RECENT CASES

Andrew Lloyd Webber prevails in copyright infringement action over "The Phantom of the Opera" title song

A Federal District Court in New York granted Andrew Lloyd Webber's motion for summary judgment in a copyright infringement action brought by Ray Repp. Repp claimed that Lloyd Webber's song "The Phantom of the Opera" infringed Repp's song, "Till You."

Judge Shirley Wohl Kram first reviewed the expert testimony concerning the purported musical similarities between "The Phantom of the Opera" and prior Lloyd Webber songs, as well as the similarities between the song and various public domain works.

Repp presented expert testimony stating that Webber's work and "Till You" shared "significant similarities in every musical element and in the interaction of these musical elements."

The court found that Repp failed to show that Lloyd Webber had access to Repp's work prior to composing "The Phantom of the Opera." Any "nexus" that existed between Robert Velline (otherwise known as Bobby Vee), a mutual friend of Repp and Lloyd Webber's brother Julian Lloyd Webber, was insufficient to justify an inference of access.

The fact that "Till You" was widely distributed also was an insufficient basis to infer access, given that there was no evidence that Lloyd Webber had a reasonable opportunity to hear the song prior to composing "The Phantom of the Opera."

It also was found that any similarities between the works were not so extensive as to support an inference of copying and improper appropriation without more. The two melodies shared several common notes, observed Judge Kram, but the songs differed in tempo and style; Repp's expert conceded that the works differed in harmony, key and mode. In all, there was no striking similarity sufficient to justify a finding of copying in the absence of access.

Judge Kram concluded by finding that Repp did not disprove Lloyd Webber's claim of independent creation, and by declining to exercise pendent jurisdiction over Repp's state law claims.

Repp v. Lloyd Webber, 858 F.Supp. 1292, 1994 U.S.Dist.LEXIS 10893 (S.D.N.Y. 1994) [ELR 16:9:3]

Ballerina may not recover more than $120,000 advance in contract dispute with publisher

Ballerina Cynthia Gregory agreed to write her memoirs for Simon & Schuster in return for a total advance of $400,000 against anticipated royalties from sales of the book. The publisher agreed to pay Gregory $120,000 upon signing the agreement, the second $120,000 "on acceptance by Publisher of the complete manuscript for the Work as satisfactory to Publisher in content and form;" $80,000 on the publication of the hardcover edition or 12 months after acceptance, whichever was earlier; and another $80,000 on the publication of the paperback edition or 24 months after acceptance, whichever was earlier. The publisher retained the right to terminate the contact if it determined in its "bona fide" editorial judgment that the final revised complete manuscript was not "reasonably satisfactory."

Gregory received the initial payment from Simon & Schuster. The publisher subsequently rejected three manuscripts as unsatisfactory, and, in June 1993, notified Gregory that it was terminating the agreement.

When Gregory sued for breach of contract, Federal District Court Judge John S. Martin, Jr. noted that the standard publishing agreement "grants publishers wide discretion in the performance of their obligations." The reference to a manuscript "satisfactory to Publisher in content and form" has been interpreted, according to the court, to require the publisher to act in good faith and to terminate the agreement only as a result of "honest dissatisfaction" with the author's work. The standard agreement imposes no duty regarding editorial services other than a duty to act in good faith.

Simon & Schuster agreed to provide "reasonable editorial assistance" if Gregory's manuscript was not satisfactory. The publisher conceded that the question of whether or not it provided such assistance was a genuine issue of material fact which could not be decided on a motion for summary judgment. The court therefore denied both parties' motions for summary judgment on the breach of contract claim.

Judge Martin denied Gregory's claims that Simon & Schuster acted unreasonably in rejecting the manuscript and engaged in anticipatory breach. The publisher may have incurred an obligation to act rationally and not arbitrarily, stated the court, but the decision as to publication was within the company's own judgment, not that of "some objective reasonable person standard."

Simon & Schuster argued that whether or not Gregory prevails on the merits of her claims, the liquidated damages clause of the agreement would limit Gregory's recovery to the $120,000 advance. Gregory responded that the clause did not apply because none of the manuscripts submitted to the publisher was a "final revised complete manuscript," and because she retained the option of seeking actual damages.

The language of the agreement, stated Judge Martin, unambiguously granted Simon & Schuster the power to invoke the termination clause and reject any manuscript submitted after Gregory had at least one opportunity for revisions. Thus, any one of the manuscripts Gregory submitted after collaborating with an editor, was a "final revised complete manuscript" within the meaning of the agreement, declared the court, in concluding that Gregory was limited to recovering the $120,000 advance she already had received and in granting Simon & Schuster's motion for summary judgment on the issue of liquidated damages.

The court proceeded to consider Gregory's cause of action alleging the violation of the Connecticut Unfair Trade Practices Act. Assuming, stated Judge Martin, that the statute even applies to publisher-author relationships, Gregory did not present evidence to oppose Simon & Schuster's motion for summary judgment. And summary judgment was warranted without reviewing the applicability of the Connecticut statute to publishing agreements because the parties agreed to be bound by New York law.

Gregory v. Simon & Schuster, Inc., 1994 U.S.Dist.LEXIS 9833 (S.D.N.Y. 1994) [ELR 16:9:3]

MCA Records prevails in dispute over ownership of Chess Masters recordings, but court vacates $4 million jury award

MCA Records, in a Federal District Court lawsuit concerning the ownership of the "Chess Catalog," a catalog of postwar blues and early rock & roll music, claimed that a California trial court decision (ELR 14:5:19) holding that Marshall Sehorn and Red Dog Express, Inc. had no rights in the catalog barred Charly Holdings, the licensee of Sehorn/Red Dog from claiming any interest in the Chess Masters recordings.

Judge Ronald S.W. Lew, after careful consideration, determined that the collateral estoppel effect of the trial court decision meant that Charly Holdings "does not now have, nor has it ever had, any right, title or interest in the Chess Masters recordings and that as per Charly Holdings, MCA has exclusive right, title and interest in the recordings."

The court noted that Charly Holdings had entered into a contract with Sehorn/Red Dog agreeing that the California trial court litigation would not be compromised without Charly Holdings' approval and giving Sehorn/Red Dog $35,000 for the defense of the case. Sehorn/Red Dog extended by five years the time period of Charly Holdings' purported sublicense agreement for the Chess Masters recordings. Thus, Charly Holdings had a significant degree of control over the litigation - another indication to the court that Charly Holdings and Sehorn/Red Dog were in privity and that Charly Holdings' positions in the instant case, including any defenses, were sufficiently represented before the trial court.

Judge Lew declined to grant MCA's request for summary judgment as to issues relating to trademark infringement, false origin and unfair competition.

In January 1995, Judge Lew vacated a jury award of $4 million to MCA; the award apparently was for the unauthorized use of the Chess catalog and Chess trademarks. According to news reports, the court, in addition to determining that the amount of the damage award was excessive, denied a motion for a new trial.

MCA Records, Inc. v. Charly Records, Ltd., 865 F.Supp. 649, 1994 U.S.Dist.LEXIS 19272 (C.D.Cal. 1994) [ELR 16:9:4]

Court issues rulings in dispute between former member of "Danger Danger" and Sony Music over re-recording of album

In March 1988, Ted Poley, along with Steve Berlow, Bruno Dicecco, and Casey Schmitt, signed a recording contract with CBS Records (the predecessor-in-interest of Sony Music) as performers in a musical group known as "Danger Danger." Sony released the group's first and second albums in 1989 and 1991, respectively; the group delivered a third album in August 1993. Before Sony released the third album, Poley was "disassociated" as a member of the group. The remaining group members re-recorded the album, and replaced Poley's vocals with those of a new group member. Sony did not release either version of the third album.

In response to a lawsuit filed by Poley, a New York trial court first rejected Poley's causes of action seeking an accounting of the royalties earned on the albums.

Judge Ira Gammerman then observed that Poley's purported right to have the third album released and promoted, or to obtain damages as a result of Sony's decision not to release the recording, was not implicit in the contract. The fact that Sony released and promoted the first two albums did not modify the contract to require the release and promotion of the third album, as argued by Poley.

The court refused to dismiss Poley's cause of action alleging that Sony breached the contract by failing to promote the second album in the manner in which the company had promoted sales of the first album. The contract did not contain a promotion obligation, but implicitly, according to Judge Gammerman, contained "an expectation that Sony, totally in control of the sale of the recordings, will promote the sale of the albums released so as to give meaning to the royalties provisions."

Judge Gammerman proceeded to dismiss a claim alleging "unconscionability;" to find that Sony did not breach an implied covenant of good faith and fair dealing in permitting the re-recording; and to reject, based on the lack of merit in the pleadings and on Sony's assurances that it did not plan to release the album, Poley's motion for an injunction barring the release of the re-recorded third album. The court denied Sony's motion for sanctions.

Poley v. Sony Music Entertainment, Inc., 1994 N.Y.Misc.LEXIS 532 (N.Y.Cnty. 1994) [ELR 16:9:4]

Court reverses its ruling that parody baseball cards violate Oklahoma right of publicity statute

Cardtoons produces "parody" trading cards of active major league baseball players. When the Major League Baseball Players Association sent the company a cease and desist letter, Cardtoons sought injunctive relief to prevent the association from interfering with the publication of the cards.

A Federal District Court in Oklahoma adopted the report and recommendation of a magistrate judge and entered declaratory judgment in favor of the association (ELR 16:3:7), finding that Cardtoons violated Oklahoma's right of publicity statute.

In October 1994, the court set aside its prior actions and granted Cardtoons' motion for summary judgment.

Chief Judge James O. Ellison noted that to be an effective parody of baseball cards, it was necessary for the

Cardtoons' cards to imitate "the general configuration" of baseball cards and to use images of actual baseball players. Without including an image, it would be "essentially impossible" to create effective parody, stated the court, because "parody relies, in substantial part, on visual identification with the parody's target." Cardtoons' cards were parody, continued Chief Judge Ellison, in that although the cards imitated the general style of baseball cards, the images of the players and the biographical material were exaggerated.

The court then pointed out that Oklahoma's right of publicity statute extends to the "right to prevent others from using one's name or picture for commercial purposes without consent," and proceeded to carefully consider whether a party may raise a parody defense to the right of publicity.

The court, stating that the right of publicity "is only analogous, not identical, to the law of trademarks," questioned the magistrate's use of a trademark law balancing analysis which found that Cardtoons' speech was commercial, that commercial speech receives less First Amendment protection than other kinds of speech, and that the baseball players' right of publicity would prevail. Chief Judge Ellison commented that because trademark analysis is mainly concerned with the likelihood of confusion issue, its utility in construing Oklahoma's "sweeping" right of publicity statute in a parody situation was minimal. Due to this factor, among others, the court chose not to rely on any forms of trademark analysis in the instant case.

Chief Judge Ellison then observed that the United States Supreme Court has given "substantial consideration" to the question of copyright fair use in a parody context. Since the parodic character of the Cardtoons trading cards was reasonably apparent, the company was eligible for a fair use analysis.

The magistrate had found that the trading cards were entitled to little First Amendment protection. But the magistrate gave excessive weight to the commercial aspect of Cardtoons, which was only one aspect of the "purpose and character of the use" factor of a fair use analysis, stated Chief Judge Ellison, and disregarded the three remaining suggested guidelines.

Chief Judge Ellison declared that the only case involving fair use and parody that was directly pertinent to the facts before the court was Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164 (1994; ELR 15:12:18); the case was unavailable to the magistrate judge at the time the report and recommendation was prepared. In conducting a fair use analysis, Chief Judge Ellison again noted that the trading cards are a commercial product, but pointed out that the cards do not advertise any other product.

The fair use guideline denominated "the nature of the copyrighted work" was "awkward" in its application to the right of publicity, observed the court. The "work" or "protected interest" at issue was the association's right to control the likeness of its members. The nature of a likeness is factual and factual works are subject to a broader scope of fair use. However, "the uniqueness of a person's likeness is a function of creativity, which is entitled to substantial protection." Chief Judge Ellison decided to discount this fair use guideline.

In considering "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the court referred to whether Cardtoons took more than was necessary to accomplish its parodic purpose. The fact that Cardtoons used caricatures, not photographs or graphically-precise drawings, weighed in favor of fair use.

The association argued, as to the fourth fair use factor, that Cardtoons planned to market its cards in the same market and manner as traditional, licensed baseball cards are sold. But the court found that it was unlikely that the marketing of caricatures of baseball players would satisfy the market demand for player's likenesses. Cardtoons' cards were not a substitute product and would not fulfill consumer demand for traditional baseball cards, stated the court.

Chief Judge Ellison emphasized that the court's decision was based upon the application of copyright law to the right of publicity. The court recognized a parody exception to the Oklahoma statute; stated that Cardtoons' product was within this exception, although the product was sold for commercial gain; concluded that Cardtoons did not violate Oklahoma law; and granted Cardtoons' motion for summary judgment.

Cardtoons v. Major League Baseball Players Association, 1994 U.S.Dist.LEXIS 16615 (N.D.Okla. 1994) [ELR 16:9:5]

Burger King prevails in copyright infringement action over multi-ethnic, educational child cartoon characters

CK Company owns the rights in the Curious Kids, a group of multi-ethnic, multi-racial cartoon children. CK claimed that Burger King's "Kids Club," a series of child cartoon characters featured in Burger King commercials and promotional materials, infringed CK's unproduced proposal for television commercials and specials featuring the Curious Kids. A Federal District Court in New York granted Burger King's motion for summary judgment.

Judge Charles S. Haight, Jr. noted that CK, in 1982, met with executives of the advertising agency Batton, Barton, Durston & Osborne to discuss the Curious Kids proposal. CK also had submitted the proposal to Burger King but the company never responded.

Burger King established its Kids Club in 1989. Saatchi & Saatchi developed the promotional device on behalf of the company.

CK pointed out that Harvey Hoffenberg was an art director at BBD&O in 1982, and participated in the meeting about the Curious Kids proposal; that BBD&O never returned the written proposal for the Curious Kids project; and that Hoffenberg later supervised Saatchi & Saatchi's development of the Kids Club.

Judge Haight, assuming for purposes of the motion, that CK's allegations were true, stated that the allegations concerning Hoffenberg could lead to a reasonable inference that the Burger King parties had access to the Curious Kids.

In turning to the issue of substantial similarity, the court reviewed various scripts, treatments, storyboards and drawings in order to assess the total "look and feel" of the Curious Kids. Judge Haight observed that each commercial-length Curious Kids script focused on two of the Kids addressing an important educational or social issue; the Kids, as described by CK, "are curious about their world, how and why things work and why things are the way they are." In contrast, the Burger King Kids are "one-dimensional cartoons," projecting a "playful, lightweight tone." The Kids Club commercials use special effects and highly stylized graphics, and portray the animated characters interacting with live action actors; the characters wear "highly stylized outfits exaggerating their stereotypical character type." It appeared to the court that the style, tone, plots and storylines of the Kids Club differed fundamentally from that of the Curious Kids.

Judge Haight then commented that copyright law does not protect basic character types and that in determining whether characters in a second work infringe preexisting cartoon characters, courts consider not only the visual resemblance of the characters, but also the totality of the characters' attributes and traits. It was found that the Curious Kids and the Kids Club characters shared "only the most general, abstract similarities."

After finding that any similarities between the characters related only to superficial, unprotectable qualities, and that there was no infringement where differences between characters "are apparent to even a casual child viewer," the court analyzed CK's claim of infringement based on "the combination, arrangement and interaction" of the Kids Club characters. Judge Haight recalled that the arrangement and combination of unprotectable individual elements is protectable if the arrangement and combination of elements is in itself original and recognizable. However, almost all of the similarities between the materials at issue "originate in the fact that the Kids

Club utilizes stock characters in order to attain its diversity...Any depiction of a diverse group of children will utilize many of the stock characters seen in the Kids Club."

Even if the combination of characters used in the Kids Club was not necessary to depict the concept of a diverse group of children, continued Judge Haight, the "vast and fundamental differences" in the tone of each work would preclude any reasonable jury from finding the two groups substantially similar. The Curious Kids "deal with serious social issues, express complex personalities and emotions, have a much more mature theme, and appear to be substantially older than the Kids Club." The drawing style and physical appearance of the two works also differ, and where the theme, tone and storylines of two cartoon works bear no similarities to one another and the visual appearance of the cartoons fundamentally differ, only very close similarities between the characters of the works can justify a finding of copyright infringement.

The court concluded that there was no likelihood that "an ordinary child observer would believe that the Kids Club originated in the Curious Kids..."

CK Co. v. Burger King Corp. 1994 U.S.Dist.LEXIS 13934 (S.D.N.Y. 1994) [ELR 16:9:6]

United States Supreme Court lets stand decision allowing challenge to "Old Joe Camel" advertising campaign

Janet Mangini challenged the use of the cartoon character "Old Joe Camel" by R.J.Reynolds Tobacco Company in an advertising campaign for Camel cigarettes. A California appellate court (ELR 16:2:22) reversed a trial court decision granting summary judgment to Reynolds, finding that Mangini's claim that the advertising campaign was an unfair business practice was not preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. section 1331), as amended by the Public Health Cigarette Smoking Act of 1969.

The United States Supreme Court, without comment, has let stand a California Supreme Court decision affirming the appellate court judgment.

The statute provides, in part that "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Mangini argued that the Old Joe Camel ads were designed to attract teenagers and that teenage smokers accounted for $476 million of Camel cigarette sales in 1992 as compared with $6 million in 1988 when the campaign began. It was alleged that Reynolds distributed products such as matchbooks, mugs and soft drink can holders which advertised Camel cigarettes but did not contain health hazard warnings. The complaint claimed, in part, that the purported violation of the federal statute constituted an unlawful and unfair business practice under California Business and Professions Code section 17200.

Six months after the complaint was filed, the United States Supreme Court decided Cipollone v. Liggett Group, Inc., 505 U.S. 407 (1992). The trial court determined that the statute, as interpreted in Cipollone, preempted Mangini's complaint.

A California appellate court agreed that the two causes of action pleaded in the complaint were preempted by federal law, but concluded that Mangini should have been granted leave to amend the complaint. On appeal, Mangini had argued two additional theories of unfair business practice. The appellate court found that one of the theories was preempted; the other theory was that the Old Joe Camel advertising campaign targeted minors "for the purpose of inducing and increasing their illegal purchases of cigarettes."

The court found that the latter theory did not have a failure to warn element, was not preempted by the federal statute, and was cognizable under section 17200. Although the bare fact of targeting minors, in and of itself, might not amount to deceptive, untrue or misleading advertising, it was observed that "the targeting of minors in cigarette advertising offends public policy as established by statute. In California, it is unlawful to sell or furnish cigarettes to persons under the age of 18 years, and it is unlawful for minors to purchase or receive cigarettes...This reflects a statutory policy of protecting minors from addiction to cigarettes...Cigarette advertising directed to minors contravenes the statutory policy of keeping children from starting on the road to tobacco addiction."

The California Supreme Court agreed, although "for somewhat different reasons" than those stated by the appellate court, that California's regulation or prohibition of the advertising of cigarettes to minors is not preempted by federal law. The plurality in Cipollone found that Congress intended the statutory phrase "relating to smoking and health" to be construed narrowly so as not to proscribe the regulation of deceptive advertising, stated Judge Arabian; accordingly, Mangini's claim based on the allegedly fraudulent statements made in Reynolds' advertisements was not preempted.

Judge Arabian also cited Penal Code section 308, which prohibits the sale of cigarettes to minors. The legislative history of the statute indicated to the court "that the state's protective role, and not primary health concerns, motivated the prohibition against selling cigarettes to minors," and the court concluded that "Congress left the states free to exercise their police power to protect minors from advertising that encourages them to violate the law. [Mangini] may proceed under that aegis."

Mangini v. R.J.Reynolds Tobacco Co., 7 Cal.4th 1057, 31 Cal.Rptr.2d 358, 875 P.2d 73, 1994 Cal.LEXIS 3160 (Ca. 1994) [ELR 16:9:7]

Florida Attorney General may proceed with antitrust investigation of unsuccessful attempt to purchase San Francisco Giants franchise

A group of investors attempted to purchase the San Francisco Giants major league baseball franchise and relocate it to Tampa Bay, Florida; the baseball owners refused to approve the sale, and the owner of the Giants then agreed to sell the franchise to a group of San Francisco investors. Florida Attorney General Robert Butterworth issued antitrust civil investigative demands, pursuant to Florida law, to the National League and its president. The focus of the investigation, as described by Florida Supreme Court Judge Harding, was "[a] combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise."

A Florida trial court issued an order quashing the investigative demands, stating that "decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption." An appellate court affirmed the order and certified to the Florida Supreme Court the question of whether the antitrust exemption for baseball would exempt all decisions involving the sale and location of baseball franchises from federal and Florida antitrust law.

After reviewing relevant case law, particularly the "comprehensive analysis" in Piazza v. Major League Baseball, 831 F.Supp. 420, 836 F.Supp. 269 (E.D.Pa. 1993; ELR 15:12:26; 16:4:32), Judge Harding concluded that baseball's antitrust exemption extends only to the reserve system, quashed the appellate court ruling, and remanded the matter for further proceedings. In a footnote comment, the court cautioned that its decision "should not be considered a ruling on the merits of any antitrust claim against the National League."

Judge Overton, specially concurring, referred to the court's analysis in Piazza; questioned why one professional sport would have a judicially created antitrust exemption, while others do not; and suggested that the United States Supreme Court should determine whether a judicially-created exemption for baseball is still viable, and if the exemption exists, whether that exemption should be applied narrowly, as interpreted in Piazza or broadly, as interpreted by Charles O. Finley Co. v. Kuhn, 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

Senior Judge McDonald, in dissent, would have affirmed the trial court's decision and adopted portions of the trial judge's order. Senior Judge McDonald observed that "[w]hile the actions and decisions of baseball in the area of league structure may give rise to civil causes of action sounding in contract or tort, they cannot form the basis for violations of antitrust laws...The application of baseball's exemption to antitrust laws in this area is clear and the Attorney General is without authority to investigate activity which is clearly exempt."

Butterworth v. National League of Professional Baseball Clubs, 1994 Fla.LEXIS 1531 (Fla. 1994) [ELR 16:9:8]

Buffalo Bills are entitled to refund of federal employment taxes

The 1982 collective bargaining agreement between the NFL Management Council and the NFL Players Association provided, in part, that NFL member clubs could make severance payments to players who had both completed two or more "credited seasons" under the Bert Bell NFL Player Retirement Plan and ceased playing professional football. The Plan defined "credited season" as a regular season during which a player was active for three or more games. The amount of severance pay depended on the number of years of NFL service and the year in which the player stopped playing professional football.

From 1984 to 1986, the Buffalo Bills paid 28 eligible former players severance payments. The club included the payments as "wages" for federal employment tax purposes, withheld the players' Federal Insurance Contributions Act tax, and paid the employer's FICA and Federal Unemployment Tax Act taxes. The taxes also were withheld for deferred regular season salary payments and incentive bonuses.

In 1988, the club filed for a refund of its employment tax payments, but succeeded only in obtaining a partial refund for FICA/FUTA taxes involving long-term deferrals of regular season salary payments and certain severance payments.

The club argued that the salary and bonus payments at issue represented nonqualified deferred compensation plans such that it was not required to levy employment taxes on the deferred amount.

Court of Federal Claims Judge Christine Cook Nettesheim noted that professional athletes seek to structure their payment schedule to achieve a degree of financial stability and that "to include these contractually arranged deferred payments in the FICA wage base would penalize a legitimate attempt to protect against the sometimes uncompromising realities of professional sports."

Judge Nettesheim also stated that the test under section 3121(v)(2) of the Internal Revenue Code in determining when a particular payment scheme constitutes deferred compensation is not whether such payments are made "upon retirement," but, more appropriately, whether such payments are part of a "plan or other arrangement." In all, the statute did not require a minimum deferral period and the court, accordingly, granted the club's claim for a tax refund.

The court also agreed with the club that certain severance payments qualified as payments made "on account of retirement" under former Internal Revenue Code sections 3121(a)(2)(A) and 3306(b)(2)(A) and that the payments would be excluded from the FICA and FUTA wage bases. Judge Nettesheim observed that the severance payments were not the equivalent of "dismissal wages," but were made to players who ceased playing professional football. The "straightforward" statutory exclusion was not contingent upon retirees refusing future employment, obtaining eligibility under their employer's pension plan, or reaching a specific age.

Buffalo Bills, Inc. v. United States, 31 Fed.Cl.794, 1994 U.S.Claims LEXIS 174 (Ct.Fedl.Cl. 1994) [ELR 16:9:8]

Court rejects "continuing tort" theory in ruling that statute of limitations bars copyright infringement action over song

In March 1991, Joseph C. Jones, doing business as Makedwde Publishing Co. and Joseph Ruffino, Jr., the owner of Ron Publishing and Ric Records sued Lyman Jones and several other parties for copyright infringement. The Makedwde parties alleged that in 1960, Alvin Johnson recorded a song entitled "Carnival Time" on Ric Records and assigned his rights in the song to Ron Publishing Co., which was acquired by Makedwde in 1985. It also was alleged that in 1979, Johnson, with the assistance of his then attorney, Lyman Jones, registered a copyright for the song. Johnson and Jones then purportedly incorporated Carnival Time Music and Records and licensed other recordings of the song.

In 1985, Jones apparently terminated his involvement in Carnival; the company, however, continued to distribute recordings.

Jones filed a motion for summary judgment, citing the Copyright Act's three year statute of limitations.

A Federal District Court, although concluding, on the basis of a "continuing tort" theory, that the statute of limitations had not run, certified the question for interlocutory appeal.

Federal Court of Appeals Judge Garwood, ruling on a question of first impression in the court, stated that Jones only was liable for Jones' acts of infringement committed within three years prior to Makedwde's lawsuit. After January 1985, Jones was not responsible for the operations of Carnival, and the statute of limitations barred the Makedwde parties' claims against him.

Makedwde Publishing Company v. Johnson, 37 F.3d 180, 1994 U.S.App.LEXIS 29421 (5th Cir. 1994) [ELR 16:9:9]

FCC and courts issue rulings concerning telephone company video dialtone services

Section 613(b) of the Cable Franchise Policy and Communications Act of 1984, codified at 47 U.S.C.section 533(b), in part, prohibits a common carrier from providing video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. Common carriers also may not provide channels of communication, or pole line conduit space, or other rental arrangements, to entities under common control if such facilities or arrangements are to be used to provide video programming to subscribers in the telephone service area of the common carrier.

Federal Court of Appeals in California and a Federal District Court in Alabama have ruled that the statute violates the First Amendment.

US West, a common carrier which provides local telephone service in fourteen states, obtained permission from the Federal Communications Commission to conduct a limited trial in Omaha, Nebraska of "video dialtone service." The company planned to construct transmission facilities for third parties to provide video programming on a common carrier basis, since the Commission has determined that video dialtone services do not violate section 533(b) so long as the telephone company does not provide the programming material.

US West, seeking to directly enter the video programming market in competition with local cable companies in its telephone service areas, requested the court to enjoin the enforcement of the cross-ownership ban.

A Federal District Court granted summary judgment in favor of US West (ELR 16:7:22), finding that the statute was unconstitutional even under the intermediate scrutiny applied to content-neutral time, place and manner restrictions which impose an incidental burden on speech, and that the statute was not narrowly tailored to serve a substantial government interest.

Federal Court of Appeals Judge Cynthia Holcomb Hall reviewed the regulatory and statutory background of the telephone-cable cross-ownership prohibition and pointed out that although the Justice Department defended the constitutionality of section 533(b) in the instant litigation, the FCC and the Antitrust Division of the Justice Department, among other government agencies, have advocated the repeal of the statute.

The court, citing Turner Broadcasting System, Inc. v. Federal Communications Commission, 114 S.Ct. 2445 (1994; ELR 16:4:16), stated that section 533(b) burdens US West's First Amendment rights by expressly prohibiting the company from engaging in speech (via cable) within a certain area. In applying intermediate scrutiny, Judge Hall characterized the government's arguments in support of the current utility of the cross-ownership ban as "weak," and rejected the government's claims that the statute encourages competition by removing any incentive telephone companies might have to discriminate in pole and conduit access and by promoting diversity in the cable industry. The government did raise an issue of fact as to whether section 533(b) promotes competition in the cable industry by reducing incentives to cross-subsidize, but this factual issue did not preclude summary judgment, stated Judge Hall, given the finding that the statute failed the narrow tailoring requirement.

Section 533(b) completely bans a protected form of speech by US West in a fourteen state area, reiterated the court, in proceeding to find that the government did not create a genuine issue of fact as to whether the statute was narrowly tailored; that the statute was invalid under the First Amendment; and that the District Court correctly granted summary judgment to US West.

Pacific Telesis Group also had brought a lawsuit challenging section 533(b). The Federal Court of Appeals consolidated the case with the US West matter. Judge Hall reversed the District Court's order denying preliminary injunctive relief to Pacific Telesis and remanded the case for further proceedings consistent with the court's opinion and with the opinion in US West.

In Bellsouth Corp. v. United States, a Federal District Court in Alabama granted summary judgment to Bellsouth in its action challenging section 533(b)'s ban on the company's provision of video programming to telephone subscribers within the company's nine state service area. Judge Sharon Lovelace Blackburn, citing Turner and Chesapeake and Potomac Telephone Company of Virginia v. United States, 830 F.Supp. 909, 1993 U.S.Dist.LEXIS 11822 (E.D.Va. 1993; ELR 16:2:31), found that intermediate scrutiny would apply; that the statute was not a narrowly tailored means of promoting diversity or of preventing alleged forms of anti-competitive conduct; and that the statute violated the First Amendment. The court enjoined the various government parties from enforcing section 533(b) against the Bellsouth parties.

In a related case, the National Cable Television Association and other parties sought review of the Federal Communications Commission's determination that neither a telephone company providing "video dialtone" service, nor a video programmer using the service to reach subscribers, is subject to the franchise requirement of section 621(b)(1) of the Cable Communications Policy Act of 1984.

Federal Court of Appeals Judge Ginsburg noted that the Commission determined that a telephone company offering video dialtone service would not be providing "cable service" as defined by the statute because it would not be engaged in the "transmission...of video programming" under the Cable Act. The cable parties argued that the Commission's definition of transmission as requiring "active participation in the selection and distribution of video programming" was unreasonably narrow. But the court concluded that the Commission reasonably interpreted the statute to require that an entity obtain a cable franchise "only when that entity selects or provides the video programming to be offered."

As "a separate and sufficient" reason for holding that a telephone company providing video dialtone service does not need a cable franchise, the Commission determined that the telephone company is not a "cable operator." According to the Commission, a telephone company providing a video dialtone service is not a "cable operator" because a video dialtone facility is not a cable system. And the customer-programmers of a common carrier video dialtone service are not "cable operators" within the meaning of the Act because "they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities."

Judge Ginsburg agreed with the Commission that video dialtone service, "a common carriage service the essence of which is an obligation to provide service indifferently to all comers," and cable service "are very different creatures," and in view of the above-noted findings, denied the cable parties' petitions for review.

The Federal Communications Commission, in January 1995, granted Bell Atlantic the right to own video programming sent over telephone lines. According to news reports, Bell Atlantic, which will be the first telephone company to own such programming, will conduct a six month "video dialtone" trial of 2,000 homes in Arlington, Virginia. The Commission granted the company permission to own an interest in fifty percent of the number of channels delivered on the network.

The Commission has sought comment on its decision not to ban telephone companies "from providing their own programming over their own video dialtone platforms."

The Commission has not reviewed the issue of whether telephone companies must obtain a franchise from local authorities when engaging in video programming, as well as in providing video dialtone service.

US West, Inc. v. United States, 1994 U.S.App.LEXIS 36775 (9th Cir.1994); Pacific Telesis Group v. United

States, 1994 U.S.App.LEXIS 36776 (9th Cir.1994); Bellsouth Corp. v. United States, 1994 U.S.Dist.LEXIS 16232 (N.D.Ala. 1994); National Cable Television Association, Inc. v. Federal Communications Commission, 33 F.3d 66, 1994 U.S.App.LEXIS 23082 (D.C.Cir. 1994) [ELR 16:9:10]

Court upholds jury award of about $500,000 to stunt performer injured by Jean Claude Van Damme during filming

Jackson Pinckney lost the vision in his left eye as a result of an accident during the filming of "Cyborg." Pinckney was performing in a fight scene with Jean Claude Van Damme when the prop knife in Van Damme's hand struck Pinckney in the eye.

Pinckney received workers compensation benefits from Cannon Films and subsequently sued Van Damme, alleging willful, wanton, and reckless negligence. A North Carolina trial court jury awarded Pinckney almost $500,000 in compensatory damages. The jury foreperson had expressed concern about one juror's activities, including visiting a karate studio, but the court denied Van Damme's motions for judgment notwithstanding the verdict and for a new trial.

North Carolina Court of Appeals Judge John C. Martin found no reversible error. The evidence demonstrated that in filming "Cyborg" and other movies, Van Damme had injured other actors, stunt performers and extras and had been warned not to make excessive, injurious contact with those performers, "which warnings he often ignored," stated the court. When rehearsing the scene at issue, Van Damme made physical contact with Pinckney and was warned not to do so. And during the actual filming of the scene, Van Damme held his knife open, instead of in the agreed-upon "tucked" position. A jury could have concluded that Van Damme was "reckless or manifestly indifferent to the consequences of his conduct and that he intentionally breached his duty to use ordinary care not to injure [Pinckney]."

With respect to the question of whether the trial court erred by denying Van Damme's motion for a new trial based on juror misconduct, Judge Martin stated that the court did not abuse its discretion in concluding that the one juror's conduct did not result in actual prejudice to the actor.

Judge Martin also rejected the argument that reputation evidence was improperly admitted.

Pinckney v. Van Damme, 447 S.E.2d 825, 1994 N.C.App.LEXIS 920 (N.C.App. 1994) [ELR 16:9:11]

New York State is not liable for injuries suffered by boxer due to alleged glove-tampering by opponent

During a 1983 boxing match with Luis Resto, promoted by Top Rank, Inc. at Madison Square Garden, now-deceased boxer Billy Ray Collins, Jr. suffered head and eye injuries that effectively ended Collins' career. Collins' injuries apparently occurred due to the removal of the padding from Resto's boxing gloves.

According to New York Court of Claims Judge Albert A. Blinder, Resto, after an investigation and hearing by the State Athletic Commission, was stripped of the victory and his boxing license. Resto and his manager also were indicted and found guilty of several criminal charges, including conspiracy, tampering with a sports contest, assault and criminal possession of a weapon.

Collins died in 1984, purportedly due to a depression-induced accident. As reported at ELR 13:2:17, Andrea

Lee Collins, the boxer's wife and the administrator of his estate, brought a personal injury action against Resto and other parties. A Federal District Court in New York granted motions for summary judgment brought by Madison Square Garden and Top Rank on Collins' negligence and breach of contract claims.

Andrea Lee Collins also sued the State of New York for wrongful death and personal injuries, alleging that the Commission's representatives at Madison Square Garden on the night of the boxing match either conspired with Resto and his manager, or failed in their duty to inspect the boxing gloves. The District Court had returned a directed verdict in favor of one of the three individual Commission inspectors assigned to the Collins-Resto fight, and a jury verdict was returned in favor of another. The jury failed to reach a decision as to whether the third inspector, Pasquale Giovanelli, who actually signed Resto's bandaging and adjusted his gloves, was culpable for failing to detect the lack of padding.

Judge Blinder observed that Giovanelli left Resto's room after signing Resto's bandages, and that when the referee returned, the fighter was wearing the gloves. New York law did not require Giovanelli's presence at the moment Resto's gloves were placed on the boxer's hands; the referee only was required to approve Resto's bandages.

Upon noting that it was the obligation of the promoter to ensure that the gloves conformed to specifications, the court declined to require the Commission to inspect and guard boxing gloves until fighters are gloved.

Collins cited Rule 216,18, which requires that "the gloves of each boxer will be adjusted in the dressing room under the supervision of the commission representative in charge..." For Judge Blinder, the rule referred only to adjustments of the gloves, not an inspection by a

Commission representative nor the presence of a Commission representative at the time of gloving. If anyone should have inspected Resto's gloves, it was the referee, stated the court, a person whose negligence could not be imputed to the Commission.

The court commented on the possibility that the Commission "has misgoverned its realm" by not adopting a rule requiring a more thorough inspection of boxers' gloves, and strongly suggested that the Commission take action "to rectify this glaring defect in the rules of boxing in this State."

However, the Commission's rule-making activity was a governmental function involving the exercise of discretion, stated Judge Blinder, and the Commission thus was immune from suit. And there was no basis for finding a special duty of care which might have provided a basis for liability despite the Commission's governmental immunity. There was no evidence that Commission representatives usually conducted a thorough inspection of gloves prior to a boxing match or assumed any other duty upon which Billy Ray Collins might have relied.

With respect to the breach of contract action, it was not shown that the Commission was a party to the contract entered into between Billy Ray Collins and Top Rank; the contract was not signed by a Commission representative nor approved by a state official.

The court concluded by rejecting Collins' claims alleging fraud and intentional tort theories of liability.

Collins v. State, 617 N.Y.S.2d 1010, 1994 N.Y.Misc.LEXIS 444 (N.Y.Ct.Clms. 1994) [ELR 16:9:12]

Publisher again prevails in dispute over title credit on "Robert's Rules of Order"

During the 1960s, James W. Cleary helped revise "Robert's Rules of Order." When the 1970 edition was published, the title page listed Dr. Cleary as having assisted Sarah Corbin Robert, along with Henry M. Robert III and William J. Evans. The work was republished in 1980; the title page again credited Cleary, Henry Robert, and Evans. The title page for the 1990 edition omitted Cleary's name, although he was acknowledged in the introduction.

A Federal District Court granted summary judgment to the publisher of the work with respect to Cleary's Lanham Act and state law claims.

A Federal Court of Appeals noted that Cleary, pursuant to a 1965 agreement, reviewed the copy for the 1970 edition, compiled and completed copy for three chapters, and wrote new copy for two chapters. The publisher agreed to pay Cleary a royalty of three-quarters of one percent of the net receipts from sales of the 1970 edition. It was specified that Cleary was engaging in work for hire. The heirs of General Robert retained all rights in the work and in the copyright; the contract did not mention giving Cleary any title credit for the 1970 edition or any subsequent editions.

Cleary claimed that he contributed about forty percent of the material in the 1970 edition. Cleary reviewed the 1980 edition, but his proposed changes were not used. He did not participate in preparing the 1990 edition, but argued that the 1990 text was essentially the same as the 1970 version. Cleary continued to receive the contractual royalty on sales of the 1990 edition, and, as part of an attempted settlement of the action, the title page of subsequent printings of the 1990 edition after the first printing will credit Cleary's assistance.

Federal District Court Senior Judge Will (sitting by designation) stated that the publisher, under the work for hire provision of the agreement, became the author of all material written by Cleary and was not required to provide the editor with title credit.

The court rejected Cleary's "reverse passing off" argument under section 43(a) of the Lanham Act on the ground that the editor had contracted away his attribution rights via the work for hire clause. Even assuming that Cleary possessed a right of attribution and did not contract it away, that right was not violated by the publisher, according to Senior Judge Will.

The Ninth Circuit requires a party claiming reverse passing off under the Lanham Act to show that there has been a "bodily appropriation" of the misattributed material. The changes between the 1970 and 1990 editions of "Robert's Rules" were not so slight that the 1990 edition would be considered a "bodily appropriation" of the

1970 edition, declared Judge Will, and the District Court properly granted summary judgment on the Lanham Act claim.

The court distinguished Rosenfeld v. W.B.Saunders, 728 F.Supp. 236 (S.D.N.Y.), aff'd, 923 F.2d 845 (2d Cir. 1990) in which the court, applying a "less demanding 'consumer confusion' standard," nevertheless rejected a claim that the editor of a medical treatise's third edition failed to give proper credit to the author of the treatise's first edition. Like the medical treatise, "Robert's Rules" is not a "mass market" book and its audience is likely to be "highly sophisticated, and...familiar with earlier editions of the work." Furthermore, Cleary's past contribution to the 1970 edition was mentioned in the 1990 introduction.

Senior Judge Will then upheld the dismissal of Cleary's unfair competition and breach of contract claims. The court commented that although the publisher, prior to entering into the contract, had agreed to give Cleary title page credit, the parol evidence rule would prohibit the introduction of the agreement if used to contradict the clear language of the parties' contract. And because Cleary relinquished authorship as well as copyright ownership when he signed the work for hire provision, "subsequent conduct and circumstances indicating an intent to provide attribution are in direct conflict with the work for hire agreement and cannot be considered."

The District Court ruling granting summary judgment with respect to Cleary's claim of intentional infliction of emotional distress also was upheld.

Cleary v. News Corporation, 30 F.3d 1255, 1994 U.S.App.LEXIS 19675 (9th Cir. 1994) [ELR 16:9:13]

Video distributor's lawsuit against English company is dismissed on ground of forum non conveniens

Kultur International Films, Ltd. claimed that it entered an agreement to act as the exclusive North American home video distributor for various classical music and opera programs owned by Covent Garden Pioneer FSP, Ltd. The parties conducted lengthy negotiations, but did not enter a written contract. In the summer of 1993, Covent Garden, after a management change, entered an exclusive licensing and distribution agreement for North America with another company.

When Kultur sued Covent Garden, alleging contract and tort claims, the British corporation sought to dismiss the complaint for lack of personal jurisdiction, or, alternatively, on the ground of forum non conveniens.

A Federal District Court in New Jersey first found that Kultur did not establish that Covent Garden had continuous and systematic contacts with New Jersey so that to subject the company to the court's general jurisdiction would not violate due process. The record did not support Kultur's argument that the retail sales of Covent Garden's video programs in New Jersey were sufficient to establish general jurisdiction over the company. Covent Garden's distributor controlled the video sales; the facts that Covent Garden products could be purchased at retail stores in New Jersey and were available by mail order from a Massachusetts company were not enough to support jurisdiction, stated Judge Wolin.

It also was noted that there was no evidence that Covent Garden or its distributor directly solicited business in New Jersey, advertised in the state, provided services to New Jersey purchasers of its products, designed the product with New Jersey customers in mind or that Covent Garden specifically directed the distributor to promote and sell its product in the state.

Judge Wolin agreed, however, that Covent Garden was subject to specific jurisdiction since the company could have reasonably foreseen that it might be called into court with respect to claims arising out of its contacts with Kultur and New Jersey. Assuming, for purposes of the motion, the existence of the alleged contract, it was found that Covent Garden had "just enough contact with Kultur in New Jersey" to allow the court to exercise personal jurisdiction on the pending claims. Covent Garden could reasonably have foreseen that its mail and "telecommunications" contacts with Kultur would have had some type of impact on Kultur and New Jersey, although the terms of the alleged agreement provided for nationwide distribution of the video products, declared the court, in denying Covent Garden's motion to dismiss for lack of personal jurisdiction.

Notwithstanding the above, the court, upon lengthy consideration, granted Covent Garden's motion to dismiss under the doctrine of forum non conveniens. Judge Wolin, cited, among other factors, the likelihood that Kultur's claims would be adequately recognized and appropriately redressed in an English court; the inclusion, in the proposed contract, of a forum selection clause providing that the parties resolve all contract-related disputes in an English court; and the greater availability, in England, of witnesses and proof.

Kultur International Films Ltd. v. Covent Garden Pioneer, FSP., Ltd., 860 F.Supp. 1055, 1994 U.S.Dist.LEXIS 15262 (D.N.J. 1994) [ELR 16:9:13]

University radio station's "no-criticism" policy violates free speech of volunteer staff members, but termination of certain volunteers is ruled constitutional

KCMU, a noncommercial radio station owned and operated by the University of Washington, prohibited the on-air criticism of KCMU/University of Washington staff or management policies. When a dispute arose between the station volunteers and station manager Chris Knab concerning programming changes, Knab told the volunteers that the policy would apply to on-air criticism of the proposed changes. Several individuals who criticized the changes were terminated as volunteers.

A group of volunteers and station listeners sued various university parties, alleging the violation of their First Amendment rights and seeking damages for wrongful termination.

Federal District Court Judge Zilly, after careful consideration, found that the university did not intend to open KCMU for use as a public forum, and did not in fact do so. However, the station conceded that certain material was barred from the station solely because of the critical viewpoint expressed therein with respect to KCMU or the university. "Suppression of particular news stories because of their content constitutes the type of pure viewpoint discrimination prohibited by the First Amendment," stated the court. Furthermore, KCMU's policy was applied not only to bar on-air statements, but to prevent off-air criticism, as well. In all, declared Judge Zilly, the no-criticism policy was, on its face, an unconstitutional, content-based suppression of speech.

The court recalled that volunteers, like paid employees, are protected by the First Amendment from the loss of their position based on the exercise of free speech rights. However, although the no-criticism policy might be unconstitutional, the station volunteers were not entitled to demand that KCMU tolerate the volunteers' expression of speech "regardless of its form and regardless of the consequences to the functioning of the station," according to Judge Zilly.

It was found that the volunteers' statements related to matters of public concern and motivated the station's decision to terminate each volunteer. However, it did not appear that the purported general disruption of the station could be traced to the volunteers' speech. The court analyzed each termination to determine whether the station violated the volunteer's constitutional rights, and also considered whether the university parties should be granted qualified immunity for terminating the volunteers whom the court found were unconstitutionally dismissed.

Judge Zilly concluded by granting the volunteers' motion for summary judgment regarding the no-criticism policy, declaring that the policy violated the free speech component of the First Amendment. The court granted in part and denied in part the volunteers' motion for summary judgment regarding the terminations; ordered the university to reinstate certain volunteers to their former positions; and determined that the individual station parties would be liable for any damages under 42 U.S.C. section 1983 only as to the termination of one volunteer, and were entitled to qualified immunity with regard to the other terminations. Judge Zilly dismissed the volunteers' free association claims.

Aldrich v. Knab, 858 F.Supp. 1480, 1994 U.S.Dist.LEXIS 10637 (W.D.Wash. 1994) [ELR 16:9:14]

Owners of backyard satellite dish antenna prevail in action challenging city's zoning ordinance

Ronald and Donna Loschiavo installed a receive-only satellite dish antenna in the backyard of their single family home in Dearborn, Michigan. The city notified the family that the antenna violated a zoning ordinance which requires city residents to obtain approval from the city zoning board and a building department permit before installing an antenna whose diameter exceeds three feet. The Loschiavo's antenna was ten feet in diameter and was placed atop a twenty-foot mast. The Dearborn ordinance also prohibited the installation of antennas more than eight feet in diameter or more than twelve feet tall.

The zoning board denied the Loschiavos' application for a variance and ordered the removal of the antenna.

The Loschiavos sued the city, claiming the violation of their First Amendment rights and also claiming that the ordinance was preempted by Federal Communications Commission regulation 47 C.F.R.section 25.104, which prohibits the enforcement of local zoning ordinances that "unduly interfere with the installation of individual satellite antennas."

The District Court found that the zoning ordinance did not deprive the Loschiavos of their constitutional rights under the First Amendment, and that the FCC regulation did not create rights enforceable by the couple within the meaning of 42 U.S.C.section 1983, and granted summary judgment in favor of the city on these claims. However, the court determined that the zoning provision unreasonably restricted the installation of antennas and enjoined the city from enforcing the ordinance as to the Loschiavos.

Federal Court of Appeals Judge Boyce F. Martin, Jr. noted that the regulation at issue arose out of the Cable Communications Policy Act of 1984, and that Congress had amended the statute to authorize the receipt of un-scrambled satellite programming for private viewing.

Judge Martin declared that the Loschiavos were enti-tled to bring a section 1983 claim against the city to en-force their right to install a receive-only satellite antenna for the private viewing of satellite programs, and that the District Court erred in granting summary judgment in favor of the city on this claim.

The District Court did not abuse its discretion in barring the enforcement of the zoning ordinance against the Loschiavos, concluded Judge Martin.

Loschiavo v. City of Dearborn, 33 F.3d 548, 1994 U.S.App.LEXIS 24230 (6th Cir. 1994) [ELR 16:9:15]

Court upholds denial of qualified immunity to Secret Service agent in action over unauthorized taping of government search by CBS "Street Stories" crew

As reported at ELR 16:4:14, United States Treasury agent James Mottola, in May 1992, obtained a search warrant authorizing government agents to enter

Babatunde Ayeni's apartment to search for items related to Ayeni's purported involvement in a credit card fraud operation. When the agents arrived, Ayeni's wife and son were home alone; Tawa Ayeni and Kayode Ayeni were not suspected of participating in the alleged scheme. The agents announced that they were police conducting an investigation. Mrs. Ayeni, as described by Federal District Court Jack B. Weinstein, "cracked open the door...[and] the agents pushed into the apartment."

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

The CBS crew taped the agents as they searched the apartment and the Ayenis' belongings, and as they questioned Mrs. Ayeni regarding her husband's whereabouts and the objects in the apartment. The crew conducted an interview, in the foyer of the apartment, with an agent; during the interview, the agent, according to the complaint, "implied the complicity of other residents of the Ayeni apartment." The only item seized from the apartment was a family photograph of the Ayenis, which also was taped by CBS, as was an agent's statement "expressing disappointment that no evidence of credit card fraud had been found." CBS never broadcast any portion of the video footage.

A Federal Court of Appeals, ruling on an interlocutory appeal, affirmed the decision of the District Court denying Mottola's motion to dismiss on the ground of qualified immunity, and also agreed that Ayeni's complaint alleged clear violations of the constitutional ban on unreasonable searches and seizures.

Chief Judge Jon O. Newman found that "Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals." It was further found that an objectively reasonable officer could not have concluded that inviting a television crew to participate in a search was within Fourth Amendment requirements.

Chief Judge Newman, although stating that the rejection of Mottola's immunity defense was based on Fourth Amendment standards, also cited federal statutory law in support of the court's conclusion.

The court remanded the matter to determine, initially, issues such as the extent of physical force and intrusive measures used during the search and whether such measures were justified by the purposes of the search, as well as questions about the officers' entry and search of the apartment before the warrant was issued.

Ayeni v. Mottola, 35 F.3d 680, 1994 U.S.App.LEXIS 25023 (2d Cir. 1994) [ELR 16:9:15]

____

Court TV reporter is entitled to shield law privilege in connection with interview of police officer

In April 1994, Joseph Soto was arrested by Police Officer Thomas Ross in Queens County on two criminal charges; the charges resulted in an indictment charging Soto with various offenses.

On the evening of Soto's arrest, Mike Ayala, an associate producer/reporter with Court TV, had interviewed Ross concerning the arrest and the subsequent paperwork and procedures.

Soto's counsel caused a subpoena to be served upon Ayala directing the reporter to bring to a Queens County court the "videotapes, notes, memoranda and/or other writings" pertaining to the interview with Ross.

Court TV and Ayala moved for an order quashing the subpoena, citing the qualified privilege for compelled disclosure under New York's Shield Law, Civil Rights Law section 79-h(c), under the First Amendment, and under Article I, Section 8 of the New York State Constitution.

Judge Randall T. Eng found that although Soto demonstrated that the information contained in the interview was highly material and relevant and was not obtainable from any alternative source, it was not shown that the information was "critical or necessary" to the proof of a material issue at Soto's suppression hearing.

Judge Eng next rejected Soto's claim that his right of access to the videotape and/or any notes relating to the interview was protected by the Sixth Amendment to the United States Constitution, and granted the media parties' motion for an order quashing the subpoena duces tecum.

The court expressed concern with "the scenario in which the journalist is so involved in the story, as to become an active participant in it," and declared that the qualified protection for non-confidential news would be carefully evaluated by the court in any situation where "an intimate relationship between a journalist and a law enforcement officer serves to undermine the professional objectivity that is contemplated under the First Amendment. Such scrutiny is essential to insure that a criminal defendant is not deprived of significant evidence, where no bona fide constitutionally protected right exists."

In re Ayala, 1994 N.Y.Misc.LEXIS 360 (Queens Cnty. 1994) [ELR 16:9:16]

Cable company prevails on section 553 claim against seller of decoding device, but court dismisses claim under section 605 of Cable Act

International Cablevision claimed that Marvin Noel sold electronic devices designed to permit the unauthorized interception and decoding of Cablevision's cable television programming signals, in violation of sections 553(a)(1) and 605 of the Cable Act. Noel conceded the violation of section 553, but sought to dismiss the claim under section 605.

Federal District Court Judge Curtin noted that after the parties' original briefs were filed, a Federal Court of Appeals decided International Cablevision, Inc. v. Sykes, 997 F.2d 998 (2d Cir. 1993; ELR 15:10:25). In Sykes, the court discussed the relationship between sections 553 and 605, and questioned the applicability of section 605 in cases which, like the case before Judge Curtin, involve the theft of television signals transmitted by coaxial cable. The Sykes court did not rule on the issue. However, Judge Curtin ordered the parties in the instant case to file additional briefs on the applicability of section 605 in light of Sykes.

Cablevision, as described by Judge Curtin, provides basic service and premium signals to subscribers via coaxial ground cable; the company scrambles its signals for premium channels and subscribers must use a descrambler or decoder.

Marvin Noel sold units which would descramble premium programming. If section 605(e)(4) were to apply to Noel's conduct, noted Judge Curtin, Cablevision would be entitled to greater damages than the damages available under section 553 and also would be entitled to reasonable attorneys' fees.

After careful consideration, Judge Curtin stated that the first sentence of section 605(a) does not protect against the unauthorized interception or receipt of wire, or indeed of any, communications, and was intended to regulate the conduct of communications personnel (emphasis by the court), rather than to address the problem of unauthorized interception or reception of communications. The unauthorized interception and descrambling of cable-borne television signals may violate section 553(a)(1), but does not constitute a violation of section 605(a), stated the court, and the sale of descramblers intended for use in the decoding of cable-borne television signals thus does not violate that part of section 605(e)(4) that prohibits the sale of any device or equipment, "knowing or having reason to know that [the device or equipment]...is intended for any...activity prohibited by [section 605(a)]."

Judge Curtin, citing the statutory language of sections 553, 605(a) and 605(e)(4), and the legislative history of those provisions, found that sections 605(a) and

605(e)(4) did not apply to Noel's conduct and denied Cablevision's motion for summary judgment.

With respect to damages, it was noted that the evidence indicated that Noel sold two descramblers to Cablevision's agents, for a total of $600. There was no evidence to support the company's assertion that Noel engaged in a substantial retail business in decoder sales. Cablevision did not present evidence to establish the company's likely losses as a result of the illegal sale and use of the two descramblers. The court, accordingly, assessed damages under section 553 at the statutory minimum of $250, but declined to grant injunctive relief, stating that under the circumstances of the case, no injunctive relief was necessary to restrain Noel from committing further violations of the statute.

International Cablevision, Inc. v. Noel, 859 F.Supp. 69, 1994 U.S.Dist.LEXIS 10874 (W.D.N.Y. 1994) [ELR 16:9:16]

Damages and injunctive relief awarded to Nintendo Corp. in action against alleged infringer must be reconsidered

Nintendo of America claimed that Aeropower Company manufactured and distributed video game cartridges containing infringing software; the allegedly infringing cartridges contained as many as forty-two games in a single cartridge.

A Federal District Court found that Aeropower's activities violated the Lanham Act, the Trademark Counterfeiting Act of 1984, the Copyright Act, and North Carolina's Unfair and Deceptive Trade Practice Act. The court awarded Nintendo damages, injunctive relief, and attorneys' fees.

A Federal Court of Appeals first affirmed the rejection of Aeropower's defenses of equitable estoppel and unclean hands, and the court's decision as to the company's liability.

The District Court had granted injunctive relief prohibiting continued infringing activities by Aeropower in the United States, Mexico, and Canada, based on the finding that infringing cartridges sold to buyers in Mexico and Canada apparently were re-entering the United States. Federal Court of Appeals Judge W. Earl Britt noted that the injunction broadly prohibited the Aeropower parties from infringing Nintendo's trademarks and copyrights "either in the United States, Canada or Mexico." The District Court properly found that the infringing conduct in Canada and Mexico had a significant impact on commerce in the United States, but did not consider Aeropower's citizenship or the possibility of conflict with Canadian or Mexican trademark law. Judge Britt therefore vacated that portion of the injunction affecting Aeropower's extraterritorial conduct and remanded the issue.

With respect to damages, the District Court had arrived at a base figure of $110,000, $10,000 for each of the eleven copyright infringements found; the court then trebled the amount under the North Carolina Unfair and Deceptive Trade Practices Act. Judge Britt pointed out that the Copyright Act provides the exclusive remedies for copyright infringement, and that the state trade practices statute only authorizes the trebling of actual damages resulting from violations of the statute. The "attempted intermixing" of the remedial provisions of the state and federal statutes was not authorized, stated the court, in vacating the award and remanding the matter for reconsideration of an appropriate damage award, as well as appropriate attorneys' fees.

Nintendo of America, Incorporated v. Aeropower Company, Ltd., 34 F.3d 246, 1994 U.S.App.LEXIS 24117 (4th Cir. 1994) [ELR 16:9:17]

Court issues further rulings in racing fan's antitrust action against publisher of The Daily Racing Form

When The Racing Times began publication in April 1991, it apparently became the sole competitor to The Daily Racing Form. Racing fan Robert Diskin claimed that Daily Racing Form, Inc. "agreed, combined, or conspired" with others to insure that the Racing Times would not continue publication. In February 1992, The Racing Times ceased publication, and The Daily Racing

Form allegedly acquired its key assets. The Daily Racing Form then increased its price.

Diskin sued the publisher, claiming antitrust violations in connection with the purchase of its competitor's assets.

A Federal District Court in New York (ELR 15:10:27) denied Daily Racing Form's motion to dismiss Diskin's action. In July 1994, the court denied the newspaper's motion for summary judgment and also denied Diskin's motion for leave to amend the complaint.

Judge Michael B. Mukasey stated that Diskin raised two issues of disputed fact: whether Daily Racing Form controlled the price at which retailers sell its newspaper, and whether the New York Racing Association (the organization that operates the Aqueduct, Belmont, and Saratoga racetracks) sells the newspaper on a commission basis.

It was noted that the fact that Daily Racing Form distributors have the right to return unsold papers to Daily Racing Form, Inc. at cost "favors the conclusion that the distributors do not function as independent entrepreneurs." The return policy, along with other factors, "reasonably could give rise to the inference that [Daily Racing Form] retailers do not constitute a distinct entrepreneurial link in the chain of distribution," stated the court, in denying Daily Racing Form's motion for summary judgment on the ground that Diskin was an "indirect purchaser" of the publication who lacked standing to seek antitrust damages.

Judge Mukasey then determined that the direct-purchaser rule would bar Diskin from bringing a Sherman Act section 2 claim as an indirect purchaser, and denied Diskin's motion to add a former distributor of The Daily Racing Form as a plaintiff.

When Daily Racing Form moved for reargument, Judge Mukasey granted the motion. However, in October 1994, on reargument, the court adhered to the result in its prior opinion, and denied Daily Racing Form's motion for certification of an interlocutory appeal.

Diskin v. Daily Racing Form, Inc., 1994 U.S.Dist.LEXIS 9129; 1994 U.S.Dist.LEXIS 14799 (S.D.N.Y. 1994) [ELR 16:9:18]

Motorbike raceway's release form is invalid

J. Kristine Kaskowski Eder and Catherine Nyman Fields, upon entering the Lake Geneva Raceway, each paid an admission fee and signed a form entitled "Release and Waiver of Liability and Indemnity Agreement." Eder and Fields did not read the form. As described by Wisconsin appellate court Judge Brown, the form provided a broad release to the motorbike raceway owner from potential liability arising from injury or death to participants in, or observers of, the racing events.

Eder and Fields were injured during a race when a motorbike left the racetrack and struck each of them.

A trial court granted the raceway's motion for summary judgment on the ground that the exculpatory contract released it from any liability for the injuries.

Judge Brown, after stating that Eder and Fields' failure to read the contract did not by itself entitle the raceway to judgment as a matter of law, found that the contract "was not consistent with the principles of freedom of contract." There was no showing that the raceway was willing to discuss the terms of the contract, and there was no opportunity for spectators such as Eder and Fields to read the contract before signing it. At a minimum, in Judge Brown's view, Eder and Fields should have had an opportunity to read and ask questions about the liability release terms.

In addition to holding that the contract was void as against public policy on the above basis, the court stated that the facts did not demonstrate that Eder and Fields could have contemplated, when signing the form, the risk of a motorbike leaving the track and injuring them, even if they had read the form. "Significant familiarity with the dangers involved plus knowledge of the terms of the release are necessary conditions precedent," stated Judge Brown, and those conditions were lacking.

The court cautioned that it was not holding that exculpatory contracts involving spectators are void as against public policy, but that such contracts should be strictly construed.

Judge Brown agreed with Eder and Fields that certain terms in the contract were ambiguous, particularly as to whether the contract applied to spectators or to participants. In all, Eder and Fields sufficiently stated claims for negligence and safe-place statute violations and the matter was remanded for further proceedings.

Judge Anderson, in dissent, would have found that the complaint did not fairly state a claim upon which relief could be granted in that Eder and Fields did not put the raceway on notice as to how it was negligent or how it violated the safe-place statute.

Eder v. Lake Geneva Raceway, Inc., 1994 Wisc.App.LEXIS 1353 (Wisc.App. 1994) [ELR 16:9:18]

Briefly Noted:

Jurisdiction/Record Distribution Agreement.

In 1989, Phonogram Ltd. and DEF American Inc. entered an agreement concerning the distribution of DEF American's products in the United Kingdom and elsewhere in the world excluding North America. When a dispute arose, DEF American, in April 1994, brought a lawsuit in a Los Angeles trial court against Phonogram and other parties seeking rescission of the joint venture and license agreements and damages for fraud, breach of contract and breach of fiduciary duty. The proceedings were removed to a Federal District Court.

In May 1994, Phonogram sued DEF American in the Chancery Court seeking a declaration as to the status of the joint venture and the licensing agreements.

Judge Evans-Lombe noted that the parties had consented to stay the English proceedings pending the determination of the proceedings in California and declined to issue interlocutory orders sought by Def

American, stating that it appeared that the Federal District Court would have the power to grant any appropriate relief.

Phonogram Limited v. Def American Inc., Chancery Division, LEXIS Enggen Library, Cases File (August 1994) [ELR 16:9:19]

Basketball Franchise.

In May 1984, Ellenstein Enterprises agreed to purchase a franchise from the Continental Basketball Association for a professional basketball club, located in Evansville, Indiana, which would be affiliated with the CBA. Ellenstein agreed to pay the $300,000 purchase price in annual installments of $60,000.

Members of the Evansville Thunder, the team operating under the franchise purchased by Ellenstein, sought an injunction to prevent the CBA and Ellenstein from excluding them from the CBA Western Division playoffs following the 1985-1986 season. Ellenstein brought a cross-claim against the CBA alleging franchise and common law fraud.

An Indiana trial court granted partial summary judgment in favor of Ellenstein and denied the CBA's motion for summary judgment on its counterclaim against Ellenstein for amounts owed on the purchase agreement.

On appeal, Judge Robertson agreed with the trial court that the agreement between the parties constituted a franchise under state law and that Ellenstein was entitled to summary judgment on this issue. The evidence indicated to the court the inequality in bargaining power existing between the parties to the franchise and that the payment of the franchise fee "was in fact payment for the right to operate a team associated with the CBA."

The CBA did not comply with the statutory registration and disclosure requirements and the trial court correctly determined that, under these circumstances, the contract of sale was void and unenforceable. It will remain for a trial court to consider the questions of liability and damages.

Continental Basketball Assn., Inc. v. Ellenstein Enterprises, 1994 Ind.App.LEXIS 1252 (Ind.App. 1994) [ELR 16:9:19]

Rugby Injury/Release.

Jeffrey Kyriazis was injured while playing rugby in a match held by the West Virginia University Rugby

Club, a member of the Sports Club Federation. A trial court found that a release signed by Kyriazis was an absolute bar to his claim and granted summary judgment in favor of the Board of Trustees and the club's faculty adviser. The West Virginia Supreme Court reversed the decision, stating that the release violated public policy and equal protection under the state Constitution.

Judge Neely noted that "[w]hen a state university provides recreational activities to its students, it fulfills its educational mission, and performs a public service. As an enterprise charged with a duty of public service here, the University owes a duty of due care to its students when it encourages them to participate in any sport."

The court then found that the release at issue was not an agreement "freely and fairly made between parties who are in an equal bargaining position." Kyriazis was required to sign the release if he wanted to play club rugby. In all, the release was void as a matter of West Virginia public policy.

With respect to Kyriazis' equal protection claim, Judge Neely stated that "[by] conditioning students' participation in clubs of the Federation upon their execution of the anticipatory Release, without demanding the same from students involved in intramurals, or other activities, the University treated similarly situated persons differently."

The court concluded by stating that there was a genuine issue of material fact about whether Kyriazis fully appreciated the risk of club rugby and that this matter would properly be determined by the jury on remand.

Kyriazis v. University of West Virginia, 1994 W.Va.LEXIS 161 (W.Va. 1994) [ELR 16:9:19]

Art/Painting Ownership.

Erica John agreed to have Sotheby's Inc. auction a painting attributed to Rembrandt entitled "Christus." Prior to the auction Dr. Julian Nava claimed ownership of the painting. Sotheby's withdrew the painting from auction, and refused to return the work to John.

When John brought a lawsuit, a Federal District Court granted Nava's motion to intervene and then approved stipulations entered into by John and Nava to settle their claims against Sotheby's; the auction gallery agreed to settle its claims against John and Nava.

In about June 1985, just prior to the divorce of Erica and Harry John, Harry John had purported to convey to Nava any interest Harry John had in the painting. In a 1989 Final Marital Settlement Agreement, Erica and Harry John agreed that the "Christus" painting, along with a Dali work, would be placed for auction sale in May 1989. Harry John died in December 1992.

Judge Edelstein first considered a judgment entered by a California trial court upon a stipulation entered into by Harry John and Nava to resolve an action between the parties. Nava claimed that the judgment constituted a prior adjudication of the ownership of the painting. Judge Edelstein ruled that the judgment was not entitled to full faith and credit, noting that Erica John was not a party to the action and that the trial court lacked jurisdiction over Erica John at the time the judgment was entered. The court, after determining that Wisconsin law would apply to the interpretation of the June 1985 agreement, found that Harry John sold his one-half ownership interest in the painting to Nava, and directed the parties to arrange an equal distribution of the work's fair market value.

John v. Sotheby's, Inc., 858 F.Supp. 1283, 1994 U.S.Dist.LEXIS 10567 (S.D.N.Y. 1994) [ELR 16:9:20]

Title IX.

In response to a Title IX lawsuit brought by the members of the University of Illinois' soon-to-be terminated men's swimming team, a Federal District Court granted summary judgment in favor of the university parties.

A Federal Court of Appeals, after reviewing the background of the decision to eliminate four teams, including men's swimming, found that the school's actions were consistent with the statute and the applicable regulations; that the decision did not deny the swimmers the equal protection of law; and that Title IX and the applicable regulation were constitutional.

In January 1995, the United States Supreme Court, without comment, refused to review the matter.

Kelley v. Board of Trustees, 35 F.3d 265, 1994 U.S.App.LEXIS 23974 (7th Cir. 1994) [ELR 16:9:20]

Cable Television/Descrambling Equipment.

A Federal Court of Appeals has affirmed a District Court ruling (ELR 16:2:31) refusing William Norris' motion to dismiss those counts of an indictment charging him with mail and wire fraud. Norris allegedly modified cable converter boxes into descramblers so that individuals could receive premium cable television programming without paying for the service.

The court also agreed with the District Court's decision to grant Norris' motion to dismiss the counts of the indictment charging him with the unauthorized decryption of satellite cable programming in violation of section 605 (e)(4) of the Cable Communications Act of 1984. Judge Bauer declined to consider whether Norris' conduct was proscribed by section 605(a) of the statute or by section 553, stating that the issue was not properly before the District Court.

United States v. Norris, 34 F.3d 530, 1994 U.S.App.LEXIS 24272 (7th Cir. 1994) [ELR 16:9:20]

Promotional Contest.

An individual identified only as Bellows won $10 million in a McDonald's promotional game, but was disqualified because her daughter worked at the McDonald's franchise where Bellows obtained the winning ticket. The contest rules provided that "persons who are immediate family members of or who reside in the same household" as an employee of a McDonald's franchisee were ineligible to participate in the contest. Bellows' daughter was married and resided about thirty miles from her mother.

When Bellows sued McDonald's, the trial court dismissed all of the claims except for the breach of contract count against Delaware McDonald's Corporation and the National Broadcasting Company, Inc. The trial court then dismissed Bellows' amended complaint.

A Michigan appellate court agreed with the trial court that Bellows was a member of her daughter's immediate family and therefore was ineligible to participate in the contest under the contest rules.

Bellows v. Delaware McDonald's Corp., 1994 Mich.App.LEXIS 373 (Mich.App. 1994) [ELR 16:9:20]

IN THE NEWS

Academy of Motion Picture Arts and Sciences prevails in dispute over "The Last Seduction"

A Los Angeles trial court judge, in January 1995, ruled that October Films and ITC Distribution were not entitled to an injunction barring the Academy of Motion Picture Arts and Sciences from refusing to include the film "The Last Seduction" on nomination ballots for the Academy Awards.

Judge Robert H. O'Brien, according to news reports, found that October Films did not present sufficient evidence to show that the Academy engaged in restraint of trade in enforcing its "No TV First Rule" against the film. It was acknowledged that HBO had paid about $1 million for the rights to "The Last Seduction," and had broadcast the film prior to its theatrical release. [Feb. 1995] [ELR 16:9:22]

DEPARTMENTS

In the Law Reviews:

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 17, Number 1 as its Columbia Institute for Tele-Information Symposium: The 1992 Cable Act: Freedom of Expression Issues with the following articles:

Freedom of Expression and the 1992 Cable Act: An Introduction by Eli M. Noam and Carolyn Cutler, 17 Comm/Ent 1 (1994)

Speech, Technology, and the Emergence of a Tricameral Media: You Can't Tell the Players Without a Scorecard by Burt Neuborne, 17 Comm/Ent 17 (1994)

A Modest Proposal on "Must-Carry," The 1992 Cable Act, and Regulation Generally: Go Back to Basics by Roger Pilon, 17 Comm/Ent 41 (1994)

Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation by Monroe E. Price and Donald W. Hawthorne, 17 Comm/Ent 65 (1994)

Merging Phone and Cable by C. Edwin Baker, 17 Comm/Ent 97 (1994)

A New Deal for Speech by Cass R. Sunstein, 17 Comm/Ent 137 (1994)

Cable Operators as Editors: Prerogative, Responsibility, and Liability by Frederick Schauer, 17 Comm/Ent 161 (1994)
The First Amendment and FCC Rule Making Under the 1992 Cable Act by Michael I. Meyerson, 17 Comm/Ent 179 (1994)

Rate Regulation, Effective Competition, and the 1992 Cable Act by Stanley M. Besen and John R. Woodbury, 17 Comm/Ent 203 (1994)

Mandated Access: Commensurability and the Right to Say "No" by Wendy J. Gordon and Anne E. Gowen, 17 Comm/Ent 225 (1994)

New Technology and the First Amendment: Breaking the Cycle of Repression by Robert Corn-Revere, 17 Comm/Ent 247 (1994)

The Right of Publicity: A Commercial Property Right - Not a Privacy Right by W. Mack Webner, 84 The Trademark Reporter 586 (1994)

The Unimportance of Being Earnest: Paramount Re-writes the Rules for Enhanced Scrutiny in Corporate Takeovers by Paul L. Regan, 46 Hastings Law Journal 125 (1994)

New Technology and Old Protection: The Case for Re-sale of Used CDs by Carla M. Miller, 46 Hastings Law Journal 217 (1994)

Communications and the Law, published by Fred B. Rothman Company, 10368 W. Centennial Road, Littleton, CO 80127, has issued Volume 16, Number 3 with the following articles:

Subliminal Lyrics in Heavy Metal Music: More Litigation, Anyone? by Juliet Dee, 16 Communications and the Law 3 (1994)

Marshall Provided Key Votes, But Few Opinions, On Freedom of Speech and Press by F. Dennis Hale, 16 Communications and the Law 25 (1994)

The Constitutionality of Political Correctness by Michael J. Laird, 16 Communications and the Law 43 (1994)

The Falsity Burden of Private Libel Plaintiffs Since Philadelphia Newspapers, Inc. v. Hepps by Brian J. Steffen, 16 Communications and the Law 57 (1994)

Unrest on the Frontiers of Copyright by Richard Wincor, 16 Communications and the Law 83 (1994)

Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value, 108 Harvard Law Review 683 (1994)

Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts by Steven C. Clay, 79 Minnesota Law Review 485 (1994)

The Journal of Intellectual Property Law has published Volume 2, Number 1 with following articles:

To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution by Edward C. Walterscheid, 2 Journal of Intellectual Property Law 1 (1994)

Likelihood of Confusion Determinations: A Survey of Eleventh Circuit Jurisprudence by Theodore H. Davis, Jr., 2 Journal of Intellectual Property Law 57 (1994)

Brief for Amici Curiae - Concerned Professors of Copyright Law, Princeton University Press v. Michigan Document Services, Inc., No 94-1778 (6th Cir. Filed Oct. 13, 1994) by L. Ray Patterson et al., 2 Journal of Intellectual Property Law 183 (1994)

Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License by Darlene A. Cote, 2 Journal of Intellectual Property Law 219 (1994)

Ex-Post Feist: Applications of a Landmark Copyright Decision by Tracy Lea Meade, 2 Journal of Intellectual Property Law 245 (1994)

Metaphors of Infringement and Equivalence: The Solution of Our Problems by Robert M. Meeks, 2 Journal of Intellectual Property Law 279 (1994)

Back to the Future: How Federal Courts Create a Federal Common-law Copyright Through Permanent Injunctions Preventing Future Works by Kristina Rosette, 2 Journal of Intellectual Property Law 325 (1994)

Protecting Intellectual Property Within Horizontal Exchange Relationships by Jerre B. Swann, Jr., 2 Journal of Intellectual Property Law 363 (1994)

"Television Without Frontiers:" A Case Study of Turner Broadcasting's New Channel in the Community - Does It Violate the Directive? by Jamie Shelden, 7 The Transnational Lawyer (published by University of Pacific, McGeorge Law School) 523 (1994)

Directors or Auctioneers? Turning Back Time in Paramount v. QVC by S. Todd Barfield, 62 University of Missouri Kansas City Review 893 (1994)

Cardozo Arts & Entertainment Law Journal has published Volume 13, Number 1 with the following articles:

Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use by Pierre N. Leval, 13 Cardozo Arts & Entertainment Law Journal 19 (1994)

The Role of the Copyright Office: An Introduction by Howard B. Abrams, 13 Cardozo Arts & Entertainment Law Journal 27 (1994)

The Exclusive Right to Read by Jessica Litman, 13 Cardozo Arts & Entertainment Law Journal 29 (1994)

Will the Copyright Office Be Obsolete in the Twenty-First Century? by Pamela Samuelson, 13 Cardozo Arts & Entertainment Law Journal 55 (1994)

The Role of the Copyright Office in the Age of Information by Eric Schwartz, 13 Cardozo Arts & Entertainment Law Journal 69 (1994)

The Copyright Office: A Proposed Direction by Richard Weisgrau, 13 Cardozo Arts & Entertainment Law Journal 81 (1994)

Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion, 13 Cardozo Arts & Entertainment Law Journal 89 (1994)

Four Questions About Art by Marci A. Hamilton, 13 Cardozo Arts & Entertainment Law Journal 119 (1994)

Jurimetic Copyright: Future Shock for the Visual Arts by Russ VerSteeg, 13 Cardozo Arts & Entertainment Law Journal 125 (1994)

Must Carry and the Courts: Bleak House, the Sequel by Nicholas W. Allard, 13 Cardozo Arts & Entertainment Law Journal 139 (1994)

From Deontology to Dialogue: The Cultural Consequences of Copyright by Barbara Friedman, 13 Cardozo Arts & Entertainment Law Journal 157 (1994)

Waits v. Frito-Lay: The Song Remains the Same by Keith E. Lurie, 13 Cardozo Arts & Entertainment Law Journal 187 (1994)

The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity by Fred M. Weiler, 13 Cardozo Arts & Entertainment Law Journal 223 (1994)

The Federal Communications Law Journal, published by the University of Indiana School of Law (Bloomington), has issued Volume 47, Number 1 as a Sympsosium: The Transformation of Television News and Number 2 as a Special Issue on the Sixtieth Anniversary of the Communications Act of 1934 with the following articles:

The Soul of a News Machine: Electronic Journalism in the Twenty-First Century by David Bartlett, 47 Federal Communications Law Journal 1 (1994)

Changes That Challenge the Soul by Herbert A. Terry, 47 Federal Communications Law Journal 25 (1994)

"Even My Own Mother Couldn't Recognize Me": Television News and Public Understanding by Jane Rhodes, 47 Federal Communications Law Journal 31 (1994)

Public Understanding, Professional Ethics, and the News: A Response to Jane Rhodes by David Boeyink, 47 Federal Communications Law Journal 41 (1994)

The Fairness Doctrine: A Solution in Search of a Problem by Adrian Cronauer, 47 Federal Communications Law Journal 51 (1994)

Fairness and the Public Trustee Concept: Time to Move On by Henry Geller, 47 Federal Communications Law Journal 79 (1994)

The First Amendment and the Protection of Unfair Speech by Barbara McDowell, 47 Federal Communications Law Journal 85 (1994)

Reflections on the Sixtieth Anniversary of the Communications Act by Robert E. Allen, 47 Federal Communications Law Journal 153 (1994)

Censorship by Media Elites Will Ultimately Threaten the Republic by Michael E. Bailey, 47 Federal Communications Law Journal 159 (1994)

Deregulating the Second Republic by Commissioner Andrew C. Barrett, 47 Federal Communications Law Journal 165 (1994)

FCC Licensing: From Comparative Hearings to Auctions by Jonathan Blake, 47 Federal Communications Law Journal 179 (1994)

Celebrating Communications Technology for Everyone by Peter David Blanck, 47 Federal Communications Law Journal 185 (1994)

Developing the Global Information Infrastructure by Seth D. Blumenfeld, 47 Federal Communications Law Journal 193 (1994)

In Search of the Multimedia Grail by Daniel L. Brenner, 47 Federal Communications Law Journal 197 (1994)

Cohen v. Cowles Media and Its Significance for First Amendment Law and Journalism by Jerome A. Barron, 3 William & Mary Bill of Rights Journal 419 (1994)

Whither the Press: The Fourth Estate and the Journalism of Blame by Gerlad G. Ashdown, 3 William & Mary Bill of Rights Journal 681 (1994)

Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules, 3 William & Mary Bill of Rights Journal 715 (1994)

Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademarked-Protected Icons by Dorean M. Koenig, 11 Thomas M. Cooley Law Review 803 (1994)

The Reporter's Privilege: Protecting the Fourth Estate by James E. Beaver and Eric A. Aaserud, 30 Willamette Law Review 73 (1994)

The Marquette Sports Law Journal has published Volume 4, Number 2 with the following articles:

Gender Equity in Athletics: Coming of Age in the 90's by T. Jesse Wilde, 4 Marquette Sports Law Journal 217 (1994)

Law and Athlete Drug Testing in Canada by Joseph de Pencier, 4 Marquette Sports Law Journal 259 (1994)

Applying the First Amendment to Prayer in a Public University Locker Room: An Athlete's and Coach's Perspective by Gil Fried and Lisa Bradley, 4 Marquette Sports Law Journal 301 (1994)

Fair or Foul? The Survival of Small-Market Teams in Major League Baseball by Kevin E. Martens, 4 Marquette Sports Law Journal 323 (1994)

Book Review: Sports and the Law by Lucrecia R. Moore, 4 Marquette Sports Law Journal 375 (1994)

The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard by Diane Heckman, 3 Detroit College of Law Review 953 (1994)

Urine or You're Out: Student Athletes' Right of Privacy Stripped in Hill v. NCAA by Karen E. Crummy, 29 University of San Francisco Law Review 197 (1994)

Campbell v. Acuff-Rose Music: The Sword of the Parodist is Mightier Than the Shield of the Copyright Holder by Jay Lee, 29 University of San Francisco Law Review 279 (1994)

The Name of the Departed Team: Who Can Use It? by Howard W. Brill, 15 Whittier Law Review 1003 (1994)

The Future of Sports by Wilfrid Sheed, Edward Tenner, John Hoberman and Allen Guttmann, 19 The Wilson Quarterly (published by the Woodrow Wilson International Center for Scholars, 901 D Street S.W., Suite 704, Washington D.C. 20024) 10 (1994)

Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate As a Means of Fostering Meaningful Reform of Intercollegiate Athletics by Harold B. Hilborn, Northwestern University Law Review 741 (19944)

The Journal of Broadcasting & Electronic Media, published by the Broadcast Education Association, Washington, D.C., has issued Volume 38, Number 4 with the following articles:

Universal Service: Prosaic Motives and Great Ideals by Harmeet Sawhney, 38 Journal of Broadcasting & Electronic Media 375 (1994)

Broadcasters' License Renewal Claims Regarding Children's Educational Programming by Dale Kunkel and Julie Canepa, 38 Journal of Broadcasting & Electronic Media 397 (1994)

Effects of Interpretations of Televised Alcohol Portrayals on Children's Alcohol Beliefs by Erica Weintraub Austin and Heidi Kay Meili, 38 Journal of Broadcasting & Electronic Media 417 (1994)

The President-News Media Relationship: A Time Series Analysis of Agenda-Setting by Wayne Wanta and Joe Foote, 38 Journal of Broadcasting & Electronic Media 437 (1994)

Copyright Protection for the Non-Literal Elements of Computer Programs: The Need for Compulsory Licensing by Aram Dobalian, 15 Whittier Law Review 1019 (1994)

Intellectual Property - Copyright Act - Copyright Infringement - Attorney's Fees - Fogerty v. Fantasy, Inc., 114 S. Ct. 1023 (1994), 33 Duquesne Law Review 345 (1995)

IIC, published by VCH Verlagsgesellschaft mbH, P.O. Box 10 11 61, D-69451 Weinheim, Federal Republic of Germany, has issued Volume 25, Number 6 with the following articles:

The EC Copyright Directives, Economics and Authors' Rights by Herman Cohen Jehoram, 25 IIC 821 (1994)

Protection for Spare Parts in the Proposals for a European Design Law by Friedrich-Karl Beier, 25 IIC 840 (1994)

Grounds for Loss of Trade Mark Rights in Italy - Transformation into a Generic Term and Revocation by Lamberto Liuzzo, 25 IIC 879 (1994)

Council Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 25 IIC 887 (1994)

Council Directive on Harmonizing the Term of Protection of Copyright and Certain Protected Rights, 25 IIC 896 (1994)

Book Review: Intellectual Property Protection and Management - Law and Practice in Japan by Teruo Doi reviewed by Christopher Heath, 25 IIC 956 (1994)

Fair Use: From Harper & Row to Acuff-Rose by Roger Zissu, 42 Journal of the Copyright Society 7 (1994)

Intellectual Property Issues in Chapter 11 Bankruptcy Reorganization Cases by David S. Kupetz, 42 Journal of the Copyright Society 68 (1994)

An Evaluation of the World Intellectual Property Organization's Draft Harmonization Treaty with Respect to Direct Infringement by Andrew Y. Piatnicia, 26 New York University Journal of International Law and Politics 375 (1994)

The Uncertain Future of Computer Software Users' Rights in the Aftermath of MAI Systems by Michael E. Johnson, 44 Duke Law Journal 327 (1994)

The Copyright and Trade Secret Protection of Communication Software: Placing a Lock on Interoperability by Steven N. Dupont, 13 The John Marshall Journal of Computer & Information Law 17 (1994)

Has the Computer Changed the Law? by David C. Tunick, 13 The John Marshall Journal of Computer & Information Law 43 (1994)

Virtual Reality: The Reality of Getting It Admitted by Mary C. Kelly and Jack N. Bernstein, 13 The John Marshall Journal of Computer & Information Law 145 (1994)

The European Intellectual Property Review, published by Sweet & Maxwell, ESC Publishing, FREEPOST, Andover, Hants SP10 5BR, United Kingdom, has published Volumes 11 and 12 with the following articles:

Harmonisation of Copyright Protection by Lewis Kurlantzick, 16 European Intellectual Property Review 463 (1994)

Copyright Protection for the Information Superhighway by Allen N. Dixon and Laurie C. Self, 16 European Intellectual Property Review 465 (1994)

"Well-known" Marks by Michael Blakeney, 16 European Intellectual Property Review 481 (1994)

Designing Appropriate Protection for Computer Programs by Andrew Christie, 16 European Intellectual Property Review 486 (1994)

Cumulation of Protection in the EC Design Proposals by Herman Cohen Jehoram (the 1994 Herchel Smith Lecture), 16 European Intellectual Property Review 514 (1994)

The Tension between National Intellectual Property Rights and Certain Provisions of EC Law by Nicholas MacFarlane, Clare Wardel and John Wilkinson, 16 European Intellectual Property Review 525 (1994)

Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study by Dennis S. Karjala, 16 European Intellectual Property Review 531 (1994)

The Entertainment Law Review, published by Sweet & Maxwell, ESC Publishing, FREEPOST, Andover, Hants, SP10 5BR, United Kingdom, has issued Volume 5, Issue 6 with the following articles:

Multimedia: Does Anacon Provide a Route to Future Protection? by Susan Hall, 5 Entertainment Law Review 191 (1994)

Format Rights in Television Shows: Your Starter for 10: The Department of Trade and Industry Consults by Shelley Lane and Richard McD. Bridge, 5 Entertainment Law Review 198 (1994)

Photographs and Privacy in Germany by Arnold Vahrenwald, 5 Entertainment Law Review 205 (1994)

Licensing Agreements: The Meaning and Effect of "Material Breach" Clauses by Stephen Bate and Jennifer Skilbeck, 5 Entertainment Law Review 223 (1994)

Home Shopping Broadcasting: A Storm in a Shopping Basket? Let the Market Decide by James Scorer, 5 Entertainment Law Review 226 (1994)

China Makes Criminal Sanctions Available Against Copyright Pirates by Yu Jianyang, 5 Entertainment Law Review 229 (1994)
[ELR 16:9:24]