RECENT CASES

Songwriter Wood Newton loses misappropriation and unfair competition claims against producers of "Evening Shade" for use of character with same name

Country music songwriter and performer Wood Newton sued Harry Thomason and Linda Bloodworth Thomason, Burt Reynolds and Mozark Productions for misappropriation and unfair competition arising from the use of "Wood Newton' as the name of the main character in the television series "Evening Shade."

The Evening Shade parties claimed that Newton, in mid-1990, knew about, and did not object to, the program's use of his name. However, upon learning, in late 1990, that the producers had decided not to buy his proposed theme song for the series, Newton apparently reconsidered his position. Newton claimed that he never consented to the use of his name and had refused to sign a release agreement.

A Federal District Court in Califomia granted summary judgment in favor of the Evening Shade parties and sanctioned Newton's attorney Michael Childress in the amount of $10,000 for filing the complaint in a Federal District Court in Illinois, an "unnecessary and frivolous" choice of venue.

Federal Court of Appeals Judge Harry Pregerson first found that Illinois choice of law required the application of California law to Newton's state common law right of publicity and statutory unfair competition claims. The court then held that, when reviewing federal claims, a transferee court in the Ninth Circuit is bound only by the circuit's precedent, and that such precedent would apply in interpreting Newton's Lanham Act claim.

Judge Pregerson disagreed with Newton's argument that consent was a disputed issue. Newton may not have orally consented to the use of his name, but his letters and conduct made it "obvious" that he did consent.

Newton also failed to present sufficient evidence to support the allegation that the Evening Shade parties used his name for a commercial purpose. The name "Wood Newton" appeared in newspaper articles about Burt Reynolds' character; the producers did not mention that the character's name was the same as Newton's name or that the fictional character in any way resembled Newton, stated Judge Pregerson, in affirming summary judgment on Newton's state law misappropriation claim.

The court rejected the argument that there was a genuine issue of material fact as to the likelihood of confusion between Newton and the television series character. Newton did not present evidence that viewers might believe that the songwriter endorsed the series or was in any way associated with the series or the fictional character. In applying the factors relevant to a determination of likelihood of confusion, it was noted that Newton's name was known and recognized primarily within the country/western music industry and that his "mark" was not strong; that Newton's "persona" was very different from that of the fictional television series character; that there was no relevant evidence of actual confusion before the court; and that Newton did not demonstrate that the alleged confusion of consumers impaired his reputation and career as a professional country/western songwriter and performer. Judge Pregerson commented that in this case, "viewers are likely to perceive the fictional character as no more than a fictional character." There was no evidence that the Evening Shade parties intended to profit by confusing viewers into believing that Newton was affiliated with the series, and there was no likelihood that the Evening Shade parties planned to expand into Newton's market.

Tbe court next found that the District Court abused its discretion by sanctioning Childress. Although only one expert witness resided in Illinois and no parties lived or had their principle place of business in the state, it was conceded that the purported injury - broadcasting the television series - occurred in all districts. Filing in an inconvenient but proper forum is not a legitimate ground for Rule II sanctions, declared the court; the filing in Illinois was not harassment in that there was no evidence of improper purpose. The sanctions order therefore was reversed.

The court concluded by declining to award attorneys' fees to the Evening Shade parties, stating that the case was not an "exceptional case" warranting an award under the Lanham Act. But the matter was remanded to the

District Court to determine a proper fee award under Section 3344(a) of the Califomia Civil Code.

Newton v. Thomason, 1994 U.S.App.LEXIS 8965 (9th Cir. 1994) [ELR 16:3:3]

New Line Cinema is held in contempt of consent order for using Stephen King's name in connection with videocassettes of "The Lawnmower Man"

In 1992, a Federal Court of Appeals (ELR 14:8:9) ruled that New Line Cinema, the distributor of "The Lawnmower Man," could state that the film was "based upon" a Stephen King story, but was not entitled to use a possessory credit. King had claimed that the film did not resemble his 1975 story, and that the use of "possessory" and "based upon" credits violated the Lanham Act.

A May 1993 settlement agreement among the parties incorporated a final consent decree which prohibited the use of King's name in connection with "The Lawnmower Man" film and all related properties and products, in all media. New Line agreed to take "immediate steps" to provide "paste-over" stickers or otherwise remove any references to King on videos of "The Lawnmower Man," and to provide compliance instructions to its distributors and wholesalers.

Federal District Court Judge Constance Baker Motley has found that New Line delayed mailing paste-over stickers or new sleeves and that the company did not determine how many stickers or sleeves retailers actually might require. It also was found that the company did not provide adequate instructions to distributors and wholesalers concerning the corrective material. Judge

Motley observed that a month after the decree was entered, "there remained in the inventories of New Line's distributors and wholesalers between 24,000 and 54,000 videocassettes packaged in offending sleeves."

After reviewing certain "false and misleading" compliance affidavits submitted by New Line, the court found the company was in contempt of the consent decree, and ordered New Line to take "any action to cure the contempt at all wholesale and retail outlets within thirty days [of the court's opinion]." If it is then determined that New Line has not substantially complied with the requirements imposed by the consent decree, the company must pay a fine to King in the amount of $10,000 per day until the noncompliance is cured.

Judge Motley further stated that King would be entitled to any "unlawful profits" earned by New Line from sales or rentals of The Lawnmower Man videocassettes or laser discs during the period of noncompliance, and ordered New Line to produce a statement of such net profits. King also will be entitled to recover the attorneys' fees and costs he incurred in the matter.

The court denied King's motion seeking to impose Rule 11 sanctions against New Line for maintaining an allegedly frivolous defense to the contempt motion.

Stephen King v. Allied Vision, Ltd., 1994 U.S. DIST. LEXIS 3615 (S.D.N.Y. 1994) [ELR 16:3:4]

Court affirms $11 million jury verdict in producer's breach of contract action against Universal Studios

A Federal Court of Appeals has affirmed a Federal District Court judgment (ELR 13:4:18) entered on a jury verdict awarding Accent Films $11.6 million in damages in the company's breach of contract action against

Universal Studios. The court, in a memorandum opinion denominated "not appropriate for publication" and which "may not be cited to or by the courts of this circuit" also affirmed the District Court ruling (ELR 13:8:19) denying Accent Films' request for $3.5 to $3.8 million in prejudgment interest on the award.

Accent Films claimed that Universal breached a contract to distribute the Roman Polanski film "Pirates" by refusing to pay $18 million of the $27 million budget of the film in return for United States and Canadian distribution rights, and by acting in bad faith in refusing to approve a revised screenplay. Universal argued that it had the contractual right to reject the revised screenplay.

Accent subsequently entered what was described as a "less lucrative distribution deal" with MGM/UA Entertainment.

Accent Films attorney Don Engel has stated that the company plans to collect about $13.5 million from

Universal, representing the judgment plus about $2 million in post-judgment interest.

Accent Films v. Universal City Studios, Inc., Case No. 82-55286 (9th Cir., Apr. 28, 1994) [ELR 16:3:4]

United States Supreme Court Justice refuses to order reinstatement of former USC women's basketball coach pending trial on sex discrimination claim

Marianne Stanley signed a four year contract with the University of Southern California in July 1989 to serve as the head coach of the women's basketball team. The contract provided for an annual base salary of $60,000, with a $6,000 housing allowance.

When negotiations began for a new contract, Stanley told Michael Garrett, the athletic director for USC, that she was entitled to be paid the same amount as the school paid George Raveling, the head coach of the men's basketball team. Raveling purportedly is paid $150,000 annually. According to Stanley, Garrett verbally agreed that she should be paid what Raveling was earning, but asserted that USC did not have the money at that time.

In April 1993, USC proposed to raise Stanley's salary to $80,000 in 1993-1994, to $90,000 in 1994-1995, and to $100,000 in 1995-1996, along with a $6,000 annual housing allowance. Stanley rejected the offer. In June 1993, USC proposed a one year contract with an annual salary of $96,000; Stanley did not respond to the proposal.

In August 1993, Stanley sued USC in a Los Angeles trial court alleging various federal and state sex discriniination claims and common law causes of action. The court issued an oral order granting Stanley's ex parte application for a temporary restraining order, pending a hearing on a motion for a preliminary injunction. The court ordered USC to pay Stanley an annual salary of $96,000 for her services as head basketball coach of the women's team, with all benefits under the 1989 contract remaining in effect. USC removed the action to a Federal District Court which, after a hearing, denied Stanley's motion for a preliminary injunction.

Federal Court of Appeals Judge Arthur L. Alarcon, in upholding the District Court's decision, first adverted to the fact that there was no trial in the matter and that discovery was not completed, providing the court with limited proof. The court proceeded to consider Stanley's claim under the Equal Pay Act which prohibits discrimination in wages "between employees on the basis of sex ... for equal work, on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Stanley did not contradict USC's evidence demonstrating the differences in the responsibilities of the head coaches of the women's and men's basketball teams, stated Judge Alarcon. Raveling was required to engage in "substantial" public relations and promotional activity to generate revenue for USC, resulting in revenue 90 times greater than the revenue generated by the women's basketball team. Raveling was required to conduct 12 outside speaking engagements per year, to be accessible to the media for interviews, and to participate in certain activities designed to produce donations and endorsements for the USC Athletic Department. Stanley was not required to engage in the same "intense level" of promotional and revenue-raising activities. This "quantitative dissimilarity" in responsibilities justified a different level of pay for the head coach of the women's basketball team, declared the court.

USC also showed that Raveling had substantially different qualifications and experience in conducting public relations and in generating revenue than Coach Stanley, as well as having fourteen years more experience as a basketball coach. "Employers may regard professional experience and education without violating the EPA," stated Judge Alarcon.

The court reiterated that the men's basketball team generated greater attendance, more media interest, larger donations, and produced substantially more revenue than the women's team.

Stanley alleged that the women's team generated revenue and that she was under a great deal of pressure to win. The court disagreed with Stanley's suggestion that a difference in the amount of revenue generated by the men's and women's teams should be ignored by the court in comparing the respective coaching positions, and stated that revenue generation is an important factor that may be considered in justifying greater pay.

Stanley did not show that her responsibilities were identical to those of Raveling, and, in all, at this stage of the proceedings, the record did not support a finding that gender was the reason that USC paid a higher salary to Raveling than was offered to Stanley. It was shown that there were significant differences between Stanley's and Raveling's public relations skills, credentials, experience, and qualifications; there also were substantial differences in their responsibilities and working conditions. The District Court did not err in finding that the head coach positions were not substantially equal.

Judge Alarcon next agreed with the District Court's rejection of the claim that USC terminated Stanley's contract or failed to renew her contract in retaliation for her involvement in protected activities.

The court expressed no opinion as to whether Stanley may establish a prima facie case of sex discrimination or retaliation at trial.

The District Court also had found that Stanley presented sufficient facts from which it could be inferred that she suffered emotional distress, loss of business opportunity and injury to her reputation flowing from the expiration of the employment contract and the failure of negotiations for a new contract. But the facts did not clearly show that USC discriminated or retaliated against Stanley on the basis of her gender and that the injury she suffered was caused by the alleged wrongful conduct of USC.

In all, the District Court did not err in determining that the balance of hardships did not favor Stanley and that the public's interest in preventing sex discrimination and discriminatory employment practices did not warrant granting injunctive relief.

In April 1994, United States Supreme Court Justice Sandra Day O'Connor rejected an emergency request by Stanley to order USC to reinstate the coach pending the trial of Stanley's lawsuit.

Stanley v. University of Southern California, 13 F.3d 1313, 1994 U.S.App.LEXIS 94 (9th Cir. 1994) [ELR 16:3:4]

Performer clanning to be member of the "Jerky Boys" fails to obtain injunctive relief to bar release of group's record

The "Jerky Boys" issued a record of comedic prank phone call performances; Billboard Magazine, according to New York trial court Judge Tompkins, reported that the record sold more than 500,000 copies.

Louis N. Gatanas claimed that he was a member of the group and was wrongfully excluded from the performances. Gatanas, among other evidence, referred to a September 1992 contract between Detonator Records, John Brennan, Kamal Ahmed and Gatanas, and to a February 1993 contract with Select Records.

Brennan and Ahmed claimed that they were the only members of the "Jerky Boys;" that Gatanas made no artistic contribution to the group; that any arrangement among the parties was "informal and at will;" and that the contract with Detonator was drafted by a relative of Gatanas.

Select pointed out that Detonator Records owns the professional name "Jerky Boys" and the master recordings; has the right to add or to remove members of the group; and has the obligation to pay royalties to the group.

Judge Tompkins ruled that Gatanas did not show a clear likelihood of success on the merits, given the conflicting testimony as to who performed the skits on the record and as to whether Gatanas was a member of the group. Gatanas also did not demonstrate irreparable harm, since any damages would be compensable. The court, accordingly, declined to issue an injunction preventing the Select parties from performing or producing a second record.

Gatanas v. Select Records, New York Law Journal (N.Y.Cnty., May 4, 1994) [ELR 16:3:6]

Winterland Concessions prevails in action alleging unauthorized distribution of merchandise containing photos of music performers

Winterland Concessions Co. holds exclusive licenses to sell products that exhibit pictures of the musical artists Madonna, George Michael, New Kids on the Block, Hammer, and the fine Young Cannibals. Winterland claimed that Peter Fenton and Rathglade Limited, doing business as Atalanta West, Atalanta Press and Culture Shock, engaged in the unlicensed production and distribution of posterbooks and calendars containing photographs of the performers in violation of the Lanham Act and section 3344 of the California Code of Civil Procedure.

In May 1993, a Federal District Court jury refused a verdict for Winterland. In October 1993, the court issued several rulings in the matter.

Judge Barbara A. Caulfield first discussed two rulings issued during pretrial conferences. The court had determined that it could exercise extraterritorial jurisdiction over the Fenton parties' United Kingdom sales. It was noted that Fenton's foreign sales activities competed with and presumably decreased Winterland's foreign sales, and that Fenton frequently oversaw his business' United States operations and sales from his United Kingdom base.

After balancing many factors with respect to whether the "interest of and links to American foreign commerce [were] sufficiently strong in relation to those of other nations," the court reiterated the decision that it could properly exercise supplemental jurisdiction over Fenton's foreign sales. The issue was not submitted to the jury since the existence of subject matter jurisdiction is a question of law, stated the court.

The Fenton parties had argued, unsuccessfully, that they were entitled to judgment as a matter of law because the photographs of the performers were functional. In the instant ruling, the court held that Winterland would have been entitled to an instructed verdict on the issue, for when a product feature is both functional and source-identifying, a copier must take reasonable measures to avoid consumer confusion. There was nothing in the record from which a reasonable juror could conclude that the Fenton parties took any such measures.

Judge Caulfield next stated that there was sufficient evidence from which to calculate Fenton's net profits and rejected Winterland's motion to increase the damage award.

The court, adverting to the jury's special verdict, awarded $2.00 to each of the following parties: Winterland Concessions, Boy Toy, Inc., Big Geoff Overseas, Bustin' Productions, Big Step Productions and FYC Tours. The court further ordered Fenton to pay net profits to the parties as follows: $75,700 to Winterland; about $42,000 to Boy Toy; about $6,500 to Big Geoff Overseas; about $1,000 to Bustin' Productions; about

$54,000 to Big Step Productions; and about $1,000 to FYC Tours.

Judge Caulfield awarded Winterland Concessions and the other parties about $43,000 from Peter Fenton in punitive damages, and about $43,000 from Rathglade Limited in punitive damages, and enjoined Fenton and Rathglade from continuing their unauthorized activities.

In January 1994, the court granted Winterland's request for about $190,000 in attorneys' fees.

Winterland Concessions Co. v. Fenton, 835 F.Supp. 529, 1993 U.S.Dist.LEXIS 14843 (N.D.Cal. 1993); 1994 U.S.Dist.LEXIS 776 (N.D.Cal. 1994) [ELR 16:3:6]

"Parody" baseball cards violate Oklahoma right of publicity statute

A Federal District Court in Oklahoma has adopted the report and recommendation of a magistrate judge and entered declaratory judgment in favor of the Major League Baseball Players Association in an action brought by Cardtoons, L.C.

Cardtoons designed "parody" trading cards of active major league baseball players. The association, prior to the publication of the cards, sent the company a cease-and-desist letter. Cardtoons responded by filing a complaint for declaratory judgment and seeking injunctive relief to prevent the association from interfering with the publication of the cards.

Magistrate Judge Wolfe noted that the association serves as the exclusive collective bargaining agent for all major league baseball players and also is the assignee of individual publicity rights for active major league players. Cardtoons, without obtaining a license from the association, planned to issue cards bearing caricatures closely resembling the likenesses of well-known baseball players, with the back of each card containing material about the players and/or the sport of baseball.

In first considering the jurisdictional issue, Judge Wolfe found that federal question jurisdiction was present because Cardtoons reasonably presumed that the association would file a Lanham Act claim. The fact that the association could have filed such a claim, but declined to do so, did not defeat federal question jurisdiction.

Judge Wolfe also noted that "a substantial First Amendment question is at the heart of this case," i.e., whether the First Amendment would protect Cardtoons in publishing a parody of prominent athletes without their consent. The First Amendment was more than just a defense - it was an essential element of the case. In turning to the question of whether Cardtoons' parodies would violate Oklahoma's right of publicity statute, the court cited SS1449(A) which, in language "virtually identical" to California law, provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or services .... without such person's prior consent..shall be liable for any damages sustained by the person or persons injured as a result thereof, and any profits from the unauthorized use that are attributable to the use shall be taken into account in computing the actual damages..."

Judge Wolfe declared that "likeness" means "any recognizable likeness," that each of the Cardtoon cards at issue had identifying characteristics and/or features of a "real life" player, that the cards contained at least a part of the player's name, and that although the cards did not use real team names, the "parody" teams were easily linked to professional teams by color and nicknames. In some cases, the text on the back of a card identified a player. In all, "a reasonable person, familiar with the sport, taking into account each of the foregoing factors in combination with the others can readily identify the real players 'parodied' on Cardtoons' cards." Thus, the cards depicted a "likeness" under the statute.

Cardtoons did not present a defense under the statute the project was not undertaken in connection with any news, public affairs, or sports broadcast or account or political campaign. The company's use of the players' likenesses was directly connected to a proposed commercial project.

Judge Wolfe, after careful discussion of the availability of the parody defense in various contexts, noted that Cardtoons' cards were "entertaining, humorous, and stimulate discussion about national issues facing professional baseball..." However, allowing the company to profit from the "economic value" of the baseball players' property rights without compensation was contrary to the meaning of the Oklahoma statute. Cardtoons might be entitled to distribute the cards without charge, or to parody baseball and its players in a book or magazine. But the company's First Amendment rights ended, according to Judge Wolfe, "when Cardtoons preys on the [baseball players'] names and likenesses for purely commercial purposes."

The association established a substantial likelihood of prevailing on the merits, but failed to show that irreparable harm would occur in the absence of injunctive relief. It was noted that the association would have an adequate damages remedy under section 1449(A), and Judge Wolfe, accordingly, recommended the denial of a preliminary injunction. Damages were denied to both parties since there was no evidence that Cardtoons had engaged in any sales of the parody cards.

Cardtoons, L. C. v. Major League Baseball Players Association, 838 F.Supp. 1501, 1993 U.S.Dist.LEXIS 19510, 19518 (N.D.Okla. 1993) [ELR 16:3:7]

Fat Boys may proceed with copyright and trademark infringement claim arising from Miller Brewing company commercial

In 1987, Miller Brewing Co. broadcast a television commercial featuring look-alikes of the members of the musical group "Fat Boys;" the look-alikes, performing in the style of the rap group, acted as background singers for actor Joe Piscopo. Miller allegedly had asked the members of the Fat Boys to appear in the commercial, but Mark Morales, Darren Robinson and Damon Wimbley declined the request. The owner of the group's service mark and copyrights sued Miller for copyright infringement, unfair competition and pendant state statutory and common law claims.

As reported at ELR 12:5:12, Federal District Court Judge Charles S. Haight, Jr. denied Miller's motions to dismiss the copyright and trademark claims, but refused to hold that the use of sound-alikes of the Fat Boys' voices violated sections 50/51 of the New York Civil Rights Law; the court stated that it would consider the alleged similarity of the voices in combination with the purported similarity in appearance of the groups.

In February 1994, Judge Haight noted that in a second amended complaint, filed after the court's opinion on Miller's motion to dismiss, it was alleged that the Miller Beer commercial infringed the copyrighted musical composition "Stick 'Em" and the copyrighted sound recording of the work, particularly the group's distinctive "Brr" and "Hugga Hugga" sounds. Miller argued that the sounds, standing alone, were not protectible. But Judge Haight ruled that Miller was not entitled to summary judgment dismissing the composition copyright claim on the ground of copyright invalidity. A jury could find, stated the court, that the Hugga Hugga and Brrr sounds, used as lyrics in the work, were sufficiently creative to warrant copyright protection, "apart from the rhythmic pattems or durations demonstrated by that work and the commercial." The sounds were more complex than a single drumbeat, and "in that complexity lies, arguably at least, the fruit of creativity. "

With respect to the issue of copying, the court observed that after the Fat Boys rejected Miller's offer, an employee of the company's advertising agency purchased a Fat Boys videotape that included the "Stick 'Em" work and made it available to the producers of the commercial. Joe Piscopo was dressed as a "fat rapper," "loosely based on the Fat Boys." And backup artists were chosen to resemble the members of the group.

In addition to the evidence of direct copying, the Fat Boys cited similarities between "Stick 'Em" and the commercial as to the lyrics and the sound recording. Again, the issue of copying was not appropriate for summary judgment, stated Judge Haight, who commented that if Miller did sample the copyrighted sound recording, "that infringed that copyright, whatever may be said of the composition copyright."

The court proceeded to find that the Fat Boys presented a genuine issue of fact as to whether Miller deliberately copied services covered by the group's registered trademark; that the Fat Boys were likely to prove at trial a combination of actual confusion, Miller's bad faith and lack of consumer sophistication sufficient to entitle them to a permanent injunction; and that the Fat Boys will be entitled to an accounting of Miller's commercial-generated profits if they prove that the infringement was fraudulent. The question of whether or not Miller acted in bad faith was another issue of fact requiring trial.

Judge Haight declined to rule on the issue of whether Miller was entitled to summary judgment as to the Fat Boys' Lanham Act claim for compensatory damages, but denied Miller's motion for summary judgment dismissing the group's Lanham Act claims and for summary judgment dismissing the complaint.

Tin Pan Apple, Inc. v. Miller Brewing Co., Inc., 1994 U.S.Dist.LEXIS 2178 (S.D.N.Y. 1994) [ELR 16:3:8]

Male model may proceed with defamation and invasion of privacy claim for unauthorized publication of his photograph

Liberation Publications, the publisher of the magazine "The Advocate," also published a collection of photographs entitled "Lust - The Body Politic." Advertisements for "Lust" appeared in The Advocate; the advertisements included a provocative photograph of model James M. Rejent. Rejent claimed that he had not consented to Liberation's commercial use of the photograph and sued the publisher, alleging the violation of sections 50/51 of the New York Civil Rights Act and defamation.

A trial court denied the publisher's motion to dismiss the action. Liberation appealed only the denial of the dismissal of the defamation claim.

An appellate court has affirmed the trial court's decision. Judge Sullivan stated that Rejent stated a cause of action for defamation based on the publication of the photograph in a manner which allegedly falsely implied that Rejent was "sexually lustful and promiscuous, that he advertises erotic photographs and that he endorses and subscribes to the sexual attitudes and views expressed in Liberation's publications." The text of the advertisement emphasized the sexual connotations of the photograph, as did the context in which the photograph and accompanying advertisement appeared, i.e., "surrounded by innumerable other suggestive advertisements of live sex videos, telephone sex talk, erotic devices and sexual literature.'

The court agreed that Rejent was not required to plead special damages - the publication of the photograph might be considered defamatory per se because of the false implication of sexual immorality.

Judge Kupferman, in dissent, would have dismissed the cause of action for defamation, stating that Rejent posed for the photograph and that "one need only look at it to conclude that he did not intend it to illustrate a pater noster."

Rejent v. Liberation Publications, Inc., New York Law Journal, p. 21, col. 3 (N.Y.App., May 12, 1994) [ELR 16:3:8]

Court upholds imposition of Rule 11 sanctions against lawyer in connection with copyright infringement claim

In 1982, as reported at ELR 11:11:14, 10:10:19, the late actor Northern Calloway, best known for his role as "David" in the television program "Sesame Street," claimed that Marvel Entertainment Group infringed his copyrighted script concept for an animated science fiction film entitled "The Skyrider." Marvel, however, presented contracts indicating that Calloway had sold his rights in "The Skyrider" to LMN Productions, and that LMN had transferred those rights to the Marvel parties.

A Federal District Court dismissed Calloway's complaint with leave to refile.

Calloway's lawyer, Ray L. LeFlore, signed an amended complaint, and Calloway signed a supporting affidavit disavowing the contracts. It was alleged that Calloway's signature was forged or was a facsimile affixed to the documents.

The District Court, relying on the facsimile claim, denied a motion for summary judgment.

Calloway, before trial, abandoned the facsimile claim and conceded that he had signed the contracts, but alleged document tampering or "alterations" after he had signed them.

The District Court directed a verdict against Calloway on the "white-out" claim. After a six week trial, a jury returned a verdict in favor of Marvel on Calloway's claim, "belatedly raised," of oral misrepresentation.

When the Marvel parties moved for Rule 11 sanctions, the court, stating that there was no good faith basis for making the facsimile claim, sanctioned Calloway $100,000. After initially sanctioning the law firm of Pavelic & LeFlore $100,000, the court modified the sanction against the firm to impose a $100,000 sanction against LeFlore; the law firm was jointly and severally liable with LeFlore for $50,000.

A Federal Court of Appeals upheld the imposition of sanctions against the law firm and against LeFlore. The court, on its own motion, reinstated Calloway's appeal which had been dismissed for failure to prosecute and remanded the matter to the District Court for a determination as to whether the sanction imposed against

Calloway should be reinstated or modified. The court also sought a determination of whether LeFlore should be jointly and severally liable for Calloway's sanctions, either alone or with the law firm. In response to a petition by the law firm, the United States Supreme Court held that only an individual attorney who signs papers, and not a law firm, could be sanctioned under Rule 11. The Court of Appeals judgment was reversed insofar as it allowed Rule II sanctions to be imposed against the law firm, and the case was remanded for further proceedings.

On remand, the Court of Appeals remanded the matter to the District Court. The District Court reinstated the $100,000 sanction against Calloway's estate and held LeFlore jointly and severally liable for the sanction.

A Federal Court of Appeals, in late 1993, upheld the District Court's ruling. Judge Winter disagreed with LeFlore's argument that joint and several liability would be inconsistent with the nondelegability of Rule 11 obligations. It was observed that an attorney may be jointly and severally liable for papers signed by a party where the attorney has signed similar or supporting papers and "the resultant abuse of judicial processes must be attributed to the offending papers as a whole." LeFlore signed the amended complaint and prepared Calloway's affidavit in opposition to the motion for summary judgment. The Rule 11 violation was "a coordinated effort," stated Judge Winter. Joint and several liability did not relieve Calloway or his estate from the nondelegable obligations of Rule 11.

The court pointed out that LeFlore did not retain a handwriting or document expert until more than one year after he signed the amended complaint. The expert testified that she did not know of any evidence that the signatures on the contracts were not genuine. Furthermore, Calloway's testimony regarding the facsimile claim was "inconsistent and sometimes unintelligible." "A reasonable attorney would not pursue a claim of forgery based on such equivocal evidence from such an untrustworthy source," stated Judge Winter.

In all, the record supported the District Court's finding that Calloway knew that there was no basis for the facsimile claim, and never provided LeFlore with a factual basis for the claim.

The court concluded by vacating the award of interest against LeFlore on the Calloway sanction prior to the imposition of joint and several liability.

Estate of Calloway v. Marvel Entertainment Group, 9 F.3d 237, 1993 U.S.App.LEXIS 29077 (2d Cir. 1993) [ELR 16:3:9]

Court affims decision granting publisher and author summary judgment in libel and invasion of privacy action

A Federal Court of Appeals has affirmed a District Court decision (ELR 15:8:17) granting a motion for summary judgment sought by Alfred A. Knopf, Inc. and Nicholas Lemann, the publisher and author of "The Promised Land: the Great Black Migration and How It Changed America," in a libel action brought by Luther Haynes and an invasion of privacy action brought by Luther and Dorothy Haynes.

Chief Judge Posner described Lemann's work as a 'journalistic history" of the migration, between 1940 and 1970, of rural Southern blacks to Northern cities. One of the life stories recounted in the book was that of Ruby Daniels, the former wife of Luther Haynes.

Dorothy Haynes claimed that the book portrayed her as an adulteress by falsely asserting that she had an affair with Luther. Luther Haynes stated that the book falsely asserted that he neglected his obligations to his family and that he lost a job because of alcohol.

Chief Judge Posner affirmed the dismissal of the defamation claim, stating that the alleged falsehoods did not incrementally damage Luther Haynes' reputation. No reasonable jury, stated the court, could find that "The Promised Land" was not substantially true in its depiction of Luther Haynes at the time he lived with Ruby Daniels; the allegedly false facts about Haynes were "variants of the truth that did not paint him in a worse light."

In turning to the claim of invasion of privacy by the publication of personal facts, Chief Judge Posner noted that the book did not describe any sexual acts or reveal any intimate details about Dorothy or Luther Haynes.

Lemann's book was "not only of legitimate but of transcendent public interest - the tone of the book was "decorous and restrained;" the discreditable facts, although having occurred thirty years before, were contained in judicial records; and the material revealed was not "deeply shocking to the average person subjected to such exposure," concluded the court.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1993 U.S.App.LEXIS 28800 (7th Cir. 1993) [ELR 16:3:10]

"60 Minutes" obtains summary judgment in apple growers' defamation action

As reported at ELR 15:1:16, the CBS television program "60 Minutes," in February 1989, presented a segment critical of daminozide, commonly known by the trade name "Alar" Alar was used in the apple industry as a growth regulator. Public interest groups expressed concern over the possibility that alar might chemically degrade into a carcinogen and remain in the flesh of apples regardless of processing procedures.

The "60 Minutes" segment discussed a report on alar by the Natural Resources Defense Council. In response to the broadcast, sales and prices fell sharply. Eventually a class action was filed on behalf of 4,700 Washington apple growers, alleging defamation and product disparagement.

Federal District Court Judge Wm.Fremming Nielsen denied the CBS parties' motion to dismiss or for summary judgment, finding that further discovery was required on the issues of falsity and malice.

In September 1993, Judge Nielsen denied the apple growers' motions to strike the opinions of CBS' experts and for partial summary judgment on the issue of falsity.

CBS claimed that it was entitled to summary judgment because the apple growers could not prove that the broadcaster's statements were false. For the purpose of the motion, the court applied the preponderance of the evidence standard of proof. After reviewing the challenged statements, Judge Nielsen declared that even if CBS's statements were false, they concerned a significant issue, could not be proven as false, and were entitled to protection. "A news reporting service is not a scientific testing lab and these services should be able to rely on a scientific government report when they are relaying the report's results," observed the court, in granting CBS' motion for summary judgment.

Auvil v. CBS 60 Minutes, 836 F.Supp. 740, 1993 U.S.Dist.LEXIS 13859 (E.D.Wash. 1993) [ELR 16:3:10]

Viacom may not totally ban indecent programming on public and leased access channels

Television Signal Corporation, doing business as Viacom Cable, provides cable television services to about 160,000 households in San Francisco. Under its exclusive franchise with the city, Viacom agreed to provide a public access channel.

Madeleine Altmann and other parties involved in producing public and leased access programs for broadcast on Viacom's system claimed that Viacom interrupted the transmission of their programs due to the sexual content of the shows.

A Federal District Court has found that the producers demonstrated that they were likely to succeed on their claims that a total ban on indecent speech on leased and public access cable would be unconstitutional, but were not likely to show that a federal statute requiring cable operators to segregate and scramble indecent material from leased access channels violates the First Amendment.

Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 authorizes cable operators to create policies to prohibit material "reasonably believed" to be indecent from leased access channels. Section 10(c) authorizes the censorship of indecent material from public access channels, pursuant to FCC regulations. Section 10(b) directs the Commission to promulgate regulations to force segregation and blocking of any indecent leased access programming that a cable operator may not have chosen to ban pursuant to its authority under Section 10(a).

Viacom argued that the statute justified its segregation of indecent public and leased access programming and its policy requiring certification from a producer that the material to be shown on the access cable was not indecent.

Judge Barbara A. Caulfield declared that the regulation of access programming based solely on whether it contains indecent material is a content-based regulation subject to strict scrutiny. And while the need to protect children from exposure to indecent material is a compelling governmental interest, a total ban on indecent leased or public access programming is not the least restrictive means of achieving that goal. Sections 10(a) and (c) of the statute encourage private cable operators to ban constitutionally protected indecent material from leased and public access channels, stated the court, and the context, effect, and objective of the regulations warranted a finding of state action. The public access program producers showed a likelihood of success as to their claim that Viacom had no authority to regulate indecency on public access cable and that any attempt to segregate indecency from public access pursuant to Section 10(c) would violate their First Amendment rights.

The leased access producers showed a likelihood of success with respect to the claim that the total ban of indecent material on leased access cable authorized by Section 10(a) would violate the First Amendment, but failed to raise any serious questions regarding the constitutionality of Section 10(b). Judge Caulfield pointed out that Viacom agreed that it would provide notice to its subscribers regarding the content and availability of segregated and scrambled channels.

The court enjoined Viacom from totally banning indecent material from public access of leased access cable; from attempting to segregate or otherwise utilize its editorial discretion to regulate indecent material on public access cable; and from using its editorial discretion to regulate indecent material on lease access cable unless it is pursuant to Section 10(b) and its implementing regulations.

Altmann v. Television Signal Corporation, Case No. C 94-0071 (N.D.Ca., Mar. 30, 1994) [ELR 16:3:10]

Court dismisses cable operator's statutory claims against bar displaying videotape of boxing match

Cablevision of Michigan, the operator of a cable television system in Kalamazoo, Michigan, obtained from The Mirage Hotel the "pay-per-view" rights to exhibit a heavyweight professional boxing fight between Evander Holyfield and James "Buster" Douglas - on a live basis - on October 25, 1990. Cablevision charged its subscribers who ordered the event the sum of $34.95.

Cablevision's signal for certain programming is "scrambled," so that it must be decoded by electronic equipment. For the Douglas-Holyfield fight, Cablevision programmed subscribers' converters to "descramble" or decode the relevant signal during the
event.

Sports Palace, doing business as Sports Forum, operated a bar in Kalamazoo. Sports Forum showed the Holyfield-Douglas fight, via videotapes obtained from a patron, on its big screen television on the night of October 25, 1990, albeit, according to Federal District Court Wendell A. Miles, on a somewhat delayed basis.

Cablevision claimed that Sports Forum violated Sections 553 and 605 of the Federal Communications Act of 1934.

Judge Miles, after finding that Cablevision had standing to sue under the statutes, observed that the version of the fight displayed by Sports Forum was a videotape copy - the bar had not intercepted nor received a "one-way transmission" of video programming from Cablevision. And Sports Forum did not receive or assist in receiving any interstate ... communication by radio" of the cable operator. Contrary to Cablevision's argument, the source of the videotape was "very relevant" under the statute, stated the court, as was the fact that Sports Forum was not involved in recording the tape.

Judge Miles also found that Sports Forum committed no act of interception because it did not "take" or seize" Cablevision's transmission before it arrived at its destined location, although a recording may have been made of the transmission "at the moment it came into the possession of the intended receiver."

The court concluded by declining to exercise jurisdiction over Cablevision's penitent state law claim for tortious interference with prospective business advantage.

Cablevision of Michigan, Inc. v. Sports Palace, Inc., 1993 U.S.Dist.LEXIS 7711 (W.D.Mich. 1993) [ELR 16:3:11]

Former Denver Broncos player Otis Armstrong must pay taxes on NFL disability benefits

Otis Armstrong played football for the Denver Broncos from 1972 through 1980. In November 1980, Armstrong was injured in a football game, and did not play professional football again.

When Armstrong sought disability benefits from the Bert Bell NFL Player Retirement Plan, the Retirement Board failed to agree as to whether his injury resulted from a "football related activity" or was due primarily to a congenital condition.

An arbitrator found that Armstrong had incurred "a disability resulting from a football injury;" that the disability "ended his football career;" and that the pain caused by the injury rendered Armstrong unemployable. The arbitrator granted Armstrong's request for total and permanent disability benefits, effective from February 1984.

Armstrong received disability benefits totaling about $190,000, about $50,000, and about $50,000 for the years 1987, 1988, and 1989, respectively. The payments were computed on the basis of a minimum monthly benefit of $4,150 ($4,000, plus $50 for each of three dependent children). Armstrong did not include the disability payment in his gross income.

The Internal Revenue Service declared that the disability payments were not excludable income. The Tax Court has sustained the Commissioner's determinations for each of the years at issue.

The Commissioner argued that Armstrong's benefits were not paid through an accident or health plan, were computed without reference to the nature of Armstrong's injury and without regard to his absence from work.

Judge Raum, in agreeing with the Commissioner, stated that it was not necessary for the court to decide whether the plan qualified as an accident or health insurance plan. It was observed that the amount of benefits payable under the total and permanent disability provisions of the NFL plan was determined for each player by using a formula based on both the number of seasons played and the particular year relating to each season played by the player. The plan provides a minimum benefit for football injuries sustained as an active player in the NFL, as well as for non-football injuries under certain circumstances. The amount of disability benefits was not effected either by the specific type or by the severity of the disabling injury sustained by the player, observed the court.

Armstrong's case was governed by Beisler v. Commissioner, 1985-25, 49 T.C.M. 534, affd. 814 F.2d 1304 (9th Cir. 1987; ELR 9:2:12), declared Judge Raum, who emphasized that the applicable statute refers not to the circumstances under which an injury is sustained but to the type or severity of the injury itself Furthermore, it appeared that the monthly benefit under the NFL plan was determined by a player's period of absence from work - the benefits "were designed to replace the income lost by a player as a result of injury, not to compensate him for the injury itself..." The Tax Court, accordingly, entered judgment for the Commissioner for the specified deficiencies in Armstrong's federal income tax.

Armstrong v. Commissioner of Internal Revenue, T.C.Memo 1993-579, 1993 Tax Ct. Memo LEXIS 596 (U.S.Tax Ct. 1993) [ELR 16:3:12]

Lender of production funds for "Easy Money" is not entitled to investment tax credit

Adams Apple, a subsidiary of DRL Enterprises, entered into a Production Services Agreement with Paper Clip Productions, the owner of the Rodney Dangerfield film "Easy Money." Adams Apple agreed to advance $1.3 million to cover a portion of the production costs of the film. Paper Clip agreed to compensate Adams Apple for its services and to repay the company based upon a percentage of "gross receipts" received by the film's distributor, Orion Pictures. Paper Clip was required to pay Adams Apple an amount equal to a percentage of the gross receipts until the amount paid to Adams Apple reached $1.45 million. Then, Paper Clip would make additional payments based on a percentage of any net profits the film might have. Adams Apple also obtained the right to claim an investment tax credit for the $1.3 million advance. Paper Clip eventually assigned all of its obligations arising under the agreement to Orion.

Although "Easy Money" had $9.5 million in unrecouped production costs, Adams Apple was paid the $1.45 million due under the agreement.

Adams Apple argued that it was entitled to the investment tax credit under 26 U.S.C. section 48(k) and its implementing regulation.

Federal District Court Judge Harry D. Leinenweber noted that the regulation provides that a lender, in order to be entitled to an investment tax credit, must look solely to the proceeds generated from the film. The court agreed with the government that the gross receipts belonged to Orion, which was not holding the funds in trust for Adams Apple, and that Adams Apple did not look solely to the actual gross receipts for repayment. Paper Clip and Orion were liable for repaying the advance according to the agreed formula and had no obligation to make the repayment out of proceeds - the proceeds were used to calculate the extent of the borrower's liability for repaying the loan.

Adams Apple was not a qualified lender and was not entitled to an investment tax credit, concluded the court, in granting the government's motion for sununary judgment.

DRL Enterprises, Inc. v. United States of America, 1993 U.S.Dist.LEXIS 7797, 93-2 U.S.Tax.Cas.(CCH) P50,416 (N.D.Ill. 1993) [ELR 16:3:12]

Cable television operator may amortize cost of acquiring franchises

A Federal Court of Appeals has upheld a Tax Court decision holding that Tele-Communications, Inc. may amortize, under Section 253 of the Internal Revenue Code, the cost of acquiring cable television franchises.

In 1978, Tele-Communications bought the three cable systems in issue; the company acquired, along with other assets, the franchises for the cable systems.

The Tax Court stated that the statutory definition of franchise encompasses local government cable television franchises, and rejected the assertion that Congress intended the section to apply only to private business franchises.

Judge Seymour noted that the term "franchise" includes an agreement "which gives one of the parties to the agreement the right to distribute, sell, or provide goods, services, or facilities, within a specified area." Judge Seymour agreed with the Tax Court that the definition was unambiguous, and also agreed that Congress did not intend to exclude cable television franchises from the definition.

The court concluded by declining to review the Commissioner's claim that the franchises were not "agreements" as required by the definition, but rights granted by local governments; this argument had not been previously raised nor addressed, and Judge
Seymour found no exception requiring the consideration of an issue raised for the first time on appeal.

Tele-Communications, Inc. v. Commissioner of Internal Revenue, 12 F.3d 1005, 1993 U.S.App.LEXIS 33522 (10th Cir. 1993) [ELR 16:3:13]

United States Supreme Court declines to review decision ordering remand of claim brought by investors in film distribution project

As reported at ELR 14:9:18, Balcor Film Investors was a limited partnership formed to raise money for films which would be produced and distributed by New World Entertainment, Ltd. Balcor initially provided the tax benefits sought by its investors, but in 1988, the company advised its limited partners that they were likely to lose some of their capital.

The cases brought by the Majeski group (a class of investors who read the prospectus) and the Eckstein group (a class of those who did not) were consolidated in a Federal District Court in Wisconsin. The investors claimed that Balcor and other parties violated Section I0(b) of the Securities Exchange Act of 1934 and Rule lOb-5. The Majeski parties argued that they purchased the limited partnership interests in reliance on the purported misrepresentations in the prospectus and its omissions of material facts. The Eckstein parties asserted "causation in lieu of reliance."

After various preliminary rulings (ELR 13:1:17; 12:8:6), a Federal District Court dismissed both actions as untimely.

Federal Court of Appeals Judge Easterbrook noted that the District Court had concluded that the Eckstein parties' claim would be barred by California's three year statute of limitations for fraud, and that the statute started to run when the investors purchased their limited partnership interests because the warnings of risk in the prospectus should have put the investors on notice of fraud. Judge Easterbrook declared that "a warning about risk does not give notice of fraud," but also challenged the Eckstein parties' argument that they could not have discovered the purported fraud with the exercise of reasonable diligence until Balcor told them in 1988 that they probably would lose money. "Discovery of the fraud means the discovery of the misrepresentation," observed Judge Easterbrook. It may be possible to decide what reasonable investors knew, or should have known, without submitting the question to a jury, but that issue was for the District Court to consider in the first instance.

Questions also were raised about the applicable statute of limitations for the Majeski parties; a determination on the issue was for the District Court, stated Judge Easterbrook.

The court, although disagreeing with the District Court's reason for dismissing the lawsuits, considered whether the investors stated a claim under the securities laws.

After careful analysis, the court ordered the remand of the Eckstein parties' case to the District Court for further proceedings on the issue of fraud, although commenting that "the difference between errors and fraud, and the fact that [Balcor] attracted $48 million ... present the Eckstein plaintiffs with a daunting task.

With respect to the Majeski parties, the court reiterated that it would be necessary on remand, as to the Section10(b) claim, to prove fraud, not just errors or omissions, and that only statements or omissions of fact can be fraudulent.

Judge Easterbrook vacated the District Court's judgment and remanded the cases for further proceedings.

In January 1994, the United States Supreme Court denied a petition for writ of certiorari.

Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1993 U.S.App.LEXIS 21543 (7th Cir. 1993) [ELR 16:3:13]

Exhibitor suing Miramax Films is not entitled to injunctive relief during pendency of antitrust action

Orson, Inc., known as the Roxy Screening Rooms, claimed that Miramax Film Corporation engaged in a conspiracy to restrain trade in violation of the Sherman Act and Pennsylvania law. It was alleged that Miramax and another Philadelphia theater, the Ritz, conspired to decrease competition in the market for the exhibition of art films.

After Orson filed its action, Miramax refused to license any more films to the company pending the resolution of the dispute. However, Miramax expressly denied that the only reason for refusing to license the film "Strictly Ballroom" to Orson was due to the filing of the lawsuit.

When Orson sought a preliminary injunction compelling Miramax to do business with the exhibitor, a Federal District Court denied the request, stating that Orson failed to prove the essential elements for injunctive relief. No hearing was held for the presentation of factual evidence and Orson did not request one. Thus, there was no evidence to support the argument that Miramax acted in retaliation for the antitrust litigation.

The court further found that Orson did not suffer irreparable harm - "there was no indication that [Orson's] customers only demand to see Miramax movies, or that other distributors' movies are not an adequate substitution." And, not only would it be difficult to administer the requested preliminary injunction, but Orson's loss of business or good will, if any, would be compensable by money damages. Orson did not make any showing regarding the likelihood of success on the merits.

Judge Joyner also observed that Orson did not actually seek to maintain the status quo in requesting a preliminary injunction, but attempted to obtain from Miramax ten films of its own choice offered by the distributor on the same terms as offered to the Ritz for a year following the entry of the order. Such an arrangement would exceed any agreement between the parties prior to the filing of the lawsuit, declared the court. Given the lack of irreparable harm or any indication of Orson's likelihood of success on the merits, Orson was not entitled to gain from the court what it could not gain in its own dealings with Miramax.

Orson, Inc. v. Miramax Film Corp., 836 F.Supp. 309, 1993 U.S.Dist.LEXIS 16010 (E.D.Pa. 1993) [ELR 16:3:14]

Federal Court of Appeals affirms Bankruptcy Court rulings on AEG film distribution agreement

In 1987, as reported at ELR 13:8:9, Atlantic Entertainment Group, Inc., the predecessor to Chapter 11 debtor AEG Acquisition Corp., entered into three distribution contracts with Zenith Productions, Ltd. Zenith delivered the films "Patty Hearst," "For Queen and Country," and "The Wolves of Willoughby Chase" to Atlantic, but Atlantic failed to pay contractually guaranteed minimum advances totalling $6 million.

In September 1988, Atlantic and Zenith entered into a series of option contracts which stated that Atlantic could purchase the distribution rights in the films for $6 million until November 15, 1988. The contracts also required Atlantic to execute confessions of judgment in favor of Zenith for the entire $6 million owed under the 1987 contracts. Atlantic did not exercise the options by the specified date.

In a February 1989 restructuring agreement, AEG agreed to purchase the distribution rights for the films in the United States and Canada, executed new confessions of judgment totalling $6 million, and granted Zenith a security interest in all of AEG's interest in the films. Zenith filed financing statements in California, Indiana and New York, recorded a copyright mortgage for each of the films with the United States Copyright Office, and filed a certificate of copyright registration for "Patty Hearst." Zenith did not file certificates for the other two films because they were foreign works and the company believed that the films were exempt from registration.

AEG paid Zenith a total of $2.06 million (an initial payment of $25O,000, followed by a payment of about $1.8 million), in the spring of 1989. In July 1989, AEG filed its Chapter 11 petition and then filed an adversary proceeding to recover the payments to Zenith as both avoidable preferences and fraudulent transfers under sections 547 and 548 of the Bankruptcy Code. Zenith sought to compel AEG to assume or reject the restructuring agreement on the grounds that it was an executory contract.

The Bankruptcy Court held that the spring 1989 payments were preferences; that Zenith's security interests in the foreign films were avoidable under Section 544(a) because they were not perfected when AEG filed bankruptcy; and that Zenith's security interest in "Patty Hearst" was perfected when AEG filed bankruptcy because Zenith had registered that film and recorded its copyright mortgage with the Copyright Office.

The court later allowed AEG to amend its complaint to add a cause of action to avoid the security interests as preferences. AEG argued that if the security interests were perfected, such perfection occurred more than ten days after AEG incurred the debt to Zenith and within the ninety day preference period. The court entered judgment in favor of AEG for $2.06 million plus interest and costs.

On appeal, Zenith argued that the restructuring agreement was an option contract under which AEG had the right, but not the obligation to purchase six "bundles" of distribution rights for $1 million each. According to Zenith, there was no existing debt when AEG made the payments; therefore, the payments were not on account of an antecedent debt.

A Federal Court of Appeals Bankruptcy Appellate Panel rejected Zenith's argument, stating that the restructuring agreement obligated AEG to purchase the film rights and thus was not an option contract. The Bankruptcy Court had found that the restructuring agreement was a conditional sales contract which restructured the debt owed to Zenith arising from Atlantic's breach of the 1987 contract. Among other factors cited by Judge

Jones was the retention by Zenith of all "right, title and interest" in the films pending payment of the purchase price. In all, the AEG's payments to Zenith were on account of the antecedent debt incurred when the restructuring agreement was executed.

Judge Jones declined to consider the issue of AEG's insolvency, which Zenith raised for the first time on appeal.

The court next upheld the Bankruptcy Court's decision to extend the preference period to one year from the date of AEG's bankruptcy, thereby bringing the $250,000 payment within the preference period.

Judge Jones agreed with the finding that Zenith's failure to register the two foreign films before AEG filed bankruptcy defeated Zenith's attempt to perfect its security interest in the copyrights, and that the security interests which the company did perfect were "not insulated from being treated as preferences..." It also was found that since AEG had possession and the right to distribute the films from the execution of the contract, no new value passed to AEG when it made a payment; payments merely served to retire the $6 million debt.

In upholding the finding that the restructuring agreement was not an executory contract, the court observed that the agreement did not involve an ongoing relationship regarding creative work on the films, and did not mention that any failure to perform by Zenith would constitute a default or refer to any remaining "material obligations" on Zenith's part. "Absent an anticipated ongoing relationship between the parties ... a transfer of a copyright should be treated like any other transfer of a property interest," concluded the court, in affirming the Bankruptcy Court's rulings.

In re AEG Acquisition Corp., 161 Bankr.50, 1993 Bankr.LEXIS 1764 (9th Cir. 1993) [ELR 16:3:14]

Judgment on jury verdict awarding $3.6 million in punitive damages in action against Lorimar Productions and ABC is remanded

As described by a Federal Court of Appeals in California, a jury awarded Donald R. Boyle $3.6 million in punitive damages on breach of contract and fraud claims arising out of an agreement to transfer Boyle's rights to a treatment for a television series to Lorimar Productions, Inc. The jury also awarded Boyle $180,000 compensatory damages.

Lorimar, American Broadcasting Company, Inc. and Coleman Luck argued that the California standard for imposing and reviewing punitive damages violates due process. The court found that the California standard satisfies due process but remanded the matter because the District Court failed to properly apply that standard in this case.

A California court may set aside a punitive damages award only where the award "appears excessive, or ... is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." This standard is measured against the criteria utilized by the jury: reprehensibility of a party's misdeeds, the ratio between the compensatory and punitive damages, and the ratio between the damages and a party's net worth. A reviewing court must examine these criteria to determine whether the punitive damage award "substantially serves the societal interest" of deterring ftiture misconduct and "whether the amount of damages exceeds the level necessary to properly punish and
deter."

It was found that the District Court erred in determining whether the amount of the award bore a reasonable relationship to deterrence in light of the Lorimar parties' wealth, and to the harm likely to result from the Lorimar parties' conduct. In considering the relationship between the award and the Lorimar parties' financial condition, the District Court compared the amount of the award with the "gross revenues" from the allegedly wrongful conduct. The rule established by lower California courts is that only net, not gross, figures are relevant to this issue.

The District Court observed that the punitive damages were "exactly twenty times" the compensatory damages. The question, however, is whether the difference between the two figures is "so wide that the punitive damages have been divorced from the societal goals of retribution and deterrence."

The court stated that if the District Court decides, on remand, that the award should be reduced, a remittitur with the option of a new trial would be required.

Boyle v. Lorimar Productions, Inc., 13 F.3d 1357, 1994 U.S.App.LEXIS 323 (9th Cir. 1994) [ELR 16:3:15]

Court enjoins enforcement of university's "discriminatory harassment" policy, but upholds termination of basketball coach for using the term "nigger" in locker room speech

Keith Dambrot was the head basketball coach at Central Michigan University. Most of the members of the team, unlike Dambrot, were black. Dambrot, as described by Federal District Court Judge Cleland, at least on one occasion during the 1992-1993 season, used the word "nigger" in a talk he gave to the players and coaching staff, addressing several players, of various races, by the term. Dambrot testified that he intended to use the term in a "positive and reinforcing" manner during the closed-door locker room team session, and that the use of the term was meant to connote someone who is "fearless, mentally strong, and tough. "

The athletic director of the university subsequently spoke with members of the team who informed him that they were not offended by the coach's use of the term. However, a school affirmative action officer stated that the use of the term violated the university's "discriminatory harassment policy;" in lieu of a more formal investigation, Dambrot agreed to a five day suspension without pay. After the incident received further attention, the university athletic director informed Dambrot that his appointment as head coach would not be renewed for the 1993-1994 season because the coach purportedly no longer was capable of effectively leading the men's basketball program.

In a lawsuit against the university, Dambrot, among other claims, alleged that the termination violated his First Amendment rights to free speech and academic freedom. Several members of the basketball team joined the lawsuit, alleging violations of their First Amendment rights as well.

The court granted Dambrot's motion for summary judgment with respect to the facial unconstitutionality of the university's discriminatory harassment policy and permanently enjoined the school from further enforcing the policy. Judge Cleland granted summary judgment to the university as to Dambrot's wrongful termination claim and Fourteenth Amendment claim.

In reaching its decision, the court first found that the basketball team members had standing, as students, to challenge the constitutionality of the discriminatory harassment policy. But the students were not directly affected by Dambrot's termination and lacked standing to challenge the university's action.

Judge Cleland, after describing the policy at issue as including "as much within its ambit as possible," stated that although the policy lacked specific and predictable sanctions, the evidence indicated that policy violations were subject to investigation and enforcement so as to bring the matter within the range of court review for constitutionality. Again adverting to the fact that the policy prohibits "any behavior, even unintentional, that offends any individual," the court pointed out that speech entitled to First Amendment protection could be effectively suppressed by the policy and that the policy on its face thus was overbroad.

The court further found that even if the policy addressed only "fighting words," as argued by the university, the policy still contained limitations on content and viewpoint which made it facially unconstitutional. In all, "the expanse of the suppression of speech made possible by this [university] policy is as remarkable as it is illegal."

The policy also was constitutionally void for vagueness, declared the court. The facts of the case indicated to the court the diversity of reaction to speech which is potentially (emphasis by the court) offensive. The imprecision of the policy might result in 'arbitrary, discriminatory, and overzealous enforcement,' noted Judge Cleland. There were no issues of fact as to the literal content of the policy and Dambrot was entitled to summary judgment.

In turning to Dambrot's First Amendment claim, the court assumed the truth of Dambrot's claim that he was attempting to flatter some players by applying the term to them as they often did to themselves. However, in Judge Cleland's view "A coach's distress about the degree of aggressiveness shown by his players on the basketball court is ... not the kind of question that is fairly cast as a 'public' issue." The fact that the term was used in a locker room speech to players also indicated that Dambrot's speech was not on a matter of public concern.

The court cautioned that it was not stating that a matter of public concern "must encompass deep philosophy, or possess any substantial degree of intellectual content." However, something "more meaningful" than a coach's desire for tougher play should be required to raise a public issue. Had Dambrot been "doing almost anything with more intellectual content than encouraging basketball players [with the term]," he would have a more persuasive argument that a political, social or other concem was involved.

Judge Cleland found it unnecessary to further consider the reasons for Dambrot's termination - there was no issue of material fact as to the words spoken by Dambrot.

Dambrot provided no authority stating that he was entitled to a pretermination hearing and his due process rights were not infringed, concluded the court.

Dambrot v. Central Michigan University, 839 F.Supp. 477, 1993 U.S.Dist.LEXIS 17294 (E.D.Mich. 1993) [ELR 16:3:16]

Chris Dudley/Portland Trail Blazers contract does not violate salary cap provisions of settlement agreement between NBA and players

In 1987, a Federal District Court in New Jersey (ELR 10:4:14) ruled that neither the National Basketball Association nor a group of then-current and former players were entitled to summary judgment in the players' action challenging the NBA's reliance, after the expiration of a collective bargaining agreement, on certain allegedly restrictive practices such as the college player draft, the salary cap and the right of first refusal.

In the spring of 1988, the NBA and the Players Association agreed on a new six-year contract; the Players Association agreed to discontinue, upon ratification of the contract, its antitrust action against the NBA.

In September 1993, a special master under the parties' settlement agreement issued certain rulings relating to the salary cap. In reviewing the rulings, Judge Debevoise noted that under the settlement agreement, a player can become a free agent after four years in the NBA; a team can increase an initial salary by thirty percent of the initial amount each year of a contract; a team can re-sign one of its own players upon the expiration of his contract without regard to the salary cap, but all other teams are subject to the salary cap provisions; and there can be no renegotiation of a contract during its first year.

Some contracts contain provisions granting the player an option to terminate his contract, at which time the player becomes a free agent. The parties have referred to an option to terminate a multi-year contract after one year as a "one-year out" provision.

In June 1993, Chris Dudley, a six-year veteran player, completed a three year contract with the New Jersey Nets. Dudley's salary during his last year with the Nets was $1.2 million. While still under contract, Dudley and his agent negotiated with the team for a new contract. New Jersey offered Dudley a seven year contract with six years fully guaranteed and the seventh year partly guaranteed. After Dudley determined that the proposed salaries were not sufficient, the team withdrew the offer; the proposed salary for the 1993-1994 season was about $1.5 million. In August 1993, Dudley entered a seven year fully guaranteed contract with Portland; the initial salary was $790,000, with thirty percent annual increases as permitted by the salary cap. The contract contained a one-year out provision.

The NBA claimed that the contract constituted cap circumvention under the settlement agreement.

In setting forth the relevant provisions of the settlement agreement, Judge Debevoise noted that the NBA is required to pay its players, annually and on a leaguewide basis, an amount equal to fifty-three percent of the NBA's revenues in aggregate salaries and benefits. The amount each team can pay in any given year in total salaries is limited to a "Maximum Team Salary" or "Salary Cap." The purpose of the salary cap is "to preserve team competition throughout the entire league by preventing the richest teams from taking the bulk of the best players to the disadvantage of the less well-situated teams." However, a team may re-sign its own veteran player after his contract with that team has expired without regard to the salary cap.

Judge Debevoise noted that the Dudley contract was within the literal terms of the settlement agreement. Dudley was a free agent, the compensation provisions were within the salary cap requirements in that Portland had "room" to pay him $790,000 during the first year of the contract, and the annual increments in each of the following six years were thirty percent. The one-year out was an option to shorten the stated term of the contract.

The NBA claimed that a "below market" contract violates the settlement agreement when a team does not have sufficient room to pay the free agent his market value and when the team "deliberately includes in the contract a device (such as an early termination provision exercisable after the first year) enabling that team to escape the limitation that its lack of Room imposes."

The special master ruled that a multiyear contract with a one-year out is not per se cap circumvention and that player options in multiyear contracts to lengthen or shorten the contract do not violate the settlement agreement. The argument that Dudley and Portland violated a prohibition against undisclosed agreements was rejected - many factors accounted for Dudley's acceptance of the Portland contract "without any secret understanding as to future compensation." Judge Debevoise noted that no party contested the special master's decision on these issues, and adopted the report.

In a subsequent report, the special master carefully considered the NBA's claim that the value of a one-year out provision should be added to a player's salary for the purpose of computing whether the salary cap is exceeded. Although a one-year out might have value to a player, the value is not necessarily part of "salary" as defined in the settlement agreement, stated the special master.

Judge Debevoise adopted the special master's report on this issue, finding "eminently sound" the conclusion that one-year out provisions in multiyear contracts are not compensation and should not be given value in computing salary cap compliance.

With respect to the issue of whether the Dudley/Portland contract circumvented the salary cap, Judge Debevoise acknowledged that the length of time before a player can exercise an option might have a substantial impact on the teams' objective of establishing maximum team salaries. The record was insufficient to warrant a finding about the long range effects of contracts which provide for both a one-year out and a first year salary significantly below what the player could expect to receive absent the one-year out.

Although expressing concern that the widespread use of one-year out provisions in multiyear contracts may have "a presently unascertainable adverse effect" on the objectives of the salary cap, Judge Debevoise concluded by agreeing with the special master's finding that Dudley's contract did not violate the settlement agreement.

Bridgeman v. National Basketball Association, 838 F.Supp. 172, 1993 U.S.Dist.LEXIS 17274 (D.N.J. 1993) [ELR 16:3:17]

Sports writer may proceed with age discrimination claim against newspaper

In the early 1970s, John M. Hairston began working for the Gainesville Sun. Hairston managed the sports department, edited the content of the sports section and wrote a daily sports column.

In 1989, Hairston filed a charge of age discrimination, claiming that he had been functionally demoted, harassed and denied wage increases because of his age. The newspaper, asserting that one of Hairston's columns created a conflict of interest, placed the writer on thirty days suspension with pay.

In January 1991, Hairston filed a new EEOC charge of discrimination, alleging that the suspension was a disciplinary action in retaliation for having filed the age discrimination claim. Hairston then filed a lawsuit under the Age Discrimination in Employment Act.

In June 1991, the Sun terminated Hairston's employment, purportedly because of a column Hairston wrote about a college basketball coach; the coach had indicated his willingness to appear as a character witness for Hairston. The newspaper had warned Hairston not to write about an individual from whom he might receive a benefit. Hairston amended his complaint to include a claim for retaliatory termination of employment.

A Federal Court of Appeals has reversed a District Court decision granting summary judgment on behalf of the newspaper, finding that Hairston established the first two elements of a prima facie case alleging retaliatory suspension and retaliatory discharge. Hairston's EEOC complaint was statutorily protected expression, and the writer was the subject of two adverse employment actions. Although the District Court found that Hairston did not establish a causal link between the protected statement and the adverse employment action, Judge Fay stated that "the record may support the proposition that the protected expression and the adverse employment action were not wholly unrelated."

It appeared to the court that Hairston provided a sufficient factual basis upon which a reasonable trier of fact might find that the stated reasons for the adverse employment actions were mere pretext, and the matter was remanded the matter for trial.

Hairston v. The Gainesville Sun Publishing Co., 9 F.3d 913, 1993 U.S.App.LEXIS 33079 (11th Cir. 1993) [ELR 16:3:18]

Court issues rulings in dispute over indoor soccer franchise

In 1990, Capitaland United Soccer Club, the owner of the professional indoor soccer team, the New York Kick, obtained a franchise from the American Indoor Soccer Association. Capitaland received twenty shares of the association's stock, and, in addition to paying a franchise fee, was required to post a $ 100,000 irrevocable letter of credit to guarantee its perfornmce of certain obligations under the agreement and under the association's bylaws. Capitaland was required to conduct operations as an active soccer team and to play all scheduled league games.

About halfway through the 1990-1991 season, Capitaland entered into an asset purchase agreement with Capital District Sports & Entertainment to sell both the team and the franchise rights. Capital District paid certain unspecified cash sums, executed two promissory notes and was obligated to obtain and forward substitute letters of credit to the association.

Capital District failed to pay the promissory notes as they came due, did not obtain substitute letters of credit, and, in September 1991, announced that it would not field a team for the 1991-1992 season.

Capitaland sued Capital District and the association, claiming that the initial franchise agreement violated various sections of the state's General Business Law.

Capitaland sought $56,000 in damages representing the amount paid for the franchise, and other remedies. Capitaland also sought $150,000 in damages against the association and Capital District for allegedly conspiring to coerce and defraud Capitaland into paying certain sums to Capital District under the asset purchase agreement.

Capital District raised various cross claims against the association and its president.

A New York trial court ruled that although Capitaland, as a shareholder, was bound by the Ohio forum selection clause in its agreement with the association, Capital District and various individual parties were not so bound. The court dismissed the causes of action raised by Capitaland, but sustained the causes of action brought by various individual parties as well as Capital District's cross complaint.

An appellate court noted that Capital District's agreement to be bound by the association bylaws was conditioned upon its becoming a shareholder. The record did not indicate whether any stock transfer was accomplished and the court declined to find as a matter of law that the forum selection clause was binding on Capital District.

Judge Mahoney agreed that dismissal was inappropriate as to the antitrust cross claims and the cross claim for injunctive relief, but ordered the dismissal of Capital District's cross claims alleging fraud and negligence.

Capitaland United Soccer Club v. Capital District Sports & Entertainment Inc., New York Law Journal, p.21, col.3 (N.Y.App., Dec. 9, 1993) [ELR 16:3:19]

Court reverses ruling that Amtrak's rejection of artist's billboard violates First Amendment

As reported at ELR 15:1:12, artist Michael A. Lebron leased a large billboard known as the Spectacular in New York's Pennsylvania Station for January and February 1993. Lebron planned to display a photomontage, accompanied by text asking "Is it the Right's Beer Now?" The work, as described by then Federal District Court Judge Pierre N. Leval, included photographs of individuals drinking Coors beer, juxtaposed with a Nicaraguan village scene "in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile." Additional text, appearing on either end of the montage, criticized the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Judge Leval noted that Coors advertising uses the slogan "Silver Bullet" for its beer. Lebron's piece announced that Coors was "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

In December 1992, the National Railroad Passenger Corporation (Amtrak), the owner of the billboard, rejected Lebron's work, stating that it was "political," and that Amtrak did not allow political advertising on the billboard in question.

Lebron sued Amtrak claiming violations of his First and Fifth Amendment rights as well as his contractual rights under the lease. The court concluded that because of the involvement of the federal government in Amtrak's structure and operation, the company's conduct in controlling speech on its billboards was governmental action; that Amtrak had violated the First Amendment by refusing to display Lebron's work; and that Lebron was entitled to access to the billboard space.

A Federal Court of Appeals has reversed the District Court decision on the ground that Amtrak is not a governmental party subject to the First Amendment.

Judge J. Daniel Mahoney pointed out that Amtrak was created, under the Rail Passenger Service Act of 1970, as a private, for-profit corporation under the District of Columbia Business Corporation Act. The statute specified that Amtrak is 'not ... an agency, instrumentality, authority, or entity, or establishment of the United States Govermment." The court did not dispute the findings of the District Court as to the extent of the government's role in the structure and financing of Amtrak, but relied on prior cases in which it was found that Amtrak and Conrail were not governmental actors in circumstances involving employment claims. In concluding that Amtrak's refusal to display the advertisement was not government action, the court did not reach the merits of Lebron's First Amendment claim. The case was remanded with the instruction to dismiss the complaint.

Chief Judge Jon 0. Newman, in dissent, expressed the view that Amtrak is subject to the First Amendment when it denies advertising space on the basis of political content - a "core" First Amendment claim, as contrasted with the employment cases in which only indirect First Amendment issues were raised.

Chief Judge Newman, although disagreeing with the ruling requiring the dismissal of Lebron's action, would not have upheld the District Court's injunction requiring Amtrak to display Lebron's work. The company's policy, while vague, was intended to prohibit political messages. It was not appropriate, in Chief Judge Newman's view, to use the federal court's equity power to force Amtrak "to venture so extensively into the political arena." If Amtrak's policy with respect to advertising space raised First Amendment concerns, damage remedies and declaratory relief would be sufficient, stated Chief Judge Newman.

Lebron v. National Railroad Passenger Corporation, 12 F.3d 388, 1993 U.S.App.LEXIS 33711 (2d Cir. 1993) [ELR 16:3:19]

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Landmark designation of Four Seasons Restaurant interior and certain furnishings is upheld

The Teachers Insurance and Annuity Association of America owns the Seagram Building in Manhattan; the building, erected between 1956 and 1958, was designed by noted architect Ludwig Mies van der Rohe. The first two floors of the building contain a commercial space occupied by the Four Seasons Restaurant; architect Philip Johnson assisted Mies van der Rohe in the building design and created the restaurant interior.

New York authorities adopted the recommendation of the city's Landmarks Preservation Commission and designated the building, its exterior plaza, interior lobby and the interior space occupied by the restaurant as landmarks.

When the association challenged the landmark designation of the restaurant area, a New York trial court dismissed the matter. An appellate court (ELR 153:25) upheld the trial court decision, refusing to conclude that the designation was arbitrary or capricious. The association was not deprived of the economic benefit of the space, noted the appellate court, in rejecting the argument that the association suffered an unconstitutional taking without compensation. Also rejected was the contention that the restaurant interior was not a public space subject to a landmark designation.

New York Court of Appeal Chief Judge Judith S. Kaye has affirmed the appellate court's order dismissing the association's complaint. Chief Judge Kaye observed that both the exterior of the Seagram Building and the restaurant interior "have been acclaimed as quintessential expressions of the International style. No one disputes their special historical and aesthetic interest." In 1987, the association proposed the building, including its lobby and outdoor plaza, for landmark designation. The restaurant operators themselves proposed to the Commission that the restaurant interior also be considered for landmark status. The Commission found that the restaurant interior had "a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City" and that the interior was "customarily open and accessible to the public..." Landmark status was conferred on the entrance lobby, Grill Room, Pool Room and balcony dining rooms, and included the marble pool, walnut bar, all surfaces, floor surfaces, ceiling surfaces, door railings, metal draperies and two hanging metal sculptures.

The court pointed out that the instant proceeding was its initial opportunity to review the application of the Landmarks Use to an interior landmark designation the appeal was limited to the Commission's statutory authority to landmark the restaurant interior. The Commission is authorized to landmark an interior 30 or more years old that is "customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation." The meaning of customary public openness is a question for a court to determine. It was noted that nothing in the law requires an owner's consent as a prerequisite to designation.

The association argued that the restaurant was not an "inherently" public interior, such as railroad stations, lobbies, and theaters. But Chief Judge Kaye rejected the distinction as not being part of the "unambiguous" law which requires "usual, ordinary or habitual (rather than rare or occasional) availability to the general public." The law did not specify that an interior must serve as a place of assembly, and extended to an interior to which the general public is usually invited, stated the court.

In all, the determination that the Four Seasons "customarily" invites the public was not arbitrary or capricious. The court further found that the law did not limit the Commission's jurisdiction to fixtures and did not exclude items appurtenant to the interior of the restaurant from the designation. The Commission found that the hanging sculptures, walnut bar, metal draperies, decorative metal railings and ceiling panels were created and installed under the direction of Philip Johnson "as an integral element of the design of the interior.' The Commission, according to Chief Judge Kaye, rationally distinguished between items integral to the design of the interior space and items that merely served to enhance the restaurant's ambiance, and, concluded the court, did not exceed its authority, and properly exercised its discretion by including the designated items.

In the Matter of Teachers Insurance and Annuity Association of America v. City of New York, 603 N.Y.S.2d 399, 1993 N.Y.LEXIS 3278 (N.Y. 1993) [ELR 16:3:20]

Attorney may proceed with libel claim involving "Den of Thieves"

A New York appellate court has upheld a trial court decision (ELR 15:6:24) ruling that attorney Michael Armstrong may proceed with a libel action against Simon & Schuster, Inc., James B. Stewart, and Laurie P. Cohen, the publisher, author, and researcher/reporter of the book "Den of Thieves."

The book, an account of "the demise and criminal prosecution of the investment banking firm of Drexel Burnham Lambert, Inc., and Michael Milken," included a statement purportedly describing an affidavit prepared for the signature of attorney Craig M. Cogut by Armstrong, the attorney for Lowell Milken. The complained of passage, in part, stated that the intent of the affidavit was "to exonerate Lowell, based on assertions of fact by Cogut. Cogut read it over and had only one problem: the facts weren't true. He angrily refused to sign, and began looking for new lawyers.." (emphasis added by the court).

Armstrong, at a meeting with Simon & Schuster prior to the publication of the hardcover edition of the book, pointed out the potential damage to a practicing attorney of a false accusation of suborning perjury, and suggested that the publisher include an "errata sheet" in the already printed hardcover edition.

The first printing of the book was distributed without an errata sheet. However, later printings of the hardcover edition of the book included changes unrelated to the challenged statement. The softcover edition of the book also included minor changes in certain material, but retained the above-cited passage with the addition of the sentence "In September 1988 Cogut submitted an affidavit."

Armstrong claimed that the book accused him of criminal conduct in ignoring a possible conflict of interest when he agreed to represent Milken and Cogut and that he, in effect, asked Cogut to execute a perjurious affidavit in order to benefit Milken.

According to Armstrong, a draft affidavit was prepared for Cogut's signature. The draft affidavit apparently would have benefitted Milken, but Armstrong assisted Cogut in obtaining new counsel to help with revising the affidavit; the final draft was completed with the assistance of Cogut's new counsel.

Judge Theodore R. Kupferman agreed with the trial court that the disputed passage was susceptible of a defamatory meaning. The trial court had observed that the challenged statements, if true, would constitute violations of the attorney ethics rules and of criminal laws as to subornation of perjury.

Judge Kupferman also agreed with the trial court that the "single instance' exception to liability would not apply. Under the rule, a statement charging an individual with a single professional dereliction, because it might not necessarily charge general incompetence, ignorance or lack of skill, would not be deemed actionable without the pleading of special damages. It was determined that Armstrong was not required to plead special damages, since the alleged defamatory words implied the subornation of perjury and suggested a conflict of interest.

The court concluded by rejecting the argument that the statements were expressions of opinion, and affirmed the trial court ruling denying the book parties' motion to dismiss the complaint.

Armstrong v. Simon & Schuster, Inc., New York Law Journal, p. 21, col. 3 (N.Y.App., April 19, 1994) [ELR 16:3:21]

Author of book critical of John Dean may sue California law firm in Florida in defamation action

Leonard Colodny was the coauthor of "Silent Coup: The Removal of a President," a book which, in part, claimed to expose John Dean as having lied and/or perjured himself during and after serving as counsel to the President. Iverson, Yoakum, Papiano & Hatch represented Maureen and John Dean in the couple's lawsuit involving Colodny's book.

Colodny claimed that a member of the Iverson law firm wrote a letter to The Tampa Tribune challenging a Tribune columnist's statements in support of the author. When the newspaper published the letter, Colodny sued the Iverson parties, in a Florida state court, alleging that he was defamed by the statement "...we are confident that full disclosure of all the tape recordings made by Colodny will expose Colodny's book Silent Coup as a fraud." The Iverson parties removed the action to a Federal District Court.

Judge Kovachevich found that Colodny properly alleged a cause of action for defamation, including allegations of express malice, to overcome the defense of qualified privilege.

With respect to the issue of personal jurisdiction, the court did not agree that the letter, written by John M.

Garrick, a partner of the Iverson firm, was not authorized by Iverson nor part of the law firm's "usual business." As a partner in the law firm, Garrick's acts in the partnership's name bound the partnership. The letter was not written solely on a personal basis, was written on law firm letterhead, and was signed by Garrick as a member of the firm. The letter referred to the law firm and "our office," and was written and published in connection with the firm's representation of John and Maureen Dean, stated the court.

In all, Garrick's actual or apparent authority to publish the letter on behalf of the law firm may have resulted in the commission of a tortious act in Florida, and the long-arm jurisdiction of Florida applied to the firm. Judge Kovachevich also stated that sufficient "minimum contacts" were present to satisfy the due process requirements of the Fourteenth Amendment, and denied the

Iverson parties' motions to dismiss and motion to strike and for sanctions.

Colodny v. Iverson, Yoakum, Papiano & Hatch, 838 F.Supp. 572, 1993 U.S.Dist.LEXIS 16585 (M.D.Fla. 1993) [ELR 16:3:21]

Tennessee Supreme Court upholds statute, as narrowed, regulating display of materials deemed "harmful to minors"

Various booksellers and publishers challenged a Tennessee statute regulating the display of materials deemed "harmful to minors." A trial court upheld the constitutionality of the statute after finding that the meaning of the term "excess violence" was unconstitutionally vague and eliding it from the statute.

The display statute made it a criminal offense for "a person to display for sale or rental a visual depiction, including a video cassette tape or film, or a written representation, including a book, magazine, or pamphlet, which contains material harmful to minors anywhere minors are lawfully admitted." The statute referred to "excess violence," which was defined as "...the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake."

The Supreme Court of Tennessee has determined that the display statute was susceptible to a narrowing construction which made it applicable to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor. The construction reduced the scope of materials covered, resulting in only a minimal burden on adult access to constitutionally protected expression, stated Judge Riley Anderson, in finding that the statute was not overbroad and that it complied with the federal and state constitutions.

Judge Anderson also agreed with the trial court that the term "excess violence" was unconstitutionally vague because it did not provide notice to potential violators of the materials affected or guidance to the officials charged with its enforcement. The trial court thus correctly applied the doctrine of elision to eliminate the vague term.

The court found that a companion nuisance statute allowed the seizure of materials "harmful to minors" only if such materials also were obscene, and that such seizures were valid only if carried out in accordance with applicable statutory procedural safeguards.

The bookseller parties did not challenge the constitutional authority of a state to regulate materials that are protected as to adults, but obscene as to minors. It was argued that the display statute was unconstitutional because it unnecessarily impeded the access of adults and older minors to protected materials. But the court held that the display statute applied only to those materials which lack serious literary, artistic, political, or scientific value for a reasonable 17-year-old minor, and stated that compliance would not impose an impermissible burden on booksellers since the amount of materials affected was "minimal," and booksellers could choose the least burdensome means of compliance. It was noted that although the statute did not have an explicit knowledge requirement, the state would be required to prove that a bookseller had knowledge of the contents and character of the material displayed or sold to establish a violation. And adults were not completely denied access to the minimal amount of materials subject to the statute.

With respect to the issue of prior restraint, Judge Anderson pointed out that seizures for the possession of obscene matter may be authorized only after a judicial determination of probable cause that the obscenity laws are being violated, and the issuance of a search warrant. The court stated that a reasonable construction of the nuisance statute was that it allowed seizures of materials "harmful to minors" only if those materials also were "obscene matter." Seizures of such material must be conducted in accordance with the statutory procedural safeguards.

The court affirmed the trial court decision overruling the booksellers' commerce clause challenge, and rejected the state's contention that the trial court erred in finding the term "excess violence" unconstitutionally void for vagueness.

A concurring judge emphasized that the court did not dispute the state's interest in protecting minors and that the statute, as construed by the court, would be the least intrusive means to balance the bookseller parties' rights of expression against the
state's interest.

Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 1993 Tenn.LEXIS 407 (Tenn. 1993) [ELR 16:3:22]

Constitutionality of Delaware statute restricting adult entertaimment businesses is upheld

As reported at ELR 15:3:18, Delaware's Adult Entertainment Establishments Act includes within the definition of such establishments enterprises which offer for sale books, magazines, films and novelties of an adult nature and which provide sexually explicit films, video and live entertainment to patrons viewing such material from enclosed booths. Entities operating adult enterprises must obtain a license and comply with specified restrictions.

In 1991, the state amended the statute by limiting the hours of business of adult enterprises to between 10:00 A.M. and 10:00 P.M. Monday through Saturday; requiring the enterprises to remain closed on all Sundays and holidays; and prohibiting the use of enclosed booths from which patrons could view live and video entertainment in seclusion.

The owner of Adult Books claimed that the amendments violated the First and Fourteenth Amendments of the United States Constitution.

A Federal District Court in Delaware, in granting summary judgment to the Commission charged with overseeing compliance with the statute, found that the amendments were content-neutral time, place and manner regulations.

A Federal Court of Appeals has upheld the District Court's decision. Judge Hutchinson stated that there was no evidence that the legislature adopted the closing hours amendment on the basis of the content of speech. The evidence was sufficient to show that the state had a substantial governmental interest in regulating the socially undesirable" incidental effects of adult businesses on residential communities.

It was further found that the closing hours amendment was narrowly tailored to serve the state's interest in "preserving the character and preventing the deterioration of its neighborhoods," and that the amendment left open adequate alternative channels of communication. The amendment, stated Judge Hutchinson, "allows those who choose to hear, view or participate publicly in sexually expressive activity more than thirty-six hundred hours per year to do so. We think the Constitution requires no more."

The court also upheld the constitutionality of the open-booth requirement.

Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware, 10 F. 3d 123, 1993 U.S.App.LEXIS 30524 (3rd Cir. 1993) [ELR 16:3:23]

Court upholds invalidation of Los Angeles' exclusive cable franchise ordinance

The Los Angeles cable communications master plan divides the city into fourteen cable franchise areas; each area is served by one cable operator. In 1983, Preferred Communications requested pole attachment service permission to lease space on utility poles to string the necessary cable wires - from Pacific Telephone and Telegraph Company and the Los Angeles Department of Water and Power. The utilities informed Preferred that it would first have to obtain a franchise from the city. The city advised Preferred that it already had awarded the franchise in the South Central area.

Preferred then sued the city, alleging that the cable franchising system violated the federal and Califomia constitutions. A Federal District Court dismissed Preferred's complaint for failure to state a claim. The Court of Appeals reversed (ELR 7:1:12), holding that Preferred's proposed activity of providing cable service was entitled to First Amendment protection, and that the city could not limit the award of franchises to a single operator in each area of the city, if the city's infrastructure was capable of accommodating additional providers.

The United States Supreme Court affirmed the Court of Appeals decision, on a narrower ground. The Supreme Court recognized that Preferred's factual allegations implicated protected speech, but remanded the matter for the development of a record on, as described by the Federal Court of Appeals, "the present uses of the public utility poles and rights-of-way and how [Preferred] proposes to install and maintain its facilities on them."

On remand, the District Court, deciding the case on cross motions for summary judgment, invalidated the city's one operator/one area policy as inconsistent with the First Amendment.

In affirming the District Court decision, the court rejected the city's arguments that it had a substantial interest in preventing the disruption and "visual blight" caused by additional cable wiring; that additional cable systems would force the rearrangement and replacement of existing utility poles; and that the installation of another system would pose safety hazards to the public who use the streets and to the DWP employees who work on the poles. The court's earlier decision in the case assumed that these were substantial interests, but held that limiting the market to a single cable operator was not narrowly tailored to advance the government's interests. "There is nothing in this record to change that conclusion," declared the court.

It was observed that the city will not be required to grant access to its utility infrastructure to all cable television operators since there will be a point when the added benefit of another franchise might be low "while the cost in terms of the city's utility-carrying capacity is high." And the court emphasized that permitting a single operator to not only build a cable facility but also provide all of the programming transmitted on it means that all regulations - even those relating only to the construction of the facility - would be subject to "demanding" First Amendment scrutiny because of their direct impact on programming. Thus, the city may restrict the number of entrants into the cable market, but may not restrict the number to only one.

The court concluded by stating that the city must make available, through its franchising procedures, at least one additional franchise for South Central Los Angeles and that any claim for damages by Preferred was "much too speculative." On remand, the District Court will retain jurisdiction and, if the city fails to offer another franchise for bidding within due course, the District Court shall order the city to do so.

Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327, 1994 U.S.App.LEXIS 153 (9th Cir. 1994) [ELR 16:3:23]

Absence of "dedicated" easement precludes cable operator's access to mobile home park

TCI of North Dakota and Telecommunications Development Corporation held non-exclusive franchises to provide cable services in Minot, North Dakota. Until December 1988, TCI or its predecessor had been the sole cable provider for the Robindale mobile home park, managed by the Schriock Holding Company. In October 1988, Schriock informed TCI that it intended to discontinue TCI's services. Schriock had negotiated with Telecommunications Development to provide cable services and had granted the company permission to use the cable lines that TCI's predecessor had installed and which TCI had used.

TCI asserted, among other claims, the right to access to the mobile home park under the Cable Television Consumer Protection and Competition Act.

A Federal District Court found that Schriock had not granted a "dedicated easement" to any utility company sufficient to provide TCI with a statutory right to access Robindale; declared that TCI's cable lines had become fixtures of the Robindale property under North Dakota law; and dismissed TCI's state law claims.

Federal Court of Appeals Judge Hansen first considered whether, for purposes of Section 541(a)(2) of the Cable Act, Schriock had granted any of the various utilities providing services to Robindale an easement "dedicated" for compatible uses. Judge Hansen agreed with Telecommunications Development and Schriock that the legal definition of "dedicated" would apply, rather than the more expansive definition proposed by TCI. The statute, stated the court, was limited to easements created when a grantor has made public his/her intention to appropriate property for a public use; the property must be accepted by or on behalf of the public for such use.

Schriock's private arrangement with the local telephone and power companies indicated an intention to appropriate a portion of the mobile home park for general public utility use. Section 541(a)(2) does not authorize access to easements privately granted to particular utility companies, and TCI had no statutory authority to 'piggyback' on those buried distribution lines, stated the court.

Prior title holders of Robindale had granted the gas company a publicly recorded easement. Judge Hansen noted that the easement rights were not granted to the public, and that the easement was a "blanket easement" with no specified property dimensions. If such a blanket easement would qualify as "dedicated," the easement would appropriate the entire mobile home park for "general and public uses," commented Judge Hansen, who expressed the view that Congress meant the word "dedicated" as used in the statute to include specificity in both location and dimension in the description of the "dedicated" property.

The types of easements accessible by a franchised cable company under the statute, reiterated the court, are those which have been recorded and which dedicate specific, ascertainable corridors of land for use by one or more utilities.

The District Court had not considered TCI's various state law claims. Judge Hansen declined to review those claims for the first time on appeal, and remanded the case for the District Court to consider whether or not to reach the pendant claims.

TCI of North Dakota, Inc. v. Schriock Holding Company, 11 F.3d 812, 1993 U.S.App.LEXIS 32252 (8th Cir. 1993) [ELR 16:3:24]

Authors of instruction book for WordPerfect may seek royalties allegedly due from sales of revised edition, but publisher prevails on unfair competition claims

Walton and Deborah Beacham wrote a book called "Using WordPerfect." Que Corporation published the book in 1985 and subsequently, with the Beachams' approval, issued two revised editions of the book.

In 1987, Macmillan, Inc. acquired Que and decided to create a new edition of Using WordPerfect. Que published the reorganized and rewritten work and Macmillan paid royalties to the Beachams on Using WordPerfect (Third Edition).

In June 1988, Que published Using WordPerfect 5. The book was written by several authors who apparently were told not to use material from Using WordPerfect (Third Edition). When Macmillan did not pay the

Beachams any royalties on the sale of the book, the couple sued the publisher.

The Beachams claimed that Using WordPerfect 5 was a "revised edition" of their Using WordPerfect book and that they were contractually entitled to royalties.

A Federal District Court in Indiana has found that there existed a genuine issue of material fact conceming whether Using WordPerfect 5 constituted a "revised edition" incorporating significant features of the Beachams' original work or was an entirely new book.

The court granted Macmillan's motion for summary judgment on the Beachams' claim that the publisher breached an implied covenant of good faith and fair dealing by misappropriating their work in Using WordPerfect to avoid paying royalties to the couple. The court declined to read an implied duty of good faith and fair dealing into a contract where the parties' intentions were clear.

Macmillan also obtained summary judgment on the Beachams' trademark infringement claim. Macmillan owned the trademark and trade dress rights in Using WordPerfect - Que first used the trademark in commerce through its publication, distribution, advertising and marketing of the book.

The court also rejected the argument that Macmillan intentionally passed off Using WordPerfect 5 and Using WordPerfect 5.1 as revisions of the Beacham's Using WordPerfect in order to trade on the goodwill of the original book without paying royalties. Again, noted the court, the Beachams had no ownership interest in Using WordPerfect or its packaging. The Beachams had no "goods" that Macmillan was trying to pass off as its own.

Even if Using WordPerfect were the Beachams' product, continued Judge Barker, the couple did not present evidence to suggest "that a newer version of a software book based on a different, more advanced brand of software would palm off the recognition of the authors of an older edition based on a different, outdated software."

The Beachams then claimed that Macmillan, by removing their name from Using WordPerfect 5 and selling "their product" as Macmillan's own, engaged in "reverse palming off." Judge Barker stated that Macmillan did not appropriate any work in which the Beachams had a protected interest. The "mere fact that there may be enough similarities between a book the Beachams authored and a subsequent book written by someone else so that the latter constitutes a 'revised edition' of Using WordPerfect [did] not mean that the Beachams are entitled to authorship credit on the cover," announced the court. The Beachams did not write any part of Using WordPerfect 5 and Macmillan did not engage in reverse passing off by not including their name on the book's cover. The court cautioned that this finding did not determine the issue of whether the Beachams' contribution to Using WordPerfect 5, based on features from earlier versions for which they were given authorship credit, was significant enough for using WordPerfect 5 to be deemed a revised edition of Using Wordperfect.

Beacham v. Macmillan, Inc., 837 F.Supp. 970, 1993 U.S.Dist.LEXIS 16217 (S.D.Ind. 1993) [ELR 16:3:25]

Court upholds denial of claims brought by manufacturer of dual-deck VCR against electronics companies; contempt finding against manufacturer is reversed

Go-Video, at one time, was the only producer of a dual-deck videocassette recorder. The company alleged that its competitors, including Matsushita Electrical

Industrial Co., Victor Company of Japan and Sony Corporation, conspired to prevent the introduction of dual-deck VCRs to the United States by agreeing that they would refuse to manufacture such VCRs or deal with manufacturers or sellers of the recorders.

In 1987, Go-Video had sued Matsushita and other electronics manufacturers alleging antitrust violations. A jury determined that there was no agreement, combination or conspiracy not to make or sell to others a dual-deck VCR or not to sell parts for manufacturing a dual-deck VCR for sale in the United States. The judgment entered on the verdict was affirmed.

After various rulings, Go-Video filed the instant lawsuit in which the company, purporting to set forth claims not raised in the prior unsuccessful action, stated that Matsushita and other manufacturers conspired to monopolize markets in consumer electronics equipment other than VCRs. Go-Video also alleged, for the

1987-1990 time period, the same antitrust violations as those raised in the 1987 lawsuit.

The District Court dismissed the antitrust claims relating to dual-deck machines on the ground that Go-Video was collaterally estopped by the judgment in the first lawsuit. The court granted summary judgment to the Matsushita parties with respect to the claims concerning other electronic products, finding that Go-Video lacked standing to assert those claims. And the court dismissed Go-Video's trademark infringement claims because certain terminal labels on the backs of other companies' receivers were found to constitute fair use as a matter of law.

Federal Court of Appeals Judge Kleinfeld stated that Go-Video's case presented "nothing new." It was apparent to the court that Go-Video meant to allege only "subsequent market consequences of the old conspiracy," rather than new kinds of monopolization or new acts. The post-1987 conduct, although distinct, was not new in a way which would vitiate the prior determination that it is lawful."

In upholding the District Court's ruling as to Go-Video's claim that the Matsushita parties conspired to monopolize markets for digital audio tape recorders, high definition television, single-deck videocassette recorders, blank audio and videotape and other consumer electronics products, Judge Kleinfeld agreed that Go-Video did not suffer antitrust injury arising from alleged monopolistic barriers to market entry.

And although Go-Video had registered the trademark VCR-2, the District Court correctly found that there could be no confusion of others' products for Go-Video's products. The challenged uses of the mark were fair use as a matter of law, concluded the court, observing that the uses were descriptive and that there was no evidence to support an inference of bad faith.

In a separate ruling, the court reversed a District Court decision holding Go-Video in contempt for using discovery from the 1987 lawsuit to support the 1990 lawsuit, in which Go-Video set forth additional antitrust violations; the claims were based, in part, on information obtained from discovery in the 1987 lawsuit.

Judge Kleinfeld noted that the parties in the 1987 lawsuit had agreed to a very broad protective order prohibiting the disclosure of material obtained in discovery. The Matsushita parties did not claim that Go-Video disclosed confidential information, violated the purposes of the protective order, or enabled a competitor or anyone else to learn anything "inappropriate." The contempt order was based on the purported violation of the term of the protective order prohibiting any use "whatsoever" of information obtained in discovery except for preparation and trial of "this action."

The court found that the Matsushita parties did not prove by clear and convincing evidence that under a good faith, reasonable interpretation of the protective order, Go-Video did not substantially comply with the order. In the court's view, "for the protective order to comply with common sense, a reasonable reading must connect its prohibitions to its purpose - protection against disclosure of commercial secrets." "Privacy of proprietary information, not immunity from suit," continued Judge Kleinfeld, was the legitimate purpose of the protective order. Go-Video, despite its "harmless technical violation," substantially complied with the order and the judgment of contempt was vacated accordingly.

In re Dual-Deck Video Cassette Recorder Antitrust Litigation, Go-Video, Inc. v. Matsushita Electrical Industrial Co., Ltd., 11 F.3d 1460, 1993 U.S.App.LEXIS 32578 (9th Cir. 1993); Go-Video, Inc. v. The Motion

Picture Association of America, Case No. 9215967 (9th Cir., Dec. 2, 1993) [ELR 16:3:25]

Court affirms execution of $15 million bond in favor of "Game Genie" distributor

The "Game Genie" device, manufactured by Lewis Galoob Toys, allows video game players to alter certain features of Nintendo games. A player controls the changes made by the Game Genie by entering codes provided by Galoob. The device blocks the value for a single data byte sent by the game cartridge to the central processing unit in the Nintendo Entertainment System and replacing it with a new value - the Game Genie does not alter the data stored in the game cartridge, and its effects are temporary.

When Nintendo of America sued Galoob for copyright infringement, arguing that the Game Genie created an unauthorized derivative work, a Federal District Court (ELR 14:3:6) found that Galoob was neither a contributory nor a direct infringer of Nintendo's rights.

In 1992, a Federal Court of Appeals upheld the District Court decision (ELR 14:8:12; 15:1:23).

Nintendo had posted a $15 million bond as security for a preliminary injunction against Galoob in the infringement action. The District Court ordered the execution of the bond in favor of Galoob and, after a "lost sales" hearing and a "profits" hearing, awarded Galoob the entire amount of the bond, plus costs; it was found that the injunction caused Galoob at least $15 million in damages during the one year period when the company was barred from marketing the video game enhancer (ELR 14:10:19).

In February 1994, a Federal Court of Appeals affirmed the District Court ruling, stating that Galoob was wrongfully enjoined and that there is a rebuttable presumption, not overcome by Nintendo, that a wrongfully enjoined party is entitled to have the bond executed and recover provable damages up to the amount of the bond. Nintendo may have acted in good faith in bringing the lawsuit, but good faith is the standard expected of all litigants, declared Judge David R. Thompson.

Nintendo argued that Galoob, by failing to assert all of its defenses at the time Nintendo sought the preliminary injunction, acted in bad faith. Judge Thompson noted that although Galoob had additional defenses it asserted at the time of trial, the company had not failed, at the time of the preliminary injunction hearing, to produce evidence and did not deceive the court.

The court also rejected Nintendo's public policy argument; public policy may favor issuing injunctions in intellectual property infringement lawsuits, but only when a permanent (emphasis by the court) injunction is sought once infringement has been established.

Furthermore, the District Court did not award punitive damages by executing the bond in favor of Galoob - the damage award was compensatory and the court found that Galoob proved by a preponderance of the evidence that it sustained actual injury as a result of the wrongful issuance of the preliminary injunction. The District Court's method of calculating the number of lost sales was not erroneous, stated Judge Thompson, in agreeing that Galoob was entitled to have the full amount of the bond executed in its favor.

Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., Case No. 92-16364 (9th Cir., Feb. 17, 1994) [ELR 16:3:26]

Court upholds, over strong dissent, FCC's decision to eliminate fairness doctrine

As reported at ELR 15:5:18, a dispute arose concerning the coverage of a ballot issue voted upon in Arkansas in November 1990. The Arkansas AFL-CIO and The Committee Against Amendment 2 filed a complaint with the Federal Communications Commission requesting a ruling that KARK-TV was not complying with the fairness doctrine in its coverage of the ballot issue. The Commission rejected the complaint, ruling that the fairness doctrine was not statutorily mandated and no longer served the public interest. A Federal Court of Appeals panel affirmed the Commission's decision.

The court granted the Committee's suggestion for rehearing en banc and vacated the panel opinion. In December 1993, the court affirmed the decision of the FCC.

Judge Beam first rejected KARK's argument that the case was moot because the ballot issue which gave rise to the litigation had been decided. Although stating that mootness was "a close question in this case," it was shown that the controversy was "capable or repetition yet evading review."

The court then disagreed with the Committee's argument that the language of section 315 of the Communications Act, along with its legislative history, indicated congressional intent to codify the fairness doctrine. Judge Beam remained convinced that although the language of the 1959 amendment to section 315(a) may have been ambiguous, the legislative history clearly indicated that the amendment did not convert an administrative policy into a new statutory obligation.

Judge Beam stated that the Commission previously had articulated its reasons for abandoning the fairness doctrine and "invoked those same reasons in this case." The

Commission's decision to eliminate the doctrine was "a permissible agency response to changed circumstances" and was affirmed accordingly.

Chief Judge Richard S. Arnold, with whom Judges Loken and Morris S. Arnold joined, concurred in the judgment. Judge Arnold questioned the continued viability of the fairness doctrine, observing that "there is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells." In order to avoid having to reach the constitutional issues raised, Judge Arnold would construe section 315 as not requiring the Conunission to impose the fairness doctrine.

Judge John R. Gibson, with whom four judgesjoined, would have found that the legislative history of the amendment to section 315 mandated the fairness doctrine. Judge Gibson pointed out that from 1959 until 1981, the Commission consistently interpreted the 1959 amendment as codifying the doctrine, and, in 1981, sought to repeal the doctrine through legislative, not agency, action.

The dissent declared that the court erred in rejecting the requests by the Committee and by the Commission to remand the matter to the Commission for further proceedings. In the rehearing en banc, the Conunission suggested that its reasoning was incomplete in the initial decision ruling that section 315 was unambiguous and did not codify the fairness doctrine. To the extent that the Commission provided specific reasons for rejecting the Committee's claim, those reasons were struck down by the majority - rejecting the Commission's reasoning should have provided a sufficient basis for a remand, stated Judge Gibson.

It also was noted that it would be "undesirable" for the court to announce a view of the statute when the Commission and Committee asked for reconsideration by the

Commission, particularly given the "distinct possibility" that the court's decision will be the law in only seven states. For Judge Gibson, the refusal to remand the matter "defies the teachings of the Supreme Court."

Arkansas AFL-CIO v. Federal Communications Commission, 11 F.3d 1430, 1993 U.S.App.LEXIS 31575 (8th Cir. 1993) [ELR 16:3:27]

Court invalidates FCC's integration preference

In choosing among applicants seeking to build and operate a new broadcasting station, the Federal Communications Commission, as described by Federal Court of Appeals Judge Stephen F. Williams, has preferred applicants who promise that the station's owners will participate in its management. In a 1965 policy statement, the

Commission declared it "important per se" for station owners to participate in day-today station management.

In 1989, an administrative law judge awarded Anchor Broadcasting Limited Partnership a permit to construct and operate a commercial FM radio station in Selbyville, Delaware. The judge rejected the competing applications of Susan M. Bechtel, Galaxy Communications and another company. Bechtel had not proposed to integrate ownership and management of the station.

In response to Bechtel's claim that the integration policy was arbitrary and capricious, a Federal Court of Appeals remanded the case to the Commission. The Commission initiated a rulemaking proceeding, but, with respect to Bechtel's case, considered only whether post-1965 regulatory changes had removed the basis for the policy. The burden was placed on Bechtel to show that the changes had done so. The Commission, finding that Bechtel did not meet the burden, reaffirmed the prior order.

Judge Williams, in December 1993, ruled that the continued application of the integration preference would be arbitrary and capricious, and remanded the case to the Commission for a proceeding in which the Commission considers any application properly before it, including Bechtel's, without reference to the integration preference.

The Commission argued that owner-managers, because of a direct financial and legal stake in a station's performance, have better incentives than employee-managers, and that stations run by integrated owners would more likely respond to community needs and comply with Commission rules; on-site owners might have more information about those needs and about compliance activities. Integrated owners also would be more likely than absentee owners to have an active interest in the operation of their stations, according to the Commission, and an interested owner would tend to improve performance.

Judge Williams cited the lack of permanence of any benefits of integration, noting that the Commission did not identify any instance in which an applicant who received a license on the basis of an integration proposal continued to operate the station as promised for an appreciable period of time. Furthermore, the Commission had no evidence indicating that the integration policy achieved even one of the purported benefits. And even if there were "more plausible" advantages of integration, they did not necessarily justify the extraordinary weight that the Commission assigns to the criterion.

The court questioned whether the integration policy actually served the benefit, if any, of having day-to-day management decisions made by parties with a financial incentive. It also was observed that station employees can be held legally responsible for their acts even if they don't own the station, and that station owners have legal accountability for the station whether or not they work at the station. Judge Williams stated that "the very existence of the integration credit weakens any correlation between a proposed owner's integration and his real interest in the station;" described as "illusory" the Commission's claim that the integration criterion can be applied more consistently and objectively than other possible ways of assessing an applicant's likely responsiveness to community needs; and commented that "every step towards the magic number [integration score] is packed with subjective judgment, some generic, some ad hoc."

In all, the Commission was not authorized to continue applying the integration criterion and Bechtel was entitled to a proceeding in which her application would be considered without reference to the policy.

Bechtel v. FCC, 10 F.3d 875, 1993 U.S.App.LEXIS 32741 (D.C.Cir. 1993) [ELR 16:3:28]

Cleveland Browns prevail in action brought by injured videographer

In December 1988, Michael Gallagher was injured when two football players collided into him during the Cleveland Browns-Houston Oilers' game at the Cleveland Stadium. Gallagher was videotaping the game for a television station. The collision occurred at the end of the field near the outside corner of the end zone.

The National Football League generally requires media personnel to stay about six feet from the perimeter of the field. The Cleveland Browns also had a "kneeling rule" which required all media personnel to kneel when working in the area between the 30 yard line to the end zone on either end of the field of play.

When Gallagher sued the team for negligence, a trial court jury awarded him $800,000 and awarded his insurer $106,000. The trial court denied the team's motion for judgment notwithstanding the verdict.

An Ohio appellate court has reversed the trial court decision. Judge Patricia A. Blackmon noted that Gallagher's risk was similar to that of a spectator at a baseball game, and ruled that media personnel must accept the fact that if they remain inside the thirty yard line on either side of the field, there is a chance of contact with the players. "It is known that running out of bounds and colliding with players and sideline spectators are events that are foreseeable, customary parts of the sport of football," commented Judge Blackmon.

Gallagher argued that the kneeling rule was unnecessary to the sport and that its enforcement decreased his chances of escaping a collision. But the court stated that the Cleveland Browns owed no duty of care to media parties to insure their safety "when they venture into the known danger during the foreseeable customary events of the game. Football videography is inherently dangerous and neither the rules, regulations, customs, nor practices demonstrate that the Cleveland Browns owed Gallagher a duty of care to refrain from enforcing the kneeling rule."

The risk to Gallagher was neither unusual nor out of the ordinary, observed the court; the enforcement of the kneeling rule was not willful and wanton conduct on the part of the team, and the trial court erred in denying the team judgment notwithstanding the verdict.

Judge Donald C. Nugent, in dissent, expressed the view that the team waived its right to assert the defense of primary assumption of risk by failing to raise the defense prior to or during trial. The team had pleaded the affirmative defense of assumption of risk in its original and amended answer, but did not raise the defense of primary assumption of risk until the motion for judgment notwithstanding the verdict. Judge Nugent pointed out that primary assumption of the risk means that a party either owes no duty to an individual or has not breached a duty owed. But the team had based its defense on implied assumption of the risk or comparative fault, arguing that Gallagher, in crossing over the "media line," changed his status from an invitee to licensee.

The jury had found that the team was negligent and that its negligence was a proximate cause of Gallagher's injuries, but also found that the videographer, either by his own negligence or by his implied assumption of risk, contributed to his injury, and, on a comparative basis, was 35 % at fault. Judge Nugent observed that the issue at trial was whether the team was negligent in implementing the kneeling policy and whether Gallagher unreasonably assumed the risk. The jury responded by apportioning liability. However, pursuant to the motion for judgment notwithstanding the verdict, the matter at issue was whether Gallagher knowingly and voluntarily assumed an ordinary, inherent risk that "was part and parcel of his participation in the activity of filming a professional football game, with no attendant duty on the part of the Browns, other than to refrain from acting intentionally or recklessly." It could not be shown, under the motion, that the Browns' kneeling policy was reckless - the team could not lose by asserting primary assumption of the risk by motion since the issue of its recklessness was never raised at trial.

Judge Nugent stated that the issue of whether Gallagher assumed the risk should have been an issue of fact for the jury's determination. A pleading must give the opposing party adequate notice of the nature of a party's action or defense. But the Browns, although pleading the defense of assumption of risk chose to pursue the doctrine of implied assumption of risk as their defense at trial; for Judge Nugent, this did not adequately provide Gallagher with notice of the team's defense.

Gallagher v. Cleveland Browns Football Co., 1994 Ohio App.LEXIS 905 (Ohio App. 1994) [ELR 16:3:29]

Injunctive relief is denied in dispute between traffic reporting services

Metro Traffic Control had a one year contract with radio station KFWB to provide traffic reporting services for the Los Angeles area. KFWB did not renew the contract; the station hired Shadow Traffic Network to provide traffic reporting services beginning in December

1991. When Shadow hired several Metro employees, Metro sought a preliminary injunction to restrain Shadow from allegedly soliciting Metro's employees to violate the noncompete and trade secret clauses of their employment contracts.

A California appellate court has upheld the trial court ruling denying Metro's request, finding that the clauses were unenforceable in the absence of evidence that Metro possessed a protectable trade secret.

Judge C.S. Vogel noted that the restrictive covenants of Metro's employment contracts prohibited an employee from managing and operating the broadcasting of traffic information, broadcasting traffic reports on television or radio, or providing operational assistance to any business engaged in developing and broadcasting traffic reports for any competitor of Metro during the term of employment and for one year following termination. The contract also provided that an employee would not use or disclose "trade secrets and confidential information" except as required for his employment at [and for] Metro and for two years after the termination of his employment.

The court stated that the provision "standing by itself" was unenforceable because it severely restricted Metro's employees' "mobility and betterment."

Furthermore, there was no evidence that Shadow was involved with KFWB's decision to not renew its relationship with Metro, or that Shadow arranged to hire Metro's key employees for the purpose of "stealing" KFWB as a customer. Absent a showing of unlawful purpose or means, Shadow was not liable for allegedly inducing Metro's employees to leave and move to the company.

Metro claimed that it possessed protectable trade secrets in the nature of information about KFWB's particular requirements with respect to traffic reporting services. However, Metro did not compile "an intangible personal property right owned by the employer ... Simply hiring personnel who possess the requirements specified by a customer does not convert the employee into a 'trade secret,'" stated the court.

The information KFWB provided to Metro was equally available to anyone contracting with KFWB; there was no evidence that any former Metro employee provided Shadow with confidential information.

In a subsequent ruling, the court, after lengthy consideration, upheld the trial court's September 1993 ruling granting Metro's motion to disqualify Latham & Watkins from further representation of Shadow because the law firm had retained as an expert witness an individual previously interviewed by Andrews & Kurth, counsel for Metro, and to whom confidential information about Metro's lawsuit purportedly was disclosed.

Judge Vogel found that "communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not thereafter retained as long as there was a reasonable expectation of such confidentiality." The court also agreed with the trial court's implicit finding that Andrews & Kurth imparted confidential information to the potential expert even though Metro chose not to retain his accounting firm as an expert witness. Since both Metro and Shadow consulted the accounting firm on the same issue - Metro's damages - it was highly unlikely that the accounting firm employee "could conscientiously discharge his duty to Shadow as its retained expert and at the same time discharge his duty not to divulge confidential information received from Metro."

In all, the trial judge did not err in concluding that Shadow had failed to carry its burden of persuading the court of the nonexistence of the fact that the accounting firm disclosed confidential information to Latham & Watkins, stated Judge Vogel, who then declared that given the manner in which Shadow litigated the matter, the court had no alternative other than to uphold the order disqualifying the entire Latham & Watkins firm.

Metro Traffic Control, Inc. v. Shadow Traffic Network, 22 Cal.App. 4th, 27 Cal.Rptr.2d 573, 1994 Cal.App.LEXIS 137 (Ca.Ct.App. 1994); Shadow Traffic Network v. Superior Court, 24 Cal.App.4th 1067, 29 Cal.Rptr.2d 693, 1994 Cal.App.LEXIS 435 (Ca.Ct.App. 1994) [ELR 16:3:29]

Court rejects judge's defamation claim based on distribution of "phony memo"

The Metropolitan News-Enterprise, a small legal newspaper, was, according to California appellate court Presiding Judge Sills, "engaged in a running feud with the presiding judge of the Los Angeles Superior Court." Employees of the newspaper circulated a phony memo to the judges and employees of the court, purportedly authored by Judge Ricardo A. Torres, making fin of his attitude toward the newspaper.

Judge Torres sued the newspaper and its employees, alleging several causes of action, including defamation. The trial court overruled the demurrer to the defamation cause of action. An appellate court has granted the newspaper parties' request for a writ of mandate commanding the trial court to dismiss the defamation claim, stating that no reasonable person could fail to conclude that the memo was a parody and was not written by the judge.

Judge Sills commented that the "phony author" parody relied "for its force and effect on the idea of attribution of ideas and words to someone who never uttered them ... The comic effect is achieved because the reader sees the words as the absurd extension of positions or ideas associated with the purported author." The court stated that whether a statement reasonably qualifies as defamatory is not a question for the jury, and claimed that taking the dissent's position would mean that "only slapstick would qualify for First Amendment protection."

For readers of the memo, "all doubt as to its satirical nature is removed by the megalomaniac final paragraph ... [which] leaves the reader with an impression reminiscent of a surrealistic comedy skit..." The "sheer ludicrousness" of parts of the memo placed the writing " easily within the realm of satiric parody," stated the court, for "it is unreasonable to believe that any judge appointed by any of California's governors in this century would be so stupid as to seriously author such a memo."

Judge Sills next declared that "the naked language" of the phony memo was sufficiently outrageous to qualify it as a parody as a matter of law. But the court proceeded to consider the fact that the memo used a court seal and stationery and was distributed in person in a courthouse, not as part of a newspaper or magazine. Although one would more likely expect a parody within certain publications than on a memo on court stationery from the presiding judge of the Los Angeles Superior Court, the writ proceeding, emphasized Judge Sills, concerned only the cause of action for defamation, not any potential civil or criminal liability for impersonating a judge or misusing the official seal or stationery of a court.

The phony memo occurred in the context of the ongoing feud between Judge Torres and the newspaper parties, and given that context, as well as the language of the memo, it was unreasonable to believe that anyone, particularly the audience actually intended, could conclude that Judge Torres wrote the memo. "It is one thing for a writing to make fun of a public figure by exaggerating some impression of him or her; it is quite another to convey the idea that the figure literally uttered certain words," concluded Judge Sills, in directing the trial court to vacate its order overruling the demurrer to the defamation cause of action and to enter an order sustaining the demurrer without leave to amend.

Judge Crosby, in dissent, focused on the circumstances surrounding the distribution of the memo, stating that even if it were assumed that every trial court judge who received the memo recognized it as a parody, the demurrer would not lie because there could be no such assumption concerning court personnel and other individuals. According to Judge Crosby, "the majority has its rose-colored glasses on when it thinks people familiar with the local legal scene could not be taken in by the phony memo; stranger, much stranger, things have come from Los Angeles judges."

Allegations in a pleading must be accepted as true on demurrer, recalled Judge Crosby, and a complaint that states a valid cause of action is not demurable. A demurrer is not decided on special knowledge, reiterated the dissent, in concluding that the petition should have been denied.

In a closing footnote, Judge Crosby challenged the majority's purported misrepresentation of his views and stated that the issue before the court was "not whether parody may be entitled to First Amendment protection (sometimes yes, sometimes no ...), but whether the cross-complaint pleads a parody as a matter of law."

Patrick v. The Superior Court of Los Angeles County, 22 Cal.App. 4th 814, 27 Cal.Rptr.2d 883, 1994 Cal.App. LEXIS 126 (Ca.Ct.App. 1994) [ELR 16:3:30]

Advertising commission forfeiture provision is ruled unconscionable

Under his employment contract with McKinnon Broadcasting Co.'s San Diego television station KUSI, advertising salesman John Ellis agreed that he would not receive commissions on advertising he sold if the station had not received payment for the advertising before Ellis terminated his employment.

After Ellis left KUSI in March 1989, the station collected nearly $100,000 in fees on advertising he had previously sold; Ellis did not receive a commission on these sales.

When Ellis challenged the forfeiture provision, the Labor Conunissioner found in his favor and awarded damages.

A trial court ruling in favor of the station has been reversed by a Califomia appellate court which held that the commission forfeiture provision was unconscionable. Ellis was asked to sign the contract without warning; was told that it was a mere "formality;" "had no reason to suspect it contained a forfeiture term which had never been discussed with him previously;" and was in no position to negotiate when the contract was first presented to him two weeks after he began work.

The court stated that even if Ellis knew or should have known of the forfeiture provision, this did not preclude a finding of unconscionability, since the record indicated to the court the presence of "oppression" based on unequal bargaining power. The fact that Ellis did not object to the (unread) forfeiture provision did not prove it was negotiable.

In all, stated Acting Presiding Judge Wiener, the contract provision was a commercially unreasonable forfeiture clause, "exacting a penalty far in excess of any potential detriment suffered by KUSI," and was unconscionable and unenforceable. The court directed the trial court to enter judgment in favor of Ellis in the amount of about $20,000.

Ellis v. McKinnon Broadcasting Co., 18 Cal.App.4th 1796, 23 Cal.Rptr.2d 80, 1993 Cal.App.LEXIS 981 (Cal.App. 1993) [ELR 16:3:31]

Briefly Noted:

Attorneys' Fees.

Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey represented Lynn Redgrave in an unsuccessful action against MCA, Inc. and Universal Television for the alleged wrongful termination of Redgrave from the television show "Housecalls."

Redgrave, her loan-out company Kellybee Enterprises, and her husband John Clark subsequently sued Finley, Kumble for malpractice claiming that the law firm's conduct prejudiced the outcome of a settlement trial in the MCA matter. The Redgrave parties converted the action into a malpractice proof of claim for $12 million in the Finley, Kumble bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York.

Attempts to settle the claim failed, and Bankruptcy Judge Frances Conrad, in December 1991, granted the trustee in bankruptcy's motion for summary judgment.

In March 1990, Finley, Kumble had filed an adversary proceeding in the Bankruptcy Court against Redgrave to recover payment of legal fees allegedly owed to the law firm. Bankruptcy Judge Conrad directed Redgrave to pay the trustee about $155,000, plus interest.

A Federal District Court in New York has affirmed the decisions of the bankruptcy court.

Judge John E. Sprizzo stated that the malpractice claim was properly dismissed because no rational finding could be made that but for Finley, Kumble's negligence, the Redgrave parties would have prevailed in the settlement trial. The California trial court had found that there was no attorney negligence during the settlement trial and the finding was entitled to preclusive effect on the issue of Finley, Kumble's negligence in the instant proceeding, declared Judge Sprizzo, who also concluded that the bankruptcy court's finding as to the amount of reasonable attorneys' fees was not clearly erroneous.

In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 157 Bankr. 1, 1993 U.S.Dist.LEXIS 9168 (S.D.N.Y. 1993) [ELR 16:3:32]

Hotel Advertisement.

An advertisement for Ramada's "Renaissance" Hotels featured testimonials from Frank and Cindy Marriott and Donald and Sally Hyatt as to why the couples stayed at Renaissance Hotels. Ramada, in response to protests by Marriott Corporation and Hyatt Corporation, added a disclaimer stating that the individuals identified in the advertisements were not related to the Marriott [or Hyatt] Hotels and the advertisements do not constitute an endorsement of the Renaissance Hotels by Marriott [or Hyattl Hotels."

A Federal District Court in New York has granted Ramada's motion to dismiss the hotel chains' complaint under the Lanham Act. Judge Richard Owen stated that the advertisements were designed to suggest to a reader that the Renaissance Hotels were comparable to, or surpassed, their competitors. It was "obvious" to Judge Owen that the advertisements were tongue-in-cheek. The court also found that no reasonable person would be misled, even without a disclaimer, into believing that the "Marriotts" or "Hyatts" were related to the hotel chains or that the Renaissance Hotels were sponsored by those companies, and, in all, that there was no likelihood of confusion.

Marriott Corporation v. Ramada Inc., 826 F.Supp. 726, 1993 U.S.Dist.LEXIS 9334 (S.D.N.Y. 1993) [ELR 16:3:32]

Auction Bid.

In May 1992, Sara Kearns, as an agent for Nardin Fine Arts Gallery, bid $77,000 for a Dufy tapestry at an auction conducted by Christie, Manson & Woods International, Inc. Upon failing to receive payment from the gallery, the auction house reoffered the tapestry for resale in mitigation of its claim against Nardin, and received $70,000.

Christie, Manson & Woods sued Nardin for about $20,000, the difference between the resale price and the original claimed liability of about $90,000, which included the principal amount, as well as late charges and storage fees.

In response to the auction house's motion for summary judgment, the art gallery argued that there were triable issues of fact concerning Christie, Manson & Woods' failure to determine the actual scope of Kearns' authority and concerning the mitigation of damages.

Judge Cahn found that questions of fact were raised which precluded summary judgment, stating that the scope of Kearns' authority to bid on the tapestry was unclear." And, assuming that Kearns did not have authority, there was a question of fact, which the court could not yet determine, as to whether the auction house properly relied on her apparent authority.

Christie, Manson & Woods International, Inc. v. Nardin Fine Arts Gallery, New York Law Journal, p. 22, col. 4 (N.Y.Cnty., Mar. 15, 1994) [ELR 16:3:32]

Insurance.

In June 1991, artist Rene Moncada obtained permission from the tenant of 397 West Broadway in the Soho area of Manhattan to paint a mural on the exterior wall of the building. The wall was located directly opposite the entrance to the Rubin-Spangle Gallery. A gallery employee, supervised by Lynn Rubin, the owner of the gallery, painted over the mural. As Moncada attempted to videotape the destruction of his work, Rubin apparently placed her hand on the lens of Moncada's camcorder to prevent the taping.

Moncada, who suffered an eye injury, sued the gallery and Rubin for violating the Visual Artists Rights Act and for malicious assault, interference with copyright and conversion.

The gallery and Rubin filed a third party complaint, naming, among others, Aetna Casualty and Surety Company, alleging that a commercial general liability policy with Aetna covered the cause of action for malicious assault.

The Aetna policy provided coverage for an 'occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Federal District Court Judge Lasker, finding that there was no showing that Moncada's injury was accidental within the meaning of the policy and that Aetna had no duty to defend, granted the insurer's motion to dismiss the third-party complaint.

Moncada v. Rubin-Spangle Gallery, Inc., 835 F.Supp. 747, 1993 U.S.Dist.LEXIS 15495 (S.D.N.Y. 1993) [ELR 16:3:32]

NFL Insurance Matter.

As reported at ELR 15:8:19, Federal District Court Judge Peter K. Leisure made several rulings concerning an insurer's claims against the member teams of the National Football League. Judge Leisure has denied the insurer's motion for an order certifying the opinion for an interlocutory appeal. Although the opinion resolved controlling questions of law, the insurer did not demonstrate substantial grounds for a difference of opinion with respect to the controlling questions decided, and did not show that immediate interlocutory review would "materially advance the ultimate termination of this action."

Judge Leisure also found that there were no special circumstances justifying the entry of partial final judgment.

N.F.L. Insurance Ltd. v. B&B Holdings, Inc., 1993 U.S.Dist.LEXIS 8800 (S.D.N.Y. 1993) [ELR 16:3:33]

Football Player Union Dues.

On December 30, 1993, a Federal District Court for the District of Columbia refused to grant a temporary restraining order sought by the National Football League Players Association. The application requested that the court direct the owner of the Washington Redskins and the National Football League Management Council to comply with an arbitration award that required the team to suspend, not later than 1:00 P.M. on December 31, 1993, all Redskins players, except Terry Orr, who had failed to pay union dues or a service fee in accordance with a the collective bargaining agreement.

Judge Joyce Hens Green stated that the association not only failed to demonstrate a substantial likelihood of success on the merits, but that any arguably irreparable injury to the association "pales in comparison to potential injury to third parties, the public interest, and to the [team and council]."

The association argued that since about one-third of NFL players do not return to the sport, the association might not be able to collect the $5,000 dues or service fee from about one-third of the Redskins players who had refused to pay that sum, resulting in a loss to the association of about $50,000.

If the court entered the requested order, the Redskins players who refused to pay the dues might miss playing in the Minnesota Vikings game scheduled for December 31, 1993. "Either a forfeit or an unexpectedly easy victory due to a weakened Redskins franchise will result in a less competitive game," commented the court.

National Football League Players Association v. Pro-Football, Inc., 1993 U.S.Dist.LEXIS 18567 (D.D.C. 1993) [ELR 16:3:33]

Cable Program Interception.

Home Box Office claimed that Carlim, Inc., the operator of Crusoe's Restaurant and Bar in St. Louis, illegally pirated HBO's satellite broadcast signal and displayed its programming in violation of sections 553 and 605 of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984. HBO voluntarily dismissed its claims against Carlim under the Copyright Act.

HBO owned the copyright in the program "World Championship Boxing, Evander Holyfield vs. Bert Cooper and Lennox Louis vs. Tyrell Biggs," which the cable operator broadcast on November 23, 1991. Carlim was not authorized to receive HBO programming through satellite, cable or any other means. However, Carlim used a Video Cipher II decoder in the satellite system at Crusoe's in order to unscramble and display scrambled programming without paying for a cable subscription; Crusoe's apparently received the Holyfield/Cooper program without authorization from HBO.

A Federal District Court in St. Louis found that Carlim's use of the pirate chip constituted the unauthorized receipt or interception of a cable communications service in violation of section 553(a)(1) and also was an unauthorized interception and publication of a broadcast communication in violation of section 605(a).

Judge Stohr stated that Carlim willfully violated section 553, and awarded HBO statutory damages of $1,000, increased by an additional $1,000 for willfulness. The court awarded HBO an additional $1,000 for

Carlim's non-willful violation of section 605, as well as injunctive relief and reasonable attorneys' fees and costs.

In Home Box Office v. Gee-Co., Inc., Judge Stohr ordered Gee-Co, the operator of Sports Cafe, to pay HBO a total of $5,000 for violating sections 553 and 605, plus reasonable attorneys' fees and costs. HBO claimed that on December 7, 1991, Sports Cafe, without authorization, displayed the cable operator's copyrighted program "World Championship Boxing: George Foreman vs. Jimmy Ellis and Roger Mayweather vs. Rafael Pineda."

Judge Stohr found that Gee-Co willfully used a decoder containing a pirate chip to receive and unscramble HBO's encrypted transmission of the program and granted HBO's request for injunctive relief.

Home Box Office v. Carlim, Inc., 838 F.Supp. 432, 1993 U.S.Dist.LEXIS 16674; Home Box Office v. Gee-

Co Inc., 838 F.Supp. 436, 1993 U.S.Dist.LEXIS 16657 (E.D.Mo. 1993) [ELR 16:3:33]

Cable Program Interception.

Home Box Office claimed that Champs of New Haven, the operator of Champs Sports Bar, violated section 151 of the Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984, the Satellite Home Viewer Act of 1988, and the Copyright Act.

A Federal District Court in Connecticut entered a default judgment against Champs Sports Bar and Salvatore J. Bova, the permittee of Champs, in the maximum amount of statutory damages - $150,000 under the Communications Act and $ 1 00,000 under the Copyright Act.

The court rejected the Champs parties' motion for relief from the default judgment, but found that the amount of damages was excessive. HBO did not allege that Champs engaged in repeated violations of the cable operator's rights over an extended period of time, that Champs obtained substantial unlawful monetary gain, or that HBO incurred significant actual damages. Chief Judge Jose Cabranes entered judgment against the Champs parties in the amount of $10,000, as well as reasonable attorneys' fees and costs.

Home Box Office v. Champs of New Haven, Inc., 837 F.Supp. 480, 1993 U.S.Dist.LEXIS 16307 (D.Conn. 1993) [ELR 16:3:34]

Title IX/Wrestling.

Several student wrestlers at Drake University from 1989 or 1990 through the 1992-1993 academic year sued the school upon the discontinuance, in March 1993, of the intercollegiate men's wrestling program.

A Federal District Court in Iowa, after reviewing the history of wrestling and of Drake University's athletic policies, declined to grant the requested injunctive relief requiring the school to reinstate the intercollegiate wrestling program pending a final decision by the court on the merits of the case.

The court noted that in the absence of a preliminary injunction, the student athletes would be unable to complete their intercollegiate wrestling activities at Drake, but would not lose their scholarships. Judge Vietor commented that Title IX "does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate or high school athletics."

It was further found that requiring Drake to reinstitute the wrestling program would be costly for the school and would interfere, albeit on a temporary basis, with the school's judgment as to how to apportion its resources. And it was unlikely, stated Judge Vietor, that the students would prevail on their claim that Drake's decision was a violation of the equal protection clause. The facts did not indicate that Drake was acting under color of state law or carrying out "state action" in conducting school affairs, including the decision to abolish wrestling. The court also found it unlikely that the students would prevail on their state law breach of contract claim.

The court concluded by rejecting the students' Title IX claim, finding, in part, that injunctive relief might undermine the underlying purposes of Title IX. Furthermore, the school's reasons for discontinuing wrestling included financial concerns, the discontinuation of wrestling programs by other colleges and lack of support by the students and conununity - there was no evidence that Title IX considerations were a factor in Drake's decision.

Gonyo v. Drake University, 837 F.Supp. 989, 1993 U.S.Dist.LEXIS 16537 (S.D.Iowa 1993) [ELR 16:3:34]

"Development Squad" Matter/Attorneys' Fees.

In the ongoing antitrust action brought by a class of professional football players against the National Football League and its member teams over "development squad" compensation policy (ELR 15:8:22), a Federal District Court, in December 1993, ordered further discovery in order to determine reasonable attorneys' fees. In March 1994, Judge Royce C. Lamberth ordered the

NFL parties to pay the players about $1.75 million in attorneys' fees and litigation costs.

Brown v. Pro Football, Inc., 839 F.Supp. 905, 1993 U.S.Dist.LEXIS 17877 (D.D.C.1993); 1994 U.S.Dist. LEXIS 2344(D.D.C.1994) [ELR 16:3:34]

NEW LEGISLATION AND REGULATIONS

Indiana enacts right of publicity statute

Indiana has adopted a new right of publicity act, effective July 1, 1994, which applies to an act or event that occurs within the state, regardless of a personality's domicile, residence, or citizenship. The statute does not affect rights and privileges recognized under any other law applying to a news reporting or an entertainment medium. And the statute does not apply to the use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms in literary or theatrical works, musical compositions, film, radio, or television programs; material with political or newsworthy value; original works of fine art; promotional material or advertisements for a news reporting or an entertainment medium that uses all or part of a past edition of the medium's own broadcast or publication and which does not convey or reasonably suggest that a personality endorses the news reporting or entertainment medium; or an advertisement or commercial announcement for the described uses.

The statute also does not apply to the use of a personality's name to truthfully identify the personality as the author of a written work, or a performer of a recorded performance under circumstances in which the written work or recorded performance is otherwise rightfully reproduced, exhibited, or broadcast.

Furthermore, a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures or mannerisms may be used in connection with the broadcast or reporting of an event or a topic of general or public interest.

"Commercial purpose," as used in the statute means the use of an aspect of a personality's right of publicity on or in connection with a product, merchandise, goods, services, or commercial activities; for advertising or soliciting purchases or products, merchandise, goods, services, or for promoting commercial activities; or for the purpose of fundraising.

The word "name" in the statute means the actual or assumed name of a living or deceased natural person that is intended to identify the person. And "person" may mean a natural person, a partnership, a firm, a corporation, or an unincorporated association.

The statutory meaning of "personality" includes a living or deceased natural person whose name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism has commercial value, whether the person uses or authorizes the use of his/her rights of publicity for a commercial purpose during his/her lifetime. And "right of publicity" means a personality's property interest in the above-cited features.

The statute proscribes the use of any aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred years after the date of the personality's death without having obtained previous written consent from the individuals specified in the statute.

A person who engages in prohibited conduct within the state or creates or causes to be created within Indiana unauthorized goods, merchandise or other materials, or transports such merchandise into the state, or knowingly causes advertising or promotional material created or used in violation of the statute to be published, distributed, exhibited, or disseminated within Indiana is subject to the jurisdiction of the state courts.

Violators of the statute may be liable for damages in the amount of $1,000 or actual damages, including profits derived from the unauthorized use, whichever is greater. If the violation is knowing, willful, or intentional the injured party may elect treble or punitive damages. In establishing profits, a party is required to prove the gross revenue attributable to the unauthorized use; the unauthorized user must prove any claim for deductible expenses.

The court also may award the prevailing party reasonable attorneys' fees, costs, and expenses and may order temporary or permanent injunctive reliel However, injunctive relief is not enforceable against a news reporting or an entertainment medium that has contracted with a person for the publication or broadcast of an advertisement and incorporated the advertisement in tangible form into material that has been prepared for broadcast or publication.

During any period that an action under the statute is pending, the court may order the impounding of goods, merchandise or other materials claimed to have been made or used in violating the statute; plates, molds, matrices, masters, tapes, negatives, or other items from which goods, merchandise, or other materials may be manufactured or reproduced. This section does not apply to a news reporting or an entertainment medium, nor does a provision enabling the court to order the destruction or other reasonable disposition of the items set forth above.

The rights recognized by the statute are property rights, freely transferable and descendible, in whole or in part, by contract, license, gift, trust, testamentary document, or the operation of the laws of intestate succession applicable to the state administering the estate and property of an intestate deceased personality, regardless of whether the state recognizes the property rights adopted by Indiana.

The written consent required by the statute and the rights and remedies provided may be exercised and enforced by a personality, or a person to whom the recognized rights have been transferred. If the transfer has not occurred, the persons described below may exercise and enforce those rights. After the death of an intestate personality, the rights and remedies of the statute may be exercised and enforced by a person who possesses a total of not less than one-half interest in the rights. If a deceased personality has not transferred his/her rights by contract, license, gift, trust or testamentary document and there are no surviving persons the rights set forth under the statute terminate. The rights and remedies provided for by the statute supplement any other rights and remedies provided by law.

Indiana Right of Publicity Act, Indiana S.B. 17, adding Indiana Code 32-13 (1994) [ELR 16:3:35]

WASHINGTON MONITOR

FCC issues notices of apparent liability to radio station licensees in connection with material broadcast on "The Howard Stern Show"

In February 1994, the Federal Communications Commission issued Notices of Apparent Liability to Infinity Broadcasting Corporation and its subsidiaries, the licensees of WJFK(AM), Baltimore; N"RK(FM), New York, New York; NWSP(FM), Philadelphia; and WJFK (FM), Manassas, Virginia, in the aggregate amount of $400,000 for broadcasting apparently indecent material during "The Howard Stern Show" on four separate days in August, September and October, 1993 between about 6:00 a.m. and 10:00 a.m.

The Commission noted in a separate opinion that monetary forfeitures were the appropriate remedy for the cited violations.

The Commission, also in February 1994, issued a notice of apparent liability for a forfeiture in the amount of $37,500 for the licensee of KFBI(FM), Pahrump, Nevada for broadcasting allegedly indecent material during "The Howard Stern Show" in September and October

1993 between about 6:00 a.m. and 11:00 a.m. The Commission expressed the view that the challenged material was indecent in that it contained language describing sexual and excretory activities and organs in patently offensive terms. Because the material aired at times when there was a reasonable risk that children may have been in the audience, it was legally actionable, stated the Commission.

Federal Communications Commission, 1994 FCC LEXIS 472, 1994 FCC LEXIS 464 [ELR 16:3:36]

IN THE NEWS

CBS and former news correspondent settle age discrimination action

CBS fired news correspondent John Sheehan in June 1991, seventeen months before his 55th birthday. Sheehan, according to news reports, would have been entitled to a full pension and health benefits if he remained with the company until he was 55.

Sheehan sued CBS for age discrimination, seeking about $1 million in damages and back pay. CBS claimed that the firing occurred due to the "downsizing' of the news division. In April 1994, the parties agreed to settle the lawsuit, on undisclosed terms. [ELR 16:3:37][Aug. 1994]

Software distributor and AFTRA enter agreement

Electronic Arts of San Mateo, Califomia, has entered a contract with the American Federation of Television and Radio Artists covering the use of union talent in interactive multimedia productions. According to news reports, AFTRA has agreed to reduce certain fees paid for talent, but apparently expects that multimedia productions will provide a new source of revenue. The agreement does not require Electronic Arts to make additional payments each time a video game is played, but sets forth circumstances which would require additional fees, as well as the company's obligations to contribute to the union's health and retirement funds. Electronic Arts agreed to use only union talent for its productions. [ELR 16:3:37][Aug. 1994]

Cable operator agrees to pay $5 million to settle Justice Department lawsuit alleging underpayment of copyright royalties

The Lenfest Group has agreed to pay $5 million to several film studios and other program providers to settle a lawsuit brought by the United States Department of Justice in which it was alleged that the cable operator failed to pay copyright owners $2.4 million from 1988-1993.

According to news reports, the lawsuit alleged that Lenfest made false statements to the Copyright Office regarding cable royalty payments.

The Copyright Office will receive the $5 million payment, and allocate the amount to program suppliers.

Lenfest has denied that it intentionally underpaid copyright owners, stating that it relied on the payment schedule of the previous owner of the company. It also was reported that the company agreed not to pass the settlement payment on to its cable customers. [ELR 16:3:37] [Aug. 1994]

DEPARTMENTS

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A Critical Analysis of Collegiate Licensing Policies and Procedures by Richard L. Irwin, David K. Stotlar and Aaron L. Mulrooney, 20 The Journal of College and University Law 97 (1993)

Do State Misappropriation Rights Survive Feist Publications Copyright Laws? by Kelly A. Ryan, 1992-93 Annual Survey of American Law 329 (1992-93)

Fun & Profit: When Commercial Parodies Constitute Copyright or Trademark Infringement by Tammi A. Gauthier, 21 Pepperdine Law Review 165 (1993)
[ELR 16:3:38]