RECENT CASES

Federal District Court jury awards almost $550,000 in damages to "Boston's" former manager; leader of group seeks new trial

When Paul Ahern brought a breach of contract action against Tom Scholz, the leader of the musical group "Boston," a Federal District Court jury, in October 1994, awarded Ahern almost $550,000 in damages.

Federal District Court Judge Edward F. Harrington subsequently found that Scholz breached an agreement to pay Ahern royalties due from Boston's third album. The 1981 agreement provided, in part, that Scholz would pay Ahern royalties due from the 1986 album after deducting only (i) a producer's royalty and (ii) all commercially reasonable recording expenses (emphasis added by the court).

Judge Harrington found that Scholz's failure to pay royalties as provided constituted a violation of Massachusetts law as an "unfair and deceptive business practice." According to the court, legal fees in the amount of about $1.7 million, the payment of $250,000 to a personal manager, and recording studio time and resulting costs totalling over $2.2 million were not commercially reasonable recording expenses. Judge Harrington suggested that $500,000 in recording expenses might be commercially reasonable, and found that Scholz's accounting was "a deliberate and blatant attempt to deprive...Ahern of monies rightfully due and owing to him as royalties from the sales of the third Boston album." The accounting, continued the court, was "a shocking display of arrogant disdain for Ahern's contractual rights and was rendered in obvious bad faith.

Artistic excellence does not excuse one from complying with the norms of decent behavior. Artists, as well as more ordinary persons, must act in good faith to perform their contractual obligations which lie at the base of an orderly society." Scholz, in addition to the damages awarded by the jury, was ordered to pay costs, interest and reasonable attorneys' fees for violating the statute.

Scholz has sought a new trial on the ground that the finding that Scholz failed to show that Ahern breached an agreement to pay Scholz the royalties due the performer for Boston's first and second albums was contrary to the evidence. Scholz also has claimed that the jury failed to follow the jury instructions by finding that Scholz breached the parties' agreement and by finding that Ahern was entitled to damages. It was further argued that the court erred by ordering the performer's lead trial counsel to testify as an expert witness against

Scholz, and that the court erred in finding that Scholz violated Massachusetts law.

Ahern v. Scholz, Case No. 91-01586 (D.Mass., Oct. 19, 1994; Oct. 31, 1994)[ELR 16:11:3]

Court awards actor's widow over $3 million in dispute over distribution rights to "Hopalong Cassidy" films

"Hopalong Cassidy," a character created by the late writer Clarence E. Mulford, was portrayed by the late actor William Boyd in several films produced between 1935 and 1939. Paramount Pictures owned the copyrights in the films, but the copyrights were not renewed, and, as of 1967, the films were in the public domain.

During the 1950s through the 1970s, Boyd Enterprises, pursuant to a license from Mulford's representatives, distributed and licensed the films for television broadcasts.

In 1973, Filmvideo Releasing Corporation and its president and sole shareholder, Maurice H. Zouary, proposed to distribute seventeen Hopalong Cassidy films on television in the United States. Zouary believed that the films were in the public domain. However, some of the films were based on certain Mulford novels; David and Peter Hastings owned the renewal copyrights in the novels.

When Zouary sought to acquire an insurance policy covering producer's liability for the films, Fireman's Fund Insurance Company agreed to issue a $1 million liability policy to Filmvideo for a term of three years, beginning in January 1974. The policy, in part, provided indemnification to Filmvideo against "any liability resulting from, among other things, infringement of copyright, whether under statutory or common law, and unfair competition."

In November 1973, representatives of William Boyd Enterprises, after reading a flier advertising the films, notified Zouary of their claim to control the television rights in the films, based on the existence of renewal copyrights in the underlying novels. The Boyd parties demanded that Filmvideo refrain from engaging in alleged unfair competition.

In March 1974, Fireman's Fund notified Zouary that the claim raised by the Boyd parties apparently was not covered by the insurance policy since the claim, although not formally filed, first was made in 1973.

Zouary responded that Filmvideo had chosen to delay the effective date of the policy from October 25, 1973 until January 1, 1974 because the company did not plan to exhibit the films until after January 1st, and also pointed out that as of July 1974, the Boyd parties still had not presented a formal claim.

Fireman's continued to collect premiums and kept the policy in force for the three year term. In 1976, the insurer agreed to amend the policy to include six additional Hopalong Cassidy films, and confirmed that the policy issued in 1973 covered the television exhibition of the first seventeen films.

In 1975, Filmvideo sought declaratory relief in a Federal District Court in New York with respect to the licensing of the films. Mulford's representatives filed a counterclaim for copyright infringement. In 1977, the Mulford and Boyd parties sued Filmvideo and Zouary, among others, in a Federal District Court in Los Angeles, alleging copyright infringement.

In 1977, Fireman's notified Filmvideo that the insurer would not provide a defense since both lawsuits were based on claims made prior to the commencement of coverage.

In Filmvideo Releasing Corp. v. Hastings, 509 F.Supp. 60 (S.D.N.Y. 1981; ELR 3:24:8), the court found that the Hopalong Cassidy films were protected as derivative works of the Mulford novels and that Filmvideo's exhibition of the films would infringe the copyrighted novels. The Federal District Court in California awarded the Boyd and Hastings parties a judgment in the amount of $960,000 based on the court's finding that 192 separate licenses for television exhibition constituted infringements of the renewal copyrights in the novels.

By 1983, the judgment, including interest, amounted to more than $1.3 million. In filing for bankruptcy, Zouary assigned to Boyd/Hastings any claim or cause of action which Zouary had against Fireman's.

Boyd/Hastings, as judgment creditors and as assignees of Filmvideo's claims, eventually sued Fireman's alleging breach of contract and failure to defend.

In 1989, a Los Angeles trial court denied Fireman's motion for judgment on the pleadings and granted Boyd/Hastings' motion to preclude Fireman's from presenting certain defenses. The court then found that the Boyd letters sent in November 1973 constituted a claim within the meaning of the Fireman's policy; that there was no distinction between an intent to exhibit the films, as indicated in fliers distributed by Zouary in October 1973, and the showing of the films in 1975; and that the Boyd/Hastings claim, although arising out of copyright infringements dating from 1975, was excluded from the coverage of the insurance policy. The court entered judgment finding that, as a matter of law, the Fireman's policy did not provide liability coverage, and dismissed the Boyd/Hastings complaint.

A California appellate court reversed the trial court decision and remanded the matter for trial (ELR 13:8:14).

In March 1995, a Los Angeles trial court ruled on behalf of the Boyd/Hastings parties with respect to the Filmvideo assigned contract claim, as well for refusing to pay the judgment and for failure to defend. After careful consideration, Judge Irving Shimer stated that Fireman's "elected to treat the insurance as being in effect for the three year term and it cannot now complain when a third party victim obtains a judgment against the insured for injuries suffered during the term of the policy by reason of conduct of the insured expressly insured against under the policy." Fireman's Fund prevailed on the various tort claims, including breach of the implied covenant of good faith and fair dealing and unfair insurance practices. The court awarded the Boyd/Hastings parties the full amount of the federal court judgment, $960,000 plus attorneys' fees, costs including the costs of the services of expert witnesses, and interest, for a total award of about $3.3 million.

William Boyd Enterprises v. Fireman's Fund Insurance Company, Case No. WEC 82630 (Los Angeles Cnty., Mar. 1, 1995, Mar. 10, 1995) [ELR 16:11:3]

Gram Parsons' daughter may pursue claim involving song catalog

In 1972, Gram Parsons hired Edward Tickner and James Dickson to manage his musical career. Parsons formed Wait & See Music to publish and promote his music; Tickner and Dickson were to collect the royalties due Parsons. When Parsons died intestate in 1973, Tickner and Dickson, according to California appellate court Judge Vogel, wrongfully converted the company and its catalog of Parsons' songs to their own company, "Tickson Music," and "proceeded to exploit the Wait & See catalog for their own economic advantage."

Parsons was survived by his wife Gretchen and by his daughter from a prior marriage, Polly Parsons.

One of the contracts listed in the inventory of Parsons' personal property included songs published by Wait & See.

In December 1985, Gretchen Parsons, individually and as administratrix of the estate, entered into a stipulation with Polly Parsons providing that the two of them each would receive one-half of all future income from the inventoried royalty contracts. The stipulation also provided that Polly Parsons would be the sole owner of any unmarshalled assets, any after-discovered assets, and any assets not shown on the inventory of the estate.

In June 1991, Len Freedman, who had purchased the Wait & See catalog, informed Polly Parsons that there did not appear to be any documents transferring Gram Parsons' compositions to Tickner and Dickson.

Polly Parsons subsequently sued Tickner, Dickson and Freedman on several grounds, alleging, in part, that Tickner and Dickson concealed the fact that Gram Parsons had never transferred any ownership interest in the Wait & See catalog, and that the Tickner parties falsely represented that they were entitled to publish the catalog, subject only to the obligation to distribute specified royalty payments. Polly Parsons' claim against Gretchen Parsons alleged that the Wait & See catalog was an unmarshalled, uninventoried, and after-discovered asset of Gram Parsons' estate and that Polly Parsons therefore was entitled to the asset as well as to all revenues generated from the promotion of its songs.

A Los Angeles trial court dismissed Parsons' action, sustaining the general demurrer of the Tickner parties.

Judge Vogel first rejected the Tickner parties' argument that Polly Parsons lacked the legal capacity to sue, noting that the Wait & See catalog was included in the estate inventory as a "Writer's Royalty rights in...musical properties" - this provided for the payment of royalty percentages. However, observed the court, the catalog as such was not inventoried as an asset of the estate, and "the right to receive a royalty payment from the publisher of the catalog is qualitatively different from the right to receive revenue predicated upon ownership of the catalog." The Wait & See catalog of songs was an uninventoried asset of the estate, declared Judge Vogel, and Polly Parsons had standing to pursue the present action in her capacity as a successor in interest to Gram Parsons.

In turning to the Tickner parties' statute of limitations arguments, Judge Vogel pointed out that the Tickner parties not only concealed the "key fact" that Gram

Parsons had never transferred this catalog to them, but further concealed that fact "by falsely representing they were the producers of the catalog, only obligated to distribute specified royalty payments." It was not unreasonable for either the estate or Polly Parsons to assume that the Tickner parties, who represented themselves as the producers of the Wait & See catalog, indeed owned the catalog. And Gretchen Parsons and Polly Parsons did not have a duty to verify the representations of the Tickner parties. In all, Polly Parsons sufficiently pled that she could not have learned of the complained-of conduct prior to June 1991.

The court emphasized that the delayed discovery rule would apply to all of Polly Parsons' causes of action, including fraud, breach of fiduciary duty, and conversion. The claims, although delayed for 19 years, were not time barred, reiterated the court, since Parsons did not know and, in the exercise of reasonable diligence, could not have discovered that the Tickner parties had no lawful right to the Wait & See catalog. The fact that Parsons received royalty payments did not preclude a lawsuit.

Polly Parsons also alleged a cause of action against Gretchen Parsons with respect to the Wait & See catalog. If Parsons prevails on her claims against the Tickner parties, noted the court, she would own the songs in the catalog; the Wait & See royalty contract might be dissolved and there was a possibility that Gretchen Parsons no longer would be entitled to royalties from that contract. Polly Parsons also sought to recover the royalty payments, derived from the Wait & See catalog, received by Gretchen Parsons from the Tickner parties.

Gretchen Parsons demurred on the ground that all of the claims were barred by the mutual release settling disputes pertaining to the administration of the probate estate. But the release, by its terms, did not resolve disputes arising after its December 11, 1985 execution date. Judge Vogel found that the release barred Polly Parsons from pursuing any claim against Gretchen Parsons for negligent administration of the estate. And because Polly Parsons did not claim extrinsic fraud against Gretchen Parsons, Polly Parsons may not attempt to reclaim from Gretchen Parsons any of the Wait & See catalog royalties received by Gretchen Parsons - those royalties derived from the long-since final order of distribution. However, if Polly Parsons prevails on her claim to the Wait & See catalog, Gretchen Parsons most likely will seek declaratory relief as to any proposed termination of future royalty payments.

The court, accordingly, reversed the judgments of dismissal.

Parsons v. Tickner, 31 Cal.App.4th 1513, 1995 Cal.App.LEXIS 83 (Ca.Ct. App. 1995)[ELR 16:11:4]

Sons of Ernest Hemingway prevail in dispute over foreign publishing rights in late author's works

The sons of the late Ernest Hemingway sought to determine their rights under a trust established in 1972 by the author's widow. The Hemingway Foundation claimed the trust and asserted a separate counterclaim for a declaratory judgment and an accounting with respect to a trust established in 1962 by Mary Hemingway, and with respect to a 1983 "Publishing Rights Agency Agreement."

Hemingway, who died in 1961, left his estate to Mary Hemingway. A one-page handwritten will directed Mary Hemingway to provide for Hemingway's three sons, by prior marriages, according to the author's "written instructions;" those instructions never were found, according to New York trial court Judge Greenfield.

In 1962, as part of a negotiated settlement, Mary Hemingway established a trust for the Hemingway sons; the trust received an interest in certain foreign publication rights.

The Foundation argued that the rights granted to the trust did not include the right to benefit from any exploitation of Ernest Hemingway's works in the English language outside of the United States, but only to benefit from foreign translations.

Mary Hemingway had formed the Foundation in 1965. In 1971, she assigned to the Foundation eight previously unpublished "Nick Adams" short stories written by Ernest Hemingway, and in 1979, she assigned to the Foundation all of Ernest Hemingway's then unpublished poems and letters. The parties agreed that these two assignments were subject to the earlier grant to the 1962 trust.

In her 1979 will, Mary Hemingway bequeathed to the Foundation any manuscripts of Ernest Hemingway that remained unpublished at the time of her death.

In a 1983 Publishing Rights Agency Agreement entered into by Mary Hemingway, the Hemingway sons and attorney Alfred Rice, the parties agreed, in part, that John and Patrick Hemingway would have the right to approve the publication or assignment of rights in material written by Ernest Hemingway, but not published during his lifetime. The Nick Adams stories and the unpublished poems and letters previously assigned to the Foundation were excluded from the 1983 agreement. The parties disagreed about the effect of the agreement in connection with the rights to Ernest Hemingway's unpublished works which were bequeathed to the Foundation in 1986 upon Mary Hemingway's death.

Judge Greenfield noted that the language of the 1962 trust unambiguously granted to the Hemingway sons all rights to copyright, publish, and distribute Hemingway's works in foreign countries, in both the English language and in foreign translations.

The court then found that the 1983 agreement did not lapse upon Mary Hemingway's death; that the rule against perpetuities did not apply; and that requiring the consent of John and Patrick Hemingway to the Foundation's publication or assignment of Ernest Hemingway's posthumous works would not violate the common law rule against unreasonable restraints on alienation. Thus, the court denied the Foundation's motion for summary judgment on its counterclaim and granted the Hemingway sons' motion for dismissal. The 1962 trust, ruled the court, is the lawful owner of all rights to copyright, publish and distribute Ernest Hemingway's works in foreign countries, in both the English language and in foreign translations, and Mary Hemingway's testamentary bequest to the Foundation in 1986 of all unpublished works of Ernest Hemingway is subject to the rights granted to John and Patrick Hemingway in the 1983 agreement.

Hemingway v. The Hemingway Foundation, New York Law Journal, p. 26, col. 1 (N.Y.Cnty., Feb. 8, 1995) [ELR 16:11:5]

Parfums Givenchy prevails in infringement action involving importation and sale of perfume in copyrighted packaging

A Federal Court of Appeals has affirmed a District Court decision granting a permanent injunction to Parfums Givenchy in a copyright infringement action against Drug Emporium, Inc. Givenchy owns the United States copyright to the box design of Amarige perfume; it was alleged that Drug Emporium, without authorization, was selling the perfume in the original copyrighted packaging.

Drug Emporium, a nationwide retail chain, purchased the perfume, in the United States, from third parties who purchased or otherwise lawfully obtained quantities of Amarige abroad and then imported the product, without authorization, into the United States. Drug Emporium purportedly distributed the perfume after Givenchy USA became the registered U.S. copyright owner of the box design.

Judge Pregerson, after finding that Givenchy USA had standing to sue under the Copyright Act, stated that a copyright holder's importation right under section 602(a) of the statute survives as to a particular copy unless and until there has been a "first sale" in the United States (emphasis by the court). It was noted that prior to the 1976 amendments to the Copyright Act, the unauthorized importation of non-pirated copyrighted articles was not prohibited. Section 602(1) was enacted in order to provide greater remedies for United States copyright owners, continued the court, and to make the mere act of importation, regardless of sale, an infringement of section 106(3)'s distribution right. Thus, a copyright owner "will gain the full value of each copy sold in the United States, by preventing the unauthorized importation of copies sold abroad from being used as a means of circumventing the copyright owner's distribution rights in the United States."

The court declined to overrule its decision in BMG Music v. Perez, 952 F.2d 318 (9th Cir. 1991; ELR 14:1:21; 13:10:8), cert. denied, 112 S.Ct. 1997 (1992) in which it was found that an importer infringed on United States copyrights when importing and selling phonorecords without the authorization of the United States copyright holder. In the instant case, Drug Emporium, as the purchaser of illegally imported copies, "has no more authority to distribute copies than does the original importer," declared Judge Pregerson.

Drug Emporium also argued that BMG Music should be distinguished because Givenchy USA, the United States copyright owner, is the wholly owned subsidiary of the foreign manufacturer of Amarige, Givenchy France. It appeared to the court that there was nothing in the language of section 602, or its legislative history or case law, to suggest that subsidiaries of foreign manufacturers should be treated any differently from other United States copyright holders.

Drug Emporium asked the court to analogize from trademark cases under section 526 of the Tariff Act of 1930. Section 526(a) of the Tariff Act prohibits the unauthorized importation of foreign-made merchandise bearing a registered trademark owned by a United States corporation. The United States Supreme Court, in K Mart v. Cartier, 486 U.S. 281, 108 S.Ct.1811, 100 L.Ed.3d 313 (1988) held that wholly owned subsidiaries of a foreign manufacturer are not entitled to invoke section 526 to prevent competition from third parties who import the products manufactured by the parent company.

Judge Pregerson observed that the decision was based on a United States Customs Service regulation interpreting certain statutory language; the regulation did not help Drug Emporium, stated the court, because section 602 of the Copyright Act is not restricted by its terms to United States citizens or companies.

The Supreme Court also relied on the purpose of section 526 of the Tariff Act, which is to protect domestic companies against foreign competition - a rationale which does not apply to the Copyright Act. The import restrictions of section 602 were intended to protect United States copyright holders from pirated articles as well as gray market copies, not to give preferential treatment to domestic companies over foreign companies. Givenchy France would have been eligible to assert United States copyright protection for the Amarige box design for itself had it not assigned its United States copyright interest to Givenchy USA.

In turning to Drug Emporium's arguments under the Lanham Act, the court noted that sections 32 and 43(a) of the statute have been interpreted so as to protect United States trademark owners from competition from goods manufactured and purchased abroad and imported without the consent of the United States trademark owner. This import protection, stated Judge Pregerson, is "functionally equivalent" to the Copyright Act's section 602 in that it allows United States companies to sue third parties that attempt to import lawfully obtained foreign manufactured goods without the authorization of the United States registered trademark owner. The rationale for the parent-subsidiary exception to the import protection of the Lanham Act does not apply to copyright law - there was "no indication that section 602 of the Copyright Act was particularly intended to give domestic copyright holders the benefit of their bargains with foreign manufacturers, nor that it was intended to protect United States copyright holders' control over the quality and contents of the copyrighted goods."

In all, concluded the court, nothing in the Copyright Act, the Lanham Act, or the Tariff Act warranted an exception to the importation right granted to United States copyright holders by section 602(a) for United States subsidiaries of foreign manufacturers.

Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 1994 U.S.App.LEXIS 29269 (9th Cir. 1994)[ELR 16:11:6]

Tower Video obtains $37,000 in attorneys' fees as prevailing party when court denies copyright holder's actual damages claim

Tower Video sold, in the United States, twenty-seven English language laser video disks of the film "Return from the River Kwai," which had been manufactured and distributed in Japan with Japanese subtitles and Japanese/English covers. Tower had acquired forty-six of the Japanese distributed disks by purchasing them for Tower Records KK, its Japanese subsidiary, and importing them into the United States.

When Screenlife Establishment brought a copyright infringement action, Tower Video ceased selling the laser disks and conceded that Screenlife was entitled to a permanent injunction barring the continued infringement of Screenlife's United States copyright, to the return of the remaining nineteen disks to Screenlife, and to an award of about $4100 (increased from an original offer of $348) representing the net profit from the sale of the twenty-seven video disks.

Screenlife had sought, but was not entitled to, statutory damages and attorneys' fees, stated Federal District Court Judge Sotomayor. The film was first published no later than 1989, but Screenlife's registration certificate was effective in May 1992, more than three months after the date of first publication. Tower Video began selling the laser disks in January 1992, after "Return's" first publication and before the effective date of registration.

Screenlife continued to seek actual damages, arguing that Tower's sale of the laser video disks reduced the value of Screenlife's licensing rights in the United States market. After a trial, the court denied Screenlife's claim.

In considering the reasonableness of Screenlife's decision to pursue the actual damages claim, Judge Sotomayor referred to two other lawsuits pending at the time of the trial in the instant case. One lawsuit concerned the right of "Return's" distributor, Tri-Star Pictures, to terminate its contract with Screenlife's subsidiary, Leisure Time Productions; Tri-Star, in a separate lawsuit, was involved in a dispute with Academy Pictures over trademark issues with respect to the use of the title "Return From the River Kwai."

Judge Sotomayor noted that at the time of trial, that District Court had held that although Academy Pictures had made a strong preliminary showing for relief under the Lanham Act, disputed issues of material fact precluded granting summary judgment. The court subsequently dismissed Academy's claim without prejudice to proceed with the claims in Tri-Star's pending trademark action; the trademark action was settled in April 1993.

Furthermore, at the time of trial, Leisure had lost a declaratory judgment motion brought by Tri-Star seeking the termination of its distribution agreement with Leisure. A Federal Court of Appeals (ELR 16:4:7), after the trial in the underlying action, affirmed the District Court's ruling that Tri-Star was entitled to terminate its distribution agreement.

An award of costs and attorneys' fees, under section 505 of the Copyright Act, is appropriate when the party seeking fees has prevailed in the litigation and the other party's conduct warrants imposing such fees. Judge Sotomayor stated that Tower was a "prevailing party" for purposes of section 505 on the issue of actual damages.

It then was found that even if Screenlife had a good faith basis to claim that the pre-release importation into the United States of the laser video disks could affect the market value of the future negotiation of licensing rights for the release of "Return," Screenlife, because of the Tri-Star litigation, "had no reasonable knowledge or expectation of a fixed release date of 'Return' in the United States to quantify its market loss." Screenlife did not know whether the movie ultimately released in the United States would have the same title as the Japanese video. Thus, the company could not reasonably assess what the impact on market value would be of a differently titled laser disk. Screenlife's claim of actual damages at the time of the trial of the action was found "at best, speculative and remote and relying on an expert opinion premised on pure speculation was unreasonable."

Bad faith or frivolousness was not a prerequisite to an award of fees, observed Judge Sotomayor, and, given the finding of Screenlife's objective unreasonableness, Tower was entitled to a total award of costs, including reasonable attorneys' fees, in the amount of about $37,000.

Screenlife Establishment v. Tower Video, Inc., 868 F.Supp. 47, 1994 U.S.Dist.LEXIS 12074 (S.D.N.Y. 1994)[ELR 16:11:7]

Saban Entertainment obtains injunction barring sale of allegedly infringing "Mighty Morphin Power Ranger" toys

Saban Entertainment, the copyright holder of the "Mighty Morphin Power Rangers," claimed that several retailers in the New York area, including Panaria International, were selling allegedly infringing items.

A Federal District Court found that Saban established a likelihood of success on its claim of copyright infringement. Judge Haight stated that a comparison of the parties' products "reveals similarities that go far beyond a generic masked heroic figure." The distinctive features of the Power Rangers include: "helmets covering the entire head, with dramatic black apertures for vision, and adorned with features of the dinosaur associated with each character; white gloves and boots which contrast with the primary colors of the uniforms, and are decorated with diamond shapes reflecting those colors; white chest markings; and wide belts (white or silver) with holsters for weapons."

Panaria consented to an injunction forbidding the company from marketing larger size toys. The products at issue were much smaller figures, but, stated the court, even the smaller toys included a sufficient number of similarities to create "an unmistakable evocation of the Power Rangers." Any differences between the parties' products apparently resulted from the small size of the figures at issue, continued the court, and "the expense of attempting to reproduce each and every feature of the protected product." But the slight differences did not alter the substantial similarity created by the totality of the products' appearances and distinctive traits, declared Judge Haight.

It was found that a ruling by the U.S. Customs Service concerning Panaria's products did not require the court to reach a different result as to Saban's likelihood of success on its copyright claim.

Judge Haight then determined that Saban showed a likelihood of success on its Lanham Act claim of trade dress infringement, as well as on its claims under the

New York Anti-Dilution statute and the state common law of unfair competition.

In turning to the issue of irreparable harm, Judge Haight stated that Saban's inability to meet the present demand for the company's licensed products was not sufficient to rebut the presumption of irreparable harm arising from the showing of substantial similarity and likelihood of confusion.

Saban also argued that the sale of Panaria's toys detrimentally affected Saban's reputation for quality - this alleged damage to Saban's reputation in the toy market would be the type of harm which is impossible to quantify and which might have the potential to diminish the demand for its licensed products. "Reputational erosion" is sufficient to support a finding of irreparable harm, stated Judge Haight, who, after considering other quality differences between the products, concluded that Saban made the requisite showing of irreparable harm, and issued the requested preliminary injunction.

Saban Entertainment, Inc. v. 222 World Corp., 865 F.Supp. 1047, 1994 U.S.Dist.LEXIS 14933 (S.D.N.Y. 1994)[ELR 16:11:8]

Creator of "Loveline" radio program loses copyright infringement claim against station owner

Infinity Broadcasting of Los Angeles, the owner and operator of Burbank radio station KROQ, suspended announcer James Trenton in August 1993. Trenton remained under contract until November 1994 and continued to receive his regular salary.

Trenton, in about 1983, developed the format for a program he called "Loveline." In February 1992, "Loveline" was expanded to a Monday-Friday program. In November 1993, KROQ announced a new permanent lead host for Loveline.

Trenton sued Infinity in a California trial court, challenging, in part, KROQ's use of the Loveline program format. When Infinity removed the matter to a Federal District Court, Trenton filed a motion to remand, arguing that his alleged interest in the Loveline program format and name was protected by California law, not federal law.

Judge Keller, noting that KROQ recorded most of the Loveline programs simultaneously with their transmission, found that the copyright infringement action arose, at least in part, under federal law and that the removal of the action was appropriate.

The court then stated that any copyrightable interest in Loveline was created in the scope of Trenton's employment; that there did not appear to be a written agreement naming Trenton as the owner of the programs; that Infinity was the author of the work and owned the copyright interest in the recorded programs; and that Infinity owned the exclusive right to prepare and broadcast derivative works based on existing Loveline programs.

Even assuming that Trenton had a protectable copyright interest in the Loveline "property" prior to the broadcast and simultaneous recording (which the court found Trenton did not), section 204(a) of the Copyright Act requires a transfer of copyright ownership to be in writing and signed by the owner of the rights. Trenton had no writing documenting the grant of a license to KROQ or challenging Infinity's registered trademark.

The court next rejected Trenton's argument that the Copyright Act is unconstitutional to the extent that it preempts state laws which protect materials not covered by the federal statute. Judge Keller stated that California Civil Code 980(a)(1) does not protect ideas, but only the representation or expression of original works which are not fixed in any tangible medium of expression.

After granting Infinity's motion for summary judgment as to Trenton's copyright infringement claim, the court turned to the nineteen state law causes of action. It was found that various property-based causes of action asserted a protectable copyright interest in the Loveline format and were not qualitatively different from Trenton's copyright infringement claim and thus were preempted under section 301 of the Copyright Act. The court dismissed the causes of action as to the Loveline programs which were simultaneously recorded.

In claims related to Infinity's alleged breach of contract, Trenton argued that Infinity agreed to compensate him for his ideas, and that the parties modified their agreements so that Trenton's compensation would increase as the popularity of Loveline increased. But Trenton based these causes of action upon a copyright interest in the Loveline format, and he had no copyright interest in the simultaneously recorded programs. However, by focusing on the alleged breaches of contract and avoiding the assertion of a copyright interest in the simultaneously recorded Loveline programs, the claims might assert state law causes of action; the court therefore dismissed Trenton's claims without prejudice.

Trenton v. Infinity Broadcasting Corp., 865 F.Supp. 1416, 1994 U.S.Dist.LEXIS 19191 (C.D.Ca. 1994) [ELR 16:11:9]

MTV "VJ" may counterclaim for breach of contract and fraud in action involving "mtv.com" Internet site

Adam Curry worked as a video disc jockey for MTV Networks under a written contract through May 1, 1992 and continued to work for MTV through April 1994 under "informal" terms.

In June 1993, Curry met with an MTV executive to discuss an Internet service he was developing with the Internet site address "mtv.com". Curry claimed that the executive declined to enter a joint venture, but indicated that Curry might continue developing the Internet site at his own expense.

In about August 1993, Curry announced the mtv.com address on MTV broadcasts, and continued to work on the project.

In January 1994, MTV asked Curry to cease using the mtv.com address. However, the network, in its programming, apparently continued to refer to the address and Curry was asked to include certain materials at the site.

MTV eventually sued Curry, alleging various claims including trademark infringement and breach of the VJ's employment contract.

MTV moved to dismiss Curry's counterclaim for breach of contract, asserting it was barred by the statute of frauds. But a Federal District Court in New York denied MTV's motion.

Judge McKenna then found Curry's pleadings sufficient with respect to the counterclaim alleging fraud and negligent misrepresentation. However, MTV was entitled to clarification of Curry's counterclaim alleging unfair competition, concluded the court.

MTV Networks v. Curry, 867 F.Supp. 202, 1994 U.S.Dist.LEXIS 15525 (S.D.N.Y. 1994)[ELR 16:11:10]

Copyright infringement claim is rejected in dispute over competing productions of "Italian comedy wedding"

Darlyne and Paul Franklin created a show entitled "Joey and Maria's Comedy Italian Wedding." The Franklins claimed that Mario D. Ciroli orally agreed to provide his dinner theater for performances of the show from September 1993 until December 1993, and that Ciroli later agreed to add six performances in January and February 1994.

In November 1993, Ciroli began advertising performance dates for his own "Comedy Italian Wedding" show.

When the Franklins brought an action for copyright infringement and for the violation of state law, a Federal District Court in Massachusetts first upheld the validity of the Franklins' copyright. Ciroli argued that the copyright application failed to include the date and nation of the first publication of the script, and failed to identify preexisting works incorporated in the show.

Chief Judge Tauro observed that the show appeared to constitute a derivative work and that the registration application should have listed the names of preexisting works and a brief statement of the additional material covered in the Franklins' script. However, it appeared to the court that preexisting works were not a significant part of the performance and that it was "highly unlikely" that the omission of those works prejudiced Ciroli or would have caused the Copyright Office to reject the Franklins' application. The omissions therefore did not invalidate the Franklins' copyright registration, nor did the failure to list the dates of publication.

Chief Judge Tauro then stated that the Franklins did not establish sufficient similarities to warrant a finding that Ciroli copied their work, given that "the 'idea' of deriding Italian weddings is capable of various modes of expression." The only similarities between the works was the reliance on "crude ethnic caricatures as cast members" and the fact that both scripts, in the court's view, were "singularly unfunny." In all, the Franklins did not show that they were entitled to injunctive relief.

The court concluded by refusing to grant a preliminary injunction in connection with the Franklins' various causes of action under state law, including breach of contract and fraud.

In a subsequent decision, Chief Judge Tauro granted Ciroli's motion for summary judgment as to the Franklins' copyright infringement claim. The court noted that the Franklins conceded that their work was not protected insofar as it involved a parody of an Italian wedding, but argued that Ciroli's work copied, among other material, the appearance of a jealous ex-girlfriend and a "Godfather" figure. It was found that the cited characters were "distinct stereotyped characters," who were "not amenable to copyright protection as such," and that the settings in which these characters appeared were logical extensions of the characters themselves and were beyond the scope of copyright protection. The expressions of ideas embodied in the cited characters and subplots were not unlawfully appropriated from the Franklin production, stated Chief Judge Tauro, who concluded by dismissing the state law claims without prejudice for lack of subject matter jurisdiction.

Franklin v. Ciroli, 865 F.Supp. 940, 1994 U.S.Dist. LEXIS 13785; 865 F.Supp. 947, 1994 U.S.Dist.LEXIS 13792 (D.Mass. 1994)[ELR 16:11:10]

Pitcher Steve Howe loses libel action against New York Post

In August 1993, the New York Post published an article concerning events which occurred during a performance of the play "Tony 'n Tina's Wedding." During the show, the cast and audience ("guests") walk from a mock wedding ceremony at a church to a catering hall "reception." During the performance at issue, one patron lit a marijuana cigarette, took a few puffs and handed it to the person behind him, who, according to the newspaper, "promptly went ballistic." The offended individual apparently was New York Yankee pitcher Steve Howe, who angrily refused the offer, stating, in part, "you're trying to entrap me, you bastard."

Howe, who claimed that he never attended the play and that the incident described did not happen, sued the New York Post, alleging various causes of action.

New York trial court Judge Elliott Wilk, assuming, for purposes of Howe's motion to dismiss, that the newspaper published a fabricated story with actual malice, found that the words used in the article were not capable of a defamatory meaning. The article did not accuse Howe of violating the terms of his probation; did not give the impression that Howe was once again involved in drug use, or that he deliberately placed himself in a location where drugs were available; and did not ridicule Howe's efforts at rehabilitation. The court, accordingly, dismissed the cause of action for defamation.

Judge Wilk also dismissed Howe's claim alleging intentional infliction of emotional distress, finding that the newspaper did not engage in "extreme and outrageous conduct," and dismissed a claim of prima facie tort.

Howe v. New York Post Co., Inc., New York Law Journal, p. 27, col. 2 (N.Y.Cnty., Mar. 13, 1995)[ELR 16:11:11]

Court again reverses contempt order entered upon author's failure to comply with discovery order in libel case

Ronald Watkins' 1993 nonfiction book "Birthright" was about the Shoen family feud over the control of U-Haul Corporation and about the as yet unsolved murder of Eva Berg Shoen. Eva was the wife of Sam Shoen, the eldest son of Leonard Shoen, the founder of U-Haul.

Leonard Shoen agreed to provide source material for the book in exchange for a percentage of royalties and proceeds from any sales of movie rights.

Mark and Edward Shoen, the two sons engaged in the feud with Leonard, sued their father, alleging that he made public statements, most to the press, linking them to Eva's death. The Shoen sons did not claim that Leonard made any defamatory statements to Watkins, but the author was served with a subpoena duces tecum, ordering him to appear at a deposition, to testify, and to produce any notes or other records in his possession relating to the death of Eva Shoen and the family feud over U-Haul. Watkins refused to comply with the subpoena and also refused to comply with a Federal District Court order to produce notes and tapes of his conversations with Leonard Shoen concerning the Shoen family. The court held the author in contempt.

A Federal Court of Appeals reversed the District Court's contempt order (ELR 16:1:25).

Soon after the court's ruling, the Shoen sons, "evidently under the impression that they had satisfied their obligation to exhaust all reasonable alternative sources," according to Federal Court of Appeals Judge Jerome Farris, again demanded Watkins' tapes and notes. The District Court granted a motion to compel Watkins to comply with the Shoen sons' discovery requests; Watkins again refused.

On August 19, 1994, the District Court ordered that unless Watkins immediately complied with the court's order, the author would be incarcerated until he agreed to comply or until the underlying litigation terminated. The court, on September 1st, found Watkins to be a recalcitrant witness and ordered his immediate incarceration. The Court of Appeals stayed the incarceration order pending the appeal.

Judge Farris recalled that in the prior proceeding, the court had found that the qualified privilege for journalists against compelled disclosure of information gathered in the course of their work extends to investigative book authors and protects nonconfidential sources and materials. The court then found that the Shoen sons did not present a sufficiently compelling need for the requested materials to overcome Watkins' assertion of the privilege.

In considering the appropriate test for determining when a civil litigant may override a journalist's privilege, the court noted that "routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." Judge Farris proceeded to hold that where information sought is not confidential, a civil litigant is entitled to requested discovery, notwithstanding a valid assertion of the journalist's privilege by a nonparty, upon a showing that the requested materials is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case.

The court rejected a fourth factor which would have required a showing that the information goes to "the heart of the seeker's case."

The District Court had found that the Shoen sons were limited purpose public figures, but Judge Farris rejected the argument that the requested tapes and notes might contain evidence of Leonard Shoen's "ill will" toward his family. Most of the allegedly libelous statements were made many months before the Shoen-Watkins interviews began. Thus, even if Leonard Shoen was hostile toward his sons at any time after the alleged libel, this showing could not, without more, establish actual malice at the time the statements were made, stated Judge Farris. The September 1991 statements, if any, regarding his attitude toward his sons were not clearly relevant to an important issue in the litigation.

Judge Farris then found that the requested material was also cumulative as to the question of ill will and concluded by vacating the order holding Watkins in contempt.

Judge James Leavy, in dissent, stated that the court's position would preclude the admission of evidence that "does not coincide precisely with the time of allegedly defamatory act(s)." Shoen's comments to Watkins on the subject of the murder of Eva Berg Shoen had a direct bearing on the Shoen sons' claim of actual malice, in Judge Leavy's view - the defamation accusation arose out of Leonard Shoen's accusation that Mark and Edward were involved in Eva's death. Any evidence of Shoen's actual knowledge of the details of Eva's murder was noncumulative, stated Judge Leavy, and the requested material was practically unavailable, despite the exhaustion of all reasonable alternative sources.

The dissent also questioned the court's decision to reject the argument that Watkins' tapes and notes would be invaluable impeachment material, and would have found that the Shoen sons met their burden as to all three prongs of the test propounded by the majority and made a sufficient showing to overcome Watkins' assertion of the journalist's qualified privilege.

Shoen v. Shoen, 1995 U.S.App.LEXIS 2794 (9th Cir. 1995)[ELR 16:11:11]

Libel claim over article in New York Magazine is dismissed

As reported at ELR 12:6:6, Nicholas Pileggi, in a May 1986 article in New York Magazine discussed the purported relationship between organized crime and certain New York City government operations. Pileggi stated that an individual known as Dominick Santiago "ran trucking companies suspected of mob infiltration...[and]

was arrested, indicted, and given a six-month federal court sentence in 1975 for embezzling $500,000 in pension funds." Pileggi claimed that Santiago, under the name Nick Sands, became a Democratic state committeeman and held other public positions, and "led a remarkable double life."

When Sands sued Pileggi and the publisher of the magazine, a New York trial court denied Sands' motion to compel Pileggi to answer interrogatories.

An appellate court ruled that Pileggi was entitled to assert New York's Shield Law and issued other rulings concerning the disclosure of information.

In January 1995, Judge Carol Arber dismissed Sands' libel action. The court found that Sands was a public figure for purposes of the instant lawsuit; that it was reasonable for Pileggi, in preparing his article, to rely upon the information provided by various government and media sources; and that there was no showing that

Pileggi entertained serious doubts as to the truth of the article. In all, Pileggi did not act with reckless disregard for the truth when he claimed that Sands had ties to organized crime, stated the court, in granting the reporters' and the publisher's motions for summary judgment.

Sands v. News America Publishing, Inc., New York Law Journal, p. 27, col. 4 (N.Y.Cnty., Jan. 17, 1995)[ELR 16:11:12]

TV station sports director/newscast anchor is entitled to overtime payments since job was not "intellectual, managerial or creative"

In a decision certified for partial publication, a California appellate court has ruled that a television station sports director/newscast anchor was entitled to overtime compensation under subdivision 3 of Industrial Welfare Commission Order No. 11-80. Brian E. Nordquist was not exempt as a professional or administrative employee engaged in primarily intellectual, managerial or creative work which required the exercise of discretion and independent judgment, declared the court. In upholding a trial court ruling which overruled an order by the Labor Commissioner rejecting Nordquist's compensation claim, the appellate court also granted the sports director's claim for prejudgment interest.

Nordquist's employment contract with KERO-TV23 provided for a basic work week of five days, with the understanding that the sportscaster/reporter "from time to time" might be required to work additional days or extended workshifts. The contract, which set forth the amount of Nordquist's annual compensation, also incorporated the employee handbook, which, in part, established a normal workweek of 40 hours, and required payment for overtime work in excess of 40 hours per week and, in California, for hours worked in excess of 8 hours per day.

As described by Judge James F. Thaxter, KERO established an informal compensatory time-off policy for on-air employees who were required to work some holidays and extra days to broadcast the daily news. Exempt employees were permitted to take one day off for each extra day worked. However, the policy was discretionary with the station management and Nordquist frequently was not permitted to take the promised compensatory time.

KERO hired Nordquist in May 1982 as an "on-air" employee under a "talent contract;" his employee category meant that his salary increase would not be limited by a set pay range. But Nordquist was listed as a nonexempt employee for Fair Labor Standards Act purposes on a corporate personnel form.

In September 1983, the station promoted Nordquist to sports director/anchor, a position in which he was responsible for producing and anchoring three sports segments of KERO's live nightly newscasts. Nordquist remained in the position until he resigned in September 1987.

Nordquist claimed that the sports director/anchor position involved "primarily mundane and unimaginative duties and responsibilities," such as gathering sports news which he summarized, scripted, and read on-air during the sports segment of the nightly newscasts. The script essentially was a rewrite of material from wire services, satellite feeds, print media, press releases, phone calls and local interviews, stated Judge Thaxter; broadcast content was determined by the sports events of the day and was prepared according to station guidelines and standard formats in the industry.

The station's news director claimed that Nordquist was required to exercise discretion, judgment and creativity, and noted that Nordquist was "the most watched sports anchor in the broadcast area."

In late 1987, Nordquist filed a claim for overtime compensation with the California Labor Commissioner. A trial court reversed the ruling that Nordquist was an exempt employee. Based on the court's ruling, the parties stipulated that Nordquist was entitled to about $100,000 in overtime compensation. The parties subsequently agreed that Nordquist was due about $60,000 in prejudgment interest and about $2500 in postjudgment interest.

Judge Thaxter, given the "dearth of case law" on the subject of exempt employees, referred to two cases arising under the federal Fair Labor Standards Act. In Dalheim v. KDFW-TV, 9l8 F.2d 1220 (5th Cir. 1990; ELR 13:1:3), the trial court, after careful consideration, found that the station failed to prove that general assignment reporters (including a sportscaster), producers, directors and assignment editors were exempt. Freeman v. National Broadcast Co., Inc., 846 F.Supp. 1109 (S.D.N.Y. 1993; ELR 16:2:19; 16:4:32) also denied an overtime compensation claim brought by a group of television network newscast employees; the court concluded that the employees were not administrative or artistic professional employees under the statute.

In Mandelaris v. McGraw-Hill Broadcasting Co., a Federal District Court, in an unpublished opinion, concluded that Mandelaris, who was Nordquist's successor as KERO's sports director/anchor, was an exempt artistic professional and administrative employee. It was determined that Mandelaris arranged coverage of various sporting events, the order of presentation of stories on a newscast and the tone of the story aired. Mandelaris was his own editor; "ad-libbed as necessary and demonstrated talent in being able to perform on television and at public events extemporaneously;" and spent more than 50 percent of his working time performing tasks which required the exercise of discretion and independent judgment.

Judge Thaxter stated that Mandelaris was not dispositive because the decision was fact specific.

The court then gave extensive consideration to Nordquist's job responsibilities, education and experience; to the statutory obligation to pay overtime; and to the fact that Nordquist's employment contract did not obligate KERO to pay overtime.

(In the unpublished portion of the opinion, the court held that the trial court erred by applying the four year limitations period for obligations arising from a written contract rather than the three year period for obligations arising from statute, and remanded the matter with directors to apply the correct statute of limitations and recalculate the amount of overtime compensation and interest due.)

Nordquist v. McGraw-Hill Broadcasting Company, Inc., 32 Cal.App.4th 555, 1995 Cal.App.LEXIS 138, 38 Cal.Rptr. 2d 221 (Ca.Ct.App.1995)[ELR 16:11:12]

Athlete must exhaust administrative remedies in action over suspension for allegedly testing positive for prohibited substance

In a decision issued in September 1993, but only recently published, a Federal District Court in West Virginia dismissed, for lack of subject matter jurisdiction, a complaint brought by Eric Barnes against the International Amateur Athletic Federation.

Barnes, the world record holder in the shot put, originally filed a lawsuit in a West Virginia trial court seeking declaratory and injunctive relief, as well as damages, against the Federation, The Athletics Congress of the United States, and the West Virginia Association of the Athletics Congress. The organizations had suspended Barnes from athletic competition for two years for allegedly testing positive for a prohibited substance.

The trial court, following an ex parte hearing, enjoined the athletic organizations from interfering with Barnes' participation in international and national amateur track and field events, including the 1992 United States Olympic Trials and the 1992 International Olympic Games. The organizations then filed a petition seeking the removal of the action to federal court.

The Federal District Court, in a prior order, refused to remand the matter to the trial court and granted the organizations' motion to dissolve the temporary restraining order entered by the trial court on the basis that Barnes did not exhaust his administrative remedies as required under the Amateur Sports Act.

Judge Copenhaver, in the instant proceeding, first granted the International Amateur Athletic Federation's motion to dismiss for insufficiency of service of process.

It then was noted that the court's prior order had found that Barnes was not a member of the West Virginia organization during any of the years relevant to the dispute and that Barnes had no real intention to obtain a joint judgment against the organization. Judge Copenhaver dismissed the complaint with prejudice as to the West Virginia association.

The court then observed that the Amateur Sports Act grants the United States Olympic Committee broad authority to regulate amateur athletics and amateur sports organizations. The Athletics Congress, as a national governing body, has adopted regulations which provide athletes with a comprehensive dispute resolution mechanism as is required by the Amateur Sports Act. Congress intended to keep disputes regarding the eligibility of amateur athletes to compete out of the federal courts, stated Judge Copenhaver, and also intended athletes with eligibility disputes to exhaust their administrative remedies. Barnes was subject to the provisions of the statute and was required to exhaust those remedies prior to filing a court action.

Judge Copenhaver recalled that "courts have consistently determined that the Amateur Sports Act does not permit them to exercise jurisdiction to review decisions rendered by TAC and the USOC pertaining to an athlete's eligibility to participate in amateur competition before the internal administrative processes established by virtue of the Act have been exhausted," and granted the two organizations' motions to dismiss accordingly.

Barnes v. International Amateur Athletic Federation, 862 F.Supp. 1537, 1993 U.S.Dist.LEXIS 20329 (S.D.W.Va. 1993)[ELR 16:11:13]

University obtains summary judgment in pay disparity action brought by former coach of women's gymnastics team

In 1992, the University of Minnesota terminated the employment of Katalin Deli, who was the head coach of the women's gymnastic team. Deli subsequently brought a lawsuit claiming that the university paid her less than the head coaches of several men's athletic teams, and that this pay differential, purportedly based on the gender of the athletes coached by Deli, constituted prohibited discrimination on the basis of sex, in violation of

Title VII of the Civil Rights Act, the Equal Pay Act, and Title IX of the Education Amendments of 1972.

A Federal District Court granted the university's motion for summary judgment. Judge Magnuson first noted that Title VII prohibits employers from discriminating against any individual with respect to compensation because of such individual's race, color, religion, sex or national origin; the statute "does not proscribe salary discrimination based on the sex of other persons over whom the employee has supervision or oversight responsibilities. Thus, Deli failed to state a Title VII claim on which relief could be granted.

Similarly, the Equal Pay Act prohibits discrimination based on the gender of the claimant only and does not reach compensation differentials based on the gender of student athletes coached by a claimant, stated Judge Magnuson. Even if Deli had alleged discrimination in salary based on her own gender, the university would be entitled to summary judgment, pursuant to Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994; ELR 16:3:4). The head coaches of the men's football, hockey and basketball teams supervised more employees than Deli; the teams had greater spectator attendance and generated greater revenue for the university; and the coaches of the men's teams had more responsibility for public and media relations than Deli had as the coach of the women's gymnastics team.

Deli's Title IX claims were barred as untimely, ruled the court, which nevertheless proceeded to reject the claims on the merits. Deli did not contend that the athletes she supervised received lesser quality coaching as a result of the difference between Deli's salary and salaries paid to the coaches of the men's teams, and the university, accordingly, was entitled to summary judgment on the Title IX claims.

Deli v. University of Minnesota, 863 F.Supp. 958, 1994 U.S.Dist.LEXIS 13394 (D.Minn. 1994)[ELR 16:11:14]

Court affirms rejection of NBA players' antitrust claims

As reported at ELR 16:7:11, Federal District Court Judge Kevin T. Duffy ruled that the antitrust laws do not apply to the collective bargaining negotiations between the National Basketball Association and the National Basketball Players Association, and that even if the antitrust laws do apply, the players would not prevail on the claim that the college draft, right of first refusal and revenue sharing/salary cap provisions of the collective bargaining agreement were per se violations of the Sherman Act or were unreasonably anti-competitive.

A Federal Court of Appeals affirmed, on the first ground, the District Court decision granting the NBA's request for declaratory relief and dismissing the players' counterclaim. The court rejected the players' argument that the NBA teams unlawfully agreed jointly to impose the challenged provisions as terms and conditions of employment while negotiating a new collective bargaining agreement.

Judge Ralph Winter carefully reviewed the nature and purposes of multiemployer bargaining, and commented that such bargaining was particularly important in sports leagues which must establish common rules concerning, among other matters, the number of games, length of the seasons, playoff structures and roster size.

The court, proceeding to the relationship between the antitrust laws and multiemployer bargaining, remarked that there was not a single instance, prior to the matter at hand, of a union or an individual employee "asserting the stark claim that the routine practices of multiemployer bargaining violate the antitrust laws." It appeared to Judge Winter that "Congress never intended that the antitrust laws prohibit multiemployer bargaining with a common union."

With respect to labor law and multiemployer bargaining, it was noted that such bargaining has been a "conspicuous" feature of collective bargaining since the formation of unions. Judge Winter, as did the District Court, referred to Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991) in which the court held that the nonstatutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented after impasse by the National Football League teams.

In all, the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a collective bargaining agreement, or from using economic force to obtain agreement to those proposals, concluded the court.

National Basketball Association v. Williams, 1995 U.S.App.LEXIS 1531 (2d Cir. 1995)[ELR 16:11:15]

Television sportscaster prevails in age discrimination claim

As described by Federal District Court Judge Doty, C. Thomas Ryther worked as a television sports anchor at KARE 11 from 1979 until 1991, pursuant to a series of three year contracts. In the late 1980s, the station reduced Ryther's reporting and organizational responsibilities. In August 1990, KARE 11 decided not to renew

Ryther's contract, which was to expire in July 1991; Ryther was informed of the decision in March 1991.

Ryther, who was 53 years old at the time of the termination of the contract, sued KARE 11, alleging defamation and age discrimination.

After a jury trial, the court granted the broadcaster's motion for judgment as a matter of law as to Ryther's defamation claim. The jury then awarded Ryther about $270,000 in back pay and about $430,000 in front pay on his age discrimination claim, and found that KARE 11's violation of the Age Discrimination in Employment Act was willful.

The District Court declined to grant the broadcaster's motion for judgment as a matter of law or for a new trial.

KARE 11 argued that Ryther's contract was not renewed because "his research was poor, he was not contributing to the station's success and his work performance was unsatisfactory."

Judge Doty found that Ryther proved the elements of a prima facie case of age discrimination by a preponderance of the evidence. Ryther was within the protected age group when his contract was not renewed; his performance was satisfactory; and he was replaced by a younger person, noted the court.

It then was found that the evidence was sufficient for the jury to reasonably conclude that the station parties intentionally discriminated against Ryther because of his age and were motivated by a "discriminatory animus." It appeared to the court that the jury, based on the evidence, could have decided that the station decided not to renew Ryther's contract even before undertaking Gallup research. Although the issue was "close," stated Judge Doty, the evidence was sufficient to support the jury's finding of intentional age discrimination.

Judge Doty concluded that there was sufficient evidence for a reasonable jury to find that the KARE 11 parties willfully violated the statute by not renewing Ryther's contract; declined to grant the broadcaster's motion for a new trial; and refused to reduce the damage award.

In a subsequent ruling, Judge Doty awarded Ryther liquidated damages totalling about $270,000. The Age Discrimination in Employment Act provides that a successful party is entitled to liquidated damages if the violation was willful; the award is a doubling of the back pay award, and is not discretionary where a jury, as in the instant case, has made a finding of a willful violation.

The court also concluded that the KARE 11 parties violated the Minnesota Human Rights Act, but declined to award Ryther additional compensatory or punitive damages or additional damages based on mental suffering.

An award of liquidated damages under the federal statute precluded recovery of prejudgment interest on the back pay award, continued Judge Doty, but Ryther was entitled to attorneys' fees of about $276,000 as to the discrimination claim, as well as costs in the amount of about $13,000.

Ryther v. KARE 11, 864 F.Supp. 1510, 1994 U.S.Dist. LEXIS 19415; 864 F.Supp. 1525, 1994 U.S.Dist. LEXIS 19475 (D.Minn. 1994)[ELR 16:11:15]

Exhibitor may challenge Miramax film licensing practices, but court rejects antitrust claims

Orson, Inc. owns and operates the Roxy Screening Rooms in Center City Philadelphia. The theater, which exhibits "art films," has two screens, each with a seating capacity of 137 persons. The Ritz theaters in Philadelphia also exhibit art films at the "Ritz Five Theaters" and the "Ritz at the Bourse." The Ritz theaters each have five screens and seating capacities ranging from 155 to 375 persons.

Between January 1992 and February 1994, Miramax Film Corporation leased 29 films to the Ritz on a first-run basis and one film on a subsequent-run basis. During that same period, Miramax leased one film to the Roxy on a first-run basis and 16 films on a subsequent-run basis.

Orson claimed that Miramax granted the Ritz an exclusive license to exhibit Miramax films, thereby eliminating competition in the art film market in violation of the

Sherman Act and Pennsylvania's Feature Motion Picture Fair Business Practices Law.

Federal District Court Judge Joyner, after finding that the Miramax-Ritz agreement was not a per se violation of the Sherman Act, stated that film clearances are vertical non-price restraints subject to a rule of reason analysis. In the instant case, the clearances served to stimulate competition between art films distributed by Miramax and art films originating elsewhere, declared the court, in granting Miramax's motion for summary judgment as to Orson's antitrust claims.

Pennsylvania law bars distributors and exhibitors from entering license agreements granting an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theaters within the geographical area. Fifteen Miramax films were exhibited at the Ritz for a period of more than 42 consecutive days; six of the films ran at the Ritz without expanding to other area theaters.

Judge Joyner found that there was sufficient evidence to suggest that the failure to expand the six films to other Center City Philadelphia theaters might constitute a violation of state law; that a jury could infer that Orson was damaged by Miramax's unwillingness to expand the six films to other Center City Philadelphia theaters; and that there was a genuine issue of fact as to whether, if Orson demonstrated a violation of the statute, Miramax acted willfully and intentionally.

The court then found that Orson failed to state claims under the trade screening and bidding procedures provisions of the Pennsylvania statute and granted Miramax's motion for summary judgment as to those provisions.

In a subsequent opinion, Judge Joyner declined to grant Orson's motion for certification of the court's order for immediate appeal.

Orson, Inc. v. Miramax Film Corp., 862 F.Supp. 1378, 1994 U.S.Dist.LEXIS 14308; 867 F.Supp. 319, 1994 U.S.Dist.LEXIS 16393 (E.D.Pa. 1994)[ELR 16:11:16]

Court dismisses dispute over Air Force base cable television franchise

As reported at ELR 15:10:23, 14:1:19, Cox Cable Communications, between 1973 and 1983, provided cable television service at Robins Air Force Base under an exclusive ten year franchise with the Air Force. When the franchise expired, the Air Force awarded a ten year exclusive franchise to Centerville Cable. Cox Cable claimed the infringement of its First and Fifth

Amendment rights and asserted a right to the renewal of its franchise under the Cable Communications Policy Act of 1984.

A Federal District Court granted a preliminary injunction barring the Air Force from forcing Cox Cable off the base and permitting the company to continue providing cable television service alongside Centerville.

When the Cable Television Consumer Protection and Competition Act of 1992 became effective prior to Centerville's argument in the Federal Court of Appeals, the court remanded the matter.

On remand, Judge Fitzpatrick first found that Centerville's agreement was not a cognizable, constitutionally protected property interest. The court therefore dismissed Centerville's claim.

Assuming that Centerville had a protected property interest in its contract with the Air Force, continued Judge Fitzpatrick, the company failed to establish a claim under the Fifth Amendment due process and takings clauses. The court dismissed the action for lack of standing and subject matter jurisdiction.

Cox Cable Communications, Inc. v. United States, 866 F.Supp. 553, 1994 U.S.Dist.LEXIS 14902 (M.D.Ga. 1994)[ELR 16:11:16]

East Hampton may not revoke cable television franchise

In July 1985, the town of East Hampton entered into a cable television franchise agreement with Sammons Communications, Inc. In 1987, the town approved the transfer of the franchise from Sammons to Cablevision.

Cablevision offered new customers an entry-level tier of cable service known as "Family Cable," which included 36 broadcast channels. New customers were required to subscribe to this tier in order to receive cable service.

In February 1993, Cablevision announced plans to restructure its rates and its tiers, by, in part, introducing a new entry-level tier of service, known as "Broadcast Basic," consisting of 10 channels, and by increasing the rates for the Family Cable tier.

The town notified Cablevision that the implementation of any such changes would be a material breach of certain provisions of the franchise agreement. In April 1994, the Town Board revoked Cablevision's franchise, effective as of October 1, 1994.

The town claimed that the introduction of the Broadcast Basic tier violated the franchise agreement provision stating that "the lowest priced package of programming that a subscriber can purchase...shall include a minimum of twenty-three (23) channels" (emphasis added by the court). Cablevision responded that this provision was preempted by the 1992 Cable Act, which states that cable operators must offer a "basic service tier," and sets forth certain "minimum contents" requirements for the tier.

Federal District Court Judge Hurley found that the Federal Communications Commission's determination that the Cable Act preempts the contents requirements of franchise agreements was a permissible construction of the statute, and deferred to the Commission's interpretation. The legislative history of the Cable Act, stated the court, indicated that although cable operators may choose to include additional channels on the basic service tier, they should not be required to do so by franchise agreements that pre-date the 1992 Cable Act. Thus, Cablevision's retiering was not a valid ground for revoking the franchise.

The town argued that the rate increase for the Family Cable tier violated the provision of the franchise agreement which stated that the town may regulate cable service rates to the extent permitted by law. The 1992 Cable Act provides, in pertinent part, that "[a]ny franchising may regulate the rates for the provision of cable service...to cable subscribers, but only to the extent provided under this section" (emphasis by the court). With regard to cable systems such as East Hampton's, the section only permits franchising authorities to regulate the rates for providing basic cable service and does not permit franchising authorities to regulate any other tier of service.

Upon the introduction of Broadcast Basic, the Family Cable tier no longer constituted "basic cable service," as defined in the statute, noted the court. The town argued that the rate changes were implemented on April 1, 1993, prior to the April 3, 1993 effective date of the relevant provisions of the Cable Act. Under the Cable Communications Policy Act of 1984, the town retained the authority to regulate the rates for the Family Cable tier.

Judge Hurley commented that, even assuming that the town under the 1984 Cable Act possessed the authority to regulate the rates for the Family Cable tier, the town was not necessarily entitled to revoke Cablevision's franchise. The premature increase was "certainly insignificant" in light of the nine year duration of the franchise and was not a material breach of the franchise agreement. The court further found that the section of the franchise agreement which, arguably, would have required the continued provision of a grandfathered tier, was preempted by the 1984 and 1992 Cable Acts. The elimination of the grandfathered tier also was not an appropriate ground for revoking the franchise.

Judge Hurley granted Cablevision's motion for summary judgment, finding that the company did not materially breach the franchise agreement, that the revocation of the franchise was improper, and that the town should have granted Cablevision's request for modification of the franchise agreement. The court enjoined the town from implementing the decision to revoke the franchise.

Cablevision Systems Corporation v. Town of East Hampton, 862 F.Supp. 875, 1994 U.S.App.LEXIS 13133 (E.D.N.Y. 1994)[ELR 16:11:17]

Court orders return of illegally seized allegedly obscene material

When a Georgia trial court judge issued a search warrant for Gordon Lee's business, Legend Bookstore, police officers seized about 300 allegedly obscene books and magazines. The materials were seized without a prior judicial determination of obscenity. Lee was arrested.

Prior to trial, the court ruled that the state could not use the seized material; the court did not hear evidence on the search and seizure and refused to reach the constitutional questions.

Lee was convicted of distributing obscene material, based upon the sale of two "adult-only" comic books; the comic books had provided the basis for the search warrant.

Lee sought the return of the seized material; the court did not rule on Lee's motion. A state appellate court upheld Lee's conviction.

Lee then filed a section 1983 action seeking damages and injunctive and declaratory relief. Federal District Court Judge Harold L. Murphy noted that under Georgia law, allegedly obscene materials seized without a "constitutionally sufficient warrant" are not admissible in a criminal action.

The court rejected the state's request that it abstain from considering the case, stating that there was no pending state proceeding with which the court would interfere. Even if Lee's motion seeking the return of the seized material constituted a state proceeding to determine obscenity, as argued by city officials, the proceeding was "wholly inadequate," in the circumstances of the instant case, to meet the constitutional requirements.

The court ordered the return of the materials seized from the bookstore. Judge Murphy determined that there was no permissible (emphasis by the court) mechanism whereby the materials in the state's possession might be declared contraband; stated that a post seizure hearing concerning the obscenity of the seized material, "at this late date," would be inadequate; and concluded that the state could not constitutionally retain the materials, even assuming they would be declared obscene, and thus contraband.

Lee v. City of Rome, Georgia, 866 F.Supp. 545, 1994 U.S.Dist.LEXIS 15053 (N.D.Ga. 1994)[ELR 16:11:18]

Previously Reported:

The United States Supreme Court has declined to review the decisions in Merriam-Webster, Inc. v. Random House, Inc. (16:8:14) and Sullivan v. National Football League (16:8:9).[ELR 16:11:18]

Briefly Noted:

Celebrity Goodwill.

A New York trial court has found that Herbie Mann's celebrity status declined during his marriage to Theresa Jann Mann and that the jazz flutist's career goodwill was separate property not subject to equitable distribution after the parties' 1990 divorce.

Judge David B. Saxe stated that goodwill, as applied to an individual, usually is understood to mean "the good reputation of the individual in that business or profession so that future business will probably continue to be generated by that individual." It was noted that Mann's fame and career were well established prior to the 1971 marriage, but there was no evidence upon which to conclude that his career goodwill increased during the marriage. Mrs. Mann had argued that the flutist's goodwill, based on his performing career during the years 1987 through 1990, should be valued at about $96,000.

Mann v. Mann, New York Law Journal, p. 26, col. 1 (N.Y.Cnty., Jan. 10, 1995)[ELR 16:11:18]

Attorneys' Fees/"48 Hours" Segment.

CBS acquired a videotape of meat processing operations at Federal Beef Processors' beef slaughter plant in Rapid City, South Dakota and planned to broadcast the videotape on February 9, 1994.

When Federal Beef sued CBS, a South Dakota trial court, on February 7th, issued a preliminary injunction ordering CBS not to broadcast the tape until the meat processor's claims were determined. The state Supreme Court agreed to hear CBS's appeal, and set a hearing date in March; the court refused to grant an emergency stay of the trial court's order.

United States Supreme Court Justice Harry A. Blackmun granted an emergency stay on February 9th, and CBS broadcast the tape on the program "48 Hours."

CBS subsequently removed the action to a Federal District Court; the court issued an order vacating the state court preliminary injunction.

When CBS sought attorneys' fees as damages incurred due to the "improvident" issuance of the preliminary injunction by the state court, Federal District Court Chief Judge Battey found that South Dakota law would govern the award of attorneys' fees; that the decision concerning the appropriateness of the state court injunction was final; and that CBS was entitled to attorneys' fees of $50,000, the amount of the injunction bond required by the state court and posted by Federal Beef when the court issued the preliminary injunction.

Federal Beef Processors, Inc. v. CBS Inc., 864 F.Supp. 127, 1994 U.S.Dist.LEXIS 9980 (D.S.Dakota 1994) [ELR 16:11:18]

Copyright Infringement/Attorneys' Fees.

Arista Records and other parties obtained a default judgment against Matthew Forman Tysinger in a copyright infringement action. The judgment ordered payment of $2,000 in statutory damages per claim for 112 of the 113 works infringed.

In considering Arista's request for attorneys' fees, Federal District Court Judge Tilley noted that Tysinger and other unidentified parties were convicted in a North Carolina court for failing to show the true name and address of the manufacturer on the packaging of certain sound recordings. This criminal activity would support a finding of Tysinger's bad faith and wilfulness in infringing Arista's copyrights, stated the court, in holding that Arista was entitled to recover attorneys' fees. After careful review, the court awarded the Arista parties about $10,800 in attorneys' fees, but refused to issue a permanent injunction, stating that the injunction then in effect was sufficient to protect the copyright holders' interests; the injunction barred the Tysinger parties from publicly performing, or aiding the public performance of, recordings owned by any of the copyright holders.

Arista Records v. Tysinger, 867 F.Supp. 345, 1994 U.S.Dist.LEXIS 16339 (M.D.N.C. 1994) [ELR 16:11:19]

Copyright Infringement/Music.

A Federal District Court in Michigan granted summary judgment to various music publishers in a copyright infringement action against IML Corporation, the owner of a bar and grill known as "Marilyn's on Monroe." The court found that IML engaged in the unauthorized performance of copyrighted material and that Geraldine and Alfred Bensmiller, the sole owners of IML, were jointly and severally liable for the claimed copyright infringements.

Chief Judge Julian Abele Cook, Jr. granted the requested injunctive relief barring the IML parties from using any musical composition in the ASCAP repertoire without authorization. The court also awarded statutory damages of $2,000 per infringement, as well as costs and attorneys' fees.

Sailor Music v. IML Corporation, 867 F.Supp. 565, 1994 U.S.Dist.LEXIS 16085 (E.D.Mich. 1994)[ELR 16:11:19]

Copyright Infringement/Music.

A Federal District Court in New York adopted the report and recommendation of a United States Magistrate Judge and granted summary judgment to Broadcast Music, Inc. and various copyright owners in a copyright infringement action against the owners of Merlin's bar in Buffalo, New York. It was alleged that Merlin's performed, without a license, thirteen musical compositions.

The court awarded statutory damages in the amount of $2,000 for each of the thirteen musical compositions infringed, for a total of $26,000 in statutory damages; full costs, including attorneys' fees in the amount of $2,100; and injunctive relief barring any further infringing activities.

Broadcast Music, Inc. v. Sonny Investment Associates, Inc., 865 F.Supp. 110, 1994 U.S.Dist.LEXIS 19147, 1994 U.S.Dist.LEXIS 19109 (W.D.N.Y. 1994)[ELR 16:11:19]

Copyright/Troll Dolls.

As reported at ELR 16:4:30, a Federal District Court in New York ruled that the troll dolls distributed by EFS Marketing and the troll dolls distributed by Russ Berrie & Company did not possess the substantial originality required for copyrightability in a derivative work. The court enjoined the companies from placing a copyright notice on any of their trolls.

In October 1994, the court rejected a motion by EFS to amend the prior ruling so as to remove all references to the invalidity of the company's copyrights. Judge Keenan referred to the court's conclusion that EFS's trolls were "virtually indistinguishable" from certain public domain trolls.

EFS argued that it had pursued a claim under section 43(a) of the Lanham Act, and that the court's ruling on the validity of the copyright in the absence of an infringement claim or counterclaim violated due process. Judge Keenan disagreed, stating that the issue of EFS's copyrights was necessarily before the court, particularly since the company sought equitable relief.

EFS Marketing, Inc. v. Russ Berrie & Company, Inc., 867 F.Supp. 192, 1994 U.S.Dist.LEXIS 15260 (S.D.N.Y. 1994)[ELR 16:11:19]

Copyright Infringement/Jurisdiction.

Judith B. Aldridge, doing business as Atlantis Underground, sued The Gap and Pam Squires, who was associated with one of the company's retail stores, alleging misappropriation. Aldridge challenged the removal of the action to a Federal District Court, but the court found that the children's clothing created by Aldridge was within the subject matter of copyright law; that the state law misappropriation claim was preempted by 17 U.S.C. section 301; and that removal was proper.

The court granted the motion to dismiss brought by The Gap and Squires, noting that although they fall within the subject matter of copyright, clothes, as useful articles, are not copyrightable.

Aldridge v. The Gap, Inc., 866 F.Supp. 312, 1994 U.S.Dist.LEXIS 15317 (N.D.Tex. 1994)[ELR 16:11:19]

Undigitized Broadcast.

Several undercover vice officers employed by the Las Vegas Metropolitan Police Department agreed to be featured in an episode of "American Detective." The producer of the program agreed that when the episode aired in Las Vegas, the features of the officers would be digitized to preserve their anonymity. The program aired on KTNV-Channel 13 without the agreed-upon blurring, and the officers sued various parties.

A Federal District Court in Nevada granted the station's motion for summary judgment on the officers' breach of contract claim. It was noted that KTNV never entered into any contract with the officers or the program producer; that the officers were not third party beneficiaries of any agreement between the producers and the station; and that it was not shown that the producers possessed the apparent authority to enter into a contract on KTNV's behalf, or that the producer was acting as the station's agent.

The court also rejected the officers' cause of action alleging negligence, stating that the officers did not demonstrate that KTNV had a duty to air only the blurred version of the episode.

Judge Pro then denied causes of action alleging misrepresentation by intentional omission and intentional misrepresentation - it was not shown that KTNV made any representations to the officers at all.

Does I-VI v. KTNV-Channel 13, 863 F.Supp. 1259, 1994 U.S.Dist.LEXIS 13472 (D.Nev. 1994)[ELR 16:11:20]

Defamation.

In the continuing litigation arising from the Hilary Foretich custody dispute, Vincent and Doris Foretich, Hilary's grandparents filed a defamation action against the producers and broadcasters of an ABC docudrama in which a character apparently referred to one or both of them as "abusers" of their granddaughter.

A Federal District Court ruled that the Foretichs were private individuals and were not required to prove that the ABC parties acted with actual malice.

After lengthy consideration, a Federal Court of Appeals, on interlocutory appeal, agreed that neither of Hilary's paternal grandparents was a public figure for the purpose of comment on the public controversy over the custody dispute "because their public statements and actions were made predominantly in self-defense." The matter was remanded to the District Court for further proceedings.

Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1994 U.S.App.LEXIS 28972 (4th Cir. 1994)[ELR 16:11:20]

Broadcasting.

In May 1989, NBC News reported on the April 1989 explosion on the U.S.S. Iowa which killed 47 sailors, including Clayton Hartwig. Members of Hartwig's family sued NBC in an Ohio trial court for intentional infliction of emotional distress. It was alleged that the broadcaster reported that Hartwig purposefully caused the Iowa explosion to commit suicide and that NBC implied that Hartwig was homosexual.

NBC removed the case to a Federal District Court, and the court granted the broadcaster's motion for summary judgment, finding that the Hartwig family did not present evidence of serious emotional distress or of extreme and outrageous conduct by NBC.

Hartwig v. National Broadcasting Co., 863 F.Supp. 558, 1994 U.S.Dist.LEXIS 13308 (N.D.Ohio 1994)[ELR 16:11:20]

Torts/Publisher Misrepresentation Claim.

In 1968, Harper & Row Publishers, the predecessor-in-interest of HarperCollins Publishers, published and distributed the book "The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse." The book included a list of attorneys available for consultation on the subject.

Jacki Barden, an adult victim of child abuse, contacted Lewis Youmans, one of the attorneys listed in the book. Barden, claiming that Youmans accepted a retainer from her, but failed to perform legal services and that the attorney's qualifications were false, sued HarperCollins alleging misrepresentation and violation of the Massachusetts Consumer Protection Act.

A Federal District Court in Massachusetts granted HarperCollins' motion for summary judgment with respect to both causes of action. Senior Judge Freedman, after carefully reviewing relevant case law, stated that allowing Barden to seek relief under a negligent misrepresentation claim "would open a pandora's box that might be difficult to close. The burden placed upon publishers to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties." In the instant case, continued the court, HarperCollins did not assume a duty to investigate, and creating such a duty might invoke First Amendment concerns. Although commenting that fraudulent behavior might require a different result, Senior Judge Freedman observed that Barden did not allege fraud.

It was further found that Barden did not allege facts to support a claim that the publisher's conduct was unfair or deceptive under Massachusetts law.

Barden v. HarperCollins Publishers, Inc., 863 F.Supp. 41, 1994 U.S.Dist.LEXIS 11906 (D.Mass.1994)[ELR 16:11:20]

Copyright Infringement/Music.

Latin American Music Company, known as ACEMLA, claimed that the Spanish Broadcasting System and WSKQ Radio infringed 21 copyrighted musical compositions by broadcasting the works without consent. A Federal District Court in New York found that ACEMLA, by failing to offer proof of actual damages during discovery, elected, by default, to seek statutory damages and consequently waived its right to a jury trial.

It also was found that statutory damages, if any, would be awarded on a per song basis, not for each infringement.

Latin American Music Company, Inc. v. Spanish Broadcasting Systems, Inc., 866 F.Supp. 780, 1994 U.S.Dist.LEXIS 15314 (S.D.N.Y. 1994)[ELR 16:11:21]

Copyright Infringement/Music.

A Federal District Court in Mississippi granted a motion for default judgment sought by Jobete Music Co. and other copyright holders in an infringement action against Callop Hampton. The ASCAP members alleged that Hampton's establishment, the Stardust Disco & Lounge, engaged in the unlicensed public performance of the copyrighted works at issue.

The court issued an injunction prohibiting Hampton and the Stardust from unlawfully performing any musical composition licensed through ASCAP; awarded damages of $2,500 per infringement for a total of $7,500; and costs and attorneys' fees in the amount of about $1,100.

Jobete Music Co. v. Hampton, 864 F.Supp. 7, 1994 U.S.Dist.LEXIS 14962 (S.D.Miss. 1994)[ELR 16:11:21]

Gaming Advertisements.

In Valley Broadcasting Company v. United States, 820 F.Supp. 519 (D.Nev. 1993; ELR 15:12:24) a Federal District Court struck down broadcast advertising restrictions imposed by statute and Federal Communications

Commission regulations. It was found that the restrictions violated the First Amendment commercial free speech rights of Nevada broadcasters. The FCC decided to stay the enforcement of the challenged broadcast regulations in Nevada pending appellate review of the ruling.

The Greater New Orleans Broadcasting Association, citing Valley Broadcasting, brought an equal protection challenge to the FCC's casino advertising restrictions. The broadcasters claimed that the stay served to classify Nevada broadcasters differently from other broadcasters, and sought a nationwide stay of enforcement.

A Federal District Court in Louisiana granted the government parties' motion for summary judgment (pending further advice regarding the standard applicable to the court's First Amendment analysis). Senior Judge Edward J. Boyle stated that the geographically limited FCC stay was rationally designed to accomplish a legitimate government goal. The court also found that the stay would withstand the stricter challenge applicable to speech entitled to full First Amendment protection.

The broadcasters argued that 18 U.S.C. section 1304 does not prohibit advertisements concerning casino gambling because casino games are not a "lottery, gift enterprise or similar scheme." The statute extends to activities involving the distribution of prizes, according to chance, for consideration, noted Senior Judge Boyle - all of those characteristics occur in casino gambling.

The FCC regulations bar the promotion of the gaming aspect of casinos, but permit the broadcast of information pertaining to a casino's amenities, such as food and rooms. In all, the regulations appeared to the court to be minor and constitutionally valid. However, Senior Judge Boyle ordered the parties to advise the court as to whether there existed an issue regarding the standard to be applied to the First Amendment analysis.

Greater New Orleans Broadcasting Association, Inc. v. United States, 866 F.Supp. 975, 1994 U.S.Dist.LEXIS 15728 (E.D.La. 1994)[ELR 16:11:21]

Copyright Infringement/Joint Work.

Dr. Alfred Balkin and Dr. Paul Wilson collaborated on a program called "Literacy Now: Breaking the Language Barrier through Song." Wilson claimed that he provided the technical specifications for the songs in the program; he did not claim that he wrote the music or the lyrics. The literacy program was not completed and was not copyrighted .

Balkin copyrighted the songs that were written to be included in the program.

Wilson sold copies of the tapes of Balkin's songs, which were contained in the work "Literacy Now Through Song (Phase 1)." In response to Balkin's action for copyright infringement, Wilson claimed to be the co-author of the songs and a co-owner of the copyrights.

A Federal District Court in Michigan rejected Wilson's claim, observing that Wilson's contribution of ideas and concepts was not copyrightable, and that there was no contractual arrangement between the parties transferring any of Balkin's rights under the Copyright Act to Wilson. The court granted summary judgment to Balkin with respect to his claims and also as to Wilson's counterclaim for an accounting.

Balkin v. Wilson, 863 F.Supp. 523, 1994 U.S.Dist.LEXIS 13531 (W.D.Mich. 1994)[ELR 16:11:21]

Horse Show Regulation.

The Secretary of the United States Department of Agriculture found that Calvin Baird violated 15 U.S.C. section 1824 (2)(d), the Horse Protection Act, by allowing horses to be exhibited and entered in a horse show while the horses were "sore." A Federal Court of Appeals reversed the decision, finding, after careful consideration, that Baird attempted to prevent, rather than allow, the exhibition or entry of the horses. The government presented a prima facie case, but Baird testified that he would direct his trainers not to "sore" his horses and would take horses away from trainers he suspected of not following this order.

Baird v. United States Department of Agriculture, 39 F.3d 131, 1994 U.S.App.LEXIS 31291 (6th Cir. 1994)[ELR 16:11:22]

Horse Protection Act.

A United States Department of Agriculture official filed a complaint against Jack and Erma Kelly alleging that they violated the Horse Protection Act by entering a sore horse in the 1989 Tennessee Walking Horse National Celebration. An examiner had found that the Kellys' horse, known as "Pride," was sore, and excused the horse from competition in the event. An administrative law judge issued an order dismissing the complaint, but the government's final order reversed the initial decision, imposed a fine of $2,000, and prohibited the Kellys from taking part in horse shows for one year.

A Federal Court of Appeals dismissed the Kellys' appeal for lack of jurisdiction since the notice of appeal was untimely. However, Chief Judge Richard S. Arnold stated that the Kellys would not be entitled to relief even if the case were properly before the court since the record was "replete" with evidence supporting the government's conclusion that Pride was sore when entered in the Celebration.

United States Department of Agriculture v. Kelly, 38 F.3d 999, 1994 U.S.App.LEXIS 29619 (8th Cir. 1994)[ELR 16:11:22]

Horse Trainer Suspension.

In April 1987, Illinois law enforcement officers at the Maywood Park Racetrack found a hypodermic syringe and a needle in Steven LeRoy's pickup truck. The state Racing Board imposed a 90 day suspension on LeRoy, an owner, trainer and driver of standardbred racehorses.

However, LeRoy, counter to the Board's ruling, entered another racetrack and was suspended for 30 additional days. Eventually, the trainer was placed on probation until December 31, 1988.

LeRoy brought a lawsuit under 42 U.S.C. section 1983, claiming that the warrantless search, allegedly without reasonable suspicion or probable cause, violated his Fourth and Fourteenth Amendment rights. The trainer sought damages and an injunction requiring the Board to expunge its disciplinary orders. A Federal District Court dismissed the lawsuit.

A Federal Court of Appeals upheld the District Court's decision, stating that the search of the truck was permissible.

Judge Wellford concurred with the majority that LeRoy did not establish any "substantive due process" violation and that the penalties imposed by the Board arising from LeRoy's threats and profanity towards racing officials did not violate equal protection requirements.

But Judge Wellford dissented with regard to the challenged search, observing that there was no evidence that the needle was capable of being used for the injection of any chemical substance into any horse, and that it was admitted that LeRoy's horses were tested and had not been administered any prohibited substance or medication. In Judge Wellford's view, the racetrack parties, in April 1987, reasonably should have known that an arbitrary search of LeRoy was unlawful or unconstitutional. Although the racetrack parties might prevail on the basis of qualified immunity, the dismissal, according to Judge Wellford, was premature under the circumstances of the case.

LeRoy v. Illinois Racing Board, 39 F.3d 711, 1994 U.S.App. LEXIS 29981 (7th Cir. 1994)[ELR 16:11:22]

Americans With Disabilities Act.

David L. Jones, who wears a prosthesis because of a leg amputation, claimed that the Southeast Alabama Baseball Umpires Association did not reasonably accommodate his handicap when it refused his request for assignment as an umpire for high school varsity baseball games. From 1989 to 1992, Jones worked as an umpire at the high school junior varsity level; the association claimed that Jones' artificial limb limited his ability to perform safely and effectively as an umpire on a regular basis at the more competitive varsity level.

The association moved for summary judgment on the ground that it was not within the coverage of the Americans With Disabilities Act, since it did not hire employees for the 20 week minimum set forth in the statute.

Jones noted that although the high school baseball season lasts only 13 to 14 weeks, the association also assigns employees to a summer youth program. Federal District Court Chief Judge Myron A. Thompson denied a motion for summary judgment, stating that Jones raised a factual dispute as to whether the association was an employer or an employment agency under the statute.

Jones v. Southeast Alabama Baseball Umpires Association, 864 F.Supp. 1135, 1994 U.S.Dist.LEXIS 14274 (M.D.Ala. 1994)[ELR 16:11:22]

Americans With Disabilities Act.

Ronald Sandison and Craig Stanley claimed that the Michigan High School Athletic Association violated the

Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Michigan law by refusing to allow the young men to participate in interscholastic athletics in the 1994-1995 school year. Sandison and Stanley were ineligible to participate in sports at their high schools because they were nineteen years old. Both young men were held back in grade promotion during grade school due to certain learning disabilities.

A Federal District Court in Michigan ruled that Sandison and Stanley demonstrated a probability of success on the merits and would suffer irreparable harm if they were not permitted to participate on the cross-country and track teams at their high schools. The court also found that the public interest would be best served by issuing the requested preliminary injunctive relief.

Judge Feikens first found that there was a basis for jurisdiction over the Association under the ADA and section 504; the Association is a private entity operating a public accommodation and a public entity and is an indirect recipient of federal financial assistance. The court rejected the Association's argument that the statutes did not extend to participation in interscholastic sports, stating that such participation was a "major life activity" for the young men.

The Association also claimed that Sandison and Stanley were not being denied participation on the basis of their disabilities, but rather on the basis of a neutral, uniformly-applied, age standard. In the instant case, a reasonable accommodation of Sandison and Stanley's disabilities could be made by waiving the age eligibility requirement - the safety concerns of the Association were not at issue, given the young men's plans to participate in two non-contact sports. And Sandison and Stanley did not provide their teams any unfair competitive advantage.

Sandison v. Michigan High School Athletic Association, 863 F.Supp. 483, 1994 U.S.Dist.LEXIS 13306 (E.D.Mich. 1994)[ELR 16:11:23]

Chicago Cubs Ballperson.

Cynthia Schoeneck was hired as the ballperson for the Chicago Cubs' 1991 season; her duties included retrieving foul balls and providing fresh baseballs to the umpire. The team decided to eliminate the position of ball person, purportedly citing insurance problems arising from hiring part-time seasonal employees.

Schoeneck brought a lawsuit claiming that the elimination of the ballperson position was a pretext for unlawful gender discrimination under Title VII of the Civil Rights Act of 1964; that the Cubs breached an oral contract guaranteeing her the position; and that she relied to her detriment on a promise of permanent employment.

Federal District Court Judge Zagel stated that Schoeneck failed to establish that she was treated less favorably than similarly situated male employees, "for the simple reason that no males were similarly situated." The team claimed that the duties of ball person could be performed by male or female members of its enhanced security staff. Since Schoeneck did not apply for a crowd control job, and since the team offered a legitimate, non-discriminatory basis for its decision, the court granted the Cubs' motion for summary judgment on this claim.

The court also rejected Schoeneck's claims alleging breach of an oral contract for permanent employment and promissory estoppel.

Schoeneck v. Chicago National League Ball Club, Inc., 867 F.Supp. 696, 1994 U.S.Dist.LEXIS 15460 (N.D.Ill. 1994)[ELR 16:11:23]

IN THE NEWS

United States and China enter trade accord

The United States and China have entered a trade accord which will provide greater access for American filmmakers and recording companies to Chinese markets and increased enforcement of China's anti-piracy laws with respect to copyrighted, trademarked or patented material.

According to news reports, China, just prior to signing the accord, closed two factories which were copying significant numbers of United States originated compact discs, laser videodiscs and software.

The Chinese government will allow the Motion Picture Association of America to open an office in Beijing to verify the authenticity of title registration documents.

The accord also provides for joint ventures in the production and distribution of American films, music and software, with the elimination of quotas for those products, and sets forth revenue-sharing arrangements for films.[Apr. 1995][ELR 16:11:24]

DEPARTMENTS

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