actual confusion, the court stated that while actual confusion is not essential to show likelihood of confusion, Nike would be required to demonstrate why a customer might conclude that Stanard's shirt was a Nike product.

The District Court had found that Stanard intended to pass off his merchandise as that of Nike. Stanard argued that he sought to use his own name as a "witty prank" on the perception of the viewer. Judge Manion stated that, on the basis of the current record, a jury could infer that the use of "Mike" was intended to be a parody.

In all, there remained many disputed facts requiring resolution at trial, concluded the court.

Nike, Inc. v. "Just Did It" Enterprises, 6 F.3d 1225, 1993 U.S.App. LEXIS 24985 (7th Cir. 1993) [ELR 16:1:31]

Distributor of travel directories obtains injunction against use of the phrase "The Travel Planner"

Official Airline Guides, Inc., a publisher of travel directories, sued Mindy Goss and other parties for trademark infringement with respect to the use of the phrases "The Travel Planner USA" and "USA Travel Planner." A Federal District Court in Oregon ruled that the challenged phrases did not infringe Airline Guides' trademark "OAG Travel Planner," but found that the Goss parties infringed the mark by using the phrase "The Travel Planner," standing alone.

Judge Farris noted that the court, in a prior proceeding, had held that "OAG Travel Planner" is an arbitrary composite trademark protectable without proof of secondary meaning, even though the phrase "travel planner" is descriptive.

In reviewing the District Court's application of an eight factor test relevant in determining the likelihood of confusion with respect to products that are related but not in direct competition, Judge Farris concluded that, considered in their entirety, the facts supported the District Court's finding of likelihood of confusion.

Judge Farris also found that the District Court properly dismissed as time barred the Goss parties' counterclaim under Section 38 of the Lanham Act.

Judge Ferguson joined in the majority's holding that the Goss parties did not infringe Airline Guides' trademark "OAG Travel Planner" by using the phrases "The Travel Planner USA" or "USA Travel Planner," but would have found that there was no infringement involved in using the phrase "The Travel Planner." The Goss parties, according to Judge Ferguson, demonstrated at trial the proposition that "travel planner" is a generic term, an issue the majority failed to decide because of "mistakenly" believing that the issue was resolved by a prior panel and thus was the law of the case. The majority misread the prior case, stated Judge Ferguson, "badly misconstruing" an isolated phrase in the opinion. Furthermore, the prior panel could not possibly have held that "travel planner" is not generic because it remanded the matter to the District Court for a finding on the "genericness" of the term. Judge Ferguson expressed the view that Airline Guides presented no admissible evidence whatsoever to prove that "travel planner" is not generic.

For Judge Ferguson, the generic nature of the phrase "travel planner" and the lack of any basis for finding a likelihood of confusion other than the use of these words, meant that the District Court erred in enjoining the Goss parties' use of "The Travel Planner."

Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1993 U.S.App. LEXIS 25872 (9th Cir. 1993) [ELR 16:1:32]

Briefly Noted:

Antitrust/Motion Picture Exhibition.

El Cajon Cinemas, Inc. claimed that American Multi-Cinema, Inc. and Pacific Theatres Corporation and/or Vista Theatres Corporation were engaged in a horizontal conspiracy in violation of section 1 of the Sherman Act. El Cajon stated, in part, that both AMC and Pacific had similar alleged clearances over El Cajon and both declined to lift the alleged clearances.

A Federal District Court in California, in 1992, granted summary judgment to the exhibitors.

When El Cajon filed a motion for reconsideration, Judge Gonzalez observed that the company did not contest the finding that the parallel conduct of AMC and Pacific was insufficient to suggest "conspiratorial objectives." El Cajon apparently sought the reversal of the court's ruling on the basis of certain conversations between the exhibitors' employees and on the basis of the court's comment, in its ruling, that the statements might be susceptible to an interpretation of improper conduct.

Judge Gonzalez, noting that the court's comment was "mistaken," referred to the "real finding" of the court as set forth in the sentences preceding the "offending sentence." According to Judge Gonzalez, the court found that the cited contacts between AMC and Pacific did not have the "sinister import" suggested by El Cajon. AMC had declined to speak with Pacific on the issues, thus negating the potential for a conspiracy.

The court never found, or at least never intended to find that the evidence would suggest a conspiracy, stated Judge Gonzalez, in reaffirming the earlier order.

The court concluded by denying El Cajon's motion for summary judgment on the exhibitors' counterclaim alleging that the company's lawsuit constituted "sham" litigation.

El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc., 832 F.Supp. 1395, 1993 U.S.Dist. LEXIS 18213 (S.D.Ca. 1993) [ELR 16:1:32]

"Olympic Kids" Mark.

The Trademark Trial and Appeal Board has granted summary judgment to the United States Olympic Committee on its claim that, under Section 110(c) of the Amateur Sports Act, O-M Bread, Inc. and Roush Products Company, Inc. had no right to register the mark "Olympic Kids."

The Board agreed with the decision in Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y. 1980; ELR 2:12:4) that the trademark use of a term which includes the word "Olympic," even if the mark includes other nonprohibited words or symbols, would violate the exclusive rights granted to the Committee by Section 110(c).

The O-M Bread parties, the owners of incontestable registrations for "Olympic" and "Olympic Meal" for bread and other bakery products, suggested that the Committee's exclusive right to use "Olympic" was limited to that word, and that another party could use the word as long as it was done in combination with another word or design. Administrative Trademark Judge Seeherman stated that there was no support for this position in the case law, legislative history, "or in common sense."

Judge Seeherman further found that proof of likelihood of confusion was not an element of the ground for opposition based on Section 110(c), and that, as a matter of law, O-M Bread's "Olympic Kids" mark violated the exclusive rights granted to the Committee and the use/constructive use of the mark therefore was not lawful use in commerce.

United States Olympic Committee v. O-M Bread, Inc., 1993 TTAB LEXIS 35 (Trademark Trial and Appeal Board 1993) [ELR 16:1:33]

Business Management Contract.

Charles W. Terrell, known as Walt Terrell, a professional baseball player, agreed to have Talent Services, Inc. manage his family's finances. Terrell paid the company an annual fee of five percent of his annual income.

After several years, Terrell claimed that the company had invested his money in high risk ventures, while misrepresenting the nature of his investments.

A Federal District Court in Chicago, after reviewing the various investment activities, denied Talent Services' motion to dismiss Terrell's action.

Judge Aspen found that Terrell asserted legally cognizable damages; stated that it was possible that the Terrells could prove, as they alleged, that Karen Terrell was a third party beneficiary to the contract; denied the company's motion to dismiss certain causes of action as barred by the statute of limitations; found that Terrell sufficiently alleged claims for common law fraud, conspiracy to commit fraud and RICO conspiracy; and denied Talent Service's motion to dismiss the request for a declaratory judgment. Judge Aspen, although aware of "the rarity with which civil RICO claims based upon business fraud are successful," stated that Terrell's complaint adequately alleged the basis of a RICO claim. The court emphasized that it did not hold that the Talent Services parties actually engaged in racketeering activity, or committed the alleged predicate acts.

Terrell v. Childers, 836 F.Supp. 468, 1993 U.S.Dist.LEXIS 14908 (N.D.Ill. 1993) [ELR 16:1:33]

Copyright Personal Jurisdiction.

A District Court in New York had personal jurisdiction over a California corporation and its officers, in a copyright infringement action arising out of the New York sale of recordings manufactured by the corporate defendant. Though none of the defendants had any presence in New York, the allegedly infringing records were available in New York retail stores; and the court inferred that the corporate defendant had a contract for the record's distribution to those New York stores. This contact was sufficient to satisfy the New York long arm statute and constitutional due process, the court held. The corporate officers also were subject to the court's jurisdiction, because one had control over the corporation's activities and had a financial interest in it, and the other had caused the manufacture and distribution in New York of the allegedly infringing records. The court also denied the defendants' motion to change venue, saying that since the plaintiff's witnesses, including

Harry Fox Agency employees, were in New York, the defendants had not shown that the convenience of the parties and witnesses would be served by transferring the case to California.

Editorial Musical Latino Americana v. Mar International Records, Inc., 829 F.Supp. 62, 1993 U.S.Dist.LEXIS 10196 (S.D.N.Y. 1993) [ELR 16:1:33]

Copyright Subject Matter Jurisdiction.

A Federal District Court has held that it does not have subject matter jurisdiction over a dispute between Hanna-Barbera and EMI Music concerning which of them is entitled to royalties from the public performance of music in the soundtracks of classic television cartoons including "The Flintstones" and "Huckleberry

Hound." The copyrights to the music in question are owned by Hanna-Barbera. The dispute arises out of a disagreement about the meaning and effectiveness of contracts entered into years ago between Hanna-Barbera and Columbia Pictures, and then Columbia and EMI's predecessors, concerning royalties earned by the music. The District Court applied the three-part test announced in Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926 (2d Cir. 1992) (ELR 14:11:5), and concluded that the case really is one for breach of contract and only incidentally for copyright infringement. Hanna-Barbera and EMI also are parties to a state court action involving the same contracts. And the Federal District Court concluded that once the state court interpreted the contracts "no copyright issues will remain."

Hanna-Barbera Productions, Inc. v. Screen Gems-EMI Music Inc., 829 F.Supp. 67, 1993 U.S.Dist.LEXIS 10079 (S.D.N.Y. 1993) [ELR 16:1:34]

Statutory Copyright Damages.

In a homevideo piracy case involving Chinese language television programs produced in Hong Kong, the First Circuit Court of Appeals has held that the plaintiff is entitled to recover statutory damages for each episode of the program that was infringed by the defendant, even though the copyrights to the particular programs at issue in the case had not been registered. The plaintiff is the exclusive licensee of homevideo duplication and rental rights to the programs at issue, and also had the right to dub those programs in the Cambodian language, which it did. The Chinese language versions of the programs were registered for copyright in the U.S. by the plaintiff's licensor, but the Cambodian language tapes were not registered. Since registration is required to recover statutory damages, and since the defendant had duplicated and rented unauthorized copies of the Cambodian language tapes, the defendant argued that statutory damages could not be awarded. The appellate court rejected this argument and held that the defendant's duplication and rental of unauthorized copies of the Cambodian language tapes also consituted an infringement of the copyrights to Chinese language versions, and that as the exclusive licensee of registered Chinese language versions, the plaintiff could recover statutory damages for the infringement of their copyrights. The appellate court also held that each episode of the program was a separate "work" for purposes of calculating the amount of statutory damages the plaintiff was entitled to recover. The district court had held that all episodes amounted to only a single work, because all of them had been registered together with a single registration. In reversing this conclusion, the appellate court held that separate works could be registered together in a single registration and yet remain distinct works for statutory damages purposes. The court applied the test used by the Second Circuit in Twin Peak Productions v. Publications International (ELR 15:7:4), even though in Twin Peaks, each episode had been registered separately.

Gamma Audio & Video v. Ean-Chea, 11 F.3d 1106, 1993 U.S.App.LEXIS 33365 (1st Cir. 1993) [ELR 16:1:34]

Previously Reported:

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: Fortune Finans AB v. Andersson, 600 N.Y.S.2d 460, 1993 N.Y.App.Div.LEXIS 7499 (15:6:19); Freeman v. Johnston, 601 N.Y.S.2d 606, 1993 N.Y.App.Div.LEXIS 8183 (15:8:16).

The United States Supreme Court has let stand the decision in Thomas v. Pearl (14:12:7).

In Licette Music Corp. v. A.A. Records, Inc. (14:2:5), a New York trial court awarded $3.9 million in compensatory damages and $750,000 in punitive damages to a music publisher in an action against a record distributor for breach of contract and fraud. In August 1993, an appellate court, at 601 N.Y.S.2d 297, 1993 N.Y.App.Div.LEXIS 8263, upheld the decision. It was found that the publisher was entitled to recover compensatory damages for tortious conduct "separate and apart from [the] claims for breach of contract arising from the concealment and denial of royalty payments due pursuant to a mechanical license agreement." Earlier business dealings between the parties created a relationship of trust and confidence, "which existed independent of the contractual duties and which was violated by numerous deceptive business practices devised...to camouflage actual sales of songs and records for which no payments were made;" the imposition of punitive damages was found appropriate in the circumstances.

Federal District Court Judge Kevin Thomas Duffy has approved a settlement between New York City and the Ancient Order of Hibernians, the sponsors of the St. Patrick's Day Parade. According to news reports, the settlement requires the city to comply with the court's 1993 ruling (15:7:12) which permitted the Hibernians to march with whom they want in exercising their free speech rights. The city agreed never to withhold a permit from the Hibernians based on the group's exclusion of marchers deemed contrary to the Hibernians' "message," and will pay the Hibernians $150,000 in legal fees. The court's injunction will remain in effect "only so long as the parade retains its character as a private celebration." [ELR 16:1:34]

Clarification

The March 1994 issue of the Entertainment Law Reporter reported that in the case of Time Inc. v. Sand Creek Partners, an injunction had been issued in favor of Time requiring Sand Creek to return film of Lyle Lovett and Julia Roberts which had been confiscated by police from a People magazine photographer and then delivered to Sand Creek. (ELR 15:10:16) Sand Creek was represented in that case by Craig Pinkus of Dutton Overman Goldstein Pinkus in Indianapolis. Mr. Pinkus has written to call attention to the fact that Sand Creek had filed its own interpleader action, because it had become caught in the middle of conflicting claims to the film made by Lyle Lovett and Time Inc. As the court noted in the order granting the injunction Time had requested, Sand Creek disclaimed any interest of its own in the film. [ELR 16:1:35]

IN THE NEWS

Insurer is not liable for $26 million settlement payment by Apple Computer to Apple Corps

In late 1991, as reported at ELR 13:7:19, Apple Corps, owned by Paul McCartney, George Harrison, Ringo Starr and the estate of John Lennon, settled a dispute with Apple Computer, Inc. involving the use of the Apple name on products for synthesizing music.

Apple Corps had brought a Chancery Court case claiming that the computer company breached a 1981 non-competition agreement whereby Apple Computer was entitled to use the Apple name on computers, but not in connection with music-related products.

Apple Computer subsequently sued its insurer, Industrial Indemnity Company, for breach of its duty to defend. The insurer contended that Apple's policy did not cover contract agreements and refused to provide a defense.

In July 1993, a San Francisco trial court, according to news reports, ordered the insurance company to pay Apple's defense costs, estimated at between $5 million to $10 million, apparently on the basis that claims covered by Industrial might have arisen in Apple Corps' action.

However, in January 1994, the court ruled that Industrial was not responsible for the $26 million Apple Computer paid to Apple Corps as part of the 1991 settlement.

It has been reported that Richard de Saint Phalle of Buchalter, Nemer, Field & Younger, the attorney for Industrial, has appealed the court's decision on the duty to defend issue. [June 1994][ELR 16:1:36]

Court dismisses Martha Raye's breach of contract action over the film "For the Boys"

A Los Angeles trial court has dismissed a breach of contract action brought by Martha Raye against Bette Midler and other parties associated with the film "For The Boys."

The court, according to news reports, found that the Midler parties did not base the film on a screen treatment of Raye's life. Raye alleged that the treatment, "Maggie," was offered to Midler for $1 million several years ago and that Midler and Raye met in 1981 to discuss the treatment. It was reported that Midler testified that the film and the treatment were not similar except for the fact that both were about entertainers during wartime. [June 1994][ELR 16:1:36]

Arbitrator awards additional damages in baseball owner collusion matter

In February 1994, arbitrator Thomas Roberts awarded a total of about $60 million to several major league baseball players in the proceeding concerning the collusion of baseball team owners against free agents.

The decision, according to news reports, covered only lost salary and interest for the 1986 and 1987 seasons. Several players were awarded $1 million or more; Jack Clark was awarded $800,000 each for the 1986 and 1987 seasons and interest increased the award by more than $500,000. [June 1994][ELR 16:1:36]

DEPARTMENTS

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Loyola of Los Angeles Entertainment Law Journal has published Volume 14, Number 1 with the following articles:

The Progress of Knowledge: A Reexamination of the Fundamental Principles of American Copyright Law by

David A. Householder, 14 Loyola of Los Angeles Entertainment Law Journal 1 (1993)

Unscrupulous Agents and the Amateur Athlete by James C. Crowley IV and Cullen C. Gault, 14 Loyola of Los Angeles Entertainment Law Journal 43 (1993)

Taking Exception to Six Decades on Film: A Social History of Women Lawyers in Popular Culture 1930 to 1990 by Ric Sheffield, 14 Loyola of Los Angeles Entertainment Law Journal 73 (1993)

Play It Again Sam: New York's Renewed Effort at Enacting a "Son of Sam" Law That Passes Constitutional Muster by Amr F. Amer, 14 Loyola of Los Angeles Entertainment Law Journal 115 (1993)

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Hastings Communications and Entertainment Law Journal Comm/Ent has published Volume 16, Number 1 with the following articles:

Summary Judgment on Substantial Similarity in Copyright Actions by Julie J. Bisceglia, 16 Comm/Ent 51 (1993)

Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions by Eric Schlachter, 16 Comm/Ent 87 (1993)

Shopping for California Right of Publicity by Barbara M. Lange, 16 Comm/Ent 151 (1993)

Florida's Bungee Jumping Regulations: Why Other States Should Take the Plunge by Cindy Oakes, 16 Comm/Ent 189 (1993)

On Your Mark, Get Set, Stop! Drug-Testing Appeals in the International Amateur Athletic Federation by Hilary Joy Hatch, 16 Loyola of Los Angeles International and Comparative Law Journal 537 (1994)

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Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art by Michael J. Elston, 56 Law and Contemporary Problems (Durham, North Carolina) 327 (1993)

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The Entertainment Law Review, published by Sweet & Maxwell Ltd, FREEPOST, Andover, Hants SP10 5BR, has published Volume 4, Issue 6 and Volume 5, Issue 1 with the following articles:

Bad Law-Or Bad Judges? Panayiotou v Sony Music Entertainment by Mark Scoggins, 4 Entertainment Law Review 163 (1993)

Let the Sponsor Beware! by Avril Martindale, 4 Entertainment Law Review 165 (1993)

The EC Rental Directive One Year after its Adoption: Some Selected Issues by Jorg Reinbothe and Silke Von Lewinski, 4 Entertainment Law Review 169 (1993)

Bootlegs in the Netherlands: The Final Blow? by willem A. Roos and Jacqueline M. B. Seignette, 4 Entertainment Law Review 178 (1993)

The World of Fictional Characters: A Journey of Fantasy by Heijo E. Ruijsenaars, 4 Entertainment Law Review 182 (1993)

Mamas Don't Let your Babies Grow Up to do Parodies! by Paul Graznak, 5 Entertainment Law Review 3 (1994)

Fair Dealing and the Clockwork Orange Case: "A Thieves" Charter? by David Bradshaw, 5 Entertainment Law Review 6 (1994)

Criminal Remedies for Copyright and Performers' Rights Infringement under the Copyright, Designs and Patents Act 1988 by Gwilym Harbottle, 5 Entertainment Law Review 12 (1994)

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Spanish Anti-trust Authority Decides on TV Soccer Rights by Santiago Martinez Lage, 5 Entertainment Law Review 26 (1994)

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Nationalism Rides Again: The Phil Collins Case by Claire Miskin, 5 Entertainment Law Review 29 (1994)
[ELR 16:1:37]