

RECENT CASES

French appellate court rules that colorization and broadcast of the "Asphalt Jungle" violated the moral rights of director John Huston and screenwriter Ben Maddow

An appellate court in Versailles, France, has ruled that the colorization and broadcast of the "Asphalt Jungle" violated the moral rights of the film's director and screenwriter, John Huston and Ben Maddow. The ruling came in a long-pending and closely watched case brought by Huston's heirs and by Maddow against Turner Entertainment Co. and France's Channel Five.

The film, originally produced by MGM in black-and-white in 1950, was colorized by Turner following its acquisition of the MGM library in 1986. When television

broadcast rights were licensed to Channel Five, Huston's heirs and Maddox filed suit in France. Early in the case, a French trial court enjoined the broadcast. But that ruling was overturned by an appellate court in Paris which held that U.S. law, rather than French law, determined who the "author" of the film was, and thus who owned moral rights in it. Under U.S. law, MGM was the film's "author"; and since Turner acquired MGM's rights, the Paris court ruled that Turner, rather than Huston and Maddox, owned whatever moral rights might be involved. As a result of that ruling, Channel Five broadcast the colorized version in 1989.

Huston's heirs and Maddox, with the support of several French guilds, took the case to France's highest court, the Cour de Cassation, which reversed the Paris court of appeals and ruled in their favor. The Cour de Cassation held that French law, not U.S. law, should be applied in deciding who owns French moral rights. The case was

then remanded to the appellate court in Versailles to answer that question, and to decide whether the colorization of "Asphalt Jungle" violated the moral rights, if they belonged to Huston and Maddox under French law.

(For more detailed accounts of the earlier decisions in this case, see ELR 13:3:3, 11:8:13, 11:2:17, 10:10:3, and 10:4:17.)

The Versailles court now has held that Huston's heirs and Maddox are the owners of the film's moral rights rather than Turner, and that colorization of the film and its broadcast did violate those rights. The court has ordered Turner to pay Huston's heirs and Maddox 400,000 French Francs (about \$86,000) and Channel Five to pay them 200,000 French Francs (about \$43,000). Turner also has been ordered to pay 2,000 Francs to each of the French guilds that intervened in the case on the side of Huston and Maddox.

Because of the importance of this decision to the entertainment industry, and because the decision itself was rendered in the French language, an unofficial English translation of the decision is published in full text immediately below.

Turner Entertainment Co. v. Huston

Court of Appeal of Versailles [France],
Combined Civil Chambers
Decision No 68, Roll No 615/92
December 19, 1994

During the solemn hearing of 24 October 1994, the Court of Appeal consisting of Mr THAVAUD, President, Mrs PETIT, Councillor, Mr MARTIN, Councillor, Mrs CAMPION, Councillor, Mrs LOMBARD, Councillor, Assisted by Mrs LAMARQUE, Chief Registrar,

heard the report of Mr THAVAUD, President, and the explanations of the parties' counsels, after which the case was reviewed in camera for a decision to be pronounced during the hearing of 19 December 1994, of which date the parties were notified.

After due deliberation by the same magistrates of the Court of Appeal, in accordance with the law, the following judgment was pronounced:

I

1. The cinematographic work entitled "ASPHALT JUNGLE" was produced in 1950 in the UNITED STATES by the METRO GOLDWYN MAYER (MGM) company, a division of LOEW'S Inc. The film was shot in black and white by the late John HUSTON, a movie director of American nationality, at the time bound by a contract of employment to LOEW'S Inc. and

co-author of the screenplay with Ben MADDOW, bound to the same company by a contract as a salaried writer.

2. On 2nd May 1950, LOEW'S Inc. obtained from the U.S. COPYRIGHT OFFICE a certificate of registration of its rights to the film. This registration was duly renewed in 1977. On 26th September 1986 the benefit of this registration was transferred to the TURNER ENTERTAINMENT Co. by virtue of a merger with MGM, including transfer of the ownership of MGM's movie library and connected rights.

3. The TURNER company had the movie colorized, an operation which on 20th June 1988 resulted in registration of a copyright application, and it enabled the Fifth French Television Channel (LA CINQ) to announce that it would broadcast this colorized version at 8:30 p.m. on 26th June 1988.

4. The broadcast was objected to by John HUSTON's heirs, Angelica, Daniel and Walter HUSTON, who were subsequently joined by Mr Ben MADDOW, the Societe des Auteurs et Compositeurs Dramatiques (SACD), the Societe des Realisateurs de Films (SRF), the Syndicat Frangais des Artistes Interpretes (SFA), the Federation Europeenne des Relisateurs de l'Audiovisuel (FERA), the Syndicat Frangais des Realisateurs de Television CGT and the Syndicat National des Techniciens de la Production Cinematographique et de Television. They opposed the broadcast because they deemed it a violation of the author's moral right, aggravated in their opinion by the fact that John HUSTON had opposed colorization of his works during his life.

5. The dispute thus arising with LA CINQ and the TURNER ENTERTAINMENT Co. (TEC) resulted in FRANCE in the following decisions:

1) An order in summary proceedings on 24th June 1988, confirmed by a judgment of the Court of Appeal of PARIS on 25th June 1988, which suspended the broadcast of the colorized film as being likely to cause unacceptable and irreparable damage;

2) On 23rd November 1988 the Court of First Instance of PARIS judged as follows:

"Declares the action of Messrs and Mrs HUSTON and Mr Ben MADDOW and the voluntary intervention of TEC admissible insofar as they are limited to the television broadcasting of the colorized version of the film entitled 'ASPHALT JUNGLE'; Declares the claims of the secondary voluntary intervenors admissible; Formally takes cognizance of the fact that Societe d'Exploitation de la Cinquieme Chaîne has abandoned its plans for broadcasting the colorized version of the film entitled 'ASPHALT JUNGLE'; As necessary forbids it from

broadcasting this version on television; Dismisses all other claims; Dismisses the claim of the TEC company".

In admitting the claim, this judgment referred in substance to the Universal Copyright Convention signed in GENEVA on 6th September 1952, ratified by the UNITED STATES, to deduce that this convention provides citizens of member States in FRANCE with the benefit of the Law of 11th March 1957, notably Section 6, which provides that the moral right is attached to the person and is perpetual, inalienable and imprescribable. Thus it distinguished between this moral right and the economic rights held by the TURNER company to the work, notably under contracts signed with John HUSTON and Ben MADDOW.

Finally, it held that John HUSTON and Ben MADDOW, by their art, had imbued their work with an original and personal character and that, because HUSTON's renown is based on the interplay of black and white,

creating an atmosphere, the said atmosphere would be jeopardized by colorization.

3) The Court of Appeal of PARIS, appealed to by the TURNER company, judged as follows on 6th July 1989:

"States that the author of the film entitled 'ASPHALT JUNGLE' is the TURNER company and that the heirs of John HUSTON as well as Ben MADDOW have no moral right to this work shot in black and white; Notes that the colorized version of the said film is an adaptation, under U.S. law, for which the TURNER company obtained a registration certificate on 20th June 1988; States that the principle of colorization could not be criticized by the heirs of John HUSTON and by Ben MADDOW, even if they could claim a moral right to the black and white film; Accordingly, reversing the judgment, Dismisses the claims of the heirs of John HUSTON and Ben MADDOW and judges admissible but unfounded the interventions of the six legal entities

supporting their claims; Authorizes the Fifth Channel to broadcast the colorized version of the film entitled 'AS-PHALT JUNGLE', formally recognizing the cognizance petitioned for."

The judgment further provided for various warning notices intended for television viewers, with respect to the possibility of using the color control device and respect for the memory of John HUSTON.

In reversing the judgment against which the appeal was brought, the Court of Appeal of PARIS settled the conflict of laws in favor of U.S. law, the law of the first publication of the work having, according to said court, granted the status of author solely to LOEW's, which cannot be defeated by the BERNE Convention, effective from 1st March 1989, which is an instrument to harmonize relations between the member countries and is not competent to affect acquired rights or the effect of contracts between producer and director. Moreover, it

dismissed the exception according to which the French conception of international law was violated and held that the copyright granted to the "derivative work" transferred in 1988 to the TURNER company made it impossible for Messrs and Mrs HUSTON and Mr MADDOW to raise it if they had a moral right to claim.

6. Messrs and Mrs HUSTON and Mr MADDOW and the intervenors appealed against this judgment of the Court of Appeal of PARIS to the Cour de Cassation.

In a ruling dated 28th May 1991, the Supreme Court reversed and cancelled every provision of the judgment of the Court of Appeal for violation of Section 1.2 of Law 64-689 of 8th July 1964 and Section 6 of the Law of 11th March 1957, stating: "According to the first of these texts, the integrity of a literary or art work cannot be affected in FRANCE, regardless of the State in whose territory the said work was made public for the first time. The person who is its author, by its creation

alone, enjoys the moral right stipulated in his favor by the second of the aforesaid texts; these are laws of mandatory application."

II

1. The TURNER ENTERTAINMENT Co. duly referred the case to the Court of Appeal of VERSAILLES, appointed as Court of Remand, and petitioned it to reverse the judgment of the Court of First Instance of PARIS, to judge that the claims of Messrs and Mrs HUSTON are inadmissible or that they have in any case no grounds to claim the moral right to which they refer and therefore to dismiss their case and all other intervenors. It also claims as follows:

- In support of its argument of inadmissibility, that Messrs and Mrs HUSTON cannot claim the status of foreign author, which is reserved for the TURNER

company under the laws applicable at the place of creation and the agreements governed by them; that they are therefore not entitled to claim French law, under the GENEVA Convention, in order to protect themselves and exercise rights which they have not acquired;

- That it is in any event the recognized holder of the patrimonial rights of the authors and that it was therefore entitled to introduce the colorized version by applying a technique which does not alter the essence of the work.

2. Messrs and Mrs HUSTON and Mr MADDOW petitioned the Court of Remand to confirm the judgment of the Court of First Instance of PARIS, further petitioning the court to add that the broadcasting of the colorized version of the film entitled "ASPHALT JUNGLE" has violated their moral right and thus to order the TURNER company to pay them FRF 1,000,000 by way of

damages and costs and a further FRF 100,000 under Section 700 of the New Code of Civil Procedure; thus:

- They oppose that French law alone is competent to determine the status of author, as pointed out by the Cour de Cassation in a decision which stresses the importance of moral right and results in dismissal of the law applicable to the agreement between director and producer; and that their claim is therefore admissible;

- That black and white is the form of expression in which the authors and especially John HUSTON have delivered their esthetic conception to the public; that colorization therefore alters the very essence of the work, of which it is no "adaptation" at all but a "transformation" or "modification"; that, moreover, John HUSTON was formally opposed to this during his life.

3. Societe des Auteurs et Compositeurs Dramatiques (SACD) intervened voluntarily and joined itself to the submissions of Messrs and Mrs HUSTON, whose

claims it supports in application of Section 3.1 of its by-laws and Section 65, paragraph 2 of the Law of 11th March 1957 and Section 38 of the Law of 3rd July 1985.

4. Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television pleaded the same and claimed FRF 10,000 from the TURNER company by virtue of Section 700 of the New Code of Civil Procedure.

5. Maitre Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ submitted that there is no case against him in view of the conversion into compulsory liquidation and Me PIERREL's court-ordered appointment as liquidator; he

furthermore claimed from the TURNER company FRF 5,000 by virtue of Section 700 of the New Code of Civil Procedure.

6. Maitre PIERREL ex-officio petitioned the court to declare his appeal admissible and well-founded, to take formal cognizance of the fact that LA CINQ, in accordance with the judgment of the Court of Appeal of PARIS on 6th July 1989, broadcast the film accompanied by the ordered notices, to reverse the referred judgment of the Court of First Instance of PARIS and, judging again, to judge that Messrs and Mrs HUSTON and Mr MADDOW do not have status as the film's authors and that they cannot claim in FRANCE the benefit of the moral right, to judge secondarily that col- orization is in principle a legal adaptation and does not violate any moral right, to dismiss the claims of the op- ponents and to order Messrs and Mrs HUSTON and Mr MADDOW to pay them FRF 30,000 by virtue of

Section 700 of the New Code of Civil Procedure. He thus reiterated the arguments already produced by the TURNER company, stressing that John HUSTON could not be unaware of the fact that he did not have the status of an author by virtue of the law governing the contracts signed with the producer.

7. The TURNER ENTERTAINMENT Co. maintained its initial claims, notably on the inadmissibility of the opponents' claims in submissions in answer to which it maintains:

- That it is the constant rule in private international law that the situation is governed by the law of the place where it occurs; that, therefore, the status of author of an art work is the status recognized in the country where the work has been created, i.e. in this case the UNITED STATES OF AMERICA; that this means LOEW'S Inc., to which the rights have been transferred;

- That the Court of Remand is not bound by the judgment of the Cour de Cassation, criticized by an authorized doctrine;

- That, in fact, the Law of 8th July 1964, incorporated as Section L 111-4 in the Code of Intellectual Property, does not apply in that it assumes that the foreign State does not provide French works with adequate and effective protection, which is not the case in the UNITED STATES; that the second paragraph of Section 1 of this law, which alone is referred to in the judgment of the Cour de Cassation, is not severable;

- That, lastly, the GENEVA Convention does not govern the formation of rights and the pre-existing status of author, for which it only organizes protection;

- That, secondarily, the Cour de Cassation has not pronounced itself on the violation of the moral right alleged to result from the colorization and that this violation has not been shown.

8. SACD opposed in replication the submissions produced ex-officio by Me PIERREL and maintained its claims as an intervenor.

9. In their turn, Messrs and Mrs HUSTON and Mr MADDOW replicated as follows:

- That the Cour de Cassation found for a solution which alone enables the authors to exercise their moral right in FRANCE; that this position complies with Section 14 bis 2 of the BERNE Convention, which provides for application of the law of the country of protection in designating the holder of the rights to a cinematographic work;

- That U.S. law only protects economic rights, wherefore the Law of 8th July 1964 remains applicable for lack of reciprocal agreements on moral right;

- That, contrary to the submissions of the TURNER company, colorization violates the moral right retained.

They furthermore petitioned the court to take cognizance of the violation of the authors' moral right by LA CINQ's broadcasting of the "colorized" film and to order Me PIERREL ex-officio to pay them one million francs in damages and costs on this ground.

10. In its rejoinder, the TURNER ENTERTAINMENT Co. petitioned the court again to judge that Messrs and Mrs HUSTON and Mr MADDOW cannot claim the benefit of the BERNE Convention and Law of 8th July 1985, which have no retroactive application, to dismiss application of the Law of 8th July 1964 because of the protection afforded by U.S. law for every attribute of copyright; to judge

- That colorization is by its nature an adaptation in the meaning of the law and to grant it the benefit of its earlier submissions;

- That ratification by the UNITED STATES of the BERNE Convention postdates the disputed situation by a considerable time;

- That, contrary to the ground produced by Messrs and Mrs HUSTON and Mr MADDOW, U.S. caselaw sanctions violation of the integrity or authorship of a work, which excludes application of the Law of 8th July 1964;

- That the Law of 3rd July 1985 cannot be claimed whereas it is not disputed that the TURNER company is the holder of the patrimonial rights, including the right to adapt the work and therefore to introduce a colorized version.

11. The closing order was pronounced on 17th February 1994.

III

1. It is first necessary to state that there is no case against Me Hubert LAFONT, ex-officio as court administrator in the compulsory reorganization of LA CINQ, as he has shown that his task ended on 3rd April 1992 when the procedure was converted into a compulsory liquidation procedure and Me PIERREL was court-appointed as liquidator.

2. Moreover, the interventions before the Court of Re-mand, in accordance with their bylaws, of Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europdenne des Realisateurs de l'Audiovisuel (FERA), Syndicat Francis des Realisateurs de Television CGT, Syndicat National des Techniciens de la Production Cinematographique et de Television and Societe des Auteurs et Compositeurs Dramatiques (SACD) have not been debated in regard to their interest in acting thus; they must accordingly be declared admissible.

3. The TURNER company first opposes to Messrs and Mrs HUSTON and Mr MADDOW and the intervenors that U.S. law should be applied to determine who has the status of the film's author; it designates the producer, i.e. LOEW's Inc., which obtained the copyright on 2nd May 1950 and whose rights, renewed on 2nd May 1977, were transferred to the TURNER company; the action of Messrs and Mrs HUSTON and Mr MADDOW to protect rights which they have not acquired is therefore not admissible.

4. But the judges in first instance correctly stressed the "very different conceptions" of U.S. and French laws, the first focusing exclusively on the protection of economic rights without referring to the creative act underlying the inalienable moral right recognized by French law, viz. Section 6 of the Law of 11th March 1957, at the time applicable, which provides that "the author enjoys the right to respect for his name, his status, his

work - this right is attached to his person - it is perpetual, inalienable and imprescribable - it is transmitted after death to the author's heirs".

John HUSTON and Ben MADDOW, of whom it is not disputed that the first is the co-author of the screenplay and the director of the film entitled "ASPHALT JUNGLE" and the second the co-author of the same film, as already referred to under (I-1), are in fact its authors, having created it, and whereas they are therefore, in the meaning of the aforesaid law, vested with the corresponding moral right, which is part of public law and therefore mandatorily protected.

5. Section 1 of Law No 64-689 of 8th July 1964 on the application of the principle of reciprocity with respect to copyright provides as follows:

"Subject to the provisions of the international conventions to which FRANCE is a party, in the event that it is noted, after consultation of the Minister of Foreign

Affairs, that a State does not provide adequate and effective protection for works disclosed for the first time in FRANCE, irrespective of the form thereof, works disclosed for the first time in the territory of the said State shall not benefit from the copyright protection recognized by French law. However, the integrity or authorship of such works may not be violated. In the case provided for in paragraph 1 heretofore, royalties shall be paid to organizations of general interest designated by decree."

The defect in protection thus likely to affect the foreign work on the conditions governing reciprocity, as laid out in paragraph 1, can only concern its economic aspects, i.e. the patrimonial rights attached thereto, in that it is limited by the general mandatory rule providing for respect of an author's moral right as proclaimed without reservation in paragraph 2.

6. It follows that the moral rights attached to the person of the creators of the work entitled "ASPHALT JUNGLE" could not be transferred and, therefore, the judges in first instance correctly ruled that Messrs and Mrs HUSTON and Ben MADDOW were entitled to claim recognition and protection thereof in FRANCE.

7. However, the TURNER company, which it is not disputed is the holder of the author's economic rights, maintains that these rights include the right to adapt the work and therefore to colorize the film entitled "ASPHALT JUNGLE", arguing that it cannot be maintained that this denatures the work; Me PIERREL, ex-officio, follows the same argument, submitting that the colorized version of the film is merely an adaptation of the original black-and-white version which is left intact and is therefore not affected.

8. However, "colorization" is a technique based on the use of computer and laser and it makes it possible, after

transferring the original black-and-white tape onto a videographic media, to give color to a film which did not originally have color; the application of this process is in no event to be considered an adaptation, defined as "an original work both in its expression and in its composition", even if it borrows formal elements from the pre-existing work; colorization, far from meeting these criteria, in fact merely consists in modifying the work by adding an element thus far not part of the creator's aesthetic conception.

9. The judges in first instance in the present case have precisely pointed out that the aesthetic conception which earned John HUSTON his great fame is based on the interplay of black and white, which enabled him to create an atmosphere according to which he directed the actor and selected the backdrops; moreover, he expressed himself clearly about his film entitled "The Maltese Falcon" when stating, "I wanted to shoot it in black and

white like a sculptor chooses to work in clay, to pour his work in bronze, to sculpt in marble".

In 1950, while color film technique was already widespread and another option was available, the film entitled "ASPHALT JUNGLE" was shot in black and white, following a deliberate aesthetic choice, according to a process which its authors considered best suited to the character of the work.

10. Therefore, the film's colorization without authorization and control by the authors or their heirs amounted to violation of the creative activity of its makers, even if it should satisfy the expectations of a certain public for commercially obvious reasons; the use of this process without the agreement of Messrs and Mrs HUSTON and Ben MADDOW infringed the moral right of the authors as mandatorily protected under French law; Messrs and Mrs HUSTON and Ben MADDOW have therefore good grounds to petition the court for

reparation of their prejudice at the hands of the TURNER company, and they will therefore be allotted FRF 400,000 by way of damages and costs for the damage done; moreover, the judges in first instance correctly recognized their right to demand that LA CINQ SA be forbidden to broadcast the modified version of the film entitled "ASPHALT JUNGLE".

11. It is constant that, contrary to the act required by the Court of First Instance, LA CINQ SA broadcast the colorized version of the film entitled "ASPHALT JUNGLE" further to a judgment by the Court of Appeal of PARIS, quashed by the Cour de Cassation on the conditions reiterated under (I-5); this broadcasting is also a direct and definite violation of the moral right whose protection was demanded by Messrs and Mrs HUSTON and Ben MADDOW, who are also wellfounded to demand reparation on this head; the Court has the elements needed to allot them the sum of FRF 200,000 by

reversing the referred judgment on the pronounced cognizance.

12. Me PIERREL, ex-officio as court-appointed liquidator of LA CINQ SA, loses his case and will bear the costs; therefore, his claim under Section 700 of the New Code of Civil Procedure is inadmissible.

Equity does not justify the claim lodged ex-officio by Me LAFONT under this Section.

On the other hand, the same consideration of equity prompts the allotment, in application of the said Section 700 of the New Code of Civil Procedure, of FRF 60,000 to Messrs and Mrs HUSTON and Ben MADDOW and FRF 2,000 each to SRF, SFA, FERA, Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television.

ON THESE GROUNDS

The Court, judging publicly, after hearing all parties and in last instance as Court of Remand; Pursuant to the closing order pronounced on 17th February 1994;

1. DECLARES that the TURNER ENTERTAINMENT Co. was entitled to petition the Court of Referral;

2. DECLARES admissible the interventions, before the same court, of Societe des Auteurs et Compositeurs Dramatiques (SACD), Societe des Realisateurs de Films (SRF), Syndicat Francais des Artistes Interpretes (SFA), Federation Europeenne des Realisateurs de l'Audio-visuel (FERA), Syndicat Francais des Realisateurs de Television CGT and Syndicat National des Techniciens de la Production Cinematographique et de Television;

3. DECLARES THAT THERE IS NO CASE against Maitre Hubert LAFONT, ex-officio;

4. CONFIRMS the judgment pronounced on 23rd November 1988 by the Court of First Instance of PARIS,

subject to the cognizance and the provisions dismissing application of Section 700 of the New Code of Civil Procedure in favor of Messrs and Mrs HUSTON and Ben MADDOW and the secondary intervenors;

Judging again and adding:

5. STATES that the colorization of the film entitled "ASPHALT JUNGLE" by the TURNER ENTERTAINMENT Co. and its broadcasting by LA CINQ SA in this version, contrary to the will of the authors or their heirs, has violated their moral right;

6. ORDERS the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW FOUR HUNDRED THOUSAND FRENCH FRANCS (FRF 400,000) by way of damages and costs;

7. ORDERS Maitre PIERREL, ex-officio as court-appointed liquidator of Societe d'Exploitation de la

Cinquieme Chaîne (LA CINQ SA) to pay them TWO HUNDRED THOUSAND FRENCH FRANCS (FRF 200,000) in damages and costs;

8. DECLARES its claim on the basis of Section 700 of the New Code of Civil Procedure inadmissible and dismisses the same claim by Maitre Hubert LAFONT, ex-officio;

9. ORDERS it jointly and severally with the TURNER ENTERTAINMENT Co. to pay Messrs and Mrs HUSTON and Ben MADDOW SIXTY THOUSAND FRENCH FRANCS (FRF 60,000) under the same Section 700 of the New Code of Civil Procedure and to pay TWO THOUSAND (FRF 2,000) to each of the intervenors referred to under (2), except SACD, which has lodged no claim in this respect;

10. ORDERS it further, jointly and severally with the TURNER ENTERTAINMENT Co., to bear the full cost of the appeal and authorizes SCP JULLIEN-

LECHARNY-ROL and SCP LISSARRAGUE & DUPUIS, avoués, to collect the said costs directly under Section 699 of the New Code of Civil Procedure.

THIS JUDGMENT WAS PRONOUNCED AND SIGNED BY:

Mr THAVAUD, President
Mrs CLEM, District Registrar
[ELR 16:10:3]

Paramount Pictures prevails in copyright infringement action over "Star Trek VI"

In 1982, Paramount Pictures released "Star Trek II: The Wrath of Khan." In June 1983, Samuel Segal submitted a screenplay, entitled "Star Trek IV: Inside the

Klingon Empire," to an executive at Paramount. Paramount, in July 1983, returned the screenplay to Segal. The studio subsequently released the third through sixth "Star Trek" films.

In 1992, Segal brought a copyright infringement action alleging that the 1991 film "Star Trek VI: The Undiscovered Country" infringed his screenplay.

A Federal District Court, in granting summary judgment to Paramount, found that "The Undiscovered Country" featured the setting, characters, and action sequences developed over the course of the "Star Trek" television and film series beginning in 1966. The film itself, as described by Judge Robreno, was "a science fiction tale of the efforts of the long-warring United Federation of Planets, the Klingon empire, and various other nations of the universe to change the course of their destructive history of violent confrontation and bring about intergalactic peace."

Paramount's film and Segal's film shared many of the same characters, observed the court, as well as a similar setting and certain common action sequences, but this was "not surprising" because these were all features common to the "Star Trek" television and film series. Furthermore, the fact that there were some common features was insufficient to show substantial similarity given the "overwhelming" differences between the works. It was noted that the works constituted "opposites of expression" with respect to the theme of peaceful relations among nations, and that there was no genuine issue of material fact as to substantial similarity.

The court further found that there was no genuine issue of fact as to whether the producers of "The Undiscovered Country" had access to Segal's screenplay; rejected Segal's claim of copyright infringement under a theory of co-authorship, stating that there was no evidence of Paramount's intent to jointly merge the two screenplays

at issue; and ruled that federal copyright law preempted Segal's pendent state law claims of unfair competition and unjust enrichment.

Segal v. Paramount Pictures, 841 F.Supp. 146, 1993 U.S. Dist. LEXIS 18316 (E.D. Pa. 1993) [ELR 16:10:8]

Warner Bros. prevails in copyright infringement case involving "Defending Your Life"

"The Last Tribunal," an unpublished novella by John Kretschmer, depicting the death and "judgment" of advertising executive Richard Meyer, is a "sober, grim work," according to Federal District Court Judge Charles S. Haight, Jr.

In contrast, the film "Defending Your Life" is a "light-hearted romantic comedy" portraying the post-death experiences of advertising executive Daniel Miller.

The court, in granting summary judgment to Warner Bros. in Kretschmer's infringement action, found that the works at issue were not substantially similar and that any similarities between the works related only to non-protectible ideas and scenes a faire.

The basic premise of both works, i.e., judgment in the afterlife, was an idea or a theme, observed Judge Haight, and was not protectible under copyright law. After reviewing the evidence, the court found that no reasonable jury could conclude that the film was copied from Kretschmer's book.

Judge Haight further found that the works differed as to "total concept and feel," pace and structure, setting, and characters. "Defending Your Life" did not

wrongfully appropriate any expression of Kretschmer's ideas, concluded the court, in dismissing the complaint.

Kretschmer v. Warner Bros., 1994 U.S. Dist. LEXIS 7805 (S.D.N.Y. 1994) [ELR 16:10:9]

Warner Bros. prevails in copyright infringement dispute involving screenplay and book, but court remands attorneys' fee award

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to Time Warner in a copyright infringement action brought by Gyorgy Fodor.

In February 1988, Fodor submitted the screenplay "Stealth" to Warner Bros. The company did not respond to the submission.

Warner, pursuant to a February 1987 agreement, published the hardcover edition of Dennis Anderson's book "Target Stealth" in February 1989.

In his infringement action, Fodor argued that common errors in his screenplay and Anderson's book established a prima facie case of copying. However, stated the court, "if Warner did not have access to the screenplay prior to the writing of 'Target Stealth,' even striking similarities between the two works must be deemed fortuitous."

In response to Fodor's observation that the February 1989 copyright registration form for Target Stealth stated that "creation...was completed" in 1988, the court noted that the version of Target Stealth for which Anderson sought registration was completed in 1988. In all, Fodor did not introduce facts which served to contradict Warner's evidence establishing prior independent creation.

The court dismissed Fodor's state law claims, reversed the District Court's award of attorneys' fees to Warner, and remanded the matter for reconsideration.

The court's opinion bears a notice stating "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R.36-3."

Fodor v. Time Warner, Inc., 1994 U.S.App.LEXIS 4250
(9th Cir. 1994) [ELR 16:10:9]

"Jurassic Park" parties prevail in copyright infringement action

Geoffrey T. Williams brought a copyright infringement action against the author and publisher of the novel

"Jurassic Park" and against the screenplay author, producer, and distributor of the "Jurassic Park" film.

During the years 1985 through 1988, Williams published four fictional dinosaur adventure stories for children. The setting of each book was "Dinosaur World," a place where visitors "tour and observe dinosaurs and other pre-historic animals in a presumably safe, man-made, controlled environment."

Federal District Court Judge McKenna noted that the Crichton parties, for purposes of the instant motion for summary judgment, conceded access. Williams argued that the total concept and feel of his works was substantially similar to the "menacing mood" of Jurassic Park. The court disagreed, stating that although Williams' works contained chase scenes, there was an "underlying sense of security that pervades these works that would preclude a reasonable jury from finding its mood

substantially similar" to that of the Crichton works which contained actual incidents of violence.

Copyright protection does not extend to themes commonly repeated in a certain genre, recalled Judge McKenna, and similarity in the basic setting of a fictional work is not by itself actionable. The similarities in the settings of the works at issue all flowed from the concededly uncopyrightable concept of a dinosaur zoo, observed the court.

Although there was a basis to find similarity between the pace of Jurassic Park and that of one of Williams' books, the court pointed out that the time sequence of the works differed, as did the quantity and quality of the characters and the sequence of events. In all, Williams did not present sufficient evidence to support a finding of substantial similarity and the court, accordingly, granted the Crichton parties' motion for summary judgment.

Williams v. Crichton, 860 F.Supp. 158, 1994 U.S.Dist.LEXIS 11506 (S.D.N.Y. 1994) [ELR 16:10:9]

Spielberg parties may enforce arbitration clause in script submission agreement

Amblin Entertainment may enforce the arbitration provision in its script submission agreement, a California appellate court has ruled.

In early 1990, Barry Spinello signed Amblin's agreement in connection with his script "Adrian and the Toy People." The company rejected the script.

In 1992, it was reported that Amblin and Universal City Studios had purchased a script written by Gavin Scott, entitled "Small Soldiers." The script was, as quoted by Judge Miriam A. Vogel, a "fantasy adventure

about a young boy's escapades with an army of toy soldiers who come to life." Spinello, concluding that "Small Soldiers" was based on his idea, sued Amblin, Universal, and Steven Spielberg in a Los Angeles trial court alleging breach of contract and various tort claims.

Amblin removed the action to a Federal District Court and then sought to compel arbitration. The court denied the motion, dismissed the conversion claim, and remanded the action to the trial court.

The trial court denied Amblin's motion to compel arbitration, finding that the arbitration clause was "procedurally and substantively unconscionable," and therefore unenforceable.

In reversing the trial court ruling, Judge Vogel stated that the rules of procedural and substantive unconscionability relied upon by the trial court were not relevant to the enforcement of an agreement to arbitrate. The court should have considered whether the submission

agreement was a contract of adhesion, and should have found, according to Judge Vogel, that it was not. Spinello, an experienced producer and writer who was represented by a literary agent, had the opportunity to negotiate and did not do so. Spinello also had submitted the script to other producers, several of whom did not require the execution of submission agreements.

Judge Vogel rejected the argument that Amblin's failure to require the execution of a submission agreement in 1988 when Spinello previously submitted his script meant that the arbitration provision would not apply. The arbitration provision stated that "any dispute" arising out of the agreement, specifically including Amblin's determination that it had the right to use material containing features or elements similar or identical to those contained in Spinello's script, would be submitted to arbitration and that, except as so provided, Spinello released Amblin from any and all claims that might arise

in relation to the submitted material. Spinello "clearly and unequivocally" agreed to arbitrate all disputes about the script. In the court's view, Spinello, by signing the 1990 agreement, waived any different rights he might have had based on the unconditional review of the script in 1988.

The matter was remanded to the trial court with directions to grant Amblin's motion to compel arbitration of all claims raised by Spinello.

Spinello v. Amblin Entertainment, 34 Cal.Rptr.2d 695, 1994 Cal.App.LEXIS 1112 (Ca.Ct.App. 1994) [ELR 16:10:10]

Film's use of copyrighted mobile as a prop was not a "copy" for purposes of infringement action

Graphic artist Carola Amsinck created artwork consisting of pastel-colored teddy bears, and licensed the "Baby Bears Artwork" for use on various items, including a "Baby Bears Musical Mobile." The mobile and its packaging identified Amsinck as the copyright owner of the work.

In 1989, Columbia Pictures Industries and RCA/Columbia Pictures Home Video released a film entitled "Immediate Family." The film contained several scenes featuring the mobile in a baby's nursery; the mobile appeared for a total time of about one minute and thirty-six seconds. The Columbia parties did not seek Amsinck's permission to display the mobile and did not credit the artist as the creator and copyright holder of the design.

A Federal District Court in New York granted the Columbia parties' motion for summary judgment in Amsinck's copyright infringement case.

Judge Keenan relied on a definition of "copy" as "...that which comes so near the original as to give to every person seeing it the idea created by the original." To establish copying, a party must prove mechanical copying with "some degree of permanence;" courts will look to a functional test to see whether the use has "the intent or the effect of fulfilling the demand for the original" (citing 3 M.Nimmer, Nimmer on Copyright, section 13.05[B], 13-192, quoting Berlin v. E.C.Publications, Inc., 329 F.2d 541, 545 (2d Cir. 1964).

The Columbia parties' display of the mobile was different in nature from Amsinck's copyrighted design, stated the court - the use was not meant to supplant the demand for Amsinck's work. The use was not a mechanical copy, was "fleeting and impermanent," and was not a copy for the purposes of a copyright infringement action, declared Judge Keenan.

The court then commented that even if Amsinck had proven that copying occurred, the Columbia parties would be entitled to a fair use defense. Again, the use of the artwork did not prejudice sales of Amsinck's design, the complained-of "copying" could not be used as a substitute for Amsinck's work, and the artist suffered no demonstrable harm from the use of her work. This "key factor," announced Judge Keenan, "all but requires a finding of fair use..."

In considering other fair use factors, the court observed that the copyrighted work was not used in advertisements, did not improperly capitalize upon Amsinck's work, and did not involve a directly competing use - the film's reproduction of the artwork would not serve as a suitable substitute for someone who wished to own a mobile bearing Amsinck's artwork.

The Columbia parties did not seek to profit directly from Amsinck's "creative, imaginative and original"

design and the court declined to find that the "short-term" display of the mobile in the film would preclude a finding of fair use.

Amsinck v. Columbia Pictures Industries, Inc., 862 F.Supp. 1044, 1994 U.S.Dist.LEXIS 10154 (S.D.N.Y. 1994) [ELR 16:10:10]

CBS may not bar restaurant from using the name "Television City"

CBS Inc. may not prevent David and William Liederman from using the name "Television City" for a restaurant in New York City, a Federal District Court Judge has ruled.

CBS, since 1952, has owned and operated "Television City," a facility in Los Angeles used for the production

of television shows. The company registered the mark in 1988 in connection with television production services and entertainment services.

The Liedermans proposed to open a "theme" restaurant and planned to sell television memorabilia as well as serving food.

Judge Kevin Thomas Duffy, in reviewing the factors relevant to a determination of likelihood of confusion, noted that CBS was not entitled to protection "in every area where television is an underlying theme." There were various registrations similar to CBS's mark for the sale and repair of television sets and appliances - uses no more likely to cause confusion with CBS's mark than the Liedermans' proposed use, stated the court. Thus, although the mark was strong within the field of television production, it was limited to that and related fields.

It then was noted that there was "little or no overlap between the services provided b[y] each of the parties;"

that the production facility and the proposed restaurant were on opposite coasts; and that it was not likely that a television fan would visit one facility "at the expense of the other."

CBS claimed that it was planning to open a restaurant which would feature the history of television. But the restaurant business is not "related" to television production, observed the court, and CBS's mark thus would not necessarily protect the endeavor.

The company's "Television City Cafe" employee cafeteria in Los Angeles, run by Marriott through a contract with CBS, was "far removed" from the type of restaurant proposed by the Liedermans, continued the court, in finding that the two establishments would not compete with each other.

It appeared to the court that the Liedermans did not act in bad faith, that the quality of the as-yet unopened restaurant would be speculative, and that the Liedermans'

restaurant would rely on public tourism while the primary function of CBS's studio was to produce television programs.

In all, there was no showing of likelihood of confusion and CBS did not demonstrate a likelihood of success on the merits so as to warrant issuing a preliminary injunction.

Judge Duffy rejected CBS's claims under section 1125 of the Lanham Act, under New York's unfair competition law, and under the state's anti-dilution statute.

CBS Inc. v. Liederman, 866 F.Supp. 763, 1994 U.S. Dist. LEXIS 15027 (S.D.N.Y. 1994) [ELR 16:10:11]

Creator of "Colorblaster" prevails in dispute over submission of airbrush toy idea

In March 1988, an employee of Kenner Parker Toys, the predecessor in interest to Tonka Corporation, began to develop the airbrush toy known as the "Colorblaster." The toy was introduced to retailers in the fall of 1990, and was exhibited at the February 1991 Toy Fair.

A principal of AEB & Associates Design Group conceived of an idea for an airbrush toy in the spring of 1988. A designers' representative presented the "Jet Art" proposal to six toy companies, all of which rejected it.

In April 1988, the designers' representative signed Kenner's "Agreement to Hold Confidential" which set forth the rights and obligations of the parties with respect to submissions. Kenner claimed that it rejected the Jet Art submission at a meeting in November 1988. At the time of the meeting, the Kenner representative was

not aware that a company employee was working on an airbrush toy.

AEB argued that Kenner asked the company if it could make a prototype of the Jet Art toy, and that AEB's representative sent the prototype to Kenner. However, Kenner's records indicated that the Jet Art submission never was received at the company's Cincinnati office. In December 1988, the designer's representative returned the Jet Art submission to AEB.

In 1992, AEB sued Kenner, alleging breach of an implied contract, unjust enrichment, and misappropriation.

Federal District Court Judge Kram found that the confidentiality agreement was enforceable against AEB, and that the agreement governed Kenner's obligations with respect to the Jet Art prototype. The court, accordingly, rejected AEB's implied contract and unjust enrichment claims.

Judge Kram stated that the agreement was not a contract of adhesion - it was not shown that Kenner refused to negotiate the terms of the agreement - and the agreement was "both within the reasonable expectations of the parties and substantively fair."

In turning to the misappropriation claim, the court agreed with Kenner that in light of similar designs for airbrush toys, the Jet Art idea lacked the requisite element of novelty.

Even if AEB could establish that the Jet Art toy was a novel concept, the court found that the company did not rebut Kenner's evidence of independent development, and therefore granted Kenner's motion for summary judgment dismissing the misappropriation claim.

Judge Kram concluded by denying AEB's motion to amend its complaint to assert a cause of action for breach of contract. Again, even if the Jet Art submission could be considered novel, the court found that the

terms of the confidentiality agreement precluded AEB from pleading a viable cause of action for breach of the agreement. The agreement provided that Kenner would not be liable for the independent creation of a toy that was similar to an outside submission.

AEB & Associates Design Group, Inc. v. Tonka Corporation, 853 F.Supp. 724, 1994 U.S.Dist.LEXIS 6829 (S.D.N.Y. 1994) [ELR 16:10:12]

Hershey Foods prevails in action alleging misappropriation of idea for television commercial

A Federal Court of Appeals has affirmed, without issuing an opinion, a District Court decision granting summary judgment to Hershey Foods in an action alleging

that the company misappropriated an idea for a television commercial.

Forrest Ball, in 1987, agreed to advise Cadbury USA on the packaging of its candy products. Ball developed a "Cadbury Kids" advertising concept which featured children in different settings enjoying the candy bars; Ball hired an artist to sketch his ideas. Cadbury did not use Ball's ideas and returned the sketches to the artist. A Cadbury employee promised Ball that if the company ever used the "Cadbury Kids" ideas, Ball would, as quoted by Judge Covello, "participate in its planning and implementation and would be compensated accordingly."

In May 1988, Cadbury terminated Ball's employment. In August 1988, Hershey Foods purchased some assets of Cadbury USA.

In 1987, the Ogilvy and Mather advertising agency produced a campaign for Hershey Miniatures candy

which conveyed the theme that the product may be enjoyed by family members with different preferences in candy. In a subsequent commercial, entitled "Hostess," the theme was evoked by the portrayal of a child's tea party during which each stuffed animal guest was served a different candy product.

The advertising agency employees who developed the "Hostess" commercial did not discuss the idea with anyone prior to their April 1989 presentation to a Hershey manager, and never saw Ball's artwork. One of Ball's commercials, entitled "Tea Party," had included five young girls, dressed up, and having a tea party at which they ate Cadbury bars. In September 1989, about one month after the "Hostess" commercial was filmed, Ball, during a meeting with Hershey's packaging department, presented many advertising ideas, including "Cadbury Kids."

Ball initially filed an action in state court, claiming that he had an implied-in-fact contract with Hershey under which the company would pay Ball for any use of the "Cadbury Kids" concept. When the matter was removed, Judge Covello, in a footnote comment, pointed that assuming that there was a contract, Cadbury (or later, Hershey) would have had to re-hire Ball to work on the project.

Judge Covello, after finding that the court possessed jurisdiction in that there was a "reasonable possibility" that the amount in controversy would exceed \$50,000, noted that Connecticut courts have not yet decided a case concerning the misappropriation of an idea. The "clear consensus" among the courts that have considered the issue, stated Judge Covello, is that the elements of a claim for misappropriation of an idea are "(1) a legal relationship must exist between the parties, and (2) the idea must be novel and concrete."

The court found that Ball had not established the existence of a legal relationship with Hershey and also found that the tea party concept was not novel. Furthermore, even if Ball had established a legal relationship and the novelty of his idea, it was found that Hershey correctly raised the defense of independent creation.

Judge Covello, stating that the affirmative defense was "dispositive," discussed Hershey's contention that it did not have access to Ball's idea when it created the tea party commercial. Some of Hershey's employees may have seen Ball's work, but Ball did not present evidence indicating that any such person was involved in the production of the commercial at issue.

Hershey also showed that although the commercials portrayed tea parties, the details and themes of the two works were very different. The differences between the ideas precluded the inference that Hershey used Ball's

idea, stated Judge Covello, in granting summary judgment to the company.

Ball v. Hershey Foods Corporation, 842 F.Supp. 44, 1993 U.S. Dist. LEXIS 19688 (D.Conn. 1993); 14 F.3d 591, 1993 U.S. App. LEXIS 34338 (2d Cir. 1993) [ELR 16:10:12]

Court rules that sale of records constitutes publication under Copyright Act of 1909, and remands matter involving ZZ Top's allegedly infringing song

In 1948, John Lee Hooker and Bernard Besman wrote a song called "Boogie Chillen;" a recording of the song was sold to the public later that year. Hooker assigned his rights in the song to Besman. Besman, who became

the sole proprietor of La Cienega Music Company, registered the song with the Copyright Office in 1967.

Hooker and Besman wrote a second version of Boogie Chillen in 1950. Besman eventually received full ownership rights in the second work and registered it in 1970.

In 1970, Hooker recorded the album "Canned Heat," on which a third version of Boogie Chillen appeared. La Cienega authorized this version, and Besman registered it with the Copyright Office in 1992.

ZZ Top, in 1973, released an album containing a song called "La Grange."

In 1991, Besman became aware of "La Grange," and notified Hamstein Music Company, the publisher of the song, of a possible copyright infringement claim.

Hamstein filed a declaratory judgment action in Texas and Besman filed an action in a Federal District Court in California.

The California court dismissed the complaint, ruling that the recordings were in the public domain; the court expressly declined to determine whether the statute of limitations had expired.

Federal Court of Appeals Judge Diarmuid O'Scannlain, in considering when the various versions of Boogie Chillen were published within the meaning of the Copyright Act of 1909, declined to follow *Rosette v. Rainbo Record Mfg. Corp.*, 354 F.Supp. 1183 (S.D.N.Y.), *aff'd per curiam*, 546 F.2d 461 (2d Cir. 1976) in which the Second Circuit adopted a District Court decision that the sale of phonograph records is not publication under the 1909 Act.

Rather, the court referred to the apparent majority rule, as articulated in 1 Nimmer on Copyright (1992) section 4.05[B], at 4-26, which provides that publication occurs upon the public sale or other distribution of phonorecords. It also was observed that *Rosette* "reduces the

incentive to immediate compliance with the 1909 Act" since an artist would be entitled to common law copyright protection while selling recordings. Upon copyrighting the work with the Copyright Office, the statutory copyright owner then would receive the 28 year term of federal protection. Rosette thus might encourage artists to delay complying with the requirements of the Copyright Act and thereby receive "longer" copyright protection, noted Judge O'Scannlain, who held that selling recordings constitutes "publication" under the Copyright Act of 1909 and that the Boogie Chillen compositions were published in 1948, 1950, and 1970, respectively.

The court observed that the record did not show whether Besman complied with the requirements of the 1909 Act. Any omission with respect to compliance was not decisive in the case of the 1948 and 1950 versions of the song, for even if Besman did so comply, the songs

entered the public domain in 1976 and 1978, respectively, when the statutory copyrights, if obtained, would have expired. If Besman complied with the statutory requirements, the 1970 version of Boogie Chillen was copyrighted upon its publication in 1970. A lack of compliance might have placed the work into the public domain upon publication; the court remanded the matter to the District Court for further findings.

Judge Ferdinand F. Fernandez, concurring and dissenting, would have followed Rosette's position (based on *White-Smith Music Pub.Co. v. Apollo Co.*, 209 U.S.1 (1908) that because a record is not a copy of the underlying work, it therefore is not a publication of the underlying work. A common law copyright holder would not necessarily have greater rights than a party who has registered a copyright since the right to sue for an allegedly infringing use of the material depends upon whether the work has been registered.

Furthermore, an author would not be entitled to recover a section 1(e) royalty for the use of a work beyond the time that an author could have recovered such payments had the work been registered at the time of the first release of a recorded performance. Thus, an author who does not register in a timely fashion cannot extend the time during which the work can be exploited, stated Judge Fernandez, who did not consider the protection available if an author actually publishes a work, as opposed to releasing a recording of its performance.

Under the majority's view, a record is a publication for the purpose of divesting the author's copyright protection in the underlying musical work, but would not be a publication for the purpose of investing the musical work with protection. Placing a copyright notice upon the record itself "would do no good at all," stated Judge Fernandez, because notice must be affixed to "each copy" of a work.

According to Judge Fernandez, his "untidy package" would protect an author, whereas the "untidy package" wrapped by the majority would protect "those who would poach on the author's creativity." His position would make no difference in the result regarding the recorded 1948 and 1950 versions of Boogie Chillen, and there would be no difference as to the 1970 version if a copyright was obtained under the 1909 Act when the version was released, noted Judge Fernandez. However, if Besman did not obtain a copyright under the 1909 Act at or before the release of the recorded 1970 version, Judge Fernandez's approach could affect the result of the matter.

La Cienega Music Company v. ZZ Top, 1995
U.S.LEXIS 295 (9th Cir. 1995) [ELR 16:10:13]

Court reviews ASCAP's proposed changes to consent decree

A Federal District Court in New York, pursuant to its continuing jurisdiction to oversee a 1950 consent judgment, as amended in 1960 (referred to by the court as the consent decree), issued rulings, in July 1994, with respect to ASCAP's motion to amend certain provisions of the decree relating to the distribution of royalties to the society's members.

ASCAP has established a system of classifying musical compositions in order to determine the royalties payable for the public performances of a member's work. The society proposed the amendments, according to the court, to more effectively compete with Broadcast Music, Inc., to update and simplify the distribution rules, and to "ensure that payments to members more accurately reflect the value of different types of

performances in the marketplace today." The government did not object to the proposed changes.

In considering the objections of several composers and music publishing entities, Judge Conner rejected the argument that ASCAP's Board of Directors approved the changes on the basis of a lack of information or on misinformation.

The court proceeded to approve the proposed changes to Attachment A - the Writers' Plan of Distribution, stating that the changes were consistent with the antitrust policies underlying the consent decree and were the product of sound business judgment by ASCAP's Board of Directors.

However, it was found that ASCAP did not offer a significant reason to support a proposed change to Attachment C -The Weighting Rules. The change would have eliminated from the Weighting Rules the specific performance weight given background, cue, or bridge

music on a durational basis, and instead placed that percentage in the Weighting Formula. The provisions of the Weighting Formula and any changes in the formula are not within the court's jurisdiction absent objection by the government. ASCAP did not argue that the change would further the antitrust purposes of the consent decrees and offered no justification for the change apart from uniformity with other performance percentage weights. Judge Conner agreed to approve changing the percentage at issue from 36 percent to 42 percent.

The court next approved changes in the weights accorded music used in conjunction with advertising, promotional and public service announcements, but retained the actual percentages in the Weighting Rules so that ASCAP must continue to apply to the court for any future changes.

ASCAP further proposed that celebrity signature songs and music used to introduce program segments should

be given credit as background music rather than as themes, stating that it has been "unduly time-consuming and inefficient to monitor this music for theme categorization." The court agreed with the ASCAP members who objected to the change, finding that "[m]usic that introduces and identifies program segments may be just as valuable as music that introduces the program itself. Such music cannot logically be categorized as background music because it simply is not background music. It is theme music in that it serves to identify a program or a segment thereof...[T]he performance value of these program segment themes is not necessarily proportional to the duration of their play." And awarding only background credit for music that introduces program segments, and is therefore in reality theme music, continued Judge Conner, would not further the goals of the 1960 order, i.e., to ensure that ASCAP members are

treated fairly and equitably vis-s-vis both ASCAP and one another.

ASCAP proposed to change the jingle definition in the Weighting Rules as it related to works not originally written for use in advertising, promotional, or public service announcements. Such works have been credited as jingles if they did not have five feature performances in ASCAP's surveys over the five preceding years. ASCAP proposed that such music should be credited as a jingle if it earned fewer than 150 feature performance credits in the radio and television surveys in the five preceding years.

ASCAP also proposed a change in a Weighting Rule as it related to the reduction of credit for television feature performances of less than 45 seconds, and that only short television performances of non-qualifying works should receive reduced credit.

The court approved the changes.

ASCAP has had a forty-year principle that "non-feature uses of works with a substantial prior history of feature performance 'qualify' for more than the minimum credit otherwise given unknown or little-known compositions for the same uses." According to ASCAP, the required feature credit thresholds for becoming a qualifying work have become too easy to reach, with too many works receiving qualifying status. The court agreed that ASCAP was entitled to change the requirements for qualification in the relevant Weighting Rule, along with other changes relating to qualification.

ASCAP obtained permission to distinguish credits for performances on radio programs and local, public, and cable television programs based on time-of-day factors, just as the society does for network television programs. ASCAP stated that it planned to reduce credit for overnight performances because of "the lesser relative value of these performances."

United States v. American Society of Composers, Authors and Publishers, 156 F.R.D. 64, 1994 U.S.Dist.LEXIS 8998 (S.D.N.Y. 1994) [ELR 16:10:14]

Advertising jingle writer fails to obtain relief in dispute over distribution of ASCAP royalties

Songwriter Steve Karmen and other jingle writers have engaged in lengthy efforts to obtain greater ASCAP royalties.

ASCAP distributes its revenues, less deductions for operating expenses, to its members. The percentage of profits that each member receives depends upon the type of use to which the member's composition is put. A 1950 consent judgment (which superseded a 1941 consent decree), ordered that ASCAP's distribution to members be made "on a basis which gives primary

consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the members directly) periodically made by or for ASCAP."

The consent judgment was modified in a 1960 consent order which specified how the performance surveys were to be conducted, established a new system of "Weighting Rules" to determine the value of the various uses of licensed music, and put into effect a "Weighting Formula."

In 1981, the society's Board of Directors increased the "use value" for jingles from one percent to three percent. Karmen believed that the increase was insufficient and filed a complaint with the Board of Review. The Board of Review denied the request to increase the rate. A panel of the American Arbitration Association affirmed the decision of the Board of Review.

After further proceedings, an arbitration panel, in April 1991, ruled that the decision of the Board of Directors to increase the weight given to jingle performances from one to three percent was arbitrary, and declared the rule void.

A Federal District Court, in 1992, found that the arbitration panel's 1981 decision was final and held that Karmen lacked standing to seek a determination of the appropriate rate because he was not a party to the consent judgment.

Karmen unsuccessfully sought to vacate the 1992 order for lack of subject matter jurisdiction (ELR 16:1:26).

In affirming the District Court's decisions, Federal Court of Appeals Judge Cardamone first stated that, absent the consent judgment, the court would agree with Karmen that his motion to vacate or modify the arbitration panel's award would not lie in federal court. Karmen had sought relief under a state statute. But the

District Court has continuing jurisdiction over the ASCAP consent judgment. And the 1960 consent order dictated the authority of the arbitration panel and the nature of the relief permitted, observed the court. Thus, the District Court correctly ruled that Karmen's petition did not simply raise contract questions under New York law, but asked the state court to construe the terms of the consent decree. Such potential action by a state court would present a significant risk of frustrating the District Court's exclusive jurisdiction over the 1950 consent judgment; Karmen's motion therefore was within the federal court's subject matter jurisdiction.

Judge Cardamone proceeded to find that the arbitration panel was not authorized to modify any rule or regulation of ASCAP; that the panel's decision to void the three percent rule was final; and that Karmen, as a non-party to the consent judgment lacked standing to petition the District Court to enforce that judgment - Karmen did

not obtain standing to enforce the consent judgment simply because his state law action was within the District Court's jurisdiction over that judgment.

The court pointed out that ASCAP's Board, in 1991, restored the three percent rate for jingles, and by reducing the weight of commercials, increased the number of credits for jingles by 16 percent, "placing Karmen in a better position than he was in prior to arbitration."

United States v. American Society of Composers, Authors and Publishers, (In the Matter of the Application of Steve Karmen), 32 F.3d 727, 1994 U.S.App.LEXIS 22851 (2d Cir. 1994) [ELR 16:10:15]

United States Supreme Court finds that Amtrak is part of the government for purposes of the First Amendment, and remands dispute over artist's billboard

Artist Michael A. Lebron, as reported at ELR 16:3:19, 15:1:12, leased a large billboard known as the Spectacular in New York's Pennsylvania Station for January and February 1993. Lebron planned to display a photomontage, with a caption asking "Is it the Right's Beer Now?" The work, as described by then Federal District Court Judge Pierre N. Leval, included photographs of individuals drinking Coors beer, juxtaposed with a Nicaraguan village scene "in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a trail of fire, as if it were a missile." Additional text, appearing on either end of the montage, criticized the Coors family for its support of right-wing causes,

particularly the contras in Nicaragua. Judge Leval noted that Coors advertising uses the slogan "Silver Bullet" for its beer. Lebron's piece announced that Coors was "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

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

Lebron sued Amtrak, claiming, inter alia, violations of his First and Fifth Amendment rights. A Federal District Court concluded that because of the involvement of the federal government in Amtrak's structure and operation, the company's conduct, at least for First Amendment purposes, was governmental action; that Amtrak had violated the First Amendment by refusing to display

Lebron's work; and that Lebron was entitled to access to the billboard space.

A Federal Court of Appeals reversed the District Court decision on the ground that Amtrak, by the terms of the legislation that created it, was not a government entity, and that the government was not so involved with Amtrak that the corporation's decision could be considered federal action.

The United States Supreme Court, in February 1995, ruled 8-1, that Amtrak was part of the government for purposes of the First Amendment.

Justice Scalia, after careful consideration, first found that the court could properly reach Lebron's contention that Amtrak was not a private entity, even though the artist had expressly disavowed this point below. The court then reviewed the nature and history of Amtrak and of government-created corporations. Congress, modifying the Rail Passenger Service Act of 1970,

provided that Amtrak "shall be operated and managed as a for profit corporation." However, although incorporated under the District of Columbia Business Corporation Act, the federal statute requires Amtrak to have a board of nine members, six of whom are appointed directly by the President of the United States, and requires the corporation to submit various reports to the President and Congress.

Facing a question of first impression, the court concluded that Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." In addition to the above-noted factors, Justice Scalia pointed out that Amtrak was established under federal law to pursue federal governmental objectives, under the direction and control of federal governmental appointees.

Thus, "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."

The court expressed no opinion as to whether Amtrak's refusal to display Lebron's advertisement violated the First Amendment, remanding the matter for further proceedings on that issue.

Justice O'Connor, in dissent, reiterated the point that Lebron had disavowed, in the prior federal court proceedings, the argument that Amtrak was a government entity, and stated that the court was precluded from considering "this broad and unexpected question" because it was not presented in the petition for certiorari. For Justice O'Connor, the question was whether the alleged suppression of Lebron's speech by Amtrak, as a

concededly private entity, should be imputed to the government. Since Amtrak's decision to reject the billboard proposal was a matter of private business judgment, and not of government coercion, Justice O'Connor would have affirmed the Federal Court of Appeals decision.

Lebron v. National Railroad Passenger Corporation, 63 U.S.L.W. 4109, 1995 U.S.LEXIS 909 (1995) [ELR 16:10:16]

Court upholds decision rejecting Apple Computer's copyright infringement claims over graphical user interface, but remands ruling denying attorneys' fees

Apple Computer holds copyrights in the graphical user interface of the company's Lisa and Macintosh computers. In 1985, Apple granted Microsoft Corporation a

license to use and sublicense derivative works generated by Microsoft's Windows 1.0, a product with a graphical user interface similar to Apple's copyrighted work.

When Microsoft released Windows 2.03 and later, Windows 3.0 and Hewlett-Packard Company (Microsoft's licensee) introduced NewWave 1.0 and later, NewWave 3.0, Apple claimed that these versions exceeded the license.

A Federal District Court, after a series of rulings (ELR 14:8:11, 15:7:10), entered judgment in favor of the Microsoft parties on the basis of noninfringement for lack of virtual identity (Apple declined to oppose Microsoft's motion for summary judgment).

Federal Court of Appeals Judge Rymer found that the District Court's approach was "on target." It was noted that the District Court was confronted with a claim involving the alleged copying of a computer program's artistic look as an audiovisual work rather than program

codes registered as a literary work. The license agreement may have extended to some or most of the allegedly infringing material.

Judge Rymer agreed with the District Court that the license covered visual displays, not the Windows 1.0 interface itself, and that the court correctly decided to identify which visual displays in Windows 2.03, 3.0 and New Wave were licensed and which were not.

The District Court then properly proceeded to distinguish ideas from expression, stated Judge Rymer, and to "dissect" unlicensed elements in order to determine whether the remaining similarities lacked originality, flowed naturally from the basic ideas, or were one of the few ways in which a particular idea might be expressed "given the constraints of the computer environment."

Upon finding that the similarities in Windows 2.03 and 3.0 consisted only of unprotectible or licensed elements, and that the similarities between protectible elements in

Apple's works and NewWave were de minimis, the District Court did not err by concluding that, to the extent there remained any creative expression in how the works were put together, they could, as a whole, receive only limited protection. The appropriate standard for illicit copying when the range of protectible and unauthorized expression is narrow, observed Judge Rymer, is virtual identity. Thus, the graphical user interfaces in Windows 2.03, 3.0 and NewWave could not be compared for substantial similarity with the Macintosh interface as a whole.

The District Court had denied the Microsoft parties' requests for attorneys' fees. Judge Rymer, in light of the standard announced in the subsequently-decided case of *Fogerty v. Fantasy*, 114 S.Ct. 1023 (1994), remanded the matter for reconsideration of the issue.

Judge Rymer carefully discussed each of the above-noted conclusions, including the language of the 1985

license agreement, and the District Court's determination that there could be no infringement unless the works at issue were virtually identical.

Apple Computer, Inc. v. Microsoft Corporation, 35 F.3d 1435, 1994 U.S.App.LEXIS 25646 (9th Cir. 1994) [ELR 16:10:17]

Court affirms ruling that photocopying of scholarly articles by Texaco scientists is not fair use

A Federal Court of Appeals has upheld a Federal District Court decision (ELR 14:11:8) holding that a Texaco scientist who, without authorization, photocopied material from various scientific and technical journals violated the Copyright Act.

In response to a class action brought by the American Geophysical Union and other publishers of scientific and technical journals, the District Court had reviewed the use by Dr. Donald Chickering, II of photocopies of eight items from the "Journal of Catalysis." The parties stipulated that an initial trial would be limited to whether Texaco's copying was fair use, and that the fair use trial would focus on the copying by Dr. Chickering, who was randomly chosen from among Texaco's many researchers.

Chief Judge Jon O. Newman, considering the matter on interlocutory appeal, emphasized that the action did not involve the issue of whether photocopying of scientific articles is fair use, or whether photocopying of such articles is fair use "when undertaken by a research scientist employed at a for-profit corporation." The issue before the court was whether the District Court correctly

determined that the copying of the eight Catalysis articles was not fair use.

Before proceeding, the court questioned whether the fair use analysis should be applied to copies produced by mechanical means, observing that "whatever social utility copying of this sort achieves, it is not concerned with creative authorship." Nevertheless, Chief Judge Newman stated that the court was obliged to apply the traditional mode of analysis in assessing fair use purposes with respect to the photocopying in the instant case.

The copyrights in issue, according to the court, were those in individual journal articles; these copyrights generally are assigned by authors to the journal publishers. Pursuant to the stipulation of the parties, the copyrights at issue were those in the eight Catalysis articles found in Dr. Chickering's files; Academic Press, the publisher of Catalysis, owns the copyrights.

Chief Judge Newman, in evaluating the fair use factor dealing with the purpose and character of the allegedly infringing use, reviewed the circumstances under which the copies of the Catalysis articles were made. It appeared to the court that the photocopying was "archival," in that it occurred primarily in order to provide Dr. Chickering with his own personal copy of each article without Texaco's having to purchase another original journal.

The court agreed with Texaco that the District Court unduly emphasized the fact that Texaco was a for-profit corporation and allowed the for-profit nature of Texaco's activity to weigh against the company "without differentiating between a direct commercial use and the more indirect relation to commercial activity that occurred here." Texaco's status as a for-profit company was not irrelevant to the fair use analysis - the purpose and character of the use cannot be determined without

considering the nature and objectives of the user, declared Chief Judge Newman. Courts therefore should examine, among other factors, the value obtained by the secondary user from the use of the copyrighted material. And courts will not recognize a defense of fair use if the secondary use can be characterized as a form of "commercial exploitation."

The copying of the Catalysis articles was undertaken to facilitate Dr. Chickering's research and did not amount to "commercial exploitation," observed the court. However, as argued by the publishers, the photocopying could be viewed as a "factor of production" in connection with Texaco's efforts to develop profitable products. Viewed as such, it would be fair to require the company to pay copyright holders for the right to photocopy original articles.

The District Court correctly found that Texaco's copying was not "transformative." To the extent that a

secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original, explained Chief Judge Newman. An untransformed copy is likely to be used simply for the same intrinsic purpose as the original, and provides limited justification for a finding of fair use. Texaco's photocopying transformed the material object embodying the intangible article and, although providing Dr. Chickering with a more usable format for the articles, was not a transformative use of the copyrighted material.

The court also rejected Texaco's argument that Dr. Chickering's photocopying constituted a "reasonable and customary" use. In response to the dissent, Chief Judge Newman commented that Chickering's copies were for archival purposes, i.e., to assemble material for future reference, even if the material remained in a private office for "when a corporation invites such archival

copying by circulating items likely to be worth copying (whether articles or entire books), any distinction between individual and institutional archiving loses all significance."

Furthermore, the court stated that the concept of a transformative use did not apply to Dr. Chickering's copying simply because he was engaged in research, and, in all, agreed with the District Court that the first factor favored the publishers.

In turning to the second fair use factor relating to the nature of the copyrighted work, it was noted that the District Court had found that this factor favored Texaco because the photocopied articles were essentially factual. Chief Judge Newman acknowledged that the articles demonstrated a "significant measure of creativity," but agreed with the District Court's finding.

Chief Judge Newman then agreed with the District Court that Texaco copied entire works, rather than only

a small percentage of the material in Catalysis, and that the third factor - the amount and substantiality of the portion used - weighed in favor of the publishers.

The District Court further found that the publishers had shown that Texaco's copying presented a substantial harm to the value of their copyrights. The evidence concerning the sales of additional journal subscriptions, back issues and back volumes did not strongly support either side with regard to the fourth factor, stated Chief Judge Newman. Evidence of the loss of a few journal subscriptions was weak evidence that the copied articles themselves lost any value.

However, the District Court had noted that if Texaco's activities did not constitute fair use, the publisher's revenues would significantly increase since Texaco would obtain articles from document delivery services, which pay royalties to publishers for the right to photocopy articles, would negotiate photocopying licenses directly

with individual publishers, and/or would acquire some form of photocopying license from the Copyright Clearance Center, Inc. Publishers may not have a conventional market for the direct sale and distribution of individual articles, but the clearance center provides "a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying." Chief Judge Newman concluded that primarily because of lost licensing revenue, and to a minor extent because of lost subscription revenue, the publishers demonstrated that Texaco's copying substantially harmed the value of their copyrights. In all, the District Court correctly decided that the challenged photocopying was not fair use. The court concluded by reiterating that its ruling was directed toward Texaco's archival photocopying - the "precise copying that the parties stipulated should be the basis for the District

Court's decision now on appeal and for which licenses are in fact available."

Judge Dennis Jacobs, in a strong dissent, disagreed with the court's conclusion as to the first and fourth fair use factors and would have found that Dr. Chickering's photocopying of the Catalysis articles was fair use.

In Judge Jacobs' view, the challenged photocopying "was integral to ongoing research by a scientist" and thus was within one of the examples of fair use cited in section 107 of the Copyright Act. Judge Jacobs considered the manner in which Dr. Chickering used scientific journals; noted that any photocopying, in relation to the volume of articles in each issue, was insubstantial; and declared that the photocopying of journal articles was "customary and integral to the creative process of science." For Judge Jacobs, the nature and purpose of the use was fully transformative, and this factor weighed in favor of Texaco.

In evaluating the effect of the photocopying on the potential market or value of the copyrighted work, Judge Jacobs pointed out that the publisher of *Catalysis* charges twice the normal subscription rate to institutional subscribers, presumably assuming that scientists will arrange to copy relevant material. The dissent stated that the only harm to a market might be to the "supposed market" in photocopy licenses. The copyright clearance arrangement is "neither traditional nor reasonable; and its development into a real market is subject to substantial impediments," stated Judge Jacobs, who proceeded to address the difficulties in arranging a licensing market for the photocopying of copyrighted material.

Judge Jacobs concluded by discussing the fact that the authors of the journal articles receive no compensation for transferring their copyrights. Thus, licensing fees "cannot be expected to increase or diminish their creativity or their drive to publish," and the court's ruling on

fair use will serve to add to the cost, time and effort that scientists spend to scan and use journal articles and therefore "tend to diminish the only reward that the authors seek from publication." Copyright law is designed to assure the author a fair (emphasis by Judge Jacobs) return, while permitting creative uses that build upon the author's work, declared the dissent, in expressing the view that Dr. Chickering's photocopying of "isolated" journal articles to assist his own research was part of a creative enterprise and was fair use.

American Geophysical Union v. Texaco Inc., 37 F.3d 881, 1994 U.S.App.LEXIS 30437 (2d Cir. 1994) [ELR 16:10:18]

Jewelry company loses infringement action due to failure to take reasonable efforts to cure omission of copyright notice on earring

In 1987, an employee of the French company Charles Garnier, Paris, designed a piece of jewelry known as the swirled hoop earring. Andin International, Inc., without authorization, began manufacturing and selling identical copies of the earring. When Garnier discovered Andin's activities, Garnier registered a copyright, as an original sculptural work, in the earring. After the July 1992 registration, Garnier began placing a copyright notice on every copy of the earring, and notified its largest customers of the registration.

In response to Garnier's copyright infringement action against Andin, a Federal District Court concluded that Garnier had forfeited its copyright in the earring because the company omitted the copyright notice upon

publication and then failed to take reasonable efforts to cure the omission; the court granted Andin's motion for summary judgment.

Federal Court of Appeals Judge Torruella, in affirming the District Court's decision on the failure to cure ground, noted that section 405(a) of the Copyright Act provides that a party's failure to affix proper notice to certain copies of a work will not result in the forfeiture of copyright protection if, within five years after the first publication of a copy without notice, the work is registered at the Copyright Office and a reasonable effort is made by the author to add notice to all copies distributed to the public "after the omission has been discovered."

Prior to March 1989, notice of copyright was mandatory. In 1988, the copyright statute was amended by the Berne Convention Implementation Act of 1988. Attaching notice of copyright no longer is required to gain

copyright protection for creative works, but the amended statute retains the cure requirements of section 405(a). The cure provision applies to "copies and phonorecords publicly distributed by authority of the copyright owners before the effective date of the [Berne Convention Implementation Act]."

Judge Torruella, after determining that deliberate omissions are potentially curable, stated that "[w]hen an author makes a deliberate decision to forgo potential copyright protection of a work by failing to affix notice on copies, with the knowledge that copyright notice is normally required, that author becomes aware of the legal effect of its omission of notice and thus has discovered the omission for purposes of section 405(a)(2)." Upon review of Garnier's copyright procedures, the court concluded that the evidence presented did not support the District Court's finding, on summary judgment, that Garnier discovered its omission of copyright at the

time it first published the swirled hoop earring. There was a genuine issue of fact, stated Judge Torruella, as to whether Garnier discovered the omission at some point between the April 1988 publication date and the July 1992 registration date.

The court, assuming that Garnier discovered its omission in July 1992, proceeded to consider whether Garnier nevertheless forfeited its copyright because of a failure to cure the omission. Section 405(a) states, in relevant part, that "with respect to copies and phonorecords publicly distributed [before March 1, 1989], the omission of copyright notice...does not invalidate the copyright in a work if ...(2)...reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered."

Andin argued that if copies in a work were distributed without notice before March 1, 1989, the obligation to

cure in section 405(a) attaches to all copies in the work, including those published after the Berne Convention Implementation Act took effect. Garnier, among other arguments, claimed that Andin's interpretation of section 405(a) conflicted with the overall purpose of the Act which was to bring United States copyright law in line with the Berne Convention by eliminating the requirement that notice of copyright be affixed to copies of a work.

Judge Torruella, in rejecting Garnier's argument, stated that the Act applied prospectively and applying forfeiture rules for the omission of notice to works first published before the Act went into effect would not conflict with the general goals of the Act. And "Congress did not intend to adopt the Berne Convention wholesale," continued the court, in finding that section 405(a) imposes a cure requirement "for all copies of any work which was first published prior to the effective date of the [Act]." In

this case, Garnier was required to cure all copies of its earrings remaining in retail inventories as of July 1992.

The court then concluded that Garnier's cure efforts were insufficient as a matter of law even under the assumption that Garnier was only required to add notice to copies of the earring in retail inventories as of July 1992. Garnier, "at the very least," stated the court, was required to take some effort to find out if its retailers had any earrings in stock, but did not do so. Judge Torruella, noting that at least one earring, lacking notice, was in retail inventories and that Garnier suspected that its largest customers had at least a few earrings in their inventories, found that there was no genuine issue of material fact as to whether Garnier was obligated to take reasonable efforts to add notice to copies of its earrings in retail inventories. Garnier's claim that a lack of evidence of significant amounts of inventory excused the

company from undertaking such efforts did not in itself preclude granting summary judgment to Andin.

To cure an omission, the author must take reasonable efforts to add legally proper notice to all copies. Garnier did not add notice in any way to copies of the earring. The letter to retailers was not affixed to any of the earrings; did not refer to Garnier's failure to attach copyright notice to the earring; did not inform retailers of the need to attach some type of notice to the earring or even to tell consumers about Garnier's copyright.

Judge Torruella commented that some inadequate cure efforts, such as providing notice which is not affixed to copies, can be relevant to, although not alone sufficient, to establish the reasonableness of an author's overall cure efforts if such efforts "contribute in some way to providing actual notice to the public of a claim of copyright."

Garnier pointed out that the company added notice to all new earrings produced after the discovery of the omission and to all earrings held by Garnier at that time, such that the "totality" of the efforts were sufficient to create a material issue of fact as to whether Garnier took reasonable efforts to cure. The court disagreed, stating that "where an author makes no legally cognizable effort to add notice to an identifiable group of copies which lack notice, and there are not significant obstacles hindering the author from adding notice to such copies, that author cannot be said to have taken reasonable efforts to cure as a matter of law." If adding notice to retail inventories would have been burdensome, unduly costly, unavailing, futile or otherwise unreasonable, a prospective cure, i.e., adding notice only to new copies thereafter produced and distributed, by itself could be sufficient to constitute reasonable efforts to cure. But Garnier, according to the court, could have provided retailers with

labels or tags for the earrings without much cost or effort. Thus, adding notice to only newly produced copies and copies in Garnier's own possession was insufficient, as a matter of law, to constitute reasonable efforts under section 405(a)(2).

Charles Garnier, Paris v. Andin International, Inc., 36 F.3d 1214, 1994 U.S.App.LEXIS 27890 (1st Cir. 1994) [ELR 16:10:19]

Subsequent written assignment validates copyright registration of architectural drawings

In 1987, Chrysalis Homes Associates hired Heise Group, Inc. to prepare original architectural drawings of single family homes. The parties verbally agreed that Chrysalis would own the drawings. Heise created a

series of drawings entitled "Verandah II;" the copyright notice on the drawings identified Chrysalis as the copyright owner. And Chrysalis' copyright registration certificate identified the company as both the author of the drawings, by "work for hire," and as the copyright claimant.

Chrysalis subsequently obtained a written release certificate from Heise confirming that Heise had assigned all of its rights, interest and ownership in the copyright for the Verandah II plans to Chrysalis. Chrysalis later sold its business and assigned its copyright in the Verandah II plans to Arthur Rutenberg Corporation. The corporation, in 1991, assigned the copyright to Arthur Rutenberg Homes.

Rutenberg claimed that Drew Homes, without authorization, used the Verandah II plans in preparing architectural drawings. While the action was pending, Rutenberg obtained a Certificate of Supplementary

Copyright Registration correcting the original registration to indicate Heise as the author and Chrysalis as the owner by assignment, and not as the author via work for hire.

A Federal District Court found that Rutenberg did not own a valid copyright at the time of the alleged infringement. The court cited *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1468 (11th Cir. 1990) in which it was found that the work for hire doctrine "does not confer authorship upon the home builder employer of the independent contractor who creates home floor plans." Chrysalis, shortly after the decision, obtained the release certificate from Heise. However, since there was no written assignment prior to the 1988 registration, Rutenberg was not entitled to register the copyright, according to the District Court.

Federal Court of Appeals Senior Judge Hill stated that the District Court apparently extended *M.G.B. Homes*,

Inc. beyond its holding that the work for hire doctrine does not confer authorship upon the employer of an independent contractor. The case, stated Senior Judge Hill, does not hold that actual ownership, mistakenly registered as authorship resulting from work for hire may not be shown by assignment from the independent contractor author. Chrysalis owned a contractual right in the copyright by assignment from the beginning of the project. The copyright registration merely contained an erroneous statement as to the acquisition of ownership, declared the court.

Senior Judge Hill, reiterating that there was no dispute as to the assignments of copyright ownership and the fact that the written assignments occurred prior to the alleged infringement by Drew Homes, concluded that Rutenberg owned a valid copyright at the time of the alleged infringement.

The court further held Chrysalis was not required to have written evidence of the assignment from Heise as a prerequisite to the application for and the issuance of a valid copyright registration. Chrysalis effectively registered its copyright on the Verandah II drawings in March 1988. Thus Rutenberg both owned the copyright in, and held a validly registered copyright on, the Verandah II plans at the time of the alleged infringement.

In vacating the District Court's judgment, the court remanded the matter for findings on the infringement issue.

Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529, 1994 U.S.App.LEXIS 19675 (11th Cir. 1994) [ELR 16:10:21]

Simon & Schuster may sue former employee and competing publisher for breach of contract, but court dismisses remaining claims

Margery Mayer left her employment at Simon & Schuster in March 1990. At the time, Mayer was the president of the Ginn Division of the publisher's Silver Burdette & Ginn affiliate. Ginn is a leading publisher of educational materials, and Mayer, along with a team of employees, developed a new reading program for the company.

Mayer had entered an employment contract in August 1988; the contract was for a three year term and provided that within one year of her termination, Mayer could not "do any act or thing to cause, bring about, or induce any interference with, disturbance to, or interruption of any of the existing relationship[s] of the Company with agents, authors, publishers, customers,

suppliers, or employees...[Mayer] shall inform all prospective employers of the provisions of this paragraph" (emphasis added by New York trial court Judge Cahn).

Mayer began working for Scholastic Inc., a publisher of, inter alia, children's book and educational materials, in the spring of 1990. Simon & Schuster permitted Mayer to terminate the employment contract, but sued Mayer and Scholastic for various causes of action arising from the allegedly wrongful solicitation of six employees, who, according to Simon & Schuster, provided Scholastic with "a working team and collective knowledge that might have taken years and a huge investment to develop." Simon & Schuster stipulated that it could not show any lost profits or other damages resulting from the "pirating" of the employees.

Scholastic and Mayer, conceding the truth of the allegations for purposes of a motion to dismiss, argued that complaint did not justify the relief sought by Simon &

Schuster, i.e., the disgorgement of Scholastic's profits on products developed by the former employees or a reasonable royalty on such products.

Judge Cahn pointed out that there was no evidence or even claim that Simon & Schuster's "World of Reading" program suffered as a result of losing the former employees; it was not argued that the former employees possessed trade secrets or that the company was unable to find qualified replacements. It would be "virtually impossible" to determine Scholastic's profit from its alleged theft of the former at will employees, observed Judge Cahn. Any profits realized by Scholastic from the sale of reading programs or products developed by the former employees would be the result of many factors, not just the contribution of those employees, declared the court.

Judge Cahn nevertheless determined that although Simon & Schuster could not show what lost profits were

attributable to the alleged wrongful conduct, the company stated a cause of action for breach of contract and would be entitled to an award of nominal damages.

The court dismissed Simon & Schuster's cause of action for unfair competition - the correlation between Scholastic's future profits on any reading programs developed by the former employees and any damage to Simon & Schuster as a result of losing the former employees was "far too attenuated" to justify an accounting, stated Judge Cahn.

Simon & Schuster's third cause of action - for unfair trade practices under New York and Massachusetts statutes - was ruled legally insufficient.

The court proceeded to find that Simon & Schuster also failed to show the requisite damages to support causes of action alleging intentional interference with a contract and breach of fiduciary duty. And there was no allegation that Scholastic received profit or property

rightfully belonging to Simon & Schuster; the company could not demonstrate a right to the profit conferred upon Scholastic by the labor of the former employees. In all, Simon & Schuster, according to Judge Cahn, did not demonstrate that it suffered any quantifiable loss as a result of the departure of the former employees such that equity and good conscience demanded that Scholastic's profits be turned over to Simon & Schuster as compensation.

Simon & Schuster, Inc. v. Scholastic Inc., New York Law Journal, p. 24, col. 6 (N.Y.Cnty., Dec. 29, 1994) [ELR 16:10:22]

Sponsor of Boston's St. Patrick's Day Parade may exclude Irish-American Gay, Lesbian & Bisexual Group from 1995 Parade

As reported at ELR 16:8:18, a Massachusetts trial court granted permanent injunctive relief to the Irish-American Gay, Lesbian & Bisexual Group of Boston barring the South Boston Allied War Veterans Council from discriminating against the group, based on its members' sexual orientation, with respect to participation in the Council's 1993 St.Patrick's Day parade. The state's Supreme Judicial Court upheld the trial court decision. The rulings were based on the finding that the 1993 parade had no discernable expressive purpose and therefore was a public accommodation subject to the Massachusetts anti-discrimination law, rather than conduct protected by the First Amendment. The veterans canceled the 1994 parade.

In January 1995, a Federal District Court ruled that the Council could bar the homosexual groups from participating in the 1995 parade because the Council planned

to use the parade, in part, to protest the previous court orders. In a lengthy opinion, Judge Mark Wolf stated that the veterans' protest was "a sincere and significant part of the planned 1995 Parade," and that conditioning the issuance of a permit for the parade on the inclusion of the gay group would violate the veterans' right to associate for expressive purposes. It was not necessary, in Judge Wolf's view, to decide whether the veterans' right to free speech also was infringed.

The court recognized that exclusion from the 1995 parade might be "personally painful" to members of the gay group, but stated that the injury was not sufficient to preclude the veterans' exercise of their First Amendment right to associate in order to engage in "symbolic speech."

The United States Supreme Court granted the veterans' petition for certiorari, requesting that the court review and reverse the Supreme Judicial Court's decision

concerning the 1993 parade; the case was not scheduled to be argued before March 19, 1995, the date of the 1995 parade.

South Boston Allied War Veterans Council v. City of Boston, 1995 U.S. Dist. LEXIS 709 (D. Mass. 1995) [ELR 16:10:22]

Broadcaster must continue negotiations with AF-TRA for new collective bargaining contract

Retlaw Broadcasting Company, doing business as KJEO-TV, and the American Federation of Television and Radio Artists were unable to reach a new collective bargaining contract. The major disagreement concerned personal service contracts negotiated between Retlaw and "high visibility" employees. Such contracts often

contain terms which differ from those in the collective bargaining contract.

At a July 26, 1993 negotiating session, Retlaw submitted final counterproposals concerning various disputed terms. The union did not accept the proposals. Retlaw subsequently announced that the parties were deadlocked and at impasse, and that Retlaw would exercise its right to unilaterally implement the counterproposals submitted to the union on July 26th.

National Labor Relations Board Administrative Law Judge William J. Pannier III, in considering the dispute, first found that Retlaw violated sections 8(a)(5) and (1) of the Act by refusing to supply the union with copies of personal service contracts executed by bargaining unit employees.

ALJ Pannier then noted that although an employer may lawfully make proposals for direct bargaining, or for limited direct bargaining, with unit employees, it cannot

create a valid impasse with respect to such bargaining. Under section 9(a) of the National Labor Relations Act, the bargaining agent of employees in an appropriate unit is the exclusive representative of all the employees in such unit for the purposes of collective bargaining concerning rates of pay, wages, hours or employment, or other conditions of employment. This mandate applies even if the terms of the personal service contracts arguably enhance, rather than replace, the terms of any collective bargaining contract.

By purporting to bargain to impasse concerning a non-mandatory subject, by unilaterally granting merit wage increases to employees in that unit after July 26, 1993, and by negotiating personal service contracts with employees in that unit hired after July 26th, at a time when no valid impasse in bargaining existed, Retlaw committed unfair labor practices in violation of sections 8(a)(5) and (1) of the Act, declared ALJ Pannier, who ordered

Retlaw to cease and desist from engaging in such practices and to undertake other specified remedial measures, including bargaining in good faith with AFTRA.

Retlaw Broadcasting Company and American Federation of Television and Radio Artists, AFL-CIO, 1994 NLRB LEXIS 1074 (National Labor Relations Board 1994) [ELR 16:10:23]

Broadcaster prevails in reporter's action arising from employment termination

Dean Phillips worked as a reporter for WXIA-TV, owned by Pacific & Southern Company. While Phillips was covering the investigation of a murder case, he was approached by Treasure Island Productions about the possibility of selling his rights to his experiences in

connection with the case for the production of a film or docudrama based on the event. Phillips and two of his sources signed an agreement which provided that Treasure Island would have an exclusive thirty-day option to purchase their "life stories," including all of their experiences concerning the murder case. Upon exercise of the option, the three individuals would split payments of \$100,000 for the production of a two-hour docudrama; \$200,000 for a four-hour docudrama; or \$300,000 for a six-hour docudrama. Phillips claimed that he immediately informed Pacific & Southern of the agreement, although he apparently did not advise the company of its terms. Treasure Island did not exercise the option.

In response to a subpoena to testify at a pre-trial hearing in the murder case, Phillips described the agreement with Treasure Island. Shortly after the hearing, WXIA terminated Phillips' employment. WXIA informed Phillips that he was terminated because the option

agreement violated the ethics policy of the station and had irreparably damaged his credibility as a reporter.

Phillips claimed that WXIA management knew about and initially approved of his involvement in the potential film project, but that when the project began receiving publicity, WXIA management falsely told him that it had no prior knowledge of his actions with respect to the project.

A Georgia trial court granted summary judgment in favor of the Pacific & Southern parties with respect to Phillips' claims alleging invasion of privacy, breach of contract, tortious interference with employment and intentional infliction of emotional distress.

Phillips appealed the ruling on his emotional distress claim. Georgia Court of Appeals Judge Andrews, in upholding the trial court's decision, noted that Pacific and Southern's alleged wrongful conduct did not cause a

substantial portion of any emotional distress purportedly suffered by Phillips.

Phillips claimed that the broadcasting parties lied to him by contending that his actions had not been approved, wrongly terminated him on the basis that those actions destroyed his credibility, and publicly broadcast a false or misleading statement about the reason for his termination. There was no evidence that the station's public statement was false, declared Judge Andrews, and, in all, Pacific and Southern's conduct did not rise to the requisite level of outrageousness and egregiousness necessary to support a claim for intentional infliction of emotional distress.

Phillips v. Pacific & Southern Co., 1994 Ga.App.LEXIS 1283 (Ga.App. 1994) [ELR 16:10:23]

Court issues rulings in action brought by disabled persons against United Artists Theatre Circuit

Connie Arnold and other individuals who use wheelchairs or who walk using aids such as crutches sued United Artists Theatre Circuits, Inc. The Arnold parties claimed that the company's movie theaters do not afford disabled persons full and equal access to their accommodations, in violation of the federal Americans with Disabilities Act and under the California Disabled Persons Act.

In April 1994, a Federal District Court granted the Arnold parties' motion to certify the lawsuit as a class action and denied United Artists' motion to dismiss the claims insofar as the Arnold parties sought damages on the basis of incidents in which they were "deterred" from attending the theaters as a result of their

knowledge of the theaters' failure to provide legally adequate accommodations for disabled persons.

California law grants disabled persons a right of full and equal access to places of public accommodation. After careful consideration, Chief Judge Thelton E. Henderson found that the statutory protection extends to claims based on incidents of deterrence. Thus, when a party "can prove that violations of applicable California disability access standards deterred her on a particular occasion from attempting to attend a place of public accommodation, that [party] states a claim for relief under California Civil Code sections 54.1 and 51, and, in particular, for damages under sections 54.3 and 52."

United Artists asked the court to reconsider its ruling concerning class action certification or to certify the order for immediate interlocutory appeal.

In September 1994, the court denied United Artists' motions. Chief Judge Henderson also modified the

previous order to require that notice and an opportunity to opt out of class adjudication of the damages claims be provided to the members of the class certified under the court's April order.

Arnold v. United Artists Theatre Circuit, Inc., 1994 U.S. Dist. LEXIS 15345 (N.D. Cal. 1994) [ELR 16:10:24]

Court nullifies horse show association's suspension of owner and trainer

When Tommy Burns was arrested for allegedly participating in a scheme to kill show horses for insurance money, Burns provided information about other participants in the scheme. In 1994, a federal grand jury in Illinois, acting largely on Burns' information, indicted 23

horse owners, trainers and riders for equine insurance fraud. Among those indicted were horse owner George Lindemann, Jr. and Marion Hulick, a trainer and manager who worked for Lindemann.

The American Horse Shows Association notified the indicted parties that they were being charged with a violation of the association's rules as to equine cruelty and were subject to suspension following a hearing.

At the close of their hearing, Lindemann and Hulick obtained a temporary restraining order from a New York trial court barring their suspension until the court considered a motion challenging the hearing. It was alleged that the association violated state antitrust law and the due process rights of Lindemann and Hulick, and that its acts constituted a breach of contract and a breach of fiduciary duty.

When the hearing committee subsequently issued its findings, the association announced the suspensions of

22 of its members, including Lindemann and Hulick. The association then applied to the court to vacate the temporary restraining order.

Judge Greenfield, after converting the matter to an Article 78 proceeding, carefully considered "whether a person charged with a crime can be summarily and indefinitely suspended from his or her position or from the exercise of rights and privileges on the basis of the accusation alone, until a court and a jury has either exonerated that person or found such person to be guilty." The court concluded that the suspension of Lindemann and Hulick was arbitrary and capricious and imposed without a meaningful hearing and in the absence of substantial evidence, and, accordingly, enjoined the association from proceeding with any suspension except after a hearing in accordance with the principles set forth by the court.

In reaching its decision, the court discussed the association's control over participation in horse show competitions and noted that there was no "inherent unsoundness" in the association's rules. The rules did not permit arbitrary or automatic suspension, but provided that the hearing committee "may deny or suspend" the privilege to participate following a hearing.

Judge Greenfield agreed that certain individuals might be temporarily suspended (subject to reinstatement) when continued service "would taint every aspect of his or her job performance or decision-making." But in the instant case, the association apparently focused on protecting its own reputation and its concern over the alleged rights of animals, rather than accommodating the rights of the indicted individuals.

The court commented that the Fifth and Fourteenth Amendments to the United States Constitution might not directly apply to the actions of the association as a

private organization with no nexus to either state or federal government, but pointed out that the fact that the association was a non-governmental agency did not eliminate the requirements of fundamental fairness. The hearing committee, which called the suspension hearing on 20 days notice, denied Lindemann and Hulick's request for more time to prepare their defense, and refused to consider certain testimony concerning the circumstances of the death of Lindemann's horse. In all, there was no meaningful hearing as to the merits, no opportunity to present evidence to rebut the charges, and no weighing of the consequences of the suspension to the individuals charged or of any alternatives to indefinite suspension.

For the court, the crimes charged "although involving egregious cruelty to animals, do not directly impact on the conduct or the outcome of future horse shows and exhibitions," and were distinguishable from cases raising

charges which go to the heart of the integrity of a sport or business. And extending a suspension not only to the accused person but to his or her spouse, family members, companions, employees, agents or others was too broad a sanction, particularly on the basis of an indictment, concluded Judge Greenfield.

Lindemann v. American Horse Shows Assn., Inc., 1994 N.Y.Misc.LEXIS 591 (N.Y.Cnty. 1994) [ELR 16:10:24]

Sacramento radio station prevails in defamation action brought by competing station

KWOD disc jockey Pat Garrett's derogatory comments about homosexuals aroused considerable discussion in the Sacramento community. When radio station KSFM

broadcast a program concerning the incident, Edward R. Stolz II, the owner, operator and general manager of KWOD brought a defamation action in his name, doing business as KWOD 106.5 FM.

The trial court ruled that Stolz was a public figure; that the challenged speech involved matters of public concern; that allegations of sexual misconduct by KWOD employees were slanderous per se, because they imputed criminal conduct; and that a jury would have to consider whether certain race-related statements were slanderous per se. A jury returned a verdict in favor of KSFM.

A California appellate court has upheld the trial court's rulings. Although the trial court decided the public figure issue in limine, Judge Richard M. Sims III found that there was substantial evidence that KWOD held "a position of general fame and pervasive power and

influence in the community in which the allegedly defamatory speech was broadcast."

Judge Sims proceeded to find that at least with respect to matters directly related to the operation and management of KWOD, Stolz was a limited purpose public figure.

The court further found that the trial court did not err in determining that the subject matter of the allegedly defamatory speech involved matters of public concern.

In an unpublished portion of the opinion, the court rejected Stolz's other contentions concerning the trial court's rulings.

Stolz v. KSFM 102FM, 30 Cal.App.4th 195, 35 Cal.Rptr.2d 740, 1994 Cal.App.LEXIS 1171 (Ca.Ct.App. 1994) [ELR 16:10:25]

Penthouse entities owe sales tax assessment of more than \$500,000 arising from purchase of paintings

New York tax authorities assessed sales and use taxes against P-H Fine Arts, Steplong Corporation, and against the officers of the companies. Fine Arts was a wholly-owned subsidiary of Penthouse International, Ltd.

The assessment arose from a corporate transaction in January 1984 whereby a subsidiary of Penthouse made a capital contribution of paintings with a value of about \$2.1 million to Steplong in exchange for ten shares of the common stock of Steplong. Eventually, according to the New York Tax Appeals Tribunal, Penthouse became the sole shareholder of Steplong; Steplong's sole capital asset was the transferred artwork.

At the time Steplong received the artwork, the company was not engaged in any business in New York.

Stepplong did not file New York corporation franchise tax reports during the audit period, did not possess a certificate of authority to collect sales tax, and did not file sales tax returns. Stepplong, noted the Tribunal, was merged into Fine Arts sometime in 1987 or 1988.

Fine Arts, during the audit period, filed quarterly sales tax returns reporting no gross or taxable sales. The company displayed its art at the premises which housed the corporate offices of Penthouse and Robert Guccione's private living quarters. After an inspection of the corporate area of the townhouse, the state's auditors concluded that the works of art acquired by Fine Arts and Stepplong were business assets of the corporations, acquired without payment of sales tax. The tax authorities assessed sales and use taxes amounting to more than \$500,000, according to news reports.

An Administrative Law Judge determined that Fine Arts was "actively engaged in the business of buying

and selling works of art," but that its purchases of art did not qualify for a statutory resale exclusion because Fine Arts did not show that the art was purchased exclusively for resale. It was found that Guccione and Penthouse used the artwork prior to resale to create a "certain image" for corporate clients.

In affirming the Administrative Law Judge's decision, although on a different basis, the Tribunal, in a per curiam opinion, agreed with the Penthouse parties that Fine Arts proved that it purchased the artwork for resale; noted that the transaction that was taxed was the purchase by Fine Arts, not a subsequent use by the company; and that Fine Arts' intent at the time of the purchase would determine whether a purchase was subject to tax.

However, the fact that the Penthouse parties may have proved the purchases were intended for resale did not necessarily prove their case. Section 1105(a) of the Tax

Law imposes a sales tax on "[t]he receipts from every retail sale of tangible personal property..." The Tribunal found that the Penthouse parties did not show that the artworks were acquired only for the purpose of resale, given that Fine Arts intended to display the artwork "in a setting where it served the business interests of Penthouse and Guccione."

The Tribunal concluded that Fine Arts, at the time of acquiring the art, planned not only to resell the works, but to allow the use of the works by the Penthouse parties. Fine Arts thus failed to show that at the time of purchase it acquired each piece of art exclusively for resale. The Tribunal emphasized that its decision was based on the purposes for which the art was acquired, and not its subsequent use. Furthermore, the transfer of artwork was not within the argued-for statutory exclusion from the definition of retail sale.

In the Matter of the Petition of P-H Fine Arts, Ltd.,
1994 N.Y.Tax LEXIS 605 (N.Y.Tax Appeals Tribunal
1994) [ELR 16:10:26]

Briefly Noted:

Securities Offering.

As described by California appellate court Judge Hastings, Panda Resources International, a conglomerate of entertainment companies, retained attorney Carlos Yanez for advice in connection with undertaking financial offerings to potential investors. The financial offerings, concededly, violated Corporations Code section 25110 in that they were not registered. Yanez advised Panda of his opinion that the offerings were exempt from registration.

Yanez, who was charged with two counts of selling securities without permission, argued that he could not be held criminally responsible, based upon strict liability, for violating the statute. A Los Angeles trial court magistrate agreed and dismissed the charges against Yanez.

A trial court judge refused to reinstate the complaint.

In affirming the trial court decision, Judge Hastings, after reviewing Yanez's relationship with Panda, stated that the trial court correctly found that substantial evidence supported the magistrate's determination that Yanez's acts "were attributable solely to his function as legal counsel."

The court rejected the argument that certain other activities engaged in by Yanez were not within his role as counsel and were sufficient to reinstate the charges. And Yanez was not criminally liable for aiding and abetting a violation of the statute, concluded Judge Hastings.

People v. Yanez, 30 Cal.App.4th 513, 35 Cal.Rptr.2d 867, 1994 Cal.App.LEXIS 1211 (Ca.Ct.App. 1994) [ELR 16:10:26]

Contracts/Television Anchor.

Don Lark, a television news anchorman, was employed by WFSB Channel 3 in Hartford, Connecticut since 1979. Lark's most recent employment contract was for the period from August 1991 through August 1995.

In August 1994, Lark sued Post-Newsweek, the owner of WFSB, alleging anticipatory breach of his employment contract. Lark sought to restrain the company from violating any of the terms of the contract by removing him from his position as anchorman on the 6:00 and 11:00 news programs, or by announcing that Lark would

be removed or replaced. Post-Newsweek recently had hired Al Terzi as a primary anchor.

A Connecticut trial court refused to grant the requested relief, expressing the view that Lark did not prove that he would be irreparably harmed if the station chose, in accordance with the employment contract, to remove Lark from his anchor position while continuing to pay him his salary. The court also found that requiring the station to have Lark deliver the news would constitute a violation of the station's editorial rights in violation of the First Amendment.

Lark v. Post-Newsweek Stations, 1994 Conn.Super. 3055 (Conn. Superior Ct. 1994) [ELR 16:10:27]

First Amendment.

Jacksonville Television videotaped an interview with the mother of three children who had been adjudicated dependent by a trial court. During a hearing, the court was informed of the interview. The court ordered that the interview not be aired unless the mother's face was obscured. It was noted that the case had become newsworthy and that the court had determined that the involvement of non-parties in the matter was detrimental to the well-being of at least the two older children and probably the youngest child as well. For the court, obscuring the mother's face while permitting the broadcast of the interview appeared to be the least intrusive means under the circumstances to protect the privacy rights of the children.

A Florida appellate court ruled that the portion of the trial court's order which restricted the media parties' right to broadcast the interview was an unconstitutional prior restraint. The videotaping of the interview violated

no law or valid court order; the trial court's inadvertent publication of the full names of the children on its order concerning a scheduled hearing indicated that the media parties obtained the information lawfully. Although the state has an important interest in protecting the interests of children, the broadcast of the interview did not necessarily serve to advance this interest, such that the need for the prior restraint was "manifestly overwhelming."

The court quashed that portion of the order which limited Jacksonville Television's right to broadcast the interview.

Jacksonville TV, Inc. v. Florida Department of Health & Rehabilitative Services, 1994 Fla.App.LEXIS 12879 (Fla.App. 1994) [ELR 16:10:27]

First Amendment/Victim Identification.

In April 1991, The Globe published two articles which contained the name and other identifying information about the Palm Beach woman allegedly raped by William Kennedy Smith. The Globe lawfully learned of the alleged victim's identity. Prior to the Globe's articles, other news organizations had identified Smith's alleged victim.

A Florida statute prohibits the identification of a victim of a sexual offense in any "instrument of mass communication." Globe Communications was charged with two counts of violating the statute.

A Florida trial court found that Florida Statutes section 794.03 violated the free speech and free press provisions of the Constitutions of Florida and the United States, and dismissed the information against Globe.

An appellate court affirmed the trial court decision (ELR 16:2:23), and the Florida Supreme Court has upheld the appellate court ruling.

State v. Globe Communications, 1994 Fla.LEXIS 1871 (Fla. 1994) [ELR 16:10:27]

New York Knicks Tickets.

In a dispute over ownership of season tickets for "premium courtside seats directly behind the players bench" of the New York Knicks at Madison Square Garden, a New York trial court ruled that two former Goldman Sachs investment bankers did not possess an ownership interest in the tickets. Judge Miller stated that the bankers had, at most, a right to use the tickets at the pleasure of Robert Harrison, the man with the renewal rights.

The bankers did not demonstrate mutual assent to the terms of the alleged oral "arrangement" - it was not shown that Harrison offered to transfer or share the renewal rights in perpetuity with the bankers - and there was no consideration in exchange for the purported right to purchase the tickets. And the arrangement was barred by the statute of frauds since it was not capable of performance within one year.

Even assuming the existence of a valid oral agreement, Harrison exercised his right to terminate by refusing to participate after the 1993-1994 season. The court therefore dismissed the bankers' causes of action.

Engel v. Harrison, New York Law Journal, p.21, col.6 (N.Y. Cnty., Aug. 10, 1994) [ELR 16:10:27]

New York Knicks Tickets.

A Westchester County trial court has rejected an action brought by Richard Copland and Joel Taman seeking to reinstate an arrangement with Gene Summ to share a season ticket subscription to courtside seats to New York Knicks basketball games at Madison Square Garden. Summ was the registered owner of the ticket subscription, but it was alleged that the parties, for almost 20 years, had shared the costs and benefits of season ticket ownership and that the members of the ticket-sharing group held an ownership interest in the ticket subscription including the renewal rights.

In 1994, Copland and Taman, who apparently wished to purchase more playoff tickets than Summ was willing to sell, had questioned Summ's authority to withhold the tickets. Summ subsequently notified Copland and Taman that he would not sell them tickets in the future.

In refusing to issue a preliminary injunction to prevent Summ's distribution of future Knicks tickets, Judge Anthony A. Scarpino Jr. found that there was no evidence to support the allegation that the arrangement among the parties constituted a partnership. And the claim that the ticket subscription was jointly owned was contradicted by documentary evidence, stated the court, for Summ controlled, managed, and exercised sole authority over the ticket subscription and held the subscription in his name alone.

The court also rejected a cause of action alleging breach of contract. Copland and Taman did not allege mutual assent as to several essential elements of the parties' purported agreement, including its duration or the parties' right to terminate the agreement. Although a pattern or custom as to the ticket sharing arrangement may have developed, an informal arrangement could not

create a contract where the parties had not agreed to the terms.

The court reiterated that there existed an informal, oral agreement to share tickets on a season-to-season basis, but that there was no evidence of any continuing obligation to sell or to buy tickets. The court, accordingly, denied the requested injunctive relief and dismissed the complaint.

Copland v. Summ, New York Law Journal, p. 34, col. 6 (Westchester Cnty., Feb. 22, 1995) [ELR 16:10:28]

Broadcasting/Trespass Claim.

In 1993, KSTP broadcast an investigative report on the practices of two veterinarians. When one of the veterinarians, Dr. Sam Ulland, visited the home of Greg and

Betty Copeland to treat their cat, a student accompanied Dr. Ulland. Patty Johnson did not inform Dr. Ulland or the Copelands that, in addition to being a student, she also was an employee of KSTP and was videotaping the house call.

When the report was broadcast, it included two brief video portions filmed inside the Copelands' home. The Copelands sued KSTP and Johnson for trespass, and later sought to amend their complaint to add claims for invasion of privacy and violation of state and federal wiretapping statutes. A Minnesota trial court denied the motion to amend and granted KSTP's motion for summary judgment on the trespass claim, finding that Johnson did not exceed the geographic boundaries of the Copelands' consent and that the couple did not expressly limit their consent to Johnson's "educational or vocational goals."

An appellate court affirmed the denial of the Copelands' motion to amend, but reversed the ruling on the trespass claim.

Presiding Judge Harriet Lansing noted that the Copelands' consent was given only to allow a veterinary student to accompany Dr. Ulland, and that there was sufficient evidence to preclude granting summary judgment to KSTP.

Copeland v. Hubbard Broadcasting, Inc., 1995 Minn.App.LEXIS 98 (Minn.App. 1994) [ELR 16:10:28]

Art/Jackson Pollock Drawing.

Kenneth Frost, in September 1993, sought to buy a work by Jackson Pollock from the Andre Emmerich Gallery. The gallery left a 1948 drawing with Frost "on

approval." Frost agreed to purchase the work for about \$300,000, but subsequently failed to make any payments. Frost claimed that a gallery representative orally agreed to modify the agreement's payment schedule to accommodate Frost's efforts to obtain financing.

The gallery learned that Frost delivered the drawing to Christie's auction house a few days after first taking possession of the work; Christie's held the drawing pending the outcome of the instant case.

In its lawsuit against Frost, the gallery noted that Frost, who was a party in a lawsuit in a Federal District Court in Illinois, was in violation of a court-ordered settlement agreement in that case whereby he was required to deliver a 1944 Pollock work (valued at \$600,000) to Christie's auction house by August 1993. Andre Emmerich Gallery alleged that Frost obtained the 1948 drawing in order to deliver it to Christie's in place of the

1944 drawing, and that Frost's conduct amounted to fraud in the inducement to enter the contract.

New York trial court Judge Goodman, stating that the contract language did not indicate any tentativeness or contingency and that there was no writing to support Frost's claim of a modification, granted summary judgment to the gallery as to its breach of contract claim and ordered Frost to arrange for the return of the drawing to the gallery. The court denied the gallery's motion for summary judgment on its cause of action for fraud.

Andre Emmerich Gallery, Inc. v. Frost, New York Law Journal, p. 26, col. 1 (N.Y.Cnty., Dec. 20, 1994) [ELR 16:10:28]

Art/Dealer Sanctions.

Art collector Patti Birch loaned a 1984 water color by Zoran Music to Joseph P. Carroll. Carroll agreed to return the work, but Birch claimed that Carroll substituted a painting, with the same title and subject matter, but of a lesser value, which was done in 1986. Carroll, according to a news report, stated that he obtained the 1984 painting from a Paris gallery run by Claude Bernard Haim.

Haim, who appeared in New York to testify in the matter, stated that Carroll, in a 1990 letter, described the painting he was purchasing as a work done in 1986.

In April 1994, Judge Ira Gammerman (in an unpublished ruling), assessed costs of \$10,000 against Carroll for falsely testifying in an attempt to cover up a fraudulent scheme.

In December 1994, a New York appellate court affirmed the trial court decision, noting, in particular, that the trial court did not err in reopening the record to receive Haim's testimony.

Birch v. Carroll, 1994 N.Y.App.Div.LEXIS 12782 (N.Y.App. 1994) [ELR 16:10:29]

Wrongful Death.

In March 1990, Stephen Nalepa and his second-grade classmates were shown a film entitled "Nobody's Useless." As described by Michigan appellate court Judge Janet T. Neff, the film, set in the late nineteenth century, depicts a young amputee who becomes so depressed that he twice tries to commit suicide. In one of the attempts, the boy tries to hang himself. The boy does not

succeed in his suicide attempts and is then taught by an older boy how to cope with his disability.

The night after seeing the film, Stephen was found hanging by a belt from the safety rail of the upper bunk bed in his bedroom, and tragically died.

Deborah and Lawrence Nalepa brought a wrongful death action against various school officials, and against the producer and distributor of the film.

The appellate court reversed the trial court's ruling that neither the school board nor the superintendent was entitled to absolute governmental immunity from tort liability. This decision rendered moot the argument that the trial court erred in finding that questions of fact existed with regard to whether the board and the superintendent acted with gross negligence.

The appellate court upheld the trial court's ruling that the school parties and the distributor of the film did not owe a duty of care to Stephen. The fact that the

distributor created promotional material (with some indications of age appropriateness) for the film did not represent a service to benefit the schools or the students watching the film. The material was created to further the distribution of the film; the distributor did not indicate to the schools that they no longer had to review the films distributed by the company and did not suggest that the age appropriateness guidelines were "conclusive," stated the court, in ruling that the distributor did not owe Stephen or his parents a duty of care.

The remaining school parties may have had a duty of care, but the duty did not extend to those actions which allegedly caused Stephen's death. The allegations that teachers and faculty used improper materials and techniques to teach children was not a basis for imposing liability under Michigan law, concluded the court.

Nalepa v. Plymouth-Canton Community School District,
1994 Mich.App.LEXIS 467 (Mich.App. 1994) [ELR
16:10:29]

Previously Reported:

As reported at 16:5:31, a Federal District Court in New York granted a directed verdict dismissing the trademark and right of publicity claims brought by William DeClemente against Columbia Pictures, the distributor of the film "The Next Karate Kid." The court's opinion in Declemente v. Columbia Pictures Industries, Inc., has been published at 860 F.Supp. 30, 1994 U.S.Dist.LEXIS 11544 (E.D.N.Y. 1994). [ELR 16:10:29]

IN THE NEWS

Writers Guild enters into agreements with three major networks and AMPTP

The Writers Guild of America has reached agreements with the three major broadcast networks and with the Alliance of Motion Picture & Television Producers.

According to news reports, the agreements include a clause setting rates of payments to writers for the use of material from television shows or movies in interactive media such as CD-ROM systems. Writers will be entitled to 1.2 percent to 3 percent of the "applicable gross," i.e., the fee that is paid to "exploit" the rights in the work. Interactive media include programs "viewed on a TV or computer screen via disc, cartridge, wireless or wire transmission, and arcade games."

The network agreement also provides higher minimum compensation, an acceleration of residual payments in specified transactions and increased coverage for writers on "reality programming."

Fox will be required to pay the full network prime time rates for programs produced for initial prime time broadcasting. The company will increase its syndication payments by 25 percent for each rerun, and by 1996, the rate will increase another 10 percent.

The Guild and the producers agreed to require that the writer's onscreen credit immediately precede the directing credit.

Furthermore, the producers have agreed to undertake negotiations with the Guild and with the Directors Guild concerning the possessory credits available to directors. During the negotiating period, the producers plan to increase their supervision of such credits. [Mar. 1995][ELR 16:10:30]

Cablevision obtains \$3.9 million damage award for unauthorized decoder sales

Federal District Court in New York, in early 1995, awarded Cablevision Systems \$3.9 million in damages arising from the sale of unauthorized equipment for de-scrambling cable television programming. According to news reports, the court apparently based the damage award on a provision of the Communications Act which provides for fines of \$10,000 per decoder sale. [Mar. 1995][ELR 16:10:30]

DEPARTMENTS

Book Review:

Copyright's Highway, From Gutenberg to the Celestial Jukebox, by Paul Goldstein. Hill and Wang, 1994.

Reviewed by Eileen Selsky

Lord Mansfield might not easily maneuver a contemporary Cavalier or Explorer, but, with "Copyright's Highway" in hand, the jurist who ruled on the ramifications of the 1709 Statute of Anne would be well-equipped to navigate among the combusive array of 21st century intellectual property issues. According to Paul Goldstein, Lillick Professor of Law at Stanford University, copyright was "technology's child from the start,"

following and accommodating the commercial markets attendant to developments such as the printing press, photography, and motion pictures. As the "celestial jukebox" displays a universe of information and entertainment, via orbiting satellites, fiber optics, cable and telephone wires, Professor Goldstein affirms that "in connecting supply to demand, creators to consumers, authors to their audiences, copyright gives producers the legal implements they need to offer their work to customers."

A discussion of *Acuff-Rose Music Inc. v. Campbell*, 114 S.Ct.Rptr. 1164 (1994), in Professor Goldstein's opening chapter, "The Metaphysics of Copyright," presents an accessible introduction to the author's concern with the public and private interests at stake in resolving intellectual property disputes. The chapter describes the differences between those who believe that copyright "is rooted in natural justice, entitling authors to every last

penny that other people will pay to obtain copies of their works," and those who accept that copyright owners "should get some measure of control over copies as an incentive to produce creative works, but...would like copyright to extend only so far as is necessary to give this incentive..." Professor Goldstein notes that copyright has been playing "catch-up" with new technologies even as lawmakers remain ambivalent on the question of whether copyright is an author's right or a user's right.

In "The History of an Idea," Professor Goldstein recalls that publishing was regulated in England even before the advent of printing; the Stationers' Company, subject to the Crown's authority, was authorized to exploit the value of books licensed by the Crown. Not until the Statute of Anne was copyright protection separated from membership in the Stationers' Company.

A fascinating account of the development of copyright

in the United States features Noah Webster, Harriet Beecher Stowe, and a significant lawsuit concerning common law copyright in which the unlikely antagonists were two individuals who had held the position of recording, and arranging the publication of, the decisions of the Supreme Court of the United States. Technology first confronted American jurists in the form of a photograph of Oscar Wilde. The court in *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), unanimously concluded that the photograph constituted creative expression. Soon after, Justice Oliver Wendell Holmes, Jr., in his first copyright opinion on the Supreme Court, upheld the copyrightability of circus posters, although the posters were used for the commercial purpose of advertising. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

Along with vivid synopses of case law, Professor Goldstein dramatically recounts the founding, on a

"rainy dark October night" in 1913, of ASCAP, and the organization's successes and travails as it wended from a private dining room in Luchow's Restaurant in Manhattan to a "skyscraping command center that overlooks Manhattan's Lincoln Center collecting more than \$300 million annually for distribution to more than fifty thousand members..."

In "Fifty Dollars to Collect Ten," Professor Goldstein reviews one publisher's determined efforts to obtain payment for the photocopying, by government medical libraries, of articles from his company's journals. *Williams & Wilkins v. The United States*, 487 F.2d 1345 (Ct.Cl. 1973), did not impose liability upon the libraries, and the decision was affirmed without opinion by an equally divided Supreme Court at 420 U.S. 376 (1975). But the issues raised, particularly as to the appropriate arena for regulating new technology - courts, regulatory or legislative bodies, or a market-based

accommodation - and as to whether a copyright owner is harmed (or is even required to show harm) when a single copy is made of his/her work remain front-page concerns.

Proceeding from the premise that "[t]he silence of Congress on the issue of private copies...left a black hole in the center of American copyright legislation," Professor Goldstein examines the marathon efforts of publishers, authors, librarians, and even Presidential Commissions, to devise guidelines for library photocopying.

Private copies obtained from the use of the newly-formidable technology of home videotaping became a crucial factor in *Universal City Studios, Inc. v. Sony Corp. of America*, 464 U.S. 417 (1984), particularly in the "protracted" deliberations of the Justices of the Supreme Court. Intense debate ultimately resulted in the court's 5-4 ruling to reverse the Ninth Circuit's decision on behalf of Universal and Disney.

Record companies facing the new technology of digital audiotape recorders managed to reach an agreement with equipment producers and music interests. The Audio Home Recording Act of 1992, in part, imposes a statutory levy on producers of blank digital audiotapes and digital audiotape equipment. However, although a consumer may copy a prerecorded cassette for private noncommercial use, the statute does not state that this private copy is not an infringement of copyright, but only, emphasizes Professor Goldstein, that "no action may be brought under this title alleging infringement of copyright."

"The Two Cultures of Copyright," describes this country's three-legged-race approach to an accommodation of moral rights. However, after attending to various economists' observations concerning the production and distribution of creative works, it appears to Professor Goldstein that the United States and European countries

have a similar understanding that "copyright should extend into every corner of economic value where the cost of negotiating a license is not insurmountably high." This understanding presumably facilitated the United States' eventual participation in the Berne Convention and may provide a reference point in the developing dispute as to whether a given right is an author's right or copyright. Professor Goldstein points out that rights that fall outside the definition of author's right or copyright escape the national treatment requirements of the Berne Convention. The remaining differences between the two cultures of copyright may be played out in the provocative arena of "neighboring rights."

The array of entertainment and information products available from "The Celestial Jukebox" are based primarily on digital code. Although the infrastructure of this provider is incomplete, the indications are that increasingly accurate supervision of subscriber selections

will mean that "copyright owners will have a far more precise measure of the demand for their products than they do today...[and will] channel their investments more precisely to meet these newly articulated patterns of demand."

Technology and private copying will continue to challenge the scope of copyright protection. *Apple Computer, Inc. v. Microsoft Corporation*, 35 F.3d 1435 (1994), already has rejected a claim seeking protection for a computer's graphical user interface. Are there copyrightable elements in databases? Professor Goldstein reviews alternative methods of protection, from the Copyright Clearance Center to trade agreements with foreign countries, and looks forward to a vital role for copyright in continuing "to promote political as well as cultural diversity, ensuring a plenitude of voices, all with the chance to be heard."

[ELR 16:10:31]

In the Law Reviews:

The Entertainment and Sports Lawyer, a publication of the ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 12, Number 3 with the following articles:

"Seven Years to Life:" The Fight for Free Agency in the Record Business by Gary A. Greenberg, 12 Entertainment and Sports Lawyer 1 (1994)

Baseball's Antitrust Exemption and an Owner-Imposed Salary Cap: Can They Coexist? by Alexander H. Butterman, 12 Entertainment and Sports Lawyer 3 (1994)

The Piracy of Parody by Alvin Deutsch, 12 Entertainment and Sports Lawyer 17 (1994)

Book Review: The Movie Business Book by Jason E. Squire, reviewed by John O'Melveny Woods, 12 Entertainment and Sports Lawyer 21 (1994)

The Columbia Law Review has published Volume 94, Number 8 as a Symposium: Toward a Third Intellectual Property Paradigm with the following articles:

A Manifesto Concerning the Legal Protection of Computer Programs by Pamela Samuelson, Randall Davis, Mitchell D. Kapor and J.H. Reichman, 94 Columbia Law Review 2308 (1994)

Legal Hybrids Between the Patent and Copyright Paradigms by J.H. Reichman, 94 Columbia Law Review 2432 (1994)

Four Reasons and a Paradox: The Manifest Superiority of Copyright Over Sui Generis Protection of Computer Software by Jane C. Ginsburg, 94 Columbia Law Review 2559 (1994)

Comments on A Manifesto Concerning the Legal Protection of Computer Programs by Paul Goldstein, 94 Columbia Law Review 2573 (1994)

Assertive Modesty: An Economics of Intangibles by Wendy J. Gordon, 94 Columbia Law Review 2579 (1994)

Misappropriation as a Third Intellectual Property Paradigm by Dennis S. Karjala, 94 Columbia Law Review 2594 (1994)

Comment on A Manifesto Concerning the Legal Protection of Computer Programs by Zentaro Kitagawa, 94 Columbia Law Review 2610 (1994)

TRIPs, The Berne Convention, and Legal Hybrids by Michael Lehmann, 94 Columbia Law Review 2621 (1994)

Legal Hybrids: Beyond Property and Monopoly? by Ejan Mackaay, 94 Columbia Law Review 2630 (1994)

The Challenges of Reforming Intellectual Property Protection for Computer Software by Peter S. Menell, 94 Columbia Law Review 2644 (1994)

Of Property Rules, Coase, and Intellectual Property by Robert P. Merges, 94 Columbia Law Review 2655 (1994)

Intellectual Property Protection for Cumulative Systems Technology by Richard R. Nelson, 94 Columbia Law Review 2674 (1994)

The Seton Hall Journal of Sport Law has published Volume 5, Number 1 with the following articles:

The Lost Season by Matthew J. McPhillips, 5 Seton Hall Journal of Sport Law 1 (1995)

In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball by Ted Curtis, 5 Seton Hall Journal of Sport Law 5 (1995)

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