RECENT CASES

Estate of Leopold Stokowski is not entitled to share of profits from home video release of "Fantasia"

In 1939, Leopold Stokowski, then the conductor of the Philadelphia Orchestra, entered into a contract with Walt Disney Productions in connection with the 1940 film "Fantasia." The 1991 release of "Fantasia" on videocassette and laser disc resulted in several lawsuits.

In Philadelphia Orchestra Ass'n. v. Walt Disney Co., 821 F.Supp. 341, 1993 U.S.Dist.LEXIS 5737 (E.D.Pa. 1993; ELR 15:7:3), the court ruled that the Orchestra was not a joint author of the film, even though it performed the music on the film's soundtrack. It was found that the Orchestra's performance was a work for hire, and the court refused to grant summary judgment on the Orchestra's breach of contract and other claims.

In a separate action filed in the Federal District Court in Pennsylvania, Disney sued Herman E. Muller, the executor of Stokowski's estate, seeking a declaration that the estate had no rights in connection with the sale and distribution of "Fantasia."

Muller subsequently sued Walt Disney Productions, The Walt Disney Company, and Buena Vista Home Video for a share of the home video profits of "Fantasia." A Federal District Court in New York denied Disney's motion to transfer the action to Pennsylvania or stay the action pending the resolution of the earlier lawsuit (Muller v. Walt Disney Productions, 822 F.Supp. 1033, 1993 U.S.Dist.LEXIS 7122 (S.D.N.Y. 1993; ELR 15:7:3).

Muller's motion to transfer Disney v. Muller to the New York court was granted (Walt Disney Co. v.

Muller, 1993 U.S.Dist.LEXIS 13057 (E.D.Pa.1993; ELR 15:7:3).

The court also granted Muller's motion to dismiss Disney's claims for indemnification and setoff against the Philadelphia Orchestra's claims. And, in a related lawsuit, Boosey & Hawkes, the publishers of Igor Stravinsky's "The Rite of Spring," which was featured in "Fantasia," also sued to obtain a share of the film's profits.

In the instant proceeding, Judge Goettel examined the 1939 contract, noting that it replaced a 1937 contract between Stokowski and Disney whereby the conductor performed certain musical services for "The Sorcerer's Apprentice," an animated short which was made a part of "Fantasia." Disney agreed to pay Stokowski $125,000 for his work under the contract.

The parties also agreed, in part, that Disney would control the manner in which the photoplay would be distributed and/or exhibited, stating that "the ownership of all rights in connection with said photoplay shall belong to us and we shall have the right...to distribute said photoplay, or any part thereof..." Disney also obtained "the right to reproduce, record, transmit, exhibit, distribute and exploit, in connection with said photoplay, any or all work, acts, poses, plays and appearances of any and all kinds hereunder and any and all musical, dramatic or other material, including, but not limiting the same to orchestration and/or arrangements of music, written or prepared by you hereunder, and we shall further have the right to record, reproduce, transmit, exhibit, distribute and exploit in connection with said photoplay all instrumental, musical and other sound effects produced by you or with your assistance...it being understood that, excepting only as hereinafter expressly provided, we shall own all rights of every kind in and to the foregoing..."(emphasis by the court).

After citing other contract provisions, Judge Goettel observed that Disney's contractual rights to the "photoplay" that became "Fantasia" were "extremely broad." The contract defined "photoplay" as including "a motion picture production, produced and/or exhibited with or accompanied by sound and/or reproducing and/or transmitting devices, radio devices, television and all other improvements and devices which are now or hereafter may be used in connection with the production, exhibition and/or transmission of any present or future kind of motion picture production."

With respect to phonograph records, it was agreed that Disney and Stokowski both would have to agree to any such use by third parties. In 1956, the parties agreed that Disney could use music from "Fantasia" in connection with the commercial sale of phonograph records; Disney agreed to pay royalties to Stokowski.

Judge Goettel stated that the contract clearly gave Disney all rights to the photoplay; that the contract's definition of "photoplay" was expansive and was intended to extend to new technologies for the "production, exhibition and/or transmission" of motion pictures; that home video was encompassed within the contract's definition of "photoplay;" and that Disney did not violate the 1939 contract in releasing "Fantasia" on home video without obtaining any additional rights from Stokowski's estate.

The fact that Stokowski retained rights to his arrangements and orchestrations was not relevant to the issue of home video, noted the court.

It was further found that the contract supported Disney's claim that Stokowski performed work for hire. The conductor received a fee which was to be "compensation in full" for his services, and for the rights he granted Disney to use his musical work. The contract was "unambiguous evidence" that Disney and Stokowski were not joint authors of "Fantasia."

For the 37 years between the initial release of "Fantasia" and Stokowski's death in 1977, continued the court, Stokowski never asserted any ownership rights despite Disney's repeated theatrical and television release of "Fantasia" and the 1940 registration and 1968 renewal of the "Fantasia" copyright in Disney's name.

The court concluded by rejecting Muller's claims that Disney infringed Stokowski's common law copyright in the sound recording of the classical music in "Fantasia;" that the company engaged in misappropriation and unfair competition, conversion and unjust enrichment; that Disney breached an advertising and publicity clause of the 1939 contract; and that the home video release of "Fantasia" violated section 43(a) of the Lanham Act. Judge Goettel, accordingly, granted Disney's motion for summary judgment as to all claims except for Muller's claim for an accounting of sales of audio materials under the 1956 contract.

Muller v. Walt Disney Productions, 871 F.Supp. 678, 1994 U.S.Dist.LEXIS 18328 (S.D.N.Y. 1994) [ELR 16:12:3]

Comedy Hall of Fame may not prevent broadcast of "Comedy Hall of Fame" awards show

The Comedy Hall of Fame, as described by Federal District Court Judge Bucklew, was a non-profit corporation formed to promote a museum and to establish an awards program.

George Schlatter Productions claimed that in early 1993 it began preparing for the First Annual Comedy Hall of Fame awards banquet; in November 1993, NBC broadcast a tape of the August banquet. Schlatter agreed to produce a second award show for airing by NBC. The Second Annual Comedy Hall of Fame was taped in August 1994.

The Comedy Hall of Fame, alleging various causes of action, sought a preliminary injunction to bar NBC's broadcast, on October 19, 1994, of the awards banquet.

Judge Bucklew found that the Comedy Hall of Fame did not show that it had a substantial likelihood of prevailing on the merits of the action. The Schlatter parties did not use the service mark, registered with the federal Patent and Trademark Office, which embodies the term "National Comedy Hall of Fame."

With respect to the mark "Comedy Hall of Fame," the court found that the organization did not prove by a preponderance of the evidence that it held a valid registration of the mark and that its mark was incontestible. And the organization did not establish that it engaged in actual and continuous use of the mark - the plan to use the mark in association with future plans to construct a museum or to raise funds were insufficient to demonstrate actual and continuous use.

Even if the organization established actual and continuous use, it did not show a substantial likelihood of prevailing on the merits of its claim that it was the first to use the mark "Comedy Hall of Fame" in association with a product or service.

The court, in denying the organization's motion for a preliminary injunction, rejected the organization's trademark dilution claim; stated that there was no showing of actual harm arising from the Schlatter parties' use of the mark; found that the Schlatter parties and third parties, such as NBC, would incur significant harm; and commented that any injunctive relief sought by the organization would be barred by the doctrine of laches.

Comedy Hall of Fame, Inc. v. George Schlatter Productions, Inc., 874 F.Supp. 378, 1994 U.S.Dist.LEXIS 19887 (M.D.Fla. 1994) [ELR 16:12:4]

Writers of the song "Thunderbird" lose copyright infringement action against ZZ Top

The teenage members of the 1950s band, the "Nightcaps," recorded and released a song entitled "Thunderbird;" the band did not apply for a copyright.

ZZ Top recorded a song entitled "Thunderbird" and copyrighted the song in 1975. In December 1992, the Nightcaps sued for copyright infringement. A Federal District Court referred the case to a magistrate who found that the Nightcaps' state and federal claims either were preempted by the Copyright Act or were barred by the applicable statute of limitations. The District Court adopted the magistrate's report and recommendations, and granted summary judgment to ZZ Top.

For purposes of the appeal of the matter, ZZ Top conceded that its version of Thunderbird was musically and lyrically identical to the version originally written and performed by the Nightcaps.

Federal Court of Appeals Judge Goldberg rejected the argument that section 301(c) applied to the instant case. The provision states, in part, "With respect to sound recordings fixed before February 15, 1972, any right or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047..." Judge Goldberg stated that the provision was intended to apply to "pirated" recordings of performances, rather than to the lyrics alone.

In turning to the Nightcaps' state law claims, including conversion, misappropriation, plagiarism, a violation of the Texas Free Enterprise and Antitrust Act of 1983, disparagement and defamation, the court found that the core of each of the theories of recovery was the wrongful copying, distribution and performance of the lyrics of Thunderbird. Thus, the claims were preempted by section 301(a) of the Copyright Act.

Judge Goldberg rejected a "continuing tort" theory, stating that "if the continuing tort theory were applied to cases involving musical recordings, then the statute of limitations would never apply to these cases...in this case the waltz was over by the time the Nightcaps filed suit." And the Nightcaps either knew, or through reasonable diligence should have known, about ZZ Top's actions more than four years before they brought their action, such that the statute of limitations was not tolled by the discovery rule. Therefore, even if the Nightcaps' causes of action survived the preemption provision of the Copyright Act, they were extinguished by the limitations period, concluded the court.

Daboub v. Gibbons, 42 F.3d 285, 1995 U.S.App.LEXIS 427 (5th Cir. 1995) [ELR 16:12:4]

ASCAP may not require Fox Broadcasting to obtain license for the satellite transmission of programs to its affiliates

Fox Broadcasting Company distributes television programming by satellite transmission to about 134 television station affiliates. Fox Television Stations owns and operates eight television stations. Fox sought a determination from a Federal District Court in New York that it was not required to obtain a license from ASCAP for the satellite transmission of its programs to its stations.

Judge William C. Conner held that ASCAP was not entitled to collect license fees for the use of music in its repertory in Fox programs broadcast between Fox's inception in 1986 and December 31, 1995, and that, even if it were, the reasonable amount of that fee would be $0. Beginning in 1996, ASCAP may negotiate a license agreement directly with Fox, stated the court, but "it must commensurately reduce the license fees paid by local stations owned by Fox or contractually affiliated with Fox."

In a lengthy opinion, Judge Conner first reviewed the 1941 consent decree which imposed certain limitations on ASCAP's operations, and the 1950 amendment of the decree. The consent decree permits ASCAP to license public performances of music on a non-exclusive basis, and requires ASCAP to offer both blanket and per-program licenses.

With respect to television broadcasting, ASCAP must issue to a "telecasting network" a license "on terms which authorize the simultaneous and so-called 'delayed' performance by...telecasting...of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such...television network...and do not require a separate license for each station...for such performance" (omissions by the court). This "through-to-the-viewer" license means that each network negotiates a license fee for the use of music in the programs that are broadcast through its affiliates and owned-and-operated stations. The license covers both the delivery of the programs to the network stations and the broadcast of the programs to the viewing public.

The court, after setting forth the extensive history of ASCAP's negotiations with the television broadcasting industry, recalled that when Fox began operations in 1986, ASCAP treated the company's programs in the same way that it handled syndicated programming, by licensing the programming at the local station level pursuant to the interim fee arrangement in place at that time for the local stations. In 1991, ASCAP indicated that

Fox should apply for a license for the transmission of its programs to the Fox stations. Fox disagreed, and eventually filed the instant application.

Judge Conner, in reaching his holding, stated that the music performances in Fox's programming were included in the license fees set for the local stations through the end of 1995, and ASCAP may not be paid two license fees for one broadcast of a musical performance to the viewing audience. Fox, prospectively, may be a "network" that ASCAP should license on a through-to-the viewer basis; if so, ASCAP must exclude revenue from Fox programs from the total revenues used to calculate the license fees collected from the local stations in order to reflect the fact that the Fox programs will no longer be licensed at the local level.

ASCAP argued that Fox must obtain its own license because the company's satellite transmissions of its programs to the Fox stations are "public performances" of the music in the programs, for which ASCAP is entitled to collect a fee. Judge Conner was not convinced that the satellite transmission of programs is "public," but stated that it was not necessary to reach this issue in order to decide that ASCAP is not entitled to license fees from Fox for those transmissions.

ASCAP, emphasized the court, may not "split" rights in order to collect more than one license fee for any one use of the music in its repertory. ASCAP's proposal to license a television programming supplier and its local television stations, instead of cable program suppliers and local cable system operators, raised arguments analogous to those in United States v. American Society of Composers, Authors and Publishers/Application of Turner Broadcasting System, Inc., 782 F.Supp. 778 (S.D.N.Y. 1991; ELR 13:8:6; 14:1:21), aff'd, 956 F.2d 21 (2d Cir.), cert.denied, 112 S.Ct. 1950 (1992; ELR 14:5:18). The cable systems and Fox may transmit their programming to the viewer in different ways, but their activities were indistinguishable with respect to the collection of fees.

In all, it was determined that ASCAP already collected, or will collect, the total license fees to which it is entitled for the Fox programs aired between 1986 and December 31, 1995.

Judge Conner concluded by agreeing with ASCAP that Fox should be licensed on a through-to-the-viewer basis, in which case Fox's programming would be excluded from the local television programs for which the local stations pay licensing fees. The court expressed the view that Fox may fit the definition of a "telecasting network" for which the consent decree requires through-to-the-viewer licensing, and held that in future licensing arrangements, ASCAP must license Fox's programs on either a through-to-the-viewer basis or at the local level.

United States v. American Society of Composers, Authors and Publishers, In the Matter of the Applications of Fox Broadcasting Company and Fox Television Stations, 870 F.Supp. 1211, 1995 U.S.Dist.LEXIS 13 (S.D.N.Y. 1995) [ELR 16:12:5]

"The Ronettes" may pursue claim for unauthorized use of their recording of "Be My Baby" in American Express television commercial

In about 1989, American Express Travel Related Services hired The Ogilvy Group to create an advertising campaign to promote the American Express Card. Ogilvy created a television commercial which featured the original sound recording of "Be My Baby." Ogilvy obtained a license from Phil Spector International, the owner of the recording and copyright owner, to use the original recording of "Be My Baby," but the American Express parties never contacted the Ronettes to obtain their permission to use the recording in the commercial.

The performers brought an action alleging various claims, including interference with their rights under the Screen Actors Guild 1988 Commercials Contract. Section 28 of the contract, in part, limits the use in commercials of material produced under other SAG or AFTRA contracts and, it was argued, would have required Ogilvy to contact the performers before using their voices in a commercial.

Ogilvy claimed that Be My Baby was recorded on July 5, 1963, but that Phil Spector did not sign the 1962-1965 AFTRA Code of Practice for Phonograph Records until October 31, 1963. Thus, the recording was not made under the jurisdiction of AFTRA, argued Ogilvy.

The AFTRA contract provided that it was to be effective as of April 1, 1962, noted New York trial court Judge Gammerman, and there was nothing in the agreement signed by Spector on behalf of his recording company that exempted him from the retroactivity provision of the contract.

The court granted a motion for summary judgment brought by Greenfield on the cause of action, but found that disputed issues of fact precluded summary judgment as to performers Bennett and Ross.

Greenfield v. American Express Corp., New York Law Journal, p. 27, col. 4 (N.Y. Cnty., Mar. 17, 1995) [ELR 16:12:6]

Former MCA shareholders may proceed with claims challenging Matsushita tender offer

In 1990, Matsushita Electrical Co. Ltd. acquired MCA, Inc. for $6.1 billion. The acquisition was accomplished through a tender offer of $71 per share of MCA common stock. MCA was merged into Matsushita as a wholly owned subsidiary on January 3, 1991.

As described by Federal Court of Appeals Judge William A. Norris, Lew Wasserman, MCA's chairman and chief executive officer at the time, owned almost 5 million shares of MCA common stock worth over $350 million at the tender price.

Wasserman's cost basis was 3+ per share. Rather than tender his shares at the tender offer price, Wasserman entered into a separate agreement with Matsushita, known as the "Capital Contribution and Loan Agreement," pursuant to which Wasserman exchanged his shares for preferred stock in a wholly-owned Matsushita subsidiary called "MEA Holdings." Matsushita agreed to fund MEA Holdings by contributing 106% of the tender price multiplied by the number of MCA shares Wasserman exchanged. The MEA Holdings preferred stock Wasserman received pays a dividend of 8.75% annually - the transaction was designed to be a tax-free exchange of Wasserman's MCA stock under Internal Revenue Code section 351(a).

Sidney Sheinberg, MCA's chief operating officer at the time of Matsushita's tender offer, owned over 1 million shares of MCA common stock. He tendered the shares pursuant to the $71 per share offer and received consideration worth over $83 million. Two days after Matsushita accepted all tendered shares, Sheinberg received an additional $21 million in cash, ostensibly in exchange for unexercised MCA stock options, according to Judge Norris.

Former MCA shareholders, who tendered their shares for the $71 tender price, claimed that Matsushita violated SEC Rule 14d-10 by treating Wasserman and Sheinberg differently from other shareholders in the tender offer. The rule, known as the "all-holder, best-price" rule, requires bidders to treat all shareholders on equal terms.

The District Court denied the MCA shareholders' motion for summary judgment on their claim that the agreement to pay Wasserman consideration that differed from the $71 per share tender offer violated Rule 14d-10; the court later granted Matsushita's motion for summary judgment on this claim.

The Federal Court of Appeals reversed the District Court decision, instructed the District Court to grant the shareholders' motion for partial summary judgment, and remanded the matter for further proceedings to determine the amount of damages, if any, that the shareholders may be entitled to recover as a result of the Wasserman transaction.

The shareholders also claimed that the Sheinberg payment violated Rule 14d-10. The Court of Appeals vacated the District Court decision granting Matsushita's motion for summary judgment on this claim and ordered further proceedings to determine whether the $21 million payment to Sheinberg was in fact a premium paid to encourage Sheinberg to tender his shares.

During the pendency of the appeal, the Delaware Court of Chancery entered a judgment (ELR 15:6:20) approving the settlement of a state class action that released all claims arising out of Matsushita's tender offer for MCA stock, including certain Williams Act claims raised in the "Epstein class action." After careful consideration, Judge Norris held that the settlement of the Delaware class action did not preclude the federal claims raised in the Epstein class action, and declined to give full faith and credit to the Delaware judgment to the extent that it released exclusively federal claims that depended upon different underlying facts than the state claim depended upon.

In a lengthy opinion, Judge Norris held that there was a private cause of action under section 14(d)(7) from which the SEC derived the authority to promulgate Rule 14d-10, and that Congress intended to provide a damage remedy "as a means of enforcing its command that every security holder who tenders his shares be paid any 'increased consideration' offered to others."

The court then rejected Matsushita's argument that the Wasserman transaction was beyond the scope of the rule because it closed after the tender offer period expired and because it was merely a private exchange of stock, structured to take place after the tender offer finished. It was noted that the redemption value of Wasserman's preferred stock incorporated the tender offer price by reference, and that the Capital Contribution and Loan Agreement was conditioned on the tender offer's success. Further proceedings will be required, stated Judge Norris, on the question of whether the consideration Wasserman received in exchange for his MCA stock had a greater value than what the MCA shareholders received, and, if so, how much greater.

Judge Norris held that the evidence presented by the shareholders gave rise to an issue of fact precluding summary judgment for Matsushita on the claim that the $21 million payment to Sheinberg violated Rule 14d-10. Matsushita's argument that MCA rather than Matsushita paid Sheinberg "begs the question," stated the court - the payment by MCA just before it was formally merged into Matsushita did not establish as a matter of law that the $21 million Sheinberg payment did not violate Rule 14d-10.

According to news reports, the value of the shareholders' damages could amount to $1 billion.

Epstein v. MCA, Inc., 1995 U.S.App.LEXIS 3722 (9th Cir. 1995) [ELR 16:12:6]

Paramount Communications prevails in noteholder's action alleging failure to mention possible merger or hostile takeover in registration statement

In July 1993, Howard Nelson paid $50,000 for notes issued by Paramount Communications; the price of the notes, as described by Federal District Court Judge Motley, subsequently declined and never recovered.

Nelson sued Paramount for violating sections 5 and 11 of the Securities Act of 1933, alleging that Paramount improperly omitted certain matters from the registration statement for the notes. Nelson claimed that Paramount's board of directors, prior to filing an SEC registration statement, was aware of pending negotiations concerning a change in control of the company, and that Paramount's management anticipated that QVC Network would make a hostile bid to take over control of Paramount.

The court granted Paramount's motion to dismiss, stating that it did not appear that Nelson could establish a material omission. At the time of the registration statement at issue, Paramount and Viacom had broken off merger negotiations; the fact that the companies still were "in contact" was not a material "state of affairs." Similarly, at the time of the registration statement, Paramount learned that QVC apparently had expressed interest in a takeover bid. Since QVC denied any such interest, the court commented that "to call this a material set of facts seems like a stretch."

Judge Motley suggested that the events in the case subsequent to the date of the registration statement, arguably rendered the prospectus materially misleading. But Nelson did not have standing to raise the issue - the takeover events occurred after Nelson made his purchase and he was not entitled to complain that the disclosure of any of the events would have significantly altered "the total mix of information available to him at the date of his purchase."

Nelson v. Paramount Communications, Inc., 872 F.Supp. 1242, 1994 U.S.Dist. LEXIS 18278 (S.D.N.Y. 1994) [ELR 16:12:7]

Attorney for executor of Andy Warhol estate receives $7.2 million fee award

As reported at ELR 16:6:24, a New York Surrogate Court set the transfer date value of the estate of Andy Warhol at about $509 million. In April 1995, the court awarded Edward Hayes and Francis Harvey fees totalling $7.2 million for serving as lawyers for the executor in the administration of the estate.

Surrogate Eve Preminger noted that the initial retainer agreement between Hayes and executor Frederick Hughes provided for a fee equal to 2 1/2 percent of the gross estate, which then was thought to be about $100 million. The parties subsequently revised the agreement, and, by 1992, Hayes had received almost $5 million. The Andy Warhol Foundation refused to make additional payments, claiming, in part, that the value of the estate was $200 million and that Hayes therefore had been paid in full under the retainer agreement.

Hughes had entered into a settlement agreement with the Foundation in which he agreed to adopt the

Foundation's estimate of the value of the estate and to accept a commission of $5.2 million in cash and title to certain Warhol paintings. Hayes argued that the value of the paintings exceeded $5 million, which would result in a commission to Hughes of more than $10 million.

Under the court's valuation of the estate, Hayes claimed that he was entitled, pursuant to the retainer agreement, to an additional $5.4 million, or a total fee of about $10.2 million.

Surrogate Preminger recalled that retainer agreements are not enforceable in the same manner as ordinary commercial contracts. In the instant case, the initial retainer might have been considered reasonable if the circumstances, in terms of the size of the estate and the nature and amount of the services to be performed, had been as first anticipated. An amended agreement decreased the fee percentage based on the recognition of the size of the estate. But the absence of a limiting or ceiling provision rendered the amended retainer agreement unenforceable, stated the court.

In proceeding to determine the reasonable value of the legal services performed, Surrogate Preminger noted that Hughes, who was aware of the complexity of the assets in the estate, asked Hayes to devote his entire practice to the estate - Hayes did so for over five years, to his own detriment and to the benefit of the estate.

After describing the many activities engaged in by Hughes, Surrogate Preminger stated that the efforts of Hughes and Hayes "were pivotal in securing Warhol's stature and the estate's assets throughout the administration of the estate...As a result of their efforts, this estate not only survived but flourished in a turbulent market." The assets of the estate were collected, categorized and distributed and "Warhol's place in the art world is as secure as any artist of his time's could be," declared Surrogate Preminger, in fixing the total fee for Hayes and

Harvey payable from the estate at $7.2 million (the award includes the amounts Hayes previously received.) The estate also was ordered to pay Hayes' attorneys a portion of their fees for services rendered at the valuation hearing, i.e.,the lesser of one-fourth of those legal fees or $250,000.

According to news reports, the Foundation plans to appeal.

Estate of Andy Warhol, 619 N.Y.S. 2d 42, 1994 N.Y.App.Div.LEXIS 12372 (Surrogate's Court 1995) [ELR 16:12:8]

Apple Computer wins dismissal of libel claim by Carl Sagan over code name "Butt-Head Astronomer" for new project

Apple Computer used the name "Carl Sagan" as a code name for a new personal computer. When scientist Carl Sagan demanded that the company stop using his name, Apple changed the code name to "Butt-Head Astronomer."

In response to Sagan's subsequent lawsuit, a Federal District Court in California first found that the new code name did not imply an assertion of objective fact, and that the statement was protected under the First Amendment and could not form the basis of a claim for libel.

The challenged statement also was protected under California law, declared Judge Baird, in granting Apple's motion to dismiss Sagan's claim for libel.

The court also dismissed Sagan's claim for intentional infliction of emotional distress, noting that Sagan is a public figure, and, again, that "Butt-Head Astronomer" is not, "nor does it imply, a statement of fact capable of being proven true or false."

The court denied Apple's motion for a more definite statement in connection with Sagan's claims alleging the violation of the Lanham Act, the violation of California Civil Code section 3344, unfair competition, and infringement of the right of publicity, and concluded by consolidating the latter claim and Sagan's invasion of privacy cause of action into a single cause of action for common law misappropriation.

Sagan v. Apple Computer, Inc., 874 F.Supp. 1072, 1994 U.S.Dist.LEXIS 20154 (C.D.Ca. 1994) [ELR 16:12:8]

Attorney may proceed with libel claim involving "Den of Thieves," rules New York Court of Appeals

The New York Court of Appeals has upheld an appellate court decision (ELR 16:4:32, 16:3:32) that attorney

Michael Armstrong may proceed with a libel action against Simon & Schuster, Inc., James B. Stewart, and Laurie P. Cohen, the publisher, author, and researcher/reporter of the book "Den of Thieves."

The book, an account of the insider trading scandals that led to the collapse of the investment banking firm of Drexel Burnham Lambert, Inc. and Michael Milken, included a statement purportedly describing the preparation of an affidavit signed by Craig M. Cogut and the submission of the affidavit to the U.S. Attorney's Office. Armstrong, the attorney for Lowell Milken, assisted in preparing Cogut's original affidavit, which subsequently was reviewed by other counsel.

The complained-of passage, in part, stated that Armstrong came to Cogut with "an affidavit he had prepared for Cogut to sign. Its intent had been to exonerate Lowell, based on assertions of fact by Cogut. Cogut read it over and had only one problem: the facts weren't true.

He angrily refused to sign, and began looking for new lawyers..."

Armstrong, at a meeting with Simon & Schuster prior to the publication of the hardcover edition of the book pointed out the potential damage to a practicing attorney of a false accusation of suborning perjury, and suggested that the publisher include an "errata sheet" in the already printed hardcover edition. Armstrong explained that the affidavit was truthful and was signed and sworn to by Cogut, and that Cogut's retainer letter with Armstrong disclosed the potential conflict of interest.

The first printing of the book was distributed without changes and without an errata sheet. Later printings of the hardcover edition of the book included changes unrelated to the challenged statement. The softcover edition of the book also included changes in certain material, but retained the cited passage with the addition of the sentence "In September 1988 Cogut submitted an affidavit."

Armstrong claimed that the book accused him of criminal conduct in ignoring a possible conflict of interest when he agreed to represent Milken and Cogut, and that Armstrong, in effect, asked Cogut to execute a perjurious affidavit in order to benefit Milken.

Chief Judge Judith S. Kaye first found that the sentence stating that "Cogut read [the affidavit] over and had only one problem the facts weren't true," was false. The sentence, in the context in which it appeared, was susceptible of a defamatory meaning, i.e., that Armstrong deliberately presented a false affidavit for Cogut to sign in order to exculpate another client, resulting in Cogut's discharge of Armstrong and the retention of new counsel.

Judge Kaye discussed whether Armstrong's claim constituted "defamation by implication," was premised on false suggestions, impressions and implications arising from otherwise truthful statements, and agreed with Armstrong that the case involved allegedly false statements of verifiable fact, with inferences flowing from those facts. Armstrong will bear the burden of proving the alleged falsity as well as the other elements of his claim.

Armstrong v. Simon & Schuster, Inc., 1995 N.Y.LEXIS 699 (N.Y. 1995) [ELR 16:12:9]

Howard Stern may not prevent on-line bulletin board service from using his name and "buttocks" photograph in advertisement

Radio personality Howard Stern claimed that Delphi Internet Services used his name and an "outlandish, bare buttock" photograph of him without permission in an advertisement for Delphi's on-line bulletin board service devoted to debate concerning Stern's campaign for Governor of New York. The caption for the advertisement asked "Should this man be the next governor of New York?" and introduced Delphi's service by stating, in part, "You've heard him. You've seen him. You've been exposed to his Private Parts. Now he's stumping to be governor. Maybe it's time to tell the world exactly what you think..."

New York trial court Judge Emily Jane Goodman, in rejecting Stern's claims under sections 50/51 of the New York Civil Rights Law, first stated that although only paid subscribers may access Delphi's on-line information services, this service was "analogous to that of a news vendor or bookstore, or a letters-to-the-editor column of a newspaper, which require purchase of their materials for the public to actually gain access to the information carried." The court then observed that Delphi was advertising a service related to news dissemination; that Delphi used Stern's name in connection with public debate on Stern's candidacy; and that "the subsequent use of Stern's name and likeness in the advertisement is afforded the same protection as would be afforded a more traditional news disseminator engaged in the advertisement of a newsworthy product."

Although Stern's photograph was not part of the on-line bulletin board and Stern did not give permission for the use of his likeness in the first instance, this did not render the use unlawful, continued the court, for it is the purpose of the advertisement that determines whether it is protected, not whether a party had permission to use the likeness.

The "incidental use" exception derives from the First Amendment interest in protecting the ability of news disseminators to publicize their own communications.

The Stern candidacy was a matter of public interest, and the use of Stern's name and photograph to indicate a subject on the computer bulletin board was within the exception. "To restrict Delphi from informing the public of the nature and subject of its service would constitute an impermissible restriction," in Judge Goodman's view, particularly since Stern was attempting "to silence the electronic equivalent of a talk show, an on-line computer bulletin board service."

The use of Stern's photograph, as well as his name, did not transform a privileged use into an unlawful use when the goal of the advertisement was to inform potential subscribers about the content of the on-line service and encourage them to subscribe, reiterated the court, in granting Delphi's motion for summary judgment.

Stern v. Delphi Internet Services Corp., New York Law Journal, p. 29, col. 3 (N.Y.Cnty., May 1, 1995) [ELR 16:12:9]

Court reviews copyright, trade dress and reverse passing off claims in dispute over futuristic games and toys

FASA Corporation, as described by Federal District Court Judge Castillo, creates and distributes fictional universes, including "Battletech," which form the basis for board games, role-playing games, novels, and game supplements. FASA also licenses the intellectual property and proprietary rights in its fictional universes to third parties for the development of interactive entertainment games, models, miniatures, merchandise, toys and other items. Virtual World Entertainment is a virtual reality entertainment company formed by the creators of "Battletech" to create and develop virtual reality games.

FASA and Virtual World sued Playmates Toys, the marketer of the "Exosquad" toy line, alleging, among other cause of action, copyright and trademark infringement.

In 1991, a FASA representative, in attempting to obtain a manufacturing agreement, presented the Battletech toy line to an employee of Playmates after signing Playmates' idea submission waiver. After the presentation, Playmates retained various Battletech material. Playmates rejected the Battletech proposal, and returned certain material to FASA; however, Playmates kept a poster, the "Battletech Compendium," and a Battletech "Technical Readout 2750," containing detailed designs.

Judge Castillo, after careful consideration, first found that Playmates did not establish that there was no genuine issue of fact as to whether the FASA representative acted within the scope of his actual or ostensible authority when he signed Playmates' waiver; thus, Playmates was not entitled to summary judgment on the grounds of waiver.

The court then considered Playmates' contention that FASA's copyright claims were based on the underlying preexisting works from which FASA derived its copyrighted material. It was noted that Playmates did not clearly identify the source or date of publication of the third-party designs; submitted no evidence suggesting that FASA had access to any of those designs; and did not demonstrate whether or not Playmates' designs were substantially similar to FASA's expressive contributions. In all, the court found that Playmates was not entitled to judgment as a matter of law based on the purported similarity of the Battletech designs to the third-party designs.

Judge Castillo next rejected Playmates' "cursory and undeveloped" argument that FASA's material constituted unprotectible scenes a faire or common features in the futuristic robotic genre.

The court commented on FASA's "inability or unwillingness to identify concrete details pertaining to the Battletech universe," and reluctantly concluded that the company was impermissibly seeking protection of general ideas and concepts such as "a futuristic, interstellar, battle dominated universe;...robot-like battle machines...genetically manipulated warriors; and...di brain." Judge Castillo cautioned that the holding was limited to not allowing FASA to base its copyright claims on similarities involving unprotectible elements and was in the context of determining the scope of copyright protection. When the court evaluates the similarity of the Battletech universe and the Exosquad toy line, the works will be compared as a whole.

In turning to FASA's trade dress infringement claim, the court found that Playmates did not demonstrate the lack of a genuine issue of material fact concerning whether FASA would be able to establish secondary meaning in light of "widespread third party use of the same elements." And FASA did raise an issue of fact as to whether its MAD CAT item has acquired secondary meaning. On the basis of these findings and others, the court denied Playmates' motion for summary judgment on FASA's trademark claims.

FASA may not claim protection under Illinois' Anti-Dilution Statute, and, after careful review, Judge Castillo declined to conclude that "an allegation of misrepresentation based solely on an alleged infringer's act of displaying, selling, or promoting the infringing work as his or her own creation, is sufficient to remove a state based claim from the preemptive reach of 17 U.S.C. section 301(a)." In the absence of any other showing of wrongdoing, the court found that FASA's tortious interference claim was within the scope of copyright and was preempted, as was a state common law unfair competition claim.

FASA Corporation v. Playmates Toys, Inc., 869 F.Supp. 1334, 1994 U.S.Dist.LEXIS 17421 (N.D.Ill. 1994) [ELR 16:12:10]

Court issues preliminary injunction in dispute between major league baseball players and team owners

On March 15, 1995, the National Labor Relations Board, on the basis of charges filed by the Major League Baseball Players Association, issued a Complaint and Notice of Hearing alleging, in part, that the

Major League Club owners had violated sections 8(a)(1) and (5) of the National Labor Relations Act. It was alleged that the owners unilaterally eliminated, before an impasse had been reached, salary arbitration for certain reserve players, competitive bargaining for certain free agents and the anti-collusion provision of their collective bargaining agreement.

Federal District Court Judge Sotomayor determined that the Board had reasonable cause to believe that the owners committed an unfair labor practice and that an injunction was warranted to avoid irreparable injury and to enable the owners and players to continue bargaining, in good faith, until the resolution of their disputes, until a genuine impasse, or until the determination by the Board of the charges before it.

Judge Sotomayor carefully reviewed the free agency and salary arbitration provisions of the most recent basic agreement between the parties, which extended from

January 1990 through December 1993. The players and owners began negotiations for a new agreement in March 1994. The 1994 baseball season began under the full terms of the expired agreement, but in August 1994, the players began their strike.

Although the parties continued to discuss proposals for a new agreement, the owners, in December 1994, declared an impasse; the owners failed to make a counter-proposal, as requested by the then mediator, to a proposal submitted by the players. On February 6, 1995, the owners announced that the player relations committee, rather than the individual clubs, would negotiate individual players' free agency contracts, and eliminated the salary arbitration rights of eligible reserve players.

Judge Sotomayor paused to consider certain factors distinguishing collective bargaining in the context of professional sports, stating that "on the one hand, the talent of an individual athlete can provide him with extraordinary bargaining power, but on the other hand, a player may sell his talent only to a circumscribed group of owners, who have something akin to monopoly power in the sport at issue." In the sports context, courts have "overwhelmingly" held that the components of reserve/free agency systems are mandatory, not permissive, subjects of bargaining.

The statutory right to join collective bargaining units belongs to employees, not to employers, continued the court. Thus, maintaining the reserve/free agency systems in the interim between collective bargaining agreements would not alter the rights of the owners to have the player relations committee represent them in negotiating a successor agreement. The owners may attempt to bargain to end free agency and other provisions of the agreement, but may not alter a particular individual's wages until the system is changed by agreement or until the parties negotiate to impasse.

Judge Sotomayor concluded that the Board had substantial reasonable cause to conclude, and a substantial likelihood of success ultimately in establishing, that the unilateral changes made by the owners to the free agency system before impasse violated the rule against changes to mandatory subjects of bargaining.

The court then found that salary arbitration for reserve players also was a mandatory part of the collective bargaining process between the players and the owners, and that injunctive relief was warranted, in part, due to the public attention to the player strike, which, in the court's view, "placed the entire concept of collective bargaining on trial." Although the public interest alone would justify the issuance of an injunction, the court found that returning the parties to the status quo would restore some of the bargaining equality that existed before the commission of the unfair labor practices in February.

National Labor Relations Board v. Major League Baseball Player Relations Committee Inc., (S.D.N.Y., April 3, 1995) [ELR 16:12:11]

Female student athletes in Kentucky may bring Title IX claim, but court affirms denial of equal protection claim

Several female student athletes who participate in interscholastic girls' high school slow-pitch softball in Kentucky sued the Kentucky State Board of Education and the Kentucky High School Athletic Association alleging the violation of the Equal Protection Clause; Title IX of the Education Amendments of 1972, as amended by the Civil Rights Restoration Act of 1987, and state law. The athletes claimed that the Board sanctioned fewer sports for girls than for boys and refused to sanction girls' interscholastic fast-pitch softball, with the result that the athletes were disadvantaged when competing for college scholarships.

A Federal District Court ruled that the athletes were not denied equal athletic opportunity and granted summary judgment for the Board parties on the constitutional and Title IX claims.

A Federal Court of Appeals concluded that the athletes raised genuine issues of fact precluding the entry of summary judgment on the Title IX claim, but affirmed the entry of summary judgment on the equal protection claim.

Federal District Court Judge Charles W. Joiner, sitting by designation, noted that when the Association sanctions a sport, this means that it recognizes and sponsors a state tournament in the sport. The Association does not prohibit member schools from participating or competing in non-sanctioned sports and does not prohibit girls from playing on boys' teams in sanctioned sports if the member school does not provide a girls' team. At the time the lawsuit was filed, the Association sanctioned 10 sports for boys and 8 for girls. The Association refused to sanction girls' fast-pitch softball because 25 percent of the schools, as required by Association policy, did not indicate a willingness to participate.

The District Court had found it unnecessary to reach the question of whether the Board and the Association were subject to Title IX. Judge Joiner, after careful review of the funding of the Board parties, rejected the argument that they were entitled to summary judgment on this issue. It then was found that genuine issues of material fact "abound" in the case, thus precluding any determination that the Board parties complied with Title IX's equal athletic opportunity mandate. The entry of summary judgment on the Title IX claims was reversed, and the matter was remanded for further proceedings.

The athletes had argued that sheer disparate impact was sufficient to demonstrate an equal protection violation. But Judge Joiner concluded that this was not enough to defeat the Board parties' motion for summary judgment on the equal protection claim.

Judge Batchelder, dissenting in part, would have ruled that the athletes, in addition to failing to present an equal protection claim, also did not present a prima facie case of a Title IX violation in the absence of proof of statistical disparity and unmet interest.

Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 1994 U.S.App.LEXIS 36130 (6th Cir. 1994) [ELR 16:12:12]

Athletic association may enforce age limit rule against learning disabled student

As reported at ELR 16:7:30, a Federal District Court in Missouri granted Edward Pottgen a preliminary injunction barring the Missouri State High School Activities Association from enforcing its age limit for interscholastic sports against Pottgen in the 1993-1994 school year. Pottgen repeated two grades in elementary school due to a learning disability, and began his senior year of high school at age nineteen. Pottgen claimed that the age limit violated Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and section 1983.

A Federal Court of Appeals reversed the District Court decision on the ground that Pottgen was not a qualified individual under the statutes.

Judge Beam noted that the portion of the injunction permitting Pottgen to play was moot since the young man had played his last game of high school baseball. However, a controversy remained with respect to the portion of the injunction which prohibited the association from imposing sanctions upon any high school for whom or against whom Pottgen played.

It was found that the association demonstrated that an age limit is an "essential eligibility requirement" in a high school interscholastic program. Pottgen could not meet this requirement, but he would be "otherwise qualified" under the Rehabilitation Act if reasonable accommodations would enable him to meet the age limit. Since Pottgen already was older than the age limit, the only possible accommodation would be to waive the essential requirement itself. The court declined to do so, stating that waiving an essential eligibility standard "would constitute a fundamental alteration in the nature of the baseball program." Section 504 was designed to extend protection to those potentially able to meet the eligibility requirements of a program or activity. Pottgen could not meet the age requirement of the association, and the District Court erred in granting the injunction based on the Rehabilitation Act claim, stated Judge Beam.

Title II of the Americans with Disabilities Act prohibits discrimination by public entities against individuals with disabilities. Again, the age limit was an essential eligibility requirement of the interscholastic baseball program, and the court rejected the argument that the association was required to waive the requirement for Pottgen.

Pottgen could not establish a deprivation of federally protected rights under section 1983, concluded Judge Beam, in remanding the matter for further proceedings consistent with the court's opinion.

Chief Judge Richard S. Arnold, in dissent, stated that the court must conduct an individualized inquiry before deciding whether a party can meet the essential requirement of an eligibility rule. Such an inquiry in the instant case would have shown that the age requirement, as applied to Pottgen, was not essential to the association's goals. Chief Judge Arnold doubted whether high school baseball competition in Missouri was fundamentally altered when Pottgen was allowed to play one more year. The District Court had found that any competitive advantage resulting from Pottgen's age was "de minimis;" that Pottgen did not deliberately delay his education in order to extend his eligibility; and that the association did not review Pottgen's circumstances or consider the issue of safety when it denied the request for a waiver of the age limit. The association, in Chief Judge Arnold's view "could easily bend to accommodate Ed Pottgen without breaking anything essential."

Pottgen v. Missouri State High School Activities Association, 40 F.3d 926, 1994 U.S.App.LEXIS 32275 (11th Cir. 1994) [ELR 16:12:12]

Security company may proceed with defamation action against NBC

In March 1993, a "Dateline NBC" segment entitled "Rambo Goes to Reykjavik" focused on an unsuccessful child rescue mission organized and carried out by Corporate Training Unlimited. Two American citizens retained the company to locate and repatriate their daughters, who, contrary to an American court order, were taken to Iceland by their Icelandic mother.

When Corporate Training brought a libel action, NBC filed a motion to dismiss for failure to state a claim, arguing that the complained-of statements were not capable of a defamatory meaning. Federal District Court Judge Dearie rejected the broadcaster's motion, stating that the ordinary member of the viewing public could have been left with an impression of Corporate Training and its officers as "charlatans and ruffians with questionable financial integrity and business judgment."

NBC then argued that the statements were protected by the fair report privilege of Section 74 of the New York Civil Rights Law. Judge Dearie noted that the statute protects only reports of judicial proceedings (emphasis by the court). The "Dateline" segment was not a fair and true report of the Icelandic trial of a Corporate Training executive and one of his employers.

Judge Dearie also refused to dismiss an allegation concerning the company's bankruptcy proceeding; as of the date of the broadcast, Corporate Training no longer was in bankruptcy and the bankruptcy proceeding was terminated on April 24, 1992.

Although agreeing that many of the comments featured in the broadcast were nonactionable opinion, the court determined that some of the statements concerning the company's finances could be taken to imply the existence of nondisclosed facts and therefore were not subject to dismissal.

Judge Dearie concluded by finding that NBC did not satisfy the defense of substantial truth with respect to a statement of the circumstances of Corporate Training executive Donald Feeney's departure from the Army.

The Feeneys also set forth a cause of action for tortious interference with prospective business advantage, claiming that they had entered into agreements with Multimedia Television Productions to produce a television series on the company's missions. The court declined to dismiss that part of the claim charging that the NBC broadcast interfered with Corporate Training's precontractual relations with Multimedia.

Corporate Training Unlimited, Inc. v. National Broadcasting Company, Inc., 868 F.Supp. 501, 1994 U.S.Dist.LEXIS 17158 (E.D.N.Y. 1994) [ELR 16:12:13]

Radio station obtains injunction barring competitor from using similar cash accumulation promotion

CMM Cable Rep. created radio promotions entitled "Payroll Payoff" and "Paycheck Payoff." The promotions promise the payment of an "hourly wage" by a radio station if a listener calls in after his or her name is selected and read on the air. If a listener does not call the radio station, the prior successful caller continues to be paid an amount every hour until the next successful caller responds or until the contest ends. Listeners supply their names to the station in response to direct mail pieces containing mail-in or fax-in forms.

Radio station customers purchase the promotion on an exclusive basis in their broadcast area and pay CMM to prepare and mail all printed material associated with the promotion.

In August 1994, WMGS-FM in Wilkes-Barre, Pennsylvania purchased the CMM promotion. At about the same time, WKRZ-FM in Wilkes-Barre purchased "The Ultimate Job" promotion from Keymarket Communications; the promotion offered to pay $100 per hour to listeners who called the station in response to their names being read over the air. The stations began broadcasting their promotions on the same day.

When CMM sued Keymarket for copyright infringement, Keymarket, for purposes of the preliminary injunction motion, conceded that CMM owned a valid copyright to the Payroll Payoff material, but argued that the copyright was limited to the direct mail pieces. Federal District Court Judge Vanaskie stated that the copyright infringement claim would encompass the parties' broadcast announcements as well as direct mail pieces; rejected Keymarket's claim of independent creation of the Ultimate Job promotion; found that Keymarket had access to material concerning the Payroll Payoff promotion, and that Keymarket copied the protectible "expression" of the promotional cash giveaway, i.e., the hourly wage analogy; and concluded that the promotions were substantially similar and that CMM established a substantial likelihood of prevailing on the merits of its copyright infringement claim.

The court then found that CMM demonstrated a likelihood of establishing that its promotion has secondary meaning, a likelihood of establishing confusion, and a likelihood of prevailing on its trade dress infringement claim.

CMM established the requisite irreparable harm as to both the copyright and trade dress infringement claims, stated the court, in granting the requested preliminary injunction barring the Keymarket parties from broadcasting or distributing material known as "The Ultimate Job." The court did not bar the Keymarket parties from using an accumulating cash award promotion concept. Judge Vanaskie required CMM to post a bond in the amount of $100,000.

CMM Cable Rep, Inc. v. Keymarket Communications, Inc., 870 F.Supp. 631, 1994 U.S.Dist.LEXIS 17293 (M.D.Pa. 1994) [ELR 16:12:14]

Publisher prevails in contract dispute with Saban Entertainment over juvenile story books based on "Mighty Morphin Power Rangers"

Tom Doherty Associates, doing business as TOR Books, is a wholly owned subsidiary of St. Martin's Press. In late 1991, TOR agreed to publish six books based on properties owned by Saban International. Saban, pursuant to a contract rider, retained the right to decide whether to publish additional juvenile story books based on its properties. If Saban decided to license the publishing rights to additional books, the company agreed to submit such additional titles for TOR's consideration.

TOR eventually brought an action alleging breach of contract and sought a preliminary injunction requiring Saban to offer TOR the right to publish juvenile story books based on Saban's Mighty Morphin Power Rangers.

Saban claimed that the agreement with TOR extended only to children's books in the same format as the six initial books, i.e., an 8x8 format. Saban did not approach TOR about publishing any books in any format, and entered into a number of licensing agreements with other publishing houses for fold-out books, hardcover books, a junior novelization, etc. based on the Power Ranger characters.

Saban filed a complaint in a California state court seeking a declaratory judgment. TOR then brought the Federal District Court action.

Federal District Court Judge McKenna, in considering the meaning and scope of the phrase "juvenile story books," first noted that a children's book "can be published in any length or size or shape, with any amount of illustrations of any kind, and directed at any reading level."

Judge McKenna determined that TOR established that it would suffer irreparable harm if Saban did not license the Power Ranger publishing rights, stating that "the Power Rangers belong to that rare and unpredictable species of wildly successful children's cult heroes...the Power Rangers are a unique opportunity for TOR." The court found that TOR bargained for the opportunity to be the exclusive publisher of a line of books and that Saban "can not be allowed to avoid the plain meaning of the Agreement simply because the property was more lucrative than either party could possibly have expected."

After stating that the alleged harm to TOR, although not quantifiable, was not speculative, the court ruled that the publisher demonstrated a likelihood of success on the merits.

Judge McKenna next noted that the plain meaning of the phrase "juvenile story book" is a book with a narrative intended to be read by or to children. Saban failed to show that the phrase was a term of art or that it carried a specific meaning in the industry, and also did not show that the language of the rider required a narrow interpretation of the phrase. The fact that Saban had retained the right to publish comic books, coloring books and activity books suggested to the court that Saban understood that the agreement granted broad publishing rights.

The agreement also prohibited Saban from authorizing the publication of any other "book" based on the same characters or stories licensed to TOR. For Judge McKenna, this meant that Saban was licensing juvenile story book rights to characters or stories rather than merely a right to publish in one format.

Saban did not show that the language of the rider itself limited the meaning of juvenile story books, continued the court. The grant of "additional" rights to juvenile story books did not limit the meaning of the phrase to the same type of book already being published by TOR. And it was not shown that anyone at TOR or Saban intended that the term have the narrow meaning of an 8x8 book. In all, stated Judge McKenna, the parties apparently did not specifically consider a line of books in different formats. In the absence of evidence to the contrary, the words in the contract carried their plain meaning, such that in this case juvenile story books would mean books with narratives directed to children.

TOR's delay in notifying Saban of the breach of contract claim allowed Saban to develop an "extensive network of licensing rights" with third parties, stated the court. Given the absence of bad faith on the part of Saban and TOR's lack of diligence, Judge McKenna declined to interfere with any existing licensing arrangements. But the court did grant TOR's motion for a preliminary injunction and ordered Saban to offer to TOR the right to publish a juvenile story book based on the Power Rangers and to offer TOR the right to publish a juvenile story book based on any characters, artwork and/or literary, television, motion picture or theatrical properties owned or controlled by Saban if, during the term of the Agreement, Saban desires to license publishing rights to a narrative designed to appeal to children. Saban may not enter into any further licenses to any party, other than with TOR, with respect to the right to publish any book based on the Power Rangers.

Tom Doherty Associates Inc. v. Saban Entertainment, 869 F.Supp. 1130, 1994 U.S.Dist.LEXIS 16907 (S.D.N.Y. 1994) [ELR 16:12:14]

Further proceedings are ordered in publisher's "reverse passing off" claim against competing distributor of childrens' books

As reported at ELR 16:4:23, Waldman Publishing Corp. publishes "classic" literary works adapted and illustrated for children. The company issued the hard cover versions of the books as a series called "Great Illustrated Classics;" the soft cover versions of the books appeared in a series called "Illustrated Classic Editions."

In 1993, Landoll, Inc. began publishing illustrated adaptations of six books, including "Oliver Twist," "Robin Hood," and "Black Beauty," in a series called "First Illustrated Classics." The company subsequently issued the adaptations in hard cover in a series called "Illustrated Classics." Landoll obtained the text and illustrations for its works from Peter Haddock, an English publisher, in return for a royalty of one cent per book sold.

A Federal District Court found that Waldman was likely to succeed on the claim of false designation of origin in violation of section 43(a) of the Lanham Act due to the similarities between the structure, texts, and illustrations of the competing adaptations - "similarities that are too striking to ascribe to coincidence." The court issued a preliminary injunction which, in part, prohibited Landoll from publishing or selling any books which copied to a substantial degree Waldman books. (It should be noted that Waldman's complaint also alleged trade dress infringement, but the claim was dropped as a basis for a preliminary injunction during a District Court hearing and was not raised in a Second Amended Complaint. The District Court also held that Waldman's common law claims were preempted by Section 301(a) of the Copyright Act - this portion of the order was not appealed. And at the time the District Court issued the preliminary injunction, Waldman had not registered its copyrights with the Copyright Office. The company subsequently did so, and amended its complaint to allege copyright infringement. The complaint was amended after the appeal was taken, and the Court of Appeals therefore did not consider the copyright claim.)

Federal Court of Appeals Judge Oakes first stated that reverse passing off as applied to a written work would prohibit not only the relabeling of a printed work, but also the reproduction of a work with a false representation as to its creator. The misappropriation would be of "the artistic talent required to create the work, not of the manufacturing talent required for publication."

Judge Oakes, in addressing Landoll's argument that it could not be held liable for copying Waldman's books because, at the time of the preliminary injunction motion, Waldman had not registered its copyrights, pointed out that a claim of reverse passing off is separate and distinct from a claim of copyright infringement. A copyright owner may control who publishes, sells or otherwise uses a work; through a Lanham Act action, an author may ensure that his or her name is associated with a work when the work is used.

The court proceeded to consider whether Waldman's books, which were adaptations of public domain works, were original enough to constitute an "origin" which might be "falsely designated." In Judge Oakes' view, it would be fair to say "that it would constitute a false designation of origin to publish without attribution to its author a work that is original enough to deserve copyright protection." It was found that the Waldman books were original works in that the selection of which episodes in the classics to include in the books, the redrafting of the text for children and the illustrations added "more than a quantum of originality to the original works."

The substantial similarity standard used in copyright infringement actions was appropriate for determining false designation of origin, continued Judge Oakes, for "a second work can be said to have the same origin as a first if the second was copied from the first." When the works are somewhat different, copying can be established as it is in copyright infringement.

The District Court did not err in finding that the Landoll books were copied from the Waldman books and that the books thus had a common origin, stated the court. Waldman has distributed its books since 1979 and Peter Haddock distributed the Waldman Great Illustrated Classics before he created the Landoll books. The court reiterated that the Landoll books contained substantial similarities to many original aspects of the Waldman books, and that in the absence of a showing of independent creation, it could be inferred that Landoll falsely designated the origin of its books by indicating its own authors as the source of the adaptations.

The District Court had concluded that Waldman had shown a likelihood of success on the reverse passing off claim because "Landoll is selling the Waldman products as Landoll's own and under Landoll's name." But the "origin" of a work is its author, and the District Court, according to Judge Oakes, did not consider who the authors of the Waldman books were, and who should be credited on the Landoll books. It was unclear from the record whether some or all of the books were written by Waldman employees within the scope of their employment. Since this determination was required in order to prepare appropriate preliminary relief, Judge Oakes remanded the issue to the District Court for further consideration.

The District Court further found that consumers would likely believe falsely that Landoll, and the writers and illustrators credited in the Landoll books, were the source of the adaptations. The Ninth Circuit has held that in the context of reverse passing off, consumer confusion is caused only by the false designation of works that are "bodily appropriations" of the originals (Cleary v. News Corp., 30 F.3d 1255 (9th Cir. 1994; ELR 16:9:13; Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990; ELR 12:5:10; 12:10:18). But Judge Oakes concurred with the District Court's conclusion that consumers are likely to be confused by Landoll's misrepresentation as to the source of its books, even though the Landoll books were "substantially similar" to but not "bodily appropriations" of the Waldman books.

As to the issue of harm, the District Court had held that Waldman and its distributor were economically harmed by Landoll, but apparently based its finding on the assumption that Waldman could enjoin Landoll from publishing its books altogether. Judge Oakes cautioned that an injunction, if appropriate, only could prohibit the publication of the books with a false representation as to their source. The District Court should have determined whether Waldman was economically harmed by Landoll's false designation, and whether, to meet the requirement for a preliminary injunction, continuing harm would be irreparable; the issue, accordingly, was remanded for further fact finding.

The injunction issued by the District Court prohibited Landoll from publishing and selling any books that are substantially similar to Waldman's Great Illustrated Classics. Even if an injunction is shown to be warranted, the scope of such an injunction would be too broad, commented Judge Oakes, who noted that, at most, Waldman would be entitled to enjoin only Landoll's acts in violation of section 43(a), i.e., any false representation as to the source of its books.

The issue of whether Landoll can reproduce the Waldman books at all is a copyright issue, concluded the court, and the District Court also may consider this issue on remand given that Waldman registered its copyrights.

Waldman Publishing Corp. v. Landoll, Inc., 43 F.3d 775, 1994 U.S.App.LEXIS 36478 (2d Cir. 1994) [ELR 16:12:15]

Court issues rulings on qualified immunity and attorneys' fees in dispute over Oklahoma State University's showing of "The Last Temptation of Christ"

As reported at ELR 14:6:11, the Board of Regents of Oklahoma State University, in September 1989, voted to suspend the showing, at the student union theater, of the Martin Scorsese film "The Last Temptation of Christ." The Board subsequently rescinded the suspension, leaving the matter to the university administration. The university directed the student union activity board to include a disclaimer in advertisements for the film; the disclaimer stated: "The showing of this film does not reflect an endorsement of its contents by the OSU Board of Regents or Oklahoma State University." The film was shown, as originally scheduled, in October 1989.

The Committee for the First Amendment, an unincorporated association of students, faculty and "other members of the university community of Oklahoma State University," brought a lawsuit under 42 U.S.C. section 1983, claiming that the university parties had engaged in content-based censorship.

A Federal District Court dismissed the committee's action with prejudice.

A Federal Court of Appeals found that the District Court did not abuse its discretion in granting summary judgment to the university parties and in denying the committee's motion for reconsideration. However, the court remanded the matter to resolve certain First Amendment, immunity and damages issues.

On remand, the District Court determined that the members of the Board of Regents were entitled to qualified immunity and would not be not liable for an award of nominal damages. Richard Cummins was the only one of the original committee members to appeal the District Court's decision.

Federal Court of Appeals Judge Ebel first found that the Regents were entitled to qualified immunity because the alleged violation of constitutional law was not clearly established at the time they briefly suspended the authority to show the film. Judge Ebel also ruled that the denial of attorneys' fees for work done after the suspension was lifted was not an abuse of discretion because the committee was not the prevailing party with regard to work done after the suspension was lifted.

The court stated that there was enough connection between the student union and the university such that the actions of the student union might appear to be sponsored by or a part of the university itself. Thus, the Regents' decision may be viewed as "nothing more than OSU deciding whether it wanted to speak or to sponsor specific speech" (emphasis by the court). The law was not clearly established at the time the Regents acted and a reasonable official might not understand that his or her actions in this case would violate Cummins' rights.

Cummins also did not show that a prior restraint occurred - to the extent that the student union was an agent of or extension of the university, the Regents did not restrain anyone's speech or the sponsorship of anyone's speech but its own. In all, the District Court correctly granted summary judgment based on qualified immunity as to all university parties.

Judge Ebel concluded by upholding the decision to grant attorneys' fees to the committee for work performed prior to the showing of the film, about $18,000 of the $46,000 requested. Fees were denied for work after that time because the court, in part, determined that the committee already had achieved the main purpose of initiating the lawsuit.

Cummins v. Campbell, 44 F.3d 847, 1994 U.S.App.LEXIS 36458 (10th Cir. 1994) [ELR 16:12:17]

Court dismisses indictment for criminal copyright infringement under the wire fraud statute

David LaMacchia, using pseudonyms and an encrypted address, set up an electronic bulletin board which he named Cynosure. LaMacchia apparently encouraged his correspondents to upload software and computer games, and transferred the material to a second encrypted address where it could be downloaded by other users.

In April 1994, a federal grand jury returned an indictment charging LaMacchia with conspiring to violate 18 U.S.C.section 1343, the wire fraud statute, by copying and distributing copyrighted software without paying royalties. The indictment did not allege that LaMacchia sought or derived any personal benefit from the purported scheme to defraud.

A Federal District Court in Massachusetts granted LaMacchia's motion to dismiss the indictment. Judge Stearns, after careful consideration, observed that the government's interpretation of the wire fraud statute "would serve to criminalize the conduct of not only persons like LaMacchia, but also the myriad of home computer users who succumb to the temptation to copy even a single software program for private use."

The court ruled that Dowling v. United States, 473 U.S. 207 (1885; ELR 7:5:9) precluded LaMacchia's prosecution for criminal copyright infringement under the wire fraud statute. Judge Stearns commented that criminal as well as civil penalties "should probably attach to willful, multiple infringements of copyrighted software even absent a commercial motive on the part of the infringer...," but that this would be a legislative responsibility.

United States v. LaMacchia, 871 F.Supp. 535, 1994 U.S.Dist.LEXIS 18602 (D.Mass. 1994) [ELR 16:12:17]

Court rejects injunctive relief in dispute over figurines of Dickens carolers

Patricia Hennon, who produces hand made Dickens carolers figurines as part of the "Cedartown Christmas Collection," sued Kirklands, Inc. and other parties for copyright infringement. It was alleged that the Kirklands parties were selling imported "knock-offs" of the figurines under the name"Cedar Town Carolers."

A Federal District court in Virginia denied Hennon's motion for a preliminary injunction, finding that there was no showing of a likely success on the merits and that there was no credible evidence that the hardships claimed by Hennon were attributable to the actions of the Kirkland parties. And an injunction would prevent the Kirkland parties from distributing Christmas merchandise, nationwide, during the Christmas season, resulting in the loss of good will and reputation as well as lost profits.

Judge Michael found that the similarities between the carolers were "to a great extent dictated by the subject matter that the works portray" - the facial expressions, clothing, posture, and feel of the figurines were typical of "impoverished Dickensian" individuals singing religious hymns. However, Hennon's carolers were bigger and plainer, had a "charming, crude, folk-art feel," and were depicted wearing clothing in simpler, brighter colors than those of Kirkland's carolers. On the basis of these and other differences and the general appearance of the figurines, the court declined to find that Hennon made an adequate showing of infringement to justify a preliminary injunction.

Hennon v. Kirklands, Inc., 870 F.Supp. 118, 1994 U.S.Dist.LEXIS 17829 (W.D.Va. 1994) [ELR 16:12:18]

Manufacturer of "Rock-A-Bye Bear" may proceed with claims against competitor, including trade dress and trademark infringement

Rock-A-Bye Baby, Inc., manufactures, among other items, the "Rock-A-Bye Bear," a stuffed bear containing a computer microchip which emits intrauterine sounds. Dex Products also sells a stuffed bear which emits "recorded sounds of the womb," called the "Mommy Bear," and an infant support pillow called "Prop-A-Bye Baby."

A Federal District Court in Illinois, in considering Rock-A-Bye's trade dress infringement claim, assumed, for the purposes of Dex's motion for summary judgment, that Rock-A-Bye Bear's trade dress was protectible.

Judge Nordberg then found that Dex did not conclusively show that the two bears were so dissimilar as to preclude consumer confusion regarding the trade dress of the parties' products and refused to grant summary judgment on this cause of action.

The court next reviewed the factors relevant to Rock-A-Bye's trademark infringement claim under section 1114 of the Lanham Act and common law, again assuming, for purposes of Dex's motion, the protectibility of Rock-A-Bye's marks and trade name. Judge Nordberg adverted to the phonetic and visual similarity of the Prop-A-Bye Baby and the Rock-A-Bye marks; declined to hold that there was no genuine issue of material fact regarding the similarity of the products; and commented that Dex again did not present evidence as to the area and manner of the allegedly concurrent use of the marks or the degree of care likely to be used by consumers.

In all, Dex did not show that there was no likelihood of confusion between the marks, stated the court, in rejecting the company's motion for summary judgment. Judge Nordberg also declined to grant Dex's motion for summary judgment with respect to Rock-A-Bye's claims alleging false advertising, and the violation of various Illinois consumer protection statutes, and deferred ruling on a claim alleging commercial disparagement.

Rock-A-Bye Baby, Inc. v. Dex Products, Inc., 867 F.Supp. 703, 1994 U.S.Dist.LEXIS 15050 (N.D.Ill. 1994) [ELR 16:12:18]

German company may not distribute allegedly infringing Soviet recordings in United States because license agreement may have been forged by third party

As described by Federal District Court Judge Denny Chin, Melodiya, a former Soviet state enterprise, records and distributes phonorecords; the enterprise, since September 1993, has been formally known as Firma Melodiya.

Before April 1, 1989, Melodiya was represented by Mezhdunarodnaya Kniga (MezhKniga), an agency of the USSR Ministry of Foreign Trade, when entering into license agreements with companies outside the Soviet Union.

In May 1987, MezhKniga granted a three year license to entities directed by Philip Allwood to distribute about 200 of Melodiya's recordings in Australia and New Zealand; the agreement was amended to include Hong Kong.

In 1989, the Soviet government authorized Melodiya to represent itself and gave it the exclusive right to license the distribution of its recordings.

In January 1994, Melodiya granted BMG an exclusive license to distribute its recordings in the United States.

In June 1994, ZYX Music GmbH, a German corporation, began shipping compact discs containing certain Melodiya recordings into New York. The labels on the discs stated "Made In Germany," contained the ZYX name and logo, the word "Melodiya" in English, Melodiya's registered trademark "M" and design logo, and stated "Made under license from Melodiya Australia C. 1987." The ZYX parties stated that they had paid a $225,000 license fee to Allwood in exchange for the exclusive right to distribute the Melodiya recordings in the United States. ZYX also claimed that a MezhKniga representative signed an addendum to the 1987 agreement with Allwood, purportedly giving Melodiya Australia the right to distribute Melodiya recordings in the United States, Japan and Europe.

Firma Melodiya and BMG, after investigating the matter, concluded that the addendum was a forgery, and sued the Allwood and ZYX parties, alleging various causes of action.

Judge Chin, after finding that Melodiya's trademarks were suggestive and therefore entitled to protection without proof of secondary meaning, declared that it was shown that the addendum was a forgery and that the Allwood parties did not have any rights to exploit the Melodiya catalogue. Several MezhKniga officials affirmed that the agency did not grant the Allwood parties any rights to distribute Melodiya recordings in the United States.

Thus, Firma Melodiya demonstrated a likelihood of confusion as to the source or sponsorship of its recordings.

Judge Chin further found that Firma Melodiya and BMG established irreparable harm arising from the allegedly inferior quality of the ZYX products and from ZYX's discount price for its compact discs. and demonstrated a likelihood of success on the merits of their claims alleging trademark infringement, trademark dilution under New York state law, common law copyright and unfair competition.

Judge Chin, upon denying ZYX's motion to dismiss on various grounds, including forum non conveniens, granted Firma Melodiya's motion for a preliminary injunction barring the ZYX parties from, among other activities, distributing any Melodiya classical music sound recordings.

In a footnote comment, Judge Chin expressed the view that ZYX may have initially acted in good faith "under the mistaken belief that it had purchased the right to distribute the Melodiya Recordings, and that it is a victim of deceit and fraud. Nonetheless, by continuing to sell the Melodiya Recordings after it suspected that the U.S. Addendum was a forgery...ZYX exercised questionable judgment."

Firma Melodiya v. ZYX Music GmbH, 1995 U.S.Dist.LEXIS 3292 (S.D.N.Y. 1995) [ELR 16:12:19]

United States Supreme Court rules that company may obtain trademark on green-gold color of dry cleaning pressing pads

The United States Supreme Court has ruled that the Lanham Act permits the registration of a trademark that consists of a color, stating that "no special legal rule prevents color alone from serving as a trademark."

Qualitex Company, since the 1950s, has used a special shade of green-gold color on the company's pads for dry cleaning presses. In 1989, Jacobson Products began to sell press pads in a similar green-gold color. In 1991, Qualitex registered the green-gold color as a trademark, and added a trademark infringement count to its unfair competition claim.

A Federal District Court ruled in favor of Qualitex, but a Federal Court of Appeals set aside the judgment on the trademark infringement claim, stating that the Lanham Act does not permit any party to register "color alone" as a trademark.

Justice Stephen G. Breyer announced that both the language of the statute and the basic underlying principles of trademark law "would seem to include color within the universe of things that can qualify as a trademark," for trademarks include "any word, name, symbol, or device, or any combination thereof."

A color also would be capable of satisfying that part of the statutory definition which requires that a person use or intend to use a mark "to identify and distinguish his or her goods...from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Over time, stated Justice Breyer, customers may come to treat a particular color on a product or its packaging as signifying a brand. If so, that color has acquired secondary meaning, in that it identifies and distinguishes the goods, in the way that descriptive words on a product may indicate a product's origin.

Trademark law, continued the court, seeks to promote competition by protecting a company's reputation and does not allow a producer to inhibit legitimate competition by controlling a useful product feature. The fact that color sometimes is not essential to a product's use or purpose and does not affect cost or quality indicates that the doctrine of "functionality" does not create an absolute bar to the use of color alone as a mark.

Qualitex's green-gold press pad color had developed secondary meaning, identified the source of the press pad and served no other function, observed Justice

Breyer, in stating that trademark law would protect the use of the green-gold color on the press pads.

The court rejected the argument that the difficulty of distinguishing among shades of a color should preclude the use of color alone as a trademark. And the fact that colors may be in limited supply might present an "occasional" problem, which, in the court's view, would not justify a blanket prohibition. If a "color depletion" problem should arise, the doctrine of functionality would be available to prevent potential anticompetitive consequences. Functionality, reiterated the court, forbids the use of a product's feature as a trademark where doing so will put a competitor at a significant disadvantage because the feature is essential to the use or purpose of the article or affects its costs or quality. Where a color serves a significant nontrademark function, courts will consider whether the use of color as a mark would permit one competitor to interfere with legitimate (nontrademark-related) competition through actual or potential exclusive use of an important product ingredient.

The court concluded that the Ninth Circuit erred in barring Qualitex's use of color as a trademark and reversed the judgment.

Qualitex Company v. Jacobson Products Company, Inc., Case No. 93-1577, 63 LW 4227 (U.S.Supreme Ct., Mar. 28, 1995) [ELR 16:12:19]

Further proceedings are required in action brought by wheelchair-bound patron against movie theater

When Marc Fiedler, a quadriplegic, attended American Multi-Cinema's Avenue Grand theater, the only wheelchair seating available was one of two wheelchair sites in the last row of seats at the back of the theater. The Avenue Grand is located in Union Station, which is owned by the United States and managed by the Department of Transportation. The agency leases the theater premises to American Multi-Cinema.

Fiedler claimed that the wheelchair seating in the theater violated the Americans with Disabilities Act of 1990. The statute provides, in part, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases...or operates a place of public accommodation."

Fiedler requested the court to direct AMC to reconfigure the seating in the Avenue Grand theater in order to enable him to occupy a wheelchair seat situated in the fourth or fifth row. Fiedler sought similar injunctive relief under the District of Columbia Human Rights Act;

this relief would apply to AMC's eight smaller theaters, each of which has a seating capacity below the Disabilities Act's threshold of 300 seats. And the complaint asked for an award of compensatory damages for the common law tort of failing to furnish facilities to a member of the public without discrimination.

AMC contended that the ADA did not apply because the company leases the space for its theater from an agency in the executive branch of the federal government; that the executive branch is exempt from the requirements of Title III of the ADA; that executive branch real estate is subject to the Architectural Barriers Act; and that AMC, as the lessee of a federal landlord, could claim the benefit of Union Station's exemption from the ADA.

Federal District Court Judge Jackson first found that the Avenue Grand Theater was a "place of public accommodation," and was subject to Title III of the ADA, notwithstanding the federal government's ownership of the leased property.

The statute provides that wheelchair areas must be an integral part of any fixed seating plan "and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." A limited exception to this requirement did not justify AMC's policy of consigning wheelchair patrons to the back of the Avenue Grand Theater, stated the court.

However, Judge Jackson concluded that Fiedler was not entitled to summary judgment, but that an "individualized assessment" must be conducted to determine whether Fiedler's presence in the fourth or fifth row of the theater in his wheelchair would present a significant risk to his fellow theater-goers; whether others similarly limited by disability, "but less agile or prudent than he," might present such a risk; and whether AMC could readily achieve an accommodation that might reduce any such dangers.

Fiedler v. American Multi-Cinema, Inc., 871 F.Supp. 35, 1994 U.S.Dist.LEXIS 18186 (D.D.C.1994) [ELR 16:12:20]

Stanford University speech code violates First Amendment

Stanford University adopted a policy entitled "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment," known as the "speech code." When several students and alumni challenged the policy, the university argued that the code only proscribed "fighting words," which are not protected under the United States Constitution.

Santa Clara trial court Judge Peter Stone found that the speech code proscribed not only words which may cause people to react violently, but also those words which may cause them to feel insulted or stigmatized. But the university was not entitled to proscribe speech that merely hurts the feelings of those who hear it. By proscribing certain words, without even considering their context, the speech code did not meet the fighting words standard -students may be punished for words which may not cause an imminent breach of the peace, but instead merely convey a message of hatred and contempt. The policy thus was unconstitutionally overbroad, ruled the court.

It was further found that even if all the expressions under the speech code were proscribable under the fighting words doctrine, the code was an unconstitutional content-based regulation. The students contended that the code did not proscribe all fighting words, but only those based upon sex, race, color, and similar attributes. The university claimed that the speech code was directed toward discriminatory harassment, not speech. But Judge Stone, among other findings, stated that the speech code unconstitutionally targeted the content of certain speech, and that the university arguably had other means to prevent harassment.

The court proceeded to consider Stanford's status as a private party with First Amendment protection of its speech rights. California Education Code section 94367 (the Leonard Law) states that "No private postsecondary educational institution shall ...make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

Under the statute, a private university student has the same right to exercise his or her right to free speech on or off campus, and may bring a civil action for any violation of the code section. The court rejected Stanford's various arguments that the Leonard Law would be unconstitutional as applied to the speech code, and, finding that the statute was constitutional and applicable to the university, granted the students' motion for a preliminary injunction.

According to news reports, Stanford will not appeal the court's decision.

Corry v. Leland Stanford Junior University, Case No. 740309 (Santa Clara Cnty., Feb. 27, 1995) [ELR 16:12:21]

Ruling that city may not operate cable service in competition with exclusive franchisee is upheld

In 1977, the city of Jamestown, Tennessee granted a 25 year exclusive franchise to the predecessor of James Cable Partners. In 1990, the city granted itself a franchise to operate a cable television system. The city constructed and installed a system that parallelled or "overbuilt" the James Cable system and operated it in competition with James Cable.

James Cable brought a state court action for a declaratory judgment that Jamestown had breached the exclusivity provision of the franchise. After a series of proceedings, the trial court, on remand, enjoined Jamestown from operating its cable system.

After Congress enacted the 1992 Cable Act, Jamestown sought a declaration that the statute did not invalidate its exclusive franchise and that the retroactive application of the statute would result in an unconstitutional taking of its property. A Federal District Court enjoined Jamestown from competing with James Cable, from granting any other franchise, and from taking any other action violating James Cable's exclusive franchise rights until 2002, when the franchise expires (ELR 15:9:21).

A Federal Court of Appeals affirmed the District Court decision. Judge Alan E. Norris noted that section 7(a)(1) of the Cable Act states that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." In Judge Norris' view, the statute operates only prospectively - the statutory language was not clear enough to require the conclusion that Congress intended retroactive application.

James Cable Partners, L.P. v. City of Jamestown, Tennessee, 43 F.3d 277, 1995 U.S.App.LEXIS 238 (6th Cir. 1995) [ELR 16:12:21]

Creditor may hold valid security interest in proceeds of sale of a broadcast license

Beach Television Partners was a Florida general partnership that owned and operated two independent television stations. Orix Credit Alliance, Inc. financed almost all of Beach's broadcasting equipment. Beach granted Orix a security interest in all of its personal property, including two Federal Communications Commission broadcast licenses. In August 1990, Beach filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. The bankruptcy court converted the filing to a liquidation under Chapter 7. The FCC approved a trustee's request to sell the two broadcast licenses to private parties for about $140,000.

In early 1993, the bankruptcy court ruled that Orix did not have a valid security interest in the proceeds from the sale of the broadcast licenses. A Federal District Court affirmed the bankruptcy court's decision. Federal Court of Appeals Judge Hatchett, citing developing case law, stated that recognizing a security interest in the proceeds of an FCC-approved sale of a broadcast license "does not contravene the FCC's authority to regulate broadcast frequencies." The court, accordingly, reversed the judgment of the District Court and remanded the matter for further proceedings.

In re Beach Television Partners, 38 F.3d 535, 1994 U.S.App.LEXIS 32279 (11th Cir. 1994) [ELR 16:12:22]

Compiler of used car valuation report prevails in copyright infringement action against competing database

MacLean Hunter Market Reports publishes the "Automobile Red Book - Official Used Car Valuations," known as the "Red Book." The Red Book projects values for used cars in various regions; the predicted values, based on a variety of information sources and the professional judgment of the publication's editors, are set forth for each automobile make, model number, body style and engine type.

CCC Information Services compiles a computer data base on the valuation of used vehicles. CCC apparently loads "major" portions of the Red Book onto its computer network and republishes Red Book information in various forms to its customers.

When CCC sought a declaratory judgment action that it incurred no liability to Maclean under the copyright law, Maclean counterclaimed alleging infringement.

Federal District Court Magistrate Judge Arthur H. Latimer recommended to the District Court that CCC's motion for summary judgment be granted. Judge Latimer stated that the Red Book displayed no originality or creativity in the selection, coordination or arrangement of date, and was not a protected original work of authorship; that the Red Book valuations were facts, or interpretations of facts, and therefore were not protected by copyright; that even if the entries were not facts, copyright protection was precluded by the doctrine of "merger of ideas and expression," because each entry in the Red Book was an idea - "the idea of the value of the particular vehicle - and that idea is necessarily communicated by a dollar figure;" and that the Red Book had been placed in the public domain by being incorporated into governmental statutes, such as those regulating the amount of insurance payments.

A Federal District Court approved the Magistrate's recommended ruling and entered judgment on behalf of CCC.

In reversing the District Court's decision, Judge Leval noted that the Copyright Act of 1976 explicitly confers limited protection on compilations pursuant to sections 101 and 103(a)(b). In Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340 (1991; ELR 12:12:17), the Supreme Court ruled that copyright protection is available only if the selection, coordination, or arrangement of a compilation of facts exhibits at least a minimal level of originality. The "thrust of the Supreme Court's ruling in Feist, continued Judge Leval, "was not to erect a high barrier of originality requirement. It was rather to specify...that some originality is essential to protection of authorship, and that the protection afforded extends only to those original elements" (emphasis by the court).

The District Court erred, stated Judge Level, in concluding that the Red Book valuations were pre-existing facts that had merely been discovered by the editors of the work. The valuations were not reports of historical prices, but were predictions by the Red Book editors of future prices in a specified geographic region; were based on many sources of data and on professional judgment and expertise; and were original creations of Maclean.

Furthermore, the fact that an arrangement of data meets market needs does not negate originality - "the use of logic to solve the problems of how best to present the information being compiled is independent creation." After describing the aspects of the Red Book listings which embodied sufficient originality to pass Feist's low threshold, the court concluded that the District Court erred in ruling that the Red Book was not entitled to copyright protection by reason of lack of originality.

Judge Level proceeded to carefully consider the nature of compilations, observing that "virtually any independent creation of the compiler as to selection, coordination, or arrangement will be designed to add to the usefulness or desirability of his compendium for targeted groups of potential customers, and will represent an idea. In the case of a compilation...such structural ideas are likely to be expressed in the most simple, unadorned, and direct fashion." If, as argued by CCC, the doctrine of merger permits the copier of a compilation to take the individual expression of such ideas, so as to avoid the risk that an idea will improperly achieve protection, then the protection of compilations under section 103 would be "illusory." In this case, the consequences of giving CCC the benefit of the merger doctrine would destroy the protection of section 103 without sufficiently advancing the copyright policy that seeks to preserve public access to ideas, concluded the court. It was noted that CCC did not copy only a few entries from a compilation, but almost the entire Red Book, and that the valuations were "approximative statements of opinion" by the editors.

Judge Leval also disagreed with the District Court's ruling sustaining CCC's affirmative defense that the Red Book had fallen into the public domain by virtue of the incorporation of the Red Book values in certain insurance statutes.

The court remanded the matter for the entry of judgment in Maclean's favor.

CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61, 1994 U.S.App. LEXIS 34212 (2d Cir. 1994) [ELR 16:12:22]

Briefly Noted:

Trademark Infringement/"Blockbuster Video."

A Federal District Court in Michigan granted Blockbuster Entertainment Group's motion for a preliminary injunction barring Laylco, Inc. from doing business under the names Video Busters or Videobusters.

Judge Edmunds found that the Blockbuster trademarks, "Blockbuster" and "Blockbuster Video" were strong marks and that the company had established secondary meaning in the marks through "extensive use, advertising, commercial success, and unsolicited media coverage." It also was found that the parties were in direct competition with each other in renting videocassettes to customers in metropolitan Detroit; that the marks were similar as a whole; and that some potential customers might be attracted to Video Busters based on the similarity to the Blockbuster name. Blockbuster presented a survey indicating some actual confusion as to the identity or origin between the names at issue. The similarity of the marketing channels used by the parties, and the low degree of purchaser care required in selecting video rentals were factors tending to show a likelihood of confusion. And it appeared to the court that the Video Buster parties knew of the Blockbuster Video marks and may have intended to infringe.

The court declared that Blockbuster was likely to succeed on the merits of its Lanham Act claim; had demonstrated irreparable injury; and was entitled to injunctive relief.

Blockbuster Entertainment Group v. Laylco, Inc., 869 F.Supp. 505, 1994 U.S.Dist.LEXIS 17851 (E.D.Mich. 1994) [ELR 16:12:23]

Attorneys' Fees.

As reported at ELR 16:6:14, Paramount Communications prevailed in a copyright infringement action brought by Michael Agee involving the use of certain Laurel and Hardy sound recordings.

A Federal District Court, in late 1994, granted Paramount's motion for about $20,000 in attorneys' fees incurred in connection with Agee's motion to disqualify the company's law firm and about $4,000 in fees arising from Agee's application for an ex parte temporary restraining order. Judge Motley stayed, pending Agee's appeal, the award of the remaining amount of attorneys' fees and costs requested by the Paramount parties for prevailing on their motion for summary judgment and dismissal of the action.

Agee argued that Paramount was not entitled to attorneys' fees under Fogerty v. Fantasy, Inc., 114 S.Ct. 1023 (1994; ELR 15:11:14) because Paramount was not a copyright holder. Judge Motley refused to limit the language of Fogerty to apply to defendant copyright holders.

In the alternative, the court based the award of attorneys' fees and costs on its inherent power and on 28 U.S.C. section 1927 which imposes excess costs and attorneys' fees on an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." Judge Motley found that Agee's motion to disqualify

Paramount's counsel was undertaken in bad faith in that there was no evidence to support any reasonable demonstration of a conflict and that the motion was brought "to harass defendants and escalate the costs of litigating for Paramount." Furthermore, Agee's counsel exhibited "highly improper conduct by obtaining a TRO without informing Paramount's counsel of his intent to do so.

Agee v. Paramount Communications, Inc., 869 F.Supp. 209, 1994 U.S.Dist.LEXIS 17114 (S.D.N.Y. 1994) [ELR 16:12:23]

Merchandising.

A Federal District Court in Illinois granted Winterland Productions a national, multi-district injunction and order of seizure prohibiting the sale of illegitimate, unauthorized merchandise displaying the names or likenesses of "Tom Petty & The Heartbreakers" within five miles of any of the group's concerts during its 1995 United States tour.

Winterland Productions is the exclusive licensee for the group's concert merchandise.

The court barred the use of the name, trade name, trademark, service mark, logo or photo or artwork of "Tom Petty & The Heartbreakers," or any imitation thereof, or using the likenesses of the performers in connection with the distribution of any clothing, jewelry, photographs, posters, buttons or other merchandise.

Federal District Courts in Baltimore and in Georgia granted Winterland similar orders for the 1995 United States tours of the groups "Boyz II Men" and "Page/Plant" and/or "Led Zeppelin," respectively.

Winterland Concessions Company v. Simon, Case No. CV-95-1444 (N.D.Ill., Mar. 9, 1995; Winterland Concessions Company v. Simms, Case No. C.V. JFM 95-68 (S.D.Md., Jan. 17, 1995); Winterland Concessions Company v. Various John Does, Case No. 95-CI-0491-CC (N.D.Ga., Mar. 1., 1995) [ELR 16:12:23]

Attorneys' Fees.

As reported at ELR 16:7:10, a Federal District Court in Michigan found that Michigan Document Services, Inc., a distributor of unauthorized "coursepacks" for students, infringed various copyrighted works. The court, in December 1994, awarded attorneys' fees to the prevailing publishers of about $295,000 and out-of-pocket expenses in the amount of about $30,000.

Princeton University Press v. Michigan Documents Services Inc., 869 F.Supp. 521, 1994 U.S.Dist.LEXIS 17655 (E.D.Mich. 1994) [ELR 16:12:24]

Antitrust/NFL Settlement.

As reported at ELR 16:2:8, a Federal District Court approved an amended settlement agreement in an antitrust action brought by a certified class of football players against the National Football League.

A Federal Court of Appeals has ruled that certain objectors who challenged the certification of the class either had minimum contacts with the forum or submitted to the jurisdiction of the District Court when contesting the merits of the settlement. The court's inclusion of the objectors in the mandatory class thus constituted a proper exercise of discretion.

It also was found that the District Court reasonably concluded that the interests of the objectors were protected by the settlement agreements; that class members were given adequate notice of the proposed settlement and "multiple" opportunities to challenge their inclusion in the class; and that the District Court properly exercised its jurisdiction by enjoining related actions.

White v. National Football League, 41 F.3d 402, 1994 U.S.App.LEXIS 34252 (8th Cir. 1994) [ELR 16:12:24]

Title VII.

Susan Bristow was employed as the associate producer of the play "Do Black Patent Leather Shoes Really

Reflect Up?," written and produced by John Powers. Bristow terminated a sexual relationship with Powers in early 1985 and claimed that Powers subsequently harassed her by firing her between 12 and 40 times (and then rehiring her), by yelling at her, following her at work, stalking her in nonworking hours and calling her 10 to 30 times a night. In March 1987, Bristow signed an employment contract which was to terminate in January 1989. But Powers closed the show and fired Bristow in April 1987.

Powers brought a lawsuit charging sex discrimination in violation of Title VII of the Civil Rights Act, breach of contract and intentional infliction of emotional distress. The jury awarded Bristow $30,000 on the tort claim, but returned a verdict for Powers on the contract claim.

A Federal Court of Appeals upheld the judgment on the tort claim, but reversed the judgment for Powers on the breach of contract claim. Judge Posner noted that the contract was a term contract, not an at-will contract, and specified the circumstances in which the contract could be terminated by either party without liability before the expiration of the term. The District Court erred in allowing extrinsic evidence, i.e., Powers' argument that the payment of Bristow's salary was contingent on the show's remaining open, to vary the terms of the contract, stated Judge Posner, who ordered the matter remanded for an assessment of damages.

The District Court had awarded Bristow $1 for the violation of her rights under Title VII. Judge Posner reversed the liability and damages findings, and ordered the District Court to recompute Bristow's monetary relief for the loss of certain post-closing employment and redetermine Bristow's entitlement to attorneys' fees under Title VII.

Bristow v. Drake Street Inc., 41 F.3d 345, 1994 U.S.App.LEXIS 33702 (7th Cir. 1994) [ELR 16:12:24]

Arbitration.

Pacer Cats Corporation provides computer equipment and technology to motion picture operators for the sale of tickets by telephone. PromoFone, Inc., now doing business as MovieFone, and Teleticketing Company provide the telephone service by which movie patrons can purchase tickets. In February 1992, the parties combined their services.

In late 1994, Pacer Cats brought an action in California alleging that Falconwood, a general partner of Teleticketing, interfered with Pacer Cat's contractual business relations by inducing MovieFone, PromoFone and Teleticketing to directly contact and solicit theater owners concerning their services; those responsibilities were granted exclusively to Pacer Cats under the agreement. The PromoFone parties, pursuant to the agreement, began arbitration proceedings in New York and asked a trial court to compel arbitration and stay prosecution of the California action.

Judge Lippmann found that the PromoFone parties' motion to compel arbitration and stay the California action was properly raised in the New York forum; rejected the argument that the agreement containing the arbitration provision was void because it was fraudulently induced and that arbitration therefore should be stayed pending a determination of the validity of the agreement by the California court; declined to find that the agreement was unenforceable because it was of indefinite duration; and ordered Pacer Cats to arbitrate all disputes arising from the 1992 agreement before an arbitrator in New York City and enjoined the company from prosecuting any action relating to the agreement.

Promofone, Inc. v. PCC Management, Inc., New York Law Journal, p.28, col. 3 (N.Y. Cnty., Feb. 16, 1995) [ELR 16:12:24]

Football Player Claim.

The Pittsburgh Steelers suspended Terry Long when the result of a drug test for anabolic steroids was positive; the test and suspension conformed with a National Football League policy. Long sued the League and other parties, alleging various constitutional and state law claims.

A Federal District Court in Pennsylvania found that Long did not allege sufficient facts which would allow the court to attribute the conduct of the League and the Steelers to the state, and dismissed the player's causes of action alleging violations of the Fourth and Fourteenth Amendments. The court dismissed Long's pendent state law claims without prejudice.

Long v. National Football League, 870 F.Supp. 101, 1994 U.S.Dist.LEXIS 17108 (W.D.Pa. 1994) [ELR 16:12:25]

Student Athletics/Drug Testing.

A Federal District Court in Arizona has barred the Paradise Valley School District from implementing the district's random drug testing program for student athletes. Students who refused to submit to the random testing of urine samples would not be allowed to participate in interscholastic sports.

Judge Rosenblatt, using the analytic process set forth in Acton v. Veronia School District 47J, 23 F.3d 1514 (9th Cir. 1994; ELR 16:7:15), reh'g. denied (1994), noted that drug testing conducted through the collection and testing of urine samples by state officials constitutes a search. In Acton, according to Judge Rosenblatt, the court found that "students and student athletes are not subject to the sort of extensive government regulation that would attenuate their privacy interests, and their lives or the lives of others generally do not depend upon their ability to perform their roles as athletes. Their rights to privacy in their excretory functions are undiminished." It appeared to the court that student athlete Adam Moule was entitled to the same protection afforded to the student athletes of the Veronia School District. The interests of the Paradise Valley School Board were not of the magnitude required to permit suspicionless testing.

The court observed that student participation in extra-curricular school-sponsored athletics was conditioned upon submitting to the district's drug testing program. The Moule family testified that the consent forms were not signed voluntarily, and Judge Rosenblatt agreed that in the circumstances of the case, the consents were "co-erced" for constitutional purposes by the fact that Adam was barred from participation without a signed consent.

The school's drug testing policy violated the Fourth Amendment of the United States Constitution and the Arizona Constitution, concluded the court, in granting the request to enter a permanent injunction.

Moule v. Paradise Valley Unified School District No. 69, 863 F.Supp. 1098, 1994 U.S.Dist.LEXIS 13103 (D.Ariz. 1994) [ELR 16:12:25]

Ski Injury.

A Federal District Court in Vermont granted a motion for summary judgment brought by Snowridge, Inc., doing business as Sugarbush Resort Corporation, in a negligence action brought by Nancy Szczotka. While skiing at Sugarbush, Szczotka fell and sustained injuries to her knee.

Szczotka had signed a release agreement at the time she rented ski equipment from the Sugarbush Rental Shop. The court found that the language of the contact clearly and unambiguously demonstrated an intent to absolve Sugarbush of liability for Szczotka's injuries. It was further found that a ski resort is not the type of public service that would justify applying public policy to relieve Szczotka of the terms of the agreement.

Szczotka v. Snowridge, Inc., 869 F.Supp. 247, 1994 U.S.Dist.LEXIS 17197 (D.Vt. 1994) [ELR 16:12:25]

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Disneyland Ride Injury.

Gary and Donna Neubauer claimed that they were injured when their "Pirates of the Caribbean" boat was rammed from behind by another boat, and sued Disneyland, alleging negligence and common carrier liability.

A Federal District Court in California noted that "California law imposes a duty of utmost care and diligence upon a common carrier of paying passengers." And the state provides that "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." The court found that Disneyland's boat ride was within the broad statutory definition of a common carrier and denied the company's motion to dismiss the common carrier claim.

Neubauer v. Disneyland, Inc., 875 F.Supp. 672, 1995 U.S. Dist.LEXIS 1480 (C.D.Ca. 1995) [ELR 16:12:25]

Labor Relations.

As described by Federal Court of Appeals Judge Boochever, Retlaw Broadcasting Company, in 1991, fired Gene Haagenson, a weekend on-air anchor at Retlaw's KJEO-TV in Fresno for "unsuitability as an on-air artist," following Haagenson's allegedly deficient coverage of the Oakland fire. The American Federation of Television and Radio Artists filed a complaint with the National Labor Relations Board. The Board affirmed an administrative law judge's decision that Retlaw violated the National Labor Relations Act by offering Haagenson reinstatement only if he waived his right under the collective bargaining agreement to grievance procedures and union representation regarding any further termination, whether for unsuitability or otherwise, should he return to work at Retlaw.

The court denied Retlaw's petition for review of the Board's decision and granted the Board's petition for enforcement.

Judge Boochever noted that the Board had found that Haagenson would have accepted an offer of reinstatement if the station had not required a waiver of Haagenson's rights under the collective bargaining agreement to grievance procedures and union representation regarding any future termination. Substantial evidence supported the Board's finding that Haagenson was engaged in the protected activity of asserting his rights under the collective bargaining agreement, stated the court.

Retlaw Broadcasting Co. v. National Labor Relations Board, 1995 U.S. App.LEXIS 9497 (9th Cir. 1995) [ELR 16:12:26]

First Amendment.

In 1989, the town of Dedham, Massachusetts passed a by-law prohibiting holders of town licenses issued pursuant to state law from conducting business activities between the hours of 1:00 A.M. and 6:00 A.M.

When National Amusements, Inc., the operator of the only movie theater complex in Dedham, claimed that the by-law violated its free speech rights, a Federal District Court upheld the by-law as a reasonable time, place and manner restriction on the company's First Amendment rights which did not violate National's equal protection or due process rights (ELR 16:4:29).

A Federal Court of Appeals, after lengthy review, upheld the District Court's decision granting summary judgment to the town.

National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 1995 U.S.App.LEXIS 53 (1st Cir. 1995) [ELR 16:12:26]

Libel.

Charlotte White planned to present a Native-American pow-wow in Manchester, Kentucky during the spring of 1993. In April 1993, the Manchester Enterprise published an article and editorial stating, in part, that White left "a trail of bad checks" and was "briefly jailed on charges of fraud" in connection with a pow-wow she organized in Hialeah, Florida. White denied the various charges and brought a lawsuit against the newspaper.

A Federal District Court in Kentucky first ruled that White would not be entitled to recover punitive damages on her claims alleging defamation and false light invasion of privacy because she did not submit a written demand for correction prior to commencing litigation.

Chief Judge Bertelsman then found that there was a genuine issue of material fact as to whether the newspaper parties published the article and editorial with knowledge of or reckless disregard for the false light in which it placed White.

The court granted the newspaper's motion for summary judgment on White's claim alleging outrageous conduct. The newspaper, "at most, acted recklessly in publishing false statements that were embarrassing to Ms. White and damaging to her reputation with minimal effort to substantiate their statements."

Chief Judge Bertelsman concluded by finding that White was not a limited public figure, and by denying the newspaper's motion for summary judgment on White's claim for lost wages.

White v. Manchester Enterprise, Inc., 871 F.Supp. 934, 1994 U.S.Dist.LEXIS 18671 (E.D.Ky. 1994) [ELR 16:12:26]

Copyright Infringement.

A Federal District Court in Texas has denied Judith Penny's request for a jury trial in a copyright infringement action brought by Broadcast Music, Inc. It was noted that the Federal Court of Appeals for the Fifth

Circuit has held that there is no right to a jury trial where a party seeks minimum statutory damages and injunctive relief under the Copyright Act (Twentieth Century Music Corp. v. Frith, 645 F.2d 6, 7 (5th Cir. 1981; ELR 3:13:7) and that the court may exercise its discretion to set damages within the statutory range without creating a right to a jury trial.

Broadcast Music, Inc. v. Penny, 872 F.Supp. 348, 1994 U.S.Dist.LEXIS 19228 (E.D.Tex. 1994) [ELR 16:12:26]

Student Athletics.

Kurt Obersteller, a former student at Flour Bluff High School, claimed that the school's football coach, Ronnie Newman, took unwarranted disciplinary actions against

Obersteller and encouraged other members of the athletic staff to harass and intimidate the student. Obersteller alleged that the school district did not protect him from Newman's purported conduct, arbitrarily assigned him a grade of 70 for his athletics class, and violated his due process rights in denying him an administrative appeal to challenge the grade assignment.

A Federal District Court in Texas noted that Obersteller's final grade in the class was an "A," and concluded that, in the circumstances, the student's alleged injury was de minimis and his claim of deprivation of a liberty interest did not warrant the application of the Fourteenth Amendment's due process clause.

Even if the court assumed that Obersteller had a liberty or property interest in a disputed grade, the student had an opportunity to challenge the grade and an opportunity to be heard.

The court, further assuming that Obersteller had a liberty interest to be free from harassment, declared that the student did not present any evidence to support his general accusations of harassment and intimidation. Judge Head declined to exercise supplemental jurisdiction over the state law causes of action and remanded those claims to the state court.

Obersteller v. Flour Bluff Independent School District, 874 F.Supp. 146, 1994 U.S.Dist.LEXIS 19380 (S.D.Tex. 1994) [ELR 16:12:26]

Previously Reported:

In DeWeerth v. Baldinger (16:8:19), a Federal Court of Appeals has filed an amended opinion, 38 F.3d 1266, 1994 U.S.App.LEXIS 29991, after a petition for rehearing.

Additional citations have become available for the following previously reported cases: Adult Video Association v. Reno (16:8:13), 41 F.3d 503 (9th Cir. 1994); Arnold v. United Artists Theatre Circuit (16:10:24), 866 F.Supp. 433 (N.D.Ca. 1994); Cardtoons, L.C. v. Major League Baseball Players Association (16:9:5), 868 F.Supp. 1266 (N.D.Okla. 1994); Jim Henson Productions v. John T. Brady & Associates (16:8:7), 867 F.Supp. 175 (S.D.N.Y. 1994), MCA Records, Inc. v. Charly Records, Ltd. (16:9:4), 865 F.Supp. 649 (C.D.Ca. 1994); Nintendo of America, Inc. v. Dragon Pacific International (16:7:21), 40 F.3d 1007 (9th Cir. 1994).

The United States Supreme Court has let stand, under the name Living Will Center v. NBC Subsidiary

(KCNC-TV), the Colorado Supreme Court decision in NBC Subsidiary, Inc. v. Living Will Center (16:7:23).

A Federal District Court ruling convicting CNN of contempt of court for violating a court order barring the broadcast of tapes of government-recorded telephone conversations between Manual Noriega and Noriega's lawyers (16:8:26) has been published. The cite is United States v. Cable News Network, 865 F.Supp. 1549, 1994 U.S.Dist.LEXIS 15686 (S.D.Fla. 1994).
[ELR 16:12:27]

DEPARTMENTS

In the Law Reviews:

Hofstra University Law Review has published a symposium on Television and Violence with the following articles:

Congressional Interest in the Problem of Television and Violence by John Windhausen, 22 Hofstra Law Review 783 (1994)

The Hollings Bill: Unconstitutional Under the First Amendment by Arthur Eisenberg, 22 Hofstra Law Review 793 (1994)

Banning Speech Does Not Cure Social Ills by Kathleen Peratis, 22 Hofstra Law Review 801 (1994)

The Impact of Televised Violence by John P. Murray, 22 Hofstra Law Review 809 (1994)

Mass Media Violence: Thoughts on the Debate by Edward Donnerstein, 22 Hofstra Law Review 827 (1994)

Viewing Television Violence Does Not Make People More Aggressive by Jonathan L. Freedman, 22 Hofstra Law Review 833 (1994)

Television Networks: Taking Affirmative Action by Beth Bressan, 22 Hofstra Law Review 857 (1994)

Government Censorship Is Not the Solution, Education Is by Peggy Charen, 22 Hofstra Law Review 863 (1994)

Reducing Television Violence by Marvin Kitman, 22 Hofstra Law Review 871 (1994)

There Is No Free Market in Television by George Gerbner, 22 Hofstra Law Review 879 (1994)

The Real Problem is Violence, Not Violence and Television by Todd Gitlin, 22 Hofstra Law Review 885 (1994)

What Is the Constitutional Solution? by William Abbott, 22 Hofstra Law Review 891 (1994)

Entertainment and Sports Lawyer, published by the ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, Illinois 60611-4497, has issued Volume 12, Number 4 with the following articles:

Moral Kombat: The Ratings Duel for Computer and Video Games by Jim Dunn, 12 Entertainment and Sports Lawyer 1 (1995)

Economic and Moral Rights under U.S. Copyright Law: Protecting Authors and Producers in the Motion Picture Industry by Laura A. Pitta, 12 Entertainment and Sports Lawyer 3 (1995)

Book Review: Multimedia: Law & Practice by Michael D. Scott with James N. Talbott, reviewed by David M. Given, 12 Entertainment and Sports Lawyer 9 (1995)

The Los Angeles Lawyer, published by the Los Angeles County Bar Association, 617 S. Olive Street, Los Angeles, CA 90014, (213) 896-6503, has published Volume 18, Number 2 with the following articles:

Wizards of Ahhhs: The Dazzling New Visual Digital Technology Raises Thorny Legal Issues for Both

Creators and Rights Holders by Peter L. Kaufman, 18 The Los Angeles Lawyer 24 (1995)

What Price Glory?: Straddling the Line Between "Contacts" and "Conflicts" Requires Special Vigilance by Entertainment Lawyers by Owen J. Sloane, 18 The Los Angeles Lawyer 28 (1995)

To Have and Have Not: In California, Celebrity Goodwill May Be High Concept in Divorce Proceedings, But It's Not Good Law by Honey Kessler Amado, 18 The Los Angeles Lawyer 34 (1995)

The Agony and the Ecstasy: The U.S. Entertainment Industry Wants Greater Protection of Intellectual Property Rights - The Price May Be Recognition of Artists' "Moral Rights" by Jeffrey L. Graubart, 18 The Los Angeles Lawyer 38 (1995)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 18, Numbers 3 and 4 with the following articles:

Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part II by Keith Aoki, 18 Columbia-VLA Journal of Law & the Arts 191 (1995)

Contractual Liability in Intellectual Property Disputes - A Case Study: Buchwald v. Paramount Pictures Corp. by Paul Watford, 18 Columbia-VLA Journal of Law & the Arts 269 (1995)

The Fine Art of Reproduction: The Doctrine of Fair Use and Auction House Catalogues by Mark Kriendler

Nelson, 18 Columbia-VLA Journal of Law & the Arts 291 (1995)

The Curse of the Pink Panther: The Legacy of the Owens-Corning Fiberglas Dissent and its Role in the Qualitex Supreme Court Appeal by Hillel I. Parness, 18 Columbia-VLA Journal of Law & the Arts 327 (1995)

Marquette Sports Law Journal has published Volume 5, Number 1 with the following articles:

Baseball's Labor Wars in Historical Context: The 1919 Chicago White Sox as a Case-Study in Owner-Player Relations by James R. Devine, 5 Marquette Sports Law Journal 1 (1994)

Squeeze Play: The Game of Owners, Cities, Leagues and Congress by John Wunderli, 5 Marquette Sports Law Journal 83 (1994)

Step Up to the Scale: Wages and Unions in the Sports Industry by Darryl Hale, 5 Marquette Sports Law Journal 123 (1994)

The Mascot Name Change Controversy: A Lesson in Hypersensitivity by John B. Rohde, 5 Marquette Sports Law Journal 141 (1994)

You Can't Play the Game If You Don't Know the Rules: Career Opportunities in Sports Management by Paul M. Anderson, 5 Marquette Sports Law Journal 161 (1994)

Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics by Melody Harris, 72 Denver University Law Review 57 (1994)

The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions by Chad M. Oldfather, 27 Connecticut Law Review 17 (1994)

Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry by Karen L. Gulick, 27 Connecticut Law Review 53 (1994)

Virtual Constitutions: The Creation of Rules for Governing Private Networks by Michael I. Meyerson, 8 Harvard Journal of Law & Technology 129 (1994)

Oh, Pretty Parody: Campbell v. Acuff-Rose Music, Inc. by Lisa M. Babiskin, 8 Harvard Journal of Law & Technology 193 (1994)

Congressional Cable-Vision: Turner Broadcasting v. Federal Communications Commission by Josephine I. Aiello, 8 Harvard Journal of Law & Technology 231 (1994)

Who Owns Information? From Privacy to Public Access, reviewed by Joshua B. Konvisser, 8 Harvard Journal of Law & Technology 249 (1994)

"Dressing" Up Software Interface Protection: The Application of Two Pesos to "Look and Feel" by Steven Schortgen, 80 Cornell Law Review 158 (1994)

Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine by Laura G. Lape, 58 Albany Law Review 677 (1995)

NAFTA: The Latest Gun in the Fight to Protect International Intellectual Property Rights by Karen Kontje Waller, 13 Dickinson Journal of International Law 347 (1995)

Don't Put My Article Online!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond by Sidney A. Rosenzweig, 143 University of Pennsylvania Law Review 899 (1995)

University Price Competition for Elite Students and Athletes: Illusions and Realities by Matthew J. Mitten, 36 South Texas Law Review 59 (1995)

Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations by James R. Bussian, 36 South Texas Law Review 153 (1995)

Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences If They Do Not by Adam A. Milani, 28 Akron Law Review 187 (1995)

More Speech, Less Noise: Amplifying Content-based Speech Regulations Through Binding International Law by Viktor Mayer-Schonberger and Teree E. Foster, 18 Boston College International and Comparative Law Review 59 (1995)

Protection of Well-Known Marks and Marks of High Reputation in Japan by Junichi Eguchi, 42 Osaka University Law Review 1 (1995) (published by Faculty of

Law, Osaka University, Toyonaka City, Osaka 560 Japan)
[ELR 16:12:28]