RECENT CASES

California Labor Commissioner voids contract between actor and personal manager who was not licensed as a talent agent, because a "significant portion" of the manager's "business as a whole" involved procuring employment for clients

California law makes an important distinction between talent agents and personal managers: agents must be licensed; managers need not be. The difference between agents and managers appears clear from the statute books. Agents get jobs for their clients, while managers do not (though managers may get recording contracts for their clients). Cal.Lab.Code section 1700. In practice, however, the difference between agents and managers has been the subject of unending controversy, litigation and commentary. (The Entertainment Law Reporter itself has published four articles on this topic, in addition to reports on individual cases. See, Don Biederman, Agent or Manager? There is a Difference . . . Isn't There? (ELR 15:9:3); Chester L. Migden, Arsenio Hall Case - The Novel Aspect (ELR 14:5:30); Philip R. Green and Beverly Robin Green, Talent Agents and the New California Act (ELR 9:4:3); Fred Jelin, The Personal Manager Controversy: Carving the Turf (ELR 7:1:3))

The difference between agents and personal managers matters, especially to managers, because if a manager gets jobs for clients (or tries to) without being licensed, the contract between the manager and his or her client may become unenforceable. More serious yet, the manager may have to refund commissions previously received from the client, even though those commissions were fairly earned for services actually rendered.

Arsenio Hall's former manager was ordered to refund more than $2 million in commissions because his former manager was held to have procured employment for Hall without being licensed as a talent agent. (ELR 15:5:4)

California's talent agent licensing law is administered by the State Labor Commissioner, and the Commissioner has jurisdiction to decide whether a manager should have been licensed as an agent. In a recent case between actor Thomas Haden Church (of the television series "Wings") and his former manager Ross Brown, the Commissioner has decided that Brown had procured employment for Church and thus should have been licensed. As a result, the Commissioner declared their personal management contract to be "illegal, void, and unenforceable," thus denying Brown the commissions he claimed were due him under that contract.

The decision is particularly significant, because it answers an important question left unanswered in the Arsenio Hall case þ namely, how extensive a manager's procurement activities must be in order to trigger the requirement that an agent's license be obtained. At one time, it was thought that any procurement at all would require such a license. But in a case in which Arsenio Hall's former manager unsuccessfully challenged the constitutionality of the California statute, the Court of Appeal ruled that an agent's license is necessary only if procurement of employment is a "significant part" of the manager's "business as a whole." Wachs v. Curry, 13 Cal.App.4th 616, 16 Cal.Rptr.2d 496 (1993) (ELR 15:3:3)

Apparently, Brown argued that procuring employment was not a significant part of his "business as a whole," because he was involved in (entertainment related) businesses apart from personal management. The

Commissioner, however, has ruled that the "business as a whole" to be looked at is that part of a manager's business that involves representing talent. Otherwise, the Commissioner noted, "even non-related occupations such as operating a fast food outlet could be counted," and that "would encourage individuals to dabble in procuring employment for artists as a sideline" without getting licenses.

The Commissioner also ruled that a manager's procurement activities are "significant" "if the procurement is not due to inadvertence or mistake," if such activities "have some importance," and if they "are not simply a de minimis aspect of the overall relationship between the parties."

To satisfy the "significant part" of the manager's "business as a whole" test, a client must show that he or she had a contract with a manager, and that their relationship was "permeated and pervaded by employment procurement activities" by the manager. According to the Commissioner, such a showing gives rise to "an inference that these activities were a significant part" of the manager's "business as a whole" and thus establishes a prima facie violation of the licensing requirement. The burden then shifts to the manager to show that procurement activities were not a significant part of his or her business. In this case, Church's evidence gave rise to the necessary inference, while Brown failed to produce any evidence at all showing that procurement activities were not a significant part of his talent related business.

The opinion also clarifies the one-year statute of limitations applicable to claims by clients that their managers had acted as unlicensed talent agents. It holds that for the purpose of determining whether a management contract is enforceable by a manager, the client may assert a violation of the licensing requirement at any time in response to a manager's claim for unpaid commissions.

But for the purpose of seeking a refund of previously paid commissions, the client is entitled to a refund only of commissions paid within a year of the time a client files a petition against his or her former manager asserting a violation of the licensing requirement. In this case, Church's petition was filed more than a year after he last paid Brown any commissions. Thus, while Church was able to have his contract with Brown declared void, he was not able to recover more than $68,000 in commissions he had paid to Brown while the two were still on good terms.

Because of the importance of this decision to the entertainment industry, and because decisions of the California Labor Commissioner are not published elsewhere, the Commissioner's decision in this case is reprinted below in full text.

Church v. Brown, Cal.Lab.Comm., Case No. TAC 52-92 (1994)

THOMAS HADEN CHURCH, Petitioner,
v. ROSS BROWN, Respondent
Labor Commissioner of the State of California,
Case No. TAC 52-92

DETERMINATION ON PETITION OF
THOMAS HADEN CHURCH

This proceeding arose under the provisions of the Talent Agencies Act (the "Act"), Labor Code sections 1700 -1700.47 n1. [n1 Unless otherwise specified, all subsequent statutory references are to the Labor Code.] On June 16, 1992, petitioner Thomas Haden Church ("Church") filed a petition with the Labor Commissioner pursuant to section 1700.44 seeking determination of an alleged controversy with respondent Ross Brown ("Brown"). Brown filed an answer, and on March 16,

A. Reich, attorney for the Labor Commissioner assigned as a hearing officer. Due consideration having been given to the testimony, documentary evidence, briefs, and arguments submitted by the parties, the Labor Commissioner now renders the following decision.

Procedural and Factual Background

The event which triggered the filing of the instant petition was Brown's initiation of an arbitration action against Church. In the arbitration, Brown asserted that, under the provisions of a "personal manager-artist" contract (the "contract") entered into with Church in November, 1988, Brown was entitled to 15% of the gross earnings from Church's artistic activities. Church, in turn, obtained a stay of the arbitration proceedings so that he could file a petition with the Labor Commissioner to establish that at the time that Brown entered into and performed under the contract he acted as a talent agent in violation of section 1700.5, thereby rendering the contract void under the Act.

Church's petition seeks a declaration that the contract is void and that Church has no further monetary or other obligations to Brown under the contract. In addition, Church wants an order requiring Brown to repay all monies previously collected by Brown under the contract. Brown's answer to the petition sets up two basic defenses: first, that Church's claims for relief are barred by the applicable statutes of limitations, section 1700.44(c), and second, that, even if not barred, the claims are legally and factually without merit. The following facts are pertinent to resolution of these issues.

Brown met Church in April, 1988 while lecturing at a seminar in Dallas, Texas. A few months later, Brown telephoned Church to ask Church to come to Los Angeles to try out for an acting part in a motion picture entitled "Stolen Moments." n2 [n2 The film was also at one time entitled "Lost Memories."] At the time of the call, Brown was employed as the casting director for the film. Although this much of the conversation is undisputed, the rest is not. According to Church, Brown also stated that he was interested in being Church's manager and that in this capacity he would be using his contacts in the industry. Brown denies making these statements.

In September, 1988, Church moved to Los Angeles, and almost immediately Brown arranged for Church to audition for a part in Stolen Moments. Brown first auditioned Church himself, privately; in this session, Brown went over some material with Church and explained to Church what was expected of the character Church was going to audition for. To insure the success of the next audition, which would be with the director and producers, Brown informed Church that he would create a resume for Church which would be set up on the letterhead of the William Morris Talent Agency. At that time, Church was not represented by William Morris.

One week later, just before the audition, Brown handed Church a resume on William Morris stationery containing a number of false credits regarding Church's prior work. Brown insisted that the factual distortions were necessary to give Church credibility, and assured Church that he would control the audition to prevent the inaccuracies from being exposed. Following the audition, Church got the part.

In early November, 1988, after the shooting on Stolen Moments had been completed, Brown presented Church with the management contract that Church eventually signed. Church testified that at this point Brown told

Church that he would use his contacts, influence, and expertise in the industry to get Church acting jobs; Church stated that this was the reason he signed the contract. Brown denied making such statements, and testified that the only thing he told Church was that he would advise him and assist him in getting representation.

The contract itself is in the form of a letter to Brown from Church. The letter defines Brown's basic duties as to "advise and counsel", and states that Brown is not a theatrical agent, and that he is not authorized nor expected to act as one. The contract further provides that for his services, Brown will be paid a commission of 15% of the gross earnings generated by Church's artistic activities.

After the contract was signed, Brown told Church that he expected the 15% commission specified in the contract to be paid on Church's gross earnings from Stolen

Moments. Church eventually paid Brown an $850.00 commission on these earnings. The evidence established that another actor on Stolen Moments, Colin Davis, also paid Brown a commission from his earnings on the picture.

The evidence was in conflict as to what Brown did for Church after the contract was signed. According to Church, Brown (1) called people in the industry and arranged appointments for Church, (2) sent out Church's resume and photographs to casting directors, (3) called casting directors on behalf of Church, (4) accessed the "breakdown service" which was available to him as a casting director to find parts for Church, and (5) told Church he would get him a part in movies Brown was working on. Church complained to Brown about Brown's failure to do enough to get Church more jobs. Although Brown acknowledged that Church made these complaints, Brown indicated he could not understand why such complaints were or would be directed at him. Brown denies that he was engaged in any of the activities ascribed to him by Church. Brown insists that, apart from counseling and advising Church, the only thing he did to help Church get jobs was to talk to Church's agent and encourage the agent to do more to get Church jobs.

After the contract was entered into, Church did obtain work on several projects, and eventually he landed a recurring role on the successful television series "Wings". Based on the earnings derived from this and the earlier work, during the period April 19, 1989 through March 13, 1991 Church paid Brown a total of $68,432.00 in commissions. Church refused to make any further payments under the contract after March 13, 1991. The arbitration action, and then this proceeding, followed.

Decision

1. THE PETITION TO DECLARE THE CONTRACT VOID SO AS TO PRECLUDE FUTURE COMMISSION CLAIMS IS NOT TIME BARRED.

The Act contains the following statute of limitations provision, at Section 1700.44, subd. (c):

"No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to Commencement of the action or proceeding."

The question presented is whether this provision bars Church's petition to the Labor Commissioner for a declaration that the contract is void so as to preclude further commission or other claims by Brown under the contract. It does not.

It is now well settled that the statute of limitations runs only against a cause of action which seeks affirmative relief and does not operate defensive matter. (3 Witkin, California Procedure, (3d. Ed. 1985), Actions section 324)

". . . [P]urely defensive matter . . . which constitutes a defense to the plaintiff's claim without calling for affirmative relief . . . will not be barred by limitations. This is so even though the defensive matter could have been used as the basis of a cause of action for affirmative relief, and the statute has run on such cause of action [Par.] . . . [D]efenses which render the contract wholly unenforceable (such as . . . illegality. . .), need not be made the basis for an action for restitution after rescission. The injured party (promisor) may allow the time for the bringing of such an action to expire, yet still defend on those grounds in the action by the plaintiff (promises)." (Id., pp. 354-355)

Under the foregoing principles there is no question that if Brown's contractual claim had arisen under the Act and therefore been asserted before the Labor Commissioner pursuant to the requirements of section 1700.44 subd. (a), Church would have been entitled to set up the defense that the contract was illegal and hence unenforceable. It would not have mattered that the "violation" giving rise to the illegality occurred more than one year prior to the commencement of the proceeding; section 1700.44 subd. (c) would not have barred assertion of the defensive matter.

The result is no different here when the contractual cause of action is not within the Act, and the avenue of declaratory relief is used to invoke the primary jurisdiction of the Labor Commissioner over an affirmative defense which does arise under the Act. Clearly, this is a proper use of declaratory relief: (a) there is an actual controversy; (b) the Labor Commissioner is vested with primary authority and special competence to adjudicate disputes under the Act; and (c) the statute of limitations has not run on the defensive matter sought to be adjudicated by means of the declaratory remedy. (3 Witkin, supra, Actions, section 475; Code Civ. Pro. section 1060; 5 Witkin, California Procedure, (3d Ed. 1985), Pleading section 819) Moreover, such relief is particularly appropriate here, where there indeed may be no adequate alternative remedy for invoking the illegality defense. (Id.; Buchwald v. Superior Court, 254 Cal.App.2d 347, 354-355, 357-359 (1967))

In addition, the conclusion reached is in harmony with the obvious legislative intent underlying section 1700.44, subd. (c). As already noted, like other statutes of limitation subd. (c) was designed to bar the untimely assertion of affirmative claims for damages, and not to prevent the invocation of legitimate defenses based on purely defensive matter. Plainly, the legislature did not intend to make the availability of defenses under the Act turn on whether or not the party asserting the affirmative claim was proceeding under the Act. That intent is effectuated by the instant result, which prevents any such irrational disparate treatment.

For the foregoing reasons, the petition for a declaration that the contract is illegal so as to preclude Brown from making further damage or other claims under the contract is determined not to be time barred.

2. THE CONTRACT IS ILLEGAL UNDER THE ACT AND CHURCH IS NOT OBLIGATED TO PAY ADDITIONAL COMMISSIONS OR OTHERWISE PERFORM FURTHER UNDER THE CONTRACT.

Section 1700.5 of the Act provides in pertinent part as follows:

"No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner."

Section 1700.4 of the Act defines the terms "talent agency" and "artist" in pertinent part as follows:

"(a) `Talent agency' means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, ... Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.

"(b) `Artists' means actors and actresses rendering services on the legitimate stage and in the production of motion pictures . . . . and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

"Since the clear object of the Act is to prevent improper persons from becoming (talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void." (Buchwald v. Superior Court, 254 Cal.App. 2d 347, 351 (1967))

Church's status as an artist is undisputed. Therefore, the sole question presented is whether Brown was engaged in the occupation of a talent agent at the time he entered into and performed the contract with Church. The answer is that he was.

The true contractual and business relationship between Brown and Church was defined at the outset by the activities which Brown undertook on behalf of Church in connection with the film Stolen Moments. In that initial encounter between the two of them, Brown used his position as casting director on the film to procure employment for Church. In doing so, Brown displayed a willingness to take whatever steps were necessary to accomplish his objectives, including violating his primary duty to the producers, concealing his conflict of interest, using his influence, and fabricated a false list of credits for Church.

It was this behavior which constituted the prototype of what was being offered to Church when he was presented with a contract by Brown in November, 1988. In other words, by the contract Brown was offering and promising to procure employment for Church if he signed, ie.: "that was just a sample of what I can and will do for you if you sign with me." This is further confirmed by Brown's insistence, after the contract was signed, that he be paid his 15% commission on the earnings generated from the employment he had procured for Church in "Stolen Moments". In view of this conduct, Church's testimony that he was induced to sign the contract by Brown's promises that Brown would use his influence and contacts to secure employment for Church is entirely believable.

In view of the true relationship of the parties, as evidenced by their conduct and words, the conclusory recitations in the contract to the effect that Brown was merely being hired as a "personal manager" carry no weight. In fact, in these circumstances, the recitations can only be considered a subterfuge designed to conceal the true "talent agency - artist" relationship which existed. (Buchwald v. Superior Court, supra, 254 Cal.App. 2d at 355)

In addition, the more credible evidence establishes that after the contract was entered into Brown performed his obligations thereunder by engaging in continuous attempts to procure employment for Church and by repeatedly promising that he would procure such employment. These activities included arranging employment interviews, sending out resumes and photographs, calling casting directors, and representing to Church that he would be given a part in a film Brown was working on. In sum, throughout the relationship with Church, Brown was engaged in the business of offering, promising, or attempting to procure employment for Church.

Brown nevertheless contends that, under the recent decision in Wachs v. Curry 13 Cal.App 4th 616 (1993), Brown was still not a "talent agency" within the meaning of section 1700.4. In particular, Brown asserts that Church failed to demonstrate that Brown's procurement functions constituted a "significant part" of his business as a whole. (Id. at 628) In this regard, Brown is mistaken.

The holding in Wachs v. Curry sets forth when licensure as a talent agent is required under the Act:

> We conclude from the Act's obvious purpose to protect artists seeking employment and from its legislative history, the "occupation" of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole then he or she is subject to the licensing requirement of the Act even if, with respect to a particular client, procurement of employment was only an incidental part of the agent's overall duties. On

the other hand, if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act, even if, with respect to a particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties. (Wachs v. Curry, supra, 13 Cal.App.4th at 628)

The governing principles are clear. The Wachs court intended to distinguish between the personal manager who, while operating in good faith, inadvertently steps over the line in a particular situation and engages in conduct which might be classified as procurement. It clearly was not the court's intention to encourage individuals to engage in activities which the Legislature has determined require a license.

It is clear from a reading of the decision in Wachs that the court intended that in determining whether the Act requires a talent agency license, only the person's employment procurement functions on behalf of talent compared to his talent counseling functions are to be taken into account in establishing the person's business for purposes of determining the significance of the procurement activity. Other activities in which the person may engage, even those related to the theater such as theatrical exhibition, motion picture distribution, or being a casting director, are not considered or counted as part of the person's "business as a whole" in making the assessment. Were this not true even non-related occupations such as operating a fast food outlet could be counted. Such a result would encourage individuals to dabble in procuring employment for artists as a sideline without the need for licensure and would hardly be in keeping with "the Act's obvious purpose to protect artists seeking employment." Wachs v. Curry, supra, at 628.

The Wachs court declined to quantify the term "significant", finding that it was not necessary in that case. Since the term "significant" does not appear in the statute, adoption of regulations designed to quantify the term would be impossible. Mindful, however, of the teachings of the California Supreme Court in the case of Auto Equity Sales, Inc. v. Superior Court 57 Cal.2d 450, 455 (1962), the Labor Commissioner recognizes that as an inferior tribunal, her hearing officers are required to follow decisions of courts exercising superior jurisdiction. The Labor commissioner, in exercising her mandated primary jurisdiction in these cases on a day-to-day basis, finds that it is imperative that definition be given to the term "significant" if that term is to be applied in determining the need for licensing.

The word "significant" is defined in American Heritage Dictionary, as follows: "Having or expressing a meaning; meaningful." This definition, coupled with the obvious purpose of the Wachs court, seems to imply that conduct which constitutes an important part of the relationship would be significant. The Commissioner finds that procurement of employment constitutes a "significant" portion of the activities of an agent if the procurement is not due to inadvertence or mistake and the activities of procurement have some importance and are not simply a de minimis aspect of the overall relationship between the parties when compared with the agent's counseling functions on behalf of the artist. This meaning would seem to be in line with the tenor of the court's decision in Wachs v. Curry.

In the context of the foregoing principles, a petitioner who asserts a licensing violation under the Act, satisfies his burden if he establishes that the petitioner was involved in a contractual relationship with the respondent and that that relationship was permeated and pervaded by employment procurement activities undertaken by the respondent. Such a showing supports an inference that these activities were a significant part of the respondent's business as a whole, and suffices to establish a prima facie case of violation of the Act. At that point, the burden shifts to the respondent to come forward with sufficient evidence to sustain a finding that the procurement functions were not a significant part of the respondent's "business as a whole" as that term is defined, above.

In the present case, Church clearly demonstrated that his contract with Brown was permeated and pervaded by procurement activities. Brown, on the other hand, failed to produce any evidence that would show that such activities were not a significant part of Brown's business, which included the representation of many other actors in addition to Church. In these circumstances, Church's evidence warranted a finding that at the time of entering into and performing under the contract, Brown was engaged in and carrying on the occupation of a talent agency. Consequently, the contract was illegal and void, and Brown is precluded from obtaining any further recovery of any kind under the contract.

3. THE PETITION TO RECOVER COMMISSIONS PREVIOUSLY PAID UNDER THE CONTRACT IS BARRED BY THE STATUTE OF LIMITATIONS.

As previously noted, section 1700.44, subd. (c) explicitly bars any claim for affirmative relief based on a violation which occurred more than one year prior to the filing of the petition. Here, the illegal acts as well as the final payment by Church under the contract all occurred more than one year prior to the filing of the petition on June 16, 1992. Consequently, any claim by Church for rescission and restitution of amounts paid, based on illegality, is time barred.

Church seeks to escape this result by invoking tolling doctrines based on equitable estoppel, continuing violation, the discovery rule, and fiduciary relationship. However, at the hearing Church failed to produce any evidence which would support application of any of these doctrines; consequently, they are not applicable in the present case.

Disposition

Accordingly, it is hereby, ordered as follows:

1. The contract between Brown and Church, is declared to be illegal, void, and unenforceable, and it is declared that Church shall have no further obligation to Brown under the contract for commissions or otherwise.

2. The claim of Church for rescission of the contract and restitution of commissions previously paid is held to be barred by the statute of limitations.

Dated: 5-12-94
/s/ William A. Reich,
Attorney and Special Hearing Officer for the Labor Commissioner

The above Determination is adopted in its entirety by the Labor Commissioner.

Dated: 6-2-94
/s/ Victoria Bradshaw,
State Labor Commissioner
[ELR 16:5:3]

British Court upholds George Michael's contract with Sony Music

A British Chancery Court has rejected George Michael's claim that his 1988 recording agreement with Sony Music Entertainment (UK) unreasonably restrained trade and was unenforceable in so far as unperformed.

As described by Judge Jonathan Parker, Michael's recording career began in 1982, when, as a member of the group "Wham!," the performer signed an agreement with Inner Vision Record Label. Inner Vision, which had a licensing agreement with Sony Music, then CBS(UK), obtained the rights to up to ten albums by the group.

In October 1983, Wham! purported to terminate the Inner Vision agreement, claiming that it was void, voidable, or unenforceable on the grounds of, inter alia, misrepresentation, restraint of trade and undue influence. Inner Vision responded by seeking injunctive relief to prevent the group from breaching its agreement pending trial. After a hearing, the parties entered an agreement whereby CBS(UK) directly signed Wham!.

The 1984 agreement provided for the delivery of master recordings for a first Wham! album during an initial contract period lasting a maximum of three years. CBS(UK) had the option of extending the contract for up to seven such contract periods, with master recordings for an additional album to be delivered during each of those periods.

The 1984 agreement contained substantially improved financial terms and also provided that in the event of Wham! splitting up, CBS(UK) could require the individual members of the group to remain bound by the agreement as if it were an agreement between CBS(UK) and such individual member.

The group's first album under the agreement was released in November 1984. In January 1985, CBS(UK) exercised the first of its seven options under the 1984 agreement, thus committing Wham! to the delivery of a second album.

In the summer of 1986, Wham! disbanded; the group's last album was released in July 1986.

CBS(UK), in November 1986, exercised the leaving member option with respect to Michael and to Andrew Ridgeley.

In January 1988, Sony took over CBS and CBS(UK) became Sony Music. Michael, who had been renegotiating his agreement with CBS (UK), signed an agreement with Sony Music. The agreement, among other terms, provided for an "initial contract period;" granted Sony Music five consecutive options to extend the term of the agreement; and stated that in no event would the term of the agreement last longer than fifteen years, i.e., until

2003, by virtue of the "contract period" provisions. The agreement is scheduled to terminate in 2003. Michael was required to deliver three albums during the initial contract period and one album during each subsequent contract period. The best-selling album "Faith" was treated as the first album delivered pursuant to the 1988 agreement - the agreement, stated Judge Parker, was, in effect, a seven album deal, with Sony Music being committed to accept delivery of "Faith" plus Michael's next two albums and having options over a further five albums.

Sony Music agreed to pay Michael an outright payment of $1 million on signing the agreement; a recoupable advance, with respect to "Faith," of $1 million on signing, a further $1 million in March 1988 and a further $1 million in June 1988. Michael also was to receive a prepayment of $3 million in "pipeline royalties" in December 1988. The agreement set forth the payments for the remainder of the albums, along with certain improved royalty rates. In July 1990, Michael and Sony agreed to vary certain terms of the 1988 agreement in order to place Michael in parity, with respect to royalties and advances, with United States "superstars" signed to Sony US.

In September 1990, the album "Listen Without Prejudice" was released. Michael, who had decided to limit his promotional activities, found his relationship with Sony steadily deteriorating. In early July 1992, Michael decided that he wanted to leave Sony. In August 1992, Michael repaid Sony the advance he had received, in March 1992, for a third album, stating that he had not commenced the recording of the album.

In October 1992, Michael initiated a lawsuit, claiming that the 1988 agreement was unenforceable as a restraint of trade.

According to Michael, there was a lack of reciprocity between Sony Music's apparent right to terminate the agreement at the end of each contract period and the lack of any comparable right granted to Michael to do so. It also was argued that the contractual assignment of copyright in the master recordings for the full term of the copyright gave Sony Music a "hold" over Michael upon the termination of the 1988 agreement. Michael observed that he was not entitled to supply any third party with master recordings during the term of the agreement, and that Sony Music had limited promotional obligations in relation to the release of his albums.

Judge Parker observed that Michael did not allege that the 1984 agreement was unenforceable, and that the parties recognized the enforceability of the agreement when they renegotiated its terms in 1988 and in 1990. It did not appear that there was oppression or misuse of bargaining power by Sony or any compulsion on Michael to enter into the 1984 or 1988 agreements.

The court, after careful consideration, proceeded to find that the compromise of the Inner Vision lawsuit (a central part of the 1984 agreement) was "entirely genuine and bona fide;" that there was a clear public interest in upholding genuine and proper compromise; that it therefore was not open to Michael to allege that the 1988 agreement was in restraint of trade; and that the terms of the 1988 agreement did not have to be justified under the doctrine of restraint of trade.

Judge Parker reiterated that the negotiations leading to the 1988 agreement took place in good faith and on the understanding that the 1984 agreement was enforceable. As a result of the 1987 renegotiation and the 1990 renegotiation, Michael obtained substantial commercial benefits, indicating to the court that applying the public policy in favor of upholding compromises would produce a just result.

Although stating that the conclusion reached on the public policy argument made it unnecessary for the court to further consider the restraint of trade issue, Judge Parker (in case the conclusion was wrong) discussed certain points based on the assumption that the 1988 agreement was subject to the doctrine of restraint of trade. The court reviewed, among other issues, the nature of the market; the nature of artists' recording contracts; the practice of renegotiation; inequality of bargaining power; the possibility of the 1988 agreement operating unfairly against Michael; and the impact of the 1984 agreement.

Judge Parker next conducted an analysis of the terms of the 1988 agreement. It was noted that the duration of the agreement was governed by the amount of product which Michael agreed to sell, and that the duration thus was to some extent within Michael's own control. The court pointed out that Michael's financial terms under the 1988 agreement reflected, among other things, Sony Music's entitlement to exclusivity of output of master recordings during the term of the agreement; that artists rarely obtain release obligations; that it was "unreal" to suggest that Sony Music might fail or refuse to exploit Michael's recordings; and that the royalty and advance provisions of the 1988 agreement substantially improved the terms of the 1984 agreement. The court found it difficult to see how the exclusivity and exploitation arising from the outright sale and transfer of copyright could be classified as a re-straint of trade or that there was anything oppressive in the fact that a record company may retain a copyright for the full copyright period, with no provision for reverter.

In all, the court declared that the restrictions of the 1988 agreement were reasonably necessary for protecting Sony Music's legitimate interests and were commensurate with the benefits obtained by Michael.

Judge Parker considered Sony Music's equitable defenses and found that Michael, having affirmed the 1988 agreement by requesting the advance for a third album, was not entitled to claim that the agreement was unenforceable as an unreasonable restraint of trade. Sony Music also established the defense of acquiescence, subject only to the counter-equities alleged by Michael. After lengthy review, the court found that Michael's claims did not alter "the balance of unfairness and unconscionableness in any way...it is unfair to Sony Music, and unconscionable, for Mr. Michael now to assert that the 1988 agreement is unenforceable."

The court concluded by rejecting the claim that the 1988 agreement was prohibited by art 85(1) of the Treaty establishing the European Economic Community, and thus was automatically void pursuant to the provisions of art 85(2).

According to news reports, Michael plans to appeal the court's decision.

Panayiotou v. Sony Music Entertainment (UK) Ltd, Chancery Division, LEXIS Enggen Library, Cases File (June 1994) [ELR 16:5:8]

U.S. District Courts do not have jurisdiction to hear cases alleging copyright infringements committed abroad, even if the infringing activities were "authorized" in the United States, a federal appellate court holds in case involving international homevideo distribution of "The Yellow Submarine"

International trade in American copyrighted goods has been one of the brightest spots in the U.S. balance of trade picture. But as sales of U.S.-produced movies, television programs, records, and software increase, so do international copyright disputes. Many of these cases wind up in federal courts in the United States, and when they do, they raise important issues about whether U.S. District Courts have jurisdiction to hear them at all.

One such case, involving the international distribution of videocassettes of the Beatles' movie "The Yellow Submarine," has resulted in a very significant decision that limits the authority of federal judges to hear international copyright disputes. The case arose because MGM had authorized the domestic and international distribution of cassettes of "The Yellow Submarine" in the mistaken belief that it had acquired homevideo (as well as theatrical and television) distribution rights to the movie. (ELR 15:1:3)

In an opinion by Judge Dorothy Nelson, the Ninth Circuit sitting en banc has held that when a defendant's conduct within the United States consists solely of authorizing copyright-infringing acts that occur entirely abroad, U.S. courts do not have subject matter jurisdiction, because even if the acts authorized abroad would have violated U.S. copyright law if they had occurred in the U.S. - indeed, even if such acts violate the copyright law of the country where they occur - infringing activity abroad does not state a claim under U.S. copyright law. By federal statute, U.S. District Courts have jurisdiction to hear only those copyright cases that arise under U.S. copyright law.

In so ruling, the court expressly overruled Peter Starr Prod. v. Twin Continental Films, 783 F.2d 1440 (9th Cir. 1986) (ELR 8:2:20), which had held that a U.S. District Court had subject matter jurisdiction where homevideos of a movie were distributed abroad, because the defendant had "authorized" the homevideo distributor to do so in a contract negotiated in France but signed in the U.S. In that now-overruled case, the Ninth Circuit had held that because the Copyright Act gives copyright owners the exclusive right "to authorize" certain uses of their works, the Act is violated if the authorization occurs in the U.S., even if the authorized activity occurs solely abroad. However, that analysis was rejected in "The Yellow Submarine" case; and the Ninth Circuit has now ruled that a defendant does not violate the exclusive right "to authorize" provision of the Act by authorizing activity which would not have been an infringement under U.S. law if the defendant had committed that activity itself.

The Ninth Circuit rejected an argument that U.S. copyright law extends to acts of infringement committed abroad when such acts "result in adverse effects within the United States."

The court did have subject matter jurisdiction over MGM's domestic distribution of "Yellow Submarine" videos. Thus the case presented an additional issue of practical importance: whether the court could award damages based on the international distribution of the videos as well as on its domestic distribution. In Update Art v. Modiin Publishing, 843 F.2d 67 (2d Cir. 1988), the Second Circuit Court of Appeals did permit recovery of damages for a foreign infringement where the foreign infringement consisted of the unauthorized reproduction of artwork that itself had been reproduced without authorization in the United States.

The plaintiff in "The Yellow Submarine" case asked the Ninth Circuit to follow the Second Circuit's Update Art decision. But the record on appeal in "The Yellow Submarine" case did not show where the "negative" for the infringing homevideos had been made (that is, whether it had been made in the U.S. or abroad). Thus the Ninth Circuit declined to rule as the plaintiff requested; rather, it said that it would "express no opinion" on the "validity" of the Update Art decision in the Ninth Circuit.

The court also declined to rule on the contention that the plaintiff could recover damages for the international distribution of "The Yellow Submarine" on the theory that it was part of "a larger conspiracy to violate [the plaintiff's] copyright that included actionable infringement within the United States," or on the theory that the plaintiff could recover damages for international distribution under foreign laws, or under a breach of contract theory. These questions were left "for the panel, in its best judgment, to consider" in further proceedings on remand.

Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1994 U.S.App.LEXIS 10604 (9th Cir. 1994) [ELR 16:5:10]

Movie "Honey, I Shrunk the Kids" was not substantially similar to a screenplay submitted by plaintiff and thus did not infringe its copyright

The Disney movie "Honey, I Shrunk the Kids" was not substantially similar to a screenplay entitled "The Formula" which had been submitted to and rejected by the studio a few years before the movie was released. Because the two works were not substantially similar, the Court of Appeals has a affirmed summary judgment that had been granted to Disney by the District Court (ELR 14:6:6).

"Honey, I Shrunk the Kids" is a family comedy/adventure about neighboring families who dislike each other initially but come together after the kids are shrunk and restored to normal size. As described by the court, "The Formula" is an adventure story about a 12-year-old boy genius who, together with his high school science teacher, invents a formula for shrinking people down to one-foot tall.

The court found that despite the shrinking-people similarity, the two works "have substantially different plots, themes, and sequences of events," have "dissimilar" characters and dialogue, and have "dramatically" different moods, settings and pace. As a result, the plaintiff had not satisfied the "extrinsic similarity" test for infringement used by the Ninth Circuit and thus was not entitled to a jury trial on the "intrinsic similarity" test.

Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1994 U.S.App.LEXIS 2609 (9th Cir. 1994) [ELR 16:5:11]

Movie "Coming to America" was not substantially similar to novel "The Arab Heart" and thus did not infringe its copyright

A Federal Court of Appeals has affirmed a summary judgment granted to defendants Paramount Pictures and Eddie Murphy (ELR 14:5:7) in a case alleging that their movie "Coming to America" infringed the copyright to the novel "The Arab Heart" written by the plaintiff, Alveda King Beal (a relative of the late Martin Luther King, Jr., and a former member of the state legislature in Georgia).

The appellate court agreed with Ms. Beal that there were similarities between the two works: "Both involve young crown princes from wealthy royal families coming to America where they meet the women they will marry" and "Both feature a strong ruler who . . . initially prefers that the prince enter into an arranged marriage." However, the court held that these similarities "involve ideas and other general themes that are not susceptible to copyright protection."

To find infringement, the law requires comparisons to be made of plots, moods, characterizations, pace, settings, and sequence of events. But when the court compared these aspects of the two works, it concluded that no reasonable factfinder could conclude that "Coming to America" and "The Arab Heart" were substantially similar.

Beal v. Paramount Pictures Corp., 20 F.3d 454, 1994 U.S.App.LEXIS 10376 (11th Cir. 1994) [ELR 16:5:11]

Washington Supreme Court rules that state's "Erotic Music Statute" is unconstitutional

In 1992, a Washington trial court (ELR 15:1:10) ruled that the state's "Erotic Sound Recordings" statute was unconstitutional and granted a motion by Soundgarden and other musical groups for a permanent injunction barring the enforcement of the statute.

The Washington Supreme Court has upheld the trial court ruling.

The statute requires that the erotic "content" of sound recordings not be displayed or made readily accessible to minors. In the first part of a two-stage statutory proceeding, prosecutors would bring a party before a trial court on five days notice for a hearing on the state's allegation as to the character of the challenged material. If the court determined that the material was erotic, the distributor would be required to place an "Adults Only" label on the front cover of all copies of the material at issue; dealers and distributors could not display the material in their store windows or in any other manner so as to make it "readily accessible" to minors; and any person who sold, distributed, or exhibited the material to a minor might be guilty of a criminal offense. The court also could enjoin the sale, distribution, or exhibition of the "erotic contents" of the material to minors throughout the state; violating the order would subject dealers and distributors to civil contempt proceedings and to criminal proceedings.

Judge Smith ruled unconstitutional the procedures under the statute as constituting prior restraint upon protected speech as applied to adults. Furthermore, the statute was overbroad because it reached constitutionally protected conduct, and violated due process by not providing sufficient time for preparing an adequate defense at the initial hearing and by subjecting dealers and distributors to civil contempt proceedings for violating an injunction even though they may not have been parties in the initial hearing and even though they may not have notice of the court's determination as to the character of certain material. The statute further violated due process by imposing criminal penalties without providing sufficient notice of which materials were adjudged "erotic," and by not providing that a party must have "knowledge" that the materials he/she sold were erotic. Judge Smith ruled that the statute violated due process and the right to a trial by jury in criminal proceedings by allowing the determination concerning whether material was "erotic" to be made at an initial civil hearing and presented as a judicial fact to a jury in a subsequent criminal proceeding.

The trial court correctly denied attorneys' fees, concluded Judge Smith.

Concurring Chief Judge Andersen disagreed with any state constitutional discussion in the majority opinion.

Soundgarden v. Eikenberry, 123 Wash. 2d 750, 871 P. 2d 1050, 1994 Wash.LEXIS 255 (Wash. 1994) [ELR 16:5:12]

To transfer copyright, writing must be the product of the parties' negotiations and must be signed at about the time oral agreement is reached, appellate court holds in affirming decision that a letter written by Anne Rice was insufficient to transfer movie rights to her novel "The Mummy"

Best-selling novelist Anne Rice writes scary books for her fans - and once she wrote a letter that must have scared her lawyers, because it almost snatched defeat from the jaws of the victory her lawyers had just obtained.

The events that led to Rice's almost fateful letter began back in 1987 when she met with movie producers Frank Konigsberg and Larry Sanitsky and orally agreed to write a romantic melodrama, the television and movie rights to which the producers had an option to acquire. The story got written; it became Rice's best-selling novel "The Mummy." But no written instrument was ever signed, documenting the oral agreement. Later, the producers attempted to extend their option, but Rice said they had failed to do so within the option period and thus whatever rights they might have had, lapsed.

The producers sued, but the District Court agreed with Rice and dismissed the case, in part because of the absence of a signed agreement as required by section 204(a) of the Copyright Act. (ELR 14:1:6) "Konigsberg, Sanitsky and Rice did lunch, not contracts," and "That might have been the end of the story, but for the fact that Rice thereafter tried to vindicate her position by writing a somewhat indignant letter" to the producers' lawyer. Rice wrote that "as far as I am concerned, these contracts, though never signed, were honored to the letter" because the producers "got exactly what they paid for." According to Rice, they had simply failed "to pick up their option, or extend it."

Rice's letter has prompted Court of Appeals Judge Alex Kozinski to display, yet again, his wit and wisdom. The letter showed, Judge Kozinski has observed, that "Inside many a practicing lawyer there's a novelist struggling to be born. The converse is also true: Novelists sometimes yearn to be lawyers. All things considered, it's best if all concerned stick with their own callings."

The literary successes of lawyers Scott Turow and John Grisham challenge Judge Kozinski's advice that lawyers should stick to their own callings. But the consequences of Anne Rice's letter show how right the judge was in suggesting that novelists stick to theirs. This is so, because upon receipt of Rice's letter, the producers' lawyers moved to reopen the case, arguing that the letter was sufficient to satisfy the "signed writing" requirement of the Copyright Act. The District Court ruled that it was not, and the Court of Appeals has affirmed.

In an opinion by Judge Kozinski, the appellate court has held that to satisfy the "signed writing" requirement for copyright transfers, "the writing in question must, at the very least, be executed more or less contemporaneously with the agreement and must be a product of the parties' negotiations." The reason for this rule, Judge Kozinski explained, is that signed writings are required to transfer copyrights for three reasons: to ensure that authors will not give away their copyrights inadvertently; to force parties who want to acquire rights to negotiate with authors to determine precisely what rights are being transferred and at what price; and to serve as guideposts for the parties to resolve their own disputes.

Rice's letter was written three and a half years after the oral agreement with the producers, a year and a half after the agreement would have expired, and six months into a lawsuit. As a result, "Rice's letter þ though ill-advised þ was not the type of writing contemplated by section 204 as sufficient to effect a transfer of the copyright to THE MUMMY."

Comment: This case arose in the context of a dispute between a transferor and a transferee. The opinion does not indicate whether the "contemporaneous signing" requirement also would be imposed if the dispute were between a transferee and an infringer, where the document of transfer was signed after the infringement took place, and the issue in the case was simply the transferee's standing to pursue the action. In light of the reasons cited by Judge Kozinski for the contemporaneous signing rule, it appears that the rule would not apply in such a case. There is no reason an infringer should benefit from tardy completion of transfer documents, where the transferor and transferee agree that a transfer did take place.

Konigsberg International, Inc. v. Rice, 16 F.3d 355, 1994 U.S.App.LEXIS 2157 (9th Cir. 1994) [ELR 16:5:12]

Biographer's use of quotations from unpublished letters is fair use

Ted Morgan's biography of author William S. Burroughs used 48 words excerpted from unpublished letters written by Harold Norse. When Norse brought a lawsuit alleging defamation, unfair competition, breach of contract and copyright infringement, a Federal District Court granted a motion for summary judgment brought by Morgan and by Henry Holt and Co., the publisher of "Literary Outlaw: The Life and Times of William S. Burroughs."

A Federal Court of Appeals affirmed the dismissal of the defamation, unfair competition, and breach of contract claims (ELR 15:7:6), but reversed the judgment on the copyright claim and remanded the matter for a determination as to whether the quotations from Morgan's letter constituted a fair use under the copyright laws.

Federal District Court Judge Legge first observed that the Ninth Circuit has not applied the fair use doctrine to a biography case and proceeded to conduct a "special analysis," particularly in light of the decisions in Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991), and Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), opinion supplemented, 818 F.2d 252, cert. denied, 484 U.S. 890.

The court described the letters in issue as correspondence written by Norse during the years 1963 through 1970. Morgan used excerpts from five of the letters in one paragraph of the biography concerning Norse's opinions about various colleagues.

In reviewing the fair use factors set forth in section 107 of the Copyright Act, the court found that the Morgan parties were likely to benefit commercially from the publication of the biography. But Judge Legge emphasized that the work was "a scholarly biography of a literary figure;" that the public would benefit from Morgan's research; and that "a biographer must, in order to be accurate, cite and quote things said by the subject and said about him by others." The commercial aspect of the copying was of minimal significance, stated the court, and the Morgan parties did not use Norse's name to advertise the book and did not prominently feature the copied material or Norse's name anywhere in the book. Furthermore, Morgan was not "racing Norse to publication or exploiting the headline value of the infringement."

It then was noted that although the copyrighted letters were unpublished, this factor did not preclude a finding as to the fair use of the copied material.

With respect to the amount and substantiality of the portions used, the court found that the copied material comprised a very small percentage of the letters - only about 50 of 12,000 words were copied. Judge Legge pointed out that Norse did not show how the copied material went to the "heart" of the copyrighted work and how it presented a factual dispute.

In considering the factor denominated the effect of the use on the potential market, the court stated that Morgan's use of the copied material did not supplant any market for Norse's letters.

The court rejected a bad faith argument, commented that the Court of Appeals already rejected Norse's "not published" argument, and stated that both courts had held that Morgan was not contractually bound to promote Norse's forthcoming autobiography.

Norse v. Henry Holt and Company, 847 F.Supp. 142, 1994 U.S.Dist.LEXIS 800 (N.D. Ca. 1994) [ELR 16:5:13]

Restaurants and bars infringed NFL copyrights by using special antenna to receive distant television broadcasts of blacked-out home games

Restaurants and bars in the Cleveland area infringed the National Football League's copyrights in television broadcasts of its games when they used special antenna to receive distant television broadcasts of blacked-out home games, a Federal District Court in Ohio has held. Under NFL rules, games are not televised in their home territories unless they are sold out 72 hours in advance.

Several restaurants and bars in the Cleveland area had installed special antenna that enabled them to receive broadcasts of locally blacked-out home games of the Cleveland Browns - broadcasts that originated from a network television station in Toledo which is outside the Browns' home territory.

The restaurants and bars argued that they were not liable for copyright infringement because of Copyright Act section 110(5) which exempts public performances by means of a "single receiving apparatus of a kind commonly used in private homes." The court disagreed, however, because survey evidence showed that the antennas used by the restaurants and bars were not commonly used in private homes in the Cleveland area.

The court also rejected the defendants' argument that the NFL was guilty of copyright "misuse" because it blacked out home games, and thus the NFL could not enforce those copyrights. The court noted that the defense of "copyright misuse" has not been recognized in the Sixth Circuit. And it ruled that even if there is an affirmative defense of copyright misuse, it is not applicable in this case, because copyright law permits the NFL to decline to license the right to telecast home games which are not sold out 72 hours in advance, if it wishes to do so.

National Football League v. Rondor, Inc., 840 F.Supp. 1160, 1994 U.S.Dist.LEXIS 19599 (N.D.Ohio 1993) [ELR 16:5:14]

New York Times prevails in libel action arising from critical review of book about professional football

In September 1989, the New York Times published a book review by Gerald Eskenazi, a Times sportswriter. In his review of "Interference: How Organized Crime Influences Professional Football," written by Dan E. Moldea and published by William Morrow and Company, Eskenazi stated, in part, that "there is too much sloppy journalism to trust the bulk of this book's 512 pages - including its whopping 64 pages of notes."

When Moldea brought an action for libel and invasion of privacy, a Federal District Court granted the newspaper's motion for summary judgment (ELR 14:10:18). The court found that a book review is the type of article which a reasonable reader knows to be comprised of the reviewer's opinion, and that, in this context, the cited comment, as well as other statements challenged by Moldea, either were statements of opinion about a literary work, or were so clearly true that no reasonable juror could find them to be false. In February 1994, a Federal Court of Appeals reversed the District Court's decision and remanded the matter, finding that the trial court erred in ruling that the review could not be defamatory as a matter of law. The court emphasized that it did not hold that Moldea had made out his entire claim, or even that he might present his case to a jury, but only that the author had stated a claim that the court declined, at that stage of the proceedings, to hold nonactionable.

In May 1994, the court granted the Times' petition for rehearing and amended its earlier decision. Judge Harry Edwards expressed "distress" and announced that he had made "a mistake of judgment." Judge Edwards stated that the original majority opinion was generally correct in its statement of the law of defamation, but that the opinion did not take sufficient account of the fact that the statements at issue appeared in the context of a book review, "a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer's description and assessment of texts that are capable of a number of possible rational interpretations." Although there is no per se exemption from defamation for book reviews, Judge Edwards observed that the original opinion applied an "inappropriate" standard to evaluate whether the Times review was actionable.

On reconsideration, it was held that the challenged statements in the review were supportable interpretations of Moldea's work, and that, as a matter of law, the review was substantially true. The court, accordingly, affirmed the District Court decision granting summary judgment in favor of the Times.

Judge Edwards stated that when a reviewer comments on the work being reviewed and when such commentary is a supportable interpretation of the author's work, the interpretation does not present a verifiable issue of fact that can be actionable in defamation. As in the original opinion, the court relied on Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990; ELR 12:2:8, 12:6:19) in finding that there is no "wholesale exemption" from liability in defamation for statements of "opinion." But Milkovich did not reject the importance of context, declared Judge Edwards, but apparently discounted the context in the circumstances of that case.

Judge Edwards recalled that "there is a long and rich history in our cultural and legal traditions of affording reviewers latitude to comment on literary and other works." The statements challenged by Moldea were not "direct assaults on Moldea's character, reputation, or competence as a journalist." And while a bad review may injure an author's reputation to some extent, continued Judge Edwards, "criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre."

The Times argued that the appropriate standard for evaluating critical reviews would be to determine whether the critic's interpretation is supportable by reference to the written work. A critic's statement must be "a rational assessment or account of something the reviewer can point to in the text, or omitted from the text, being critiqued" (emphasis by the court).

As previously held, the statement that "Moldea's work is sloppy journalism" was capable of a defamatory meaning insofar as it tended to injure Moldea's reputation as an investigative journalist. Contrary to the original opinion, Judge Edwards stated that it was "highly debatable" whether the "too much sloppy journalism" statement was sufficiently verifiable to be actionable. In any event, it was not necessary to determine the verifiability of the statement because the Times presented supportable interpretations of the reviewer's comments.

With respect to Eskenazi's statement that Moldea "revives the discredited notion" that Carroll Rosenbloom, "the ornery owner of the Rams, who had a penchant for gambling, met foul play when he drowned in Florida 10 years ago," Judge Edwards noted that a reasonable jury could conclude that the review's characterization of the book's portrayal of Rosenbloom's death was false. However, Moldea did not reveal that Rosenbloom's death was accidental until 35 pages after giving "undeniably titillating hints of homicide." Judge Edwards declined to hold that a reviewer could not reasonably suggest that Moldea sought to "revive" the notion that Rosenbloom was murdered in order to build suspense prior to disproving that theory.

Moldea also claimed that Eskenazi asserted that Moldea incorrectly portrayed as "sinister" a meeting between Joe Namath and Lou Michaels, a member of the Baltimore Colts. Moldea argued that the book revealed that the meeting was innocent. The original opinion concluded that a reasonable jury could find that Moldea did not describe the meeting as a "sinister" rendezvous, but made it clear that the meeting was "quite accidental."

Judge Edwards observed that even applying the "supportable interpretation" standard, this statement was "close to the line." Nevertheless, Judge Edwards announced that he was "constrained to conclude that [the passage] does not give rise to an actionable claim." It appeared that only the "sinister meeting" passage provided Moldea with a possible basis for his defamation claim, and this was "a very weak basis indeed." The passage was not defamatory on its face, and even without the support of the passage, the review's assertion that "Interference" contained "too much sloppy journalism" was, as a legal matter, "substantially true," and thus not actionable in defamation.

Judge Edwards concluded by agreeing with the District Court's dismissal of Moldea's false light invasion of privacy claim.

Chief Judge Abner Mikva, in writing a dissenting opinion to the original decision, expressed concern that "the extra dimension placed on Milkovich by [the court's decision] causes some troublesome surgery on the First

Amendment and its impact on artistic expression." Chief Judge Mikva pointed out that the First Amendment has recognized a distinction between "communications intended to inform and those seeking to appeal to the artistic senses," and cautioned that the court's opinion might "open up the entire arena of artistic criticism to mass defamation suits." The standard of "sloppiness" in the context of artistic works would not be verifiable, for Chief Judge Mikva, no matter what examples are used to sustain or reject the charge.

Chief Judge Mikva, in discussing the historical protection of artistic and literary criticism, noted that potentially defamatory statements of opinion appearing in reviews have been afforded significant protection from defamation liability by the common law privilege of fair comment and by First Amendment doctrine. Milkovich, stated Chief Judge Mikva, although rejecting a distinct privilege for all statements that could be labeled opinion, did not alter these earlier protections, but shifted the inquiry towards whether a statement is verifiable.

Readers approach literary and artistic criticism with the expectation that the opinions therein are not meant as objective statements or implications of fact - "the public nature of the work under review allows readers to arrive at their own opinions," stated the dissent.

The primary statement at issue might be taken by some to mean that Moldea's work contained specific factual inaccuracies - a charge the author could disprove by providing support for the challenged statements. Other readers, noted Chief Judge Mikva, might interpret the "sloppy journalism" statement as implying that the author wrote a "bad" book. For Chief Judge Mikva, the statement was "far too close to the nonverifiable end of the spectrum to warrant defamation liability."

The imprecision of the statement, combined with its use in a book review, placed the statement "under the protective umbrella of nonverifiable opinion," declared the dissent. It appeared to Chief Judge Mikva that the review expressed "a uniquely subjective evaluation" of the quality of the book. In circumstances such as the instant case, publishers should prevail, in the dissent's view, where the verifiability of the statements at issue is doubtful. The phrase "too much sloppy journalism" was simply too subjective to be verified and should have been protected under Milkovich.

Chief Judge Mikva did not propose creating a "wholesale" defamation privilege for statements appearing in literary or artistic criticism, but questioned the majority's refusal to consider the effect of the "communicative vehicle" upon the audience. "Reviewers should escape defamation liability unless they attempt to smuggle defamatory and verifiable facts about the author under the guise of criticism," stated the dissent -but that was not the case before the court.

The dissent concluded by stating that the review's implication concerning the Namath-Michaels meeting was protected non-verifiable opinion; that the Rosenbloom allegation also was not independently actionable; and that Moldea should rely "on other reviewers, and to the book itself, to prove his work worthy of its claims."

For the dissent, the court's decision may "significantly affect the freedom with which reviewers go about their jobs. Fear of legal reprisal threatens to cause reviewers to retreat to rhetorical excess instead of explaining their gripe and attempting to support it by reference to the work under review. Such a result would chill the informative and lively public discourse that frequently accompanies the publication of an influential book. . . . Courts should be most hesitant to assume an arbiter's role in this most delicate area of First Amendment speech. While the designation of speech as a `book review' should not automatically exempt it from the libel laws, any more than the `opinion' label enshrines other speech, the `sloppiness' of the reviewer's work should be left to the readers to determine, rather than for judges or juries to ordain."

Moldea v. New York Times Company, 22 F.3d 310, 1994 U.S.App.LEXIS 9397 (D.C.Cir. 1994); dissent appears at Moldea v. New York Times Company, 15 F.3d 1137, 1152, 1994 U.S.App.LEXIS 2685 (D.C.Cir. 1994) [ELR 16:5:14]

Court rejects basketball player agent's antitrust claim over certification requirements

In a decision issued in 1991, but not published until 1994, a Federal District Court in Colorado granted summary judgment to the National Basketball Players

Association and to the co-chairman of the Committee on Agent Registration and Regulation of the Association in an action brought by Thomas P. Collins. Collins challenged the legality of the Association's regulations governing player agents and the operation of Article XXXI of the Association's collective bargaining agreement with the National Basketball Association which forbids NBA teams from negotiating with agents who are not certified by the Association.

As described by Judge Matsch, the regulations set forth a comprehensive system of agent certification and conduct. A player agent may not conduct individual contract negotiations unless he/she signs the "Standard Player Agent Contract." The contract prohibits the imposition of a fee or commission on any contract which entitles a player to the minimum salary and limits agent fees on all contracts. A "code of conduct," in part, prohibits an agent from offering anything of value to a player or other parties to induce the player to use the agent's services. And agents may not engage in conduct that constitutes an actual or apparent conflict of interest, or in any unlawful conduct involving dishonesty, fraud, deceit, or misrepresentation.

Collins received certification in 1986, soon after the regulations took effect, but his certification was revoked in 1988 because he failed to pay agent dues and failed to attend at least one agent seminar as required by the regulations. An Association committee denied Collins' 1990 application for recertification, based, in part, on allegations against him by Kareem Abdul-Jabbar. A lawsuit brought by Abdul-Jabbar against Collins, his former agent, was settled in November 1989. The committee, citing Collins' purported conduct while acting as Abdul-Jabbar's agent, determined that Collins "was unfit to serve in a fiduciary capacity on behalf of NBA players. . ."

Collins subsequently brought the instant lawsuit alleging, among other claims, that the Association's actions created a group boycott and constituted a per se violation of the Sherman Act by restraining him from representing individual basketball players in salary negotiations with their teams.

Judge Matsch observed that the Association's regulations and Article XXXI of the collective bargaining agreement were within the statutory exemption from antitrust regulation. Although the Association's regulations limit agents' representational ability, the identified "market" for the representation of NBA basketball players in salary negotiations "is explicitly precluded by the federal labor laws." As the exclusive representative for all of the NBA players, the Association is legally entitled to forbid any (emphasis by the court) other person or organization from negotiating for its members, stated the court.

The regulations did not serve to establish a group boycott against Collins, who did not trade with the Association, the NBA or the NBA member teams.

Furthermore, the Association did not combine with a non-labor group or a non-party to a labor dispute in adopting the regulations or negotiating Article XXXI. The Association developed the regulations in response to agent abuses and to benefit its members and "did not develop them in collusion with the employer group or to assist the employer group effort to restrain competition or control the employer group's product market."

The union activity was not designed to help employers control competition and prices, emphasized Judge Matsch, who concluded by rejecting Collins' claim of tortious interference with contracts and intentional interference with prospective business advantage.

In 1992, a Federal Court of Appeals affirmed the District Court decision.

Collins v. National Basketball Players Association, 850 F.Supp. 1468, 1991 U.S.Dist.LEXIS 21162 (D.Colo. 1991), aff'd without opinion, 1992 U.S.App.LEXIS 24069 (10th Cir. 1992) [ELR 16:5:16]

Texas Supreme Court declines to recognize cause of action of false light invasion of privacy

Clyde Cain, a prison inmate in Texas serving a life sentence for murder, sued the Hearst Corporation, doing business as the Houston Chronicle Publishing Company, for false light invasion of privacy.

A June 1991 article referred to Cain as a burglar, thief, pimp, and killer. Cain claimed that the article falsely stated that he was a member of the "Dixie Mafia" and that he had killed as many as eight people.

Hearst removed the case to a Federal District Court in Texas; the court granted the company's motion for dismissal on the ground that the one year limitations period for libel claims expired before Cain filed his lawsuit.

A Federal Court of Appeals certified to the Texas Supreme Court the following questions: whether Texas recognizes the tort of false light invasion of privacy, and, if so, which statute of limitations would govern that action.

The Texas Supreme Court has ruled that the state does not recognize the tort of false light invasion of privacy. Judge Raul A. Gonzalez, after careful consideration, stated that false light claims largely duplicate other rights, particularly defamation and that such claims lack many of the procedural safeguards that accompany actions for defamation, "thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law." In all, declared Judge

Gonzalez, " the marginal benefit to be achieved by permitting recovery against non-defamatory speech not addressed by any existing tort is outweighed by the probably chilling effect on speech and, in some cases, on freedom of the press, that would result from recognition of the false light tort."

Judge Jack Hightower, in dissent, expressed the view that the court's ruling would unduly narrow an individual's right to "personal dignity, integrity, and sense of selfhood." Judge Hightower noted that the scope of actionable conduct differs between the torts of defamation and false light - there are communications which, based on their content, are not defamatory, but may be false light violations of privacy because they are highly offensive. Furthermore, the torts are designed to protect different interests - defamation preserves an individual's reputation interests, but false light invasion of privacy protects an individual's sensitivities about what people know and believe about him/her. The torts also differ with respect to the level of publicity required for the cause of action to arise - false light requires significantly broader publication than does defamation.

The dissent commented that the overlap between the torts, by itself, should not require rejecting a cause of action for false light invasion of privacy; that there is a "patent inconsistency in allowing suit for public disclosure of private facts as an invasion of privacy but not for disclosure of untrue facts;" and that applying an actual malice standard would adequately protect federal free speech rights.

Cain v. Hearst Corporation, 1994 Tex.LEXIS 122 (Tex. 1994) [ELR 16:5:17]

Claim of musician seeking co-ownership of Hoyt Axton song "Joy to the World" is barred by laches, Court of Appeals holds

In a case of "first impression" in the Ninth Circuit, the Court of Appeals has held that laches may be a defense to an action seeking a declaration of co-authorship (and resulting co-ownership) of a copyrighted work.

The work at issue in this case was the song "Joy to the World," composed in 1970 by the defendant, singer-songwriter Hoyt Axton, and allegedly co-authored by the plaintiff, David Jackson.

Jackson knew by 1975, and perhaps as early as 1971, that Axton denied Jackson was a co-author of the song. Yet Jackson did not file suit until 1991. The District Court granted summary judgment for the defendant (ELR 15:1:8). And the Court of Appeals affirmed.

The appellate court has held that laches is available as a defense in a case of this sort; and it agreed with the District Court that Jackson had not overcome the presumption of prejudice that arose from his delay in filing suit.

Jackson v. Axton, 25 F.3d 884, 1994 U.S.App.LEXIS 13221 (9th Cir. 1994) [ELR 16:5:18]

Current copyright owner of "Why Do Fools Fall in Love?" obtains ruling limiting damages to co-authors of song

In 1993, a Federal District Court jury determined that Jimmy Merchant and Herman Santiago, two former members of the group "Frankie Lymon and the Teenagers," had co-authored the group's hit song "Why Do

Fools Fall in Love?" and were co-owners of its copyright (ELR 15:12:22; 14:8:20).

The court denied a motion for a new trial, but granted a motion by several parties including Morris Levy, Big Seven Music Corp. and Roulette Records, for judgment as a matter of law with respect to a statute of limitations issue. Merchant and Santiago, who waited 26 years (after turning age 21) to bring their lawsuit, claimed that they were entitled to a tolling of the statute of limitations on the ground of duress. The court held that duress must constitute "an integral part of the cause of action in order to justify a tolling of the statute of limitations." Alternatively, it was found that the jury's verdict was not supported by the evidence. And, based on section 507(b) of the Copyright Act, the court limited Merchant and Santiago to recovering damages accruing within three years of October 7, 1987, the day their complaint was filed.

In January 1993, Windswept Pacific Entertainment, which acquired ownership of the "Fools" copyright in 1988, moved to intervene in the action; Windswept requested the court to state explicitly that the company was only liable for damages accruing since February 1990, three years before its intervention in the action.

Chief Magistrate Judge Buchwald commented that "for reasons unknown" to the court, Merchant and Santiago never sought to join Windswept even though they knew the company had acquired ownership of the "Fools" copyright after the complaint was filed. It was found that Merchant and Santiago were responsible for failing to timely join Windswept; that the calculation of the limitations period would run from the date that the company became a party to the action; and that Windswept was liable only for damages accruing since February 25, 1990.

Merchant v. Lymon, 848 F.Supp. 29, 1994 U.S.Dist.LEXIS 3319 (S.D.N.Y. 1994) [ELR 16:5:18]

"TV Teddy" prevails in copyright and trademark infringement action brought by creator of "Teddy Ruxpin"

Alchemy II created and owns all rights in the animated, talking, plush teddy bear named "Teddy Ruxpin" which has been marketed since 1985. Recently, Yes! Entertainment Corp. developed a plush, talking teddy bear named "TV Teddy." Don Kingsborough, the president and founder of Yes!, originally marketed Teddy Ruxpin for Alchemy, through a company known as Worlds of Wonder.

When Alchemy filed a lawsuit against Yes!, Federal District Court Judge Rea first declined to disqualify

Yes!'s counsel, stating, in part, that Alchemy suffered no actual prejudice by virtue of the law firm's representation of Yes! The law firm had represented Worlds of Wonder during several lawsuits, against third parties, seeking to enforce its rights under a Teddy Ruxpin license agreement with Alchemy.

In turning to Yes!'s motion for summary judgment on Alchemy's copyright infringement claim, Judge Rea noted that the company, for purposes of the motion, conceded both Alchemy's ownership of the copyrights at issue and that Yes! had access to the copyrighted works. The court then observed that the similar features cited by Alchemy were derived from the common idea of a talking, plush teddy bear. Plush material is common to most stuffed toys; many stuffed animals wear clothes; protruding noses are functional on animatronic animals; and contrasting paw and ear colors "are standard on teddy bears everywhere." Alchemy was not entitled to rely on any standard or functional features to demonstrate substantial similarity.

With respect to the pear-shaped head of the toys, the court commented that there are only a limited number of head shapes a teddy bear could have. The shape, although "somewhat distinctive," was not unique and probably was not protectible, stated Judge Rea. Even assuming that the head shape was distinctive and nonfunctional, this evidence of similarity was de minimis, and insufficient to preclude a grant of summary judgment. All of the other similarities involved nonprotectible elements common to any talking teddy bear.

Judge Rea observed certain differences in the coloring and clothing of the bears; in eye orientation and color; in fur configurations and body shapes; and in the audiovisual presentation of each toy. The voices of the bears were different and TV Teddy interacts with a video story, while Teddy Ruxpin "narrates" a story as the voices and sounds of the story are broadcast from his torso.

The idea of a talking teddy bear is not protectible under the copyright laws, declared Judge Rea, and Yes! was entitled to summary judgment.

Alchemy further argued that Yes! infringed its four registered trademarks; each of the marks contained the words "Teddy Ruxpin," and attempted to claim the generic word "Teddy" as a valid mark. Judge Rea rejected the company's claim of a proprietary interest in the word "teddy" by itself - the work "is a generic term which Alchemy cannot prevent others from using, even when the word is associated with a product in direct competition."

Because "teddy" was the only word common to the marks used to name the two bears, it was clear, in Judge Rea's view, that TV Teddy and Teddy Ruxpin were not at all similar. The court therefore granted summary judgment in favor of Yes! on Alchemy's claims for trademark infringement under both the Lanham Act and at common law.

In turning to Alchemy's trade dress infringement claim, the court reiterated that the products were not substantially similar and that the likelihood of confusion as to the source of each toy based on its look or overall audiovisual presentation was minimal.

The court also found that alleged similarities between the packing of Teddy Ruxpin and TV Teddy were insufficient to demonstrate a likelihood of confusion. Even granting that Teddy Ruxpin's overall trade dress is distinctive and has acquired a strong secondary meaning, Yes! did not adopt confusingly similar dress. In the absence of a likelihood of confusion, the court declined to find that Yes! competed unfairly in the market based on the use of a similar mark or trade dress.

Judge Rea concluded by rejecting Alchemy's causes of action alleging unfair competition under California

Business and Professions Code section 17200 and dilution of trademark.

Alchemy II, Inc. v. Yes! Entertainment Corporation, 844 F.Supp. 560, 1994 U.S.Dist.LEXIS 1982 (C.D.Ca. 1994) [ELR 16:5:18]

Court withdraws decision granting partial summary judgment to publisher in dispute over troll doll illustrations

In about 1959, as described by Federal District Court Judge Haight, Thomas Dam, a citizen of Denmark, created troll dolls. Dam's company sold or publicly distributed the dolls in the United States without copyright notice, and the dolls passed into the public domain.

In early 1992, Modern Publishing hired artist Arthur Friedman to create artwork, based upon the public domain trolls, for a series of troll coloring and activity books. Modern obtained registrations of copyright for each of the publications as derivative works.

In May 1992, Landoll, Inc. hired Friedman to illustrate four troll activity books; a company employee instructed Friedman "Please key them similarly to the ones you did for Modern - neuter, no clothes."

When Modern brought an action for copyright infringement, Landoll argued that its activity books showed the public domain trolls pursuing different activities and striking different poses from those depicted in Modern's publications.

Judge Haight first stated that Landoll's view of the copyright registrations obtained by Modern was "unreasonably narrow." Modern claimed that Friedman added to the preexisting public domain troll dolls "original illustrations" which included "original modification of" those dolls. The illustrations were protectible, not the particular postures or poses in which those illustrations were arranged in Modern's publications, noted the court.

Judge Haight then observed that in the First Circuit "a relatively modest amount of originality suffices for copyright protection" and that this requirement was "more than satisfied" by "the distinctive pupils of [Friedman's] Trolls' eyes (small green circles within larger yellow circles), their sharply pointed and elongated ears, and their varying facial expressions." The original troll dolls apparently had ears which were not pointed and quite different eyes. Friedman's depictions of trolls for Modern's publications were protected by copyright, ruled the court; the copyrights were not limited to the particular poses and postures in which the figures appeared.

Modern also showed that Landoll copied the protected work without authorization. Landoll claimed that it had no prior knowledge of the Modern publications; that Landoll's employee intended only to request comparable trolls for Landoll; and that the employee emphasized to the artist that the drawings for Landoll were to be different from Modern's.

Judge Haight stated that although Landoll's arguments raised genuine issues of fact, such facts were not material and would not preclude summary judgment. Landoll's hiring of Friedman established its access to the original troll illustrations Friedman created for Modern. "Access to the creator implies access to his creations," declared the court, and "the Troll depictions in the Landoll publications are virtually identical to those in the Modern publications."

The court concluded that Landoll's troll publications infringed Modern's copyrights, and granted Modern's motion for partial summary judgment on the issue of infringement.

In response to Landoll's argument that an artist does not sell the right to use his artistic style when he sells his drawings, Judge Haight commented that "an artist who creates an original work entitled to copyright protection may choose between copyrighting it himself or assigning ownership of copyright to another." Friedman chose the latter course and Landoll had to accept the legal consequences, in Judge Haight's view.

In March 1994, after considering Landoll's motion for reargument, Judge Haight stated that the court's prior opinion did not sufficiently consider the protectibility under the Copyright Act of Modern's drawings, and that the court would further review whether Friedman's troll drawings contained the requisite original contributions to distinguish them from the troll dolls in the public domain. Judge Haight emphasized that the court did not hold that sufficient originality was absent, but that summary judgment was not appropriate on this issue. The court, accordingly, withdrew the ruling granting partial summary judgment to Modern.

Modern Publishing, A Division of Unisystems, Inc. v. Landoll, Inc., 841 F.Supp. 129, 1994 U.S. Dist.LEXIS 137; 849 F.Supp. 22, 1994 U.S.Dist.LEXIS 2313 (S.D.N.Y. 1994) [ELR 16:5:19]

New York Magazine's publication of photograph does not violate Civil Rights Law

New York Magazine published a photograph of Esmeralda Alvarado and another individual; the photograph was accompanied by a caption reading, "Once a month, transplanted Mexicans pay up to $100 to swill

Tecate [Mexican beer] and listen to local bands at the old Roseland Ballroom." Alvarado and the other individual, who were 18 and 20 years old at the time of publication, stated that they were not Mexican and did not attend concerts such as those described in the article. Alvarado asserted that the photograph was taken at an afternoon concert attended with family members and that no alcohol was served at the concert. Impact Visuals Photo & Graphics, Inc. provided the photograph to the magazine.

In response to Alvarado's claims of libel per se and the violation of sections 50 and 51 of New York's Civil Rights Law, a New York trial court granted Impact Visuals' motion to dismiss the libel cause of action, but let stand the libel cause of action against the magazine and the Civil Rights Law claims against Impact Visuals and the magazine.

An appellate court has dismissed the remaining claims against Impact Visuals and New York Magazine. The court noted that a picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising unless it has no real relationship to the article or unless the article is an advertisement in disguise. The photograph at issue illustrated the general theme of the magazine article and was not within the scope of the statute, stated the court.

With respect to the defamation claim, it was noted that Alvarado argued that the use of the word "swill" imputed drunkenness. But even assuming that Alvarado was depicted as being among the patrons drunk at a concert, the imputation of drunkenness would be libelous only if "accompanied by some aggravating factor;" such a factor was not present, concluded the court.

Alvarado v. K-III Magazine Corporation, 610 N.Y.S.2d 241, 1994 N.Y.App.Div.LEXIS 4046 (N.Y.App. 1994) [ELR 16:5:20]

Satellite broadcasters may not subscribe as "cable systems" to compulsory licensing provisions of Copyright Act

Section 111 of the Copyright Act defines a "cable system" as "a facility, located in any State, Territory, trust Territory, or Possession, that...receives signals transmitted or programs broadcast by one or more television broadcast stations...and makes secondary transmissions of such signals" (emphasis by Federal Court of Appeals Judge Kravitch). Cable systems, under the compulsory licensing provisions of section 111, may transmit copyrighted television broadcasting, as long as they pay royalties and comply with other specified procedures.

When the National Broadcasting Company sued Satellite Broadcast Networks, Inc. for copyright infringement, a Federal District Court found that Satellite Broadcast was not a cable system because the company's facilities were not located entirely within a single state, and held that Satellite Broadcast rebroadcast NBC's signals without permission.

However, in National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991; ELR 13:9:13), a Federal Court of Appeals held that satellite carriers are "cable systems" covered by the compulsory licensing provisions. The court stated that satellite carriers implicitly were included in the compulsory licensing scheme, and rejected the argument that a "cable system" must be located entirely within a single state.

The court also declared "unpersuasive" the Copyright Office's policy decision (issued after oral argument in the case) denying satellite broadcasters the right to subscribe to the compulsory licensing provisions of section 111.

In 1992, the Copyright Office affirmed its policy decision by promulgating final regulations providing that satellite carriers are not "cable systems" under section 111(f). It was pointed out, among other factors, that satellite carriers are not located in any state, and that the statute was directed at "localized retransmission services."

In the instant proceeding, the Satellite Broadcasting and Communications Association, a trade group representing satellite carriers, challenged the Copyright Office regulations. Based on the court's previous holding, the District Court invalidated the regulations.

On appeal, Judge Kravitch stated that although the new regulations conflicted with the court's interpretation of the term "cable system" in Satellite Broadcast Networks, the regulations were neither arbitrary, capricious, nor in conflict with the clear meaning of the statute. The court's previous decision did not address the "clear meaning" of the term "cable system" under section 111(f), but rather rested its decision upon inferences drawn from the statutory scheme and upon the court's policy determination that satellite carriers should be included for the benefit of their rural customers. The regulations were "valid exercises of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme" and were binding on the court. Judge Kravitch therefore reversed the District Court's invalidation of the regulations and remanded the matter for the entry of judgment on behalf of the Copyright Office.

Satellite Broadcasting and Communications Association of America v. Oman, 17 F.3d 344, 1994 U.S.App. LEXIS 5485 (11th Cir. 1994) [ELR 16:5:21]

Court upholds arbitrator's decision in dispute between Directors Guild and Home Box Office over excerpt fee payments

When Home Box Office introduced a new cable service called "The Comedy Channel," the company obtained permission to use clips from various television programs and films. HBO also reached an agreement with the Writers Guild and the Screen Actors Guild regarding the use of the clips. In March 1989, HBO negotiated a tentative agreement, which would not have required the payment of excerpt fees to the directors of the clips, with the Directors Guild; the Director's Council refused to approve the agreement.

HBO filed a claim for expedited arbitration to determine its obligation to the directors of the excerpted material. The arbitrator did not reach a decision.

HBO operated The Comedy Channel from November 1989 until April 1991. In March 1992, an arbitrator found that HBO breached the excerpt fee provisions in its collective bargaining agreements, but declined to determine damages based on the specified per use measure. The arbitrator considered awarding damages based on losses actually suffered, but the Directors Guild refused such an award. The arbitrator therefore limited his award to a declaration of the rights of the parties.

When the Directors Guild brought an action to vacate the arbitrator's decision, a Federal District Court dismissed the action for failure to state a claim.

A Federal Court of Appeals, in upholding the District Court decision, stated that the arbitrator's award derived from an arguable construction of the bargaining agreement, particularly a provision authorizing the arbitrator "to counteract otherwise unjust results."

The court indicated that its disposition of the matter was "not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir.R. 36-3."

Directors Guild of America v. Home Box Office Inc., 1994 U.S.App. LEXIS 563 [ELR 16:5:21]

Cable company must air material submitted for public access channel, but New York court rejects negligence and libel claims

Glendora Buell submitted program material to be cablecast by Cable Systems Corporation on its Nassau County System access channel in the fall of 1993. The material consisted of thirty minute programs, entitled "A Chat with Glendora." After broadcasting several programs, the company refused to air the remaining material, apparently because Buell used the time to discuss developments in the many pro se lawsuits she has filed.

Buell, among other claims, alleged that the cable operator violated New York State Executive Law Article 28, section 829(3). Section 829(3) provides that "No cable television company may prohibit or limit any program or class or type of program presented over a leased channel or any channel made available for public access or educational purposes." Section 531(e) of the Cable Communications Policy Act states that, subject to section 544(d), "a cable operator shall not exercise any editorial control over a public, educational or governmental use of channel capacity..." Section 544(d) provides that franchising authorities and cable operators may specify in a franchise that certain cable services either shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution.

The Cable Television Consumer Protection and Competition Act of 1992 expanded the scope of editorial control a cable operator may exercise over its public, educational and government access channels. The Act permits a cable operator to exercise editorial control, regardless of whether such control is stipulated in the franchise, over not only obscene material, but material containing sexually explicit conduct or material soliciting or promoting unlawful conduct.

Cablevision did not claim that Buell's program was obscene, sexually explicit, or that it solicited or promoted unlawful conduct. In the absence of such a claim, both the federal and state statutes prohibit a cable operator from exercising editorial control over program material. A New York trial court therefore denied Cablevision's motion to dismiss for failure to state a cause of action on the grounds that the state law was preempted.

Judge Donald N. Silverman stated that although section 829(3) may have an incidental effect on the First Amendment rights of cable operators with respect to the editorial control of public access, educational and government programming, cable operators retain editorial control over the remaining channel capacity. Cable Systems did not incur any substantial burden, declared Judge Silverman, in upholding the constitutionality of section 829(3).

The court commented that the Supreme Court decision on the "must carry" provisions of the Cable Act in Turner Broadcasting System, Inc. v. Federal Communications Commission would not alter the constitutional analysis of section 829(3); the statute imposes no special obligations on the speech of cable operators and is content neutral. Cable Systems' motion to dismiss for failure to state a claim on the grounds that section 829(3) is unconstitutional was denied.

In turning to Buell's constitutional claims, the court referred to a Federal District Court ruling issued in February 1994 in a matter involving the same parties. The court found that Buell did not state a claim under the United States Constitution since the Cable Systems parties were private persons and not state actors. Since Buell had an opportunity to litigate this issue in the prior action, to the extent the issue was based on the United States Constitution it was collaterally estopped, ruled Judge Silverman.

With respect to potential violations of Buell's rights of speech and press under the New York State Constitution, the issue of whether the Cable Systems parties were acting under color of state law was identical to the issue raised in the federal proceeding, and that collateral estoppel would apply. The court found that Buell did not show that any of the Cable Systems parties were state actors. The fact that a cable company is considered a public utility does not mean that Cable Systems was "imbued" with the power or authority of the state.

The court also granted Cable Systems' motion to dismiss Buell's causes of action for negligence, defamation, and intentional infliction of emotional distress.

According to news reports, the decision has been stayed while Cable Systems appeals the ruling.

Glendora v. Kofalt, New York Law Journal, p. 26, col. 2 (Westchester Cnty., Aug. 10, 1994) [ELR 16:5:22]

Wisconsin's regulation of negative option billing as unfair trade practice is not preempted by FCC regulation

Time Warner Cable operates cable systems in several Wisconsin communities. In order to subscribe, a customer must order the first level of service offered in the "basic" tier. Many subscribers also order an optional second or "standard" tier.

As part of a restructuring of services after the passage of the Cable Television Consumer Protection and Competition Act of 1992, Time Warner removed certain channels from its basic and standard tiers in various communities and offered the channels on a per channel or "a la carte" basis. Subscribers could add or drop a la carte channels on an individual basis; the channels also were available in a discounted package.

The Wisconsin Department of Agriculture, Trade and Consumer Protection charged Time Warner with violating state law for its practice of charging for a package of "a la carte" channels without obtaining a subscriber order requesting these channels by name. It was argued that the company's billing practice constituted "negative option billing," an unfair trade practice. The state sought to enjoin this practice and to compel Time Warner to return all income received through the alleged negative option billing.

Time Warner claimed that a Federal Communications Commission regulation, promulgated under the 1992 Cable Act, preempted the state statute. The regulation at issue provides that "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude [1] the addition or deletion of a specific program from a service offering,

[2] the addition or deletion of specific channels from an existing tier of service, or [3] the restructuring or division of tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations."

The Wisconsin officials claimed that the regulation did not authorize Time Warner's purported practice of billing a subscriber for a la carte offerings even though the subscriber had not requested any of the offerings by name. It was argued that there was no conflict between the federal regulation and the Wisconsin statute prohibiting negative option billing and no conflict preemption.

Federal District Court Chief Judge Crabb stated that if Time Warner correctly interpreted the regulation, the Federal Communications Commission acted outside its delegated authority in promulgating the regulation. Chief Judge Crabb noted that the 1992 Cable Act provided that "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name (emphasis by Chief Judge Crabb). For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."

According to Time Warner, the regulation was consistent with the statute in that the Commission stated that the "restructuring of tiers and equipment...will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment [a] subscriber presumably has already 'affirmatively requested' this level of service..." Under the regulation, Time Warner's a la carte channels already were "affirmatively requested" because at the time the a la carte channels were unbundled, the company's customers had requested the service tier from which the channels were removed. It was noted that the Federal Communications Commission determined that a subscriber who chooses a service tier with twenty channels has requested the particular number of channels regardless whether the channels remained in a tier or were separated out into a la carte offerings. Under this interpretation, the regulatory negative option prohibition would permit a cable operator to charge for a service that at one time was part of a tier the customer requested by name but was not requested by name itself.

However, the express language of the statutory negative option prohibition, noted Chief Judge Crabb, requires a cable operator to obtain a request for a given service by name before the operator may charge for that service. The Commission was not free to ignore the "by name" request, and the regulation was invalid as contrary to congressional intent, declared the court. Chief

Judge Crabb proceeded to find that Wisconsin's regulation of negative option billing did not conflict with a valid federal regulation.

Chief Judge Crabb rejected the arguments that the regulation specifically preempted Wisconsin's ability to enforce its own law against Time Warner and that the state was impermissibly engaged in regulating cable rates. Although states may not regulate rates, they are not preempted from regulating matters that may affect cable rates indirectly.

In all, Wisconsin's prohibition of negative option billing did not conflict with the relevant FCC regulation because the regulation was invalid to the extent that it authorized the billing practice challenged by Wisconsin officials. The federal statutory and regulatory provisions dealing with negative option billing did not specifically preempt Wisconsin's negative option billing law in any other way, and Congress's bar of state regulation of cable rates did not have preemptive effect in this case because Wisconsin's regulation of negative option billing did not constitute regulation of cable rates. The court, accordingly, entered judgment for the Wisconsin officials.

Time Warner Cable v. Doyle, 847 F.Supp. 635, 1994 U.S.Dist.LEXIS 3658 (W.D.Wis. 1994) [ELR 16:5:23]

Court denies injunctive relief in dispute over use of "Catalog" mark for home shopping television channel

A Federal District Court in New York has rejected Fashion Television Associates' motion for a preliminary injunction barring Spiegel, Inc. and Time Warner Entertainment Company from producing, distributing or broadcasting television programming under the names "Catalog 1 (1 or One)," "Catalog 2 (II or Two)," or "Catalog Channel" in connection with a home shopping television channel.

Fashion Television had used the marks "Catalogue TV" and "Catalogue Channel" in developing a home shopping television channel. The U.S. Patent and Trademark Office, after initially refusing the company's application to register "Catalogue TV" and "Catalogue Channel" as service marks, subsequently withdrew its rejection of the application to register the "Catalogue TV" mark.

Judge Robert L. Carter found that although Fashion Associates' registration applications demonstrated its intention to adopt the "Catalogue" mark as a trademark, the company's promotional efforts were not adequate to establish use of the mark in commerce. No evidence was presented that the viewing public had a chance to become acquainted with the "Catalogue" mark because the network had not yet begun broadcasting. Thus, Fashion Associates could not have created a sufficient association in the public mind between the mark and its source. In view of the failure to show the use of the "Catalogue" mark in commerce, Fashion Associates did not show a likelihood of succeeding on the merits.

Even if Fashion Associates could establish serious questions as to the merits of its case, the balance of the hardships did not weigh in favor of granting the requested injunctive relief. Since the company did not show the use of the marks in commerce, there was no basis on which it could claim irreparable harm if the court refused to grant an injunction. The Spiegel parties also had engaged in significant efforts in developing their "Catalog" home shopping television channel. Fashion Associates could adopt a marketing strategy aimed at distinguishing its channel from the competing channel, noted the court, in denying the company's motion for a preliminary injunction.

Fashion Television Associates, L.P. v. Spiegel, Inc., 849 F.Supp. 19 (S.D.N.Y. 1994) [ELR 16:5:24]

New Zealand court bars sale near Auckland stadium of bootleg merchandise bearing names and likenesses of Metallica and Paul McCartney

The High Court of New Zealand, in a decision issued on March 25, 1993, granted ex parte orders barring various parties, located at or about the MT Smart Stadium in Auckland on March 26 1993, from selling unauthorized merchandise bearing the names and likenesses of the musical group Metallica and singer Paul McCartney. Tony Blain, the exclusive authorized licensee for New

Zealand and Australia with respect to merchandise embodying the names, likenesses, trademarks, logos and visual representations of the performers, had sought the orders.

The court agreed to authorize certain named solicitors, as officers of the court, to approach vendors of unauthorized merchandise at the concert venues; to obtain the vendors' current addresses and evidence of identity; and to arrange for the surrender of all merchandise in their possession referring to or depicting either Paul McCartney's name or image or the name or image of Metallica.

Parties served with an injunction, cautioned the court, were to be advised of their remedies, including a right to apply to the court within 24 hours for a review of the orders and a right to claim damages in an appropriate case.

Judge Anderson commented that Blain's claim to a proprietary interest in the goodwill and copyrights of Paul McCartney and Metallica was complemented by the provisions of the Fair Trading Act 1986, particularly the provisions designed to prevent the deception of the public.

Tony Blain Pty Limited v. Splain, High Court of New Zealand, Auckland Registry [1994] FSR 497 (LEXIS ENGGEN Library, Cases File) [ELR 16:5:24]

British court issues rulings in dispute over footage taken at "rave"

Beggars Banquet Records, doing business (with respect to dance music) as XL Recordings, hired Spidercom Films to film an all-night dance party which was held in Hampshire on August 29-August 30, 1992. Spidercom agreed to produce "a musical documentary suitable for commercial sale plus possible re-edit for placements on TV/Satellite type programmes." XL, which agreed to pay Spidercom a total fee of L20,000, was designated the owner of the copyright in the video. Spidercom, upon signing the agreement, received L8,000.

In November 1992, Spidercom claimed that it was entitled to the second installment of its production fee; XL did not promptly reply to the request.

Spidercom subsequently provided video footage from the rave to the producers of "Storyline." In January 1993, Carlton Television broadcast a program entitled "Suddenly Last Summer" in its Storyline series. Spidercom received L18,500 for the use in the program of the excerpts from the footage.

When XL sought to restrain any further use of the footage and to require Spidercom to return the material, a British Chancery Court, in a decision issued in May 1993, found that XL had "arguable, but not unchallengeable claims to be the owner of the copyright in the footage and of the chattels constituting it." According to Judge Warner, XL had a stronger claim to be a joint owner with Spidercom of the copyright.

Spidercom also raised the defense of "fair dealing" for the purpose of reporting current events. But Judge Warner questioned whether the use of 13 1/2 minutes of the footage in a program of 25 minutes was fair dealing, whether events that took place in August 1992 were "current" in January 1993 and whether the program was limited to "reporting" those events.

After careful consideration, the court granted XL, subject to providing an undertaking, access to the footage in order to complete its proposed documentary. If

Spidercom succeeds at trial, the company then would be entitled to damages or an account of profits. XL agreed to pay any profits that it might derive from the exploitation of the footage into an escrow account awaiting the outcome of the trial.

Judge Warner declined to grant an injunction restraining the further dissemination of Carlton's program, stating that any harm to XL's interests that might result from the broadcast or distribution of the program was outweighed by the public interest in the subject matter of the piece.

Spidercom was ordered not to make any further use of the footage pending trial.

Beggars Banquet Records Ltd v Carlton Television Ltd, Chancery Division (1993) (Available in LEXIS ENGGEN Library, Cases File) [ELR 16:5:25]

Bankruptcy Court's sealing of documents relating to "Dances With Wolves" video licensing is upheld

Orion Pictures Corporation granted McDonald's Corporation a license to distribute videocassettes of three films, including "Dances With Wolves." Orion was in a Chapter 11 reorganization; the parties obtained approval from the Bankruptcy Court to enter into the transaction. The parties agreed that the transaction should remain confidential and Orion moved to seal all documents filed with the court, including the licensing agreement. The Bankruptcy Court granted Orion's motion.

The Video Software Dealers Association sought to unseal the agreement and related documents. As described by Federal Court of Appeals Judge George C. Pratt, association members, in previous transactions, had purchased from Orion about 500,000 videocassettes of

"Dances With Wolves" at $72 per copy, $64 more per copy than the McDonald's sale price.

The Bankruptcy Court denied the association's motion, and a Federal District Court affirmed the decision. The court noted that section 107(b)(1) of the Bankruptcy Code creates an exception to the general rule that court records are open for public examination; that confidential commercial information does not have to rise to the level of a trade secret in order to be protected under section 107(b)(1); and that the Bankruptcy Court did not abuse its discretion by sealing the confidential materials.

In upholding the District Court decision, Judge Pratt noted that in the bankruptcy area, Congress has established a special rule for trade secrets and confidential research, development, and commercial information. The Bankruptcy Court had reviewed in camera the information that Orion requested be sealed, and found that it qualified as confidential commercial information. The

District Court had found that disclosing the sealed information, including the overall structure, terms and conditions of the McDonald's agreement would very likely result in a "direct and adverse" impairment to Orion's ability to negotiate favorable promotion agreements, thereby giving Orion's competitors an unfair advantage.

Judge Pratt reiterated that the statute was not meant to protect only trade secrets; that commercial information is not required to meet the same level of confidentiality as trade secrets in order to warrant protection; and that Orion was not required to show "good cause" as a conditon to having the court seal the information.

The fact that Orion previously disclosed several of the terms in its agreement in order to rebut the association's claim of an antitrust violation did not amount to a waiver of confidentiality with respect to the other confidential commercial information contained in the agreement.

Video Software Dealers Association v. Orion Pictures Corp., 21 F.3d 24, 1994 U.S.App.LEXIS 7146 (2d Cir. 1994) [ELR 16:5:25]

Harness racehorse driver may not reopen civil rights action against Yonkers Raceway

In 1972, the New York State Racing and Wagering Board licensed George Hadges to own, train and drive harness race horses.

In 1986, the Racing Board found that Hadges, in an incident at Roosevelt Raceway, illegally signalled and passed wagering information to a member of the public while the driver was taking his harness race horse to the starting line. The Board also noted that Hadges's horse behaved erratically during the race, interfering with the other horses, and that the horse whose number Hadges had called out won the race. Hadges denied the charges. As a result of the incident, the Board, in 1989, suspended Hadges for six months.

When Hadges's license was restored, he attempted to obtain racing privileges at Yonkers Raceway which refused to accept him. In response to Hadges's lawsuit, a Federal District Court (ELR 12:6:19) stated that the raceway was a private facility and that the court did not have jurisdiction over Hadges's civil rights claim under 42 U.S.C. section 1983 because there was an absence of government action. A Federal Court of Appeals upheld the decision (ELR 13:1:18).

In the instant proceeding, Hadges essentially sought to reopen his federal claim of a civil rights violation. Judge Goettel granted the racetrack's motion for summary judgment, finding, in part, that Hadges did not show that there was collusion among all of the trotting tracks whereby barring a licensee from one track would result in being barred from the remaining tracks.

The court determined that although the current action lacked any substantial factual basis, it was not so frivolous as to warrant the imposition of Rule 11 sanctions.

Hadges v. Yonkers Racing Corporation, 845 F.Supp. 1037, 1994 U.S.Dist.LEXIS 3211 (S.D.N.Y. 1994) [ELR 16:5:26]

Ski race sponsor prevails in negligence action brought by handicapped skier

In March 1992, Franklin Potter, a handicapped skier, was injured while competing in the National Handicapped Downhill Championships at the Aspen Highlands ski area. Potter sued National Handicapped

Sports, the sponsor of the event, alleging that a race official was negligently standing on or near the race finish line and that the official's presence caused Potter to fall and fracture his hip.

In granting summary judgment to National Handicapped Sports, a Federal District Court in Colorado noted that Potter, prior to the race, read and signed a liability waiver and a registrant's release. Potter argued that the exculpatory agreements were void as a matter of public policy because of the nature of the sports organization's services to handicapped individuals and its duty to the public to keep the race course free from obstacles. Judge Babcock observed that Potter was injured while participating in a recreational activity which was neither a matter of great public importance nor a matter of practical necessity. There was no public duty that prevented the enforcement of the releases.

Potter also contended that the agreements did not clearly and unambiguously release the sports organization from liability. After examining the language in each release, Judge Babcock stated that although the registrant's release did not contain the term "negligence," the waiver was written in simple and clear terms and was not "inordinately" long and complicated. However, the express on-course hazards listed in the release were those occurring "naturally," and Judge Babcock declined to conclude, as a matter of law, that in executing the registrant's release, it was the parties' clear and unambiguous intent to preclude National Handicapped Sports' liability for Potter's claim.

In turning to the liability waiver, the court concluded that the waiver established the parties' intent to extinguish the sports organization's liability for injuries to Potter arising from the organization's negligent acts, and that, as a matter of law, the liability waiver was valid and encompassed Potter's claims.

Potter argued that even if the releases were valid as to a negligence claim, they were inapplicable in the instant matter because National Handicapped Sports was willfully and wantonly negligent. But Potter had not alleged in his complaint or in discovery material that National Handicapped Sports' purported misconduct was more than simple negligence. Even if Potter had alleged a claim for willful and wanton negligence, the facts were insufficient to support an inference by a reasonable fact finder that the race official acted willfully and wantonly.

Potter v. National Handicapped Sports, 849 F.Supp. 1407, 1994 U.S.Dist.LEXIS 5560 (D.Colo. 1994) [ELR 16:5:26]

Briefly Noted:

Copyright Infringement/Music.

A Federal District Court has granted summary judgment to several music publishers and composers in a copyright infringement action against Gertrude Stubbs, the sole proprietor of the Buck and Doe Corral in Pearson, Georgia.

Chief Judge Edenfield determined that Stubbs presented unauthorized public performances of copyrighted musical works. While Stubbs allegedly did not profit from the performance itself, the Buck and Doe Corral was a "profit-making enterprise." The fact that Stubbs may not have paid the performers "does not alter the nature of a profit-making enterprise," stated the court.

Furthermore, Stubbs, as sole owner of the Buck and Doe Corral, had the right and ability to control the activities at the establishment, derived a financial benefit from the operation of the establishment, and could be held individually liable for copyright infringement.

Chief Judge Edenfield awarded statutory damages of $2,000 per violation, for a total of $6,000 - about three times the amount Stubbs would have paid to be licensed - as well as injunctive relief barring Stubbs from further infringing the copyrighted works at issue, and attorneys' fees and costs in the amount of about $4,000.

Major Bob Music v. Stubbs, 851 F.Supp. 475, 1994 U.S.Dist.LEXIS 6165 (S.D.Ga. 1994) [ELR 16:5:27]

Copyright/Statute of Limitations.

The plaintiff's claim that the movie "Sister, Sister" infringed the copyright to his screenplay "A Little Visit

Home" (aka "Sleep Tight Little Sister") was barred by the Copyright Act's three-year statute of limitations, because the plaintiff had viewed "Sister, Sister" in August 1987 but did not file suit until February 1991. The plaintiff argued that New World had distributed the movie during the three-year period that preceded the filing of his lawsuit, that is, between February 1988 and February 1991. But the court rejected the plaintiff's argument that distribution during that period would enable the plaintiff to "reach back" to infringements that had taken place more than three years before suit was filed. Moreover, the court noted that the plaintiff had failed to produce any evidence that New World had distributed the movie within three years prior to suit being filed. While the plaintiff had asserted such distribution, those assertions relied "on naked allegations and speculation," and thus the plaintiff failed to demonstrate the existence of a genuine issue of material fact. Summary judgment for the defendants was therefore affirmed.

Roley v. New World Pictures, Inc., 19 F.3d 479, 1994 U.S.App.LEXIS 5259 (9th Cir. 1994) [ELR 16:5:27]

Copyright/Soft-Sculptures.

The defendant's soft-sculpture animal-head duffel bags were found to be substantially similar to the plaintiff's soft-sculpture animal-head duffel bags, because the "overall similarity" in the bags' appearances and the "almost exact identity of the[ir] disassembled component pieces" far outweighed their "relatively trivial dissimilarities." Moreover, the defendant was found to be a "willful infringer," and therefore increased statutory damages of $50,000 per infringement were awarded, where the defendant did not investigate the possibility it was infringing even after receiving notice from the Customs Service that a shipment of its merchandise had been seized, had continued to sell its merchandise, and did not check to see what copyrights the plaintiff had registered even after it was aware of the plaintiff's copyright claims and after it had been in touch with the plaintiff's attorney.

Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 1994 U.S.App.LEXIS 4480 (7th Cir. 1994) [ELR 16:5:27]

Copyright/Dolls.

The defendant's "Baby Dolly Mine" doll was substantially similar to the plaintiff's "Puffalump Kids" baby doll; but the defendant's "Tender Tots" mouse doll was not substantially similar to the plaintiff's "Baby Puffalumps" mouse doll, a Court of Appeals has held. On appeal from a preliminary injunction issued by a District Court as to both dolls, the Court of Appeals did a de novo comparison of the protectible features of the dolls, and it concluded that: an ordinary observer would find the baby dolls to be substantially similar, but the protectible elements of the mouse dolls were substantially dissimilar. Comment: This opinion contains an excellent explanation of the difference between copying in fact and illegal copying, and of the infringement requirement that there be substantial similarity of protectible expression. This decision points out that where works have both protectible and unprotectible elements, courts must exclude comparison of the unprotectible elements in deciding whether an ordinary observer would conclude that one was copied from the other.

Fisher-Price, Inc. v. Well-Made Toy Manufacturing Corp., 25 F.3d 119, 1994 U.S.App.LEXIS 12535 (2d Cir. 1994) [ELR 16:5:27]

Radio Station Trademark.

Pride Communications Limited Partnership, the licensee for radio station WZSR-FM in Crystal Lake, Illinois, broadcasts at a frequency of 105.5 Mhz. The station has used "STAR 105.5" or "STAR 105.5 Radio" as its on-air name and holds an Illinois trademark registration for the mark STAR 105.5 RADIO.

In December 1993, WCKG, a corporation owned by Cox Broadcasting, purchased WYSY-FM, a Chicago radio station operating at the frequency of 107.9 Mhz. WYSY, whose broadcast ranger overlaps with a portion of WZSR's geographical broadcasting area, adopted an "adult contemporary" music format similar to that of WZSR and identified itself as "STAR 107.9."

A Federal District Court in Illinois has adopted a Magistrate Judge's recommended decision granting injunctive relief to Pride with respect to WCKG's use of the terms "STAR 107.9," "Chicago's new STAR 107.9," or any other designation so similar to Pride's mark as to be likely to cause confusion.

Magistrate Judge Pallmeyer found that the word "star" is not descriptive of radio broadcast and promotion services. Even assuming that "star" is descriptive, Pride made an adequate showing that its mark had obtained secondary meaning in the company's broadcast area, found Magistrate Judge Pallmeyer, and was entitled to the exclusive use of the mark.

The fact that WCKG did not know of WZSR's existence until after WYSY began operations and did not intend to harm WZSR was not controlling. And Pride presented evidence that consumer confusion might result in inaccurate crediting of its station by the Arbitron rating service.

In all, Pride established that it was likely to prevail on the merits of its Lanham Act trademark infringement claim and also on the merits of related state law claims. The entry of a preliminary injunction would not disserve the public - listeners would continue to have access to WCKG's programming. Magistrate Judge Pallmeyer therefore granted the requested injunctive relief.

Pride Communications Ltd. Partnership v. WCKG, Inc., 851 F.Supp. 895, 1994 U.S.Dist.LEXIS 755 (N.D.Ill. 1994) [ELR 16:5:28]

New York Civil Rights Law.

A New York trial court has enjoined the band Virgin Steele from distributing for purposes of trade its music video "The Tale of the Snakeskin Voodoo Man." The video, in addition to the band members, features Joey and Mary Jo Buttafuoco (Joey Buttafuoco's brother Robert manages the band), and Jacqueline Tavarez, an Amy Fisher "look-alike."

Tavarez claimed the violation of her rights under section 51 of the New York Civil Rights Law, alleging that she was not informed of, and did not consent to, the band's plan to air the video on the television program "A Current Affair." Tavarez's former employer, Marvel Comics, purportedly terminated her portrayal of the character "Nightcat" because Marvel no longer considered her "an appropriate person to associate with children."

Judge Elliott Golden found that Tavarez established a prima facie violation of the statute, although factual details concerning Tavarez's knowledge of the proposed use and her express or implied consent to the use still were "unclear." Those issues, however, related to damages and did not provide a defense to either an injunction or the action.

Tavarez v. Buttafuoco, New York Law Journal, p. 23, col. 1 (Brooklyn State Sup.Ct., Aug. 4, 1994) [ELR 16:5:28]

Adult Enterprise Ordinance.

A Little Rock, Arkansas ordinance prohibited "sexually oriented businesses" from operating within 750 feet of religious facilities, schools, the boundaries of residential zones or any single-family or multiple-family use, public parks, medical facilities, historical properties, or another sexually oriented business. The sexually oriented businesses included in the ordinance were adult arcades, adult bookstores, adult video stores, adult cabarets, adult motion picture theaters and adult theaters, each of which enterprise was further defined.

In response to a challenge by adult book store owners, a Federal District Court upheld the constitutionality of the ordinance.

A Federal Court of Appeals affirmed the District Court decision. It was noted that the ordinance did not prohibit the operation of a sexually oriented business, but only limited the areas of such operation. The ordinance was a content-neutral time, place and manner regulation aimed at the secondary effects of sexually oriented businesses. The fact that Little Rock relied on the experiences of other cities and did not present evidence of actual secondary effects of the business did not show an improper purpose by the city. The ordinance served a substantial governmental interest; permitted reasonable alternative avenues of communication; did not violate due process; and was not a bill of attainder.

Ambassador Books & Video, Inc. v. City of Little Rock, Ark., 20 F.3d 858, 1994 U.S.App.LEXIS 6040 (8th Cir. 1994) [ELR 16:5:28]

WASHINGTON MONITOR

Native-Americans' attempt to cancel registrations for "Washington Redskins" marks requires further proceedings

Suzan Shown Harjo and several other Native-American individuals enrolled as members of federally recognized Indian tribes sought to cancel various registrations owned by Pro Football, Inc., including the marks "Redskins" and "Washington Redskins."

The Trademark Trial and Appeal Board first ruled that the Harjo parties had standing to challenge the registrations. It was alleged that the term "Redskins" is a pejorative, derogatory, degrading, offensive, scandalous, disparaging and racist designation for a Native American person. These facts, if proved, would serve to establish that the Harjo parties had a personal interest in the proceeding beyond that of the general public.

The Board found that statutory grounds were set forth for seeking to cancel the registrations, and proceeded to consider an issue of first impression, i.e., whether the equitable defenses of estoppel and laches would be available against Section 2(a) claims of disparagement and scandalousness. The Board declared that there existed a broader interest, beyond the personal interest being asserted by the Harjo parties, in "preventing a party from receiving the benefits of registration where a trial might show that [a party's] marks hold a substantial segment of the population up to public ridicule." The Harjo parties may attempt to make such a showing, ruled the Board.

The Board cautioned that it did not intend to announce a general rule concerning the availability of the defenses of laches and estoppel against a claim of disparagement and scandalousness, and that its decision that the equitable defenses were not available in the instant case was based on the asserted public policy
interest.

According to the Board, the critical dates in the case were the issue dates of the registrations - it will have to be decided whether, at the time the registrations issued, the marks were scandalous and/or disparaging.

With respect to Pro Football's claim that the Harjo parties did not allege any special damages, the Board observed that there is no requirement that actual damage be pleaded and proved in order to establish standing or to prevail in an opposition or cancellation proceeding and that Pro Football did not support its assertion that proof of special damages is, or ought to be, an element of claims under Section 2(a).

The Board concluded by construing Pro Football's remaining defenses as amounting to a charge that the relevant provisions of Section 2(a) were unconstitutional. To the extent that Pro Football was requesting that the Board find that Section 2(a) violated the First Amendment, such a finding was beyond the authority of the Board, as would be a determination as to whether the provision was overbroad or vague.

Harjo v. Pro Football, Inc., 1994 TTAB LEXIS 9, 30 U.S.P.Q.2d (BNA) 1828 (Trademark Trial and Appeal Board 1994) [ELR 16:5:29]

University of Wisconsin may register trademarks for "Bucky Badger" and other school insignia

The Trademark Trial and Appeals Board has found that the University of Wisconsin may register "Bucky Badger" as a trademark for clothing items, as well as a mark featuring the badger design on the block letter "W," the name "Wisconsin Badgers," and other combinations of the mascot and school names.

The University Book Store and other local and state retail businesses opposed the registration, primarily on the ground that the university had abandoned the marks at issue. According to the opposers, the university, prior to entering a formal licensing program in January 1988, never claimed ownership in the marks and allowed many non-affiliated entities to use the marks.

Administrative Trademark Judge Hohein, in a lengthy opinion, found that the university did not abandon the subject marks. The retail parties never used the marks as their own marks, but merely sold and advertised merchandise imprinted with the marks. The university's tolerance of such activities was best characterized, stated Judge Hohein, as "a royalty-free, nonexclusive, implied license to use marks which, particularly in and around the University's Madison campus, principally signified [the university] in the mind of the consuming public and have continued to do so." It appeared that to a significant portion of the relevant public, the subject marks identified the university as the primary source of its educational and entertainment services. It was noted that the lack of a formal system of quality control over the merchandise sold by the unaffiliated retailers did not indicate the abandonment of the marks since the quality of the imprinted items remained "at an acceptable level in virtually all instances."

Judge Hohein rejected the argument that the use of the image of "Bucky Badger" and other subject marks by diverse businesses amounted to a forfeiture of the university's rights - the university most likely viewed the use of the marks as "expressions in the business community of goodwill and support" for the university's educational and entertainment services. It was not necessary for the university to act against every use by nonaffiliated entities in order to avoid the risk of abandonment of the marks, emphasized Judge Hohein, who concluded that the marks, although weak, had not lost their significance as marks for the university's goods and services.

The university was entitled to adopt a formal licensing program, including the subject marks, given its increased concern with inappropriate uses of the marks, potential product liability problems if the marks were used in connection with dangerous or unauthorized products or events, and the major change, during the 1980s, in the "entire nature of the market for merchandise imprinted with college and university indicia..." Licensing programs provide protection and enforcement mechanisms.

Judge Hohein concluded by finding that the mark "Wisconsin Badgers" had acquired secondary meaning which entitled the university to registration even if the mark, as argued by the retailers, would otherwise be regarded as primarily geographically descriptive, and by finding that the marks at issue were not aesthetically functional as used in connection with clothing.

The University Book Store v. The Board of Regents of the University of Wisconsin System, 1994 TTAB LEXIS 8 (Trademark Trial and Appeal Board 1994) [ELR 16:5:29]

Small Business Administration will provide financial assistance to media enterprises

The Small Business Administration has repealed its media policy rule; creditworthy small businesses engaged in media activity now will be eligible to be considered for SBA financial assistance.

Under the policy, which was adopted in 1953, no SBA direct or guaranteed business loan, economic injury disaster loan, or development company assistance has been made to applicants engaged in the "creation, origination, expression, dissemination, propagation or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form or content." The agency sought to avoid any accusation that the government was attempting to control editorial freedom by subsidizing media or communication for political or propaganda purposes. The agency also has attempted to avoid government identification, through its business assistance programs, with concerns which might publish or produce matters of a religious or controversial nature. And the agency recognized that the constitutionally protected rights of freedom of speech and press "ought not to be compromised either by the fear of government reprisal or by the expectation of government financial assistance."

Under the rule, ineligible enterprises have included publishers, producers, importers, exporters or distributors of all types of communications (such as newspapers, sheet music, posters, film, tapes, theatrical productions, greeting cards, and books), plus transportation concerns limited to the distribution of such products. Exemptions have been granted to commercial printing firms, advertising agencies, technical production facilities (such as recording studios) and vocational schools. Specialty book or videotape stores which sell or rent items in a single or limited subject area have not been eligible for assistance.

The media policy rule has not been applied to assistance provided by small business investment companies which are licensed by the SBA. The companies operate within SBA regulations, but their transactions with small companies are private arrangements which carry no SBA guaranty.

The agency also has been providing physical injury disaster loans to media concerns and academic schools since 1953, based on humanitarian grounds. The SBA does not distinguish, for eligibility purposes, between media and non-media concerns for physical disaster loans, but economic injury disaster loans have been subject to the limitations of the media policy rule.

It was determined that the assistance available under the exceptions to the media rule and under the SBIC and disaster programs has not sufficiently promoted job growth and economic development. The SBA, accordingly, will provide assistance under its business, economic injury disaster, and development company loan programs, to media concerns which are otherwise eligible for such assistance.

The agency has reserved the right to withhold financial assistance on a case-by-case basis upon reviewing any constitutional or other legal issues which may arise.

Small Business Administration (Media Policy Rule), 59 FR 36042 (July 15, 1994) [ELR 16:5:30]

IN THE NEWS

Court overturns $8.1 million damage award against Kim Basinger

In mid-1993, a California trial court reduced a jury award of $8.9 million to Main Line Pictures in the company's breach of contract action against actress Kim Basinger. The court entered judgment in the amount of $7.4 million, and also awarded Main Line more than $700,000 in attorneys' fees, for a total award of about $8.1 million (ELR 15:3:27; 15:2:3).

In September 1994, an appellate court overturned the judgment, ruling that the jury received "prejudicially ambiguous" instructions.

According to news reports, the court found that the special verdicts in the case did not sufficiently distinguish between Basinger and her production company, Mighty Wind Inc.. The court ordered Main Line to pay Basinger's appeal costs, but refused to enter judgment in favor of the actress in the dispute over her refusal to appear to the film "Boxing Helena."[Oct. 1994] [ELR 16:5:31]

Walt Disney Co. prevails in copyright infringement action brought in Chinese court

The Beijing People's Intermediate Court has ruled that Beijing Publishing Press/Beijing Children's Publishing Press and its distributor, New China Book Store Distribution Center, were liable for copyright infringement by publishing books based on Walt Disney Co.'s animated films.

According to news reports, this was the first time a copyright infringement claim by a United States company was heard by a Chinese court. The court has not yet determined damages. [Oct. 1994] [ELR 16:5:31]

Court dismisses former karate instructor's claims against distributor of "The Next Karate Kid"

A Federal District Court in New York has granted a directed verdict dismissing the trademark and right of publicity claims brought by William DeClemente against Columbia Pictures, the distributor of the film "The Next Karate Kid."

According to news reports, DeClemente contended that he was nicknamed "The Karate Kid" in 1964 by his martial arts instructors, and that at about the same time he met Robert Kamen who became the writer of the film "The Karate Kid." Kamen purportedly saw DeClemente perform karate several times, although he did not see

DeClemente in the twenty years prior to the release of the 1984 film.

In 1988, after the release of the second film, DeClemente registered the words "The Karate Kid" as a service mark with the United States Patent and Trademark Office, for use in karate exhibitions.

In rejecting DeClemente's attempt to prevent the distribution of "The Next Karate Kid" and to obtain a share of the profits from the first three films and licensed items, Judge Arthur D. Spatt found that DeClemente has not been recognized by consumers, even in the martial arts market, as "The Karate Kid." DeClemente rarely advertised and was not the only person to use the phrase.

Furthermore, even assuming that the service mark was infringed and that there existed public confusion between DeClemente and the film character, Judge Spatt found that the Columbia Pictures' First Amendment interest in naming its films would outweigh the public's interest in preventing consumer confusion in this case.

Judge Spatt did not issue a written opinion. For further information, contact Tom J. Ferber, (212) 421-4100. [Oct. 1994][ELR 16:5:31]

Puerto Rico and Michigan enact anti-piracy statutes

Puerto Rico has enacted an anti-piracy law mandating that the actual name and address of the manufacturer of a sound recording must be displayed on the outside of the recording's packaging. An "anti-bootleg" provision of the statute makes it a crime to manufacture or distribute the sounds of a live performance of an artist. The statute, which contains an "unauthorized duplication" provision that covers pirated and counterfeit sound recordings initially recorded prior to 1972, makes sound recording piracy a felony carrying a maximum sentence of up to five years in prison and also a $250,,000 fine.

Michigan also has enacted an anti-piracy statute; the statute contains "true name and address" and "anti-bootleg" provisions. Violators will be charged as felons and, if convicted, can be imprisoned for up to five years and/or fined up to $250,000.

According to the Recording Industry Association of America, the passage of the Michigan statute brings the total number of states with more stringent anti-piracy statutes to 29. [Oct. 1994][ELR 16:5:32]

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[ELR 16:5:34]