RECENT CASES

"Net Profits" clause used by Warner Bros. in contracts for Batman is not unconscionable, California trial court rules

The "net profits" clause used by Warner Bros. in its contracts with producers Benjamin Melniker and Michael Uslan, concerning the production of Batman, is not unconscionable, a California Superior Court judge has ruled. The ruling was issued after the producers had presented their evidence during the trial, in response to the studio's motion for judgment in its favor on the producers' claim that their contract was a contract of adhesion that should be strictly interpreted against Warner Bros. and should not be interpreted in a way that would be contrary to their "reasonable expectations."

According to the producers, the contract was unfair to them, because Warner Bros. and others had earned millions of dollars from Batman but they had not.

Judge David Yaffe rejected the producers' unfairness claim, saying "that ever since the King's Bench decided Slade's Case in 1602, right down to today, courts do not refuse to enforce contracts or remake contracts for the parties because the court or the jury thinks that the contract is not fair. That principle is not some medieval anachronism. This society, this country, this culture operates on the basis of billions of bargains struck willingly every day by people all across the country in all walks of life. And if any one of those people could have their bargain reexamined after the fact on the ground that it was not fair or on an assertion that it was not fair, we would have a far different type of society than we have now; we would have one that none of the parties to this case would like very much. . . . Whether a contract is fair is not the issue. A contract is not unconscionable simply because it is not fair. . . . To be unconscionable, a contract must `shock the conscience' or, as plaintiffs alleged in . . . their complaint, it must be `harsh, oppressive, and unduly one-sided.' After considering all the evidence, the Court finds that the plaintiffs have failed to prove that the Warner Agreement, taken as a whole, is unconscionable."

This same unconscionability contention was previously made by columnist Art Buchwald in his lawsuit against Paramount Pictures in which he contended that the Eddie Murphy movie "Coming to America" had been based on a treatment he had written and sold to Paramount. The Buchwald/Paramount contract provided that if a movie were made based on his treatment, he would be paid a portion of the movie's net profits. In that case, another California Superior Court judge (sitting in the same courthouse where the Batman case was decided) ruled that Paramount's net profit definition was unconscionable. (ELR 12:8:3) The judge therefore disregarded the Paramount net profits clause and awarded Buchwald (and his partner) $900,000 even though the movie had not generated net profits in accordance with the contract's provisions. (ELR 13:11:3) The ruling in the "Coming to America" case is now pending before the California Court of Appeal.

Judge Yaffe's decision in the Batman case has not been published elsewhere, because the California Superior Court is a trial level court, and trial court decisions are not published in California (as trial court decisions in New York often are). Because the issue presented by the Batman case is an especially important one in the entertainment industry, the court's ruling is reprinted below in its entirety.

Batfilm Productions, Inc. v. Warner Bros., Inc., Nos. BC 051653 and BC 051654 (Cal.Super.Ct., L.A.Cnty., March 14, 1994)

Batfilm Productions, Inc., et al., Plaintiffs, v. Warner Bros. Inc., et al., Defendants

Superior Court of the State of California for the County of Los Angeles; Consolidated Cases No. BC 051653 and No. BC 051654

March 14, 1994

Hon. David P. Yaffe, Judge of the Superior Court

Phase I Statement of Decision

The Court divided the trial of this case into two phases. Phase I consisted of a bench trial of plaintiffs' non-jury claims. Those claims primarily concern plaintiffs' "Net Profits" participation in the Batman motion pictures.

The plaintiffs are two individuals, Benjamin Melniker and Michael Uslan, and the two corporations that furnish their services, Batfilm Productions, Inc., and Franklin Enterprises, Ltd. The defendants are Warner Bros. and Polygram Pictures, Inc. (The Court previously granted the summary judgment notion of defendants Peter Guber, Jon Peters, and the Guber-Peters Entertainment Co.) Polygram Pictures did not participate in the bench trial.

In 1979, Mr. Melniker and Mr. Uslan obtained an option on the motion picture rights to the Batman comic book characters. In November 1979, they made a deal with Casablanca Productions (Polygram's predecessor) for the development and production of a motion picture to be based on those characters (the "Casablanca Agreement"). Under the Casablanca Agreement, Mr. Melniker and Mr. Uslan were entitled to receive certain fixed and contingent compensation if a Batman motion picture were produced.

In 1981, Polygram assigned to Warner Bros. its rights and obligations under the Casablanca Agreement. In 1988, Mr. Melniker and Mr. Uslan and Warner Bros. signed a written amendment to the Casablanca Agreement (the "Warner Agreement"). Under the Warner Agreement, Mr. Melniker and Mr. Uslan were entitled to receive $300,000 in fixed compensation for Batman, plus a $100,000 "deferment" once the film generated a certain level of receipts, plus 13% of the so-called "Net Profits," as defined in an attachment to the Warner Agreement.

Warner Bros. has paid Messrs. Melniker and Uslan the $300,000 fixed fee and $100,000 deferment. Under the

Warner Agreement, Warner Bros. has also paid Melniker and Uslan an additional $700,000 in fixed fees on two additional motion pictures (Batman Returns and Batman: Mask of the Phantasm). Warner Bros. will have similar financial obligations to plaintiffs on each additional Batman motion picture. Although Batman has generated more revenue than any other Warner Bros. film, it has not generated any "Net Profits" under plaintiffs' contract. Melniker and Uslan filed suit in 1992 claiming, inter alia, they were denied their fair "Net Profits" compensation.

The primary claims originally to be tried to the Court were the Tenth Cause of Action for an accounting of the revenues and expenses of Batman and the Eleventh Cause of Action for a declaration that plaintiffs' "Net Profits" definition is unconscionable and, thus, unenforceable. On the first day of trial, however, plaintiffs dismissed their accounting claims. Warner Bros. is therefore entitled to prevail on that cause of action.

At the close of plaintiffs' case, Warner Bros. moved for judgment pursuant to section 631.8 of the Code of Civil Procedure. In reviewing the evidence, the Court believed that Mr. Melniker and Mr. Uslan had offered evidence to prove that the Warner Agreement was contract of adhesion that should be strictly interpreted against Warner Bros. and should not be interpreted in a way that would be contrary to plaintiffs' reasonable expectations.

of adhesion is not the same as an unconscionable contract, which is no contract at all. "Unconscionability" requires a far different level of proof. The plaintiffs did not prove that they are to be relieved of their contract with Warner Bros. on the ground of unconscionability.

Mr. Melniker negotiated the Warner Agreement on his and Mr. Uslan's behalf. No one is less likely to have been coerced against his will into signing a contract like the Warner Agreement than Mr. Melniker. This former general counsel and senior executive of a major motion picture studio (Metro-Goldwyn-Mayer) knew all the tricks of the trade; he knew inside and out how these contracts work, what they mean, and how they are negotiated.

Even with Mr. Melniker's knowledge and experience, plaintiffs complain that Warner Bros. knew when the parties signed the Warner Agreement in 1988 that Batman would not generate "Net Profits." Plaintiffs did not explain the relevance of this to the issue of whether their contract is unconscionable. Even if they had, however, they failed to prove that Warner Bros. knew in 1988 that Batman would not generate any "Net Profits."

At the core of plaintiffs' case is their argument that the contract was not fair to them because Warner Bros. and others earned millions of dollars on Batman and plaintiffs did not. The answer that argument is that ever since the King's Bench decided Slade's Case in 1602, right down to today, courts do not refuse to enforce contracts or remake contracts for the parties because the court or the jury thinks that the contract is not fair.

That principle is not some medieval anachronism. This society, this country, this culture operates on the basis of billions of bargains struck willingly every day by people all across the country in all walks of life. And if any one of those people could have their bargain reexamined after the fact on the ground that it was not fair or on an assertion that it was not fair, we would have a far different type of society than we have now; we would have one that none of the parties to this case would like very much.

When one talks about a motion picture and the claims of this type that are made, they all have one thing in common: the plaintiff comes in and says, "Without me, they would have had nothing, and look how they treated me." But the process of making a motion picture consists of the process of bargaining with many talented people on many different and inconsistent bases, and making bargains with them that cannot rationally be compared one to another. It would not be good for the motion picture business or for the parties to this case if any one of those people on any motion picture could come back and ask a court to remake the bargain that he made on the ground that he now asserts, after the fact and in light of the success of the picture, that he was not fairly treated in comparison with others. Whether a contract is fair is not the issue. A contract is not unconscionable simply because it is not fair. Plaintiffs claim that the Warner Agreement is unconscionable within the meaning of Civil Code section 1670.5. To be unconscionable, a contract must "shock the conscience" or, as plaintiffs alleged in paragraph 139(b) of their complaint, it must be "harsh, oppressive, and unduly one-sided."

After considering all the evidence, the Court finds that the plaintiffs have failed to prove that the Warner Agreement, taken as a whole, is unconscionable.

That, however, is not the end of the inquiry that the Court must make. Under Civil Code section 1670.5, if the evidence shows that any part of a contract is unconscionable, the Court may refuse to enforce that part of the contract.

During the trial, plaintiffs claimed that eight elements of the Warner Agreement's "Net Profits" definition were unconscionable: (1) the 10% advertising overhead charge; (2) Warner Bros.' retention of any economic value of United States tax credits created by the payment of taxes in the foreign territories where Batman was distributed; (3) application of the 15% production overhead charge on participation payments to third parties; (4) application of the 15% production overhead charge on the $100,000 deferment; (5) all of the interest charges; (6) the costs charged by Pinewood Studios in England for holding sets and stages after completion of photography; (7) application of the 15% production overhead charge to the costs incurred at the Pinewood Studio lot; and (8) the inclusion in "gross receipts" of only 20% of the revenue from videocassettes, less a distribution fee. (These items, and the dollar amounts associated with them, are listed on Exhibit B9.)

In considering Warner Bros.' motion for judgment under Code of Civil Procedure section 631.8, the Court had little difficulty in rejecting seven of plaintiffs' claims.

As to all of the items relating to overhead charges (Items One, Three, Four, and Seven), the Court granted

Warner Bros.' motion for judgment because the plaintiffs failed to prove that historically Warner Bros.' indirect general administrative expenses for motion picture production and advertising -- "overhead" -- do not equal or exceed the amount charged under the "Net Profits" definition, namely, 15 percent of production costs and 10 percent of advertising expenditures. As a matter of fact, plaintiffs conceded that they could not show that the overhead charges under the "Net Profits" definition exceeded Warner Bros.' actual overhead costs, taken as a whole.

Plaintiffs argued that charging overhead on certain production costs, advertising expenses, gross participations, deferred payments, and payments paid to foreign studios was unconscionable because the administrative cost of providing those goods or services was less than the contractual 10 or 15 percent overhead surcharge. Plaintiffs did not prove that allegation. And, more important, the test is not whether Warner Bros.' overhead charge on a particular direct cost item exceeded the "actual" administrative or other indirect expenses associated with providing that one item or service to the production or advertising of a movie. As the accounting experts for both sides testified, overhead cannot be assessed with such precision. Under the circumstances, the test must be whether the production and advertising overheads charged by using the percentage allocations are, in total, unconscionably higher than Warner Bros.' actual production and advertising overhead costs on a motion picture. Plaintiffs offered no evidence to support such a finding.

Plaintiffs also failed to show that the advertising costs, gross participations, deferred payments, and payments paid to foreign studios were not historically included in the pool of costs that were compared to Warner Bros.' general and administrative expenses to estimate its rate of overhead. In sum, plaintiffs simply failed to prove that any of the overhead charges are unconscionable.

The Court also granted Warner Bros.' motion for judgment as to Item Two, the foreign tax credit. According to plaintiffs, when a motion picture is distributed overseas, many countries impose a tax on the receipts generated. That tax payment gives rise to a credit that can be used under certain circumstances to offset United States income tax obligations. Plaintiffs claimed that, in calculating their "Net Profits," it is unconscionable for Warner Bros. to deduct foreign taxes as a distribution expense without adding something for the value of the foreign tax credits. The plaintiffs failed to prove, however, that Warner Bros. received any foreign tax credits on Batman, or the amounts thereof, or that Warner Bros. received any actual financial benefit from those tax credits when calculating and paying its United States tax obligations. Even if such a credit had been received, the plaintiffs failed to prove that they ever asked Warner Bros. to agree that, in computing "Net Profits," Warner Bros. would augment the gross receipts of the picture by the amount of the tax credits. No such provision is contained in plaintiffs' contract and there was no evidence that they ever expected such treatment of the tax credits.

The Court also granted the motion for judgment as to Item Six, the Pinewood Studios sound stage holdover costs, because there was no evidence that the holdover charge is not properly a cost of the first Batman movie.

The Court granted the motion for judgment as to Item Eight, videocassette distribution, on the ground that Mr. Melniker knew that a 20 percent royalty was standard in the industry. He never questioned it. He never asked that it be changed. The plaintiffs did not prove that the 20 percent royalty unconscionably exceeded the actual revenues, less expenses, from videocassette distribution. They also offered no evidence that a "distribution fee" on the distribution of videocassettes was unconscionable. Nor did they prove that they could have negotiated a better deal elsewhere at the time this deal was made, in which a higher percentage of video revenue, without deduction of a distribution fee, would be credited to the picture in calculating "Net Profits."

Item Five concerned the "interest" charge on production costs. Under paragraph 2A of plaintiffs' contract, "Net Profits" become payable once the picture generates enough gross receipts to cover the specified distribution fees, distribution expenses, and production costs. Until then, under paragraphs 2A and 9 of plaintiffs' "Net Profits" definition, the production costs bear an interest charge. Under the contract, Warner Bros. reduces the interest-bearing balance of production costs with only those gross receipts that remain after deducting the distribution fees and expenses. Plaintiffs claim that is unconscionable for Warner Bros. to not credit the interest-bearing production cost balance with all of the gross receipts of the picture. They also claim that because the distribution fee represents a source of "profit" for Warner Bros., this method of calculating interest is unconscionable because it allows Warner Bros. to charge interest on the cost of production after the picture has generated revenues in excess of that amount.

Plaintiffs did present sufficient evidence to require Warner Bros. to defend its method of computing interest under the contract.

After listening to the evidence presented by Warner Bros. and the arguments of counsel, however, the Court finds that Warner Bros. met its burden of showing that the method of calculating interest provided in their contract is not unconscionable. Warner Bros. met its burden in a number of ways.

Warner Bros. showed that the interest provision in the Warner Agreement is really the same provision found in the 1979 Casablanca Agreement that Warner Bros. did not have anything to do with. Plaintiffs were bound by that contract before they ever dealt with Warner Bros. They cannot complain that they were harmed by being required to abide by a similar provision with the same effect.

Warner Bros. also showed that plaintiffs would not have gotten any better deal on the calculation of interest if they had borrowed the production costs from a third party lender, had produced Batman themselves as independent producers, and had hired Warner Bros. (or presumably anybody else) just to distribute it for them. In that case, plaintiffs would not have been able to use all of the gross receipts generated by the film to repay their lender. Just as in their contract with Warner Bros., they would have been able to repay the production financier only with the gross receipts left over after the distributor retained enough to cover the distribution fees and expenses.

And, if there is a "profit" embedded within Warner Bros.' distribution fee, plaintiffs did not prove the amount of it or that it prevented the picture from showing a net profit.

All of that evidence is sufficient to overcome the plaintiffs' evidence as to the unconscionability of the method of calculating interest under their "Net Profits" contract.

Separately, plaintiffs argued that the language of their "Net Profits" contract did not permit Warner Bros. to continue charging interest once the gross receipts of the picture -- prior to the deduction of distribution fees and expenses -- exceed the total production costs. The duty of the Court is to find out what the parties meant by the language of their contract. If the contract is one of adhesion, the Court interprets it so that it does not defeat the reasonable expectations of the party who was forced to adhere to it. But the Court will not substitute its own interpretation of the contract if that is not what the evidence shows that the parties intended.

The Court rejects plaintiffs' argument because there was no evidence that plaintiffs ever interpreted the language of the interest provisions in the manner claimed at trial. Mr. Melniker was an old hand at motion picture agreements of this type and had negotiated other "Net Profits" contracts like this himself. He had experience with similar provisions yet he never mentioned the interest issue with anyone at Warner Bros. Plaintiffs offered no evidence that they expected Warner Bros. to compute interest in any other manner. They have thus failed to prove that the contract defeated their reasonable expectations.

Given the Court's decision in favor of Warner Bros. on plaintiffs' unconscionability claim, Warner Bros. is entitled to prevail on plaintiffs' Thirteenth Cause of Action for "unfair competition" because that claim was dependent on a finding that their "Net Profits" contract was unconscionable.

Finally, Warner Bros. is entitled to prevail on plaintiffs' Fourteenth Cause of Action arising from the exhibition of the animated Batman television series. Plaintiffs presented no evidence on this cause of action at trial. [ELR 16:4:3]

Tri-Star Pictures prevails again in dispute over termination of distribution agreement for "Return From the River Kwai"

The construction of the framework for the lengthy dispute over the distribution of a film entitled "Return From the River Kwai" began in 1956. At that time, the late Sam Spiegel produced the film "The Bridge on the River

Kwai." An entity known as the Albatross Trust was granted the right to certain royalty payments in connection with the distribution of the film; Academy Pictures eventually succeeded in interest to Albatross.

In 1959, Columbia Pictures Industries, Inc. acquired the copyright to "The Bridge on the River Kwai," subject to Academy's royalty interest.

Leisure Time Productions, in 1978, acquired the film rights to the book "Return From the River Kwai," and registered the title with the Motion Picture Association of America. Columbia Pictures protested the registration of the title. Although the Association did not consider the protest because it was received a few days late, the protest was published in the Association's daily listing service.

In July 1986, Tri-Star Pictures agreed to distribute "Return From the River Kwai" in the United States and Canada. Leisure Time warranted that it would provide the film free of any claims that "can or will" impair or interfere with Tri-Star's rights. The agreement provided for termination upon Leisure Time's breach of any warranty which "materially affect[ed]" the rights of Tri-Star. And Leisure Time agreed to indemnify Tri-Star for any claims caused by a breach of the distribution agreement; the company was required to obtain insurance to protect against trademark claims.

Tri-Star and Columbia Pictures Industries merged in December 1987 and became "sister companies" of Columbia Pictures Entertainment.

In 1990, a Federal District Court (ELR 12:10:3) found that Academy's trademark claim would impair or interfere with Tri-Star's distribution rights and would constitute a breach of Leisure Time's warranty. The court concluded that because Leisure Time could not deliver the film free of all claims against it, Tri-Star was entitled to terminate the distribution agreement.

In subsequent rulings, the court, in part, granted judgment in favor of Tri-Star on its claim for declaratory judgment and in favor of Tri-Star and other Columbia parties, dismissing various claims asserted by Leisure Time.

Federal Court of Appeals Judge Miner, in upholding the District Court decision, first noted that the court was not required to determine that a companion trademark action brought by Academy would succeed in order to decide the instant case. And it was observed that given the indemnity and insurance coverage provisions of the distribution agreement, the threat of money damages arising from the Academy claim would not materially affect Tri-Star's rights under the agreement. However, if Academy obtained a preliminary injunction barring the distribution of the "Return" film, such an injunction would materially affect Tri-Star's rights, stated Judge Miner. It was not clear to the court that the injunctive relief sought by Academy was barred by laches. Thus Academy's claim materially affected Tri-Star's rights and obligations under the distribution agreement and the company was entitled to exercise its right of termination.

The court proceeded to comment that Tri-Star had no duty or obligation to compel its sister company, Columbia Pictures, to license the use of "Bridge on the River Kwai" title for the Leisure Time work, and that Tri-Star had "bargained for the right to protect itself from having to litigate a colorable claim and, in exercising that right, it cannot be said to have acted in bad faith in this case.

Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V., 17 F.3d 38, 1994 U.S.App.LEXIS 3052 (2d Cir. 1994) [ELR 16:4:7]

Musical group may not use the name "1964 as the Beatles"

Apple Corps Limited, the owner of the rights of publicity, trade names and trademarks of The Beatles music group and of its former members individually, sued the members of a performing group known as "1964 as the Beatles," alleging the violation of section 43(a) of the Lanham Act and Tennessee's Personal Rights Protection Act.

The group imitated the overall appearances, hairstyles, dress, mannerisms, voices, equipment and musical performances of The Beatles; referred to each other, on stage, as "John," "Paul," "George," and "Ringo;" adopted Liverpool accents; performed only songs which The Beatles recorded or performed; and placed The Beatles' logo on the group's bass drum, with "1964" written above the logo in small print. During a two year period, the group also marketed shirts, posters and other merchandise featuring the group name "1964 as the Beatles."

A Federal District Court in Tennessee first found that there was a genuine dispute as to whether the public was likely to be confused about whether Apple Corps or The Beatles endorsed or sponsored the group, and, accordingly, denied Apple Corps' motion for summary judgment seeking a permanent injunction under the Lanham Act.

Judge Echols, citing Estate of Presley v. Russen, 513 F.Supp. 1339 (D.N.J. 1981; ELR 3:2:1), then found that the group was not entitled to First Amendment protection for the use of the names and likenesses of The Beatles. Furthermore, the use of a combination of the individual names of The Beatles, as well as the use of the name "The Beatles" in advertising or promotional materials, violated the Tennessee statute, ruled the court.

In turning to the use of advertising posters which were modeled after the album cover for "A Hard Days' Night," the court observed that the posters contained photographs of the faces of the group, photographed from the middle of their noses up. The group members were wearing hair styles similar to the mid-1960s hair styles of The Beatles. The photographs were arranged to form a block, in a format identical to that used on the American version of the album cover at issue.

Judge Echols stated that the "1964" group was using the likenesses of The Beatles to promote its shows; found that the use of the photographs violated the Tennessee statute; granted Apple Corps' motion for partial summary judgment under Tennessee's Personal Rights Protection Act; and permanently enjoined the group from using the distinctive combination of the names of

The Beatles in material advertising or promoting its performances or products; and from using any likeness of the group The Beatles, or the individual members thereof, in advertising or promotional material.

Apple Corps Limited v. A.D.P.R., Inc., 843 F.Supp. 342, 1993 U.S.Dist. LEXIS 19223 (M.D.Tenn. 1993) [ELR 16:4:7]

"Spanky" McFarland's representative may proceed with claims alleging unauthorized use of name

George "Spanky" McFarland, who was a child actor in the "Our Gang" series, brought a lawsuit challenging the use of the name Spanky McFarland by a New Jersey restaurant. The restaurant, owned by Anaconda, Inc. and operated by Joseph Miller, also used McFarland's image as it appeared when he performed in the series.

A Federal District Court granted the restaurant parties' motion for summary judgment on the ground that Hal Roach Studios, Inc., the producer of the "Our Gang" series, or its successor, was the owner of whatever rights McFarland had to the name "Spanky McFarland" under a 1936 contract between the performer's parents, acting on his behalf, and the studio.

Federal Court of Appeals Judge Hutchinson, noting that McFarland died while his appeal was pending, first found that the infringement of a person's right to exploit commercially his own name or the name of a character so associated with him that it identifies him in his own right is a cause of action that under New Jersey law survives the death of the person with whom the name has become identified. McFarland's personal representative therefore was entitled to seek to prevent the unauthorized use of the name "Spanky McFarland." The court further found that there was evidence showing that the name Spanky McFarland had become so identified with McFarland that "it could be considered his own name or the name of a character so associated with him as to be indistinguishable from him in public perception."

Judge Hutchinson also stated that the District Court erred in concluding that the 1936 contract deprived McFarland of all standing to enforce his right of publicity in the name Spanky McFarland. On remand, if McFarland's personal representative can demonstrate that the name Spanky McFarland identified George McFarland and "not just the little urchin Spanky" he portrayed in the movie and television series, McFarland's right of publicity to exploit the name Spanky McFarland would be superior to that of the restaurant parties.

The court reviewed George McFarland's career, the changing ownership of the Our Gang series, and New Jersey law governing the survival of an action alleging the infringement of an individual's right of publicity, reiterating that "where an actor's screen persona becomes so associated with him that it becomes inseparable from the actor's own public image, the actor obtains an interest in the image which gives him standing to prevent mere interlopers from using it without authority." Again, if McFarland's representative demonstrates the performer's identification with the name "Spanky," it did not appear to Judge Hutchinson that New Jersey law would permit the restaurant parties to appropriate the nickname for their own commercial advantage without McFarland's consent. It also did not appear to the court, on the basis of the record presented on the motion for summary judgment, that the 1936 contract could divest

McFarland of all proprietary interest in the exploitation of his own name.

McFarland v. Miller, 14 F.3d 912, 1994 U.S.App. LEXIS 1225 (3d Cir. 1994) [ELR 16:4:8]

Plays are not "joint works," despite contributions made by actors, where there was no intent to merge contributions or where actors' contribution was not separately copyrightable

Three plays written by Karen Erickson and produced at Trinity Theatre (in Evanston, Illinois) were not "joint works," as the Theater later contended, despite contributions made to the plays by actors who appeared in them, a Federal Court of Appeals has ruled. Erickson once served as artistic director (and in other capacities) for

Trinity Theatre. The plays at issue in the case were written and produced while she was affiliated with the Theatre.

Eventually, Erickson left Trinity and demanded that it cease performing the plays. When Trinity refused to do so, Erickson sued it for copyright infringement. Trinity contended that it had not infringed the plays' copyrights, because it asserted that it had received permission to continue staging the plays by the actors who had made contributions to the plays during the writing process and had thereby become co-owners of those copyrights.

The District Court issued a preliminary injunction against Trinity, and that injunction has been affirmed on appeal. The appeals court observed that to be a "joint work" for copyright ownership purposes, those who contribute to its creation must intend to merge their contributions into a unified work and that "collaboration alone" is not sufficient. Also, the contributions of each collaborator must be separately copyrightable; it is not sufficient that the result of the collaboration be copyrightable.

In this case, the evidence concerning two of the plays showed that Erickson, the playwright, did not intend to merge her contribution with those of the actors, and thus those plays were not joint works for that reason. As to the third play, the evidence showed that the playwright may have intended to merge her contribution with those of an actress; but the actress' contribution was not shown to be separately copyrightable expression. Thus that play was not a joint work either.

Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1994 U.S.App.LEXIS 177 (7th Cir. 1994) [ELR 16:4:9]

German Supreme Court reverses decision granting injunctive relief to licensee of Cliff Richard works against unauthorized distributor of imported recordings, but asks European Court of Justice to consider anti-discrimination provisions of EEC

EMI Electrola obtained an exclusive license in Germany to certain recordings by musician Cliff Richard which were first published in 1958 and 1959.

In 1985, Patricia Im-Und Export, a German company, manufactured, in Germany, various records containing performances by Richard. Although the records were ordered by a Danish company and were delivered to the company, they "found their way back to Germany," according to the German Federal Supreme Court, where they were sold by the original manufacturer without the authorization of EMI. Richard's musical works were in the public domain in Denmark, but still were protected by copyright in Germany.

In response to a lawsuit by EMI, a regional appellate court, after referring the matter to the Court of Justice of the European Communities (ELR 11:12:9), ordered the various Patricia parties to cease distributing the records in issue.

The German Federal Supreme Court, in a decision issued in June 1992, noted that the appellate court had found that EMI was entitled to performance protection rights, as derived from Cliff Richard, under sections 96 and 97 of the German Copyright Act of 1966. Richard's rights were based on a constructive adaptor's right in the records he made in 1958 and 1959 under section 2(2) of the Copyright (Literary and Musical Works) Act (1901), which was in force at the time. The performing artist was treated as equivalent to the adaptor as the author of a work "by means of a legal fiction" - the Act did not recognize for the performing artist any performance protection right as such. The appellate court determined that protection under the 1966 Act was available to foreign artists under the Rome revision of the Berne Convention.

The court rejected the appellate court's ruling, stating that EMI could not claim national protection on the basis of German national law in conjunction with international copyright conventions.

The court agreed that it was possible for an adaptor's copyright under section (2)2 of the Copyright Act to have been created in the records. However, under the Copyright Act of 1966, the adaptor's right was transformed into a performer's right under sections 73 et seq. The adaptor, as author, thus in principle became the owner of the rights to an injunction under section 96(1). But the appellate court erred in finding that Richard, from whom EMI derived its rights, could, as a subject of a foreign state, claim protection under German law.

Furthermore, national protection was not available under section 125(5) of the Copyright Act in conjunction with the Rome Revision of the Berne Convention. The Berne Convention, stated the court, only applies to authors' rights and not to performers' rights. The fact that a performing artist was entitled to a constructive copyright in recordings of his/her performances in accordance with the German law in force at the date of the performance did not change this principle. The adaptor's copyright, though formulated as a copyright, constituted a performance protection right, noted the court, and became such under the 1966 Copyright Act.

The court also rejected the argument that EMI was entitled to protection under Article 7(1) of the EEC which prohibits any discrimination on the grounds of nationality. The principle only applies "within the scope of application" of the Treaty, and there are no set Community rules directly affecting copyright and performers' rights. The court nevertheless referred to the European Court the questions of whether the national copyright law of a member state would be subject to the prohibition on discrimination under Article 7(1) EEC, and, if so, whether the provisions operating in a member state for the protection of artistic performances are compatible with Article 7(1) EEC if they do not confer on nationals of another member state the same standard of protection (national treatment) as they do on national performers.

Patricia Im-Und Export Verwaltungsgesellschaft mbH v. EMI Electrola GmbH, [1993] ECC 421 (Available in LEXIS EURCOM Library, Cases File) [ELR 16:4:9]

British appellate court rules that Panamanian company may proceed in lawsuit over Jimi Hendrix musical works

In April 1988, the English solicitors Goodman Derrick & Co. brought a copyright infringement lawsuit in the name of Presentaciones Musicales SA against Daniel Secunda. Presentaciones Musicales claimed to own the copyrights in all the musical works of the late Jimi Hendrix and, in particular, in an album entitled "The Jimi Hendrix Concerts." The company stated that it employed Secunda as its exclusive sales agent for the album in territories outside the United States and Canada, but that Secunda allegedly breached the agency agreement. The solicitors apparently relied on the authority of a Mr. Van Walsum to issue the writ on behalf of the company, which was incorporated in the Republic of

Panama. Subsequently, the solicitors Cameron, Markby, Hewitt succeeded Goodman Derrick & Co.

In March 1991, it was learned that Presentaciones Musicales had been "dissolved" under the Panama Corporations Law in June 1987, about ten months before the lawsuit was filed. However, it was claimed that the commencement of the action was ratified and that the action was adopted by Presentaciones Musicales acting by its directors as its liquidators in May 1991.

A British trial court found that Presentaciones Musicales continued to exist in the eyes of Panamanian law and that its liquidators were entitled to ratify the commencement of the lawsuit, and ordered Secunda not to infringe Presentaciones Musicales' copyrights.

An appellate court, after careful consideration and after noting that the causes of action pleaded by Presentaciones Musicales were not barred by statute in May 1991, dismissed Secunda's appeal.

Judge Roch, another member of the appellate court panel, joined in the dismissal of the appeal. Judge Roch concluded that the issue of ratification was governed by English law and that the ratification of 1988 writ was effected. Presentaciones Musicales thus may proceed with its claims against Secunda for alleged acts of breach of contract and copyright infringement dating back to 1982 and may raise claims based on the Copyright Act 1956, in Judge Roch's view.

Secunda v. Presentaciones Musicales SA, LEXIS Eng-gen Library, Cases File (Court of Appeal, Civil Division, Nov. 12, 1993) [ELR 16:4:10]

Computer bulletin board operator infringed copyrights to Playboy photos uploaded without his knowledge

In what is the first published opinion dealing with copyright in "cyberspace," a Federal District Court in Florida has held that the operator of a computer bulletin board system (BBS) infringed the copyrights to photographs from Playboy magazine. The court ruled that the bulletin board operator violated Playboy's exclusive rights to publicly display and distribute its copyrighted photographs, because subscribers to the defendant's BBS had viewed and downloaded Playboy photos from it.

The Playboy photos in question had been uploaded to the defendant's BBS by his subscribers, not by the defendant himself. The defendant denied knowing the photos had been uploaded to his BBS until served with the complaint in this case. Nevertheless, in granting summary judgment for Playboy, the court held that it did not matter that the defendant may have been unaware that the photos had been uploaded, because intent or knowledge is not an element of copyright infringement and thus even an innocent infringer is liable.

According to the court, the defendant had distributed Playboy's photos by supplying his BBS subscribers with "a product containing unauthorized copies" of those photos. The defendant's activity also constituted a public display, because as used in the Copyright Act the word "display" includes a "transmission" from one place to another, and the display was "public" because even though access to the defendant's BBS was limited to subscribers, those subscribers included a substantial number of people outside the defendant's circle of family and friends.

The court rejected the BBS operator's fair use defense. The court applied the four-factor fair use test set forth in section 107 of the Copyright Act; and the court noted that the defendant's BBS was a commercial use of

Playboy's photos (BBS subscribers paid for the right to access the BBS), Playboy's photos were "fantasy and entertainment" works, the defendant copied a very important part of Playboy's copyrighted publications, and if unauthorized uploading of Playboy's photos became widespread, it would adversely affect the potential market for Playboy's copyrighted works.

Playboy Enterprises, Inc. v. Frena, 839 F.Supp. 1552, 1993 U.S.Dist.LEXIS 19165 (M.D.Fla. 1993) [ELR 16:4:10]

Harmony may be protected by copyright even when added to a pre-existing melody, Federal District Court rules in dispute between heirs of Billy Strayhorn and Duke Ellington over Strayhorn's claimed

interest in the music to a revised version of "Satin Doll"

A dispute between the heirs of composers Duke Ellington and Billy Strayhorn presents what the court itself described as "an issue of first impression: whether a harmony added to an earlier work can, as a matter of law, be the subject of copyright." The dispute arose because Strayhorn's estate claims an interest in the harmony and melody of a revised version of the jazz classic "Satin Doll" when it is performed without lyrics. This claim has been contested by the Estate of Mercer Ellington (Duke Ellington's only child), though the Ellington estate acknowledges that Strayhorn's heirs have an interest in the song when it is performed with lyrics.

The dispute appears to have arisen for both factual and legal reasons. On the factual side, there are at least four versions of "Satin Doll" -- the original instrumental melody, a revised instrumental melody with harmony, and two versions consisting of the revised melody and harmony plus lyrics. The versions of the song containing lyrics were registered for copyright as derivative works. But the registration and renewal certificates for these versions, and other documents (a contract and printed versions of the song), contain inconsistent information about two important facts: whether the "derivative work" copyrights for the song cover the revised version of the music (as well as the lyrics) or only cover the lyrics; and whether Billy Strayhorn contributed only to the song's lyrics or instead co-authored the revised version of its music as well.

In response to cross motions for summary judgment, District Judge Vincent Broderick has ruled that summary judgment could not be granted to either party concerning the scope of the derivative work copyrights -- that is, whether they cover the revised music and the lyrics, or the lyrics only -- because this issue involves genuine issues of material fact. If those copyrights cover only the song's lyrics, then the Strayhorn estate has no interest in "Satin Doll" when it is used or performed without lyrics.

If, however, it is determined that the derivative work copyrights cover the revised music (as well as the lyrics), then the Strayhorn estate would have an interest in the song when used or performed even without lyrics, if Strayhorn collaborated with Duke Ellington in writing the revised music and if the revised music is eligible for a copyright of its own.

This last issue -- whether the revised music is eligible for a copyright of its own -- is the one of greatest interest to those in the music industry who are not directly involved in the case themselves. This is so because the only variation between the original and revised melody is a single note, and Judge Broderick ruled that a one-note variation is too insubstantial to warrant copyright protection. The issue thus became whether adding harmony to an existing melody could result in a derivative work entitled to a copyright of its own (separate from the copyright in the pre-existing melody).

The Ellington estate argued that harmony can never be the subject of copyright, because only melody and structure are original while "harmony results from the formulaic application of centuries-old compositional rules." Judge Broderick agreed that "melody generally implies a limited range of chords which can accompany it." On the other hand, he found that "a composer may exercise creativity in selecting among these chords." Moreover, he found, "Creating harmony may, but need not, be merely a mechanical by-product of melody," because "in contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds." Judge Broderick therefore concluded that harmony could be sufficiently original to warrant copyright protection. The validity of the derivative work copyright to the revised version of "Satin Doll" was held to be a question of fact to be decided at trial.

Tempo Music, Inc. v. Morris, 838 F.Supp. 162, 1993 U.S.Dist.LEXIS 17623 (S.D.N.Y. 1993) [ELR 16:4:11]

Jury must decide whether a grant of "all rights" in a music subpublishing agreement includes homevideo rights, District Court rules in case involving songs by the Rolling Stones

In a case involving a dispute between two music publishers over homevideo rights to certain songs by the Rolling Stones, a Federal District Court in New York has refused to instruct the jury to use a "strict construction" approach in deciding whether a grant of "all rights" in a subpublishing agreement included rights to license use of songs on homevideo devices.

The court noted that the Second Circuit has not yet squarely addressed the issue of licensing rights in new technologies and that the law elsewhere is equally unsettled.

The court said that the fact that the homevideo medium was not generally known in 1966 when the subpublishing agreement was entered into was not conclusive where a transaction is between sophisticated businesspersons. It ruled that although a strict-construction approach may be appropriate where a particular new use was completely unforeseeable and could not possibly have formed part of the bargain, the court refused to apply it where terms of grant were broad and likelihood of technological change was known by parties.

ABKCO Music, Inc. v. Westminster Music Ltd., 838 F.Supp. 153, 1993 U.S.Dist.LEXIS 16929 (S.D.N.Y. 1993) [ELR 16:4:12]

Agency is not required to identify photographer of costumed Robert De Niro, but British court enjoins publication of photographs from "Mary Shelley's Frankenstein"

In November 1993, "The People" newspaper published a photograph taken during the filming of "Mary Shelley's Frankenstein." In the film, Robert De Niro portrays a character known as "the sharp featured man"; the character is transformed, after his execution by hanging, into "the creature." The photograph depicted De Niro standing with the hangman character and another character on the scaffold.

Shelley Films sued Rex Features Limited, the agency which supplied the photograph to the newspaper, seeking to enjoin the agency from making further use of the photograph and seeking the disclosure of the identity of the photographer.

Shelley Films pointed out that 95 per cent of the individuals on the film set were under a contractual obligation of confidence to the producer. But Chancery Division Judge Rattee stated that there was evidence indicating that the photographer was not an employee of Shelley Films; that it appeared, at this stage of the proceedings, that the producer did not have a cause of action in breach of confidence against either the photographer or Rex Features; and that the court, accordingly, lacked jurisdiction to issue the requested disclosure order.

In a subsequent ruling, the Chancery Division stated that Shelley raised serious questions on the issues of copyright infringement and breach of confidence; that the company, if successful at trial, would not be adequately compensated by an award of damages; and that the potential for damage to Shelley's commercial interest, should the company succeed at trial, appeared to outweigh any potential damage to Rex. The court, accordingly, granted an injunction restraining Rex, pending trial, from publishing photographs of "costume, costume design, set, set design or character body and facial prosthesis and prosthesis designs made for use in [Shelley's] film 'Mary Shelley's Frankenstein'...and any other photograph, reproduction or image made or apparently or purportedly made within the said studios and depicting the making of the said film..." The order was limited in its application to the costumes of specifically named actors.

Shelley Films Limited v. Rex Features Limited, Chancery Division (1993) (Available in LEXIS ENGGEN Library, Cases File) [ELR 16:4:12]

British appellate court orders discharge of injunction barring television program from using excerpts from "A Clockwork Orange"

A British trial court granted Time Warner an injunction barring Channel Four Television Corporation and Fabula Films Ltd. from using about twelve minutes of excerpts from the film "A Clockwork Orange" in a documentary program entitled "Without Walls."

On appeal, Judge Neill first found that it was irrelevant, with respect to the issue of fair dealing under section 30(1) of the Copyright Designs and Patent Act

1988, that the Channel Four parties obtained a laser disc of the film in Paris. The court noted that there may be cases, particularly in relation to unpublished works, where the method of obtaining the copyrighted material is relevant to the issue of fair dealing. In the instant case, the fair dealing defense, if otherwise available, was not destroyed by the method by which the Channel Four parties obtained the clips.

Time Warner complained that nine of the twelve excerpts used in the program depicted violence, thereby creating an "unfair impression of the film's overall content." Judge Neill, contrary to the trial court, stated that he was not prepared to assume that the program misrepresented the film "to any significant extent."

It then was found that although the clips from "A Clockwork Orange" amounted to about eight percent of the television program, the use was within the scope of fair dealing. Judge Neill observed that the clips were accompanied by voiceover commentary and criticisms.

Time Warner argued that Channel Four's purpose in broadcasting the program was to encourage the release of the film in England, where it has not been shown for twenty years. But the court stated that although Channel Four's claim that the purpose of the progam was for criticism and review might be "shaken" at trial, Time Warner had not demonstrated, at this stage of the matter, that there were serious issues to be tried on the fair dealing defense. The court allowed the appeal, and discharged the injunction.

Judge Henry agreed that the Channel Four parties raised a prima facie defense under Section 30 and that the injunction should be discharged. Judge Farquharson agreed with Judges Neill and Henry.

Time Warner Entertainments Company LP v. Channel 4 Television Corporation, LEXIS in ENGGEN Library, Cases File (Court of Appeal, Civil Division, Oct. 1993) [ELR 16:4:13]

Publisher of Margaret Thatcher's memoirs may not restrain newspaper's unauthorized use of excerpts

On October 6, 1993, the Daily Mirror published material based on "The Downing Street Years," the memoirs of Lady Thatcher. Times Newspapers had purchased the exclusive right to publish extracts from the work. The book was scheduled to be published by Harper Collins on October 18th; Times Newspapers planned to begin publishing excerpts from the text on October 10th.

When the Harper Collins parties sought an injunction to restrain further publication by the Daily Mirror, a British trial court refused to grant the requested relief.

On appeal, Sir Thomas Bingham addressed the claim of breach of confidence, stating that the parties' copyright claim did not raise any issues "not already involved in the confidence issue." It was observed that Times Newspapers had "an obvious commercial interest" in maintaining the secrecy of the Thatcher material until October 10th. But the court found that the company's commercial interest did not confer on the material the requisite "quality of confidentiality." Sir Bingham referred to the possibility that the law may be extended to establish a right of confidence in circumstances such as those before the court, but declined to so extend the law in a hearing on an interlocutory application.

After questioning the clarity of the wording of the proposed injunction, the court agreed with the trial court's determination and dismissed the appeal.

In a concurring opinion, Judge Leggatt expressed regret that Times Newspapers could not restrain the "continued pirating" of passages from the book, but adverted to the possibility that the publishers eventually may recover damages.

Times Newspapers Ltd v. MGN Ltd, Court of Appeal (Civil Division), 1993) (Available in LEXIS ENGGEN Library, Cases File) [ELR 16:4:13]

Order preventing broadcast of "America's Most Wanted" segment on criminal awaiting trial is reversed

Gerald D. Murray was awaiting trial on charges of first degree murder and sexual battery arising out of the 1990 slaying of a 59-year-old woman. The case, according to Florida appellate court Chief Judge Zehmer, had extensive notoriety. On October 16, 1993, Murray's attorney filed an emergency motion seeking a "gag" order to prevent the broadcast that evening of a segment of the television program "America's Most Wanted" over WAWS in Jacksonville. Murray's trial was scheduled for the week of December 13, 1993; the motion claimed that the segment, which contained details about Murray's case would violate his Sixth Amendment rights.

The trial court prohibited WAWS from broadcasting any segments of "America's Most Wanted" at the scheduled time on October 26th to the extent that the program contained non-news segments, such as interviews of the victim's family members, referring to Murray.

The appellate court granted a petition for certiorari filed by Clear Channel Communications (the operator of WAWS); stated that the trial court erred in sealing the hearing transcript; found that Murray's motion was legally insufficient to support the entry of the trial court's order; and quashed the order.

In a May 1994 opinion explaining the basis for its order on the petition, Chief Judge Zehmer stated that the order constituted an invalid prior restraint in violation of Clear Channel's First Amendment rights. The unsworn emergency motion did not set forth the nature and extent of the pretrial publicity that would result from the broadcast of the segment at issue. The court apparently did not consider alternative measures to protect Murray's right to a jury trial. And there was no showing that the restraint imposed by the court could effectively prevent the anticipated harm. The order permitted information characterized by the court as "news" relating to the case to be televised and did not prohibit the publication in the Jacksonville area, by other parties, of non-news material. Chief Judge Zehmer commented that attempting to distinguish "news" from "non-news" served to "improperly inject the court into the editorial process" and rendered the order impermissibly vague and overbroad.

Clear Channel Communications, Inc. v. Murray, 1994 Fla.App.LEXIS 4499 (Fla.App. 1994) [ELR 16:4:13]

Invasion of privacy claim against newspaper is remanded for findings on "newsworthiness" of published information

In February 1989, the Detroit News published an article by Ann Sweeney concerning unique love relationships involving friends or family members of former mates. Denise Winstead's ex-husband, in response to an advertisement seeking information for the article, provided the newspaper with details of his relationship with Winstead. The article included the ex-husband's story in quotation marks, identified the persons involved by their first names only, and did not refer to the age, career, or location of any of the parties. However, the article did mention that "Denise" had several abortions, engaged in partner swapping, and was involved in a surrogate parenting relationship with her ex-husband and friend "Linda" because "Denise" was unable to have children.

Winstead alleged that the article invaded her privacy by publishing embarrassing private facts.

A Michigan trial court granted the newspaper's motion for summary judgment on the ground that the information in the article was privileged as "newsworthy."

A Michigan appellate court stated that although the article may have been newsworthy, it was necessary to remand the matter for the trial court to determine if reasonable minds could differ as to whether the information published about Winstead was of legitimate public interest.

Judge J.H. Gillis also suggested that the trial court, after further development of the record, review the issue of whether there was a "logical nexus" between the information published about Winstead and the topic of the article to justify the application of the privilege.

And even if Winstead's ex-husband had an absolute First Amendment right to tell his story, including those facts revealed in the instant proceeding, the court questioned whether the newspaper parties could assert that right in their defense.

Winstead v. Sweeney, 205 Mich.App. 664, 1994 Mich.App.LEXIS 278 (Mich.App. 1994) [ELR 16:4:14]

Discovery is ordered concerning unauthorized taping of government search by CBS "Street Stories" crew

In May 1992, United States Treasury Agent James Mottola obtained a search warrant authorizing government agents to enter Babatunde Ayeni's apartment to search for items related to Ayeni's purported involvement in a credit card fraud operation. When the agents arrived, Ayeni's wife and son were home alone. The agents announced that they were police conducting an investigation. Mrs. Ayeni, as described by Federal District Judge Weinstein, "cracked open the door...[and] the agents pushed into the apartment."

Subsequently, additional agents arrived, along with a CBS news crew from "Street Stories." Mrs. Ayeni, who was not informed that the crew was from CBS, asked not to be photographed.

The CBS crew taped the agents as they searched the apartment and the Ayenis' belongings, and as they questioned Mrs. Ayeni regarding her husband's whereabouts and the objects in the apartment. The crew conducted an interview, in the foyer of the apartment, with an agent; during the interview, the agent, according to the complaint, "implied the complicity of other residents of the Ayeni apartment." The only item seized from the apartment was a family photograph of the Ayenis, which also was taped by CBS, as was an agent's statement "expressing disappointment that no evidence of credit card fraud had been found."

Judge Weinstein stated that Mottola's act of facilitating the CBS camera crew's entry into the apartment and its filming of the search apparently exceeded the scope of the warrant. At this stage of the proceeding, Mottola's action arguably "was so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution."

The photographs taken by CBS amounted to a "seizure" under the meaning of the Fourth Amendment; the crew was filming for its own purposes, not as part of the authorized search.

In all, the defense of qualified immunity was not available to Mottola or to the CBS parties, stated the court, in ordering further discovery.

CBS, emphasized Judge Weinstein, "had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record. The images, though created by the camera, are a part of the household; they could not be removed without permission or official right." CBS claimed no First Amendment right to be present - the television tape was a seizure of private property, i.e., information, for non-governmental purposes. On the basis of the pleadings, CBS was not entitled to qualified immunity. Even if the company was entitled to the same defense as a government official, the allegation that there was a violation of a clearly established constitutional right precluded a grant of qualified immunity, declared Judge Weinstein, in finding that the motion to dismiss was properly denied.

Ayeni v. CBS Inc., 848 F.Supp. 362, 1994 U.S.Dist.LEXIS 3023 (E.D.N.Y. 1994) [ELR 16:4:14]

Music publishers are awarded monetary damages and broad injunctions against the owners of restaurants, a physical fitness facility, a tavern and a lounge that performed songs without ASCAP licenses

In five similar but otherwise unrelated cases, music publishers have been awarded statutory damages and broad injunctions against the owners of businesses that publicly performed music without necessary ASCAP licenses.

In one of these cases, liability for the unlicensed public performances of songs by a restaurant has been imposed on an officer and shareholder of the corporation that controlled the restaurant, who also was the restaurant's manager, because he knew that the restaurant's ASCAP license had been terminated and because he had a financial stake in the restaurant's infringing activity. The defendant had continued to permit public performances of copyrighted music despite repeated ASCAP warnings, and thus a Federal District Court in Massachusetts awarded statutory damages of $2,500 per song, for a total of $15,000, even though the defendant's unpaid license fees plus ASCAP's investigative fees amounted to only $6,800. In awarding this amount (plus attorneys' fees), the court noted the Copyright Act's "strong deterrence policy." Also, because the restaurant had continued to permit unlicensed public performances of copyrighted music despite numerous warnings from ASCAP, an injunction barring the public performance of "any" composition in the ASCAP repertory was held to be appropriate.

In another case, a physical fitness facility was not exempt under section 110(5) of the Copyright Act from the requirement that it obtain a public performance license to play music, where the facility's sound system included 13 recessed ceiling speakers and several floor speakers, and where the system "further transmitted" songs throughout the facility, a Federal District Court in Georgia has ruled. As a result, the music publishers who own the copyrights to the songs that were performed have been awarded statutory damages of $2,500 for each of three infringements, for a total of $7,500, against the owners the fitness facility. During the period in question, an ASCAP license for the facility would have been only $1,900. In awarding almost four times what the license fee would have been, the court noted that the defendants had continued to publicly perform music despite 26 letters from ASCAP warning them of the need to have a license for such performances. Thus, the court explained that if it awarded only the amount of the license fee, the defendants would have succeeded in "flouting the copyright laws with no net loss." The court said that its $7,500 award "should help to deter" the defendants and others from "willfully violating the statutory requirements of the Copyright Act."

In a third case, the owner of a tavern where music was publicly performed without a license has been declared a "willful infringer" even though the band had contractually agreed not to perform any songs they were not authorized to perform. A Federal District Court in Texas has ruled that the tavern owner could not escape liability by instructing performers not to play copyrighted music; and the fact that performers were independent contractors would not absolve the tavern owner from liability. As owner of the tavern, the defendant had a financial interest in the infringing activity and the right and ability to supervise it, the court held. As a result, the music publishers who were the owners of the copyrights to the songs performed in the tavern were awarded statutory damages of $2,500 for each of seven infringements, for a total of $17,500, against the owner of the tavern. In this case too the court noted that the defendant had continued to publicly perform music without a license despite numerous warnings from ASCAP that a license was necessary. And the court explained that the amount awarded was both to compensate the plaintiffs and to deter future violations. Because the tavern had continued to permit unlicensed public performances despite numerous warnings from ASCAP, the court granted an injunction barring the public performance of "any ASCAP members' copyrighted music without proper authorization."

In a fourth case, copyright owners were awarded statutory damages of $1,500 for each of three infringements, for a total of $4,500, against defendants who had publicly performed music in a lounge without a license despite 13 contacts from ASCAP warning them of the need to have a license for such performances. During the period in question, the defendants' ASCAP license would have been only $1,770; but the court said that it had attempted "to fashion a remedy which puts the defendants on notice that it costs less to obey the copyright laws than to violate them," and that its award was "an appropriate amount to deter the defendants from continuing their infringing conduct and to sufficiently protect the copyrights held by the plaintiffs." A permanent injunction also was entered.

In another restaurant case, the owner of the restaurant was held liable for copyright infringement because music was performed in the restaurant without a license, despite the owner's claim that he had not authorized the infringing performances. The court ruled that he was liable, because as the owner of the restaurant, he had the right and ability to supervise the infringing activity and an obvious and direct financial interest in the exploitation of copyrighted materials. Though the defendant argued that as an ASCAP license would have been only $649 per year for the two years during which the unlicensed performances took place, the court awarded some of the copyright owners statutory damages of $1,500 for each infringement and other owners statutory damages of $2,500 for each infringement, plus more than $8,600 in attorneys' fees and disbursements, and it issued a permanent injunction. The court did so, because the defendant had disregarded ASCAP's attempts to offer a license on more than 30 occasions.

Marvin Music Co. v. BHC Ltd. Partnership, 830 F.Supp. 651, 1993 U.S.Dist.LEXIS 12605 (D.Mass. 1993); Swallow Turn Music v. Wilson, 831 F.Supp. 575, 1993 U.S.Dist.LEXIS 12306 (E.D.Tex. 1993); Blue Seas Music, Inc. v. Fitness Surveys, Inc., 831 F.Supp. 863, 1993 U.S.Dist.LEXIS 12910 (N.D.Ga. 1993); Jasperilla Music Co. v. Wing's Lounge Ass'n, 837 F.Supp. 159 (S.D.W.Va. 1993); Superhype Publishing, Inc. v. Vasilious, 838 F.Supp. 1220, 1993 U.S.Dist.LEXIS 16750 (S.D.Ohio 1993) [ELR 16:4:15]

United States Supreme Court remands decision upholding "must-carry rules"

A Federal District Court for the District of Columbia, in an action challenging sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, ruled (ELR 15:2:8) that the challenged provisions did not violate the First Amendment. The provisions require cable television systems to carry the signals of a specified number of local broadcast television stations.

The United States Supreme Court, in a 5-4 decision, has found that there remain unresolved issues of material fact in the record, and, accordingly, vacated the District Court's judgment and remanded the matter for further proceedings.

Section 4, as described by Justice Anthony M. Kennedy, requires cable operators to carry "local commercial television stations," including all full power television broadcasters, other than those qualifying as "noncommercial educational" stations under section 5, that operate within the same television market as the cable system. Cable systems with more than 300 subscribers, but only 12 or fewer active channels, must carry the signals of three commercial broadcast stations.

If there are fewer broadcasters requesting carriage than space available under the Act, the cable operator must carry only those broadcasters who request carriage. If there are more requesting broadcast stations than spaces available, the cable operator may choose which of the stations it will carry. The broadcast signals carried under section 4 must be transmitted on a continuous, uninterrupted basis, and must be placed in the same numerical channel position as when broadcast over the air. And, subject to a few exceptions, a cable operator may not charge a fee for carrying broadcast signals in fulfillment of its must-carry obligations.

Section 5 imposes similar requirements for the carriage of local public broadcast stations, referred to in the Act as local "noncommercial educational television stations." A cable system with 12 or fewer channels must carry one of these stations; a system of between 13 and 36 channels must carry each local public broadcast station requesting carriage. The Act requires cable operators to import distant signals in certain circumstances, but provides protection against substantial duplication of local public broadcast stations. And section 5 requires cable system operators to carry the program schedule of a public broadcast station in its entirety and at its same over-the-air channel position.

Justice Anthony Kennedy noted that Congress, after evaluating the technological and economic conditions in the cable industry, had concluded that in the absence of must-carry rules, there was a "substantial likelihood" that additional local broadcast signals might be deleted, repositioned, or not carried; that the shift in market share from broadcast to cable would continue to erode the advertising revenue base which supports free local broadcast television; and that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."

It was pointed out that the must-carry rules regulate cable speech by reducing the number of channels over which cable operators exercise "unfettered control," and by making it more difficult for cable programmers to compete for carriage on the limited channels remaining. But although the rules, on their face, impose special obligations upon cable operators and special burdens upon cable programmers, the rules do not do so with reference to the content of speech, stated Justice Kennedy, in declining to impose a strict scrutiny review. The extent of any interference with the cable operators' editorial discretion does not depend upon the content of the cable operators' programming, and all cable programmers confront the same reduction in the number of channels for which they can compete. The privileges conferred by the must-carry rules also are unrelated to content - the rules benefit all full power broadcasters who request carriage, as long as the broadcaster operates in the same television market as a cable system.

According to the court, the rules distinguish between speakers in the television programming market only with respect to the manner in which speakers transmit their messages to viewers, and not with respect to the messages they carry, i.e., broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored.

The court rejected the argument that the rules are content-based because they promote speech of a favored content. Rather, the "overriding objective" of Congress in enacting the must-carry rules was "to preserve access to free television programming for the 40 percent of Americans without cable." The rules, emphasized Justice Kennedy, "do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements."

The fact that Congress stated that broadcast television stations are valuable contributors to the national communications system does not mean that the must-carry rules are content-based, continued Justice Kennedy. The rules were designed to protect broadcast television from what Congress determined to be unfair competition by cable systems and "to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming - whatever its content."

In concluding that the rules were not designed to favor or disadvantage speech of any particular content, the court also rejected the argument that the rules are content-based because the preference for broadcast stations "automatically entails content requirements" (emphasis by the dissent in the District Court).

Justice Kennedy next rejected the claim that strict scrutiny was warranted because the rules compel speech by cable operators, favor broadcast programmers over cable programmers, and single out certain members of the press for "disfavored treatment." The court reiterated that the must-carry rules are justified by the special characteristics of the cable medium - "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television" and that the rules, which apply to almost all cable systems in the country, do not present inherent dangers to free expression or the potential for censorship or manipulation. The court agreed with the District Court in applying the intermediate standard for content-neutral restrictions that impose an incidental burden on speech, citing Ward v. Rock Against Racism, 491 U.S. 781 (1989; ELR) and United States v. O'Brien, 391 U.S. 367 (1968).

However, on the basis of the record developed thus far in the case, and in the absence of findings of fact from the District Court, Justice Kennedy was unable to conclude that the government parties had shown a danger to the economic health of local broadcasting and that the must-carry rules did not burden substantially more speech than was necessary to further the government's legitimate interests. The government parties asserted that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems and that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail. Justice Kennedy noted the absence of evidence establishing that any dropped or repositioned broadcaster would be at serious risk of financial difficulty, and the lack of findings concerning the actual effects of the rules on the speech of cable operators and cable programmers - "i.e., the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters." It also was noted that the record did not provide judicial findings concerning "the availability and efficacy" of constitutionally acceptable less restrictive means of achieving the government parties' asserted interests.

In view of the unresolved genuine issues of material fact, the District Court erred in granting summary judgment on behalf of the government parties, stated Justice Kennedy, in remanding the case for further proceedings.

Justice Harry A. Blackmun, in a concurring opinion, emphasized the "paramount importance of according substantial deference to the predictive judgments of Congress," particularly where Congress, as in the instant case, developed an extensive record. On remand, the government parties may present additional material from the record.

Justice John Paul Stevens concurred in the judgment and joined in parts of Justice Kennedy's opinion, but would have affirmed the District Court's judgment sustaining the must-carry rules. The District Court, stated Justice Stevens, evaluated the rules as content-neutral regulations of protected speech according to the same standard Justice Kennedy instructs the court to apply on remand.

For Justice Stevens, Congress's findings were sufficient to sustain the must-carry rules against facial attack. Furthermore, even if Congress had not had evidence that terminations or refusals of carriage already had occurred, it reasonably could have inferred that the cable operators' "bottleneck" control, together with the already high degree of vertical integration in the industry would "motivate such conduct in the near future...An industry need not be in its death throes before Congress may act to protect it from economic harm threatened by a monopoly," commented Justice Stevens. Although reiterating that additional evidence was not necessary to resolve the question of the facial constitutionality of the must-carry rules, Justice Stevens, stating his substantial agreement with Justice Kennedy's analysis of the case and the fact that a vote to affirm the District Court judgment would mean that no disposition of the appeal would obtain the support of a majority of the court, concurred in the judgment vacating and remanding the matter.

Justice Sandra Day O'Connor, with whom Justices Antonin Scalia and Ruth Ginsburg joined, and with whom Justice Clarence Thomas joined, in part, would have found that the must-carry rules, by reserving about one-third of the channels on a cable system for broadcasters, violate the First Amendment. Justice O'Connor analogized the operation of the must-carry rules to a situation where the government orders all movie theaters to reserve at least one-third of their screenings for films made by American production companies, or requires all bookstores to devote one-third of their shelf space to nonprofit publishers. It appeared to Justice O'Connor that the rules prefer broadcasters over cable programmers and that this preference is not content-neutral; that "preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content;" and that content-based justifications, even if "benignly motivated" are subject to strict scrutiny.

The asserted interests in localism and in diversity of viewpoints are not "compelling" for the purposes of the compelling state interest test, in Justice O'Connor's view, so as to justify a content-based speech restriction. And even assuming that the government could set aside some channels to serve its purported interests in public affairs and educational programming, the statute was not sufficiently tailored to this goal - the dissent observed that the statute burdens not only cable entertainment programmers, but also CNN and C-SPAN and other public affairs and educational channels. In all, the must-carry rules impermissibly restrain the cable operators' editorial discretion as well as the cable programmers' speech, declared Justice O'Connor.

The dissent concluded by stating that the must-carry rules are "fatally overbroad," even under a content-neutral analysis in that the rules disadvantage cable programmers even if an operator has no anticompetitive motives and even if a broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access.

Justice Ginsburg concurred in part and joined Justice O'Connor's opinion concurring in part and dissenting in part. Justice Ginsburg, substantially for the reasons stated by the dissenting judge in the District Court decision in the matter, concluded that the must-carry rules are an "an unwarranted content-based preference and hypothesize a risk to local stations that remains imaginary." If the apparent lack of evidence indicating that broadcast television is in jeopardy is not overcome on remand, this should result in an ultimate judgment for the cable parties, declared Justice Ginsburg.

Turner Broadcasting System v. Federal Communications Commission, 62 LW 4647, 1994 U.S.LEXIS 4831 (U.S.Sup.Ct., June 27, 1994) [ELR 16:4:16]

Artists prevent dismantling of sculptural installation

John Meade Swing, John James Veronis, Jr. and John Francis Carter have worked together, under the name "Three-Js" or Jx3", to create sculptures and other works of visual art.

In 1991, the artists agreed to design, create and install sculptures and other works in the lobby of a building in

Queens, New York. Sig Management Company granted the artists full authority with respect to the design, color and style of the works to be installed, but retained the right to determine the location of the pieces. The contract provided that the artists would receive credit for the sculptures and art works and would own the copyrights in the works. Sig Management was to receive fifty percent of any proceeds earned from the exploitation of the copyrights. The parties extended the term of the contract until January 1994.

From December 1991 until July or August 1993, Sig Management, as described by Federal District Court Judge David Edelstein, paid each artist $1,000 weekly. From the summer of 1993 until April 1994, a successor partnership to Sig continued the payments to the artists, as work on the installation proceeded.

On about April 21, 1994, the artists sued Helmsley-Spear, Inc., alleging the violation of Section 106A(a)(3) of the Copyright Act, known as the Visual Artists Rights Act of 1990. The statute provides that the author of a work of visual art, subject to specified limitations, has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right." The author also may prevent any destruction of "a work of recognized stature," and any intentional or grossly negligent destruction of that work will violate the author's rights.

The artists claimed that Helmsley-Spear had announced its intention to remove or materially alter the works at the Queens property and that the artists were entitled to preliminary injunctive relief based on the presumption of irreparable harm generally available in cases of copyright infringement.

Judge Edelstein stated that even assuming that the presumption of irreparable harm would not apply to claims brought pursuant to the Visual Artists Rights Act, the artists established that they would be irreparably harmed if the Helmsley-Spear parties altered, defaced, modified or mutilated the art works at issue during the pendency of the lawsuit. The statute embodies a droit moral, such that the proposed dismantling of the works would leave the court without the power to remedy the violation of the artists' rights.

The artists also showed that they would be irreparably injured if they were to be denied access to the lobby of the Queens property during the pendency of the lawsuit for the purposes of observing, viewing, or showing the works, or photographing or videotaping the works, continued the court. It was noted that the artists had unrestricted access to the property prior to the events leading to the lawsuit - the denial of access would mean that the artists would be unable "to protect, or prevent the exploitation or infringement of, their copyright" in the works. Permitting access to the property also was necessary to insure that the works were not altered, defaced, modified or mutilated, commented Judge Edelstein, as well as to allow the artists to prepare for the trial on the merits of their claims.

The court, however, found that the artists did not show irreparable harm absent preliminary injunctive relief with respect to the claim of breach of contract against Sig Management.

It was determined that the artists demonstrated the existence of sufficiently serious questions going to the merits to make them a fair ground for litigation and also demonstrated that the balance of hardships was in the artists' favor.

The artists made a strong showing that the work was not a "work made for hire," stated the court. In reviewing the factors set forth in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989; ELR 11:3:12) as being relevant to the question of whether a party who creates a copyrightable work is an "employee," Judge Edelstein cited the testimony presented by Helmsley-Spear which indicated that Sig Management and the successor partnerships provided the artists with some tools, required that the artists work on the project for a minimum number of hours weekly, paid the artists via a weekly check from which taxes were withheld, paid some of the artists' assistants, and provided the artists with some health insurance benefits for a portion of the time they worked on the project.

More significantly, observed the court, the partnerships did not have the right to determine the "shape or style" of the work. The artists claimed that it was their understanding that they would be designing a lobby which would be a "museum" of their original art work; such "unfettered artistic freedom" was not characteristic of an employer-employee relationship, stated Judge Edelstein.

Furthermore, the artists were highly skilled, used many of their own tools to create the work, and did not have an ongoing employment relationship with the partnerships. The partnerships were not in the business of creating, marketing, or exploiting works of art or sculpture. The artists were required to work a minimum number of hours weekly on the work, but were permitted to, and often did, work additional hours. There was no deadline for the completion of the work; apparently, it was understood that the project would end when the artists completed the transformation of the lobby. The artists worked for a period of time without any insurance benefits, and supplied thousands of dollars worth of raw material for which they never sought or received reimbursement.

Judge Edelstein found it particularly relevant that the artists owned the copyright to the work and that the work was signed by the "Three-Js," rather than with a corporate logo, trademark, or company name.

The work at issue consisted of a number of sculptural elements and other visual elements - the artists presented evidence to show that the work was permanently incorporated into the property and could not be removed without the destruction of the work. Judge Edelstein noted that tile was attached to the floor and walls to form "a vast mosaic" interrelated with sculptural elements adorning the floor, walls, and ceiling of the lobby. The mosaic contained words and phrases corresponding to sculptural elements located on the ceiling and walls. The court described the interrelationship of the elements comprising one portion of the lobby, which, together, depicted "the destruction of the world's oceans as a result of man's greed," and noted that the floor mosaic, composed of more than 800,000 recycled glass tiles, was permanently attached to the floor. Removal of the tiles, as well as other tiles affixed to the walls, could only be accomplished by chiseling them off of the floor or walls - a process that would result in their destruction.

Thus, it was shown that the work was "incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work," and a serious question was raised as to the merits of the claim that the work was entitled to protection as a work of visual art installed in a building that could not be removed without its destruction.

The artists also presented testimony indicating that the work was a "work of recognized stature" under the statute, and indicating that the destruction of the work would affect their honor and reputation.

Helmsley-Spear's constitutional challenge to the statute were not so likely to prevail at trial as to prevent the issuance of preliminary injunctive relief, stated Judge Edelstein, who rejected the argument that the statute operated as an unconstitutional taking - the statute did not compel property owners to allow any invasion of their property interests, and did not require that a work of visual art, once installed, remain in place for perpetuity. The work must remain in place only during the creating artist's life. And an owner may, at the time a work is installed, seek from the artist written consent to waive the rights granted by the statute.

The artists showed that they would suffer great hardship if the work were to be altered or destroyed or if access were denied, stated the court. Helmsley-Spear's claim that the work was unsafe was rejected - any potential hazards did not appear to present an imminent threat to the public and could be remedied without altering or destroying the work, declared Judge Edelstein.

The court therefore enjoined the Helmsley-Spear parties from taking any action to alter, deface, modify, or mutilate the sculptures in issue and from denying the artists access to the Queens property for the purpose of viewing, photographing or videotaping the work.

Carter v. Helmsley-Spear, Inc., 852 F.Supp.228, 1994 U.S.Dist.LEXIS 6447 (S.D.N.Y. 1994) [ELR 16:4:19]

Chicago aldermens' claims of immunity are rejected in civil rights action brought by art student

Harold Washington, Chicago's first black mayor, died of a heart attack in November 1987, shortly after being re-elected. In May 1988, the Art Institute of Chicago presented a student exhibition. The exhibition, which was not open to the public at large, included a painting by David Nelson entitled "Mirth and Girth," which, as described by Federal Court of Appeals Chief Judge Posner, portrayed "a full-length frontal portrait of a portly grim-faced Harold Washington clad in a white bra and G-string, garter belt, and stockings." The painting apparently angered some viewers, but Nelson refused a request by school officials to remove the work.

The Chicago City Council subsequently passed a resolution threatening to cut off the city's contribution to the Art Institute unless the Institute apologized for displaying the painting.

Several aldermen, at some point, went to the school and took the painting down. The painting, after incurring a one-foot gash, was retrieved by police officers and returned to Nelson. The president of the Art Institute

Board later issued a public apology promising that the painting would not be displayed publicly.

Nelson brought a civil rights action under 42 U.S.C. section 1983, charging that certain aldermen had deprived him of his First and Fourth Amendment rights.

A Federal District Court rejected the defense of official immunity. In upholding the court's ruling, Judge Posner first expressed concern at being asked to resolve the threshold issue of immunity in a five-year old case.

The court then considered whether, in 1988, the law was clear "that local government officials may not go onto private property without invitation..., seize a painting that they do not like because it vilifies a public official with whom they had been associated, and wrap it in brown paper and remove it so that no one can see it." To ask the question, stated Judge Posner, was "pretty much to answer it." If the city owned the Art Institute, it would have some power to regulate offensive displays, noted the court, but the aldermen had "no more right to enter it uninvited and take the art off its walls than they would have to enter a private home and take 'offensive' art off its walls."

Judge Posner concluded by suggesting that the District Court quickly resolve the case, stating that the aldermen's defenses to liability were "threadbare," whatever may be the measure of damages to Nelson.

Nelson v. Streeter, 16 F.3d 145, 1994 U.S.App.LEXIS 1597 (7th Cir. 1994) [ELR 16:4:20]

Cincinnati Reds' banner policy again is held unconstitutional in dispute over "John 3:16" sign display

As reported at ELR 15:5:21, the Reverend Guy Anthony Aubrey successfully challenged the banner display policy of the Cincinnati Reds. The team's policy, as of 1990, required that banners and signs be in good taste, not interfere with the sight-line of the batter, pitcher or umpire looking down the foul line, and not obstruct the view of anyone in the stands. Aubrey had attempted to display, at Game Two of the 1990 World Series, a sign citing the biblical passage "John 3:16;" security personnel confiscated the banner. A Federal District Court found that the team's "good taste" standard, as written, was substantially vague and overbroad.

The team adopted a new sign and banner policy in 1993. However, when Aubrey attended a game with the intention of displaying signs readings "John 3:16" and "Go Reds John 3:16," he was informed that he could not display the signs at the game.

Aubrey again sued the team and the city of Cincinnati. Early in the course of the proceedings, the team announced that it would revoke the banner policy and not permit any banners to be displayed at the stadium other than commercial advertising.

Federal District Court Judge Spiegel found that the 1993 sign and banner policy was substantially vague and overbroad. The policy permitted signs "only if said signs pertain directly to baseball." The court noted that it had found, in the previous proceeding, examples of the "inherent arbitrariness" of a "pertain to baseball" standard.

The 1993 policy also prohibited signs which were "vulgar, indecent, obscene or inappropriate for viewing by children;..." (emphasis added by court). A provision excluding "obscene" signs would likely be constitutional, but the United States Supreme Court has rejected restrictions based on a "vulgar" or "indecent" standards. And the "inappropriate for viewing by children" criterion, standing alone, was "hopelessly vague and overbroad," stated Judge Spiegel.

The most objectionable section of the policy, according to the court, was the requirement that "Any signs, banners or displays not conforming to the above will be removed, unless they have specific written approval, in advance, from the Stadium Operations Division of the Cincinnati Reds." It appeared that team personnel would have the power to arbitrarily review all expression which might otherwise violate the policy.

Although Aubrey's motion for injunctive relief was moot, the court granted his motion for partial summary judgment with respect to the facial validity of the 1993 sign and banner policy of the Cincinnati Reds and the city of Cincinnati.

Aubrey v. Cincinnati Reds, 841 F.Supp. 229, 1993 U.S.Dist.LEXIS 18799 (S.D.Ohio 1993) [ELR 16:4:21]

Court upholds award of $500,000 in action involving faulty digitization of talk-show participant

An individual identified only as Kubach agreed to participate in a live call-in show on WMAZ on the topic of AIDS and drug use. Kubach, who had AIDS, was told that his face would be electronically distorted and he would not be recognized by the audience. However, for the first seven seconds of the segment, the digitization was inadequate and Kubach was recognizable.

After the incident, Kubach, who feared being recognized, ceased working and suffered from increased physical problems. When Kubach sued Multimedia WMAZ, Inc. for invasion of privacy, a Georgia trial court jury awarded him $500,000 in general damages and $100 in punitive damages.

An appellate court has upheld the judgment entered on the verdict on condition that the punitive damage award be vacated.

WMAZ argued that Kubach waived his right to claim that the broadcaster publicly disclosed private facts because he had made the fact that he had AIDS "public" prior to the broadcast. It was noted that Kubach's face was adequately digitized in an earlier nationwide program and the evidence did not show that his identity was revealed by that broadcast. But Kubach did not make the fact of his disease public as a matter of law by telling a small number of people about his condition, stated Chief Judge Pope. WMAZ's disclosure went far beyond the scope of any prior disclosure by Kubach, both as to audience and purpose. Furthermore, the station had agreed to respect Kubach's privacy. The trial court did not err in denying WMAZ's motion for a directed verdict on the waiver claim.

The court also rejected the argument that the disclosure occurred during a broadcast on a matter of public interest. It was noted that Kubach was not involved in a criminal incident or investigation; the identities of those suffering from AIDS are generally not a matter of public interest, stated Chief Judge Pope. The court agreed that the evidence was insufficient to support an award of punitive damages, but did not agree that the entire award (including the general damages award) had to be vacated because the punitive damages award was unsupported.

Judge Beasley, in a concurring opinion, agreed that Kubach did not waive the right to maintain the confidentiality of his condition - Kubach expressly reserved the right to nondisclosure of his identity and WMAZ had agreed to conceal it. Presiding Judge Beasley also agreed that there was evidence that Kubach's disclosures concerning his condition were "limited, discriminate, and not so far-reaching as to be conclusively categorized as 'public' even though they were, to an extent, uncontrolled."

Judge Birdsong concurred in the portion of the opinion finding that the evidence did not adequately raise the issue of punitive damages, but would have found that prejudicial error resulted when the jury was given a "totally unauthorized charge" as to punitive damages at the same time it was instructed on the issue of liability and general damages. Placing the unauthorized issue before the jury, even in a bifurcated proceeding, meant that there was "a fair risk of taint" created as to the general damage award, stated Judge Birdsong, who would have ruled that the trial court erred in denying the broadcaster's motion for a directed verdict as to punitive damages.

Judge Birdsong observed that although there was a momentary revealing of Kubach's face, the digitization level was corrected within seven seconds. The station's conduct may have amounted to negligence or even gross negligence, but did not constitute willful misconduct or the entire want of care necessary to support a jury award of punitive damages, in Judge Birdsong's view. The award of $100 in punitive damages was "grossly disproportionate" when compared to the general damage award, and was incapable of fulfilling the statutory purposes of punishing, penalizing or deterring conduct, declared Judge Birdsong, who questioned whether the jury erroneously included punitive damage elements with the general damage award. Judge Birdsong would have found that WMAZ was denied a fair trial.

Judge Andrews, in dissent, noted that an "indefinitely large number of persons," not required by law or public policy to maintain confidentiality, knew of Kubach's AIDS condition and that Kubach could not have had any reasonable expectation that this fact would remain a private matter. Judge Andrews would have concluded, as matter of law, that Kubach waived a right to privacy in his AIDS condition and did not retain this right as to the WMAZ audience who did not know he had AIDS at the time of the broadcast.

Judge Andrews nevertheless concluded that Kubach had a cause of action based on WMAZ's undertaking to conceal Kubach's identity and Kubach's reliance on this undertaking. However, the trial judge charged the jury solely on the claim of invasion of privacy. A short charge was given that WMAZ had a duty to diligently carry out any promise it made not to reveal Kubach's identity, but the instruction was given within the context of the instructions regarding invasion of privacy. Since the verdict was based on this erroneous legal theory, WMAZ was entitled to a new trial, stated Judge Andrews.

Multimedia WMAZ, Inc. v. Kubach, 212 Ga.App. 707, 443 S.E.2d 491, 1994 Ga.App.LEXIS 400 (Ga.App. 1994) [ELR 16:4:21]

Judgment of intentional copyright infringement is not dischargeable in bankruptcy

In 1989, a Federal District Court entered a judgment on a jury verdict against John William Hibbs and United Amusements, Inc., a corporation owned by Hibbs, in a copyright infringement action brought by Demetrios James Sophos. The jury, via special verdicts, determined that the Hibbs parties engaged in willful infringement.

In late 1993, the Bankruptcy Court for the Central District of California granted Sophos' motion for summary judgment and held that the copyright infringement judgment was nondischargeable as to Hibbs. The court denied Sophos' motion for summary judgment with respect to Sandra Burris Hibbs; Mrs. Hibbs was not a party to the District Court action.

Judge Kathleen P. March noted that under Section 523(a)(6) of the Bankruptcy Code, a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. Hibbs was barred by res judicata from reviewing the jury determination of liability. And the court stated that Sophos was entitled to postjudgment interest, bringing the total amount of the nondischargeable judgment to about $260,000, with interest continuing to accrue from the date of entry of the Bankruptcy Court judgment.

Judge March granted Sophos summary judgment on the statutory elements of willfulness and malice. It appeared that Hibbs intended to personally participate in the allegedly infringing acts of United Amusement, i.e., selling, although aware of Sophos' copyright, certain video game art. Hibbs was barred by the judgment from raising any possible defenses with respect to these issues as well as on the questions of whether Hibbs' acts were without justification or excuse; whether Sophos' property was injured; and whether Hibbs caused the injury to Sophos' property.

The court concluded by noting that there was no judgment against Mrs. Hibbs and any unliquidated claim for the previously sued-on infringement was time barred. However, Sophos was entitled to proceed against the postpetition community property of Mr. and Mrs. Hibbs to satisfy the nondischargeable judgment against Hibbs. Sophos, cautioned the court, may not reach any postpetition separate property of Mrs. Hibbs.

In re John William Hibbs and Sandra Hibbs, 1993 Bankr.LEXIS 1707 (Bankr.Ct.,C.D.Ca., Oct. 26, 1993) [ELR 16:4:22]

Publisher prevails in "reverse passing off" claim against competing distributor of children's books

Waldman Publishing Co., since 1979, has published "classic" literary works adapted and illustrated for children. The company issued the hard cover versions of the books as a series called "Great Illustrated Classics"; the soft cover versions of the books appeared in a series called "Illustrated Classic Editions."

In December 1993, Landoll, Inc. began publishing illustrated adaptations of six books, including "Oliver Twist," "Robin Hood," and "Black Beauty," in a series called "First Illustrated Classics." The company subsequently issued the adaptations in hard cover in a series called "Illustrated Classics." Landoll obtained the text and illustrations for its works from Peter Haddock, an English publisher, in return for a royalty of one cent per book sold.

When Waldman learned of the text and illustrations contained in Landoll's books, the company sought injunctive relief.

Federal District Court Judge Haight found that Waldman was likely to succeed on the claim that Landoll violated section 43(a) of the Lanham Act due to the similarities between the structure, texts, and illustrations of the competing adaptations - "similarities that are too striking to ascribe to coincidence." It was noted that the arrangements of chapters were the same in the books and that the Landoll texts "closely follow[ed]" the Waldman texts. Adapting and condensing a long original work requires "editorial selection of the incidents and descriptions to include and those that will be omitted;" the Landoll works required no such editorial effort, stated Judge Haight, because they were copies of the Waldman books. In all, it appeared to the court that Landoll was selling the Waldman products as Landoll's own and under Landoll's name. In a footnote comment, it was pointed out that there was no evidence that Landoll employees had anything to do with the copying - the company received the texts and illustrations from Haddock and reproduced them. But Landoll, upon being made aware of the similarities, had stated that it intended to continue distributing the books and thus was committing the tort of reverse passing off, "even though the tools to accomplish that tort were fashioned by other hands." The failure of the Landoll books to credit Waldman as the source of the adaptations was actionable under section 43(a).

The court found that it was "inherent" in Landoll's conduct that purchasers of the Landoll works would mistakenly believe that Landoll created the adaptations - a sufficient showing of impact upon consumers to justify injunctive relief. The damage to Waldman could not be accurately measured, and thus was irreparable in nature, according to Judge Haight, who granted Waldman's motion for a preliminary injunction on the Lanham Act claim.

Judge Haight concluded by finding that although cases have held that state law claims of "passing off" are not preempted by section 301(a) of the Copyright Act, Waldman's reverse passing off claim was so preempted.

Waldman Publishing Corp. v. Landoll, Inc., 848 F.Supp. 498, 1994 U.S.Dist.LEXIS 4493 (S.D.N.Y. 1994) [ELR 16:4:23]

Briefly Noted:

"Peter Pan" Musical.

Piers Chater-Robinson wrote a musical adaptation of Peter Pan, entitled "Peter Pan, the British Musical." Poole Arts Trust Ltd, in association with Michael Rose, presented the play in 1991.

Chater-Robinson, sometime in mid-1993, learned that the Poole Arts Theatre was planning a December 1993 pantomime entitled "Peter Pan, the Return;" the author sought to enjoin the production.

A British trial court, noting that the parties had accepted that the script and lyrics for the new production did not infringe Chater-Robinson's work, declined to order early discovery with respect to the allegedly infringing music in the new production.

The court also observed that the theater had agreed to eliminate from its promotional material the phrase "It's back," and refused to issue an injunction on Chater-Robinson's passing off claim.

Chater v. Rose, Chancery Division (1993)(Available in LEXIS ENGGEN Library, Cases File) [ELR 16:4:24]

Counterfeit Tapes.

A Washington statute makes it a felony to fail to disclose the origin of a recording; a person is guilty under the statute when, "for commercial advantage or private financial gain, the person knowingly advertises, or offers for sale, resale, or rent....any recording which does not contain the true name and address of the manufacturer in a prominent place on the cover, jacket, or label of the recording."

A trial court jury found that Adnan Adham Awawdeh was guilty of violating the statute and the court ordered Awawdeh not to sell cassette tapes, legal or counterfeit and to pay $1,300 in restitution to the Recording Industry Association of America and the sheriff's office.

An appellate court has affirmed the conviction, rejecting Awawdeh's argument that federal copyright law preempted the statute. The Copyright Act protects an owner's property right in his or her intellectual property, observed Judge Dennis J. Sweeney; the Washington statute protects consumers by requiring "an appropriate and accurate identification of the manufacturer," and does not regulate the contents of a recording.

However, the court reversed the order of restitution, stating that neither the RIAA nor the sheriff's office showed a financial injury or loss of property as a direct result of the crime charged and were not victims under the relevant statute. The order prohibiting Awawdeh from lawfully selling tapes also was reversed.

State of Washington v. Awawdeh, 864 P.2d 965, 1994 Wash.App. LEXIS 1 (Wash.App. 1994) [ELR 16:4:24]

Art/"Counterfeit" Currency.

Artist J.S.G. Boggs produces trompe l'oeil pieces closely resembling United States currency. After identifying himself as an artist, Boggs barters the pieces for their face value in goods and services.

In 1990, the United States Secret Service seized the color proofs for a catalog featuring Boggs' work, informing the printing company that the publication of the work, in its actual dimensions and in full color, would violate various counterfeiting statutes. On several other occasions, the Secret Service advised Boggs that he could be prosecuted for reproducing and passing the "Boggs Bills."

Boggs brought a lawsuit seeking to enjoin the Secret Service from interfering with the reproduction and distribution of his work. The artist claimed that 18 U.S.C. sections 474 and 504 prohibited him from using illustrations or likenesses of United States currency "as vehicles for the expression of opinions and ideas" in violation of his First Amendment rights.

Federal District Court Judge Lamberth, after careful consideration, found that the challenged statutes provided the government with the means to establish and maintain the value of United States currency without infringing Boggs' constitutional rights. The statutes were constitutional on their face and as applied to Boggs, stated Judge Lamberth, who dismissed Boggs' complaint and refused to enjoin any possible enforcement by the government parties.

Boggs v. Bowron, 842 F.Supp. 542, 1993 U.S.Dist. LEXIS 17667 (D.D.C. 1993) [ELR 16:4:24]

Art/Street Vendor.

New York Criminal Court Judge Laura L. Jacobson has dismissed a misdemeanor complaint against Robert Bery who was arrested for selling his paintings, on a public sidewalk, without a vendor's license.

The applicable administrative code provision was amended in 1982 to exempt vendors of written material from the license requirement. Bery claimed that art, as a protected form of expression, was entitled to the same treatment as written material.

The court found that the statute did not apply in this case based on Bery's First Amendment rights. The paintings at issue, entitled the "Forest Series," expressed "a clear political viewpoint." It also was noted that some of the works included written material. And Bery's acts were not the kind of behavior meant to be regulated by the statute, concluded the court, in dismissing the complaint and ordering the return of Bery's property which was confiscated at the time of his arrest.

It should be noted that the prosecutor also had moved for dismissal of the complaint in the interest of justice, without the issuance of an opinion on the validity of the ordinance. Bery opposed such a dismissal, arguing that it would only affect the charges against him and might not protect his property.

People v. Bery, New York Law Journal, p.29, col.6 (N.Y.Cnty., May 13, 1994) [ELR 16:4:24]

Art Dealers Commission.

O. Roy Chalk orally agreed that Milwaukee Auction Galleries and Joseph Van Goethem each would be entitled to a five percent commission, to be paid by the buyer, if they located parties who were "ready, willing and able" to buy a work of art from Chalk's collection, and if the sale was made.

When the art dealers brought a Mr. Morishita to view Chalk's art, Morishita expressed interest in Renoir's "L'Enfant a la Pomme." However, as described by Federal Court of Appeals Judge Posner, Morishita thought the price of $3.5 million was too high. A year later, a company controlled by Morishita bought the painting from Chalk for $2 million. The art dealers unsuccessfully demanded a commission on the sale, as well as on

Chalk's sale to another buyer, under similar circumstances, of a Mary Cassatt painting.

Judge Posner found that the District Court correctly directed a verdict for Chalk on the art dealers' claim of fraud, but erred in refusing to give a requested instruction on "procuring cause" with respect to the art dealers' breach of contract claim. The court cautioned that the remand would be limited to the art dealers' promissory estoppel theory of liability.

Milwaukee Auction Galleries, Limited v. Chalk, 13 F.3d 1107, 1994 U.S.App. LEXIS 322 (7th Cir. 1994) [ELR 16:4:25]

Artwork Copyright.

The defendant created unauthorized (and thus infringing) derivative works by purchasing notecards bearing the plaintiff's watercolor paintings which the defendant then affixed to ceramic tiles and covered with a transparent protective layer of acrylic or epoxy, a Federal District Court has held. In Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988), cert. denied, 489 U.S. 1018 (1988), this same defendant was held liable for infringement for having mounted artwork by Patrick Nagel onto ceramic tiles -- a decision which the court in this case said "compels" its conclusion that the defendant infringed the plaintiff's copyright in this instance as well. The District Court, which was located in Alaska, also ruled that it had personal jurisdiction over the defendant, even though it was a New Mexico corporation, because the defendant had sold the allegedly infringing goods to a retail store in Alaska. But the court held that it did not have personal jurisdiction over an employee of the New Mexico corporation whose allegedly infringing activities were performed solely as an employee of the corporate defendant.

Munoz v. Albuquerque A.R.T. Co., 829 F.Supp. 309, 1993 U.S.Dist.LEXIS 10897 (D.Alaska 1993) [ELR 16:4:25]

Employment Termination.

In December 1990, Larry Calton entered a one year contract with CV Radio Associated to host a daily, three hour sports/talk program on radio station WKNR. In June 1991, Calton used the phrase "jew you down" in response to a call-in question about trading professional baseball players. In response to complaints from listeners, Calton made several on-air apologies.

On the day after the broadcast, the station terminated Calton.

When Calton sued CV Radio for breach of contract and defamation, a trial court granted the company's motion for summary judgment, finding that Calton was terminated with just cause and that there was no evidence to support Calton's defamation claim.

An Ohio appellate court has upheld the trial court's decision.

Calton v. CV Radio Associated, L.P., 1994 Ohio App. LEXIS 1386 (Ohio App. 1994) [ELR 16:4:25]

Teacher Suspension.

In early 1989, James C. Spurger showed the film "Boss" to his class of special education students at

Tioga High School. The "PG" film apparently contained "repeated racial epithets and stereotypes." Spurger claimed that he showed the film as an introduction to a discussion of racial bigotry.

The Rapides Parish School Board charged Spurger with willful neglect of duty and incompetence under the Louisiana Teachers Tenure Act and suspended Spurger without pay for the first semester of the 1989-1990 school year and placed him on probation for the second semester.

A trial court reversed the Board's decision, holding that the Board failed to comply with procedural requirements, such as offering Spurger remediation procedures for the alleged incompetence. It also was found that the Board did not specifically vote on both charges.

A Louisiana appellate court has reversed the trial court decision and reinstated the Board's determination, finding that there was substantial evidence to support the Board's action.

Judge Edmond L. Guidry, Jr. noted that the willful neglect of duty charge did not require remediation procedures and was properly before the Board. The court concluded that Spurger's rights were not violated by the Board's failure to vote on the particular charges. It also was observed that there are alternate methods of teaching students about the offensiveness of the use of the word "nigger," and that Spurger, in any event, did not use class time to teach the designated subject matter - Arts and Crafts.

Spurger v. Rapides Parish School Board, 628 So.2d 1317, 1993 La.App.LEXIS 3801 (La.App. 1993) [ELR 16:4:25]

Sports Betting.

A New Jersey appellate court has affirmed a ruling by the state's Casino Control Commission that the commission has no constitutional or statutory authority to permit sports betting in New Jersey's gambling casinos.

As described by Judge A.M.Stein, the state legislature, in early 1993, chose not to vote on a joint resolution to place a referendum on the ballot permitting a proposed constitutional amendment authorizing casino betting on sports events. The National Football League, the National Basketball Association, the National Hockey League and the Commissioner of Baseball were among the parties who opposed submitting the proposed amendment to the voters.

The operators of the licensed gambling casinos in Atlantic City asked the commission for a determination that the 1976 state constitutional provision authorizing casino gambling and the regulatory legislation enacted pursuant to the provision authorized sports betting operated by casinos as a "gambling game." The casino operators provided a set of proposed regulations, similar to those adopted in Nevada where sports betting is legal.

Judge Stein cited the state's cautious approach to the legalization of gambling and the frequent acknowledgement by state officials that a constitutional amendment approved by the voters would be a prerequisite to undertaking sports betting. Except for constitutionally-authorized simulcast horse race betting, gambling casinos may operate only those games conducted solely in-house, concluded the court.

In the Matter of the Petition of Casino Licensees for approval of a New Game, Rulemaking and Authorization of a Test, 633 A.2d 1050, 1993 N.J.Super.LEXIS 871 (N.J.App. 1993) [ELR 16:4:26]

Libel.

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

An appellate court decision (ELR 15:8:16) granting summary judgment to Johnston in Freeman's libel action has been upheld by the New York Court of Appeals. Judge Smith agreed with the appellate court that the evidence was insufficient to allow a rational factfinder to find actual malice by clear and convincing evidence. The court also agreed that the statement, in the context in which it allegedly was made, was not susceptible to the defamatory meaning that Freeman supported illegal acts of sabotage if the negotiations were not resolved to his satisfaction.

Freeman v. Johnston, New York Law Journal, p. 27, col. 3 (N.Y., July 1, 1994) [ELR 16:4:26]

Libel.

The November 1992 issue of Essence magazine contained an article entitled "Up Against the Wall: Black Men and the Cops." The article was accompanied by a photograph showing, as described by New York trial court Judge Cahn, "a young black male standing in profile with his hands cuffed behind his back and bleeding profusely from the head. The subject's mouth is open suggesting that he may be yelling. The wounds have been highlighted in dark red." The figure was superimposed over another photograph which depicted a line of police officers in riot gear with their batons grasped in front of them in defense.

Eric Kippins alleged that he was the individual shown in the photograph of the handcuffed man, that he did not authorize the use of his photograph, and that readers of the magazine would assume that Kippins committed a criminal act rather than that he was a victim of police brutality.

A New York trial court has granted the magazine's motion to dismiss, stating that nothing in the challenged article linked Kippins with any act of "criminality" or "disgraceful conduct," and that the photograph and article were not libelous per se. And Kippins did not present any facts to show that the article was capable of communicating a libelous intent.

The court also rejected Kippins' claim under sections 50/51 of the New York Civil Rights Law - the article focused on a matter of public interest and the photograph was reasonably related to the subject matter of the article. Kippins also failed to state a cause of action for intentional infliction of emotional distress, concluded the court.

Kippins v. Essence Communications, Inc., New York Law Journal, p. 22, col. 4 (N.Y.Cnty., May 20, 1994) [ELR 16:4:26]

Libel.

A Federal Court of Appeals has upheld a District Court decision granting summary judgment to the Gannett Company in a libel action brought by Herbert Meisler arising from the publication of an article in the December 21, 1990 issue of "USA Today." The article concerned certain actions of the Wisconsin State Racing Board in connection with the operation of the Dairyland Greyhound Park. The court agreed with the District Court's conclusion that no reasonable jury could find actual malice by clear and convincing evidence.

Meisler v. Gannett Company, Inc., 12 F.3d 1026, 1994 U.S.App.LEXIS 1359 (11th Cir. 1994) [ELR 16:4:26]

"Son of Sam" Law.

The Maryland Court of Appeals has vacated a trial court decision holding that Maryland Code section 764, the state's "Son of Sam" law, was unconstitutional and unenforceable as overinclusive and as a content-based regulation of speech. The Court of Appeals stated that the trial court erred in addressing the constitutional issue raised by Ronald W. Price, who was convicted of charges of sexual child abuse committed upon former students and other charges. Price, prior to his trial, stated that he had contracted to sell "his story." When the state's Attorney General attempted, pursuant to the statute, to obtain a copy of the contract, Price challenged the constitutionality of the statute.

The Court of Appeals found that the Attorney General would have to obtain a copy of any contract entered into by Price from the other party to the contract. If the state compelled an individual to produce a contract under section 764, this would implicate the constitutional privilege against self-incrimination, stated Chief Judge Murphy, "if the act of production would amount to testimony which would incriminate" the individual. The court, notwithstanding lengthy consideration of the issue, did not reach the constitutionality of section 764 on its merits, deciding only that the statute did not require an individual to submit to the Attorney General a potential notoriety of crimes contract. And although acknowledging that it may be difficult for the Attorney General to obtain a contract where the identity of the other contracting party may not be known, the court vacated the judgment and remanded the matter with directions to dismiss the Attorney General's complaint.

Curran v. Price, 1994 Md.LEXIS 39 (Md. 1994) [ELR 16:4:27]

School Athletics.

The Mississippi Supreme Court has upheld a Mississippi High School Activities Association eligibility rule which requires that a participant in interscholastic activities attend a school in the school district of which his/her parents or guardians are bona fide residents. The stated purposes of the rule - to encourage and promote fair competition among schools and to deter "odious recruitment tactics" - were legitimate. The rule did not impermissibly burden the right to travel or any other fundamental right; was a rational means of carrying out a legitimate state end; and was not overbroad. The trial court erred in granting declaratory relief and issuing a permanent injunction barring the enforcement of the rule, concluded the court.

Mississippi High School Activities Association, Inc. v. Coleman, 1994 Miss.LEXIS 32 (Miss. 1994) [ELR 16:4:27]

Noncompetition Clause.

Gerald Brooks was employed as an anchor and reporter at Post-Newsweek Stations' WFSB from 1979 to December 1, 1993. His contracts with the company provided that WFSB would have the right of first refusal for Brooks' services if the station agreed to match a bona fide offer from another company. Brooks agreed, regardless of whether or not WFSB exercised the right of first refusal, not to accept an offer from specified competing stations. Brooks further agreed not to provide his on-air services to any television station within a designated area in Connecticut or part of Massachusetts for six months after the end of his employment with WFSB.

In August 1993, when television station WVIT offered to employ Brooks, WFSB decided not to match WVIT's offer. Brooks began working for WVIT in December 1993, and, by contract, was to begin appearing on WVIT news programs no later than June 3, 1994.

A Connecticut trial court denied Post-Newsweek's request for an injunction to enforce the restrictive covenant, cautioning that the decision "is unreported and may be subject to further appellate review."

Post-Newsweek Stations v. Brooks, 1994 Conn.Super.LEXIS 709 (Conn.Super. 1994) [ELR 16:4:27]

Landmark Designation.

New York's Landmarks Preservation Commission designated as a landmark a five story building on lower Broadway; from 1853 until about 1859, the building housed the gallery of photographer Mathew Brady and the exterior of the building has remained largely unchanged from the time of Brady's occupancy.

Lena Russo, the owner of the building, claimed that the landmark designation wrongly interfered with plans for the demolition of the building and the development of the site.

A trial court (ELR 14:4:18) rejected Russo's arguments that the city's definition of "landmark" was unconstitutionally vague or that the landmarking was an unconstitutional taking of property without just compensation.

An appellate court has upheld the trial court decision, noting that the record established a "cultural and social historical dimension" to the building even apart from its association with Brady. The building has been viewed as an "exemplar" of dageurrotypists' galleries, and its historical merits were sufficient to justify the designation, stated the five judge panel. Given the historical and cultural factors present, the court declined to determine whether the association of a site with an historic individual, such as Brady, as a sole criterion, would warrant a landmark designation.

Matter of Russo, New York Law Journal, p. 25, col. 3 (N.Y.App., May 19, 1994) [ELR 16:4:27]

Forfeiture Proceeding.

The Federal Communications Commission found that William Leigh Dougan violated the Communications Act of 1934 by operating a radio station without a license and by refusing to permit FCC engineers to inspect the station. Dougan operated a radio station called "KAPW" out of a backyard at his home in Phoenix, Arizona. The FCC issued a Notice of Apparent Liability for Monetary Forfeiture, setting the amount of forfeiture at $17,500 and subsequently issued its forfeiture order.

When Dougan filed a petition for review, a Federal Court of Appeals found that Federal District Courts have exclusive jurisdiction to hear enforcement suits by the government and suits by private individuals seeking to avoid enforcement in forfeiture matters; the court therefore dismissed Dougan's case for lack of jurisdiction.

Dougan v. Federal Communications Commission, Case No. 92-70734 (9th Cir., April 20, 1994) [ELR 16:4:28]

Jurisdiction.

The University of Iowa Press agreed to publish a book of short stories written by Starkley Flythe entitled "Lent: The Slow Fast." Barbara Urrea and Susan Petro sued Flythe and the publisher for invasion of privacy, alleging that a story in the book contained confidential information about them which was used without their permission.

The action was brought in a Georgia trial court, which denied the university's motion to dismiss for lack of personal jurisdiction and sovereign immunity. Flythe was dismissed for lack of venue.

A Georgia appellate court, on an interlocutory appeal, has reversed the trial court's decision.

Judge Cooper noted that although the university testified that it did not regularly conduct business in Georgia, it sold 438 copies of Flythe's book to purchasers in the state (albeit half of which were sold to Flythe), and sold other works to bookstores and libraries. It appeared to the court that there was a proper basis for the exercise of personal jurisdiction.

However, stated Judge Cooper, the trial court erred in refusing to grant immunity to the university on the basis of comity. The full faith and credit clause may not require a forum state to recognize the sovereign immunity of another state, but the forum may recognize another state's sovereign immunity as a matter of comity, noted the court. Iowa, under its Tort Claims Act, has waived its immunity from suit only to the extent it is sued in its state courts. Georgia has a similar policy. Thus, the application of Iowa's statute would not violate Georgia's public policy, and the trial court abused its discretion in not recognizing Iowa's sovereign immunity as a matter of comity.

University of Iowa Press v. Urrea, 1993 Ga.App. LEXIS 1574 (Ga.App. 1993) [ELR 16:4:28]

Torts.

Willie Green, III, a drummer in the band "The Neville Brothers," claimed that he suffered damage to his ear and hearing loss when a sound blast occurred during a concert in which he was performing. The concert was held at the Holiday Star Theater in Merrillville, Indiana.

Whiteco Industries owned and operated the theater and had agreed to provide the band "a professional quality sound system...and engineer/operator." Joel Nygra operated the sound system for the concert.

Green alleged that after he indicated that he needed to hear more saxophone from his speaker, which was three feet from his head, the volume of the speaker shot upward, causing a sound blast and knocking Green from his seat.

A Federal District Court rejected Green's products liability claim and also held that Whiteco could not be held vicariously liable for any purportedly negligent acts of Nygra, an independent contractor. The court then granted Whiteco's motion for summary judgment, stating that there was no evidence that a sound blast occurred.

In affirming the District Court's decision, Federal Court of Appeals Judge Harlington Wood, Jr. noted that Green did not provide any evidence that the sound system malfunctioned or was otherwise defective and did not show that Whiteco was subject to Indiana's strict products liability statute.

Green v. Whiteco Industries, Inc., 17 F.3d 199, 1994 U.S.App.LEXIS 2906 (7th Cir. 1994) [ELR 16:4:28]

Torts.

In April 1988, the Marriott Corporation hosted a "Murder Mystery Weekend" tour sponsored by Collette Travel Service. Marriott provided accommodations and meals to the tour participants; Collette Travel hired Murder by Invitation, an acting troupe, to entertain the group during the weekend.

On the evening of April 29th, Christopher Mansfield, a member of the troupe, became engulfed in flames while performing a fire-eating act. Robert Thomalen, a fellow actor, attempted to help Mansfield, and, in so doing, suffered burns. During the incident, a can of lighter fluid spilled, ignited, and caused burns to Theresa Belmont, a guest sitting at a table close to the stage.

In response to a lawsuit by Thomalen and Belmont, Marriott argued that it was not informed that the actors would stage a fire-eating act. But Federal District Court Judge Gorton, stating that it was a "close call," found that there was sufficient evidence from which a reasonable jury could infer that Marriott should have known about the fire-eating act.

It was noted that Thomalen testified that Mansfield had performed the act at least once as part of the entertainment presented by the acting troupe. And Marriott did not show that it made any effort to determine what acts the troupe planned to perform over the weekend, stated the court, in denying Marriott's motion for summary judgment on the negligence claim.

Thomalen and Belmont's strict liability claim was rejected because there was no "escape of a dangerous instrumentality from Marriott's property." The court concluded by denying Marriott's motion for partial summary judgment on its cross claim for indemnity against Collette Travel, insofar as Marriott might be liable to Thomalen and Belmont for negligence arising from a failure of its fire sprinkler system, but granted the motion for partial summary judgment with respect to liability arising from any negligence other than that alleged with respect to the fire sprinkler system.

Thomalen v. Marriott Corporation, 845 F.Supp. 33, 1994 U.S.Dist.LEXIS 2997 (D.Mass. 1994) [ELR 16:4:28]

Signal Interception.

In May 1992, That's Entertainment, Inc. purchased the exclusive licensing rights to the live closed circuit television broadcast of the June 19, 1992 professional heavyweight boxing match between Evander Holyfield and Larry Holmes. That's Entertainment claimed that J.P.T., Inc. unlawfully intercepted and broadcast the boxing match to the patrons of a bar known as the Colonial Inn in violation of section 705 of the Federal Communications Act of 1934, as amended, 47 U.S.C. section 605. J.P.T. claimed that it obtained and paid for the event through its cable service provider. A Federal District Court in Maryland granted That's Entertainment's motion for summary judgment on the issue of liability. Senior District Judge Alexander Harvey, II noted that even assuming that there was no "interception" because the Colonial Inn's manager purportedly was authorized by the cable company to receive the event on a pay-per-view basis, the J.P.T. parties violated section 705 because they were not authorized to broadcast the event to the patrons of a commercial (emphasis by the court) establishment. Section 705(a) proscribes, among other activities, the unauthorized divulgence or use of communications which may have been "received" legally for certain purposes. There was no triable issue as to the fact that the J.P.T. parties diverted the signal from its intended point of reception to the Colonial Inn.

The court also observed that it was not relevant under the statute whether the J.P.T. parties acted willfully.

That's Entertainment, Inc. v . J.P.T., Inc., 843 F.Supp. 995, 1993 U.S.Dist.LEXIS 19316 (D.Md. 1993) [ELR 16:4:29]

First Amendment.

In 1989, the town of Dedham, Massachusetts passed a by-law prohibiting holders of town licenses issued pursuant to state law from conducting business activities between the hours of 1:00 a.m and 6:00 a.m.

When National Amusements, Inc., the operator of a movie theater complex in Dedham, claimed that the by-law violated the company's free speech rights, a Federal District Court first found that the by-law was content neutral - the town had sought to limit the secondary effects of late shows, such as traffic and security problems.

National also claimed that the by-law was racially motivated since a survey conducted by the company indicated that late show patrons were "predominantly" black. The court, stating that there was no evidence that race was involved in the decision to adopt the by-law, found that the town had a valid governmental interest in dealing with the secondary effects of late night movies and that the by-law addressed those effects.

It was further found that there was no disparate effect along racial lines in closing down the late night shows - the by-law's incidental effect upon a protected class was no different than on society generally. The court stated that the by-law afforded National reasonable alternative means of expressing the same communication; provided sufficient guidance as to what activities were proscribed; did not target National's theater complex; and was a reasonable time, place, and manner restriction on National's First Amendment rights which did not violate the company's equal protection or due process rights.

National Amusements, Inc. v. Town of Dedham, 846 F.Supp. 1023, 1994 U.S.Dist.LEXIS 8011 (D.Mass. 1994) [ELR 16:4:29]

Copyright infringement.

Although there was no material issue as to the ownership and validity of the copyright in the plaintiff's anthropomorphic resin mice figurines, conflicting evidence as to direct copying and substantial similarity gave rise to issues of material fact on which a reasonable jury could find for either party. "Substantial similarity" is determined under an "ordinary observer" test, and so that issue is generally not resolvable by summary judgment, particularly in favor of plaintiffs. Summary judgment motions by both parties in this case was therefore denied.

Ganz Bros. Toys v. Midwest Importers of Cannon Falls, Inc., 834 F.Supp. 896, 1993 U.S.Dist.LEXIS 14998 (E.D.Va. 1993) [ELR 16:4:29]

Copyright Infringement Action/Movie Soundtrack.

Registration of the copyright to the motion picture "DIVA" was sufficient to permit an action asserting infringement of the copyright to a soundtrack recording and the musical compositions contained in the movie's soundtrack, if the copyright claimant to the movie and its soundtrack is the same company. This is so even though the movie and the musical compositions in its soundtrack were created by different "authors," a Federal District Court in New York has held. Where the musical compositions are created first and the motion picture is a derivative or collective work based on those compositions, registration of the derivative or collective work by the owner who also claims copyright in the compositions is sufficient to permit an infringement action as to the compositions. On the other hand, a letter from the Copyright Office confirming receipt of a transfer document for recordation was not sufficient to satisfy the Copyright Act's requirement (found in section 205(d)) that recordation of the transfer document be preceded by the filing of an infringement action by the transferee. Thus, summary judgment for the plaintiff could not be granted until the transfer document actually was recorded.

Greenwich Film Productions, S.A. v. DRG Records, Inc., 833 F.Supp. 248, 1993 U.S.Dist.LEXIS 12335 (S.D.N.Y. 1993) [ELR 16:4:30]

Copyright/Costumes.

A prior judgment that costumes were not copyrightable was vacated, notwithstanding a Court of Appeals ruling that a "misrepresentation" in a copyright application that costumes were "soft sculptures" precluded a copyright action. (ELR 12:2:14) An affidavit from a Copyright Office Examiner stating that the description of costumes as "soft sculptures" in registration applications was routinely allowed by the Copyright Office and did not constitute a representation that the works had no useful function, was permissible new evidence allowing vacatur of the prior judgment under rule 60(b) of the Federal Rules of Civil Procedure.

Whimsicality, Inc. v. Rubies Costume, Inc., 836 F.Supp. 112, 1993 U.S.Dist.LEXIS 15692 (S.D.N.Y. 1993) [ELR 16:4:30]

Copyright/Dolls.

In a dispute between distributors of two types of "troll" dolls based on a public domain doll, the court found that neither set of dolls had the "substantial originality" required for copyrightability in a derivative work.

EFS Marketing, Inc. v. Russ Berrie & Company, Inc., 836 F.Supp. 128, 1993 U.S.Dist.LEXIS 13444 (S.D.N.Y. 1993) [ELR 16:4:30]

Copyright Fair Use.

The defendants' unauthorized publication of the plaintiff's copyrighted "Love Scale" (a respected psychological self-test and evaluation) was a non-infringing fair use with respect to publications that occurred prior to the court's decision, but would not be a fair use in the future, and thus future use of the Love Scale was enjoined. In applying the four fair use factors, the court concluded that they split 2-2: the defendants' publication of the Love Scale in a textbook was productive and primarily noncommercial; the Love Scale was scientific and scholarly in nature; the defendant used all of the Love Scale, but the defendants' qualitatively substantial copying was "ameliorated" by their "beneficial" use of the entire Love Scale; and there was some meaningful likelihood of market harm. In balancing the factors, the court concluded "with respect to past conduct that the very slight preference of the final two factors is outweighed by the slightly more weighty preference of the first two factors." On the other hand, the court acknowledged that "[t]he potential `widespread application' of this holding to the future conduct of these defendants and other similarly situated textbook publishers," warranted a separate analysis with respect to future use, as to which the court concluded that "the fourth and most important factor assumes a more hefty significance and the balance tips in Rubin's [the plaintiff's] favor."

Rubin v. Brooks/Cole Publishing Co., 836 F.Supp. 909, 1993 U.S.Dist.LEXIS 19104 (D.Mass. 1993) [ELR 16:4:30]

Copyright Attorneys' Fees.

The defendant who owned the theater in which an infringing play was staged, and who successfully defended infringement claims asserted against him, was awarded attorneys' fees against the plaintiff, even though the defendant had withheld a portion of the play's boxoffice receipts pursuant to an indemnity agreement with the other defendants (who had written and produced the infringing play). A Federal District Court in New York has ruled that the defendant was entitled to fees for work done by his attorneys on all issues in the case, not simply on those issues which had been the basis for the dismissal of the case against him. But the defendant was not awarded all of the fees he sought, because his attorneys had not maintained complete records of the date, time and services rendered, for which fees were sought. The plaintiff was successful against other defendants, and was awarded attorneys' fees against them. However, the plaintiff was not awarded all of the fees she sought because her success was only partial. That is, the plaintiff had sought actual and punitive damages as well as injunctive relief. While she was awarded injunctive relief, statutory damages and the defendants' profits, she did not recover actual or punitive damages. The court therefore reduced the amount of attorneys' fees sought by the plaintiff to reflect the time devoted to her unsuccessful efforts to prove actual and punitive damages.

Childress v. Taylor, 835 F.Supp. 739, 1993 U.S.Dist.LEXIS 15461 (S.D.N.Y. 1993) [ELR 16:4:30]

Copyright Damages.

In an action involving the defendant's manufacture and sale of counterfeit t-shirts bearing copies of the plaintiffs' copyrighted works, the plaintiffs have been awarded maximum statutory damages of $20,000 per infringement, plus an additional $5,000 per infringement because the defendant's actions were willful, plus costs and attorneys' fees.

Dive N' Surf, Inc. v. Anselowitz, 834 F.Supp. 379, 1993 U.S.Dist.LEXIS 14666 (M.D.Fla. 1993) [ELR 16:4:31]

Copyright/Trademark Infringement.

Summary judgment has been granted to Western Publishing Company, the defendant in a case that alleged that the defendant's game "Pen the Pig" infringed the copyright to the plaintiff's game of the same name. A Federal District Court in Georgia granted the defendant's motion, because the defendant produced substantial uncontradicted evidence that it had independently created its game and had not copied the plaintiff's. While there was some similarity between the plaintiff's and the defendant's game, and while the defendant had access to the plaintiff's game, the court rejected the plaintiff's argument that the similarity in question had rebutted the defendant's evidence of independent creation. Both games use fences and a connect-the-dots scheme to "pen the pig." But the court ruled that this similarity was "so commonplace given the format of the games that it is not probative of copying." The court also found that the plaintiff had not acquired trademark rights in the "Pen the Pig" title, because the plaintiff had never sold any of his games.

Simmons v. Western Publishing Company, Inc., 834 F.Supp. 393, 1993 U.S.Dist.LEXIS 14475 (N.D.Ga. 1993) [ELR 16:4:31]

Copyright/Trademark Damages.

Nintendo has been awarded statutory damages of $2,000 for each of 12 willful infringements of the copyrights to its video game cartridges, for a total of $24,000 on its copyright claims. More significantly, Nintendo also has been awarded treble damages of $2,970,000 on its claim for trademark counterfeiting.

Nintendo of America, Inc. v. Ketchum, 830 F.Supp. 1443, 1993 U.S.Dist.LEXIS 12922 (M.D.Fla. 1993). [ELR 16:4:31]

ASCAP Consent Decree.

A Federal District Court in New York has issued a ruling under the ASCAP Consent Decree establishing the amount that ABC and CBS owe ASCAP as license fees for their network broadcast of ASCAP-licensed music.

After an extensive review and analysis of the evidence and contentions of the parties, District Judge William Conner ruled that ABC's blanket license fee for 1986 through 1993 shall be $10.47 million per year, and that CBS's blanket license fee for 1991 through 1993 shall be $9.75 million per year. In reaching these figures, Judge Conner started with the blanket fees paid by the two networks for 1985; he then adjusted those figures to take into account percentage changes in the networks' average revenue and average music use from the 1981-1985 period to the 1986-1991 period.

United States v. ASCAP (Application of Capital Cities/ABC and CBS), 831 F.Supp. 137, 1993 U.S.Dist.LEXIS 11303 (S.D.N.Y. 1993) [ELR 16:4:31]

Cable Television/City Tax.

In 1990, the City of Norfolk established a utility tax rate for cable television service at seven percent of consumer's total bill. Cox Cable Hampton Roads, Inc., noting that vendors supplying television service through Satellite Master Antenna Television systems were not subjected to the tax, argued that the tax violated its equal protection rights.

A trial court granted the city's demurrer to the cable company's equal protection claim. The Virginia Supreme Court reversed the ruling (ELR 13:12:19), stating that the company was entitled to a trial on the merits of its arguments that the tax ordinance created a classification which was not based on a real difference in the systems; that the distinction was not relevant to the purpose for which the classification was made; and that the different treatments were arbitrary.

The trial court's ruling, on remand, rejecting Cox Cable's claim, has been affirmed by the Virginia Supreme Court. Judge Henry H. Whiting noted that Cox Cable and the SMATV vendors utilize different transmission methods to supply their programming and this difference justified the tax distinction. Cox Cable provides television service without requiring viewers to furnish the additional equipment SMATV viewers must provide upon their premises, observed the court. And Cox Cable offered local programming through its system while SMATV vendors cannot offer such programming.

The cited differences provided a rational basis for the distinction between taxing Cox Cable's billings to its subscribers and declining to tax the billings of the SMATV vendors, ruled the court.

Cox Cable Hampton Roads, Inc. v. City of Norfolk, 439 S.E.2d 366, 1994 Va.LEXIS 21 (Va. 1994) [ELR 16:4:31]

Cable Rates.

The Cable Communications Policy Act of 1984, in part, prohibited municipalities or other cable franchising authorities from regulating cable television service rates after December 29, 1986. Local regulation of cable service rates was allowed in those areas "not subject to effective competition," as defined in FCC regulations.

The Commission initially found that five Illinois municipalities, among other communities, were within areas of effective competition. The municipalities had entered agreements, prior to the enactment of the Cable

Act, to receive cable television service from Sammons of Illinois.

In 1988, under modified FCC regulations, the municipalities were not considered areas with effective competition; Sammons thus was subject to regulation.

Sammons had steadily increased its basic rate from $7.28 per month in 1986 to $13.30 per month in 1992. The municipalities sued Sammons and its corporate parent, alleging the breach of franchise provisions restricting unreasonable rates for basic cable service.

In November 1993 Federal District Court Judge Norgle, who had denied Sammons' motion for summary judgment (ELR 15:5:15), entered judgment on behalf of the cable operator with respect to the issue of the reasonableness of the company's rate increases after January 1987, stating that the rates complied with the Cable Act and the franchise agreements with each municipality.

Judge Norgle also noted that the municipalities failed to comply with FCC procedures for challenging a determination concerning effective competition; did not allow an opportunity for interested parties to comment on the decision to regulate rates; and failed to take final action within 180 days on any basic cable rate increase proposed by Sammons since 1986. In all, concluded the court, Sammons' basic cable rates were reasonable and appropriate; the municipalities failed to show that Sammons breached its franchise agreements by charging excessive rates.

City of Ottawa, Illinois v. Sammons Communications, Inc., 836 F.Supp. 555, 1993 U.S.Dist.LEXIS 15733 (N.D.Ill. 1993) [ELR 16:4:31]

Previously Reported:

The United States Supreme Court has let stand the rulings in Aronsen v. Donahue (15:10:18) and Branton v. Federal Communications Commission (15:9:23).

The Federal Court of Appeals for the District of Columbia has voted to rehear Action for Children's Television v. Federal Communications Commission (ELR 15:11:15) and Alliance for Community Media v. Federal Communications Commission (ELR 15:11:15), and has vacated the judgments in those cases in per curiam orders at 15 F.3d 186, 1994 U.S.App.LEXIS 6438 and 1994 U.S.App.LEXIS 6440.

According to news reports, the Federal Communications Commission and the owner of Chicago radio station WMVP (formerly known as WLUP-AM), settled, in early 1994, an action involving the alleged broadcast, by Evergreen Media Corp., of obscene, indecent or profane language in violation of 18 U.S.C. section 1464. The Commission dropped its indecency charges and will not seek about $40,000 in fines; Evergreen, without admitting any wrongdoing, will pay $10,000 to the government and dismiss a counterclaim challenging the constitutionality of the Commission's enforcement of its definition of indecency.

The following cases, which previously were reported in the Entertainment Law Reporter,have been published: Armstrong v. Simon & Schuster, 610 N.Y.S.2d 503, 197 A.D.2d 87, 1994 N.Y.App.Div.LEXIS 4069 (16:3:21); Freeman v. National Broadcasting Company, Inc., 846 F.Supp. 1109 (16:2:19); Rejent v. Liberation Publs., Inc., 1994 N.Y.App.Div.LEXIS 5157 (16:3:8).

The California Supreme Court, at 1994 Cal.LEXIS 1193, refused to review the decision in Wilson v. Franchise Tax Board (16:2:4).

A Federal District Court ruling in Piazza v. Major League Baseball, has been reported at 836 F.Supp. 269 as well as at 1993 U.S.Dist.LEXIS 14622. [ELR 16:4:32]

WASHINGTON MONITOR

Copyright Royalty Tribunal corrects cost of living adjustment of mechanical royalty rate

In November 1993, the Copyright Royalty Tribunal announced a cost of living adjustment to the mechanical royalty rate, effective January 1994. The new rate announced by the Tribunal at that time was to have been 6.61 cents or 1.3 cents per minute of playing time (or fraction thereof), for musical works embodied in phonorecords. (ELR 15:9:25). Thereafter, the Tribunal announced "corrections" to these rates. The correct rate for mechanical royalties, payable by record companies that take advantage of the compulsory mechanical license provision of the Copyright Act, is 6.60 cents or 1.25 cents per minute of playing time (or fraction thereof), per record per song. The effective date of the correction also was January 1, 1994.

Cost of Living Adjustment of the Mechanical Royalty Rate; Correction, 58 Fed.Regis. 60787 (1993) [ELR 16:4:33]

DEPARTMENTS

In the Law Reviews:

Hastings Communications and Entertainment Law Journal Comm/Ent has published Volume 16, Number 2 with the following articles:

Suing American Meida in Foreign Courts: Doing an End-Run around U.S. Libel Law? by Kyu Ho Youm, 16 Comm/Ent 235 (1994)

The Economic Case for the Coexistence of Monopoly Power and Goodwill in the Cable Television Industry by Joshua Genser, 16 Comm/Ent 265 (1994)

International Film Co-Production Tax and Subsidy Mechanisms by Margaret Moore, 16 Comm/Ent 287 (1994)

Home Audio Taping of Copyrighted Works and The Audio Home Recording Act of 1992: A Critical Analysis by Joel L. McKuin, 16 Comm/Ent 311 (1994)

The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry by Kevin E. Stern, 16 Comm/Ent 349 (1994)

Researching the Right of Publicity: A Revised and Comprehensive Bibliography of Law-Related Materials by Frank G. Houdek, 16 Comm/Ent 385 (1994)

Cardozo Arts & Entertainment Law Journal has published Volume 12, Number 2 with the following articles:

Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze by David J. Saylor, 12 Cardozo Arts & Entertainment Law Journal 321 (1994)

Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status by Edward J. Damich, 12 Cardozo Arts & Entertainment Law Journal 387 (1994)

Film Labelling as a Cure for Colorization (and Other Alterations): A Band-Aid for a Hatchet Job by David A. Honicky, 12 Cardozo Arts & Entertainment Law Journal 409 (1994)

Architect as Artist: Artists' Rights and Historic Preservation by Patty Gerstenblith, 12 Cardozo Arts & Entertainment Law Journal 431 (1994)

The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried by Gary S. Lutzker, 12 Cardozo Arts & Entertainment Law Journal 467 (1994)

Rewiring the First Amendment: Meaning, Content and Public Broadcasting by Donald W. Hawthorne and Monroe E. Price, 12 Cardozo Arts & Entertainment Law Journal 499 (1994)

Conservator Overreaching and the Art Owner: Contractual Protections Against the Overzealous Restoration of Fine Art by Peter Adelman, 12 Carodozo Arts & Entertainment Law Journal 521 (1994)

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Friedman, 12 Cardozo Arts & Entertainment Law Journal 545 (1994)

The UCC and Consignment: Making the Code Safe for Artists and Other "Little Fellows," by Mark Marcone, 12 Cardozo Arts & Entertainment Law Journal 579 (1994)

The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway by Jonathan D. Blake and Lee J. Tiedrich, 46 Federal Communications Law Journal 397 (1994)

Preemption of Local Regulation of Radio Antennas: A Post-Deerfield Policy for the FCC by James R. Hobson and Jeffrey O. Moreno, 46 Federal Communications Law Journal 433 (1994)

Newscasts as Property: will Retransmission Consent Stimulate Production of More Local Television News? by Lorna Veraldi, 46 Federal Communications Law Journal 469 (1994)

Fine Tuning the Federal Government's Role in Public Broadcasting by Howard A. White, 46 Federal Communications Law Journal 491 (1994)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 17, Number 3 with the following articles:

The Library of Congress Advisory Committee on Copyright Registration and Deposit - Letter and Report of the Co-chairs by Robert Wedgeworth and Barbara Ringer, 17 Columbia-VLA Journal of Law & the Arts 271 (1994)

An Overview of the Copyright Renewal Amendment and Its Impact on Renewal Practices Under U.S. Law by William M. Hart and Roy S. Kaufman, 17 Columbia-VLA Journal of Law & the Arts 311 (1994)

Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers by Warren H. Husband, 17 Columbia-VLA Journal of Law & the Arts 327 (1994)

An Analysis of the Second Circuit's Ruling in Bourne v. Walt Disney: Disney Will Be Singing "Hi-Diddle-Dee-Dee (An Infringer's Life for Me)" by David Miercort, 17 Columbia-VLA Journal of Law & the Arts 359 (1994)

Thurgood Marshall Law Review, a publication of Texas Southern University, has published a symposium on

Current Trends in the U.S. Sporting Arena as Volume 19, Number 3, with the following articles:

The National Basektball Association Salary Cap, Dead or Alive? by Steve Patterson, 19 Thurgood Marshall Law Review 535 (1994)

Release Me Not: Products Liability and Ski Bindings Injuries - A Source for Model Sports Principles by John R. Eichstadt, 19 Thurgood Marshall Law Review 551 (1994)

The Baseball Antitrust Exemption Revisited: 21 Years after Flood v. Kuhn by Walter T. Champion, Jr., 19 Thurgood Marshall Law Review 573 (1994)

Student-Athlete Prospective Economic Interests: Contractual Dimensions by Timothy Davis, 19 Thurgood Marshall Law Review 585 (1994)

Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption by Edmund P. Edmonds, 19 Thurgood Marshall Law Review 627 (1994)

Financial Planning for Professional Athletes by David J. Herzog, 19 Thurgood Marshall Law Review 663 (1994)

Foul Ball!! Piazza v. Major League Baseball by Timothy D. Blevins, 19 Thurgood Marshall Law Review 677 (1994)

Book Review: Sports Law in a Nutshell, by Walter T. Champion, Jr., West Publishing, St. Paul, Minnesota, by

Misty X. Brown, 19 Thurgood Marshall Law Review 689 (1994)

To Loan or Not to Loan: Potential Owner Liability to Users of Sporting Equipment by Greg Cagle, 19 Thurgood Marshall Law Review 695 (1994)

The Effects of McNeil v. National Football League: Boom, Bust or Equalizer? by David D. Farr, 19 Thurgood Marshall Law Review 701 (1994)

Kleinknecht v. Gettysburg College: What Duty Does a University Owe Its Recruited Athletes? by Kerry L. Hollingsworth, 19 Thurgood Marshall Law Review 711 (1994)

Are Sports Torts Now Par for the Course? The Emerging Reckless Disregard Standard for Sport Participant

Liability by Bill McNabb, 19 Thurgood Marshall Law Review (1994)

Hit, Sacked and Dunked by the Courts: The Need for Due Process Protection of the Student-Athlete in Intercollegiate Athletics: National Collegiate Athletic Association v. Miller by Scott A. Mitchell, 19 Thurgood Marshall Law Review (1994)

Book Review: Sports Law Practice by Martin J. Greensberg, The Michie Company, Charlottesville, Virginia by Reginald M. Parker, 19 Thurgood Marshall Law Review (1994)

Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis by Andrew Beckerman-Rodau, 47 Arkansas Law Review 603 (1994)

Learned Hand Never Played Nintendo: A Better Way to Think about the Non-Literal, Non-Visual Software Copyright Cases, 61 The University of Chicago Law Review 613 (1994)

The Forum on the Entertainment and Sports Industries of the American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 11, Number 4 of the Entertainment and Sports Lawyer with the following articles:

Sex and Violence: European Censorship of American Films by Margaret Moore, 11 The Entertainment and Sports Lawyer 1 (1994)

Beyond Obscenity: Canada's New Child Pornography Law by Brian M. Blugerman, 11 The Entertainment and Sports Lawyer 3 (1994)

Arbitration of Intl. Sports Disputes by Jan Paulsson, 11 The Entertainment and Sports Lawyer 12 (1994)
[ELR 16:4:37]