RECENT CASES

California Labor Commissioner voids contract between rap recording artist and former personal manager, because management agreement provided that manager would attempt to obtain ``personal engagements'' even though manager was not licensed as talent agent

Rap recording artist Domino - whose debut album and single ``Getto Jam'' are reportedly approaching platinum-level sales - has won a significant victory before the California Labor Commissioner in a dispute with his former personal manager, Jerome Howard. At the rapper's request, the Commissioner has declared Domino's personal management contract with Howard to be ``illegal, void, and unenforceable,'' and the

Commissioner has ruled that Domino has ``no further obligation to Howard under the contract for commissions or otherwise."

The personal management agreement signed by Domino provided that Howard would attempt to obtain a recording contract and ``personal engagements" for Domino. The California Labor Code requires those who attempt to obtain employment for performers to become licensed by the Labor Commissioner as talent agents. The Code does contain an exemption from the licensing requirement for those who merely attempt to obtain recording contracts for their clients. But there is no such exemption for those who attempt to obtain other forms of employment for recording artists, not even the types of ``personal engagements" that aspiring recording artists so often use as stepping stones to recording contracts.

Since Howard's contract provided he would attempt to obtain such engagements, the Commissioner ruled that he should have been licensed; and since he was not, the contract was void.

This case is the second time this year that the Labor Commissioner has voided a management contract because the manager was not licensed. Earlier, the Commissioner voided the management contract of television actor Thomas Haden Church (``Wings") (ELR 16:5:3). That ruling is on appeal to the courts.

The Domino ruling is significant because it rejected Howard's argument that he was exempt from the licensing requirement - regardless of what his contract said - because he never in fact attempted to obtain ``personal engagements" for Domino. Under the Court of Appeal's decision in Wachs v. Curry, 13 Cal.App.4th 616, 16 Cal.Rptr.2d 496 (1993)(ELR 15:3:3), those whose procurement activities are only ``incidental" need not be

licensed. But the Domino ruling appears to limit Wachs to those cases where the management contract is silent about procurement, and the performer alleges that the manager engaged in procurement activities nonetheless.

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 in full text immediately below.

Ivy v. Howard, Cal.Lab.Comm., Case No. TAC 18-94 (1994)

SHAWN ANTIONE IVY, p.k.a. ``Domino,'' Petitioner, v. JEROME HOWARD, an individual, Respondent.

Labor Commissioner of the State of California,

Case No. TAC 18-94

DETERMINATION ON PETITION OF
SHAWN ANTIONE IVY, p.k.a. ``DOMINO''

This proceeding arose under the provisions of the Talent Agencies Act (the ``Act'' ), Labor Code sections 1700 through 1700.47.n1. [n.1 Unless otherwise specified, all subsequent statutory references are to the Labor Code.] On February 7, 1994, petitioner Shawn Antione Ivy, p.k.a. ``Domino'' (``Ivy'' ), filed a petition with the Labor Commissioner pursuant to California Labor Code Section 1700.44 seeking determination of an alleged controversy with respondent Jerome Howard (``Howard''). Howard filed an answer, and on June 6, 1994, a full evidentiary hearing was held before Michael S. Villeneuve, 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 a lawsuit filed by Respondent Howard to enforce the terms of a ``Personal Management Agreement'' signed by the parties in February 1992. The court action is stayed pending the resolution of this matter.

By all accounts, the parties met around the beginning of 1992, and, at the behest of Cherie Kirkwood, Howard was persuaded to attempt to use his contacts in the recording industry to obtain a recording contract. It is disputed whether Howard or Kirkwood was to perform those portions of the contract which called for Howard and Kirkwood, as joint managers, to also attempt to

obtain personal engagements to advance the career. Kirkwood claims there was no such division of duties. Howard claims that there was a separate oral agreement to that effect. The contract on its face, however, contains at paragraph 9, a clause stating that the written agreement supersedes all other agreements relating to the subject matter of the agreement.

It was also undisputed that Howard did nothing to attempt to obtain personal bookings for Ivy, other than respond to, and later reject, a possible offer from the Montel Williams show to book Ivy to perform on the show in exchange for Howard's appearance on the show to discuss matters related to his knowledge of the Jackson family.

DECISION

1. THE CONTRACT IS ILLEGAL UNDER THE ACT AND IVY 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 therefor 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 . . . musical artists, writers . . . composers, . . . 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))

Ivy's status as an artist is undisputed. Therefore, the sole question presented is whether Howard contracted in

writing to engage in the occupation of a talent agent on behalf of Ivy. The answer is that he did.

Howard argues that since his understanding of his obligations under the contract was limited solely to the procurement of a recording contract, for which an agent need not be licensed, those provisions of the contract which called for him to perform activities requiring a license are surplusage. Under Civil Code Section 1667, however, contracts that are contrary to express statutes or public policy as set forth in statutes are illegal contracts; the illegality voids the entire contract. Thus, absent a savings clause, the entire contract must fall if it purports to bind the parties to an arrangement expressly forbidden by statute. No savings clause can he found in the contract, express or implied. Nor can such a savings clause be inferred, since the contract by its express terms supersedes all prior contracts, and any oral side agreements would be negated by the Statute of Frauds,

since they would relate to the two-year period of the written contract, and thus could not be performed within one year.

Howard further argues that he is not required to have a license since he was not engaged in the occupation of a talent agent. But that is what he expressly promised in writing to do. The true contractual and business relationship between Howard and Ivy was defined at the outset by the agreement drafted by Howard. It is elemental that ambiguities in contracts are construed against the person who drafted them. But in this case, there was no ambiguity. Howard expressly warranted that he would undertake on a professional basis the duties of a talent agent with respect to matters not subject to the recording industry exclusion of the Labor Code. It was this contractually promised behavior which constituted the prototype of what was being offered to Ivy when he was

presented with a contract by Howard in February 17, 1992.

Howard nevertheless, contends that, under the recent decision of Wachs v. Curry, 13 Cal.App.4th 618 (1993), Howard was still not a ``talent agent'' within the meaning of section 1700.4. In particular, Howard asserts that Ivy failed to demonstrate that Howard's procurement functions constituted a ``significant part'' of his business as whole. (Id. at 628) In this regard, Howard is mistaken.

As we have explained in precedent decision Thomas Church v. Ross Brown, TAC 52-92, adopted June 2, 1994, 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 investment counseling, 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 ``significant'' portion of the activities of an agent if the procurement is not due to inadvertence or mistake and if 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 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, Ivy clearly demonstrated that the contract with Howard was permeated and pervaded by promises to procure personal appearances and like activities not connected with procurement of recording contracts. The contract which requires Howard to procure personal appearances speaks for itself. Such activity requires one to be licensed in the State of California. The argument that simply because there has been no such procurement there is no violation of the licensing statute defies logic.

Since the contract was illegal it was void. As the California Supreme Court stated in Buchwald, supra, ``to regulate such activity for the protection of the public, a contract between an unlicensed [talent agent] and an artist is void." It is not simply the illegal terms which are void, the whole of the contract is void. Howard is precluded from obtaining any further recovery of any kind under the contract.

DISPOSITION

Accordingly, it is hereby ordered as follows:

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

Dated: Oct. 27, 1994

Michael S. Villeneuve, Attorney and
Special Hearing Officer for the Labor Commissioner

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

Victoria L. Bradshaw, State Labor Commissioner
[ELR 16:7:3]

United States Supreme Court upholds conviction of distributor of Traci Lords videotapes under child pornography statute

In 1986 and 1987, as described at ELR 15:1:11, an undercover police officer contacted Rubin Gottesman, the owner of X-Citement Video, Inc., about buying videotapes featuring Traci Lords. The officer apparently stated that he wanted tapes in which Lords had appeared when she was under the age of 18. Gottesman sold the officer the tapes and eventually was convicted of violating sections 2252(a)(1) and (a)(2) of the Protection of Children Against Sexual Exploitation Act of 1977. The statute prohibits the distribution, receipt, or shipping of child pornography. A Federal District Court sentenced

Gottesman to twelve months incarceration and ordered him to pay a $100,000 fine.

A Federal Court of Appeals ruled that section 2252 was facially unconstitutional, holding, in part, that the statute did not require a showing that Gottesman knew that one of the performers was a minor.

In November 1994, the United States Supreme Court upheld, 7-2, the constitutionality of the statute, declaring that it was properly read to include such a requirement.

Section 2252 provides, in relevant part that ``(a) Any person who - (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if - (a) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (b) such visual depiction is of such conduct; (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate

or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; . . . shall be punished as provided in subsection (b) of this section."

Chief Justice William H. Rehnquist noted that the Federal Court of Appeals adopted ``the most natural grammatical reading'' whereby the term ``knowingly'' in subsections (1) and (2) modified only the surrounding verbs, and did not modify the elements of the minority of the performers, or the sexually explicit nature of the material.

In rejecting this reading, Chief Justice Rehnquist cited applications which would produce ``absurd'' results, and

also referred to cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms did not contain them. It was pointed out that Congress, in amending the statute in 1984, did not express an intent to eliminate the mens rea requirement previously attached to the character and content of the material through the word obscene, and that the legislative history of the statute ``persuasively'' indicated that Congress intended that the term ``knowingly'' would apply to the requirement that the depiction be of sexually explicit conduct. As a matter of grammar, stated Chief Justice Rehnquist, it would be difficult to conclude that the word ``knowingly'' modified one of the elements in (1)(A) and (2)(A), but not the other.

Chief Justice Rehnquist observed that a statute without a scienter requirement as to the age of the performers would raise serious constitutional doubts and that it was incumbent upon the court to read the statute to eliminate

those doubts so long as such a reading was not plainly contrary to Congress's intent. Thus, the term ``knowingly" in section 2252 extended both to the sexually explicit nature of the material and to the age of the performers, concluded the court.

Justice Antonin Scalia, with whom Justice Clarence Thomas joined in dissent, declined to conclude that the statutory language could be interpreted to include an explicit scienter requirement, and stated that the Federal Court of Appeals' interpretation was ``the only grammatical reading" (emphasis by Justice Scalia). Justice Scalia would have read the statute as providing criminal penalties ``for the knowing transportation or shipment of a visual depiction in interstate or foreign commerce, and for the knowing receipt or distribution of a visual depiction so transported or shipped, if that depiction was (whether the defendant knew it or not) a portrayal of a minor engaging in sexually explicit conduct." The statute

as so interpreted would be unconstitutional, according to Justice Scalia, since, by imposing criminal liability upon those not knowingly dealing in pornography, the statute established a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities.

For Justice Scalia, the court's disposition of the matter served to raise ``baseless constitutional doubts that will impede congressional enactment of a law providing greater protection for the child-victims of the pornography industry."

United States v. X-Citement Video, Inc., 63 U.S.L.W. 4019, 1994 U.S.LEXIS 8601 (1994) [ELR 16:7:6]

Los Angeles County adult business ordinance is ruled unconstitutional

Los Angeles County Code section 22.56.190 requires that the operation of an adult business will not ``adversely affect the use'' of schools, parks, playgrounds, places of worship, or similar uses within a 500-foot radius. As described by California appellate court Judge Earl Johnson Jr., the ordinance also requires that the adult business is ``sufficiently buffered'' from ``residentially zoned areas within the immediate vicinity so as not to adversely affect'' those areas. And the exterior appearance of the business cannot be ``inconsistent with'' commercial structures within the immediate neighborhood.

After a hearing, a regional planning commission denied T.M. Smith's application for a conditional use permit for a nude dancing cabaret in an unincorporated area of the

county near the cities of Azusa and West Covina. It was found that the cabaret was not ``sufficiently buffered'' from a mobile home park 190 feet away or from an area of single family residences 400 feet away, and that the building's exterior appearance was not consistent with commercial structures in the immediate neighborhood, particularly a newly constructed shopping center across the highway.

The appellate court reversed the trial court's decision denying Smith's request for mandamus relief.

The court found that the ordinance was so vague as to constitute a prior restraint and that the court could not construe the ordinance to eliminate its unconstitutional vagueness without completely rewriting its language.

Judge Johnson suggested possible approaches for the county government to take when considering land use regulation as a means to determine the appropriate location of adult businesses. Los Angeles County has

established general criteria with respect to the subjective factors influencing the suitable location of adult businesses and delegated to an administrative body, i.e., the regional planning commission, the discretion to make such subjective judgment as to whether the impact of approving the adult business at the proposed location would be adverse and, if so, whether it would be adverse enough to deny an adult business conditional use permit.

In delegating such authority, stated Judge Johnson, a local legislative body must provide criteria which are ``narrow, objective, and definite.'' Any legislative standard purporting to allow administrative agencies or individual officials the discretion to deny or grant conditional use permits on a subjective, case-by-case basis should include, in the court's view, which properties the adult business must detrimentally affect to warrant exclusion, the kind of detrimental impacts an adult

business imposes on those properties which would be deemed grounds for banning an adult business from the proposed location, and the degree of detrimental impact required to deny the adult business a permit for the proposed location. The standard should ``convey a sense the impact must be substantial,'' declared Judge Johnson.

The criteria used by the regional planning commission in the instant case did not provide adequate guidance. The court found problems ``with every dimension'' of the standard requiring the disapproval of an adult business unless the commission found that it was ``sufficiently buffered in relation to residentially zoned areas within the immediate vicinity so as not to adversely affect said areas.''

Judge Johnson also questioned the finding that Smith's proposal did not meet the standard requiring the exterior appearance of the structure to be consistent with the external appearance of commercial structures in the

immediate neighborhood. The provision would allow the exclusion of an adult business use for reasons having nothing to do with the secondary effects of adult businesses, stated the court.

In all, concluded Judge Johnson, the language of the ordinance did not contain ``narrow, objective and definite'' standards and was ``so vague and the flaws so wide and deep'' that it remained for Los Angeles County, rather than the court, to cure.

T.M. Smith v. County of Los Angeles, 24 Cal.App.4th 990, 29 C.R.2d 680, 1994 Cal.App.LEXIS 436 (1994) [ELR 16:7:7]

Court upholds city's ``adult establishment'' ordinance

A Federal Court of Appeals has reversed a District Court decision which barred the enforcement of a Rochester, Minnesota zoning ordinance restricting the location of ``adult establishment uses'' against a newly-opened adult bookstore in downtown Rochester.

ILQ Investments, Inc. and Excalibur Group, Inc. opened Downtown Book and Video in the summer of 1992; the store segregated forty percent of its floor space into an adults-only area selling sexually explicit books, magazines and novelty items. The city claimed that the store violated the zoning ordinance because it was an ``adult establishment'' located within 750 feet of a ``youth facility,'' i.e., the Rochester Public Library.

When government entities upheld the zoning administrator's decision, ILQ brought a 41 U.S.C. section 1983 action, seeking declaratory and injunctive relief.

The District Court, in granting a preliminary injunction enjoining the enforcement of the ordinance, concluded

that ILQ was likely to succeed on the merits of its constitutional challenge because, among other factors, the ordinance's definition of ``adult bookstore'' was impermissibly vague.

Federal Court of Appeals Judge Loken, in applying City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), first found that the ordinance was content-neutral. The city was not concerned with the content of the materials carried by Downtown Book and Video, but with the anticipated impact of adult businesses on the surrounding communities. And ``regulations reasonably designed to curb unwanted secondary effects of sexually oriented businesses serve a substantial government interest,'' stated the court.

The city adopted the ordinance after a thorough legislative process, adverting to adverse secondary effects linked to adult businesses generally as well as adverse

secondary effects specifically attributable to adult bookstores (emphasis by the court). The fact that ILQ's bookstore offered non-adult as well as adult materials and did not have facilities for the on-premises viewing of the sexually explicit material did not mean that the facility could avoid a time, place and manner regulation that was justified by studies of the secondary effects of reasonably similar businesses.

The court then found that the District Court erred in concluding that ILQ was likely to prevail on the merits of its First Amendment and due process claims. In all, the preliminary injunction should not have been granted, stated Judge Loken, who commented that ``the public interest is not served by premature federal court intervention in regulatory matters of strong local interest."

ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1994 U.S.App. LEXIS 14680 (8th Cir. 1994) [ELR 16:7:8]

Interactive telephone game creator fails to show novelty and originality required for misappropriation claim

Oasis Music claimed that 900 U.S.A., Inc. misappropriated Oasis's ideas for an interactive telephone game. In 1989, an affiliate of 900 U.S.A. agreed to maintain the confidentiality of all materials relating to Oasis's interactive ``Dead End Program.'' But 900 U.S.A. subsequently advised Oasis that it no longer was interested in entering a joint venture to develop the program.

Oasis alleged that the 900 U.S.A. parties used ideas from the Dead End Program in the ``Robocop 2'' interactive telephone game.

New York State Supreme Court Judge Angela Mazzarelli stated that in the circumstances of the case, Oasis was required to show that the ideas suggested by the company with respect to the Dead End Program were novel or original, and not merely ``a clever or useful adaptation of existing knowledge.''

Oasis argued that its game used skip logic patterns and was the first program to introduce lifelike sound effects. However, Judge Mazzarelli observed that at the time Oasis submitted its proposal to the 900 U.S.A. parties, non-trivia based interactive games already existed and were using sound effects. And Oasis did not demonstrate that the idea of a skip logic pattern was novel, rather than a ``mere adaptation'' or natural progression

of the concept of linear plot sequence already in existence.

Furthermore, Robocop 2 appeared to involve a linear plot sequence in which a caller's correct choice would continue the game in a linear manner - it did not appear to the court that the ``idea'' of skip logic progression was used in Robocop 2.

The court also rejected the argument that the inclusion of an anticrime, antidrug message in the game was a novel idea, stating that the fact that such themes may not have been included in telephone interactive games prior to the Oasis's proposal did not necessarily mean that the idea itself was novel.

Judge Mazzarelli commented that Oasis's idea for using PIN numbers as a source of identifying callers and tracking previous attempts at the game was an adaptation of existing knowledge in the public domain; Oasis did not demonstrate that the PIN identification number

idea was novel and original within the meaning of New York law.

Oasis Music, Inc. v. 900 U.S.A., Inc., 614 N.Y.S.2d 878, 1994 N.Y.Misc.LEXIS 272 (1994) [ELR 16:7:8]

Inflatable costumes portraying advertising characters are not entitled to copyright protection

Entertainment Research Group, with authorization from various copyright holders, manufactures three-dimensional inflatable costumes of characters such as the Pillsbury ``Doughboy,'' ``Toucan Sam,'' ``Dino the Dinosaur,'' and ``Cap'n Crunch'' for use in grocery stores and shopping malls. Entertainment Research had attached copyright notices to the derivative costumes, and

claimed that Aerostar International, without authorization, copied the costumes.

United States Magistrate Judge Langford noted that section 103(b) of the Copyright Act provides that the copyright in a compilation or derivative work ``extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material'' (emphasis added by Magistrate Langford).

The court then cited the decision in North Coast Industries v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992), a case involving a pattern design imprinted on a dress. A Federal District Court decision had held that minimum changes in design made by North Coast in a

work already in the public domain were insufficient to warrant copyright protection. The Federal Court of Appeals stated that summary judgment would be appropriate only if ``. . . no reasonable trier-of-fact could find even trivial differences in the designs. . . ."

Unlike the designs in North Coast, stated Magistrate Judge Langford, the costumes at issue were ``a necessary hybrid of form and function; the court thus was presented with the issues of the scope of copyright protection and the propriety of summary judgment ``when elements of artistry and function are intertwined." It was found that any aspect of a section 102 ``sculptural work" which is essentially functional, utilitarian or mechanical, does not merit copyright protection. Furthermore, ``any differences in appearance between a derivative work and the preexisting work which are driven primarily by a functional, utilitarian or

mechanical purpose cannot be considered when seeking artistic differences for the purpose of originality."

The court observed that Entertainment Research's clients would likely request costumes which were completely identical to the preexisting advertising characters, and that any minimal differences in appearance were not the result of ``artistic decision-making,'' but resulted from the fact that the costumes would be worn by humans.

Magistrate Judge Langford concluded that no reasonable trier-of-fact could find even trivial artistic differences in design between the preexisting works and the underlying works, and that Entertainment Research was not entitled to derivative copyright protection. The court expressed the concern that granting Entertainment Research a derivative copyright might provide the company with a ``pseudo-monopoly'' on all inflatable ``Doughboys'' or other characters, such that any

subsequent costume makers and/or the original copyright holders would be limited by such grants, or would be ``vulnerable to harassment."

If Entertainment Research was attempting to gain copyright protection in the structure, methods and function which comprised the internal workings of the costumes, this was not within the realm of copyright law, recalled the court, in granting Genesis Creative Group's motion for partial summary judgment.

Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 853 F.Supp. 319, 1994 U.S.Dist.LEXIS 7576 (N.D.Cal. 1994) [ELR 16:7:9]

Publishers prevail in copyright infringement action against distributor of ``coursepacks''

A Federal District Court in Michigan has adopted a magistrate judge's finding that Michigan Document Services, Inc., a distributor of ``coursepacks," infringed various copyrighted works. Coursepacks are ``compilations of academic materials, selected and arranged by professors, which are then assigned to the students in the professors' classes." Professors deliver their coursepack materials to Michigan Document which prepares bound copies for sale to students; professors do not receive compensation for bringing their coursepacks to Michigan Document.

Three coursepacks prepared by Michigan Document in 1992 included six excerpts copied from works owned by Princeton University Press, Macmillan Inc. and St. Martin's Press. The shortest excerpt copied was 17 pages; the longest was 95 pages. Michigan Document did not obtain permission to copy any of the excerpts and did not pay any royalties or permission fees.

According to the court, Michigan Document admitted that it could have sold as many as 25,000 coursepacks in 1991 for about 700 different courses, and that the company prepared coursepacks for 1,000 different classes in 1992. The company copied at least 2,900 copyrighted excerpts in connection with the 1992 winter term at the University of Michigan; there were thirteen other schools at which Michigan Document sold coursepacks.

The magistrate found, and the court agreed, that Michigan Document engaged in ``pure copying for profit,'' rejecting the argument that the use of the coursepacks by professors and students was educational. The fair use defense also was not available to Michigan Document because of the ``original, interpretive'' nature of the copyrighted materials, the amount and substantiality of the excerpts copied, the commercial use of the material, and the publishers's loss of a significant source of revenue from the unpaid permission fees.

In Basic Books v. Kinko's Graphics, 785 F.Supp. 1522 (S.D.N.Y. 1991; ELR 13:6:17), the court found that the reproduction of copyrighted works for sale in coursepacks constituted infringement. Judge Barbara K. Hackett found Kinko's ``persuasive and not sufficiently distinguishable to be inapplicable to this case . . . ," although not alone determinative of the matter.

The court enjoined Michigan Document from any future reproduction of any of the copyright holders' existing or future copyrighted works. After careful review, Judge Hackett found that Michigan Documents' conduct was willful; that the company sought to realize a profit for itself; and that its position was unreasonable and recklessly disregarded the copyright holders' property rights. The court awarded damages in the amount of $5,000 per infringed work for a total of $30,000, as well as reasonable attorneys' fees.

Princeton University Press v. Michigan Document Services, 855 F.Supp. 905, 1994 U.S.Dist.LEXIS 8541 (E.D.Mich. 1994) [ELR 16:7:10]

Court upholds judgment entered on jury award of $5800 to photographer in copyright infringement action involving Forbes 400 magazine

Wesley M. Walker, Jr.'s photograph of businessman John D. Hollingsworth, Jr. accompanied an article in a Greenville, South Carolina newspaper. In 1989, the Forbes 400 issue of Forbes magazine used a cropped version of Walker's photograph in a profile about Hollingsworth.

When Walker sued for copyright infringement, the parties stipulated to Forbes' revenue attributable to the publication of the 1989 Forbes 400 issue. A Federal District

Court jury awarded Walker damages of about $5800. The court rejected Walker's motion for a new trial on damages.

Walker claimed that the District Court erred in admitting testimony concerning the derivation of Forbes' advertising and subscription revenue because this purportedly enabled the jury to ``sever'' categories of revenue in determining the damage award. Walker agreed that Forbes could introduce evidence of various expenses, such as overhead and publishing costs, that Forbes could deduct from the gross revenue total, but argued that the jury was not entitled to sever whole categories of revenue.

Under section 504(b) of the Copyright Act, an injured party may recover not only an amount to compensate for the injury resulting from the infringement, but also the infringer's profit attributable to the infringement.

Federal Court of Appeals Chief Judge Ervin stated that the District Court did not abuse its discretion in allowing Forbes to introduce testimony concerning the derivation of the advertising and subscription sales revenue related to the Forbes 400 issue. The testimony assisted the jury in determining the amount of revenue derived from the particular issue of the magazine, and how to apportion the profit from the issue.

Chief Judge Ervin also rejected Walker's appeal from the District Court's refusal to give two proposed jury instructions, noting, in part, that the court correctly instructed the jury that damages were not to be measured by the entire profit earned by Forbes on the issue, but were available ``in an amount commensurate with the value of the alleged infringing material in relation to the issue as a whole."

Walker v. Forbes, Inc., 28 F.3d 409, 1994 U.S.App.LEXIS 16357 (4th Cir. 1994) [ELR 16:7:10]

Court issues post-trial rulings in copyright infringement action involving songs from Disney movies

In the ongoing dispute (ELR 14:9:3; 15:1:23) involving the songs from the movies ``Snow White and the Seven Dwarfs" and ``Pinocchio," a Federal District Court jury ruled that Walt Disney Co. infringed Bourne Co.'s copyrights by using songs from the movies in television advertising and promotions. The jury ruled in favor of Disney as to the right to use the songs in videocassettes.

The parties, according to Judge Louis L. Stanton, stipulated to $420,000 in damages.

In ruling on various post trial motions, the court declined to grant relief from its order denying Bourne's

motion for judgment as a matter of law; denied Disney's motion for sanctions; and denied Bourne's applications for attorneys' fees, but allowed costs.

Judge Stanton then granted Bourne's motion for a permanent injunction requiring Disney to obtain a license before using any of the musical compositions in television advertisements and promotions. However, Bourne was not entitled to an order directing Disney to account for all its unlicensed television advertisements and promotions, nor to the surrender and destruction of all infringing tapes and recordings. The court stated that Bourne's rights would be adequately protected by the injunction.

Bourne also was entitled to prejudgment interest, declared the court, in order to be ``sufficiently compensated."

Bourne Co. v. Walt Disney Co., 1994 U.S.Dist.LEXIS 7783, 31 U.S.P.Q.2d (BNA) 1858 (S.D.N.Y. 1994) [ELR 16:7:11]

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Court rejects antitrust claims of NBA players

Federal District Court Judge Kevin Thomas Duffy began his response to a lawsuit involving the National Basketball Association and the National Basketball Players Association by declaring his conviction that ``neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process. Each is truly guilty of this practice."

The court, in reviewing the history of the parties' disputes, noted that the players, in 1970, had brought a class action antitrust lawsuit challenging certain NBA

players restrictions. A Federal District Court, in Robertson v. National Basketball Ass'n., 389 F.Supp. 867 (S.D.N.Y. 1975), denied the NBA's motion for summary judgment.

In 1976, under a court-approved settlement entered into by the parties in Robertson, the NBA modified the college draft and instituted the right of first refusal. The settlement agreement provided that it would expire at the end of the 1986-1987 NBA season. The players and the NBA, also in 1976, entered into a collective bargaining agreement incorporating the terms of the settlement agreement. In 1980, the parties entered into another multi-year collective bargaining agreement that incorporated the terms of the Robertson settlement agreement.

The 1980 agreement expired in June 1982. In 1983, the NBA sought to introduce the salary cap. A special master determined that the salary cap would violate the terms of the settlement agreement. The players and the

NBA modified the expired 1980 collective bargaining agreement to include a salary cap; the agreement was continued through the end of the 1986-1987 season.

In October 1987, the players, in Bridgeman v. National Basketball Ass'n., 675 F.Supp. 960 (D.N.J. 1987; ELR 10:4:14) sought a ruling that the college draft, the right of first refusal and the salary cap violated the antitrust laws. The parties reached an agreement, incorporated in the 1988 collective bargaining agreement, which continued the college draft, the right of first refusal and the salary cap.

The 1988 collective bargaining agreement expired on June 23, 1994. In June 1994, the NBA sought a declaration that the challenged practices did not violate federal antitrust laws. (In a footnote comment, Judge Duffy stated that the initiation of the declaratory judgment action ``cannot be said to violate Rule 11 of the Federal Rules of Civil Procedure. It does, however, constitute

sharp and shady practices of the type that most ethical lawyers shun.") The players brought counterclaims alleging that the continuation of the employment practices would be an unreasonable restraint of trade.

Judge Duffy referred to Bridgeman as establishing the principle that antitrust immunity survives only as long as the employer continues to impose employment restrictions unchanged and ``reasonably believes that the challenged practice or a close variant of it will be incorporated in the next collective bargaining agreement."

In the lengthy proceedings in Powell v. National Football League, a Federal Court of Appeals, in Powell II, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991) held that antitrust immunity exists as long as a collective bargaining relationship exists and labor law remedies are available.

In Brown v. Pro Football, 782 F.Supp. 125 (D.D.C.1991), the court held, according to Judge Duffy, that the continuing implementation of a collective bargaining agreement's salary provisions by the NFL after the agreement had expired was not shielded by the nonstatutory labor exemption and that immunity from antitrust law does not extend past the formal expiration of the collective bargaining agreement.

Judge Duffy concluded that the appropriate standard to apply would be the Powell II standard and that the continued implementation of the challenged practices by the NBA would not violate the antitrust laws as long as the collective bargaining relationship existed.

It appeared to Judge Duffy that even if the nonstatutory exemption did not apply, the players would not prevail on a charge of a per se violation of Section 1 of the Sherman Act. And the alleged restraints of trade did not

seem to the court to be, ``on balance," unreasonably anti-competitive.

Judge Duffy concluded by reiterating the availability of collective bargaining to resolve the parties' dispute.

National Basketball Association v. Williams, 857 F.Supp. 1069, 1994 U.S.Dist.LEXIS 9759 (S.D.N.Y. 1994) [ELR 16:7:11]

Washington Redskins prevail in dispute over players' payment of union dues

As reported at ELR 16:3:33, a Federal District Court for the District of Columbia refused to grant a temporary restraining order sought by the National Football League Players Association. The Association requested that the court direct the owner of the Washington Redskins and

the National Football League Management Council to comply with an arbitrator's order that required the team to suspend, no later than 1:00 P.M. on December 31, 1993, any Redskins players who had failed to pay union dues or a service fee under a 1993 collective bargaining agreement. The arbitrator had found that the District of Columbia, not Virginia, was the predominant job situs of the players, and that the agreement therefore did not violate Virginia's right-to-work laws.

Prior to the arbitration hearing, Redskins player Terry Orr, in a separate action, had obtained a temporary restraining order in a Virginia trial court barring the enforcement of the agency shop provision against Orr.

The Redskins subsequently filed a counterclaim in the District Court proceeding seeking a declaratory judgment that the arbitrator's award was unlawful and unenforceable. Judge Thomas F. Hogan, in granting summary judgment to the Redskins, cited Virginia's public policy

declaring ``that the right to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization." Virginia law prohibits employers from requiring employees to pay union dues or similar fees to labor unions.

Judge Hogan then found that the predominant job situs of the players was Virginia, the place where the players spend the majority of their time. Although the team derived its revenue from playing games, the court observed that ``practices, conditioning, and meetings are an integral part of game preparation." The arbitrator erred in interpreting relevant case law, concluded Judge Hogan, in ruling the arbitrator's award unenforceable as a violation of the law and public policy of Virginia.

National Football League Players Association v. Pro-Football, Inc., 857 F.Supp. 71, 1994 U.S.Dist.LEXIS 6558 (D.D.C. 1994) [ELR 16:7:12]

Coach may proceed with racial discrimination claim against World League of American Football, but court rejects claims against NFL

The World League of American Football, formed as a venture by 26 of the 28 National Football League clubs, operated in 1991 and 1992 as a professional football league with teams in ten cities in the United States, Canada and Europe.

James Jackson, III, an African-American, applied for a coaching position with a World League team. He had been the head coach and general manager of the Connecticut Football Giants, a minor league football team based in New Haven, and had previous coaching experience. Jackson, who was not interviewed and was not hired as a head coach for any of the World League

teams, eventually filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter. Jackson sued the World League and the NFL, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964.

A Federal District Court in New York found that there existed genuine issues of material fact as to what were the minimum qualifications for World League head coaches and whether Jackson's coaching experience satisfied the criteria. The league's motion for summary judgment on the ground that Jackson failed to establish a prima facie case was not appropriate, stated Judge Robert P. Patterson, Jr.

The World League argued that even if Jackson could establish a prima facie case, the football league parties presented a legitimate, nondiscriminatory reason for not hiring Jackson in that he was less qualified than the individuals hired as World League head coaches. Jackson

claimed that the World League engaged in a pretext for discrimination, noting that the criteria for determining the qualifications for World League head coaching applicants had not been published. It appeared to Judge Patterson that a reasonable trier of fact could draw an inference from the testimony, particularly the testimony concerning the hiring of Roman Gabriel, that Jackson was not less qualified than Gabriel and that the World League's ``proffered'' reason for declining to hire Jackson was ``not worthy of credence.'' Jackson also provided evidence that the World League may have been motivated by ``discriminatory animus.''

Judge Patterson then found that Patterson provided no basis for holding the NFL responsible for the acts of its individual member teams; that the evidence did not support a reasonable finding of the substantial interrelatedness of the operations of the leagues; and that there was no genuine issue of fact with respect to the common

ownership of the leagues or with respect to the NFL's control over World League labor relations. In all, the NFL and the World League were not a single employer and the court, accordingly, granted the NFL's motion for summary judgment.

Jackson v. National Football League, 1994 U.S.Dist.LEXIS 8303 (S.D.N.Y. 1994) [ELR 16:7:12]

Teenage pitcher injured in tryout with Cincinnati Reds may proceed with negligence claim

In June 1990, Jeffrey Zimmerman, a scout for the Cincinnati Reds, supervised a tryout for the team in Lodi, California in which players aged 16 to 21 were invited to participate. Jeffery Wattenbarger, who was 17 years old at the time, attended the tryout. Wattenbarger signed

a waiver of liability form; the form included a space for the signature of a parent or guardian. Although Wattenbarger's mother was not present and did not sign the form, the young man was permitted to participate.

One portion of the tryout involved a simulation of an actual game. When Wattenbarger threw his third pitch to a batter, he felt his arm ``pop," and informed the team personnel of this occurrence. According to California Court of Appeal Presiding Judge Puglia, Wattenbarger, who claimed not to have received a response, returned to the mound and threw another pitch. He then experienced severe pain in his arm and stopped pitching.

It was found that a potion of the bone and tendons in Wattenbarger's arm had been pulled away due to the force of the contraction of his triceps muscle during pitching.

Wattenbarger claimed that the team and Zimmerman were negligent in permitting him to throw the fourth

pitch. A trial court granted the team parties' motion for summary judgment and dismissed the case.

In reversing the trial court ruling, Judge Puglia stated that it was not unforeseeable, in the instant circumstances, that a participant would ``attempt to push his body beyond its capabilities."

Various policy considerations, in addition to the foreseeability of harm, supported imposing a duty on the team. The tryout was conducted for the benefit of the team. Imposing a duty to protect tryout participants from aggravating an existing injury would help to prevent future harm, and would not burden either the team or injured players, stated the court. And evidence was presented that the Reds maintained insurance for tryout injuries.

In all, the team owed a duty of care to protect participants from aggravating injuries during tryouts - this

would include preexisting injuries known to the team as well as those occurring during the tryout.

Judge Puglia observed that issues of fact existed as to whether the team parties were aware of Wattenbarger's injury, whether they encouraged or permitted him to throw the fourth pitch, and whether this pitch caused injury. The matter was remanded for the trial court to enter an order denying the Reds' motion for summary judgment.

Wattenbarger v. Cincinnati Reds, Inc., 28 Cal.App.4th 746, 33 Cal.Rptr.2d 732, 1994 Cal.App.LEXIS 963 (1994) [ELR 16:7:13]

Assumption of risk doctrine bars claim by spectator injured by foul ball at baseball game

When Mary Sue Gunther attended her first baseball game, a foul ball struck her in the face, causing serious injuries. Gunther sued Charlotte Baseball, the owner of the minor league Charlotte Knights, alleging negligence in the design and operation of the team's stadium, located in South Carolina.

A Federal District Court, noting that the case presented a question of first impression in South Carolina, concluded that the state's Supreme Court would find that a patron at a baseball game assumes the risk of injury of being struck by a batted ball.

Gunther had occupied a seat in the second row of bleachers behind the third-base dugout and eighty-one feet from home plate. The team usually warned spectators, via the public address system, about the hazards of foul balls; the warnings were issued before and during the game. Gunther claimed that she arrived as the game

began and was injured before any subsequent warnings were broadcast.

Just before Gunther was struck, another ball had been fouled back into the nearby press box area; the court, for purposes of the motion, assumed, as contended by Gunther, that the press box glass, on three or four prior occasions, had been shattered by foul balls. It also was noted that the screen behind home plate at the stadium was the highest in the league and extended almost from dugout to dugout.

Judge Joseph F. Anderson, Jr. noted that the ``overwhelming weight of authority from other jurisdictions holds that baseball patrons assume the risk of being struck at games;" that Gunther's ignorance of the game was no excuse; and that the South Carolina Supreme Court has applied the assumption of the risk doctrine in a variety of cases, albeit not in the context of a baseball game. Furthermore, fans who attend games expect

distractions, even the breaking of the press box glass; such distractions ``are at least as foreseeable to the spectators as they are to the owners of the premises," stated Judge Anderson, in granting the team's motion for summary judgment.

Gunther v. Charlotte Baseball, Inc., 854 F.Supp. 424, 1994 U.S.Dist.LEXIS 12832 (D.S.Car. 1994) [ELR 16:7:14]

Dismissal of cable operator's claims against bar displaying videotape of Holyfield-Douglas fight is upheld

As reported at ELR 16:3:11, Cablevision of Michigan, the operator of a cable television system in Kalamazoo, Michigan, obtained from The Mirage Hotel in Las

Vegas the exclusive right to exhibit a heavyweight professional boxing match between Evander Holyfield and James ``Buster'' Douglas - on a live basis in Kalamazoo - on October 25, 1990. Cablevision charged subscribers who ordered the pay-per-view event the sum of $34.95; the company charged commercial establishments about $1,000.

The fight was transmitted via an encrypted signal and could be viewed only by subscribers with a converter programmed by Cablevision.

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

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

Judge Miles noted that the bar had not intercepted or received a ``one-way transmission" of video programming from Cablevision, as is required in order to establish a violation of section 553. And the bar operator did not ``receive or assist in receiving any interstate . . . communication by radio" in violation of section 605(a). The source of the videotape, contrary to Cablevision's argument, was ``very relevant" under the statute, stated the court, as was the fact that Sports Forum apparently was not involved in recording the tapes.

It also was found that Sports Forum committed no act of interception because it did not ``take" or ``seize" Cablevision's transmission before it arrived at its destined location, although a recording may have been made of

the transmission ``at the moment it came into the possession of the intended receiver."

A Federal Court of Appeals has affirmed the District Court's decision granting summary judgment in favor of Sports Palace, reiterating that Sports Forum did not tap into a cable transmission path and that the rebroadcast of cable programming via videotape is not an interception.

The court preceded the opinion by stating ``Not recommended for full-text publication. Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced."

Cablevision of Michigan, Inc.v. Sports Palace, Inc., 1994 U.S.App.LEXIS 13914 (6th Cir. 1994) [ELR 16:7:14]

School district's random drug testing policy for athletes violates Fourth Amendment and Oregon Constitution

A Federal Court of Appeals has reversed a District Court decision holding that a school district's mandatory random drug testing policy for participants in interscholastic athletics did not violate a student's right to be free from unreasonable searches, under either Article I, Section 9 of the Oregon Constitution or the Fourth Amendment.

In 1989, the Vernonia School District adopted a policy whereby all students who wanted to participate in

interscholastic athletics were required to sign a form authorizing the district to perform a drug test on a urine sample provided by the student. All interscholastic student-athletes were to be tested at the beginning of each athletic season in which they competed. During the season, student athletes would be tested at random on a weekly basis.

When James Acton's parents refused to sign the drug test consent form, the student was suspended from interscholastic athletics for the season. The Actons then sued to challenge the policy.

Federal Court of Appeals Judge Fernandez agreed with the Actons that even if there were a drug problem, it did not justify a random testing program. After a discussion of the applicable law, the court noted that the evidence showed that it appeared that there was some drug use in the schools, that student discipline had declined, that athletes were involved, and that there was reason to

believe that one athlete had suffered an injury because of drug usage and others may have.

Judge Fernandez next found that the urine collection and testing procedures under the policy constituted a search. However, the policy was properly authorized by ``a politically accountable body;" seemed to have contributed to improving discipline and reducing drug use; and did not vest discretion with district officials as to test subjects.

The court carefully conducted an analysis of Fourth Amendment case law, noting that Oregon appellate courts have never decided a random drug testing case. In concluding that the district's concerns did not justify random, suspicionless testing, Judge Fernandez cautioned that the court did not decide the validity of an appropriate individualized testing program; or whether a random search, in certain circumstances, might be appropriate in a school setting; or whether a program

based upon the ``truly voluntary consent'' of parents to have their child randomly tested might be upheld.

Citing the privacy interests of the students, the court concluded that the policy was invalid under the Fourth Amendment, and that Oregon would find it invalid.

Judge Reinhardt, in a concurring opinion, emphasized that while the court expressly held that the school district policy violated the Oregon Constitution, it also held that the policy violated the Fourth Amendment to the United States Constitution.

Acton v. Vernonia School District 47J, 23 F.3d 1514; 1994 U.S.App.LEXIS 9882 (9th Cir. 1994) [ELR 16:7:15]

Constitutionality of Interstate Horseracing Act is upheld

In an agreement that expired in April 1992, Turfway Park Racing Association and the Kentucky Division, Horsemen's Benevolent & Protective Association had set forth the terms and conditions for racing at Turfway's thoroughbred racetrack in Florence, Kentucky. When Turfway refused to increase the percentage of revenues derived from interstate off-track wagering to be distributed to the horsemen's purses, the Association parties refused to consent to interstate off-track wagering on races being run at Turfway Park; such consent is required by the Interstate Horseracing Act of 1978.

As described by Federal Court of Appeals Senior Judge Contie, Turfway sought to obtain the required consent directly from the individual racehorse owners by inserting a paragraph in its entry form which conditioned

entry in a race on the racehorse owner's consent to interstate off-track wagering. Turfway's races then were broadcast to several out-of-state facilities where off-track wagers were placed.

The Association sued the racetrack and several out-of-state entities that had received the simulcasts, claiming that Turfway violated the statute by accepting interstate off-track wagers on Turfway's races without the Association's consent.

A Federal District Court decision declaring the statute unconstitutional and granting Turfway Park's motion for partial summary judgment has been reversed.

Senior Judge Contie stated that the statute regulates interstate wagering, not simulcasting, and did not regulate commercial speech in violation of the First Amendment. The court also reversed the District Court's ruling that the statute was unconstitutionally vague, and found that the statute was rationally related to advancing Congress'

legitimate interest in protecting the sport of horseracing, notwithstanding the horsemen's veto power.

Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc., 20 F.3d 1406, 1994 U.S.App.LEXIS 6466 (6th Cir. 1994) [ELR 16:7:15]

California statute regulating ``green marketing'' is upheld

The Association of National Advertisers sued the Attorney General of California, challenging section 17508.5 of the state's Business and Professions Code, which regulates certain environmental claims used in advertising, i.e., ``green marketing.''

A Federal District Court decision upholding the constitutionality of the statute (ELR 15:5:18) has been affirmed.

The statute makes it unlawful for a manufacturer or distributor of consumer goods to represent that its product is ``ozone friendly,'' ``biodegradable,'' ``photodegradable,'' ``recyclable,'' or ``recycled'' unless the goods meet the statute's definition of those terms or definitions adopted by the Federal Trade Commission. Federal Court of Appeals Judge Choy found that the District Court did not err in holding that the statute regulates only commercial speech. Judge Choy mentioned, among other factors, the placement of the regulation amidst provisions generally governing advertising as an indication of the legislature's ``intent to regulate misrepresentations made in a commercial context exclusively.''

The District Court correctly determined that section 17508.5 withstands intermediate scrutiny, continued

Judge Choy. The statute restricts potentially misleading speech; California has a substantial governmental interest in providing truthful environmental advertising and encouraging recycling; and the statute directly advances the asserted governmental interest. The record supported the legislature's conclusion ``that ecological claims boost consumer demands for products that do not always measure up. Given this nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation."

In addition to increasing consumer knowledge and discouraging the exploitation and deception of the green market, the statute prevents ``the unscrupulous advertiser from capturing the green premium that ecologically minded consumers are increasingly willing to pay for

goods whose environmental bona fides they are ill-equipped to assess."

Judge Noonan, in dissent, agreed with the majority's conclusion that the speech in issue was commercial speech, but viewed the statute as a ``zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone, including manufacturers and distributors, is essential to the development of a healthy environment. Tested by our Bill of Rights, the statute is defective."

Judge Noonan declared that the statute contained vague standards; bore a ``rough and speculative" relation to the interests of the state; and unconstitutionally discriminated among speakers, i.e., between commercial and nonprofit entities.

Association of National Advertisers, Inc. v. Lungren, 1994 U.S.App.LEXIS 32645 (9th Cir. 1994) [ELR 16:7:16]

Failure to show direct copyright infringement bars ASCAP's claims against trade show organizer, but court conducts thorough review of vicarious liability doctrine

The American Society of Composers, Authors and Publishers and the copyright holders of ten songs sued Nevada/TIG, Inc., Interface Group-Massachusetts, Inc. and Interface Group-Nevada, Inc., the organizers of the 1991 COMDEX/Fall computer trade show and the co-sponsors of the show's awards ceremony. Nevada/TIG was dismissed from the case by stipulation. ASCAP claimed that Interface did not obtain a trade show

license which would have authorized the performances of the copyrighted music in the ASCAP repertory at the COMDEX/Fall trade show and awards ceremony

A Federal District Court in Massachusetts ruled that the copyright holders failed to establish a prima facie case of copyright infringement.

The parties had stipulated that Interface was not authorized to perform the works at issue, but Interface declined to stipulate that the performers were unauthorized. ASCAP's initial evidentiary burden was to show that the performers of the copyrighted works lacked authorization from the copyright holders or their agents. However, on the record before the court, ASCAP did not explicitly contend that the performances by the five exhibitors, or by the band or disc jockey at the awards ceremony, were unauthorized. Thus, stated Judge Keeton, even if the court were to declare that Interface would have to produce proof of authorization once the

copyright holders made a good faith affirmation that the performers lacked authorization, the ASCAP parties were not entitled to the application of such a rule in this case.

Judge Keeton adverted to cases in which liability was imposed on third parties without an explicit finding of a direct infringement, but refused to follow those cases since the record before the court did not provide a basis on which to assume or to find that a direct infringement occurred. The court, accordingly, granted summary judgment on behalf of the Interface parties.

Judge Keeton nevertheless proceeded to address the other issues raised ``in order to create a full record that includes all potentially material factual findings."

Looking to Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963), Judge Keeton set forth the standard for a finding of vicarious liability in the context of copyright infringement as follows:

``When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials - even in the absence of actual knowledge that the copyright monopoly is being impaired - the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation."

The Shapiro, Bernstein decision recognized that vicarious liability rests, in part at least, ``on a policy foundation relating to risk allocation," commented Judge Keeton, who then stated that ``the law of vicarious liability treats the expected losses as simply another cost of doing business. The enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise. In addition, placing responsibility for the loss on the enterprise has the added

benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses." By focusing on the benefit received from, and control over, an enterprise, a court can evaluate a party's ability to spread losses and police conduct within the enterprise, as well as the underlying fairness of holding the enterprise liable.

The version of vicarious liability that has developed in the context of copyright infringement requires that the right of control extends far enough to give an entity a veto over performing any music at all, if authorization of the copyright holder cannot be established.

The Copyright Act does not explicitly refer to vicarious liability, but under the House Report on the Copyright Act of 1976, an entity ``must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation

and either direct or indirect benefit from the infringing performance." The standard defines two types of control - either supervision over the operation as a whole, or control over the specific infringing performance - and allows for vicarious liability on a showing of either direct or indirect financial benefit. For Judge Keeton, this definition ``more nearly capture[s] the standard that is currently applied by the courts in copyright cases involving performances."

Judge Keeton next stated that the use of summary judgment, in contexts other than copyright law, might be inappropriate to decide a case with a disputed agency question, but a decision as a matter of law would be proper in copyright cases under the Shapiro, Bernstein standard because the Second Circuit shifted the decision-making responsibility from the jury to the court, and altered the test to be applied for a finding of vicarious liability. In the instant case, it appeared to

Judge Keeton that reasonable persons might differ in their determinations regarding the alleged control and benefit in the context of trade shows generally, and the COMDEX show in particular. The evaluative determination to be made in this case was a reasonably disputable one, rather than one that could be made as a matter of law.

After considering various cases dealing with the issue of ``control,'' Judge Keeton stated that enterprises were found, as in the House Report, to have ``control'' over a performance if they either actively operated or supervised the operation of the place where the performances occurred or controlled the content of the infringing program. Judge Keeton then determined that Interface had a right and ability to control and supervise its exhibitors, as those terms have been used in the context of vicarious liability in copyright cases. It was noted that Interface could have altered its agreement with exhibitors to

prohibit music at COMDEX/Fall, but chose only to prohibit music at levels intrusive to other exhibitors and to advise exhibitors to obtain proper licenses. Interface employees attended the show to insure compliance with the agreement, and, in all, actively supervised the COMDEX/Fall show and had the contractual ability to control the allegedly infringing performances.

Interface not only rented space to exhibitors, but also exercised ``a pervasive and continuing control" over the exhibitors that was inconsistent with the usual relationship of landlord and tenant; promoted the COMDEX/Fall show through advertising to develop an audience for the exhibitors; and profited from the exhibitors not only through rental fees, but by charging admission fees.

With respect to the performers at the awards ceremony, the court found that Interface did not have a contract with the performers and did not exercise any

control over them. Judge Keeton declined to impose liability on Interface because there was no evidence showing which entity controlled or hired the disc jockey who performed at the awards ceremony. Furthermore, there was no evidence indicating which copyrighted songs were played by the disc jockey and which, if any, by the band.

Judge Keeton next found that Interface derived a financial benefit from the infringing performances of its exhibitors; that this benefit was ``direct;'' and that Interface expected commercial gain from the COMDEX/Fall show. An assessment of the amount of benefit was not required to determine liability. The ``crucial question for establishing the benefit prong of the test for vicarious liability,'' stated Judge Keeton, was ``not the exact amount of the benefit, but only whether [a party] derived a benefit from the infringement that was substantial enough to be considered significant.''

The court found that Interface derived a benefit from the exhibitors' music that was substantial enough to be considered significant in determining whether the financial benefit prong of the test for vicarious liability was satisfied. The exhibitors performed music, some of it copyrighted, to attract attention to their booths and, along with Interface, derived a significant financial benefit from the attention.

The court did not address whether Interface derived a financial benefit from the performances at the awards ceremony because there was no evidence that the first prong of the test for vicarious liability was met.

The ASCAP parties also argued that Interface should be held liable as a contributory infringer for the allegedly infringing performances at the awards ceremony. Again, the lack of evidence prevented the court from making the determination as to contributory infringement.

Judge Keeton rejected the argument that the exhibitors were necessary parties to the case; noted that Interface never entered any evidence in support of a fair use defense; and found that injunctive relief was not warranted. Acting, contrary to its own determination, on the assumption that the ASCAP parties proved a prima facie case, the court found that damages of $6,000 ($1,000 per infringement) would be appropriate; the finding was based on the court's assessment of the benefit that the songs provided to Interface and on the stipulation that, if Interface had purchased the proper license, it would have cost about $4,000.

Polygram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F.Supp. 1314, 1994 U.S.Dist.LEXIS 8830 (D.Mass. 1994) [ELR 16:7:16]

Trade show organizer is not vicariously liable for alleged infringement of copyrighted songs

The American Society of Composers, Authors and Publishers, on behalf of several copyright owners, sued Reed Publishing (USA), Inc., a convention organizer, alleging the infringement of nineteen songs by exhibitors at a 1991 trade show.

A Federal District Court in New York has found that Reed was not liable as a vicarious infringer, and granted the company's motion for summary judgment dismissing ASCAP's complaint. The court found it unnecessary to reach the issue of whether the exhibitors' performances of the copyrighted songs rose to the level of copyright infringement. The copyright holders, stated Judge John F. Keenan, did not establish that Reed had both the right and ability to supervise and control the purported

infringers, and that Reed derived a direct financial benefit from the primary violators' alleged infringement.

Judge Keenan found that trade show organizers ``do not determine how exhibitors conduct their business or even whether they use music at all." Reed may have been able, ``at great expense," to police the exhibitors for infringing conduct, but this was insufficient to impose vicarious liability.

Furthermore, Reed leased space to the exhibitors in exchange for a fixed fee based on the size of a booth; the company's revenue from the trade show did not depend on whether an exhibitor played any music. And there was no evidence that visitors to the show attended ``for the sake of the music played by four out of 134 exhibitors."

Artists Music, Inc. v. Reed Publishing (USA), Inc., 1994 U.S.Dist.LEXIS 6395 (S.D.N.Y. 1994) [ELR 16:7:18]

Further proceedings are ordered in dispute over licensing rights to ``Rocky and Bullwinkle'' characters

In March 1991, the two principals of Jay Ward Productions signed a letter agreement granting I.R.V. Merchandising the exclusive right to license such Ward characters as ``Bullwinkle,'' ``Rocky,'' ``Boris,'' ``Natasha,'' and ``Dudley Do-Right.'' The letter was subject to ``our lawyers go ahead per a contract to be signed'' and to obtaining the written release of Filmtel, a previous licensee. I.R.V. proceeded to secure several licensing agreements and forwarded the advance license payments to Ward.

In early April 1991, Ward notified I.R.V. that it had decided not to enter an agreement with the company. Ward eventually granted MCA the right to obtain licenses for the Ward characters.

A Federal District Court in New York has ruled that I.R.V. presented sufficient evidence to raise disputed questions of material fact regarding whether Ward intended to be bound by the March letter agreement.

Judge Charles H. Tenney noted that although the letter indicated that the Ward parties anticipated signing a contract, it also stated that the parties' agreement was effective as of March 27, suggesting that an already-created licensing arrangement would later be memorialized. Furthermore, the Ward parties had provided I.R.V. with the names of prospective licensees, and encouraged prompt contact. The Ward parties ultimately signed license agreements with several entities initially contacted by I.R.V.

The court observed that the letter agreement and a meeting of the parties set the term of the agreement, the characters covered, a sliding payment commission rate, the effective date of the agreement, and certain potential licensees excluded from the agreement. The fact that parties did not resolve all of the terms of the contract did not preclude the existence of a contract.

Judge Tenney next commented that at this stage of the proceedings, the court could not determine whether obtaining the Filmtel release was a condition precedent to the formation of a contract, as argued by the Ward parties.

In all, disputed questions of fact were raised regarding whether Jay Ward Productions intended to be contractually bound to I.R.V. as of March 27, and summary judgment therefore was inappropriate.

The court denied the Ward parties' motion for summary judgment with respect to a statute of frauds defense and

with respect to I.R.V.'s promissory estoppel claim. However, Judge Tenney dismissed I.R.V.'s contract and promissory estoppel causes of action insofar as those claims sought damages for a loss of reputation, noting that New York law generally does not permit damages for loss of reputation in breach of contract actions.

Judge Tenney concluded by dismissing I.R.V.'s claim for tortious interference with prospective economic advantage. The relationship between I.R.V. and prospective licensees was not a protected type of contractual business relationship. I.R.V. did not allege any relationship with the licensees other than acting as the agent for Ward; the licensees would not have paid commissions or any other form of consideration to I.R.V., nor would I.R.V.have been a party to the written licensing contracts.

I.R.V. Merchandising Corp. v. Jay Ward Productions, Inc., 856 F.Supp. 168, 1994 U.S.Dist.LEXIS 8586 (S.D.N.Y. 1994) [ELR 16:7:19]

Anheuser-Busch prevails in trademark infringement action involving magazine ad parody

A Federal Court of Appeals has reversed a District Court decision (ELR 15:7:21) dismissing Anheuser-Busch's trademark infringement, trademark dilution and unfair competition claims against Balducci Publications in connection with a parody advertisement.

The back cover of the April 1989 issue of ``Snicker'' magazine featured a mock advertisement for a fictitious product called Michelob Oily. The ad, which included, along with graphics, the phrases ``One Taste and You'll Drink it Oily'' and ``Michelob Oily,'' followed by a

registered trademark symbol, also stated ``At the rate it's being dumped into our oceans, lakes and rivers, you'll drink it oily sooner or later, anyway." At the side of the page, in small type, were the words ``Snicker Magazine Editorial by Rich Balducci. Art by Eugene Ruble. Thank goodness someone still cares about quality (of life)."

Anheuser-Busch has used the slogan ``Somebody still cares about quality," and the trademark ``One Taste and You'll Drink it Dry" to advertise its products.

Richard and Kathleen Balducci stated that they produced the ad parody to express an opinion regarding environmental pollution, and, in so doing, used some of Anheuser-Busch's trademarks without alteration and without permission.

Senior Judge John R. Gibson determined that the trademarks used in the ad were very strong; that the location of the ad might confuse consumers accustomed to seeing ads on the back cover of a magazine; and that the

evidence suggested that Richard Balducci had, ``if not an intent to confuse, at least an indifference to the possibility that some consumers might be misled by the parody." It was noted that the magazine did not indicate to readers that the ad was a parody; that the brewer's marks were used with little or no alteration; that the disclaimer was ``virtually undetectable;" and that Balducci included a registered trademark symbol after the words ``Michelob Oily." Senior Judge Gibson expressed the view that Balducci sought to do ``far more" than just ``conjure up" an image of Anheuser-Busch in the minds of its readers, and declared that many factors were consistent with a finding that the ad parody presented a significant likelihood of confusing consumers.

Survey evidence also supported Anheuser-Busch. Senior Judge Gibson adverted to the finding that over half of the individuals surveyed thought Balducci needed the brewer's approval to publish the ad, and that many of

these individuals presumably felt that such approval had been obtained. In all, the survey demonstrated actual consumer confusion.

The District Court erred in finding no likelihood of confusion, stated Senior Judge Gibson, who commented that the District Court ``mistakenly weighted its analysis in favor of Balducci in an effort to satisfy the limits set by the First Amendment." Senior Judge Gibson declared that the ``better course would have been to analyze the likelihood of confusion first and then proceed to an analysis of the First Amendment issues."

In turning to the First Amendment considerations, the court first stated that there is no absolute First Amendment right to use a party's trademarks in a parody, and then found that the First Amendment did not bar the application of the Lanham Act in this case. The consumer confusion was ``wholly unnecessary to Balducci's stated purpose," stated Senior Judge Gibson - the magazine

could have conveyed its message ``with substantially less risk of consumer confusion."

Senior Judge Gibson cautioned that the court did not hold that the extensive borrowing of Anheuser-Busch's trademarks amounted to a per se trademark violation, but that Balducci failed to insure that readers would understand that the ad was an unauthorized editorial.

The court further found that the ad parody, by suggesting that Anheuser-Busch products were contaminated with oil, tarnished Anheuser-Busch's marks in violation of Missouri's anti-dilution statute.

Although the court granted Anheuser-Busch's request for one dollar in damages, it stated that the parties had not developed a satisfactory record with respect to the limits which the First Amendment might place on the scope of the injunctive relief available to the brewer; the District Court was instructed to enter judgment for Anheuser-Busch and award appropriate relief.

Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 1994 U.S.App.LEXIS 16295 (8th Cir. 1994) [ELR 16:7:19]

Sega prevails in copyright and trademark infringement claims against operator of computer bulletin board

Video games copyrighted by Sega Enterprises were made available, without the company's authorization, to users of an electronic bulletin board known as MAPHIA. According to Federal District Court Judge Wilken there was evidence that MAPHIA, either directly or through an affiliate, sometimes charged a fee or a barter exchange for downloading Sega's games. The Sega game programs maintained and distributed through

the MAPHIA bulletin board included ``pre-release'' versions of games which were not available to the public.

Judge Wilken noted that the operation of the MAPHIA bulletin board was likely to damage Sega's reputation and the substantial goodwill in the company's trademarks. It was noted that Sega was unable to control the quality of the games distributed under its trademarks on the bulletin board - MAPHIA may have had the opportunity to alter Sega's game programs and the unauthorized copies did not contain the packaging and instructions used by Sega.

Judge Wilken first held that Sega established its claims of copyright infringement and contributory infringement arising from the MAPHIA parties' operation of the bulletin board and by the advertising, sale and distribution, directly or through an affiliated bulletin board network, of video game copiers.

The court rejected a fair use defense, citing the fact that users of the bulletin board were likely to make copies to avoid having to buy video game cartridges from Sega. The commercial purpose and character of the unauthorized copying weighed against a finding of fair use, stated Judge Wilken, as did the nature of the copyrighted work, the amount and substantiality of the portion copied, and the likely ``substantial and immeasurable adverse effect'' of the use upon the market for Sega's copyrighted works.

Sega also established a claim for trademark infringement under the Lanham Act. Judge Wilken observed that when a Sega game copied from the MAPHIA bulletin board is played, the game begins with a screen showing the federally registered SEGA trademark and the Sega logo. Thus, ``confusion, if not on the part of bulletin board users, is inevitable on the part of third parties

who may see the copied games after they enter the stream of commerce."

Judge Wilken, after finding that Sega established a claim of unfair competition under the Lanham Act and that the company showed the likelihood of irreparable harm arising from the operation of the bulletin board, granted Sega preliminary injunctive relief.

The MAPHIA parties alleged that Sega's access to the bulletin board through the use of a pseudonym constituted a violation of the Electronic Communications and Transactional Records Act, and that a seizure order issued by the court was inappropriate. Judge Wilken noted that the MAPHIA bulletin board was open to the public, and normally accessed by the use of an alias or pseudonym.

Furthermore, the statute contains an exception for access which is authorized by a user of an electronic service with respect to a communication for that user. The

Sega employee's access apparently was authorized, directly or indirectly, by a MAPHIA user. And the fact that the employee of a party, in the course of investigating a copyright or trademark infringement, fails to announce his/her identity ``does not provide a defense to the infringement when such identification would have defeated the investigation," declared Judge Wilken.

The court concluded by affirming the seizure of the counterfeit and unauthorized copies of Sega's video game programs located on the premises of the bulletin board operator, and by granting, during the pendency of the action, broad injunctive relief to prevent the unauthorized copying of the Sega video game programs.

Sega Enterprises Ltd. v. MAPHIA , 857 F.Supp. 679, 1994 U.S.Dist.LEXIS 5266 (N.D.Cal. 1994) [ELR 16:7:20]

Ruling awarding damages to Nintendo under Copyright Act and Lanham Act is upheld

In 1990, George Sheng, the sole proprietor of Dragon Pacific International, began importing and selling video game cartridges that were compatible with the Nintendo home video game system. Nintendo's game cartridges usually contained one game; the cartridges sold by Sheng contained many games per cartridge, including ten to twelve games copyrighted by Nintendo.

A Federal District Court found that Sheng infringed a total of thirteen separate Nintendo copyrights and acted ``intentionally, willfully, and with actual knowledge'' that the game cartridges infringed Nintendo's copyrights. Sheng also had represented that the cartridges were Nintendo products in violation of Nintendo's trademark rights.

The District Court granted Nintendo's motion for summary judgment with respect to the company's copyright and trademark infringement claims, and awarded Nintendo statutory damages under the Copyright Act of $65,000 and actual damages under the Lanham Act of $62,000, representing the profits made by Sheng on the sale of the cartridges - this amount was trebled to $186,000 on the basis of Sheng's willful violation.

Federal Court of Appeals Judge Diarmuid F. O'Scannlain found that the damage award for copyright infringement, standing alone, was appropriate, and that the award for trademark infringement, standing alone, also was appropriate.

The combined award did not constitute an improper double recovery, stated the court. Nintendo's claims were not based on the same wrongful act - selling the cartridges ``may have been one act, but it was two wrongs."

It was further found that Nintendo did not recover the same type of damages under both acts.

Judge O'Scannlain rejected Sheng's claim that the District Court erred in refusing to apportion damages based on the infringing and noninfringing elements of the cartridges. Apportionment is not an option when statutory damages are elected, stated the court, and by assessing statutory damages for only the thirteen infringed copyrights, the District Court did not award Nintendo damages for any of the non-Nintendo games on Sheng's cartridges.

The District Court's decision not to apportion damages under the Lanham Act was not an abuse of discretion, continued the court. The trademark damages reflected the fact that Sheng advertised each entire cartridge as a Nintendo product. And where infringing and noninfringing elements of a work cannot be readily separated, all of an infringer's profits should be awarded to the

complaining party, declared the court, observing that it was ``difficult to see a workable distinction between Sheng's representations that his cartridges were Nintendo products and his representations that they were Nintendo-compatible Nintendo products.'' Furthermore, Sheng did not present any evidence at trial on how to apportion damages on this basis.

Nintendo of America, Inc. v. Dragon Pacific International, 1994 U.S.App.LEXIS 31981 (9th Cir. 1994) [ELR 16:7:21]

Court upholds FCC's orders granting exemptions from equal time rules for segments of ``The McLaughlin Report'' and for independently produced news interviews

Section 315 of the Communications Act requires that when a broadcast licensee permits a legally qualified candidate for any public office to use a broadcasting station, the licensee must provide all other legally qualified candidates for that office with an equal opportunity to use the broadcast station. The act exempts certain categories of broadcast material from the equal time requirement, such as the appearance by a candidate on any bona fide newscast, bona fide news interview, bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject covered by the documentary), or on-the-spot coverage of bona fide news events.

In 1988, the Federal Communications Commission's Mass Media Bureau granted a petition filed by Oliver Productions, Inc., the producer of ``The McLaughlin Group," for a ruling declaring that the news reporting segments of ``McLaughlin" were ``bona fide newscasts"

exempt from the equal time provisions of Section 315 of the Communications Act.

The Commission rejected a petition by the Telecommunications Research and Action Center for review of the Bureau's order. A Federal Court of Appeals then denied the Center's petition for review of the Commission's decision (ELR 13:1:10).

Sometime prior to the court's 1990 decision, the Center had instituted a new proceeding asking the Commission for a declaratory ruling reversing its position that the news reporting segments of ``McLaughlin" were exempt from the equal time provisions as ``bona fide newscasts." The Commission denied the request.

In 1992, a group of public broadcasters requested a declaratory ruling from the Commission that ``independently produced, bona fide news interview programs" are exempt from the equal time provision of section 315. The Commission previously had held that the exemption

would apply only when programs were produced by Commission licensees or networks. The Commission granted the public broadcasters' petition.

Federal Court of Appeals Judge Sentelle, in denying the Center's petition for review of the ``McLaughlin Group'' decision, first found that the Communications Act does not require that a news segment must present several stories in a row to qualify for the ``bona fide newscast'' exemption. The Commission determined that the news reporting segments of ``McLaughlin'' qualified for the exemption and the court deferred to the Commission's reasonable interpretation of the ``newscast'' exemption.

The court also upheld the Commission's ruling that independently produced, bona fide news interview programs are exempt from the equal opportunity provisions of section 315. Judge Sentelle observed that the plain language of the statute deals only with the

responsibilities of licensees who broadcast exempt or non-exempt programming - ``it does not speak to the identity of the program's producer." The Commission's extension of the ``bona fide" news programming exemption to independent producers was reasonable and consistent with the language, legislative history, and policies of the Communications Act, concluded the court.

Telecommunications Research and Action Center v. Federal Communications Commission, 26 F.3d 185, 1994 U.S.App.LEXIS 15604 (D.C.Cir. 1994) [ELR 16:7:22]

Statute barring telephone companies from providing video programming to subscribers violates First Amendment

US West, its affiliated companies and other telephone companies providing local exchange telephone service in several states, including Washington, sought to provide cable television programming within their respective service areas. Section 533(b) of the Cable Communications Policy Act of 1984 prohibits common carriers from providing such programming directly to subscribers. A Federal District Court in Washington reviewed the history of the ban and discussed the conclusions of various government agencies recommending the repeal of section 533(b). Chief Judge Rothstein then found that the statute was subject to a higher standard than mere rational basis review and proceeded to consider whether the section 533(b) was sufficiently narrowly tailored to justify its ``sweeping exclusion" of the US West parties from video programming activity.

The government argued that telephone companies might discriminate against competitors by limiting pole and conduit access. It was noted that the Pole Attachment Act of 1978 provided the Federal Communications Commission with the power to regulate the terms and conditions of pole attachments. And the Commission has concluded, as quoted by Chief Judge Rothstein, that there is ``little threat that the local telephone companies could preemptively eliminate competition" in the video programming market by discriminating in pole access. Telephone companies already are permitted to provide video transport services, the area in which potential problems of access would be most relevant, commented the court, observing that any remaining access issues could be resolved by measures much less drastic than a total video programming ban.

The court also rejected the argument that the statute served to prevent telephone companies from subsidizing

their video programming activities by passing on those costs to their telephone ratepayers, and the argument that the telephone companies have monopolistic tendencies likely to result in anticompetitive behavior. Chief Judge Rothstein adverted to the suggestions made by various government parties concerning less restrictive controls to prevent any such behavior.

In all, the complete ban on telephone company providers of video programming in their service areas was an unnecessarily severe means of achieving the government's objectives, concluded the court; the statute did not appear to serve the stated objectives, and, if it did serve the objectives, did so by infringing on the telephone companies' First Amendment rights. The ban also would deprive the public of access to a greater number of choices in video programming, and the possibility of competitive pricing, declared the court, in granting the telephone companies' motion for summary judgment.

US West, Inc. v. United States, 855 F.Supp. 1184, 1994 U.S.Dist.LEXIS 8357 (W.D.Wash. 1994) [ELR 16:7:22]

NBC prevails in defamation claim brought by Colorado distributor of ``living will'' material

As reported at ELR 15:7:15, the Living Will Center in Colorado sells, for $29.95, a package of information and forms for drafting and implementing a living will.

NBC subsidiary KCNC-TV aired a news report in which it was stated that some medical ethicists view the sale of living wills as ``really exploiting people's fear of death.'' The broadcast mentioned that the center acknowledged that its forms were the same as those distributed without charge by many hospitals and libraries,

but claimed that it provided additional material to purchasers, and updated the material. A doctor's initial comment about the enterprise was ``I think it's a scam.'' The doctor then declared that purchasers of the center's material would find themselves to have been ``totally taken.'' The broadcast concluded by noting that the center's president was neither a doctor nor a lawyer, but an ``entrepreneur.''

When the center challenged the report, the station aired another story which provided more information about other institutions distributing forms similar or identical to the center's forms at little or no cost.

A Colorado appellate court reversed a trial court ruling on behalf of NBC, finding that the challenged statements, when considered in the context of the broadcasts as a whole, implied material assertions of fact susceptible to being proved false.

The Colorado Supreme Court has reversed the appellate court's decision, and held that the broadcasts were constitutionally privileged. Chief Judge Rovira stated that the terms ``scam" and ``taken" as well as the substance of the broadcasts did not contain or imply a verifiable fact and could not reasonably be understood as an assertion of actual fact about the center's products.

The broadcasts did not suggest that the center was committing the crime of fraud or that it engaged in a deceptive commercial practice. The term ``scam," as used by the doctor in the segment, was the doctor's expression, ``in figurative and hyperbolic terms," of his estimation of the worth of the product, stated the court, and the broadcast provided sufficient information for viewers to resolve their questions about the enterprise.

The statement concerning consumers being ``totally taken" also was found constitutionally privileged, for, again, the statement reflected the doctor's judgment

regarding the desirability of purchasing the center's package.

Chief Judge Rovira determined that the substance of the broadcasts, like the doctor's statements, did not imply verifiable facts, and remanded the matter to the appellate court with directions to reinstate the trial court's entry of summary judgment in favor of NBC.

Judge Erickson, in dissent, expressed the view that the trial court erred in denying the Living Will Center the opportunity to develop a factual basis for its claim. Judge Scott, in dissent, also questioned the trial court's dismissal of the action without allowing the center an attempt to establish that there existed a genuine issue of material fact.

NBC Subsidiary, Inc. v. Living Will Center, 1994 Colo.LEXIS 527 (Colo. 1994) [ELR 16:7:23]

Court dismisses libel claim over magazine article

In 1989, Lynette Harris and her twin sister were prosecuted for tax evasion in a Federal District Court in Wisconsin. The sisters were charged with willful failure to report as income money they received from an elderly widower. They were convicted and Harris was sentenced to serve time in prison and was ordered to pay a fine of $12,500. A Federal Court of Appeals reversed the convictions of both sisters, holding that the money they received - apparently more than half a million dollars each over several years - was a gift, for tax purposes.

James Romanesko wrote an article about the case for the February 1992 issue of Milwaukee Magazine, owned by Quad/Creative, Inc. and published by Betty Ewens Quadracci. Romanesko described the

experiences of Dennis Casey, the author of a book about Harris.

Chief Judge Terence T. Evans, in response to Harris's defamation action, first found that Harris was at least a limited purpose public figure. The court, noting that Harris did not allege malice in her complaint and did not prove by clear and convincing evidence the existence of material disputed facts on the issue of actual malice, granted summary judgment to Romanesko, Quadracci and Quad/Creative.

With respect to Harris's claims against Casey, Chief Judge Evans stated that Wisconsin case law indicated that a Wisconsin court would not afford the New York Times malice standard to a nonmedia party. However, because Casey was entitled to summary judgment on separate and independent grounds, the court did not address the constitutional issue and reviewed Harris's claims under the common law defamation standard.

Chief Judge Evans, after discussing each of the seven allegedly defamatory statements, declared that none of the statements was actionable as defamatory, either because there was no factual dispute as to the truth of the statement, there was no way to prove falsity, the statement was not attributable to Casey, or the statement was incapable of defaming Harris. The court, accordingly, granted Casey's motion for summary judgment.

Harris v. Quadracci, 856 F.Supp. 513, 1994 U.S.Dist.LEXIS 8985 (E.D.Wisc. 1994) [ELR 16:7:24]

Court vacates order restricting publication of name or likeness of minor charged with murder

When a 17 year old girl was arrested and charged with murder, the media broadcast the minor's name and

image in connection with a story about the arrest. The media obtained the minor's name from various sources, including school officials.

During a subsequent detention hearing in a San Diego juvenile court, the court allowed the press to remain at the hearing, but ordered reporters not to use any cameras or recording devices or make any drawings of the minor. The court issued a minute order barring the news media ``from identifying by full name or by likeness this minor in any description of this or any subsequent court proceeding in this case . . ." The minute order contained the minor's full name.

A television station used the minor's full name and ran the footage from the arrest story, noting that the court order precluded the station from stating whether the individual shown in the earlier footage and identified by name was the same person charged with murder in the juvenile court proceedings.

Several broadcasters filed a petition for writ of mandate requesting a California appellate court to direct the trial court to vacate its order restricting coverage of the proceedings. KGTV Television Studios then was served with an order directing the station to show cause why it should not be held in contempt.

The appellate court found that the juvenile court order was an unconstitutional prior restraint on speech. Judge Nares, after reviewing the background of statutes regulating access to information about minors in the juvenile justice system, and discussing cases dealing with the media's right to publish lawfully obtained information, noted that ``where the court welcomes the media into the courtroom, holds a public hearing where last names are used and issues an order containing the minor's full name, the source of the information is the court itself."

It was observed that there is no statutory provision conditioning media attendance at a public hearing on

judicial control over what the press reports. Judge Nares expressed the view that confidentiality would be ``irreconcilable with the legislative mandate for an open hearing, and, as a practical matter, impossible to enforce when the public at large may freely come and go from the courtroom." However, courts do retain the discretion, even after determining that a minor has committed a serious offense, to keep the minor's name confidential, assuming the court previously has taken measures to preserve confidentiality.

Judge Nares concluded that the juvenile court erred in precluding the media from attending an open public hearing; found that the court's order violated the First and Fourteenth Amendments; and directed the trial court to vacate the minute order and order to show cause re contempt.

KGTV Channel 10 v. The Superior Court of San Diego County, 26 Cal.App.4th 1673, 32 Cal.Rptr.2d 181, 1994 Cal.App.LEXIS 763 (Cal.Ct.App. 1994) [ELR 16:7:24]

Court issues further rulings in dispute over services of New York newspaper columnist

As reported at ELR 15:9:9, New York County Acting Judge Herman Cahn granted the New York Daily News a preliminary injunction barring Michael McAlary from working as a writer or editor for the New York Post or any other newspaper or magazine in the New York metropolitan area.

McAlary, in early 1993, left the New York Post, where he was employed as a columnist, and entered an employment agreement with the Daily News for a two year term. McAlary, hired as an Associate Editor/Columnist,

agreed not to write for any other newspaper or magazine in the United States or Canada without the prior written permission of the Daily News.

In August 1993, McAlary informed the Daily News that he planned to return to the New York Post. However, in February 1994, McAlary entered into a new three year contract with the Daily News.

When the New York Post brought a lawsuit, a trial court denied permanent injunctive relief, holding that the 1993 agreement which the newspaper sought to enforce terminated by its terms on December 11, 1993, as a result of McAlary's twelve continuous weeks of disability (the writer had been injured in a car accident in September 1993), and was not revived or renewed by McAlary's subsequent acceptance of compensation after December 11, 1993. The court dismissed the newspaper's request for equitable relief and severed and continued the claims for damages.

The New York Post parties chose to move for leave to replead the original causes of action for breach of contract against McAlary, and inducement of breach of contract and tortious interference with contractual relations against the Daily News parties; the Post also asserted various new causes of action.

Judge Cahn first adverted to the ``law of the case'' doctrine, noting that unless a ruling contrary to the trial court's ruling is rendered on appeal, the basis for the repleaded causes of action, i.e., the 1993 Post agreement, no longer existed and the Post's claims threfore no longer were viable.

Similarly barred were the Post's claims alleging oral and implied in fact agreements pursuant to which McAlary undertook to perform all of the obligations set out in the 1993 agreement with the newspaper. Assuming such agreements were entered, they terminated on December 11, 1993 as a result of McAlary's disability.

The trial court had rejected the argument that the 1993 Post agreement was either ``revived'' or ``renewed'' based on the parties' conduct and actions subsequent to December 11, 1993; Judge Cahn agreed that the cause of action for breach of an amended contract lacked the requisite factual support.

The Post's claim for tortious interference with prospective economic relations also was rejected for, among other reasons, the fact that a competitor may be excused from the consequences of interfering with prospective contractual relationships ``where the interference is intended at least in part to advance the competing interest of the interferers, and the means employed are not wrongful.'' The Post did not present sufficient facts to show that the conduct of the Daily News parties in negotiating with McAlary was ``wrongful'' or culpable, particularly since the writer was a ``free agent.''

The court granted the Post's motion for leave to amend the complaint by adding a cause of action based on a promissory note. Judge Cahn also allowed the Post to include a claim for misrepresentation in the amended complaint, as well as a claim for money had and received.

NYP Holdings Inc. v. McAlary, New York Law Journal, p. 29, col. 6 (N.Y.Cnty., Sep. 12, 1994) [ELR 16:7:25]

Ruling rejecting taxpayer claims in connection with master recording lease investment is upheld

In December 1983, George Christian, Jr. and other parties signed an agreement with Auravision Corp. entitled ``Tenants in Common in an Equipment Lease.'' The

purpose of the agreement was to invest in the ``Billy Meisner `Nightfire' L.P." master recording. The lessees employed Georgetowne Sound to manufacture and distribute records and tapes derived from the master. Under the agreement, all profits, losses, rents and other costs incurred relating to the management of the master were shared by the lessees in proportion to their interest.

The master was assigned a value of $7.35 million; Georgetowne Sound was allocated a ten percent interest for the company's investment of $9,000 in cash and a promissory noted for $21,000.

In 1987, the Internal Revenue Service issued notices of deficiencies to some of the Meisner investors. In 1992, the Tax Court found that no evidence had been presented to suggest that the agreement was not a partnership.

In 1991, the Internal Revenue Service issued a Final Partnership Administrative Adjustment covering the tax

years 1983 and 1984, classified the agreement as a partnership for federal tax purposes, and disallowed all losses, deductions, expenses and income tax credits associated with the Meisner master recording lease.

Federal District Court Senior Judge Joseph H. Young, in upholding the government's determination, cited the fact that the promotional materials for Auravision focused on the tax benefits to the lessees rather than on a business purpose. It also was noted that the investing parties had no experience in the music industry, and that the value placed on the master had no relationship to the $300,000 paid by the lessees or to the government appraiser's determination of the fair market value - $3,000. The appraiser commented that although Meisner was unknown in the United States, Georgetowne Sound designed an album cover which did not contain a picture of the artist, did not indicate whether the album was vocal or instrumental, and did not mention the style of music

performed. The quality of the album was poor, according to the appraiser, and the album was only recorded on two tracks instead of the standard 16 or 24. Generally, recordings like the Meisner master ``do not generate enough income to justify the recording expense." The lessees, who claimed that they relied on a valuation provided by Auravision, would have had to sell more than twelve million albums to recoup an investment of $7 million, and Georgetowne Sound would have had to sell 50,000 albums to recoup its $30,000 investment.

Judge Young then found that the transaction lacked commercial plausibility, noting that the album was not even produced until May 1985, two years after the lease was signed, and that the Georgetowne parties deducted 100 percent of the distribution costs. The record indicated that not a single album was sold.

Given the lessees' ``lack of zeal in promoting Billy Meisner, [and] lack of experience with master

recordings, the overvaluation of the Billy Meisner master recording, and the deferral of payment for it," the court found that the investment was a sham transaction to be disregarded for tax purposes, and also found that the investment was a generic tax shelter.

The District Court's 1993 decision has been affirmed without opinion.

Georgetowne Sound v. United States, 856 F.Supp. 1056, 1993 U.S.Dist.LEXIS 11478 (D.Md. 1993); 19 F.3d 10 (4th Cir. 1994) [ELR 16:7:25]

Court reduces tax assessed on value of late author's name

Author Virginia C. Andrews died in 1986, and her estate subsequently paid federal estate taxes of over $2

million. In 1990, the Internal Revenue Service issued a notice of deficiency, stating that Andrews' name was an asset of the estate having a value of about $1.2 million on the date of her death; the IRS assessed deficient taxes in the amount of about $650,000. The estate paid under protest the deficient tax and interest, a total of about $950,000, and filed a claim for refund. A Federal District Court in Virginia, noting that the value of an author's name at date of death was an issue of first impression, reviewed Andrews' literary career. The author of ``Flowers in the Attic'' and many other commercially successful works, had entered a two-book contract in 1984 which specified an advance of $2 million. Just prior to her death, Andrews signed another two-book contract; the contract, among other terms, provided for an advance $3 million against royalties. The publisher did not receive the executed contract until

after Andrews' death and did not execute the contract it had proposed.

However, in March 1987, Pocket Books revised the proposed contract to reflect that the project would proceed with a ghostwriter. The publisher hired Andrew Niederman to write two books but specified that Andrews would be considered the author of the works to be produced by Niederman and that Andrews' company, Vanda Productions, Ltd., would be entitled to register the copyrights on those works either in the name of Vanda or Andrews.

Niederman's first work was a commercial success and the parties agreed that Niederman would write three additional ``children in jeopardy'' novels in the Andrews style. The author agreed not to disclose that he had written, or was writing, books ``under the name of'' Andrews. And although Andrews' death had been reported, it was not until the publication of the fifth ghostwritten

book in 1990 that her death was confirmed to her readers.

Federal District Court Judge Payne observed that the predominant reason for concealing Niederman's identity was that ``Andrews was the preeminent author in this unique genre and that books written by a well-known author have an enhanced chance of commercial success." It appeared to the court that Andrews' name was important in achieving the immediate, substantial commercial success of the first ghostwritten book, particularly given the lack of critical reviews of the work.

Judge Payne then reviewed the process by which the IRS determined the value of Andrews' name, and the evidence offered by the estate, which suggested a fair market value of $140,000 for the hypothetical sale of Andrews' name.

On the date of Andrews' death, stated the court, the parties to the hypothetical sale transaction would have

known that Andrews was a bestselling author; that the success of paperback genre works is ``heavily dependent upon association with the name of an author whose similar works were well-accepted by an extensive and faithful audience;" and that a poorly received book bearing Andrews' name might have an adverse impact on the sales of the books Andrews wrote before her death. The parties also would be aware that ghostwriters often are used to continue producing works in a series begun by a deceased author, but that there were significant risks associated with such a project.

After careful review, Judge Payne determined that Andrews' name was an asset of the estate and that the value of the author's name on the date of her death was about $700,000. The IRS therefore erred in its tax assessment, stated the court, in ordering the parties to agree to the amount of the taxes owed and the refund due the estate.

Estate of Andrews v. United States, 850 F.Supp. 1279, 1994 U.S.Dist.LEXIS 6408 (E.D.Va. 1994) [ELR 16:7:26]

Violinists may claim depreciation deduction for antique bows

In 1985, Richard and Fiona Simon purchased a violin bow for $30,000; the bow was made in the 19th century by Francois Xavier Tourte. The Simons subsequently purchased a second Tourte bow for $21,500. The Simons planned to use the bows in their full-time employment as violinists.

In 1989, the musicians claimed a depreciation deduction of $6,300 with respect to the first bow and a deduction of about $4,500 with respect to the second bow. The Internal Revenue Service disallowed the

deductions, arguing, in part, that the useful lives of the bows was indeterminable since they were treasured works of art for which it would be impossible to determine useful lives.

The Tax Court held that the Simons were entitled to depreciate the bows, under the accelerated cost recovery system, over the five year period for ``recovery property." Judge David Laro stated that the Tourte bows ``fit snugly" within the definition of recovery property. The bows were tangible property; were placed in service after 1980; and were regularly used by the Simons in their trade or business as professional violinists.

Personal property may be depreciated if it is ``of a character subject to the allowance for depreciation." For the court, this meant that the property must suffer ``exhaustion, wear and tear, or obsolescence in order to be depreciated..." The Simons' frequent use of the Tourte bows subjected them to substantial wear and tear,

declared the court, in holding that the Simons were entitled to a depreciation deduction for the year in issue.

In a footnote comment, the court expressed the view that the Tourte bows were not works of art, but rather, functioned ``actively, regularly, and routinely" to produce income in the Simons' trade or business.

The court disagreed with the Commissioner's argument that the bows were nondepreciable because they had value as collectibles, independent of their use as musical instruments. The fact that an asset may outlive a taxpayer is not dispositive of the issue of whether that asset has a useful life for depreciation purposes, declared the court.

Judge Ruwe, concurring in the opinion, noted that under section 167, depreciation was allowed over the useful life of an asset in order to allow taxpayers to deduct the anticipated loss in value attributable to wear and tear. This required a taxpayer to prove the useful life

and salvage or residual value of the asset. Section 168 eliminated these requirements, and specified the number of years over which the cost of certain types of assets may be deducted, thus eliminating the need to calculate salvage or residual value in order to determine the expected economic loss.

Although expressing understanding of the dissent's concern that section 168 might allow an asset to be written off over a period much shorter than its actual useful life and that the entire costs might be deducted despite the fact that there might be no actual economic decrease in value, Judge Ruwe noted that ``that is the price of the tax simplification implicit in section 168."

Chief Judge Hamblen, in dissent, questioned the majority's creation of a ``tax shelter for musicians." The violin bows were ``works of art" that the Internal Revenue Service has treated as nondepreciable property because ``as instruments and collectibles they have an

indeterminable useful life." The majority's holding would be contrary to such legal precedent, stated Chief Judge Hamblen.

According to the dissent, the majority's holding was that if a taxpayer uses in his/her trade or business tangible personal property which suffers some wear and tear, ``irrespective of whether the wear and tear can be restored by ordinary maintenance, irrespective of whether it has a determinable useful life, and irrespective of whether it declines in value, the taxpayer is entitled to depreciate the property under [section 168] by treating it as falling within one of the five broad classes of `recovery property.'"

For Chief Judge Hamblen, useful life remains a ``hallmark" in the basic concept of depreciation in both sections 167 and 168. The premise underlying the depreciation allowance is that wear and tear or

obsolescence causes a corresponding reduction in the value of an asset and diminishes its useful life.

According to Chief Judge Hamblen, the Simons' costs were not used up over the claimed five year period. Richard Simon apparently could not determine how long the bows would be usable, and it was not shown that the bows were the type of property subject to depreciation. The dissent, giving a broad meaning to the term ``work of art," would have included an antique music instrument or bow within the definition. And even if used in a trade or business, a work of art retains its character as such because it does not have a determinable useful life and generally does not decline in value over a predictable period, reiterated Chief Judge Hamblen.

The dissent proceeded to question the finding that the Simons' frequent use of the Tourte bows ``subjected them to substantial wear and tear during the year in issue." The bows were in excellent condition at the time of

trial, noted Chief Judge Hamblen, and ``may be good for another 175 years, if properly maintained." In all, the bows, stated the dissent, were ``usable and treasured works of art whose physical life and use to [the Simons] were not lessened by wear and tear that could not be restored by current maintenance. Their cost was not being consumed or used up over a determinate period. They have inherent and independent value as collectibles that may remain for centuries...and were not of a character subject to the allowance for depreciation."

Judge Gerber, in dissent, commented that the bows had both recoverable or depreciable and intrinsic attributes. A taxpayer would not be entitled to a depreciation deduction for intrinsic value and the bows, in spite of their use, continued to increase in value from the original purchase price. Judge Gerber agreed with the majority that the bows were tangible property placed in service after 1980, and were used in the Simons' trade or business.

But Judge Gerber would have found that the Simons did not show that all of the property was of a character subject to the allowance for depreciation. Some portion of the bows was subject to wear and tear, and the Simons should have shown which portion of the bows was subject to wear and tear, and thus was recovery property.

Judge Gerber pointed out that the majority's holding would provide an opportunity for ``substantial unintended abuse.'' Taxpayers may be able to depreciate items with current business utility and intrinsic collector's value and, after three or five years, have the tax benefit of the entire cost, at a time when the value of the item has not decreased or may have increased, and then may pass on the still valuable items to future generations.

Judge Halpern, joined in Chief Judge Hamblen's dissent, and also stated the view that to claim recovery property within the meaning of section 168(c)(1), the

Simons would have had to show not only that the bows were subject to wear and tear but also that they had determinable useful lives.

With respect to Judge Gerber's suggestion that the bows were dual use property, Judge Halpern noted that the Tax Court has allowed less than a full allowance for the exhaustion, wear and tear and obsolescence of property where only a portion of the property is used in a trade or business. However, it did not seem to Judge Halpern that it was appropriate to say that a property can wear out for one purpose but not another; Judge Halpern therefore would not have allowed a depreciation deduction for the utility related to the particular determinable useful life of the bows (which, in any event,the Simons had not shown to be so limited).

Simon v. Commissioner of Internal Revenue, 1994 U.S.Tax Ct.LEXIS 60, 103 T.C. No. 15 (U.S.Tax Ct. 1994) [ELR 16:7:27]

Briefly Noted:

Unemployment Benefits.

During 1992, Tamara Nerby was paid for performing in three commercials, and was entitled to reuse fees for the rebroadcast of the commercials. Nerby was contractually restricted from appearing for competitive products during the period covered by the reuse fees.

When Nerby filed a claim for unemployment compensation benefits in May 1993, an administrative agency denied the claim, citing Nerby's failure to perform

services for wages in fifteen weeks. Nerby received session fees,i.e., earned wages, in only nine weeks in 1992.

A Minnesota appellate court noted that Nerby received session fees for the services she performed; performed no new services in exchange for the reuse fees; and was free to make commercials except for a competitive product.

Minnesota law exempts from wages ``remuneration paid to radio and television artists which represents residual payments and which is accrued subsequent to the production of musical jingles, spot announcements, radio transcriptions, and film sound tracks."

The court rejected Nerby's argument that the rule was limited to residuals paid for the production of voice spots and did not apply when an actor's image is used in a visual medium. The finding that the reuse fees were residual payments which did not qualify as wages was well-supported, stated Judge Marianne D. Short, and the

decision to include only the weeks in which Nerby received payment for making commercials was consistent with the purpose and history of the unemployment statute. Nerby ``was part of the labor force in only nine weeks in 1992," and the finding that the performer was ineligible for unemployment compensation benefits thus was not clearly erroneous.

Nerby v. Talent Partners, 518 N.W.2d 633, 1994 Minn.App.LEXIS 609 (Minn.App. 1994) [ELR 16:7:28]

Laser Designer Fees.

In 1978, Stephen Weinreich and Richard Sandhaus, the owner of Dick Sandhaus Productions, worked on a laser light show system known as the Silver system. The parties agreed that Weinreich would receive a one-third

interest in the net profits earned by the sale or rental of the Silver system or derivative systems.

In June 1978, Sandhaus formed Science Faction Corporation; the company acquired the Silver system from Dick Sandhaus Productions.

Weinreich, Sandhaus and another individual then worked on another system, the 2000 system; the components of the system were substantially the same as those in the Silver system, with certain improvements. In 1979, Weinreich stopped working for the Sandhaus entities.

In 1981, Sandhaus began to develop the 360 system; the system contained fundamental design changes, and Sandhaus no longer used systems similar to, or derivative of, the Silver or 2000 systems.

Federal District Court Judge Sweet found that the 1978 letter agreement was an enforceable contract; that the piercing of the corporate veil was appropriate in this

case; that Weinreich's work on the Silver system was sufficient to entitle him to recover under the 1978 agreement; and that the 2000 system was similar to, or derivative of, the Silver system, but that the 360 system was not. After reviewing the parties' calculations, it was found that Weinreich was entitled to about $20,000 for the 1978 to 1981 period and to about $34,000 for the use of the 2000 system after 1981, for total damages under the breach of contract cause of action of about $54,000, together with interest as specified.

The court granted Weinreich's claim for recovery under quantum meruit for work performed on projects other than the Silver system to the extent of awarding him $1,500.

Weinreich v. Sandhaus, 850 F.Supp. 1169, 1994 U.S.Dist.LEXIS 5536 (S.D.N.Y. 1994) [ELR 16:7:29]

Attorneys' Fees.

In the ongoing dispute between photographer Elizabeth Marshall and New Kids on the Block, Big Step Productions sought reasonable attorneys' fees based on a Federal District Court order (ELR 16:2:19). In early 1994, Judge Robert P. Patterson, Jr. awarded Big Step about $36,000 for attorneys' fees and about $4,800 for expenses for the period from October 1992 through August 1993.

Marshall v. New Kids on the Block Partnership, 1994 U.S.Dist.LEXIS 378 (S.D.N.Y. 1994) [ELR 16:7:29]

Libel/Television Broadcast.

The television program ``Code 3" broadcast a segment entitled ``Gunpowder River Rescue," during which Michael Crowley was shown assisting two teenagers stranded in the middle of the river. The narrator/host of the segment described Crowley, who was not named, as ``a well-meaning National Guardsman who jumped in to help" and who ``attempted a rescue - and now finds himself stranded." Crowley claimed that the program falsely portrayed him as a victim, rather than as a facilitator of a team rescue effort.

Federal District Court Senior Judge Frank A. Kaufman, applying Maryland law, concluded that the statement and pictures used in the Code 3 broadcast were not defamatory as a matter of law. The footage conveyed the true facts of the rescue operation, including showing Crowley supporting one teenager on his shoulders. And the narration never explicitly referred to Crowley as a ``victim." The Code 3 segment was, at most, ``merely

offensive" and was not capable of a defamatory meaning. Also rejected were Crowley's claims alleging false light invasion of privacy and intentional infliction of emotional distress.

Crowley v. Fox Broadcasting Co., 851 F.Supp. 700, 1994 U.S.Dist.LEXIS 6003 (D.Md. 1994) [ELR 16:7:29]

Trademark/``Martha Washington'' Doll.

The Trademark Trial and Appeal Board has upheld a ruling that the name ``Martha Washington'' for a doll was merely descriptive of Carlson Dolls' product. Adminstrative Trademark Judge Cissel noted that ``the likely reaction of ordinary consumers presented with ``Martha Washington'' on tags attached to 'historical

dolls' made to look like women in colonial clothing would be that the name indicates not the commercial source of the dolls, but rather is used as a description of the historical figure the dolls are supposed to represent." Thus, the refusal to register based on Section 2(e)(1) was proper.

In re Carlson Dolls Co., 1994 TTAB LEXIS 6 (1994) [ELR 16:7:29]

First Amendment.

The Adult Video Association sought a declaratory judgment that the film ``After Midnight'' was protected under the First Amendment and was not legally obscene in the Western District of Tennessee.

Federal District Court Judge Turner granted a motion to dismiss brought by law enforcement officials, stating that the association lacked standing since there was no justiciable case or controversy before the court. Association members had not engaged in any activity in the district for which they could be prosecuted under federal obscenity laws, and did not show that the law enforcement officials had harassed them or threatened them with prosecution in connection with the videotape.

Judge Turner rejected the argument that the association members were ``injured'' as a result of having to choose between self-censorship and the risk of prosecution and conviction, so as to bring the instant action within the case or controversy requirement of Article III.

Adult Video Association v. United States Department of Justice, 853 F.Supp. 263, 1994 U.S.Dist.LEXIS 6509 (W.D.Tenn. 1994) [ELR 16:7:30]

Student Athletics/Disability Ruling.

A Federal District Court in Missouri has granted Edward Pottgen a preliminary injunction barring the Missouri State High School Activities Association from refusing to allow Pottgen to participate in interscholastic athletics in the 1993-1994 school year because of his age. Pottgen had been diagnosed with a learning disability, and repeated two grades in elementary school. He began his senior year of high school at age nineteen. The association, in accordance with its bylaws, declared Pottgen ineligible to compete in interscholastic activities.

Judge Shaw found that Pottgen did not present a safety hazard to other, younger high school baseball players and had not purposely delayed his education in order to

gain athletic maturity and experience. Any potential competitive advantage claim was de minimis, stated the court - Pottgen, ``a good baseball player, not a superior one," had not been ``red-shirted" to obtain an advantage.

Furthermore, the association had neither considered the issue of safety nor made an individualized review of Pottgen's circumstances in denying the student's request for a waiver.

The court determined that Pottgen demonstrated that he would be irreparably harmed if he was prevented from participating in his school's baseball program during his senior year, and that there would be no undue financial or administrative burden on the association. Pottgen also had shown a ``high probability" that he was likely to prevail on a claim brought under the Americans with Disabilities Act and had raised a substantial question as to whether he might prevail on his claim under the Rehabilitation Act of 1973. If it is found that the

association's decision violated Pottgen's rights under the statutes, the student also will have shown a probability that he will succeed on the merits of his claim under 42 U.S.C. section 1983.

The public interest in regulating interscholastic activities must accommodate the more compelling public interest of prohibiting discrimination against those with disabilities, concluded the court, in issuing the requested injunctive relief with respect to Pottgen's competition in his high school's baseball games and in barring the imposition of any penalty, discipline or sanction on any school for which or against which Pottgen competes in these games.

Pottgen v. Missouri State High School Activities Association, 857 F.Supp. 654 (E.D.Mo. 1994) [ELR 16:7:30]

Auto Racing/Driver Injury.

A Federal District Court in Idaho has granted summary judgment to Firebird Raceway in a negligence action brought by injured race car driver Gary Groves. During a 1992 race, Groves lost control of his car, which then hit a guardrail, flipped and caught on fire. Groves argued that the racetrack parties failed to provide adequate and proper firefighting equipment and personnel and that this alleged negligence caused Groves' injuries.

The court noted that the release signed by Groves prior to, and as a prerequisite to, his participation in the race was a complete bar to the action. The release, in part, extended to all acts of negligence by the racetrack, including negligent rescue operations.

There were no Idaho statutes regulating race track operators or sponsors, continued the court, and there was,

accordingly, no public duty involved in the case so as to justify an exemption to the enforcement of the release.

Kathy Groves' claim for loss of consortium was ruled a derivative claim subject to the same defenses as Gary Groves' action.

Groves v. Firebird Raceway, Inc., 849 F.Supp. 1385, 1994 U.S.Dist.LEXIS 5575 (D.Idaho 1994) [ELR 16:7:30]

Libel.

An editorial in the April 21, 1989 issue of the Charleston Gazette included critical comments concerning Marshall University associate professor Stan Maynard's activities in supervising the athletes attending the school.

When Maynard sued the newspaper for libel, a trial court jury awarded him $1.00 in compensatory damages and $160,000 in punitive damages.

A West Virginia appellate court has reversed the trial court order upholding the award.

Chief Judge Brotherton noted that the challenged article involved a matter of public concern and was not defamatory, whether examined statement-by-statement or read as a whole. The article appeared on the newspaper's editorial page; the tone of the article indicated that the writer was expressing an opinion; and the challenged statements did not suggest that Maynard was a ``corrupt" individual and did not contain any provably false assertions of fact.

Maynard v. Daily Gazette Co., 1994 W.Va.LEXIS 141 (W.Va.App. 1994) [ELR 16:7:30]

Noise Ordinance.

A Boston ordinance restricted the hours of operation of establishments holding entertainment licenses by, in part, prohibiting such businesses from operating between the hours of 2:00 A.M. and 6:00 A.M.

Loft Twenty-one Association, a noprofit corporation, operated a private club open to ``members only'' from 1:00 A.M. to 5:00 A.M. The Loft played recorded music but did not serve alcoholic beverages. In 1979, The Loft sued to have the ordinance declared unconstitutional. The corporation settled its lawsuit against the city; under the 1985 agreement, judgment was entered for The Loft on its request that the city be enjoined from initiating prosecution or from enforcing the ordinance against the corporation. The Loft ceased operating in October 1985.

In 1992, The Loft, in conjunction with Back Bay Cultural Association, resumed operations. The city issued a

conditional entertainment license, but denied the request for a license beyond 2:00 A.M. and brought an action seeking to prevent the Back Bay parties from offering unlicensed entertainment after 2:00 A.M.

A trial court judge ruled that the 1985 agreement was invalid, that there was no First Amendment violation and that the city was entitled to summary judgment.

The Supreme Judicial Court of Massachusetts, which transferred the case from the appellate court on its own motion, ruled that the ordinance violated the First Amendment.

Judge Lynch agreed with the trial court that the ordinance was content neutral. However, the ordinance was not narrowly tailored to achieve a substantial governmental interest in that it would adversely affect entertainment that did not produce certain specified undesirable secondary effects.

Judge Lynch concluded by agreeing with the trial court that the city, by exempting The Loft, under the 1985 agreement, from the terms of the ordinance, exceeded its authority - the ordinance did not authorize the city to make exceptions to its enforcement.

City of Boston v. Back Bay Cultural Assn., Inc., 418 Mass. 175, 635 N.Ed.2d 1175, 1994 Mass.LEXIS 384 (Mass. 1994) [ELR 16:7:31]

WASHINGTON MONITOR

Federal Communications Commission clarifies offsetting of payments from programmers to cable operators in response to inquiry from Disney Channel

As described by the Acting Chief of the Federal Communications Commission's Cable Services Bureau, Section 76.922 (d)(3)(X) of the Commission's rules is designed to protect cable subscribers by assuring that external programming costs paid by subscribers are based on the net costs incurred by a cable operator and reflect any rebates or other compensation received by the operator from the programmer.

The Disney Channel sought clarification of the rule in connection with promotional efforts undertaken by operators. Disney noted that programmers often purchase advertising time from operators to promote the programmer's offerings, and that programmers may reimburse operators for all or part of their marketing expenses related to promoting the program service, including printing and postage costs, advertising agency fees, and sales force commissions. Disney claimed that the costs represented ordinary costs of doing business for the

programmer that were not refunds or rebates of the programming fees paid by operators to programmers.

Acting Chief Kathleen M.H. Wallman, in responding to Disney, stated that the Commission did not believe that reimbursements of verifiable, reasonable promotional expenses of the type set forth by Disney would require offsetting under the rule in all circumstances. Accordingly, Section 76.922(d)(3)(X) would not require a programmer's payments to an operator for advertising time to promote the programmer's offerings, or payments to reimburse the operator for reasonable, documented expenses of marketing a program service to consumers, be offset against increases in programming costs for purposes of calculating charges accorded external treatment.

The determination was limited to situations where the programmer ``has routinely and ordinarily reimbursed the cable operator for promotional expenditures..." The

determination does not permit programmers, absent special circumstances justifying a waiver, to initiate the reimbursement of promotional expenses, or significantly expand reimbursements, without the offsetting required under the rules.

As long as the reimbursements are part of a reasonable marketing plan and it does not appear that the operator and the programmer have altered reimbursement practices primarily to avoid offsetting, the Commission will not require the application of the section. The Commission also will not require offsetting for reimbursements for verifiable and reasonable promotional expenses for new program services added to a regulated tier. The limitations will not apply to the purchase of advertising time from cable operators. If an expenditure for advertising is customary and verifiable, the Commission will not require offsetting even if the programmer is undertaking additional advertising expense.

The Disney Channel, 1994 FCC LEXIS 2283, 75 Rad.Reg.2d (P & F) 306 (May 23, 1994) [ELR 16:7:32]

FCC denies Time Warner's petition to enforce exclusivity of contract with Court TV, but grants exclusivity petition of New England Cable News

In June 1994, the Federal Communications Commission determined that continued enforcement of an exclusive distribution agreement between Courtroom Television and Time Warner Cable was not in the public interest. The Commission therefore denied Time Warner's petition to enforce the agreement, and stated that the exclusivity provision may not be used to deny programming to any multichannel video programming distributor.

Section 628(c)(2)(D) of the Cable Television Consumer Protection and Competition Act of 1992 provide that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.

Time Warner obtained the exclusive right to exhibit Court TV in areas served by the cable operator for ten years, beginning in July 1991, with an option to renew until 2006. Time Warner's exhibition and distribution rights extended to cable or other wire transmission service and to the reception of Court TV programming by satellite master antenna television systems, multipoint distribution services, and any other means of receiving programming.

Court TV is owned by a combination of cable operators and broadcasters, including Time Warner, Liberty

Media, Cablevision Systems and NBC; Time Warner is the largest investor in Court TV. Time Warner's ownership interest in Court TV constituted an ``attributable interest," noted the Commission, making Court TV a vertically integrated programming vendor subject to the Commission's program access rules. The rules barred Court TV from providing a cable system affiliate the exclusive right to distribute Court TV within the operator's franchise area without a determination by the Commission that such exclusive distribution would meet specified public interest criteria.

Time Warner argued that it was seeking to enforce exclusive contracts with only three of the sixty total programming services subject to the program access rules that it carries. (Time Warner had submitted another petition seeking exclusivity for Prime Ticket Network, and had the exclusive right to distribute Turner Network television within the franchise areas of its cable systems.

The contract for Turner Network Television was entered into prior to June 1, 1990 and was grandfathered under the 1992 Cable Act). Time Warner also pointed out that it had agreed not to enforce its exclusive distribution rights against direct broadcast satellite providers.

Time Warner adverted to the many alternate sources of programming available to competing distribution systems; claimed that Court TV was not an ``essential facility'' for which access was required or necessary for the survival of a competitor; argued that the contract with Court TV would not harm competition in the national or local multichannel video programming distribution market; and stated that exclusivity was a necessary incentive for investments in the development of Court TV.

The Commission, noting that Time Warner has about 500,000 subscribers in Manhattan while Liberty has only 12,000 subscribers, stated that allowing exclusivity for Court TV in Manhattan would ``limit Liberty's

ability to develop as an effective competitor, and [would] also limit the ability of other potential competitors to enter this market." After further evaluation, the Commission determined that the effects of the proposed exclusivity on both the development of competition in the local and national distribution markets, and competition from alternate technology competing distributors weighed against a finding that continued enforcement of Time Warner's exclusive contract with Court TV would be in the public interest.

The Commission also found that Time Warner failed to demonstrate that the continued enforcement of its exclusive distribution rights for Court TV was required to attract capital investments for the production, promotion, distribution or carriage of Court TV, and failed to demonstrate that continued exclusivity for Court TV was needed to promote diversity in programming.

The Commission, although not reaching the issue of the reasonableness of the fifteen year term of the exclusive contract with Court TV, commented that it did not believe that Time Warner could demonstrate that such an excessive period of exclusivity was consistent with the statute. The continued enforcement of exclusivity for any length of time would adversely affect competition in the relevant distribution markets and, in all, was not in the public interest, concluded the Commission.

On the same day as the Commission denied Time Warner's petition, it granted a petition filed by New England Cable News seeking authorization for the regional cable news network to enter into exclusive program distribution agreements with cable television system affiliates. It was determined that granting the petition, with specified limitations, would meet the public interest criteria set forth in the 1992 Cable Act and in the Commission's implementing regulations.

New England Cable News provides 24-hour programming by satellite to cable television systems servicing about 950,000 cable subscribers in New England. The company sought to enter into exclusive programming agreements with cable system affiliates whereby the affiliate would receive an exclusive license to distribute New England Cable News within the affiliate's cable franchise area for seven years.

The Hearst Corporation and Continental Cablevision own New England Cable News. Hearst does not own any cable systems; Continental has minority interests in several satellite cable program services and owns many cable systems. New England Cable, due to Continental's partial ownership, is a vertically integrated cable satellite programming vendor subject to the Commission's program access rules, stated the Commission. Thus, New England Cable was required to obtain a public interest determination by the Commission prior to granting

a cable system affiliate the exclusive right to distribute the company's programming within a local franchise area.

The Commission determined that granting New England Cable's request would not result in the denial of access to its programming by competing multichannel video programming distributors in the relevant local markets, except for a small number of SMATV operators. And it was highly relevant, stated the Commission, that no SMATV operator had requested carriage of New England Cable.

It was further found that New England Cable demonstrated that exclusive affiliations with cable operators for distribution of the company's programming within the affiliates' service areas was required to attract and secure capital investments for the production, promotion, distribution and carriage of its regional news service. The Commission declared that New England Cable

demonstrated that its proposed exclusivity would enhance diversity in the programming market, and that it would be appropriate to allow the news service to provide exclusivity to its cable affiliates for the full seven year period proposed, but that all such exclusive distribution rights must terminate completely seven years from the effective date of the instant order.

Federal Communications Commission, In the Matter of Time Warner Cable, Petition for Public Interest Determination...Relating to Exclusive Distribution of Courtroom Television, 9 FCC Rcd 3221, 1994 FCC LEXIS 2435, 75 Rad.Reg. 2d (P&F) 350; In the Matter of New England Cable News, Petition for Public Interest Determination...Relating to Exclusive Distribution of New England Cable News, 9 FCC Rcd 3231, 1994 FCC LEXIS 2471, 75 Rad. Reg.2d (P&F) 360 (June 1, 1994) [ELR 16:7:32]

Federal Communications Commission permits cable operators to increase fees upon adding channels

In November 1994, the Federal Communications Commission adopted rules, effective January 1995, allowing cable operators to raise their rates when they add channels to a basic cable service tier. Cable operators, over the next two years, may increase monthly fees by as much as $1.50 - subscribers will pay $.20 each for up to six new channels, plus a maximum $.30 in program licensing fees in 1995 and 1996.

The Commission also will allow cable operators to add cable channels on a ``new product tier'' at unregulated rates; an existing cable network may appear on the unregulated tier as long as the network also remains on the regulated tier.

According to news reports, the Commission, in a related action, authorized the auctioning of licenses for a ``wireless'' cable service that would compete with traditional hard-wired cable television systems.
[Dec. 1994][ELR 16:7:34]

Federal Communications Commission revises radio station ownership rules

In October 1994, the Federal Communications Commission revised its ownership rules to allow minorities to buy up to 25 AM and 25 FM stations. Non-minorities are subject to the prior limit of 20 AM stations and 20 FM stations. According to news reports, a non-minority broadcast group may take a non-controlling interest in five additional AM and FM stations that are owned by minorities.

The Commission retained its local ownership rules, which allow broadcasters to own two AM and two FM stations in large markets and a total of three stations in small markets.
[Dec. 1994][ELR 16:7:34]

Satellite dish owners may continue to receive commercial television station signals

In September 1994, the House of Representatives extended for five years the right of satellite program carriers to continue rebroadcasting commercial television station signals to satellite dish owners.

The legislation, according to news reports, also establishes that certain Fox network broadcasts are ``local'' rather than ``distant'' signals. Cable operators in areas not served by Fox affiliates therefore may be more likely

to distribute the Fox programming, since cable royalty payments are required only for distant signal access.

The legislation includes a provision requiring satellite carriers to pay ``fair market value" for access to network programming; an arbitration panel may consider the economic impact of new fees on satellite carriers and the fees that cable systems pay for access to broadcast signals.
[Dec. 1994][ELR 16:7:34]

IN THE NEWS

Jury rejects Jeffrey Masson's libel claim against writer of New Yorker article

After lengthy proceedings (ELR 10:12:10; 11:4:7; 11:9:20; 12:2:18; 14:1:3; 15:3:17; 16:1:21), a Federal

District Court jury found that Janet Malcolm's 1983 New Yorker article about Jeffrey M. Masson did not libel the psychoanalyst.

The jury, according to news reports, found that two of five challenged quotations were false, and that one of the quotations defamed Masson. However, the jury concluded that Masson did not present clear and convincing evidence that Malcolm knew the quotation was false or acted with reckless disregard for the truth.
[Dec. 1994][ELR 16:7:34]

DEPARTMENTS

In the Law Reviews:

The Florida Entertainment, Art & Sport Law Journal has published Volume II with the following articles:

From Impending Doom to a Moral Issue: Title IX and the Female Intercollegiate Athlete by Thomas M. McAleavey, II Florida Entertainment, Art & Sport Law Journal 9 (1994)

Florida's Artist Consignment Act: The Best Laid Plans of Mice and Men by Stephanie D. Staples, II Florida Entertainment, Art & Sport Law Journal 47 (1994)

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