RECENT CASES

Pepsico wins copyright infringement case involving the phrase "You got the right one baby, uh-huh," used by Ray Charles in Pepsi commercials

In a copyright infringement case that tested the outer limits of the doctrines of "access" and "copyrightability," a federal court of appeals has affirmed a summary judgment in favor of the defendant, Pepsico, Inc. In so ruling, the court established that the plaintiff was pushing the envelope too far with respect to both issues.

The plaintiff had alleged that Ray Charles' use of the phrase "You got the right one baby, uh-huh" in Pepsi commercials infringed what the plaintiff claimed was his copyright in the phrase "You Got the Right One, Uh-Huh." The appellate court's ruling was made in an

unpublished per curiam decision which by court rule limits the circumstances under which it may be cited as precedent in future cases.

Pepsico denied that it had access to any use by the plaintiff of that phrase, and the District Court granted summary judgment for that reason. (ELR 15:5:14) The Court of Appeals affirmed this ruling on three grounds. First, it held that even if the plaintiff's phrase and Pepsico's phrase were strikingly similar, it was still necessary for the plaintiff to show a "reasonable possibility" Pepsico had access to the plaintiff's phrase -- something the plaintiff had not shown. In so ruling, the appellate court rejected the argument that where striking similarities exist, they are sufficient by themselves to give rise to an inference of copying even in the absence of evidence of a reasonable possibility of access.

Second, the appellate court ruled that the plaintiff was not entitled to an inference of access simply because he

asserted that he had performed his phrase on 26 radio stations, including two stations in New York City where the creators of the Pepsi jungle were then living. The court observed that there was no evidence that the plaintiff had used the phrase during any of those performances, and that in any event, the presence of the Pepsi jingle writers in New York City was not enough, alone, to give rise to an inference of access.

Third, the appellate court rejected the argument that access could be proved because the plaintiff had submitted his phrase to an employee of a Pepsi subsidiary in Baltimore. The Pepsi jingle had been written by outside advertising professionals, not by Pepsi employees. Expert testimony was offered by the plaintiff that ideas "percolate up" in the advertising industry; but the court rejected that testimony as unsupported conjecture.

Pepsico also had argued that the plaintiff's phrase was not eligible for copyright protection in the first place.

The District Court had declined to rule in Pepsico's favor on this argument, but the Court of Appeals agreed with Pepsico. The appellate court held that the plaintiff's phrase "fails to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable."

Takeall v. Pepsico, Inc., 1993 U.S.App.LEXIS 31911 (4th Cir. 1993) [ELR 16:2:3]

Summary judgment for 20th Century Fox affirmed, because plaintiff failed to prove access, in case alleging movie "Dreamscape" infringed copyright to plaintiff's unpublished novel

A federal appeals court has held that summary judgment was properly granted to Twentieth Century Fox and other defendants in a copyright infringement action involving the movie Dreamscape, because the plaintiff had failed to show that the defendants had access to his unpublished novel The Saurian prior to the completion of one version of the screenplay from which the movie was eventually produced.

The plaintiff's agent had sent portions of his novel to Fox in April 1981. But by that time, one version of the Dreamscape screenplay already had been registered with the WGA. The registered version of the screenplay was rewritten before the movie was produced, and the plaintiff argued that the defendants had access to his novel before the rewritten screenplay was completed. But the appellate court rejected this argument, because all of those involved in writing both versions of the screenplay had submitted affidavits stating they had no

knowledge of the plaintiff or his novel until his suit was filed. The plaintiff submitted no controverting affidavits.

The court said that in order to find that the defendants had access to the plaintiff's novel, "we would have to assume that the persons who created Dreamscape lied about their lack of knowledge of the [plaintiff] and his novel. We would also have to assume that Fox made copies of the portions of [plaintiff's] novel before returning them to his agent and then distributed those copies." The court ruled that it would "decline" to find access under those circumstances.

McGaughey v. Twentieth Century Fox Television, 12 F.3d 62, 1994 U.S.App.LEXIS 840 (5th Cir. 1994) [ELR 16:2:3]

Trademark Office's refusal to register the mark "Major League Baseball Players Alumni" is reversed by Court of Appeals

The Major League Baseball Players Alumni applied to register a design mark consisting of the name of the association and a baseball player design. The Trademark Trial and Appeal Board of the Patent and Trademark Office affirmed an examining attorney's refusal to register the mark.

A Federal Court of Appeals, in a per curiam opinion based on "the scant record" before the court, has reversed the board's decision that the mark was likely to cause confusion with the registered service marks "Major League Baseball," with and without a baseball player design, for baseball exhibitions and baseball promotional activity. The court cited the "wide disparity" in

the services involved and the differences in both the words and designs of the respective marks.

The Major League Baseball design depicts a silhouette of the head and shoulders of a baseball player swinging at a ball with his bat. Major League Baseball Properties, Inc., the owner of the Major League Baseball marks, had disclaimed the words "Major League Baseball" apart from the mark as shown. The words were sufficiently associated with the picture to constitute a part of the design, according to Judge Rich, who concurred in the court's decision, but declined to join an opinion which stated only generalized reasons for refusing to uphold the Board's ruling.

The association's design included the silhouettes of three full-length baseball players swinging bats; the association agreed to disclaim the words "Major League Baseball Players Alumni."

Judge Rich, after conducting a historical survey, stated that the words "major league baseball" did not indicate a specific source -the evidence suggested that "major league baseball" is "part of the language of this country, purely descriptive, and the name of a category of professional organized baseball to be contrasted with minor league professional baseball, high school baseball, Little League and the like."

Judge Rich noted that the association operated an "alumni" group and was not engaged in promoting baseball by encouraging the manufacture and sale of merchandise or by presenting entertainment services in the nature of baseball games. In all, it appeared to Judge Rich that because of the cumulative differences in the marks and the services provided, the concurrent use of the marks would not be likely to cause confusion or mistake.

In Judge Rich's view, the case should have been remanded to the Patent and Trademark Office with instructions to permit the association to enter the agreed-upon disclaimer, and, in the absence of any other objection, to pass the application to publication.

In re Major League Baseball Players Alumni Association, 1993 U.S.App.LEXIS 29060 (Fed.Cir. 1993) [ELR 16:2:4]

Nonresident L.A. Raider player's California income tax is based on work during football season

In October 1983, Marc Wilson signed three National Football League one-year contracts, under which the Los Angeles Raiders agreed to pay Wilson, respectively, $700,000, $800,000, and $900,000 in

1984-1986, not counting performance bonuses. In the off-season during those years, Wilson lived in Washington and was not a California resident for California income tax purposes. However, because Wilson's income from the Raiders contract derived from a California source, he paid California income tax on a portion of his income for those years, based on a Franchise Tax Board regulation.

Wilson claimed that his contract required him to work or to be available for work every day each year, resulting in about 40-45 percent of his income being taxable. The Board assessed additional taxes for 1984-1986, arguing that under the contract, Wilson only worked or had to be available for work during the football season. The Board's calculation subjected 88-91 percent of Wilson's income to state tax. Wilson paid the additional taxes under protest and then sought a refund of about $120,000 in taxes, penalties and interest.

A Los Angeles trial court entered judgment for Wilson. A California appellate court reversed the judgment and the California Supreme Court, according to news reports, has let stand the appellate court ruling.

Judge Reuben Ortega noted that Wilson and the Board agreed that the regular season included California duty dates, and a special session which included mini-camps. Furthermore, Wilson did not challenge the Board's allocation formula whereby working days in California are divided by the total of working days both in and outside of California. Wilson claimed that the Board's exclusion of off-season football activity from duty days, regardless of the location of such activity, was arbitrary.

Although the issue was "a close one," stated Judge Ortega, it appeared that Wilson's contracts did not require year round availability or participation in off-season football activity. Wilson and his coaches announced that they thought off-season football activity was mandatory;

the coaches conceded that it was not because of the contract, but because of Wilson's obligations as a professional athlete and his self-interest in avoiding being cut.

In Newman v. Franchise Tax Board, 208 Cal.App.3d 972 (1989; ELR 11:3:16), nonresident Paul Newman, who was under an exclusive contract for an eleven week period during the filming of "The Sting," included, in computing his income attributable to California sources, days when he did not actually work but was "on-call." The court affirmed the trial court's judgment for Newman, on the ground that the actor was contractually required to be "on-call" throughout the eleven week period.

Judge Ortega concluded by observing that the result would be "fair" - nearly all of Wilson's football income was earned in California. Wilson argued that he might be subject to double taxation in states which tax nonresident athletes' income based on road games in their

states. Wilson did not cite any cases or statutes indicating that he was threatened with such taxes and the Board, at oral argument asserted that Wilson would receive a credit for any such taxes against his California assessment.

The court limited its conclusion to the contracts before it in agreeing with the Board's ratio, and remanding the matter to the trial court with instructions that it enter judgment for the Board.

Wilson v. Franchise Tax Board, 20 Cal.App.4th 1441, 1993 Cal.App.LEXIS 1238 (1993) [ELR 16:2:4]

Pittsburgh Pirates owner loses claim against city for breach of agreements concerning purchase of the team

Pittsburgh Associates, the owner of the Pittsburgh Pirates baseball franchise, claimed that the city's late mayor, Richard S. Caliguiri, on behalf of the city, promised to provide funds to Pittsburgh Associates in exchange for the company's agreement to purchase the Pirates and keep the team in Pittsburgh.

Pittsburgh Associates claimed that in reliance upon the mayor's promise to provide $25 million in capital, the company entered into an asset purchase agreement with the team's former owner. In late 1985, the city's Urban Redevelopment Authority agreed to an unconditional $20 million loan to Pittsburgh Baseball, Inc., the general partner of Pittsburgh Associates - an additional $5 million was to be available if the Stadium Authority sold or refinanced Three Rivers Stadium. When the Stadium Authority failed to do so, Mayor Caliguiri purportedly promised that the city would unconditionally provide the

remaining $5 million, an obligation later reduced, due to various financial transactions, to $4.2 million.

A Pennsylvania Commonwealth Court has affirmed a trial court decision rejecting Pittsburgh Associates' action seeking to obtain $4.2 million. Since the City Council had not approved the purported agreement, the trial court did not err in dismissing the breach of contract claim. The court also denied the company's promissory estoppel claim, stating that Pittsburgh Associates did not sufficiently plead that it reasonably relied on Mayor Caliguiri's alleged oral promise.

Pittsburgh Associates contended that the city would be unjustly enriched if it were able to repudiate the mayor's promise after accepting the benefits attendant to keeping the Pirates in Pittsburgh. But Judge Madaline Palladino noted that the company did not establish that "a party which bestows an indirect benefit is entitled to a quasi-contract remedy."

Judge Joseph T. Doyle agreed with the majority that Pittsburgh Associates did not cite a Pennsylvania case in which "mere municipal inaction can constitute ratification of a defective contract," but would have found that the company set forth facts which might be sufficient to sustain a claim for promissory estoppel.

Judge Doyle further pointed out that the case cited by the majority on the quasi-contract claim stated that the party who has conferred benefits may recover compensation - the case did not say that the party conferring the benefits must confer them directly. It was "abundantly clear" to Judge Doyle that except for Pittsburgh Associates, "the Pirates' fans would not have been able to purchase tickets, baseball memorabilia or other goods and services attendant to their support of the team's endeavors. Nor could the City itself resonate with civic pride over having a professional baseball team carry its name in the major leagues." Judge Doyle would have

remanded the matter for further proceedings on the promissory estoppel and quasi-contract claims.

Pittsburgh Baseball, Inc. v. Stadium Authority of the City of Pittsburgh, 630 A.2d 505, 1993 Pa.Cmmw.LEXIS 483 (Pa.Cmmw. 1993) [ELR 16:2:5]

Cincinnati Bengals football player wins new hearing on workers compensation claim

On July 24, 1987,the Cincinnati Bengals agreed to pay Chris Thatcher an annual salary of $87,000 for the 1987-1988 season. Thatcher received $22,000 as an advance against his annual salary; the advance was not contingent upon Thatcher's selection to the team roster for the season. Thatcher's receipt of the $65,000 balance of the annual salary depended on whether the player

made the team. The employer reserved the right to terminate the contract if Thatcher's skill or performance was unsatisfactory compared with other players. The contract also paid Thatcher $450 per week for each week that he participated at the team's pre-season training camp. At the start of the regular season, as a "rostered player," Thatcher was to receive the balance of $65,000 in either weekly or bi-weekly installments during the football season.

Thatcher, also on July 24, 1987, signed a second year contract; the contract set forth an annual salary of $80,000.

Both contracts required the team to continue to pay the yearly salary if Thatcher was injured in the performance of his services under the contract, promptly reported the injury to the team doctor, and was physically unable to perform under the contract.

On July 31, 1987, Thatcher suffered an injury to his right knee during the first week of pre-season training camp. After Thatcher had surgery, the team's orthopedic surgeon certified that the player was temporarily and totally disabled through September 23, 1988. Thatcher received the balance of his annual salary under the contract during the 1987-1988 football season. He returned to pre-season training camp during the summer of 1988 and was paid the training camp salary of $500 per week. But in July 1988, pursuant to a medical evaluation, the team exercised its right to terminate Thatcher's contract.

Thatcher subsequently obtained employment as an assistant football coach at various colleges.

In January 1989, Thatcher applied to the Ohio Bureau of Workers' Compensation for wage loss benefits. After various proceedings, Thatcher's application for wage loss benefits was denied.

Ohio appellate court Judge Young noted that a claimant for wage loss benefits must causally relate his claimed disability to his industrial injury. The Bureau determined that the evidence did not support a finding that Thatcher returned to employment other than his former position as a direct result of the claimed disability. Judge Young disagreed, stating that although the team argued that Thatcher probably would not have made the roster even if he had not been injured, the evidence indicated that Thatcher was terminated because of his injury.

The applicable regulation did not connect an injured worker's right to wage loss compensation to the continued possibility of employment at the job where the injury occurred. "It should make absolutely no difference to the wage loss issue," continued the court, "whether the injured worker was about to be fired or was asked to quit for reasons unrelated to the injury...The court

should ask whether there is a medical impairment flowing from the industrial injury which prevents the employee from working."

The regulations further provided that the claimant's average weekly wage for the year proceeding his injury would be the weekly wage upon which compensation is based. Judge Young found that the hearing officer set forth in his order the factors relevant to the decision to setting Thatcher's average weekly wage at $564, and upheld the decision.

The court remanded the matter for further determinations as to the time period for which Thatcher was entitled to wage loss compensation benefits and the amount of benefits to which the player was entitled. Judge Young observed that Thatcher had shown only that the commission abused its discretion in denying wage loss benefits on causation grounds, but had not shown entitlement to any specific amount of benefits. It was

possible that Young would not be able to establish such entitlement, stated the court. And until the commission determines that Thatcher is entitled to wage loss benefits, the court declined to consider the player's arguments concerning the constitutional validity of a setoff regulation.

State of Ohio ex rel. Chris Thatcher v. The Cincinnati Bengals, 1993 Ohio App.LEXIS 3581 [ELR 16:2:6]

Wisconsin tax agency properly calculated tax owed by nonresident Green Bay Packer player

In 1984, the Green Bay Packers paid player Thomas J. Flynn, a nonresident of Wisconsin, about $98,000. The wage statement attached to Flynn's 1985 income tax return indicated wages in the amount of about $188,000.

The Wisconsin Department of Revenue assessed additional taxes against Flynn. The department based Flynn's Wisconsin wages from the Packers on a ratio of Wisconsin duty days over total regular season duty days. The Packer wages taxable by Wisconsin were found to be about $89,500 for 1984 and about $162,000 for 1985.

The Wisconsin Tax Appeals Commission, in affirming the assessment, first found that Flynn's signing bonus was personal services income and was subject to taxation. The Commission then found that the off-season conditioning program undertaken by Flynn while in Pennsylvania was not a service for which he was compensated by the team and was properly disregarded in calculating the tax assessment. It was noted that Flynn's contract did not compensate him for training during the off-season, but for reporting, already in fit condition, and participating in meetings, practice sessions, and

games. The fact that the Packers provided a specific conditioning program to Flynn and "encouraged" him to follow it did not mean that the player rendered compensable services, stated the Commission.

Flynn v. Wisconsin Department of Revenue, 1993 Wisc.Tax.LEXIS 26 (Wis.Tax Appeals Commission 1993) [ELR 16:2:6]

Former college basketball coach must include severance pay in gross income when calculating federal income tax

When the University of Arizona, in August 1983, notified John Lindsey that he would not be rehired as head basketball coach, the school sent Lindsey a payment of about $49,000 as "severance pay." The amount of the

payment equalled Lindsey's base salary and was given to him in addition to his salary for the 1982-1983 season.

Lindsey did not include the payment in his gross income for the 1983 taxable year.

When Lindsey sued various university parties claiming, in part, breach of an oral agreement that the coach's one year contract would be renewed for three additional years, a trial court jury awarded Lindsey $215,000 for deprivation of three years of employment and awarded an additional $480,000 for the decrease in Lindsey's future earning capacity.

An Arizona appellate court affirmed the judgment entered on the verdict with respect to the award for loss of employment and an additional award of about $90,000 for attorneys' fees. The court vacated the judgment of the trial court with respect to the award for loss of future earning capacity.

The United States Tax Court has agreed with the Internal Revenue Service that Lindsey did not prove that the payment in issue constituted damages received on account of personal injuries or sickness. There was substantial evidence that the university made the payment as severance payment, not in settlement of a personal injury claim, and that the payment therefore was includable in gross income.

The court declined to find that Lindsey was liable for additions to tax for negligence or for substantial understatement, stating that Lindsey had disclosed his receipt of the university's payment to his accountant.

Lindsey v. Commissioner of Internal Revenue, T.C.Memo 1993-384, 1993 Tax Ct.Memo LEXIS 389 (U.S.Tax Ct. 1993) [ELR 16:2:7]

Cincinnati Bengals' share of revenue from network television contracts is exempt from municipal income taxation

The Cincinnati Tax Commissioner assessed income tax against the Cincinnati Bengals for television revenue received during the team's fiscal years 1987 through 1989. The city Income Tax Bureau Board of Review upheld the assessment, as modified. A trial court held that the pro rata share of revenue from network television contracts received by the team was intangible income properly exempt from municipal taxation.

An Ohio appellate court, in affirming the trial court decision, noted that the tax authorities argued that the revenue was taxable because it was a payment by the NFL for services provided by the Bengals, i.e., playing a full schedule of football games. The team contended that its share of the revenue was a royalty payment for a

limited license to the television networks to exploit the copyright, intangible property of all the member teams - their football games - and was nontaxable intangible income.

The court found that the network television revenues were "substantially equivalent to royalty payments." It was observed that the team and the NFL retained significant rights in the use of the broadcasts of their games; that there were limitations on the networks' use of film and videotape highlights of the games; and that member teams receive revenue for games in which they do not appear or perform, unlike a personal services contract.

Furthermore, state law characterizes as royalties payments for the right to use or publish intangible property, such as copyrighted material. The networks paid to broadcast the copyrighted games of the NFL and its member teams. The fact that the network payments

initially are made to an NFL Clearance Account and that the revenues are distributed to the teams as payments from the NFL did not require a different conclusion - the trial court had found that the television networks pay the member teams, not the NFL, for the broadcast rights to the games. The character of the revenue received by the NFL remained the same when the royalty was transferred to the member teams.

Cincinnati Bengals, Inc. v. Papania, 1993 Ohio App.LEXIS 5006 (Ohio App. 1993) [ELR 16:2:7]

Court approves amended settlement agreement in football players' antitrust class action against NFL

In September 1992, Reggie White and several other football players sued the National Football League and

its member clubs. The players challenged various NFL rules, including the right of first refusal/compensation component of Plan B, the college draft, the NFL Player Contract and the preseason pay rules.

The class action sought antitrust damages and injunctive relief that would have barred the NFL parties from enforcing the right of first refusal/compensation rules of Plan B, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993.

In late February 1993, the players and the clubs entered into a stipulation and settlement agreement which was designed to end the instant action and related cases. The terms of the settlement were reported at ELR 14:9:19 and Judge Doty issued a decision approving the settlement (ELR 15:9:17).

In August 1993, Judge Doty granted a motion to amend the stipulation and settlement agreement and

approved the amended agreement. The amendments related to various aspects of the new NFL player movement system and did not affect the amount of any settlement payment due to class members under the terms of the original settlement agreement, noted the court.

The amendments modified the veteran free agency rules concerning franchise and transition players, the transition player provisions, the expansion team college draft, and the salary cap.

Judge Doty, among other findings, declared that the amended settlement agreement, as a whole, was not per se illegal, and was fair, reasonable and adequate to the class; found that the Philadelphia Eagles lacked standing to object to the amended settlement agreement (although the court proceeded to consider the merits of the objections "to ensure a complete record); and stated that there was no evidence of fraud or duress in the settlement of

licensing litigation which resolved "a wide range of legitimate disputes between the NFL and the NFLPA."

It also was found that in the present case, rulings with respect to the "reconstitution and recognition" of the NFLPA as the players' union were not within the primary jurisdiction of the National Labor Relations Board. The court determined that the NFLPA was validly reconstituted as a union and granted a motion for further factual findings concerning the scope of the nonstatutory labor exemption.

The court concluded by reaffirming its prior determination that it had appropriate jurisdiction to adjudicate the claims of all class members, including those of absent, nonresident class members, and by denying a motion to sanction the Eagles.

In a subsequent opinion, Judge Doty granted the National Football League parties' motion to hold Leslie O'Neal in contempt of the court's April 1993 order.

Judge Doty stated that O'Neal could "purge" himself of the contempt by withdrawing his motion to return his case to the active caseload of the Central District of California by a specified date and taking no further action inconsistent with the court's April order.

The court also issued an order approving the amended stipulation and settlement agreement.

White v. National Football League, 836 F.Supp. 1458, 1993 U.S.Dist.LEXIS 14570; 836 F.Supp. 1505, 1993 U.S.Dist.LEXIS 14166; 836 F.Supp. 1508, 1993 U.S.Dist.LEXIS 14162 (D.Minn. 1993) [ELR 16:2:8]

NLRB orders further collective bargaining in dispute between public television stations and Writers Guild

The Writers Guild of America, East had a collective bargaining agreement with various public television stations covering freelance writers who prepare literary material for the stations. The last agreement, which was for the period July 1, 1985 through June 30, 1988 (extended to August 14, 1988), provided, in part, for a minimum payment of about $10,000 for a one hour documentary, plus residuals for tape sales and subsequent showings. The stations were limited to showing a program no more than four times in three years; each release would consist of unlimited showings within a seven day period.

Walter Annenberg gave more than forty million dollars to the Corporation for Public Broadcasting, but required stations receiving funds from the Annenberg Foundation to agree that programs produced with the funds could be shown an unlimited number of times during a nine year period. Annenberg and the Corporation also required

that the writers of the programs relinquish any potential income from supplementary sources, such as tape sales.

The union and the stations, from about January 1986 through 1989, attempted to solve the conflicts between the agreement and the grant. The stations offered to increase the minimum fee and, by August 15, 1988, were offering 300 percent of the prior minimum.

It also was proposed that if the stations would waive any rights they might have and let the writers receive payments for foreign broadcasts of their shows, the union might be willing to waive the "four in three" provision and agree to Annenberg's requirement for unlimited showings for nine years.

The parties were not able to agree on these issues by August 15th, at which time the negotiator for WGBH, the Boston-based public television station, apparently stated that the parties had reached an impasse and announced that WGBH, in order to begin writing for the

Annenberg-funded show, "State of the World," was unilaterally changing the compensation method from four in three to nine years unlimited programs, with compensation at 300 percent of the prior minimum.

When the Writers Guild filed a complaint charging an unfair labor practice, Administrative Law Judge Joel P. Biblowitz first found that WGBH, by refusing to provide the union with information about writers' and producers' fees paid to hyphenates, violated Section 8(a)(1)(5) of the National Labor Relations Act.

Judge Biblowitz then carefully reviewed the course of the parties' negotiations and the testimony concerning the August 15th meeting, and concluded that there was no impasse on that date. An impasse exists, stated Judge Biblowitz, "when negotiations have run their course and the parties are deadlocked. An employer cannot advance the date of an impasse, or declare an impasse based upon alleged business necessity." It was found that

WGBH declared the impasse, not only due to the failure to reach an agreement with the union, but because the station had to begin writing services on "State of the World" on that date. By unilaterally changing the terms and conditions of employment of its union-represented writers who were employed to work on the Annenberg production at a time when there was no impasse in the negotiations, WGBH violated Section 8(a)(1)((5) of the Act, concluded Judge Biblowitz.

Judge Biblowitz recommended that WGBH be ordered to promptly supply the union with the requested information regarding the pay of its writer-producers and the breakdown of this pay between writing and producing functions, and, on request, to bargain collectively in good faith with the union on the terms and conditions of employment of unit employees. Judge Biblowitz also recommended that WGBH be ordered to reinstate the

wages and terms and conditions of employment that existed prior to August 15, 1988.

In August 1993, the National Labor Relations Board affirmed Judge Biblowitz's February 1991 rulings, findings, and conclusions and adopted the recommended Order. The record did not support a finding of business necessity for WGBH's decision to implement the Annenberg proposal unilaterally on August 15th. However, the Board announced that it would "disavow the implication in the judge's decision that an employer can never advance the date of impasse or declare an impasse on the basis of business necessity." The Board agreed with Judge Biblowitz that the parties were not at an impasse and that the union had not insisted on the foreign copyright proposal as a condition to agreement on a contract.

Community Television of Southern California and The Writers Guild of America, East, Inc., 1993 NLRB LEXIS 852 [ELR 16:2:8]

Further proceedings are ordered in dispute over cable television rights to "Rocky and Bullwinkle" cartoon series

As reported at ELR 13:6:9, 14:1:21, Producers Associates of TV, in March 1959, conveyed to General Mills, Inc. the ownership of Producers' animated cartoon series known as "Rocky and His Friends" (later renamed "The Bullwinkle Show"). General Mills obtained the "exclusive right in perpetuity to all exhibition rights (television and theatrical) in the United States..." A February 1960 letter agreement reaffirmed General Mills' exclusive exhibition rights in "each of the programs and any element,

segment or part thereof on television and in theatres without limitation..."

In 1990, General Mills attempted to license the Rocky and Bullwinkle series to the Comedy Channel, a cable television service. But Producers claimed that General Mills did not have cable rights in the series, and granted videocassette rights to a division of Walt Disney Company.

In response to General Mills' action for declaratory relief and damages, a New York trial court ruled that the contract encompassed cable television rights to the series, but that the company did not possess videocassette or videodisc distribution rights.

A New York appellate court has agreed that the license granted to General Mills did not extend to videocassettes or videodiscs for home use. However, it was not clear to the court that the grant of an exclusive right to exhibit the cartoons "on television... without limitation"

extended to "a transmission medium which, although in existence at the time [the contract] was executed, had not yet been commercially exploited as a system for the mass distribution of paid television programming."

The parties' agreement was ambiguous as to the scope accorded to the term "television;" extrinsic evidence will be required to determine the intent of the parties, stated the court, in finding that summary judgment would be "inappropriate" with respect to the construction of the right to distribution via cable television.

General Mills, Inc. v. Filmtel International Corporation, 599 N.Y.S.2d 820, 1993 N.Y.App.Div.LEXIS 6852 (N.Y.App.1993) [ELR 16:2:9]

Songwriter may proceed with libel action against Sony Music based on liner notes of Sister Souljah album

In 1991, songwriters Michael Shinn and Antonio Brutus agreed to produce, write and arrange five master tapes for Lisa Williamson, known as "Sister Souljah." Williamson, as the agent of Souljah's Spirit, Inc., granted Sony Music Entertainment Inc. the right to release the album, "360 Degrees of Power," and subsequently authorized Sony to make certain payments directly to Shinn and Brutus for the production of the master recordings. However, in January 1992, Williamson directed Sony not to make any further payments to Shinn and Brutus.

The credits on the cover of the album were categorized as "Thanks," "Extra Special Thanks," "Special Thanks,"

and "Two-Faced Backstabbers." Shinn was included in the latter category.

A New York trial court has ruled that Shinn stated a viable cause of action for defamation and denied Sony's motion to dismiss. Judge Gloria C. Aronin noted that although many of the lyrics in the album contained "vituperative, rhetorical hyperbole," the reference to Shinn in the credits section implied certain facts known to Williamson regarding Shinn's purported deceitful conduct in his profession and thus stated an actionable claim of libel per se. It will remain for a trier of fact to determine whether the challenged words were likely to be understood as defamatory by the ordinary and average reader.

Judge Aronin granted Sony's motion to dismiss Shinn's breach of contract or third party beneficiary claims. Sony was not a signatory to the contract between the songwriters and Souljah Spirit, Inc.

Shinn v. Williamson, New York Law Journal, p. 34, col. 5 (Kings Cnty., Feb. 17, 1994) [ELR 16:2:10]

Bankruptcy Court allows Alabama Symphony Association to reject collective bargaining agreement with musicians in Chapter 11 reorganization

A collective bargaining agreement between the Alabama Symphony Association and the Birmingham Musicians' Protective Association, a division of the American Federation of Musicians, reduced wages paid under previous agreements, but provided that in the third year of the agreement, the musicians' compensation would return to pre-1991 levels.

The Symphony, in January 1993, filed a voluntary petition under Chapter 11 of the Bankruptcy Code, and sought to reject the collective bargaining agreement,

claiming that the "snap-back" provision would preclude its effective reorganization.

A federal bankruptcy court first found that the orchestra did not file its petition in bad faith.

The musicians then argued that the orchestra's failure to pay compensation and benefits to the musicians after filing its petition amounted to a unilateral termination or modification of the collective bargaining agreement, and that this unilateral modification or termination prevented the orchestra from applying to reject the collective bargaining agreement.

The court denied the musicians' motion to strike, holding that the nonpayment did not terminate or modify the collective bargaining agreement, although it might be a breach of contract.

Judge Tamara O. Mitchell proceeded to analyze the factors relevant to the orchestra's application. It was found that the orchestra made a proposal to the

musicians at the Code-specified time; that the proposal was based on all available information; that the orchestra proposed only necessary modifications to the collective bargaining agreement, and the proposed modifications "did not wreak utter and total havoc" on the agreement; that the proposed modifications attempted to treat all parties fairly and equitably; that the orchestra provided relevant, necessary information to the union; and that the orchestra attempted to meet and negotiate with the union, but was rebuffed.

The court found that the musicians did not seek to negotiate toward a meaningful reorganization, but merely insisted that the orchestra comply with the payment terms of the collective bargaining agreement. This was an "unreasonable position," stated Judge Mitchell - the musicians knew that the orchestra did not have funds available and failed to bargain without good cause.

Judge Mitchell commented that the orchestra's liquidation was "almost certain" if the court did not approve the rejection of the agreement, resulting in losses not only to the musicians, but to the city and state. In balancing the equities of the matter, the court also considered the non-profit nature of the orchestra and mentioned that there was no evidence suggesting that management would gain financially from concessions by the musicians. Under reorganization, the musicians would have "the possibility of a future" with the orchestra. The court therefore granted the orchestra's application to reject the collective bargaining agreement with the musicians.

In re: Alabama Symphony Association, 155 Bankr. 556, 1993 Bankr.LEXIS 825 (N.D.Ala. Bankr.Ct. 1993) [ELR 16:2:10]

Dismissal of class action arising from Time Warner debt reduction efforts is reversed

As reported at ELR 15:3:20, Time, Inc., in 1989, agreed to acquire all of Warner Communications' outstanding stock for $70 per share. The acquisition caused Time to incur debt of over $10 billion. The Time directors, prior to the Warner acquisition, had rejected Paramount Communications' tender offer of $200 per share.

Time Warner, when faced with a balloon payment on its debt, proposed a variable price offering on June 6, 1991. The proposal was rejected by the SEC, but the SEC approved a second proposal announced on July 12th. The price of Time Warner stock fell from $117 on June 5th to $89.75 on July 12th.

A class action complaint alleged that Time Warner and certain company officials misled purchasers of the stock

during the period from December 12, 1990 through June 7, 1991.

A Federal District Court in New York granted the Time Warner parties' motion to dismiss the claims of securities fraud, common law fraud and negligent misrepresentation on the grounds that the complaint failed to allege material misstatements or material omissions and that the complaint did not allege scienter on the part of the Time Warner parties.

Federal Court of Appeals Judge Jon O. Newman first considered whether it was proper to dismiss allegations of fraudulent statements when the complaint failed to identify the speaker. The class action alleged that some as yet unknown agents of Time Warner made misleading statements (or omitted to disclose material information) in discussions with reporters or analysts concerning Time Warner's potential "strategic alliances" with other companies. The District Court had found

that the complaint was required, at a minimum, to identify the speaker of the allegedly fraudulent statements. Judge Newman agreed that dismissal was proper as to the unattributed statements.

The class further alleged that certain attributed statements did not disclose problems in the strategic alliance negotiations, and did not disclose the active consideration of the rights offering. Judge Newman first affirmed the ruling that none of the statements constituted an affirmative misrepresentation. There was no suggestion that the factual assertions contained in any of the statements were false when the statements were made.

The court then stated that "a duty to disclose arises whenever secret information renders prior public statements materially misleading, not merely when that information completely negates the public statements." Time Warner's public statements could have been understood by reasonable investors to mean that the company hoped

to solve its debt problem through strategic alliances - the company thus may have incurred a duty to disclose facts that would place those statements "in a materially different light."

Judge Newman cautioned that the court was not holding that whenever a corporation speaks, it must disclose every piece of information in its possession that could affect the price of its stock. But "when a corporation is pursuing a specific business goal and announces that goal as well as an intended approach for reaching it, it may come under an obligation to disclose other approaches are under active and serious consideration." Whether consideration of the alternate approach constitutes material information, and whether nondisclosure of the alternate approach renders the original disclosure misleading, remain questions for the trier of fact. The class's allegations of nondisclosure of the rights offering were sufficient to survive a motion to dismiss.

As an alternative basis for its dismissal order, the District Court found that the class failed to adequately plead scienter.

Judge Newman determined that the class presented sufficient allegations as to Time Warner's motive to benefit from the nondisclosure concerning its consideration of a rights offering to satisfy the scienter requirement and withstand a motion to dismiss. The class claimed that Time Warner's prior statements concerning strategic alliances became misleading by a material nondisclosure of the active consideration of a dilutive rights offering. In these circumstances, the court considered the pleading sufficient to survive dismissal, noting that markets may not fully correct for prior misleading information once a necessary disclosure has been made. It will remain for the class to prove that Time Warner had a motive not to promptly correct any misleading aspect of the prior statements. The court declined to find, on a

motion to dismiss, that the class could not prove the existence of a motive.

The court's reinstatement of the section 10(b) claim mandated reinstatement of the state law fraud claim as well, announced Judge Newman - the basis of dismissing the state law fraud claim was the failure to plead a misrepresentation or omission of a material fact, a requirement under New York law. However, the District Court properly dismissed the negligent misrepresentation claim.

Judge Winter, in dissent, agreed that the allegation that Time Warner's failure to disclose active consideration of the variable price rights offering was material in that it rendered prior statements arguably misleading, but would have found that the class did not adequately establish scienter. The offering of common shares might have been dilutive but not injurious, and Time Warner's failure to disclose active consideration of an equity

offering did not make its prior statements misleading, stated Judge Winter. The dissent emphasized that the offering was not a standard equity offering, but a variable price rights offering restricted to existing shareholders - this indicated that outside capital was not available. Thus, the new offering would necessarily lessen the value of the common shares because existing shareholders had either to put up more money or to incur a disproportionate loss in value. In light of the prior statements, active consideration of the variable price offering should have been disclosed.

With respect to scienter, Judge Winter found the "scenario" relied upon by the majority as "wholly implausible" in light of the nature of the variable price rights offering. Judge Winter pointed out that there is a waiting period after the filing of a registration statement which provides "ample time" for the information contained in the statement to be absorbed by investors. Judge Winter

would have affirmed the dismissal of the complaint, stating that the argument concerning Time Warner's motive for purportedly delaying the announcement of the variable price rights offering "posits a scenario that is inconsistent with assumptions underlying securities law, statements in the complaint, and any plausible understanding of the operation of capital markets."

The Supreme Court has denied Time Warner's petition that it hear the case.

In re Time Warner Inc. Securities Litigation, 9 F.3d 259, 1993 U.S.App.LEXIS 31173 (2d Cir. 1993) [ELR 16:2:11]

Delaware Supreme Court finds that Paramount board of directors failed to act reasonably in Viacom and QVC transactions

The Supreme Court of Delaware has upheld a November 1993 Court of Chancery decision (1993 Del.Ch.LEXIS 258) granting a preliminary injunction to QVC Network Inc. and certain Paramount stockholders barring the use of various defensive measures, approved by the board of directors of Paramount, which were designed to facilitate a "strategic alliance" between Viacom Inc. and Paramount Communications Inc. and, as described by Chief Judge Veasey, to "thwart" an unsolicited, more valuable, tender offer by QVC.

The court affirmed the Court of Chancery decision in December 1993 (1993 Del.LEXIS 440), stating at that time that an opinion "will follow in due course." The February 1994 opinion cautions: "This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal."

The Court of Chancery had found that the Paramount directors violated their fiduciary duties by favoring the Paramount-Viacom transaction over the more valuable QVC offer. The court preliminarily enjoined the Paramount parties from amending or modifying Paramount's stockholder rights agreement, or taking other action to facilitate the tender offer by Viacom or any proposed merger. The court also enjoined Viacom and the Paramount parties from taking any action to exercise any provision of the stock option agreement between the companies.

Judge Veasey declared that the sale of control involved in the Paramount-Viacom transaction required the Paramount directors to act on an informed basis to obtain the best value reasonably available to the stockholders. The court agreed with the Court of Chancery that the Paramount directors violated their fiduciary duties, and

remanded the matter to the Court of Chancery for further proceedings.

Judge Veasey noted that the Paramount Board, in approving the original agreement whereby Paramount was to merge with and into Viacom, adopted several provisions designed to decrease the success of any potential competing bid.

Under the "no-shop" provision, the Paramount Board agreed that Paramount would not "solicit, encourage, discuss, negotiate, or endorse any competing transaction" except under specified circumstances. The Board also agreed that Viacom would receive a $100 million termination fee if Paramount terminated the original merger agreement because of a competing transaction; if Paramount's stockholders did not approve the merger; or if the Paramount Board recommended a competing transaction.

Furthermore, a stock option agreement granted Viacom an option to purchase about 19.9 percent of Paramount's outstanding common stock at a specified per share price if any of the triggering events for the termination fee occurred. Viacom was permitted to pay for the shares with "a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price," and Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock. The stock option agreement was not "capped" to limit its maximum dollar value, and therefore, stated the court, "it had the potential to reach (and in this case did reach) unreasonable levels."

In September 1993, QVC proposed to acquire Paramount for about $80 per share. The following month, citing the slow pace of the merger discussions, QVC

announced an $80 cash tender offer for 51 percent of Paramount's outstanding shares; the bid offered over $10 per share more than the consideration provided by Viacom's original merger agreement.

Paramount and Viacom subsequently entered an amended merger agreement, which although essentially the same as the original agreement, provided for an $80 per share cash tender by Viacom for 51 percent of Paramount's stock and improved other stock conversion provisions. Judge Veasey pointed out that the defensive measures intended to make a competing bid more difficult were not removed or modified in the amended merger agreement.

On November 15, 1993, the Paramount Board determined that the new QVC offer was not in the best interests of the stockholders, purportedly on the basis that QVC's bid was excessively conditional. Judge Veasey commented that the only quantitative analysis of the

consideration to be received by the stockholders under the proposals of Viacom and QVC was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them.

Judge Veasey reiterated that "enhanced scrutiny" may be applied to the actions taken by corporate directors when, as in the instant case, a matter involves the approval of a transaction resulting in a sale of control and involves the adoption of defensive measures in response to a threat to corporate control. The Viacom-Paramount transaction would shift control of Paramount from the public stockholders to a controlling stockholder, Viacom. The Paramount stockholders thus were entitled to receive a control premium and/or protective devices "of significant value." Since there were no such protective provisions in the Viacom-Paramount transaction, the Paramount directors "had an obligation to take the

maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available."

The court determined that the Paramount directors did not act reasonably, and that the result achieved for the stockholders was not reasonable under the circumstances. It appeared to Judge Veasey that the Paramount Board, when entering into the original merger agreement, and thereafter, gave insufficient attention to the potential consequences of the defensive measures demanded by Viacom. In particular, the termination fee, whether or not unreasonable by itself, made Paramount less attractive to other bidders, when coupled with the stock option agreement. And the no-shop provision inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC, which had already expressed an interest in the company.

QVC's interest in Paramount provided the opportunity for the Paramount Board to seek significantly higher value for the Paramount stockholders than that being offered by Viacom, stated the court. It should have been clear to the Paramount Board that the stock option agreement, along with the termination fee and no-shop provisions, were impeding the value reasonably available to company stockholders, but the Board did not attempt to eliminate or modify the devices.

By November 12, 1993, the value of the revised QVC offer on its face exceeded that of the Viacom offer by over $1 billion at then current values. The disparity of value "cannot be justified on the basis of the directors' vision of future strategy," declared Judge Veasey - the change of control would end the authority of the Paramount Board to implement a "strategic vision in any meaningful way." In mid-November, the directors remained "paralyzed" by their uninformed belief that the

QVC offer was "illusory." As Judge Veasey stated, "this final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonable available was thereby squandered."

The court rejected Viacom's claim that it had certain "vested" contract rights with respect to the no-shop provision and the stock option agreement. Again, those defensive measures, according to the court, were improperly designed to deter potential bidders, and did not meet the applicable reasonableness test. To the extent that a contract purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. In all, the no-shop provision was invalid and did not provide Viacom with any vested contract rights, and, in the instant case, the stock option provision also was invalid.

Judge Veasey concluded by considering, in an addendum, an instance of professional misconduct and lack of civility during certain depositions in the matter.

Paramount Communications Inc. v. QVC Network Inc., 1994 Del.LEXIS 57 (Del. 1994) [ELR 16:2:12]

School's decision not to publish reviews of "Rain Man" and "Mississippi Burning" violated student author's constitutional rights

In 1989, when Brien Desilets was an eighth grade student attending Clearview Junior High School, he wrote two movie reviews for the school newspaper. The reviews were not published; Charles Bishop, the school principal removed the articles because the movies, "Mississippi Burning" and "Rain Man," were R-rated.

Bishop's position was that the reviews would encourage student under age 17 to see the movies. Michael P. Toscano, the school superintendent, supported Bishop's decision.

Patricia Desilets, on behalf of Brien, sued the Board of Education, Toscano and Bishop, alleging that the censorship of the articles violated Brien's state and federal constitutional rights.

A New Jersey trial court concluded that Desilets' state, but not his federal, constitutional rights had been violated. The court found that the school could have disassociated itself from the movie reviews by including a disclaimer stating that the school did not endorse the movies and by reminding students that they could not see the movies unless accompanied by a parent.

The appellate court agreed that the school newspaper was not a public forum, but disagreed with the finding that the school parties did not violate Desilets' First

Amendment rights. Judge Keefe noted that the censorship was not based on the style or content of the reviews, and that the reviews did not imply that a reader should see the movies without parental guidance. The school parties' conclusion that all R-rated movies are inappropriate for junior high school students "reads more into the movie rating system than is intended by the system itself, and is inconsistent with the system's purpose," stated Judge Keefe, who commented that the decision concerning the appropriateness of a movie's content is a parental one, not an educational one.

In the event that the presence of a review in the newspaper could be seen as an endorsement by the school parties, a disclaimer would be a "minimal accommodation" to the First Amendment where the content of the review was otherwise appropriate.

Judge D'Annunzio agreed with the conclusion that the school newspaper was not a public forum, but would

have reversed the judgment of the lower court. For Judge D'Annunzio, disassociating the school from acts which encourage junior high students to view R-rated films is "a legitimate pedagogical concern." By not publishing reviews for R-rated movies, the school parties were maintaining a neutral position on a controversial issue, declared the dissent, and the impact on Desilets' freedom of expression was slight.

Desilets v. Clearview Regional Board of Education, 630 A.2d 333, 1993 N.J.Super.LEXIS 736 (N.J.App. 1993) [ELR 16:2:14]

Court rejects claims against "Boys' Life" arising from accidental shooting death of child

The September 1988 edition of Boys' Life magazine included an advertising supplement on shooting sports, sponsored by the National Shooting Sports Foundation Inc. The supplement contained advertisements for firearms and ammunition manufacturers, a checklist on firearm safety, and articles in which information was provided about earning merit badges for shooting; the biathlon, an Olympic shooting sport; the Presidential Sports Award, which can be earned for accomplishments in the shooting sports; and getting started in the shooting sports.

Jan Way alleged that her son, Rocky William Miller, and several of his friends, after reading the supplement, located an old rifle and a .22-caliber cartridge. In November 1988, twelve-year-old Rocky was killed when the rifle accidentally discharged.

Way sued the Boy Scouts of America, the Foundation, and Remington Arms Company, for the negligent

publication of the magazine supplement and for strict liability. A Texas trial court, without stating the grounds for its decision, granted the magazine parties' motions for summary judgment.

On appeal, Way argued that the supplement presented a foreseeable and unreasonable risk of harm to its young readers, and that the magazine parties had a duty to exercise reasonable care either not to create this risk of harm or to mitigate the risk by giving clear, explicit, prominent warnings to children about the dangers inherent in the use of firearms and ammunition.

The magazine parties cited the decision in Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989; ELR 11:9:15), cert. denied, 493 U.S. 1024 (1990), in which the court held that the publisher did not violate a legal duty by publishing a facially innocuous classified advertisement. An individual who read the ad placed by an ex-Marine willing to take "high risk

assignments," hired the advertiser to murder his wife. The court stated that the burden of preventing harm would have required the magazine to refrain from printing any personal service classified ads, and concluded that the magazine did not violate the required standard of conduct by publishing the ad.

Way responded that the shooting supplement motivated, promoted, and advertised the use of firearms and ammunition by minors and that the particular risk of harm to minors was clearly foreseeable. Way referred to Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D.Ark. 1987; ELR 9:3:14, 9:5:17) and Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992; ELR 13:3:19), cert. denied, 113 S.Ct. 1028 (1993; ELR 14:10:9). However, Texas appellate court Judge Mark Whittington stated that Norwood was inapplicable - the court, in holding that the risk of injury was foreseeable in a "gun for hire" ad with

resulting illegal activity - did not use a risk-utility analysis and balance the risk of harm against the utility of the magazine's conduct. And in Braun, the ad in question, as opposed to the "facially innocuous" ad at issue in Eimann, clearly stated that the advertiser was "ready, willing and able" to use a gun to commit crimes.

The magazine parties also cited Walters v. Seventeen Magazine, 195 Cal.App.3d 1119 (1987; ELR 9:7:17) in which a minor who suffered toxic shock syndrome alleged that she purchased Playtex Tampons in reliance on an advertisement contained in Seventeen Magazine. The court held that the publisher was not responsible for Walters' injuries and would not "create a new tort of negligently failing to investigate the safety of an advertised product." Way argued that the duty in the instant case was not a duty to investigate, but a duty not to publish material concerning a dangerous product, or, if the decision to publish was made, to warn. Judge

Whittington observed that in Walters, it was alleged that the publisher knew, before publication, that the tampons might be dangerous - information was available on toxic shock syndrome. Thus, both Walters and the instant case involved liability for the publication of ads for dangerous products that allegedly harmed readers, in magazines aimed toward minors.

It appeared to Judge Whittington that the record did not support a conclusion that Rocky's experiment with the rifle and cartridge was a reasonably foreseeable consequence of the publication. Furthermore, the magazine supplement, which emphasized the responsible use of firearms as a supervised and safety-conscious activity, was of significant social utility.

The court, like the Eimann court, did not address the First Amendment arguments raised by the magazine parties, but concluded that the Eimann court was correct in reasoning that the Supreme Court's recognition of

limited First Amendment protection for commercial speech supported the significance of such speech for purposes of the risk-utility analysis.

Pursuant to the risk-utility analysis, the court concluded that the supplement did not create a duty on the part of the magazine parties to either refrain from publication or add warnings about the danger of firearms and ammunition.

The court rejected Way's claim that the magazine parties violated Texas law because the ads, on their face, were offers to sell firearms to minors - the ads were not offers to sell firearms to minors within the scope of the statute.

Also rejected was Way's attempt to extend the doctrine of attractive nuisance to the magazine supplement.

Judge Whittington concluded by denying Way's products liability claim, noting that products liability law "is geared to the tangible world," and that "the ideas,

thoughts, words, and information" in the magazine supplement were not products.

Way v. Boy Scouts of America, 856 S.W.2d 230, 1993 Tex.App.LEXIS 1918 (Tex.App. 1993) [ELR 16:2:14]

United States Supreme Court enters stay of preliminary injunction barring CBS from airing tape of meat packing plant

A South Dakota trial court entered a preliminary injunction prohibiting CBS Inc. from airing videotape taken at the factory of Federal Beef Processors Inc., a South Dakota meat packing company. CBS planned to televise the tape on the "48 Hours" program scheduled for broadcast on February 9, 1994.

As described by United States Supreme Court Judge Blackmun, CBS obtained the footage of Federal's meat packing operations through the cooperation of a Federal employee who voluntarily agreed to wear undercover camera equipment during his shift. CBS stated that its investigation was not targeted at Federal, but at the meat processing industry generally, and that CBS did not intend to reveal the company that was the source of the footage.

Federal sued to prevent the broadcast of the tape, alleging, among other claims, trespass, breach of the duty of loyalty, and violation of the Uniform Trade Secrets Act.

The trial court enjoined CBS from "disseminating, disclosing, broadcasting, or otherwise revealing" any footage of the Federal plant interior, stating that the disclosure would likely cause irreparable injury to the company. It was noted that since CBS obtained the

videotape "at the very least, through calculated misdeeds," the First Amendment prior restraint doctrine did not apply. The court also stated that any injury to CBS resulting from the delay was outweighed by the potential economic harm to Federal. On February 8, 1994, the South Dakota Supreme Court denied CBS' application for a stay of the injunction; the court later amended its order to require that the trial court judge rescind the injunction or show cause on March 21, 1994 why a peremptory writ of mandamus should not be issued.

Justice Blackmun, in entering a stay of the injunction, stated that the prior restraint doctrine would apply in the matter - the record thus far did not contain clear evidence of criminal activity on the part of CBS. The trial court decision conflicted with prior decisions of the Supreme Court with respect to prohibiting prior restraints, there was a reasonable probability that the case would warrant certiorari, and the indefinite delay of the

broadcast would cause irreparable harm to the news media that would be intolerable under the First Amendment, concluded Justice Blackmun. If CBS breached its state law obligations, commented the court, the First Amendment would require Federal to seek its remedy through a damages proceeding "rather than through suppression of protected speech."

CBS Inc. v. Davis, 1994 U.S.LEXIS 1326 (U.S.Sup.Ct. 1994) [ELR 16:2:15]

Nevada statute regulating NCAA enforcement procedures violates Commerce Clause

Jerry Tarkanian and three other individuals who were charged with violating NCAA rules in a pending investigation of the University of Nevada, Las Vegas, asserted

their right to have the proceedings against them comply with a Nevada statute. The statute, enacted in 1991, imposed certain minimum "due process" procedural standards on interstate organizations, i.e., national collegiate athletic associations which have member institutions in 40 or more states, when a Nevada institution, employee, student-athlete, or booster is accused of a rules infraction during an enforcement proceeding in which sanctions may be imposed.

A Federal District Court declared that the statutory provisions violated the Commerce Clause and the Contract Clause of the United States Constitution, and enjoined the Tarkanian parties from taking action to seek protection under the statute (ELR 14:12:6).

Federal Court of Appeals Judge Ferdinand F. Fernandez affirmed the District Court decision on the basis of the Commerce Clause. Judge Fernandez first pointed out that the District Court erred in holding that

the statute did not violate the Commerce Clause per se because the statute did not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests. The District Court also should have considered whether the statute directly regulated interstate commerce. It was clear, stated Judge Fernandez, that the statute regulated only interstate organizations engaged in interstate commerce, and did so directly.

The statute, continued Judge Fernandez, would have "a profound effect" on the NCAA's enforcement of its rules and its regulation of "the integrity of its product." The association would have to adopt Nevada's procedural rules for Nevada schools. And, in order to maintain a uniform enforcement procedure, and to avoid liability under the statute, the NCAA would have to apply Nevada's procedures to enforcement proceedings throughout the country. The statute thus would likely control the

regulation of a product in interstate commerce that occurred wholly outside Nevada's borders; this type of extraterritorial effect is forbidden by the commerce clause, declared the court.

The extraterritorial reach of the statute also violated the Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions - such statutes could subject the NCAA to conflicting requirements.

In all, the Nevada statute violated the Commerce Clause per se and it was not necessary for the court to balance the burden on interstate commerce against any local benefit derived from the statute.

Judge Fernandez concluded by observing that the authority sought by the statute "goes to the heart of the NCAA and threatens to tear that heart out..."

National Collegiate Athletic Association v. Miller, 10 F.3d 633, 1993 U.S.App.LEXIS 30119 (9th Cir. 1993) [ELR 16:2:16]

Court orders further proceedings in action over Pennsylvania school district's policy barring male students from playing on high school girls' field hockey team

As reported at ELR 15:2:13, John Williams sued a Pennsylvania school district, claiming that his exclusion from his high school's girls' field hockey team violated Title IX of the Education Amendments of 1972, and the Pennsylvania and federal constitutions.

The school district limited the field hockey team to female students and did not provide a school field hockey team for boys. A Federal District Court stated that

Williams was prevented from playing interscholastic field hockey solely on the basis of his gender; found that field hockey was not a contact sport for purposes of the athletic regulations under Title IX; and enjoined the school district from excluding Williams from the girls' field hockey team.

Federal Court of Appeals Chief Judge Sloviter noted that the regulations implementing Title IX bar sex discrimination in a wide variety of education programs and facilities, including interscholastic athletics. The school district argued that its policy was within an exception to the regulations whereby a team may exclude members of one sex if a sport is a "contact sport." Furthermore, the regulations require a school to permit a member of the excluded sex to try out for the single-sex team only if the athletic opportunities of the excluded sex have previously been limited. Even if they have been so limited, continued Judge Sloviter, "exclusion is permitted if

the sport involved is a contact sport. The contact sport exception is thus the broadest exception recognized to the overarching goal of equal athletic opportunity."

The District Court had held that, as a matter of law, field hockey is not a contact sport; the court relied on the fact that field hockey was not among the contact sports mentioned in the regulation and on the fact that there was no evidence that bodily contact was the purpose or a major activity of field hockey.

Judge Sloviter concluded that the District Court, on the basis of the record before it, erred in granting summary judgment to Williams on the issue of whether field hockey is a contact sport.

The applicable regulation defines a contact sport as one "the purpose or major activity of which involves bodily contact." Sufficient evidence was presented, according to Judge Sloviter, to raise an issue of material fact about whether a major activity of field hockey

involves bodily contact, and thus precluded summary judgment for Williams on the issue.

Judge Sloviter proceeded to observe that if it is determined that field hockey is a contact sport, then no further inquiry would be necessary. But if a sport is not a contact sport, and there is no team for the other sex in that sport, the regulation requires that members of the excluded sex be permitted to try out for a single-sex team only if their athletic opportunities have "previously been limited." The District Court had found that athletic opportunities for girls surpassed those of boys at Williams' high school, and concluded that athletic opportunities for boys within the district had "previously been limited."

Judge Sloviter stated that the District Court was correct in implicitly rejecting a sports-specific interpretation of the regulation and considering overall athletic opportunities in the district. However, the District Court erred

in holding as a matter of law that athletic opportunities for boys were previously limited at the high school because girls, for almost 20 years, had been able to try out for more teams than boys. The mere opportunity to try out for a team was not determinative of the question of "previously limited" athletic opportunities under Title IX, declared Judge Sloviter, for "athletic opportunities" means real opportunities, not illusory ones.

The court pointed out that in determining whether boys' athletic opportunities at the high school had been limited, a factfinder must decide whether meaningful physiological differences between boys and girls of high school age "negate the significance of allowing girls to try out for boys' teams but not allowing the reverse." The case was remanded for further consideraton as to whether athletic opportunities for boys were previously limited.

Judge Sloviter declined to reach the federal constitutional claims; vacated the District Court's judgment on the section 1983 claim; and remanded the state law claim to the District Court for factfinding as to whether there are any real physical differences between boys and girls that warrant different treatment and whether boys are likely to dominate the school's athletic program if admitted to the girls' teams. Only upon such a finding, stated Judge Sloviter, would it be possible to determine whether the school district's policy of excluding boys from girls' teams was necessary to the district's recognized interest "in preserving meaningful athletic opportunities for girls...and/or whether there is a current need to rectify the admittedly pervasive past discrimination against female high school students with respect to athletic opportunities."

Judge Scirica, in a concurring opinion, expressed the view that the rules of field hockey and certain

conclusory opinions set forth in affidavits submitted by Williams did not create a genuine issue of material fact as to whether field hockey is a contact sport. If the school district had moved for summary judgment on the Title IX claim on this record, Judge Scirica would have granted it.

Williams v. School District of Bethlehem, Pa., 998 F.2d 168, 1993 U.S.App. LEXIS 16234 (3d Cir. 1993) [ELR 16:2:16]

Court declines to modify injunction ordering Pennsylvania university to reinstate women's sports teams

A Federal District Court in Pennsylvania issued a preliminary injunction requiring Indiana University of

Pennsylvania to reinstate two varsity women's sports programs, field hockey and gymnastics (ELR 15:7:22). Several women student athletes claimed that the university's proposed elimination of the intercollegiate programs violated Title IX of the Education Amendments Act of 1972. The university sought to modify the injunction by replacing the women's gymnastics program with a women's soccer program.

A Federal Court of Appeals has upheld the District Court's ruling that the university did not show a change of circumstances sufficient to warrant modifying the injunction.

Judge Hutchinson noted, in part, that although the university, in reducing its athletic program, also discontinued the men's tennis and soccer teams, the evidence presented showed that eliminating the two women's teams increased the imbalance between individual opportunities for men and women in percentage terms.

And most of the financial savings from the cutbacks apparently resulted from eliminating the women's teams, resulting in a savings of $110,000. Eliminating the men's teams saved only $35,000.

The court found that it had appellate jurisdiction over the order of the District Court denying the university's motion for modification even though three of the four class representatives either had graduated or no longer planned to continue competing.

The absence of some of the individual gymnasts did not show that it was inappropriate to continue to try to maintain the status quo in the matter - there was testimony in the record that women presently attending, or planning to attend the school still were interested in participating in a gymnastics program.

It was not clear to the court that the proposed substitution of soccer for gymnastics would substantially improve what the District Court decided was likely to be a

violation of Title IX. Judge Hutchinson noted that although replacing the gymnastics program with soccer would increase the percentage of female athletes, it would decrease the overall percentage of expenditures the school provided for women's athletics - a fifteen member gymnastics team requires a $150,000 investment while a fifty member soccer team requires only $50,000. Even if the funding issue were put aside, the school did not have a specific overall plan to achieve total compliance at a future date.

In all, the District Court did not abuse its discretion in refusing to modify the preliminary injunction. Judge Hutchinson cautioned the District Court, in considering the entry of a final decree, against giving too much weight to the interests of the original named athletes no longer involved in the proceeding. If final injunctive relief becomes appropriate, the court should determine

whether any alleged violations of federal law would affect the entire class.

Favia v. Indiana University of Pennsylvania, 7 F.3d 332, 1993 U.S.App.LEXIS 26628 [ELR 16:2:17]

"Moscow Circus" dispute is subject to arbitration in New York

In March 1989, VTPO Soyuzgoscirc ("SOY") and Circus Productions, Inc. agreed to create a partnership in order to present performances of the Moscow Circus in the United States, Canada and Mexico. SOY was a Soviet Union corporation which allegedly had controlled the country's circus industry for more than 70 years and had used the name "Moscow Circus" since about 1977.

Circus Productions agreed to manage and control the business of the partnership and guaranteed SOY $1 million per year in profits from circus tours. SOY agreed to assign to the partnership all ownership rights in the trademark "Moscow Circus" and Circus Productions agreed to register the trademark on behalf of the partnership.

The parties subsequently entered into several ancillary agreements; two of the agreements changed the forum for arbitration from the American Arbitration Association in New York to International Arbitration in the Hague. According to Federal District Court Judge John S. Martin, Jr., the Netherlands forum was chosen as a neutral region when Circus Productions insisted on a New York forum and SOY demanded a Russian location.

The partnership presented its circus tour from August 1989 until the summer of 1990.

Show Corporation also promoted a United States tour, under the name "Moscow Circus," of Russian circus performers. The president of Circus Show, Steven Leber, also was the president of Circus Productions.

With the breakup of the former Soviet Union, Rosgoscirc, a state company of the Russian Federation, claimed to succeed to the rights of SOY. Rosgoscirc sought to terminate the partnership with Circus Productions; to collect monies allegedly due; and to institute arbitration proceedings against Circus Productions at the American Arbitration Association in accordance with the arbitration provision of the original agreement.

Judge Martin noted that the parties conceded that there never was an association entitled "the International Arbitration in the Hague" in The Netherlands, nor any similar arbitration organization or system in that region. After careful consideration, Judge Martin stated that

given the intent of the parties for an AAA-type arbitration, Circus Productions' admitted preference for New York arbitration, and the selection of the AAA in the original agreement, the agreement should be construed to provide for arbitration at the AAA. The court therefore denied Circus Productions' petition for a stay of arbitration and granted Rosgoscirc's cross-motion to compel the arbitration already commenced at the AAA.

With respect to Rosgoscirc's trademark infringement claim, the court found that the claim was not merely incidental to the parties' contract dispute and that federal subject matter jurisdiction was present.

Judge Martin then denied Circus Productions' motions to dismiss the action due to Rosgoscirc's purported lack of standing and for failure to state a claim; found that it was appropriate in the instant circumstances to permit Rosgoscirc to sue on behalf of the partnership; denied a motion to stay the trademark case pending the outcome

of the arbitration; and dismissed non-party Circus Productions' motion to intervene.

In a subsequent ruling, Judge Martin denied Rosgoscirc's motion for a preliminary injunction pending arbitration.

Rosgoscirc v. Circus Show Corp., 1993 U.S.Dist. LEXIS 9797; 1993 U.S.Dist. LEXIS 13984 (S.D.N.Y. 1993) [ELR 16:2:18]

Topps Company may not recover attorneys' fees in dispute over "New Kids on the Block" licensing

In January 1990, Big Step Productions granted The Topps Company a license to use the likenesses of the musical group "New Kids on the Block." Big Step warranted that all material furnished by the company to

Topps would be Big Step's own, original creation and agreed to indemnify and hold Topps harmless from claims arising out of any breach of warranty.

Elizabeth Marshall brought a copyright infringement action against New Kids on the Block and other parties, alleging the unauthorized use of Marshall's photographs of the group, including the use of the photographs on Topps' trading cards.

A Federal District Court denied the New Kids' parties' motion to dismiss (ELR 14:2:7).

Marshall subsequently settled the action by agreeing to accept two payments totalling $110,000 from Big Step and from the New Kids on the Block Partnership.

Topps did not contribute to the settlement, but claimed that Big Step and Winterland Productions were liable for its attorneys' fees, amounting to about $78,000, incurred in defending Marshall's action.

Big Step argued that the licensing agreement did not require that Big Step provide indemnification to Topps unless it was established by a final judgment or a settlement agreement that Big Step breached its warranty of ownership, and that since Topps did not show that the settlement agreement established a breach of warranty, Big Step had no obligation to pay Topps' attorneys' fees.

It appeared to Federal District Court Judge Robert P. Patterson, Jr., that the settlement agreement was not within the scope of the licensing agreement's indemnification provision, and that Topps, accordingly, was not entitled to payment for its attorneys' fees. Big Step did not exercise its right to assume Topps' defense, and Topps rejected Big Step's offer to defend. Therefore, Big Step had no liability to Topps based on its failure to provide a defense.

The court next rejected Topps' claims based on estoppel; ruled that Big Step was entitled to certain royalty

payments withheld by Topps, plus interest on those payments; and declined to determine whether Topps had a right, not expressly granted in the licensing agreement, to withhold royalty payments against its potential indemnification recovery.

In subsequent rulings, Judge Patterson found that Big Step was entitled to recover reasonable attorneys' fees and costs incurred in the litigation and that the interest rate provided for in the licensing agreement was the rate of prejudgment interest applicable to Big Step's judgment against Topps.

Marshall v. New Kids on the Block Partnership, 1993 U.S.Dist. LEXIS 9864; 1993 U.S.Dist. LEXIS 12395; 1993 U.S.Dist. LEXIS 13461 (S.D.N.Y. 1993) [ELR 16:2:19]

Statutory overtime provision applies to NBC News writers and producers

The overtime provision of the Fair Labor Standards Act of 1938 states that "no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Jacob Freeman and 148 other employees of the news division of NBC argued that the company improperly calculated their overtime compensation. The employees, members of the National Association of Broadcast Employees and Technicians, worked under collective bargaining agreements that established their base pay and, as described by Federal District Court Magistrate Judge Kathleen A. Roberts, provided for the payment of

various "fees" when they performed specific job functions on a given day. The agreements also provided for overtime payments when the employees worked more than forty hours in a week, at one and one-half times the usual hourly compensation.

NBC calculated overtime pay based on the hourly equivalent of the employees' base pay alone. The employees contended that under the statute, their "fees" should have been included in the base wage for purposes of calculating overtime. NBC did not dispute this contention, but argued that the employees were exempt as administrative and/or professional employees and were not entitled to overtime. (In a footnote comment, Judge Roberts mentioned that the court was "advised informally" that recent collective bargaining resulted in the inclusion of fees in base pay for purposes of calculating overtime.)

The parties agreed to sever the actions of three individuals, who worked primarily as newswriters and producers, with the expectation that the court's determination with respect to these parties "would provide sufficient precedent or guidance to NBC and the other [parties] that the remaining cases could be resolved without trial."

In a 126 page ruling, Judge Roberts discussed the purpose of the overtime provision of the statute; the nature of the exemption under section 213(a)(1) for administrative/professional employees; and case law pertaining to journalists. After describing the operation of the NBC News Division, NBC Nightly News with Tom Brokaw, the Weekend Nightly News program, and WNBC-TV's local news, the court referred to the witnesses and testimony at trial, during which "writers and producers at the pinnacle of accomplishment and prestige in broadcast journalism, in order to increase their

remuneration, present themselves as simple writers, editors and reporters, who are forced to fit the news into the rigid molds imposed upon them by their employer; while NBC extols [the Freeman parties] as 'the best and the brightest' in the most competitive media market in the country, but argues that they are therefore too creative, talented and independent to merit increased pay."

The court next extensively considered the background, job description, and responsibilities of Freeman, a newswriter for NBC Nightly News, of NBC Weekend Nightly News producer Bernard Brown, and of WNBC-TV field producer Robert Garner, and reviewed the testimony of NBC's witnesses with respect to the employees' writing and producing tasks.

Judge Roberts, primarily relying on Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990; ELR 13:1:3), concluded that NBC failed to prove by a preponderance of the evidence that the employees were exempt as

administrative or professional employees and found that Freeman, Brown and Garner were entitled to have their fees included in their wage base for purposes of calculating overtime.

It was found that the employees' work related "essentially to producing the primary product of a broadcast news organization, i.e., an individual newscast or news program," rather than to NBC's administrative operations. Freeman, Brown and Garner did not set business policy, plan the news division's long-range objectives, promote the newscasts or negotiate salary or benefits with other personnel. NBC did not demonstrate that the employees' production functions affected business operations "to a substantial degree."

NBC also failed to establish, according to Judge Roberts, that the employees were subject to exclusion from the statutory overtime provisions as either "learned" or "artistic" professionals. It was not shown that the

primary duties of Freeman, Brown and Garner consisted of "work requiring knowledge of an advanced type in a field of science or learning."

Journalism can qualify as work "in a recognized field of artistic endeavor," and journalists, in certain circumstances, may be exempt artistic professionals, stated the court. NBC argued that the employees' primary duty was "to develop and create engaging and interesting news stories, which requires judgment, selectivity, creativity, invention and a high degree of talent...Each must analyze substantial amounts of complex information derived from a variety of sources, including original sources; each must interpret that material to give it meaning for NBC viewers; each is compelled to make a number of difficult choices about what to include and how to express it in the most engaging manner possible; and each must 'individualize' his treatment of such

material in the course of creating a visual news story expected to have flair, vitality and distinctiveness."

The court, however, found that although the employees were "`talented' in the sense that they have a native and superior ability in their fields...," the work performed by Freeman, Brown and Garner was predominantly functional - it depended primarily upon acquired skill and experience and did not depend to a sufficient extent upon invention, imagination or talent to qualify for exemption as the work of an "artistic" professional.

Judge Roberts concluded that the employees were entitled to recover unpaid overtime from April 30, 1983, but that NBC did not engage in a voluntary, deliberate and intentional violation of the Fair Labor Standards Act.

According to news reports, the employees may be entitled to sums of between $10,000 and $25,000 each in back pay.

In a subsequent ruling, Judge Roberts denied NBC's motion for an order certifying for interlocutory appeal the court's previous opinion and order.

Freeman v. National Broadcasting Company, Inc., 1993 U.S.Dist.LEXIS 11712; 1993 U.S.Dist. LEXIS 17624 (S.D.N.Y. 1993) [ELR 16:2:19]

Court remands discrimination claim by Hispanic female disc jockey upon finding that Civil Rights Act of 1991 does not apply retroactively

Irene Mojica, a Hispanic female, was the overnight disc jockey at Chicago radio station WGCI-FM, owned by Gannett Company. Mojica sued Gannett claiming, among other charges, discrimination under Title VII and under 42 U.S.C. section 1981 because she was not

promoted into a better time shift. Federal Court of Appeals Judge Manion noted that between the time Mojica first was hired as the full-time overnight disc jockey and the time she filed suit, five positions became available in non-overnight shifts at the station. Four of the positions were filled by black disc jockeys and one position, the 10:00 P.M.-1:00 A.M. shift, was filled by a Hispanic woman.

A few weeks before the scheduled trial, Congress enacted the Civil Rights Act of 1991. The District Court applied the new law retroactively, and the jury awarded Mojica compensatory damages of $35,000 and punitive damages of $125,000 for her claim of discrimination on the basis of national origin.

In response to Gannett's motion for judgment notwithstanding the verdict, the court reversed the punitive damages award but let stand the jury's finding of discrimination and the compensatory damage award.

In reversing the District Court's decision, Judge Manion first found that because the conduct giving rise to Mojica's claim occurred before the new Civil Rights Act became effective, Gannett was not liable under the new law. Mojica had claimed national origin discrimination under Title VII and under section 1981. The District Court provided the jury with a combined instruction on the claim; the jury returned one verdict and did not distinguish the statutory basis of the verdict. It was impossible, stated Judge Manion, to know to what extent the jury assessed liability under Title VII as opposed to section 1981.

The jury should not have been allowed to consider the section 1981 claim, observed Judge Manion, because the Supreme Court has held that the former section 1981 - the law governing the instant case - excluded claims based on the failure to promote or transfer an employee unless the "promotion rises to the level of an opportunity

for a new and distinct relation between the employee and employer..." The amended section 1981 eliminated this requirement. By allowing Mojica to proceed under the new statute, the District Court allowed her to proceed with a new claim which did not exist at the time the challenged conduct occurred.

Furthermore, the former Title VII allowed recovery only for back pay and provided other equitable remedies - there was no way to determine what portion of the jury's $35,000 damage award was meant to compensate for back pay.

In all, "the verdict was beyond rescue," and the case was remanded for further review of Mojica's Title VII discrimination claim. Judge Manion declined to remand the section 1981 claim, stating that Mojica did not allege facts indicating that the sought-for promotion would involve the opportunity to enter into a new and distinct contractual relationship with Gannett.

The court concluded by finding that the evidence was sufficient to support the jury's finding of discrimination; affirmed the District Court's decision to strike punitive damages; and remanded for a trial on the issue of whether Gannett committed national origin discrimination under the former Title VII.

Judge Easterbrook, with whom Chief Judge Bauer joined, joined the majority's opinion.

Judge Cummings, with whom two judge joined in dissent, expressed, at length, the view that the language and structure of the Civil Rights Act of 1991 showed that Congress intended it to apply to Mojica's trial.

Two other dissenting opinions also questioned the majority's position on the retroactivity of the Civil Rights Act.

Mojica v. Gannett Company, Inc., 7 F.3d 552, 1993 U.S.App.LEXIS 24897 (7th Cir. 1993) [ELR 16:2:21]

Fox television engineer's state action for employment discrimination based on national origin is not preempted by federal labor law

Rosario Ramirez, employed by Fox Television Station, Inc. as an engineer at a local television station in Los Angeles, alleged that Fox subjected her to discrimination in the terms and conditions of her employment because of her national origin. She claimed, in part, that she was bypassed as the audio engineer for Dodgers baseball games and that Fox failed to post job openings or to promote minority employees.

Without utilizing grievance and arbitration procedures set forth in the collective bargaining agreement between Fox and her union, Ramirez brought an action in California state court, alleging that Fox violated the state's

Fair Employment and Housing Act. Fox removed the case to a Federal District Court on the ground that the claim required interpretation of the bargaining agreement and was preempted by section 301 of the Labor Management Relations Act.

When Ramirez moved to remand the case to state court, the District Court denied the motion. The court subsequently dismissed the "case" without prejudice because Ramirez failed to exhaust the grievance procedure under the bargaining agreement.

Federal Court of Appeals Chief Judge J. Clifford Wallace first noted that since the dismissal apparently was based on the conclusion that Ramirez's claim was preempted, it "effectively ended the litigation of Ramirez's original state law cause of action." Judge Wallace concluded that the District Court's dismissal constituted a final order and that the Court of Appeals had jurisdiction over Ramirez's appeal.

It then was noted that in every case in which the court had considered an action brought under the California Employment Act, the court had held that the case was not preempted by section 301. Judge Wallace observed that Ramirez asserted the right, under the statute, "to be free from employment discrimination based on her national origin...the bargaining agreement neither created the right Ramirez asserts nor can it remove or alter that right."

The resolution of Ramirez's action would not require the interpretation of the bargaining agreement, noted the court. Although the parties may refer to the agreement to determine the terms and conditions of Ramirez's employment, the underlying cause of action averred that Fox discriminated against Ramirez in applying and/or altering those terms and conditions. Thus, "although the inquiry may begin with the Bargaining Agreement, it certainly will not end there." The right asserted by

Ramirez, in contrast to some of the rights at issue in other cases cited by Fox, "cannot be modified by agreement. She cannot be discriminated against under certain conditions..."

Ramirez's state law discrimination cause of action was not preempted by section 301, concluded Judge Wallace. The District Court therefore lacked jurisdiction over the case and erred by denying the motion to remand.

Judge Cynthia Holcomb Hall, dissenting in part, disagreed with the majority that the District Court properly exercised its discretion in imposing sanctions on Ramirez's attorney in the amount of $150 in connection with filing the identical brief in opposition to Fox's motion for summary judgment that he had filed in support of Ramirez's remand motion.

Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 1993 U.S.App.LEXIS 17387 (9th Cir. 1993) [ELR 16:2:21]

Court reverses decision granting summary judgment to tobacco company in action challenging "Old Joe Camel" advertising campaign

Janet C. Mangini challenged the use of the cartoon character, "Old Joe Camel," by R.J.Reynolds Tobacco Company in an advertising campaign for Camel cigarettes. A California appellate court reversed a trial court decision granting summary judgment to Reynolds, finding that Mangini's claim that the advertising campaign was an unfair business practice was not preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. section 1331). Mangini argued that the Old Joe

Camel advertising campaign was designed to attract teenage smokers and that teenage smokers accounted for $476 million of Camel sales in 1992 as compared with $6 million in 1988 when the campaign began. It was alleged that Reynolds distributed products such as matchbooks, mugs and soft drink can holders which advertised Camel cigarettes but did not contain health hazard warnings.

Judge King noted that the 1965 federal statute required health warnings on cigarette packages but not for cigarette advertising. A 1969 amendment strengthened the cigarette package warning label, banned certain cigarette advertising, and modified the statute's preemption clause to read: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

Six months after Mangini filed the instant complaint, the United States Supreme Court decided Cipollone v. Liggett Group, Inc., 505 U.S. 407 (1992), a state court common law damages action against three cigarette manufacturers arising from the death of Rose Cipollone from lung cancer. The court held, with regard to the 1965 statute, that its preemption provision did not encompass common law claims, but extended only to "positive enactments by legislatures or administrative agencies that mandate particular warning labels." With regard to the 1969 statute, the court held that its preemption provision (which is currently in force) preempts common law damages actions as well as positive enactments. But the scope of the preemption is limited, according to the court - each claim must be reviewed to determine whether "the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and

health...imposed under State law with respect to...advertising or promotion,' giving that clause a fair but narrow reading."

The trial court decided that the 1969 statute, as interpreted in Cipollone, preempted Mangini's claims.

Judge King initially found that the federal statute did preempt Mangini's claim that the challenged advertisements glamorized cigarette smoking to minors without disclosing the ill effects of smoking and the fact that it is illegal for minors to purchase cigarettes in California.

The court then stated that the theory that targeting minors for the purpose of inducing and increasing their illegal purchases of cigarettes did not have a failure to warn element and was not preempted. And although the bare fact of targeting minors, in and of itself, might not amount to deceptive, untrue or misleading advertising, it was found that the targeting of minors in cigarette

advertising might be considered "unfair" under section 17200 of the Business and Professions Code.

Judge King declared that the targeting of minors in cigarette advertising offends public policy as established by California statute; exploits minors by "luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking..;" and may cause substantial physical injury to minors.

In all, Mangini's "targeting of minors" theory constituted a cause of action under California law and was not preempted because it was not "based on smoking and health". The court, cautioning that it had merely assumed the truth of the factual allegations in the complaint, concluded that it was reasonably possible that Mangini could amend the complaint to state a cognizable cause of action setting forth the "targeting" theory on

the existing factual allegations (the theory had not been presented to the trial court). It was reiterated that in order to prevail on the merits, Mangini must establish a link between the Reynolds advertising campaign and the consumption of cigarettes by minors.

Judge King mentioned that a separate issue, which was not before
the court and was not decided by the court, was whether state law restrictions on the advertising campaign would violate the First Amendment - the resolution of the issue must await the development of a factual record before the trial court, concluded the court.

Mangini v. R.J.Reynolds Tobacco Company, 17 Cal.App.4th 354, 1993 Cal.App.LEXIS 728 (Ca.Ct.App. 1993) [ELR 16:2:22]

Unconstitutionality of Florida statute barring publication of names of victims of sexual offenses is affirmed

A Florida statute prohibits anyone from "printing, publishing, or broadcasting...in any instrument of mass communication" the name or other information identifying a victim of a sexual offense.

The State of Florida charged that Globe Communications Corp. violated the statute and was subject to criminal sanctions in connection with the publication, in April 1991, of two articles concerning the sexual battery allegedly committed by William Kennedy Smith on Patti Bowman.

The trial court, as quoted by Florida appellate court Judge Anstead, stated that after the alleged rape was reported to police, Kenneth Harrell, a Globe reporter, traced the identity of the victim. The Globe, as did other

news organizations, then published the victim's name and other identifying information.

The trial court held that the statute violated the free speech and free press provisions of the Constitutions of Florida and the United States, both on its face and in the way the state sought to apply the statute to Globe in the instant case with respect to truthful information, lawfully obtained, about a matter of public concern. It was found that the statute's blanket prohibition against publishing the names of all rape victims, without a hearing and a case-by-case determination that restraining the freedom to publish was necessary to accomplish a valid and important state interest, was unconstitutionally overbroad and that no valid state purpose would be served by imposing criminal liability on Globe Communications.

The statute also was unconstitutional as applied in the case, according to the trial court. Bowman's identity was widely known to many members of the public and the

media and her identity had been published by several British newspapers before the Globe published her name. The state thus could not claim a threat to either the criminal justice system or to Bowman's safety.

The court, citing The Florida Star v. B.J.F., 491 U.S. 524 (1989; ELR 11:4:12) further found that the state could not constitutionally punish Globe Communications for a disclosure prohibited by the state, "when all other means and instrumentalities of dissemination are not regulated by the statute."

In affirming the trial court decision granting Globe Communications' motion to dismiss, Judge Anstead rejected the state's effort to "salvage" the constitutionality of the statute - the ban on publication was "absolute and unequivocal" and the statute was "hopelessly overbroad" in its application to constitutionally protected activity.

State of Florida v. Globe Communications, 622 S.2d 1066, 1993 Fla.App.LEXIS 7991 (Fla. App. 1993) [ELR 16:2:23]

Seller of purported Braques pastel may proceed with claims against auction house arising from rescission of sale

In 1948, Janet C. Koven purchased, from an art gallery, a pastel by the painter Georges Braque for $1,400. In 1989, Koven decided to sell the work through Christie, Manson & Woods and entered into a consignment agreement. The auction house confirmed the authenticity and ownership of the pastel and, in May 1990, sold the work to Barbaralee Diamonstein.

When Diamonstein questioned the pastel's authenticity, Christie's sought, and received, assurance from Elaine

Rosenberg, the widow of the gallery owner, that Koven had purchased the pastel from the gallery.

When Christie's informed Diamonstein of the confirmation of the provenance of the pastel, the purchaser nonetheless demanded written verification of the work's authenticity by a scholar. Christie's believed that the pastel was authentic, according to Federal District Court Judge Charles S. Haight, Jr., but the auction house sent the work to France for an examination by Claude Laurens, who holds the droit moral for Braque.

In January 1991, Laurens' son notified Christie's that the pastel "could not be recognized as from the hand of Georges Braque," and refused to issue a certificate of authenticity.

Christie's decided to rescind the sale, and refunded the purchase price to Diamonstein. Koven, however, refused to remit the $600,000 she had received from the sale.

The auction house's insurer sued Koven for breach of the consignment agreement. Koven filed a third party complaint alleging that Christie's breached the agreement and breached its fiduciary duty towards Koven by rescinding the sale despite the authenticity of the pastel and Christie's belief in the authenticity of the work. Koven also alleged that Diamonstein was obligated to return the money Christie's had refunded.

Judge Haight first found that Koven's complaint against Diamonstein did not state a claim upon which relief could be granted. Even if Koven's allegations stated a cause of action against Diamonstein, Koven offered no proof in support of the allegations in the complaint. The court, accordingly, granted Diamonstein's motion for summary judgment.

With respect to Koven's claim against Christie's, the court requested the parties to conduct further research on the question of whether Christies' breached any duty

owed to Koven when it took affirmative actions to confirm the authenticity of the pastel, given the terms of a limited warranty, as expressly incorporated in the consignment agreement.

Koven had questioned the choice of the Laurens family as experts, arguing that Christie's did not have "complete discretion" in this matter. Christie's had an obligation to act reasonably in choosing which experts to consult, noted the court - the auction house's reliance on the absolute nature of the term "complete discretion" was "misplaced."

In considering Christie's right to rescind the sale, Judge Haight stated that since there is an implied duty of good faith and fair dealing read into every contract, Christie's was entitled to rescind the agreement only if it could demonstrate that it used reasonable discretion in determining that the auction house or Koven, as seller, might be subject to liability.

Furthermore, under the consignment agreement, Koven specifically authorized Christie's to rescind the sale where the auction house "in its sole judgment determines that the offering for sale of any Property has subjected or may subject Christie's and/or Seller to any liability, including liability under warranty of authenticity or title." It appeared to Judge Haight that Christie's would have the right to rescind in a case where there was less than a clear-cut breach of the warranty of authenticity. To justify rescission of a sale under the agreement, Christie's must show at trial that at the time it decided to rescind, "it entertained, in good faith, a reasonable apprehension of difficulty on the part of auction house or seller in defending against the buyer's claim that the work was not authentic."

In addressing additional issues raised by Koven, Judge Haight found that Christie's will have to show, at trial, that its choice of experts was reasonable and that the

Laurens examined the pastel and could not authenticate it - questions of fact precluding the entry of summary judgment. A material dispute as to whether Christie's was acting reasonably when, in its sole judgment it determined to rescind the sale of the pastel, also precluded the entry of summary judgment.

The court concluded by denying Christie's motion for summary judgment on its counterclaim against Koven to recover attorneys' fees expended in defending the third party action brought by Koven.

Greenwood v. Koven, 1993 U.S.Dist.LEXIS 18272 (S.D.N.Y. 1993) [ELR 16:2:24]

Art gallery may proceed with case alleging breach of purported agreement to purchase Van Gogh painting

In 1989, David McCall, Delwin Morton, Martin Massman and Gail Cooper, constituting the partnership "'X' Partners," also known as "The Texas Bunch," asked Don McCulley of McCulley Fine Arts Gallery, Inc. to locate paintings for the partnership on a commission basis. McCulley obtained an option on a Van Gogh painting entitled "Roadway in a Paris Park" for $3 million and offered it to the partnership for $3.5 million, which included a $500,000 commission for the gallery. In late 1989, the Gallery agreed to become a "partner" in the transaction and to postpone receiving any commission until after the resale of the painting. According to the oral agreement, Massman, who was to fund the initial purchase, would receive $3 million upon resale; the Gallery would receive the next $500,000, plus ten percent of the profits over $3.5 million. The other partners also were to share in the profits above $3.5 million.

McCulley notified the seller that the gallery was exercising its option. However, Massman apparently did not provide the funds for the purchase and the option expired.

When McCulley sued the partnership alleging breach of contract and breach of fiduciary duty, a Texas trial court granted summary judgment to the partners.

An appellate court has found that McCulley raised an issue of fact concerning whether the contract was accepted and whether a meeting of the minds occurred - it appeared that the parties had agreed to the essential terms of the purchase of the painting although certain specific issues were left for future negotiations.

Judge Richard Barajas also found that McCulley raised factual issues with respect to damages and with respect to whether there was an agreement to share profits and losses. And to the extent that the transaction was a "failure to fund," it was not within the statute of frauds.

The partnership claimed that Don McCulley, representing the gallery, committed fraud by making statements to Massman that the Van Gogh could be purchased for $3 million when it may have been offered to McCulley for $2.5 million. Judge Barajas observed that a factual issue existed regarding the offering price of the work.

Judge Barajas, after determining that Massman had sufficient minimum contacts to subject him to the jurisdiction of the court, stated that the purported representation as to the value of the painting "did not cause Massman to spend any more money negotiating the purchase than he otherwise would have spent." The trial court therefore did not err in granting the gallery's motion for summary judgment on Massman's counterclaims premised on the alleged misrepresentation of the purchase price.

Judge Barajas remanded the matter to the trial court for further proceedings.

McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 1993 Tex.App.LEXIS 1707 (Tex.App. 1993) [ELR 16:2:24]

Art gallery may bring breach of warranty claim against seller of Picasso print with allegedly forged signature

David Tunick, Inc., an art gallery, purchased a print of "Le Minotourmachie," purportedly signed by Pablo Picasso, from Swiss art dealer E.W. Kornfeld. Tunick, according to news reports, claimed that although the $1.4 million print was made by Picasso, the signature was forged, thereby decreasing the value of the work.

Judge David N. Edelstein, who previously had ruled that New York was the proper forum for the dispute

(ELR 15:3:17), noted that for the purpose of Kornfeld's motions for summary judgment, the authenticity of the signature was in dispute.

Kornfeld argued that even if the signature was not authentic, Tunick's refusal to accept another print of "Le Minotauromachie," which also was allegedly signed by Picasso, defeated Tunick's ability to recover for breach of warranty. In considering whether a non-conforming tender of a work of art may be cured by an offer of a different but similar work, apparently an issue of first impression, Judge Edelstein referred to the Uniform Commercial Code as enacted in New York. Under Code section 2-508, a purchaser who in good faith revokes his acceptance of goods has the same rights and duties with regard to the goods involved as if he/she had rejected them. Kornfeld claimed that it had the right under the Code to substitute conforming goods for the allegedly non-conforming tender rejected by Tunick.

Judge Edelstein found that "two prints, by the same artist and from the same plates, are not interchangeable," and that the Code would not, as a matter of law, obligate a buyer to accept a substitute print from the same series of prints. It was observed that two prints from a series produced by an artist "each possess distinctive qualities that may impact their aesthetic and economic value...differences in the quality of impressions are observable as the plate used to make the prints wears during the course of printing." Coloration and contrast may vary among prints in a series and these factors, among others, can substantially impact the value of a given print, as would improper storage of the fragile works.

The court then stated that "a print is selected by a purchaser because the traits of that print please the purchaser's aesthetic sensibilities. Thus, whether prints in a series are largely similar or slightly different is less

important than the fact that the purchaser chose a given print "because he (emphasis by the court) viewed it as uniquely beautiful, interesting, or well-suited to his collection or gallery. Nothing else will satisfy that collector but that which he bought. For these reasons, prints are not interchangeable."

Since each print is unique, noted the court, there can be no exact substitute for a given print purchased by a collector. Tunick bid for and purchased the specific (emphasis by the court) print that Tunick viewed prior to the auction. It would be "fundamentally unfair, and unsound policy," in Judge Edelstein's view, to impose on Tunick a duty to accept another print of the work as a substitute for the one Tunick actually viewed, bid for, and purchased.

Judge Edelstein found that because prints are unique, both as a result of differences in impression quality and condition, section 2-508 does not apply to prints. Even

if a seller offers to substitute a print from a series from which a non-conforming tender was drawn, a buyer would not be obligated to accept as a substitute the print that he/she did not view, bid upon, or purchase. The court, accordingly, denied the Kornfeld parties' motion for summary judgment as to Tunick's claim for breach of express warranty.

It was also alleged that at the time Kornfeld sold the print to Tunick, Kornfeld knew that the signature was not authentic and that representations made to Tunick regarding the provenance of the print were false. Judge Edelstein found that Tunick made a sufficient showing to place into question triable issues concerning Kornfeld's state of mind and intent at the time the print was sold to Tunick. The record indicated disputed issues of fact concerning whether the signature was genuine, whether the provenance of the print was accurately represented, and if the signature was not genuine or the

provenance was inaccurately described, whether the Kornfeld parties acted recklessly or with scienter in making any inaccurate representations.

The court concluded by denying the motion for summary judgment on Tunick's claim that the Kornfeld parties breached their duty of honesty and fair dealing under New York's Uniform Commercial Code; granting Kornfeld's motion for summary judgment with respect to a purported joint venture of Kornfeld and Tunick to resell the print; rejecting a claim of breach of fiduciary duties based on a purported principal-agent relationship; and by finding that disputed issues of fact precluded summary judgment on Kornfeld's counterclaim alleging Tunick's breach of his agreement to pay Kornfeld for the print.

David Tunick, Inc. v. E.W. Kornfeld, 838 F.Supp.848, 1993 U.S. Dist.LEXIS 17257 (S.D.N.Y. 1993) [ELR 16:2:25]

Court recognizes banks' lien, subject to approval of FCC, in proceeds of radio station sale

In a decision issued in April 1993, but only recently published, a Federal District Court in Massachusetts found that a lien may be recognized in the proceeds of the sale of a radio station, so long as the Federal Communications Commission, after being apprised of the lien, does not object.

Judge Woodlock had appointed a receiver for the assets of Arrow Communications, Inc. and subsequently authorized the receiver to sell radio station KMJC-FM, one of Arrow's assets; the proceeds of the sale were

retained pending the resolution of creditors' claims. Arrow's creditors included two banks which provided the company with a $9 million line of credit, secured by a lien on Arrow's tangible and intangible property.

The court referred to a recent notice of proposed rulemaking in which the Federal Communications Commission stated, with respect to broadcast licenses, that its rule prohibiting sellers from retaining a reversionary interest and its policy prohibiting third party security interests were based upon statutory provisions prohibiting the grant of ownership interests in the spectrum and the assignment by licensees of their interests in a license without prior Commission approval. The Commission sought comment on whether the Communications Act prohibits security or reversionary interests in licenses per se.

After careful review, Judge Woodlock declared that there was no case in which the Commission has ruled

that a "bare" lien would prohibit the transfer, assignment, or holding of a radio broadcast license. The Commission has expressly declined to enter disputes about creditors' rights in license proceeds, and apparently its primary goal in such matters is to prohibit only certain forms of third party interference between the licensee and the Commission. In In re Tak Communications, Inc., 138 B.R. 568 (W.D.Wis.1992), aff'd, 985 F.2d 916 (7th Cir.1993; ELR 15:7:21), a Federal Court of Appeals upheld a District Court decision affirming a bankruptcy court's determination that the Commission prohibits creditors from holding security interests in broadcast licenses. The court also stated that the Commission not only prohibited the liens at issue in Tak, but liens as a form of security interests generally.

But the liens in Tak were not liens merely against the proceeds of the licensee's use of the license, or the licensee's transfer of rights, noted Judge Woodlock. The liens

gave the banks the right "to take possession of the collateral," including the licenses. The banks had initiated an adversary proceeding in the bankruptcy court seeking to declare the validity of their liens and sought a declaratory judgment that they held a perfected interest in Tak's right to sell the station. Such claims, stated Judge Woodlock, would interfere with the Commission's regulation of its licensees and would conflict with the Commission's policy that a licensee must be able to transfer his/her license freely.

Judge Woodlock found the Tak opinions overbroad insofar as they purported to forbid all liens in broadcast licenses.

In In re Ridgely Communications, Inc., 139 B.R. 374 (Bkrtcy.D.Md.1992), the court held that a broadcast license is property within the Bankruptcy Code's definition of the debtor's estate, and that creditors may hold liens in broadcast licenses, restricted "to the extent of

the licensee's proprietary rights in the license vis-a-vis private third parties," and with no right of foreclosure. Tak was distinguished since the decision did not relate to a distribution of proceeds arising from the sale of a broadcast license as a going concern approved by the Commission, the type of distribution involved in Ridgely and expected in the instant case.

Judge Woodlock declined to adopt the holding of the Tak court insofar as it applied Commission restrictions on security interests - derived from the Commission's discharge of its regulatory duties - to different contexts.

The banks had a secured right to remuneration from the proceeds of the transfer of Arrow's broadcast license by the receiver to another entity, concluded the court. And the banks' secured interest in the general intangibles of the Arrow stations, including the license, was superior to the unsecured interest of another creditor.

State Street Bank and Trust Company v. Arrow Communications, Inc., 833 F.Supp. 41, 1993 U.S.Dist. LEXIS 14219 (D.Mass.1993) [ELR 16:2:26]

John Gotti's lawyer may obtain reporters' testimony and unpublished notes and television outtakes in criminal contempt proceeding

Bruce Cutler served as John Gotti's trial counsel in a proceeding brought against Gotti by the United States government. Cutler was disqualified in August 1991. During the course of the Gotti case and following his disqualification, Cutler was quoted in many newspaper articles, and appeared on several television programs, in which he commented on Gotti and the case.

In November 1991, Federal District Court Judge Glasser appointed a special prosecutor to prosecute

Cutler for criminal contempt for intentionally and willfully violating the court's orders and Local Criminal Rule 7. Rule 7 states that a lawyer may not "release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending...criminal litigation with which a lawyer...is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." The rule specifies that lawyers shall not release extrajudicial statements that a reasonable person would expect to be publicly disseminated concerning "the character or reputation of the accused," "the identity, testimony or credibility of prospective witneses," or "any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case." The rule does not

preclude a lawyer from replying to charges of misconduct that are publicly made against him/her.

In April 1992, Judge Glasser signed an order to show cause why Cutler should not be held in criminal contempt for violating Judge Glasser's prior directions to comply with Rule 7. The contempt proceeding was assigned to Chief Judge Platt.

In preparing for a nonjury trial of the matter, the special prosecutor and defense counsel for Cutler served subpoenas upon several reporters and television stations - no issue concerning the special prosecutor's subpoenas was presented on the instant appeal.

Cutler, after a hearing on a motion to quash by the reporters and the television stations, agreed to limit his subpoenas so that reporters would not be required to produce unpublished notes of interviews of persons other than Cutler and the government officials, and the

television stations would be required to produce outtakes only of their interviews of Cutler.

Chief Judge Platt denied the motions to quash and ordered the reporters and the television stations to comply with the subpoenas. The reporters stated that they were unwilling to reveal confidential sources or to produce notes or other unpublished materials unless directed to do so by a Federal Court of Appeals. The television stations advised the court that they would not dislcose the outtakes to Cutler's defense counsel, but were willing to offer the outtakes for the court's in camera review on the condition that if the District Court found the outtakes to be relevant, the television stations would have an opportunity to appeal the District Court's ruling before the outtakes were disclosed to Cutler.

The court ordered the reporters and television stations held in contempt and ordered the payment of a fine of $1.00 per day until they complied with the court's

instructions; the imposition of punishment was stayed pending an expedited appeal.

Federal Court of Appeals Judge Mahoney agreed that Cutler was entitled to the testimony, and production of the unpublished notes, of the reporters regarding statements made by Cutler to the reporters in connection with the articles in issue, and the production of the outtakes. The allegedly contemptuous conduct by Cutler was "precisely what the Reporters observed and wrote about, and what the TV Stations recorded on videotape." Cutler was entitled to examine the reporters regarding the context, background, and content of the statements in the reporters' articles and to review relevant unpublished notes relating to these matters as well as the outtakes to defend against the charge that his statements were in criminal contempt, particularly since Cutler was claiming that his allegedly contemptuous

statements were replies to charges of misconduct, and were expressly precluded from the coverage of Rule 7.

Judge Mahoney rejected Cutler's request for access to the reporters' unpublished notes regarding statements by government officials concerning Gotti and the Gotti case, and for related cross-examination of the reporters.

United States v. Cutler, 6 F.3d 67, 1993 U.S.App.LEXIS 24752 (2d Cir. 1993) [ELR 16:2:27]

Court rules on constitutionality of provisions of Cable Act of 1992

Daniels Cablevision, Time Warner Entertainment Company and Discovery Communications, Inc. challenged various provisions of the Cable Television

Consumer Protection and Competition Act of 1992 and the Cable Communications Policy Act of 1984.

Federal District Court Judge Thomas Penfield Jackson acknowledged that the 1992 Cable Act, in effect, confiscated for use by others, a portion of the cable systems' capabilities to deliver signals to their subscribers. Assuming that the cable operators and programmers were "speakers," i.e., "purveyors of messages rather than of message-bearing electronic impulses," Congress "deprived them of unlimited choice as to the messages they will deliver, to whom they may deliver them, and the 'speakers' for whom they will do so," stated the court.

However, in Turner Broadcasting System, Inc. v. Federal Communications Commission, 810 F.Supp. 1308 (D.D.C.1992; ELR 15:2:11), referred to by Judge Jackson as the Must-Carry decision, the court rejected similar challenges to sections 4 and 5 of the 1992 Cable Act. The court observed that the "crucial inquiry for

determining the appropriate level of First Amendment scrutiny is not merely whether governmental regulation results in compelling certain speech, fetters the speaker's discretion in deciding what to say, or favors particular speakers at the expense of others, but is also whether the regulation is, overtly or covertly, content-based; that is, the government is telling the speaker what can or cannot be said."

The provisions challenged in the instant case primarily served regulatory goals unrelated to content, stated Judge Jackson, and would be constitutional if the goals served significant governmental interests and did not burden substantially more speech than necessary to serve these interests.

Section 7(b) of the 1992 Act, in conjunction with section 611 of the 1984 Act, allows local franchising authorities to require a franchisee to designate a portion of its channel capacity for "public, educational, or

governmental use." The franchisee may not exercise any editorial control over such programming.

Section 612(b) of the 1984 Act, the "leased access" provisions, obligates cable operators to reserve channel capacity for use by commercial programmers that are unaffiliated with the operator - the cable operator may not exercise editorial control over its lessees' programming, except to the extent that it may consider content in establishing a reasonable price to charge the unaffiliated lessee, and may decline to carry programming that it reasonably believes to be obscene.

Section 19 of the 1992 Act, the "vertical integration" provisions, regulates the conduct of programmers in which a cable system operator has a property interest. The section directs the Federal Communications Commission to issue regulations to prohibit discrimination by vertically integrated programmers in the prices, terms, and conditions of sale or delivery of cable programming

between cable systems. The section also directs the Commission to adopt regulations prohibiting exclusive distribution contracts between vertically integrated programmers and operators.

Section 3 of the 1992 Act, the "rate regulation" provisions, requires cable operators to provide all subscribers with a basic service tier containing all sections 4 and 5 mandatory carriage broadcast stations; all public, educational or governmental stations which must be carried pursuant to the franchise; and all regular non-satellite broadcast stations regularly transmitted by the operators. The section also requires an operator to maintain a uniform rate structure throughout its geographic region, and prohibits operators from requiring subscribers to purchase any service, other than the basic tier, as a precondition to receiving any other pay-per-view or pay-per-channel service; the price structure for such

channels must be uniform regardless of the quantity of services ordered by a subscriber.

The operators claimed that the provisions interfered with their ability to design the packages of services they would like to offer their subscribers. The programmers contended that the provision would make it more difficult for operators to carry the products of certain programmers and would prevent the programmers from reaching their "optimum audience."

The court held that the above-cited provisions were content-neutral and would withstand a balancing test. The public, educational, governmental access and leased access provisions served the significant regulatory interest of affording speakers with lesser market appeal access to "the nation's most pervasive video distribution technology. Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of

federal legislative power." And the leased access provisions promoted fair competition by "overcoming the natural tendency of cable operators to enhance the profitability of their affiliated programmers."

Judge Jackson pointed out the public, educational and governmental use is negotiable and lease access obligations depend on the number of channels a cable operator has available, and may not exceed fifteen percent of total capacity.

The section 19 constraints also were content-neutral measures to correct a market to which access is controlled by those who own the technology - the provision prohibits discrimination and exclusivity agreements, but does not prohibit any programmer from dealing with any operator altogether.

The rate regulation provisions were wholly unrelated to content, observed the court, and were designed "to reduce anti-competitive operator practices, to combat

concentration in the industry, and...to keep rates affordable to the public, regardless of message." Section 3 operates only in the absence of effective competition and Congress has provided the Commission with standards to determine whether operator rates are reasonable.

The direct broadcast satellite service provisions of the 1992 Cable Act were ruled unconstitutional. Section 25 of the Act directs the Commission to impose mandatory carriage requirements on providers of direct broadcast satellite services. The DBS distributors transmit their signals via earth-orbiting satellites directly into subscribers' receivers through dish antennas, not over coaxial cable strung along public rights-of-way. As a condition to the authorization or renewal of any DBS service license, the provider must allocate four to seven percent of its transmission capacity to "noncommercial programming of an educational nature."

Judge Jackson noted that some of the parties before the court were programmers who market their material to DBS distributors, and who alleged that the set-aside for educational programming meant that they would be competing for fewer channel positions. The court found that the programmers met the requirements for Article III standing.

It then was found that to the extent the provision has a content component at all, the DBS provision would fail. There was no evidence upon which the court could conclude that regulation of DBS service providers was necessary to serve any significant regulatory or market-balancing interest. It was not shown that educational television was lacking in the homes of DBS subscribers, nor was there a reason to conclude that section 25 was designed in response to anti-competitive DBS provider practices. In all, there was no justification for the First Amendment burdens imposed by the provision.

Section 15 of the 1992 Cable Act requires a cable operator to give notice to its subscribers, at least 30 days in advance, if it proposes to provide a free preview of a "premium channel" - one offering movies rated X, NC-17, or R by the Motion Picture Association of America. The court agreed with the cable operators and Encore, a pay-per-view movie programming service, that Section 15 is content-based, and burdens at least some protected speech. The notice requirements make the carriage of free previews less practicable and more costly, declared Judge Jackson, and cable operators therefore would be dissuaded from carrying programmers like Encore on their systems. Congress incorporated the Motion Picture Association's rating system as the measure of indecency, noted the court, and leaving such definition to a trade association was sufficient to invalidate section 15 on overbreadth grounds. The government did not demonstrate that all movies rated R are

indecent; failed to address identical uninvited indecency originating from non-cable television sources; and did not show that the law applied to broadcasters that carry uncut R or NC-17 movies.

A portion of section 11(c) of the 1992 Act directs the Commission to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a cable operator is authorized to reach through cable systems it owns or in which it has an attributable interest. The government argued that the provision would prevent horizontal concentration in the cable industry and would promote diversity of speakers. Even if content-neutral, it did not appear to the court that there would be any circumstances under which the FCC could adopt constitutional regulations in this area - any governmentally ordained quota on the number of subscribers an operator may reach leaves the operator with "no

intra-medium means of speaking to the remainder of its potential audience."

The provisions abrogating the statutory immunity that private cable operators formerly enjoyed for liability for the transmission of obscenity; the provisions immunizing municipally owned cable operators from civil liability to private competitors for money damages; and the retransmission consent provisions do not implicate the First Amendment to any significant extent at all, declared Judge Jackson, and are compatible with the First Amendment.

The 1984 Act had conferred immunity from state law liability upon cable operators who transmitted obscene material included in the obligatory public, educational and governmental and leased access programming. Section 10(d) of the 1992 Act removes all immunity for the carriage of obscenity.

It was argued that potential liability for obscenity would impermissibly burden speech by creating an incentive to cable operator self-censorship. No speakers, cable operators included, have a constitutional right, stated the court, "to relieve them of anxiety about crossing the threshold from the risque to the obscene. Congress's earlier decision to provide cable operators with immunity was a matter of grace that it has always been free to rescind."

Section 7(c) of the 1992 Act permits municipally owned cable enterprises to compete with private operators, and relieves municipally owned systems of franchising requirements. Section 24 of the 1992 Act exempts municipalities from civil damages liability arising out of local regulation of cable services. The cable parties argued that section 24 might encourage public cable operators to censor or punish their private competitors. The cable parties argued that immunity for civil

damages alone would make censorship virtually inevitable, but the court found this hypothesis "conjectural," stating that declaratory and injunctive relief would be sufficient to protect against municipal abuses of power "if and when they should occur, and that municipal retaliation on the basis of content will be sufficiently apparent in the circumstances to ensure the effectiveness of 'as applied' challenges."

Congress apparently found that claims against municipalities for civil damage liability related to the regulatory activities of the cable industry were "posing 'a potentially crippling burden' on local governments and their ability to provide vital public services to their citizens."

Section 6 of the 1992 Act directs the Commission to implement regulations prohibiting cable operators from carrying broadcast signals without the consent of the originating broadcaster. In conjunction with the must-carry provisions of section 4 of the 1992 Act, section 6

provides broadcasters with electing between demanding mandatory carriage of the programming they cannot sell, and negotiating a price for that which is in demand.

Judge Jackson pointed out that Congress has the authority to provide artists, and broadcasters, with copyright protection for their work, and that it was not constitutionally significant that Congress "has done in the Cable Act what it otherwise could have done in the Copyright Act."

Daniels Cablevision, Inc. v. United States, 835 F.Supp. 1, 1993 U.S.Dist. LEXIS 12806 (D.D.C.1993) [ELR 16:2:28]

Statute prohibiting telephone companies from providing video programming to subscribers violates First Amendment rights of Bell Atlantic companies

Chesapeake and Potomac Telephone Company of Virginia and Bell Atlantic Video Services Company, both wholly-owned subsidiaries of Bell Atlantic Corporation, claimed that section 533(b) of the Cable Communications Policy Act of 1984 violated the First Amendment. The challenged provision prohibits telephone companies, and their affiliates, from providing video programming to subscribers within their service areas.

In August 1993, a Federal District Court in Virginia ruled that the ban was unconstitutional. However, in October 1993, Judge T.S. Ellis, III, issued a ruling limiting the scope of the August decision, stating, according to news reports, that the decision applied only to Bell Atlantic, not to all of the remaining regional Bell companies, which did not participate in the original lawsuit.

Chesapeake and Potomac, which provides local wireline telephone exchange and exchange access service in

portions of Virginia, claimed that it would benefit from having the capability to carry video programming to its telephone subscribers. The parties agreed that the existing fiber optic technology is capable of providing telephone service and transmitting video programming on an integrated basis directly to subscribers.

Judge Ellis reviewed the background of telephone company participation in the cable industry; pointed out that despite Congressional efforts to promote competition in the industry, providing cable television "has remained a monopoly service in virtually every community;" found that the Bell Atlantic parties had standing to bring their lawsuit; and determined that the challenged statute would be evaluated under a standard "higher than mere 'rationality' review."

Furthermore, since the 1984 Cable Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided

by, a television broadcast station," section 533(b) would have to be applied with reference to the content of the message being conveyed, stated Judge Ellis. The line between permissible visual images and impermissible "video programming" has become increasingly blurred with the advance of technology, continued the court.

However, Judge Ellis, after careful consideration, found that section 533(b) was a content-neutral restriction, despite the fact that determining whether the statute would apply to any particular message could only be accomplished by reference to the content of that message. The two interests advanced by the government in support of the statute, diversity in the ownership of communications outlets and competition in the video programming market, did not refer to the content of the regulated speech. Thus, while section 533(b) would be subject to heightened review as a restriction on the Bell Atlantic parties' First Amendment rights, the statute did

not warrant the strictest standard of review reserved for content-based restrictions on speech.

In applying the intermediate level of scrutiny pertaining to "time, place and manner" restrictions and to incidental burdens on speech, the court noted that the Bell Atlantic companies were able to communicate by means other than video programming; could directly provide video programming to anyone residing outside their area of service; and could communicate with subscribers inside their service area through video programming by producing such programming and marketing it to broadcasters and cable operators.

The court then declared that section 533(b) did not directly promote competition in the video programming market. The statute bars entry into the market for video transport service by the one class of potential competitors interested in competing with the "entrenched monopolists" in the cable television industry and thus

"clearly operates in the first instance to restrict competition in the market for video programming by limiting the number of outlets through which such programming can be distributed."

The government's other asserted justification - protecting diversity of ownership of communications outlets - was found to be a significant governmental interest. But Judge Ellis commented that there "is no more draconian approach to solving the problem of potential anti-competitive practices by telephone companies in the cable television industry than a complete bar on their entry into that industry." If there were a range of regulatory strategies that would effectively eliminate the threat of anti-competitive conduct by the telephone companies in the cable television industry, then it appeared that section 533(b) would burden substantially more speech than was necessary to further the government's

legitimate interests. The court declined to find that all less restrictive alternatives were not feasible.

Section 533(b), reiterated Judge Ellis, prohibits a telephone company from directly providing video programming to subscribers in its service area. A telephone company may not exercise control or discretion over the programming transported over its facilities, but is not precluded, under existing law, from competing in the market for video transport services. The government expressed concern that telephone companies would engage in pole access discrimination and cross-subsidization in an attempt to monopolize the video transport market. But the ban imposed by section 533(b) addressed the government's asserted concern that telephone companies would act anticompetitively in the video programming market, not the video transport market. It did not appear to the court that telephone companies would be able to evade regulation of any anticompetitive behavior in the

video programming market, and any potential for telephone companies to act anticompetitively in the video programming market most likely could be reduced to a level below the level of risk tolerated in relation to cable operators

In all, stated Judge Ellis, there was no evidence to suggest that standard methods of regulation would be ineffective to control anticompetitive activities by telephone companies in the video programming market. The companies do not enter the video programming market with an inherent advantage that would enable them to evade effective regulation. Section 533(b) was not narrowly tailored to serve a significant governmental interest and was facially unconstitutional in violation of the Bell Atlantic companies' First Amendment right to free expression, concluded the court.

The Chesapeake and Potomac Telephone Company of Virginia v. United States of America, 830 F.Supp. 909, 1993 U.S.Dist.LEXIS 11822 (E.D.Va. 1993) [ELR 16:2:30]

Charges of mail and wire fraud against distributor of cable signal descrambling equipment are upheld, but court dismisses charges based on section 605(e)(4) of Cable Act

The government alleged that William Norris sold converter boxes and modifying kits, along with instructions on how to install a chip or module into the converter box, to descramble encrypted cable programming transmissions. It also was alleged that Norris modified cable converter boxes into descramblers so that individuals could receive premium cable television channels without

paying the required fee to cable operators. The government claimed, in part, that Norris violated federal mail and wire fraud statutes.

A Federal District Court in Indiana refused to dismiss the mail and wire fraud charges against Norris, stating that a charge of mail or wire fraud need not be supported by an underlying false representation or statement. Judge Miller found that the indictment sufficiently alleged that Norris participated in a scheme to defraud, and used the mail or wires to execute the scheme.

The government also charged Norris with violating 47 U.S.C. section 605(e)(4). Norris argued that the statute applied to satellite transmissions primarily intended for cable operators and did not extend to transmissions received by cable customers over coaxial wire. Norris claimed that the only criminal statute that might apply to the sale of converter boxes that descramble coaxial wire

transmissions, as opposed to satellite or radio transmissions, was 47 U.S.C. section 553(a).

The court noted that the "plain language" of section 553 appeared to govern the illegal activity alleged in the indictment. And the legislative history of section 553, as well as case law, supported the position that the statute was intended to apply to individuals manufacturing or distributing cable converter boxes.

The government contended that the phrase "satellite cable programming," as defined in section 605(d)(a), would include satellite signals that have been retransmitted by cable operators over coaxial wire. But Judge Miller pointed out that Norris' converter boxes were not designed to decrypt satellite signals "primarily intended for the direct receipt by cable operators," and stated that the court failed to find any reported prosecutions under section 605(e)(4) involving the manufacture or

distribution of cable converter boxes that descramble coaxial wire transmissions.

The indictment may have alleged violations of 47 U.S.C. section 553, but did not allege violations of 47 U.S.C. section 605(e)(4) and was dismissed accordingly.

Judge Miller subsequently denied the government's motion for reconsideration. It was noted that when the court issued its decision, no reported cases had addressed the issue of the interrelationship of sections 553 and 605(e)(4) with respect to the use of converter boxes for the unauthorized interception of premium cable programming transmitted over coaxial wire. Since then, a Federal Court of Appeals decided International Cablevision, Inc. v. Sykes, 997 F.2d 998 (2d Cir. 1993; ELR 15:10:25), in which a cable television system brought a civil action against an individual who was selling cable television "black boxes" - devices that would permit

subscribers to receive programs broadcast on premium channels without paying a cable company for the services. The court held that Sykes' conduct violated section 553(a) but questioned whether there was a violation of section 605(e)(4) and remanded the case. Judge Miller remained "steadfast" in reiterating that section 553(a), and not section 605(e)(4) would govern the theft of a signal transmitted over coaxial cable.

United States v. Norris, 833 F.Supp. 1392, 1993 U.S.Dist. LEXIS 13404, 13321 (N.D.Ind. 1993) [ELR 16:2:31]

Michigan Supreme Court invalidates ordinance giving cable TV company mandatory access to apartment complex

In 1974, the city of Lansing granted Continental Cablevision the nonexclusive right to operate a cable system. Continental, in part, agreed to provide nine designated access channels, and to pay three percent of its gross revenues as a franchise fee to the city.

In 1980, the predecessor in interest of Edward Rose Realty provided Continental with the exclusive right to install and operate its cable system in two apartment complexes. In 1986, Rose notified Continental that it would not renew the contract upon its expiration in June 1987. Rose informed Continental that it planned to install a private cable system, a satellite master antenna television system, to provide cable service to its tenants.

Continental, in March 1987, submitted a proposed ordinance to the city that would prohibit an owner of a multiple-unit residential dwelling from interfering with a tenant's choice to receive cable service from the city's franchisee. The city adopted an ordinance stating that

"No owner, agent or representative of the owner of any dwelling shall directly or indirectly prohibit any resident of such dwelling from receiving cable communication installation, maintenance and services from a Grantee operating under a valid franchise issued by the City." If an owner refused access by the franchised cable service, the city, upon request of the franchisee, could begin condemnation proceedings. The franchisee would be responsible for indemnifying all expenses and costs incurred by the city.

In response to Continental's request that the city commence condemnation proceedings against Rose, the city, in March 1988, filed two complaints for condemnation under the state's Uniform Condemnation Procedures Act to secure for use by Continental that portion of Rose's property required for the operation of the cable company's services.

A trial court upheld the validity of the condemnation proceedings. Rose's application for leave to appeal was granted and all proceedings in the trial court were stayed. The appellate court reversed the judgment of the trial court.

The Michigan Supreme Court has affirmed the appellate court decision, holding that the ordinance was unreasonable and beyond the authority of the city to exercise the power of eminent domain.

Judge Dorothy Comstock Riley noted that although a city may be authorized to condemn private property for any public use within the scope of its powers, the cited enabling statutes did not specifically authorize the takings in the present case. There was no state statute identifying as a public use or purpose the mandatory access onto private property by a city-franchised cable provider. And since it appeared that the asserted benefit to the public was not clear and significant and would not

predominate over the private interest of Continental, it was found that the proposed taking was not justified.

Judge Riley observed that the state legislature had not announced as a general public purpose that city-franchised cable operators have mandatory access to all rental properties. The city passed its ordinance without an express delegation of authority by the state. The city did not assert, in so doing, that it proposed to protect Rose's tenants from discriminatory rates by Rose or that the apartment complex owner was gouging its tenants with regard to the franchised cable services or its SMATV services.

The court agreed with the appellate court that the requirement of universal service was not, in and of itself, a public purpose. The requirement was intended to preclude a franchised cable operator from refusing service to poorer communities, and was not an enabling provision authorizing the cable operator to demand access to

every dwelling despite the owner's desire for such service.

The ordinance was not likely to increase competition in the cable industry - access to private dwellings under the ordinance is enforceable only by the franchised cable operator. Continental had entered into exclusive cable service contracts in ninety percent of its contracts in Lansing. Even if private systems were allowed to compete, noted the court, Continental already had secured ninety percent of the market.

The proposed action, continued the court, would regulate cable services beyond limits established by Michigan or the federal government. Judge Riley adverted to the fact that Congress considered a mandatory access provision in the 1992 Cable Act - the provision was deleted before the enactment of the statute.

Judge Conrad L. Mallett, Jr., in dissent, would have found that the public was the primary beneficiary of the

proposed condemnation. The city had determined that Continental provided a variety of services that Rose's satellite system could not provide. Judge Mallet challenged the majority's failure to consider the "breadth" of services offered through the broadcast of public, educational and governmental channels. Continental also had agreed to maintain state-of-the-art equipment and technology and to provide universal service.

City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 1993 Mich.LEXIS 1654 (Mich. 1993) [ELR 16:2:32]

Constitutionality of Connecticut statute granting cable television companies access to apartment complexes is upheld

Connecticut's mandatory cable access law guarantees franchised cable television companies access to apartment complexes exclusively serviced by satellite master antenna television companies on the request of the residents of the complex.

Under an agreement between Amsat Cable Ltd. and Stamford Apartments, an apartment complex owner, Amsat held an exclusive easement for the installation of an SMATV system in the Hoyt-Bedford apartment complex and an exclusive right to provide cable television service to the residents of the complex.

Cablevision of Connecticut, a cable television franchise holder, apparently proposed to seek access to the Hoyt-Bedford complex. Amsat brought an action under 42 U.S.C. sections 1983 and 1988 seeking a declaration that section 16-333a of Connecticut's General Statutes, was unconstitutional.

A Federal District Court adopted the recommended ruling of the Magistrate Judge, granted Cablevision of Connecticut's motion for summary judgment, and dismissed the complaint.

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

Judge Walker noted that the First Amendment protects a cable operator's right to make certain programming decisions and to disseminate its speech, as well as its viewers' rights to receive the speech. But Amsat erred in believing that it had "a constitutional right not only to speak, but to speak profitably." Ending Amsat's monopoly control over cable service in buildings now served by the company might drive Amsat out of business, but this did not give rise to a First Amendment claim, stated the court.

Amsat also argued that the Connecticut statute unconstitutionally favored franchised cable operators, such as

Cablevision, by guaranteeing the cable operators access to the homes of viewers who want their services, while not guaranteeing such access to Amsat.

The court declined to reach the merits of the equal protection claim, stating that it was not justiciable; the claim lacked ripeness and Amsat lacked standing to assert the claim. Amsat's claim was based on "the presupposition" that it would not be able to obtain access to additional buildings it might wish to service because it did not receive the right of access accorded franchised cable operators. However, there was no admissible evidence in the record tending to prove that Amsat was denied access to any buildings it sought to service. And since Amsat had claimed that it could not survive economically in direct competition with franchised cable operators, there was "good reason to believe that [the company] will not attempt to service new facilities, whether or not it has a right of access, so long as

franchised cable operators have a right to enter those facilities."

In all, any constitutional claim based upon the purportedly discriminatory denial to Amsat of a right of access was not fit for decision, declared the court.

The court next rejected Stamford Apartments' argument that applying section 16-333a to require it to provide Cablevision with access to Hoyt-Bedford would unconstitutionally compel the apartment owner to speak. The statute granted Cablevision the right to transmit its speech on its own equipment located on property acquired from building owners under condemnation procedures, noted Judge Walker, and the record did not suggest that transmitting Cablevision's programming via easements into the homes of tenants would associate Stamford Apartments with Cablevision's programming "in any meaningful way." Even assuming that Stamford Apartments was a speaker within the meaning of the

First Amendment, the statute would not operate to violate its First Amendment rights.

Judge Walker concluded by finding that section 16-333a was not facially invalid under the takings clause of the Fifth Amendment, and was not preempted by the Cable Act or by the ruling in In re Earth Satellite Communication Inc., 95 F.C.C.2d 1223 (1983), affirmed under the name, New York State Commission on Cable Television v. Federal Communications Commission, 749 F.2d 804 (D.C.Cir. 1984; ELR 7:4:11).

Amsat Cable Ltd v. Cablevision v. Connecticut Limited Partnership, 6 F.3d 867, 1993 U.S.App.LEXIS 23427 (2d Cir. 1993) [ELR 16:2:33]

Dismissal of investors' federal securities fraud claim against Taj Mahal casino/hotel partnership is affirmed

A Federal Court of Appeals has affirmed a District Court decision (ELR 15:1:18) granting a motion to dismiss brought by Donald Trump and other parties in a securities fraud action brought by investors in the Taj Mahal hotel and casino.

In 1988, as the primary source of funding for the Taj Mahal, the Trump parties offered, and Merrill, Lynch, Pierce, Fenner and Smith underwrote, $675 million in fourteen percent first mortgage investment bonds.

Upon learning that the Taj Mahal planned to file Chapter 11 bankruptcy and establish a reorganization plan, various bondholders claimed that the prospectus accompanying the issuance of the bonds contained

affirmatively misleading statements and materially misleading omissions.

The basis of the District Court's decision, noted Judge Becker, was the "bespeaks caution" doctrine, according to which a court may determine that "the inclusion of sufficient cautionary statements in a prospectus renders misrepresentations and omissions contained therein non-actionable." Judge Becker stated that the doctrine essentially was the same as the well-established principle that a statement or omission must be considered in context, and that the doctrine was "both viable and applicable" to the instant matter. The prospectus conveyed "the extreme risks inherent in the venture while simultaneously carefully alerting the investors to a variety of obstacles the Taj Mahal would face, all of which were relevant to a potential investor's decision concerning purchase of the bonds." The court concluded that, given the "warning signals" in the text of the prospectus itself, the

investors could not establish that a reasonable investor would find the alleged misstatements and omissions material to his or her decision to invest in the Taj Mahal.

Judge Becker observed that the cautionary statements in the prospectus stressed, among other factors: "the intense competition in the casino industry; the absence of an operating history for the Taj Mahal which could serve as a basis for its valuation; the unprecedented size of the Taj Mahal casino in Atlantic City; and the enterprise's potential inability to repay the interest on the bonds in the event of a mortgage default and subsequent liquidation of the Taj Mahal."

The investors challenged the statement that the partnerships believed "that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." But Judge Becker pointed out that the complaint did not sufficiently allege that the Trump parties made a material

misrepresentation (emphasis by the court). Due to the disclaimers and warnings contained in the prospectus, "no reasonable investor could believe anything but that the Taj Mahal bonds represented a rather risky, speculative investment which might yield a high rate of return, but which alternatively might result in no return or even a loss...under this set of facts, the bondholders cannot prove that the alleged misrepresentation was material."

The context of the challenged statement "clearly and precisely" relayed to the bondholders the substantial uncertainties inherent in the completion and operation of the Taj Mahal. The prospectus contained both general warnings that the partnership could not assure the repayment of the bonds as well as specific references to the risk factors that would make the completion and profitable operation of the Taj Mahal "highly uncertain." "Within this broad context," stated the court," the statement at issue, was, at worst, harmless." In all, the

warning and cautionary language served to negate any potentially misleading effect that the partnership's belief in its ability to repay the bonds would have on a reasonable investor. The prospectus "cautioned that the bonds represented an exceptionally risky, perhaps even speculative, venture and that the Partnership's ability to repay the bonds was uncertain. Given this context, we believe that no reasonable jury could conclude that the subject projection materially influences a reasonable investor."

The court also found that the alleged omission of material facts did not state actionable securities fraud claims.

In re Donald J. Trump Casino Securities Litigation - Taj Mahal Litigation, 7 F.3d 357, 1993 U.S.App.LEXIS 26691 (3d Cir. 1993) [ELR 16:2:34]

NASCAR and New York race track prevail in negligence action by widow of race car driver

Ima Jean Mc Duffie sought damages from NASCAR and Watkins Glen International, Inc. for the wrongful death of John D. Mc Duffie, Jr. as a result of a car crash that occurred when Mc Duffie participated at a race at the Watkins Glen Raceway.

A Federal District Court in New York granted motions for summary judgment brought by NASCAR and Watkins Glen and dismissed Mc Duffie's complaint.

Chief Judge Telesca noted that Mc Duffie, who was 52 years old at the time of his death, had been a professional stock car driver for more than 25 years. For each year that he participated in NASCAR racing, Mc Duffie signed applications for membership both as an owner and driver; the applications contained releases with

respect to NASCAR as well as the owners and operators of the tracks at NASCAR sanctioned events.

Mc Duffie also agreed, in his application for the NASCAR benefit plan, that any claim for accident injuries (including death), incurred in any NASCAR stock car event, was limited to those provided in the benefit plan.

And Mc Duffie signed event releases for his participation in each NASCAR event. In all, observed Chief Judge Telesca, Mc Duffie signed four liability release forms in conjunction with the "Budweiser at the Glen" event.

Ima Jean Mc Duffie, while not disputing that Mc Duffie's car went out of control as a result of mechanical failure, argued, among other claims, that one of the turns at the track was negligently designed and encouraged speeds "for which it was not designed."

Judge Telesca, in considering NASCAR's assumption of risk argument, cited Turcotte v. Fell, 68 N.Y.2d 432

(1986; ELR 7:1:18) which "firmly established the doctrine that primary assumption of risk, in the context of professional sports...is a complete defense to negligence claims brought by the participant against the owner of the sport facility or the promoter." NASCAR argued that the risks of racing at Watkins Glen in general, and around the turn at issue, were open and obvious, and that Mc Duffie, given his experience at the track, was aware of the conditions at the turn, including the speed at which the turn was approached, and thus voluntarily assumed the risk of racing at the track.

The court pointed out that safety issues concerning Turn 5 were well known prior to the August 1991 race. It was "inconceivable," stated Judge Telesca, that a driver with Mc Duffie's experience at the track was unaware of the reasonably foreseeable risks of Turn 5. No triable issue of fact was raised as to whether Mc Duffie voluntarily assumed the risks of racing at Watkins Glen.

It was noted that the proximate cause of Mc Duffie's accident was not a negligently designed barrier but a mechanical failure. The alleged acts of negligence - the faulty design of the track which purportedly permitted Mc Duffie to go too fast, and the lack of an adequate barrier to prevent injury once Mc Duffie's car went out of control - could not have been reasonably foreseeable. Mc Duffie voluntarily assumed the risk of approaching Turn 5 at the fastest speed he could attain, and was well aware of the dangers associated with auto racing. The possibility of losing control of a race car at a high rate of speed is an inherent foreseeable risk in auto racing, commented the court, and it appeared that Mc Duffie chose to assume the reasonably foreseeable risks of racing at Watkins Glen.

The court next rejected the claim that New York law rendered the releases signed by Mc Duffie void as against public policy because Mc Duffie was a "user" of

a recreational facility within the meaning of the statute. Mc Duffie paid an entry fee for the race, but the fee was paid for a pre-race safety inspection, not for the use of the race track. And Judge Telesca cited Lago v. Krollage, 157 A.D.2d 49 (1990; ELR 12:9:17) in which the court held that an auto mechanic killed while working at a stock car race was not a "user" of the facilities within the statute. New York law thus did not void the NASCAR membership release signed by Mc Duffie. Mc Duffie was not a patron user of the race track, and the New York statute therefore did not apply in the case and did not void the NASCAR membership release signed by Mc Duffie.

There was no evidence to substantiate a claim of willful misconduct on the part of the NASCAR parties, concluded the court, and also granted summary judgment dismissing this claim.

Mc Duffie v. Watkins Glen International, Inc., 833 F.Supp. 197, 1993 U.S.Dist.LEXIS 13009 (W.D.N.Y. 1993) [ELR 16:2:35]

Briefly Noted:

Trade Name Infringement.

S&S Investments, Inc. used the name "Showtime" for two video rental stores in Alamogordo, New Mexico. In April 1990, Larry Hooper opened a Showtime video store in Alamogordo; Hooper had registered the trade name "Showtime" with the state in February 1989, prior to the time S&S began to do business under that name. However, Hooper's actual use of the name did not begin until April 1990. The trial court ruled that Hooper's prior registration did not bar S&S from appropriating the

name through actual use. It was further ruled that the prior use in Alamogordo entitled S&S to continue to use the name and to prevent Hooper from using the name in Alamogordo. The court concluded by ruling that S&S was not entitled to force Hooper to disgorge all profits earned from the Alamogordo store prior to the court's decision.

On appeal, Chief Judge Pamela B. Minzner noted that New Mexico's trademark law differs from the Lanham Act in that the state law does not have a constructive notice provision and specifically preserves the common law right to trademarks acquired in good faith at any time. S&S, stated the court, established a good faith acquisition of a trade name at common law, and its rights were superior to those of Hooper, whose prior state registration "was not accompanied by prior use in the market area in question."

Judge Minzner agreed with the trial court's finding that S&S acquired the right to use the Showtime name in good faith; that S&S properly appropriated the name in Alamogordo under the common law; that S&S was the prior user in that market; and that S&S had the exclusive right to use the Showtime name for video rental stores in Alamogordo.

The court upheld the trial court's refusal to award any damages as a result of Hooper's simultaneous use of the Showtime name. S&S had sought all profits earned by Hooper from the Alamogordo store. The evidence indicated that Hooper did not use the Showtime name to "cash in on" S&S's reputation; Hooper had a good faith belief that he was entitled to use the name in Alamogordo. And S&S did not prove any major adverse consequences resulting from Hooper's use of the Showtime name.

S&S Investments, Inc. v. Hooper Enterprises, Ltd., 862 P.2d 1252, 1993 N.M.App.LEXIS 112 (N.M.App. 1993) [ELR 16:2:36]

Misappropriation.

Johnny Stewart Game Calls, Inc., a manufacturer of wild animal calls, claimed that United States Sporting Products, Inc. copied sounds from nineteen of Stewart's tapes. A Texas trial court jury found that Sporting Products misappropriated recordings of various animal sounds gathered and marketed by Game Calls, and assessed $209,000 in actual damages and about $480,000 in exemplary damages. The court entered judgment against Sporting Goods and John Bowling, the company's president, and also awarded Game Calls attorneys' fees and permanent injunctive relief.

A Texas appellate court has affirmed the trial court judgment. Judge Vance first stated that a misappropriation claim does not extend a property interest to matters in the public domain - Sporting Products could have gathered its own animal sounds rather than using Game Calls' tapes as a source of information. It also was found that both compensatory and exemplary damages are recoverable for misappropriation in addition to injunctive relief.

Judge Vane rejected Sporting Products' challenge to a jury charge; stated that the jury finding of Bowling's "knowing participation" in the misappropriation was a sufficient basis for personal liability; held that implied or legal malice is the appropriate standard for assessing exemplary damages for misappropriation; and determined that the award of exemplary damages, less than three times actual damages, was not unreasonable in proportion to the award of actual damages.

United States Sporting Products, Inc. v. Johnny Stewart Game Calls, Inc., 865 S.W.2d 214, 1993 Tex.App.LEXIS 2675 (Tex.App. 1993) [ELR 16:2:36]

DEPARTMENTS

In the Law Reviews:

The UCLA Entertainment Law Review has unveiled its premier issue dedicated to the late Professor Melville Nimmer with the following articles:

Tributes to Melville B. Nimmer by Kenneth L. Karst, Norman Abrams and Kenneth Ziffren, 1 UCLA Entertainment Law Review 1 (1994)

The Law of Ideas, Revisited by Lionel S. Sobel, 1 UCLA Entertainment Law Review 9 (1994)

A Positive Economic Theory of the Right of Publicity by Mark F. Grady, 1 UCLA Entertainment Law Review 97 (1994)

Corcovado: Renewal's Second Coming or False Messiah? by David Nimmer, 1 UCLA Entertainment Law Review 127 (1994)

It's a Wonderful Life - Motion Picture Studios Can Regain Control of Their Wayward Classics by Eric P. Early, 1 UCLA Entertainment Law Review 139 (1994)

The Sports Lawyers Journal, published by Tulane Law School's Sports Law Society, has issued Volume 1, Number 1 with the following articles:

Sports Broadcasting and the Antitrust Laws: Stay Tuned for Baseball after the bulls Romp in Court, by Don Shacknai, 1 The Sports Lawyers Journal 1 (1994)

The Chicago Bulls Win Again: Antitrust, Sports and Broadcasting by Leonard Feldman, 1 The Sports Lawyers Journal 51 (1994)

The Future of Sports Broadcasting and Pay-Per-View: An Antitrust Analysis by David M. VanGlish, 1 The Sports Lawyers Journal 79 (1994)

While Free Agents Reap Benefits of NFL Labor Settlement Agreement, Rookies Get Set for Further Legal Battles by Michael S. Kagnoff, 1 The Sports Lawyers Journal 109 (1994)

Contractual Freedom Over Substance-Related Issues in Major League Baseball by Edward Rippey, 1 The Sports Lawyers Journal 143 (1994)

The Use of Arbitration in Professional Baseball by Frederick N. Donegan, 1 The Sports Lawyers Journal 183 (1994)

The Race Does Not Always Go to the Stronger or Faster Man...but the One Who Goes to Court: An Examination of Reynolds v. IAAF by Jill J. Newman, 1 The Sports Lawyers Journal 205 (1994)

To Be an Equitist or Not: A View of Title IX by Loretta M. Lamar, 1 The Sports Lawyers Journal 237 (1994)

Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications, and the Movement

Toward Compliance, by Teresa M. Miguel, 1 The Sports Lawyers Journal 279 (1994)

Nonconstitutional Privacy Based Challenges to NCAA Drug Testing by Anthony Saler, 1 The Sports Lawyers Journal 303 (1994)

The Regulation of Sports Agents: Fact or Fiction? by Michael A. Weiss, 1 The Sports Lawyers Journal 329 (1994)

Sports Figures' Right of Publicity by Alexander Margolies, 1 The Sports Lawyers Journal 359 (1994)

Communications Lawyer, published by the Forum on Communications Law of the American Bar Association, has issued Volume 12, Number 1 with the following articles:

The Two Faces of Commercial Speech under the First Amendment by P. Cameron De Vore, 12 Communications Lawyer 1 (1994)

Insider's View: National Information Superhighway: Beyond a 500 Channel World by Larry Irving, 12 Communications Lawyer 3 (1994)

Networks, Standards, and Intellectual Property: The Fabric of Information Infrastructure by Brian Kahin, 12 Communications Lawyer 5 (1994)

Resisting Subpoenas for Published or Broadcast Information by John P. Borger, 12 Communications Lawyer 10 (1994)

EEO Compliance under New FCC "Tough But Fair" Enforcement Regime by Barbara K. Gardner, 12 Communications Lawyer 15 (1994)

Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music by Carl A. Falstrom, 45 Hastings Law Journal 359 (1994)
[ELR 16:2:38]