RECENT CASES

GATT and NAFTA Implementation Acts make significant changes to U.S. copyright law

At one time in the not-too-distant past, copyright and entertainment law were one thing and international trade regulation was something else. Those days are gone now. Even if you read nothing more specialized than Daily Variety and The Hollywood Reporter, you're well aware of how important the activities of Mickey Kantor - the U.S. Trade Representative - have become to the entertainment industry. This month, his attention may have been given to Japan's treatment of the U.S. auto industry. But earlier this year, Ambassador Kantor was the entertainment industry's champion in China.

As important as our recent bilateral agreements with China and Japan are, two other developments are of even greater significance: NAFTA and GATT - the North American Free Trade Agreement, and the Uruguay Round of the General Agreement on Tariffs and Trade. Both of these massive agreements touch on virtually every aspect of commerce. But their impact on U.S. copyright law is what will be of greatest significance to entertainment lawyers.

NAFTA and GATT are not "self-executing" in the United States. That is, neither is itself law here. Thus, in order to satisfy the obligations imposed on the U.S. by its approval of these international agreements, it was necessary for Congress to adopt "Implementation Acts." It was these Implementation Acts that amended U.S. copyright law, and the amendments are historic and dramatic in both conceptual and practical ways.

Taken together, the NAFTA and GATT Implementation Acts do three things to the U.S. Copyright Act.

They restore copyright protection to certain foreign works that had gone into the public domain in the United States.

They prohibit "bootlegging" - the unauthorized recording or transmission of live musical performances and the unauthorized distribution of bootleg recordings.

And they make permanent the Copyright Act's prohibition against the unauthorized rental of sound recordings and computer software.

When first enacted, the Copyright Act's ban on the unauthorized rental of sound recordings and software had their own built-in "sunset" dates - dates by which those prohibitions would have expired of their own accord. Thus, all Congress had to do to make these bans permanent was to eliminate the sunset dates. And that is what it did do in the NAFTA Implementation Act (as to sound recordings) and the GATT Implementation Act (as to software). These provisions are not complex and do not appear to raise any difficult issues of interpretation or application.

On the other hand, the bootleg and copyright-restoration provisions of the Implementation Acts are complex and do raise difficult issues of enormous proportions. Analyses of these provisions will appear in the next two issues of the Entertainment Law Reporter. In the meantime, because of the significance of the copyright provisions of these two Acts to the entertainment industry, the full text of those provisions is reprinted immediately below.

NAFTA Implementation Act, P.L. 103-182 (103d Cong. 1994); GATT Implementation Act, P.L. 103-465 (103d Cong. 1994)

NAFTA IMPLEMENTATION ACT
PL 103-182; HR 3450

Subtitle C-INTELLECTUAL PROPERTY

SEC. 332. RENTAL RIGHTS IN SOUND RECORDINGS.

Section 4 of the Record Rental Amendment of 1984 (17 U.S.C. 109 note) is amended by striking out subsection (c).

SEC. 334. MOTION PICTURES IN THE PUBLIC DOMAIN.

(a) IN GENERAL.-Chapter 1 of title 17, United States Code, is amended by inserting after section 104 the following new section:

[Section] 104A. Copyright in certain motion pictures

(a) RESTORATION OF COPYRIGHT.-Subject to subsections (b) and (c)-(1) any motion picture that is first fixed or published in the territory of a NAFTA country as defined in section 2(4) of the North American Free Trade Agreement Implementation Act to which Annex 1705.7 of the North American Free Trade Agreement applies, and

(2) any work included in such motion picture that is first fixed in or published with such motion picture,

that entered the public domain in the United States because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by section 401, 402, or 403 of this title, the absence of which has not been excused by the operation of section

405 of this title, as such sections were in effect during that period, shall have copyright protection under this title for the remainder of the term of copyright protection to which it would have been entitled in the United States had it been published with such notice.

(b) EFFECTIVE DATE OF PROTECTION.-The protection provided under subsection (a) shall become effective, with respect to any motion picture or work included in such motion picture meeting the criteria of that subsection, 1 year after the date on which the North American Free Trade Agreement enters into force with respect to, and the United States applies the Agreement to, the country in whose territory the motion picture was first fixed or published if, before the end of that 1-year period, the copyright owner in the motion picture or work files with the Copyright Office a statement of intent to have copyright protection restored under subsection (a). The Copyright Office shall publish in the Federal Register promptly after that effective date a list of motion pictures, and works included in such motion pictures, for which protection is provided under subsection (a).

(c) USE OF PREVIOUSLY OWNED COPIES.-A national or domiciliary of the United States who, before the date of the enactment of the North American Free Trade Agreement Implementation Act, made or acquired copies of a motion picture, or other work included in such motion picture, that is subject to protection under subsection (a), may sell or distribute such copies or continue to perform publicly such motion picture and other work without liability for such sale, distribution, or performance, for a period of 1 year after the date on which the list of motion pictures, and works included in such motion pictures, that are subject to protection under subsection (a) is published in the Federal Register under subsection (b).

(b) CONFORMING AMENDMENT.-The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 104 the following new item: "104A. Copyright in certain motion pictures."

GATT IMPLEMENTATION ACT
PL 103-465; H.R. 5110, S. 2467

Title V - INTELLECTUAL PROPERTY

SEC. 501. DEFINITION

For purposes of this title-

(1) the term "WTO Agreement" has the meaning given that term in section 2(9) of the Uruguay Round Agreements Act; and

(2) the term "WTO member country" has the meaning given that term in section 2(10) of the Uruguay Round Agreements Act.

Subtitle A-COPYRIGHT Provisions

SEC. 511. RENTAL RIGHTS IN COMPUTER PROGRAMS.

Section 804(c) of the Computer Software Rental Amendments Act of 1990 (17 U.S.C. 109 note; 104 Stat. 5136) is amended by striking the first sentence.

SEC. 512. CIVIL PENALTIES FOR UNAUTHOR-IZED FIXATION OF AND TRAFFICKING IN

SOUND RECORDINGS AND MUSIC VIDEOS OF LIVE MUSICAL PERFORMANCES.

(a) IN GENERAL.-Title 17, United States Code, is amended by adding at the end the following new chapter:

CHAPTER 11-SOUND RECORDINGS AND MUSIC VIDEOS

[Section] 1101. Unauthorized fixation and trafficking in sound recordings and music videos

(a) UNAUTHORIZED ACTS.-Anyone who, without the consent of the performer or performers involved-

(1) fixes the sounds or sounds and images of a live musical performance in a copy or

phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

(b) DEFINITION.- As used in this section, the term "traffic in" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer, or dispose of.

(c) APPLICABILITY.-This section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

(d) STATE LAW NOT PREEMPTED.-Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.

(b) CONFORMING AMENDMENT.-The table of chapters for title 17, United States Code, is amended by adding at the end the following: "11. Sound Recordings and Music Videos . . . 1101"

SEC. 513. CRIMINAL PENALTIES FOR UNAUTHORIZED FIXATION OF AND TRAFFICKING IN SOUND RECORDINGS AND MUSIC VIDEOS OR LIVE MUSICAL PERFORMANCES.

(a) IN GENERAL.-Chapter 113 of title 18, United States Code, is amended by inserting after section 2319 the following:

[Section] 2319A. Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances

(a) OFFENSE.-Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain-

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;

shall be imprisoned for not more than 5 years or fined in the amount set forth in this title, or both, or if the offense is a second or subsequent offense, shall be imprisoned for not more than 10 years or fined in the amount set forth in this title, or both.

(b) FORFEITURE AND DESTRUCTION.- When a person is convicted of a violation of subsection (a), the court shall order the forfeiture and destruction of any copies or phonorecords created in violation thereof, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such copies or phonorecords may be made. The court may also, in its discretion, order the forfeiture and destruction of any other equipment by means of which such copies or phonorecords may be reproduced, taking into account the nature, scope, and proportionality of the use of the equipment in the offense.

(c) SEIZURE AND FORFEITURE.-If copies or phonorecords of sounds or sounds and images of a live musical performance are fixed outside of the United States without the consent of the performer or performers involved, such copies or phonorecords are subject to seizure and forfeiture in the United States in the same manner as property imported in violation of the customs laws. The Secretary of the Treasury shall, not later than 60 days after the date of the enactment of the Uruguay Round Agreements Act, issue regulations to carry out this subsection, including regulations by which any performer may, upon payment of a specified fee, be entitled to notification by the United States Customs Service of the importation of copies or phonorecords that appear to consist of unauthorized fixations of the sounds or sounds and images of a live musical performance.

(d) DEFINITIONS.-As used in this section-

(1) the terms "copy", "fixed", "musical work", "phonorecord", "reproduce", "sound

recordings", and "transmit" mean those terms within the meaning of title 17; and

(2) the term "traffic in" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent to transport, transfer, or dispose of.

(e) APPLICABILITY.-This section shall apply to any Act or Acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act.

(b) CONFORMING AMENDMENT.-The table of sections for chapter 113 of title 18, United States Code, is amended by inserting after the item relating to section 2319 the following: "2319A. Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances."

SEC. 514. RESTORED WORKS.

(a) IN GENERAL.-Section 104A of title 17, United States Code, is amended to read as follows:

[Section] 104A. COPYRIGHT in restored works

(a) AUTOMATIC PROTECTION AND TERM.-

(1) TERM.-

(A) Copyright subsists, in accordance with this section, in restored works, and vests automatically on the date of restoration.

(B) Any work in which Copyright is restored under this section shall subsist for the remainder of the term of copyright that the work would have otherwise been granted in the United States if the work never entered the public domain in the United States.

(2) EXCEPTION.-Any work in which the copyright was ever owned or administered by the Alien Property Custodian and in which the restored Copyright would be owned by a government or instrumentality thereof, is not a restored work.

(b) OWNERSHIP OF RESTORED COPYRIGHT.- A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source county of the work.

(c) FILING OF NOTICE OF INTENT TO ENFORCE RESTORED COPYRIGHT AGAINST RELIANCE PARTIES.-On or after the date of restoration, any person who owns a copyright in a restored work or an exclusive right therein may file with the Copyright Office a notice of intent to enforce that person's copyright or exclusive right or may serve such a notice directly on a reliance party. Acceptance of a notice by the Copyright Office is effective as to any reliance parties but shall not create a presumption of the validity of any of the facts stated therein. Service on a reliance party is effective as to that reliance party and any other reliance parties with actual knowledge of such service and of the contents of that notice.

(d) REMEDIES FOR INFRINGEMENT OF RESTORED COPYRIGHTS.-

(1) ENFORCEMENT OF COPYRIGHT IN RESTORED WORKS IN THE ABSENCE OF A RELIANCE PARTY.-As against any party who is not a reliance party, the remedies provided in chapter 5 of this title shall be available on or after the date of restoration of a restored copyright with respect to an act of infringement of the restored copyright that is commenced on or after the date of restoration.

(2) ENFORCEMENT OF COPYRIGHT IN RESTORED WORKS AS AGAINST RELIANCE PARTIES.-As against a reliance party, except to the extent provided in paragraphs (3) and (4), the remedies provided in chapter 5 of this title shall be available, with respect to an act of infringement of a restored copyright, on or after the date of restoration of the restored copyright if the requirements of either of the following subparagraphs are met:

(A) (i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) files with the Copyright Office, during the 24-month period beginning on the date of restoration, a notice of intent to enforce the restored copyright; and

(ii) (I) the act of infringement commenced after the end of the 12-month period beginning on the date of publication of the notice in the Federal Register;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which copyright has been restored under this section are made after publication of the notice of intent in the Federal Register.

(B) (i) The owner of the restored copyright (or such owner's agent) or the owner of an exclusive right therein (or such owner's agent) serves upon a reliance party a notice of intent to enforce a restored Copyright; and

(ii) (I) the act of infringement commenced after the end of the 12-month period beginning on the date the notice of intent is received;

(II) the act of infringement commenced before the end of the 12-month period described in subclause (I) and continued after the end of that 12-month period, in which case remedies shall be available only for the infringement occurring after the end of that 12-month period; or

(III) copies or phonorecords of a work in which Copyright has been restored under this section are made after receipt of the notice of intent.

In the event that notice is provided under both subparagraphs (A) and (B), the 12-month period referred to in such subparagraphs shall run from the earlier of publication or service of notice.

(3) EXISTING DERIVATIVE WORKS - (A) In the case of a derivative work that is based upon a restored work and is created-

(i) before the date of the enactment of the Uruguay Round Agreements Act, if the source country of the derivative work is an eligible country on such date, or

(ii) before the date of adherence or proclamation, if the source country of the derivative work is not an eligible country on such date of enactment,

a reliance party may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph.

(B) In the absence of an agreement between the parties, the amount of such compensation shall be determined by an action in United States district court, and shall reflect any harm to the actual or potential market for or value of the restored work from the reliance party's continued exploitation of the work, as well as compensation for the relative contributions of expression of the author of the restored work and the reliance party to the derivative work.

(4) COMMENCEMENT OF INFRINGEMENT FOR RELIANCE PARTIES.- For purposes of section 412, in the case of reliance parties, infringement shall be deemed to have commenced before registration when acts which would have constituted infringement had the restored work been subject to copyright were commenced before the date of restoration.

(e) NOTICES OF INTENT TO ENFORCE A RESTORED COPYRIGHT.-

(1) NOTICES OF INTENT FILED WITH THE COPYRIGHT OFFICE.-

(A) (i) A notice of intent filed with the Copyright Office to enforce a restored copyright shall be signed by the owner of the restored copyright or the owner of an exclusive right therein, who files the notice under subsection (d)(2)(A)(i) (hereafter in this paragraph referred to as the "owner"), or by the owner's agent, shall identify the title of the restored work, and shall include an English translation of the title and any other alternative titles known to the owner by which the restored work may be identified, and an address and telephone number at which the owner may be contacted. If the notice is signed by an agent, the agency relationship must have been constituted in a writing signed by the owner before the filing of the notice. The Copyright Office may specifically require in regulations other information to be included in the notice, but failure to provide such other information shall not invalidate the notice or be a basis for refusal to list the restored work in the Federal Register.

(ii) If a work in which copyright is restored has no formal title, it shall be described in the notice of intent in detail sufficient to identify it.

(iii) Minor errors or omissions may be corrected by further notice at any time after the notice of intent is filed. Notices of corrections for such minor errors or omissions shall be accepted after the period established in subsection (d)(2)(A)(i). Notices shall be published in the Federal Register pursuant to subparagraph (B).

(B) (i) The Register of Copyrights shall publish in the Federal Register, commencing not later than 4 months after the date of restoration for a particular nation and every 4 months thereafter for a period of 2 years, lists identifying restored works and the ownership thereof if a notice of intent to enforce a restored copyright has been filed.

(ii) Not less than 1 list containing all notices of intent to enforce shall be maintained in the Public Information Office of the Copyright Office and shall be available for public inspection and copying during regular business hours pursuant to sections 705 and 708. Such list shall also be published in the Federal Register on an annual basis for the first 2 years after the applicable date of restoration.

(C) The Register of Copyrights is authorized to fix reasonable fees based on the costs of receipt, processing, recording, and publication of notices of intent to enforce a restored copyright and corrections thereto.

(D) (i) Not later than 90 days before the date the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, the Copyright Office shall issue and publish in the Federal Register regulations governing the filing under this subsection of notices of intent to enforce a restored copyright.

(ii) Such regulations shall permit owners of restored copyrights to file simultaneously for registration of the restored copyright.

(2) NOTICES OF INTENT SERVED ON A RELIANCE PARTY.-

(A) Notices of intent to enforce a restored copyright may be served on a reliance party at any time after the date of restoration of the restored copyright.

(B) Notices of intent to enforce a restored copyright served on a reliance party shall be signed by the owner or the owner's agent, shall identify the restored work and the work in which the restored work is used, if any, in detail sufficient to identify them, and shall include an English translation of the title, any other alternative titles known to the owner by which the work may be identified, the use or uses to which the owner objects, and an address and telephone number at which the reliance party may contact the owner. If the notice is signed by an agent, the agency relationship must have been constituted in writing and signed by the owner before service of the notice.

(3) EFFECT OF MATERIAL FALSE STATEMENTS.-Any material false statement knowingly made with respect to any restored copyright identified in any notice of intent shall make void all claims and assertions made with respect to such restored copyright.

(f) IMMUNITY FROM WARRANTY AND RELATED LIABILITY.-

(1) IN GENERAL.-Any person who warrants, promises, or guarantees that a work does not violate an exclusive right granted in section 106 shall not be liable for legal, equitable, arbitral, or administrative relief if the warranty, promise, or guarantee is breached by virtue of the restoration of copyright under this section, if such warranty, promise, or guarantee is made before January 1, 1995.

(2) PERFORMANCES.-No person shall be required to perform any act if such performance is made infringing by virtue of the restoration of copyright under the provisions of this section, if the obligation to perform was undertaken before January 1, 1995.

(g) PROCLAMATION OF COPYRIGHT RESTORATION.-Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States, restored copyright protection on substantially the same basis as provided under this section, the President may by proclamation extend restored protection provided under this section to any work-

(1) of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation; or

(2) which was first published in that nation.

The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under such a proclamation.

(h) DEFINITIONS.-For purposes of this section and section 109(a):

(1) The term "date of adherence or proclamation" means the earlier of the date on which a foreign nation which, as of the date the WTO Agreement enters into force with respect to the United States, is not a

nation adhering to the Berne Convention or a WTO member country, becomes-

(A) a nation adhering to the Berne Convention or a WTO member country; or

(B) subject to a Presidential proclamation under subsection (g).

(2) The "date of restoration" of a restored copyright is the later of-

(A) the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States, if the source country of the restored work is a nation adhering to the Berne Convention or a WTO member country on such date; or

(B) the date of adherence or proclamation, in the case of any other source country of the restored work.

(3) The term "eligible country" means a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a proclamation under section 104A(g).

(4) The term "reliance party" means any person who-

(A) with respect to a particular work, engages in acts, before the source country of that work becomes an eligible country, which would have violated section 106 if the restored work had been subject to copyright protection, and who, after the source country becomes an eligible country, continues to engage in such acts;

(B) before the source country of a particular work becomes an eligible country, makes or acquires 1 or more copies or phonorecords of that work; or

(C) as the result of the sale or other disposition of a derivative work covered under subsection (d)(3), or significant assets of a person described in subparagraph (A) or (B), is a successor, assignee, or licensee of that person.

(5) The term "restored copyright" means copyright in a restored work under this section.

(6) The term "restored work" means an original work of authorship that-

(A) is protected under subsection (a);

(B) is not in the public domain in its source country through expiration of term of protection;

(C) is in the public domain in the United States due to-

(i) noncompliance with formalities imposed at any time by United States Copyright law, including failure of renewal, lack of proper notice, or failure to comply with any manufacturing requirements;

(ii) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or

(iii) lack of national eligibility; and

(D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country.

(7) The term "rightholder" means the person-

(A) who, with respect to a sound recording, first fixes a sound recording with authorization, or

(B) who has acquired rights from the person described in subparagraph (A) by means of any conveyance or by operation of law.

(8) The "source country" of a restored work is-

(A) a nation other than the United States;

(B) in the case of an unpublished work-

(i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, the majority of foreign authors or rightholders are nationals or domiciliaries of eligible countries; or

(ii) if the majority of authors or rightholders are not foreign, the nation other than the United States which has the most significant contacts with the work; and

(C) in the case of a published work-

(i) the eligible country in which the work is first published, or

(ii) if the restored work is published on the same day in 2 or more eligible countries, the eligible country which has the most significant contacts with the work.

(9) The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

(b) LIMITATION.-Section 109(a) of title 17, United States Code, is amended by adding at the end the following:

Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on-

(1) the date of the publication in the Federal Register of the notice of intent filed with the Copyright Office under section 104A(d)(2)(A), or

(2) the date of the receipt of actual notice served under section 104A(d)(2)(B), whichever occurs first.

(c) CONFORMING AMENDMENT.-The item relating to section 104A in the table of sections for chapter 1 of title 17, United States Code, is amended to read as follows: "104A. Copyright in restored works." [ELR 17:1:3]

"Bambi" book is in public domain, court rules in copyright infringement action brought against Walt Disney Co. by assignee of literary publication rights

The complicated relationship between foreign publication and United States copyright duration - and the impact of an obscure U.S. "wartime extension" for works of Austrian origin - was at the heart of a fascinating dispute between the Walt Disney Company and the assignee of literary publication rights to the book "Bambi." To prevail, Disney had to swallow a bitter pill. It had to take the position that "Bambi" is now in the public domain in the U.S. But prevail, it did.

As described by Federal District Court Judge Wilken, "Bambi" was written by Felix Salten, an Austrian citizen, and was first published in the German language in Berlin in 1923 without a copyright notice. A second German language edition was published in Germany in 1926, with a copyright notice. A claim to copyright the 1926 edition of Bambi was registered in the United States Copyright Office in 1927.

In December 1936, Salten and his publisher assigned rights in Bambi to Sidney Franklin. Franklin subsequently assigned all his rights to Walt Disney Productions; the Walt Disney Company is the successor in interest to Walt Disney Productions. The assignments, which were recorded in the Copyright Office in 1939, transferred all copyrights except literary rights to publish the original Bambi text and translations of the text.

Disney first released the Bambi film in 1942. Salten died in 1945. The copyright in the Bambi book was renewed in 1954 by Salten's daughter, Anna Salten Wyler; the renewal certificate indicated that 1926 was the original publication date.

In 1958, Anna Wyler executed three agreements with Disney concerning rights to the Bambi book. Anna Wyler died in 1977; her husband, Veit Wyler, was the sole successor to her rights in Salten's literary properties. In 1993, Veit Wyler and his two children assigned all their rights in the Bambi book to Twin Books Corporation.

When Twin Books sued Disney for copyright infringement, Disney sought summary judgment, arguing, among other claims, that the Bambi book is in the public domain.

Judge Wilken agreed with Disney that Bambi, under the 1909 Copyright Act, fell into the public domain at the end of its first 28 year period unless Anna Wyler promptly renewed the copyright. Under the statute, the term of copyright protection began when the work was first published, with or without a copyright notice. Twin Books argued that the copyright term for Bambi began on the date of publication with notice in 1926, an argument "totally without merit," according to Judge Wilken.

Twin Books cited Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946) in which the court held that, unlike publication in the United States without the appropriate copyright notice, publication abroad without notice of United States copyright would not necessarily preclude the owner from subsequently obtaining a valid United States copyright. But the court in Heim did not discuss the effect of its ruling on the term of a copyright and did not provide a basis for Twin Books' conclusion that the term of copyright protection does not start in such cases until the work is published with notice. The Bambi copyright, assuming its validity, expired in 1951, stated Judge Wilken, and Anna Wyler's failure to renew in a timely manner resulted in Bambi's release into the public domain.

The court then adverted to a 1960 proclamation by President Eisenhower declaring that with respect to works of citizens of Austria subject to renewal of copyright under the laws of the United States on or after March 1938 and prior to July 1956, there existed "during several years of the aforementioned period such disruption or suspension of facilities essential to compliance with the conditions and formalities prescribed with respect to such works by [U.S. copyright laws] as to bring such works within the terms of the [1909 Act], and that accordingly the time within which compliance with such conditions and formalities may take place is hereby extended with respect to such works for one year after the date of this proclamation."

Twin Books argued that the proclamation operated retroactively to render Anna Wyler's 1954 renewal timely and valid. But the court interpreted the proclamation as requiring copyright owners who had previously made a defective renewal to file a corrective renewal within a year after the proclamation.

Judge Wilken observed that it was not possible to discern from Wyler's 1954 renewal that it was a defective filing which might have been cured by the 1960 proclamation, or that the copyright would expire three years earlier than the renewal indicated. Anna Wyler's copyright was not saved by the proclamation because Wyler did not file a corrective document to cure the inaccurate and late renewal within a year after the proclamation, held the court; the copyright in Bambi expired and fell into the public domain in 1951.

The court also rejected Twin Books' argument that Disney, as a licensee of the copyright, was estopped from challenging its validity.

Twin Books Corporation v. Walt Disney Company, 877 F.Supp. 496, 1995 U.S.Dist.LEXIS 6008 (N.D.Ca. 1995) [ELR 17:1:10]

Comedian Jeff Foxworthy wins preliminary injunction barring sale of unauthorized T-shirts bearing his "You might be a redneck..." jokes

Jeff Foxworthy, a comedian best known for his "redneck" humor, determined that Custom Tees was producing T-shirts bearing replicas of Foxworthy's jokes.

In response to the comedian's action for copyright and trademark infringement, a Federal District Court in Georgia first found that the court possessed jurisdiction over Custom Tees and Stewart R. Friedman, an employee of the company. It was noted that Custom Tees shipped T-shirts to Georgia; that Friedman, in directing the marketing and production operations of Custom Tees, "transacted business" in Georgia on behalf of the company; that Foxworthy had a cause of action relating to those acts; and that the exercise of jurisdiction over Friedman (who, with his wife, operated the business) would be reasonable.

Senior Judge Richard C. Freeman proceeded to find that venue was proper, and that the court was not such an inconvenient forum so as to require a transfer in the interest of justice.

In considering Foxworthy's claim to a common law trademark in the phrase "you might be a redneck," Senior Judge Freemen observed that section 43(a) of the Lanham Act protects unregistered, common law trademarks from infringement where the unauthorized use would likely confuse consumers as to the source or sponsorship of goods or services. The court stated that the "you might be a redneck" phrase serves as a trademark when used in connection with Foxworthy's humor, noting that the comedian created several marketable goods based upon the phrase and that a substantial segment of "the viewing, listening, reading, and laughing public" associate the phrase with Foxworthy.

The fact that Foxworthy may be known by his jokes as well as the "you might be a redneck" phrase did not limit the fact that he also was known by the phrase, continued the court. And although the phrase might have a "facial functionality," the functionality defense was insufficient to preclude the protection of the phrase. Senior Judge Freeman stated that using the introductory phrase "simply accommodates the style of [Foxworthy's] humor;" and that the comedian claimed a trademark in the phrase that distinguishes his particular brand of humor, not in all redneck humor. Although the phrase "functions" to deliver a joke, this would not deprive the phrase of protection where it also "functions" to distinguish

Foxworthy's brand of humor, and thus was entitled to protection from confusingly similar phrases used in similar contexts.

Senior Judge Freeman next reviewed the factors relevant to a finding of a likelihood of confusion and determined that the phrase "you might be a redneck" was suggestive of Foxworthy's humor. And although Custom Tees modified its use of the phrase to "you ain't nothin' but a redneck," the two phrases conveyed a similar overall impression; the context of the phrases also was similar, and, in the shirts shown to the court, identical. The parties were competitors in the humorous T-shirt business, noted the court, and their retail outlets and advertising methods were the same.

Most significantly, the court expressed the "strong suspicion" that the content and form of Custom Tees' shirts was "not accidental," and that there was little evidence in the record to support a finding of good faith. There was evidence of actual confusion, observed Senior Judge Freeman, and Custom Tees' product, although distinguishable in appearance from Foxworthy's shirts, "utilized the association to gain a competitive advantage."

In all, Foxworthy demonstrated a likelihood of success on the merits of his Lanham Act claim since Custom Tees' shirts would cause confusion in the public as to their source and sponsorship.

With respect to Foxworthy's copyright infringement claim, the court first rejected Custom Tees' argument that the copyright registration for one of Foxworthy's books was a "compilation" registration and that the registration did not cover the individual material compiled. Custom Tees cited Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 111 S.Ct. 1282 (1991), but Senior Judge Freeman pointed out that Feist did not say that the copyright in a compilation extends only to the selection and arrangement of materials - copyright extends to the "author's original contributions." Thus, although Custom Tees may not have copied the selection and arrangement of the jokes in the compilation, there was a separate question as to whether the company copied the original contributions of the author in the preexisting material, i.e., the jokes themselves.

Also rejected was Custom Tees' claim that the jokes were not original, and that Foxworthy therefore could not claim "authorship" in them. But Foxworthy testified that while he may use other people's ideas, he writes every word in his books, and wrote each joke used by Custom Tees on the shirts at issue.

Senior Judge Freeman, after further consideration of the factors relevant to the issuance of a preliminary injunction, granted Foxworthy's motion.

Foxworthy v. Custom Tees, 879 F.Supp. 1200, 1995 U.S. Dist.LEXIS 3901 (N.D.Ga. 1995) [ELR 17:1:11]

Model may proceed with invasion of privacy claim against magazine publisher for unauthorized use of her photograph in advertisement

Kimberly Kyser-Smith claimed that she paid Bovanti Communications $325 for 500 composite sheets, in addition to various color and black and white prints, but did not receive the material.

Kyser-Smith also claimed that she participated in an audition for an advertising campaign but did not sign a release agreement with Bohannon Modeling Agency, a division of Bohannon Enterprises. Michael Bohannon was the president and chief executive officer of Bovanti and of Bohannon Enterprises.

Kyser-Smith's photograph was used in an advertisement which appeared in two issues of Upscale magazine, allegedly without her consent and without compensation.

In response to Kyser-Smith's lawsuit, Bovanti argued that Bohannon Modeling Agency was the real party in interest and that Bovanti Communications could not have entered into the contracts with Kyser-Smith because it was not incorporated until 1992, after the complained-of incidents.

A Federal District Court in Alabama ruled that Bovanti was not a proper party to the lawsuit, and granted summary judgment in favor of Bovanti as to Kyser-Smith's claims.

The court then granted summary judgment in favor of Upscale as to Kyser-Smith's breach of contract and unjust enrichment claims, finding that Bohannon Modeling Agency was the only party that entered into a contract with the model and was the only party from which she might expect payment.

In turning to Kyser-Smith's invasion of privacy claim, the court observed that Upscale Communications, Inc., the publisher of Upscale Magazine, used the model's photograph to publicize its affiliate's products. A reasonable juror could find that Upscale published Kyser-Smith's photograph in its advertising brochure for its own commercial advantage, stated the court, in denying summary judgment as to the invasion of privacy claim based on misappropriation for commercial use.

Kyser-Smith also alleged a false light invasion of privacy claim, declared Judge De Ment, for there was a question of fact as to whether the model's appearance in a red-sequin, low-cut dress advertising a product with the name "Hot Six Oil" might be offensive to a reasonable person.

Recklessness in the publication of the advertisement was inferred from the fact that Kyser-Smith did not sign a release form authorizing the publication or use of the photographs for any lawful purpose without restriction. Judge De Ment, accordingly, denied Upscale's motion for summary judgment as to the claim of false light invasion of privacy, but emphasized that the ruling should not be read to imply that Upscale necessarily should be held liable.

Kyser-Smith v. Upscale Communications, Inc., 873 F.Supp. 1519, 1995 U.S.Dist.LEXIS 975 (M.D.Ala. 1995) [ELR 17:1:12]

Sponsor of Boston's St.Patrick's Day parade may exclude Irish-American Gay, Lesbian & Bisexual Group, rules United States Supreme Court

The United States Supreme Court has ruled that the South Boston Allied War Veterans Council may bar the Irish-American Gay, Lesbian and Bisexual Group of Boston from participating in the Council's St.Patrick's Day-Evacuation Day parade.

As reported at ELR 16:8:18, a Massachusetts trial court granted permanent injunctive relief barring the Council from discriminating against the Group on the basis of sexual orientation with respect to participation in the annual parade. The court had found that the Council had no written criteria or particular procedures concerning participation in the parade, that the parade was a public event, and that it appeared that the Group was excluded on the basis of its members' sexual orientation, in violation of the state's public accommodations law.

The Supreme Judicial Court of Massachusetts upheld the trial court decision, noting that the trial court had found that the parade was not an exercise of the Council's constitutionally protected right of expression, but was "an open recreational event...subject to the public accommodations law." And the trial court did not err in finding that the Council violated the law, or in finding that the Council did not prove that it truly was exercising its own First Amendment rights.

Justice David H. Souter first reviewed the history of the parade, noting that the tradition of formal sponsorship by the city ended in 1947 when the then-mayor granted authority to organize and conduct the St.Patrick's Day-Evacuation Day Parade to the Council, an unincorporated association of individuals elected from various South Boston veterans groups. The Council receives a permit for the parade and, through 1992, the city allowed the Council to use the city's official seal and provided printing services as well as direct funding.

Justice Souter then considered the First Amendment issues raised, observing that parades are "a form of expression, not just motion..." and that "[t]he protected expression that inheres in a parade is not limited to its banners and songs..." A private speaker does not lose constitutional protection "simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech" - the selection of contingents to form a parade is entitled to protection.

After reviewing the "venerable history" of the Massachusetts public accommodations law, Justice Souter commented that in the instant case, the law was applied "in a peculiar way." The trial court's application of the statute essentially required the Council to alter the expressive content of its parade; in effect, the sponsors' speech itself was the public accommodation. But this use of the state's power, stated Justice Souter, violates the fundamental rule of First Amendment protection, "that a speaker has the autonomy to choose the content of his own message."

"Rather like a composer," continued Justice Souter, "the Council selects the expressive units of the parade from potential participants," and generally arranges a harmonious message. The Council was entitled to exclude a speaker propounding a particular point of view, and that choice "is presumed to lie beyond the government's power to control."

The Council was not, as was the cable operator in Turner Broadcasting System v. FCC, 62 LW 4647, 1994 U.S.LEXIS 4831 (1994; ELR 16:4:16) "a conduit" for the speech of participants in the parade. The participation of the Group in the parade would likely be perceived as having resulted from a Council determination that the Group's message was worthy of presentation and possibly of support. In the context of an expressive parade, as with a protest march, each unit's expression is perceived by spectators as part of the whole, and "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."

Justice Souter further stated that the state's public accommodations law may not interfere with speech "for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

The court concluded by emphasizing that its holding did not express a particular view about the Council's message. However, "disapproving a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others," declared the court in remanding the matter.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 1995 U.S.LEXIS 4050 (U.S.Sup.Ct., June 19, 1995) [ELR 17:1:12]

Court upholds FCC's decision to grant Fox TV permanent waiver of broadcast-newspaper cross-ownership ban upon Rupert Murdoch's reacquisition of bankrupt New York Post; in separate matter, FCC permits Fox TV to argue for waiver of restrictions on foreign ownership of broadcast stations

Fox TV has had to wrestle with two separate restrictions on the ownership of television stations, imposed by federal law. The restrictions in question that are those that prohibit the cross-ownership of newspaper and broadcast stations and those that put a 25% cap on foreign ownership of stations. Thusfar, at least, Fox has come out on top.

Fox Television Stations, which is controlled by Rupert Murdoch, acquired a television station in New York City in 1986. At the time, Murdoch also owned the New York Post. Murdoch was granted two years to divest his interest in the Post to satisfy the Federal Communications Commission rule prohibiting common ownership of a broadcast station and a daily newspaper in the same market. In 1988, Murdoch sold the newspaper, although Murdoch's company remained contingently liable for some of the Post's obligations.

In 1993, after a series of ownership changes, Murdoch's company agreed to assume management of the Post, conditioned, among other things, upon his obtaining a permanent waiver of the FCC's ban on cross-ownership and negotiating new agreements with the Post's labor unions.

The FCC granted the permanent waiver, stating that Murdoch's eligibility would serve the public interest by allowing the bankruptcy court to consider all eligible bidders for the Post. It also was noted that there was evidence that Murdoch's ownership might be "pivotal" to the newspaper's viability; that the many broadcast stations and newspapers in the New York market reduced the possibility that Murdoch would obtain an undue amount of control in the marketplace; and that any cost to diversity from the waiver would be outweighed by the preservation of the Post.

In September 1993, the bankruptcy court authorized the purchase of the Post by Murdoch's company; the company was the only bidder for the newspaper. The court observed that the Post had suffered continuing and substantial losses during the bankruptcy proceedings and that it was likely that the newspaper, if not purchased by Murdoch, would liquidate.

The Metropolitan Council of NAACP Branches and other parties argued that Fox made misrepresentations of material fact in its waiver request by implying that there existed a June 1, 1993 deadline for FCC action based on the termination date of the court-approved management agreement. The Commission found that Fox's claim concerning the deadline date was an overstatement and potentially misleading, but decided that there was no evidence of deceptive intent by Fox and that further inquiry was not warranted. Judge Sentelle described the statements by Fox as "bombast" rather than outright falsehoods, and pointed out that the FCC relied on other evidence in the record suggesting that Fox did not actually attempt to mislead the FCC on the relevant issues. The Commission's conclusion that allegations regarding Fox's misrepresentations did not raise a material issue requiring a hearing was not arbitrary and capricious or unsupported by the record.

Judge Sentelle proceeded to find, after careful consideration, that the FCC did not err by failing to order a hearing on the specifics of Murdoch's bid for the Post.

Furthermore, the FCC, in rejecting the NAACP parties' argument that the failure of the Post would increase diversity, stated that the cross-ownership rule was never intended to cause the demise of an existing newspaper but to promote diversification of the mass media as a whole. Given the broad authority of the FCC to determine the public interest in this area, stated Judge Sentelle, the decision to preserve an existing source of information seemed reasonable and would be upheld.

The court next upheld the FCC's decision to grant a permanent rather than a temporary waiver, citing the fact that granting the waiver helped the debtor, the creditors and the bankruptcy court by removing uncertainties as to the viability of the primary bidder. The FCC's finding that Fox met the heavy burden for a permanent waiver and that such waiver was in the public interest was entitled to substantial judicial deference, according to Judge Sentelle, as was the fact that Murdoch previously had a temporary, two-year waiver and the Post "floundered" when he divested it.

In a separate matter, in May 1995, the Federal Communications Commission ruled that Fox Television Network did not mislead the FCC in 1985 about the company's ownership structure. At that time, Rupert Murdoch sought FCC approval to acquire the six television stations that initially comprised the network.

However, the FCC determined that Fox's parent, the Australian-based News Corp. Ltd., is not an American company, reversing a 1985 finding. According to news reports, the FCC only recently learned that News Corp. owns 99 percent of the equity in the stations. Foreign companies are prohibited by federal law from owning more than 25 percent of a United States subsidiary that controls an American broadcast station. The FCC will allow Murdoch, who is a naturalized United States citizen, to argue that it would be in the public interest for him to be granted a waiver to this restriction with respect to the eight stations currently owned by Fox Television.

Metropolitan Council of NAACP Branches v. Federal Communications Commission, 46 F.3d 1154, 1995 U.S.App.LEXIS 1539 (D.C.Cir.1995) [ELR 17:1:13]

Court denies request for ex parte seizure of allegedly infringing products bearing "Looney Tunes" and "Mighty Morphin Power Ranger" copyrights and trademarks

Time Warner Entertainment, Saban Entertainment, and other parties claimed that various unnamed parties, without authorization, were manufacturing and distributing merchandise bearing copyrighted designs and trademarks in the "Looney Tunes" and "Mighty Morphin Power Ranger" characters.

A Federal District Court in New York has ruled that the Time Warner parties' proposed seizure order would violate the Fourth Amendment, as follows: by having a private investigator conduct the seizure and impoundment, rather than a United States Marshal or other law enforcement officer; by seeking to conduct a roving search, rather than stating, with particularity, the locations where allegedly infringing goods were known to be produced or stored; and by setting forth, in sweeping terms, the materials to be seized. The proposed order also did not contain internal references to the Looney Tunes or Power Rangers marks, but broadly covered all of the Time Warner and Saban trademarks, leaving discretion with the attorney participating in the search.

Judge Sifton further stated that the Time Warner parties did not show that an order of more limited scope or remedy would not be adequate in these circumstances. It was observed that the Doe parties were not street vendors - their printing equipment and machinery would not be easily moved or destroyed; that there was no prior injunction against the Doe parties; and that it was not clear to the court why an injunction prohibiting the sale, transfer, or destruction of evidence, plus expedited discovery, or why a more limited seizure order would not be suffice.

The court, accordingly, denied the Time Warner and Saban parties' application for an ex parte application for a temporary injunction and restraining order. The court granted the application to have the case sealed, with the exception of its opinion.

Time Warner Entertainment Company v. Does, 876 F.Supp. 407, 1994 U.S.Dist.LEXIS 19741 (E.D.N.Y. 1994) [ELR 17:1:14]

University of Arkansas obtains summary judgment on Lanham Act claim involving clinic's use of the name "Razorback" and design logo

A Federal District Court in Arkansas has granted partial summary judgment to the University of Arkansas on its federal trademark infringement claim under section 32 of the Lanham Act against the Razorback Sports and Physical Therapy Clinic.

As described by Chief Judge H. Franklin Waters, former Arkansas football coach Hugo Bezdeck is credited with naming the university's football team in 1909 when he referred to his players as "a wild band of razorback hogs." The university identified itself with the Razorback mark and a design logo featuring a red, running hog. The mark obtained its first federal registration in 1989, and has been licensed to about 720 third party users.

The clinic, originally known as the Physical Therapy Clinic, changed its name to the Razorback Sports and Physical Therapy Clinic in 1989 when two university-associated athletic trainers became clinic consultants and limited partners. For a design logo, the clinic used a red, running Razorback hog, and distributed promotional materials emphasizing its relationship with the university.

Chief Judge Waters, in considering the factors relevant to determining the existence of a likelihood of confusion, first concluded that the Razorback marks were strong marks, "highly deserving of protection." It was noted that the use of the Razorback marks, in connection with physical therapy or medical services, "as well as almost any other good or service one can imagine," is arbitrary.

The clinic argued that the marks are geographically descriptive, i.e., that the term "Razorback" refers to Arkansas in the way that the term "Lone Star" refers to Texas and "Quaker State" refers to Pennsylvania. The court, in rejecting the argument, characterized the evidence submitted by the clinic as "highly dubious."

In reiterating that the Razorback marks are arbitrary, distinctive, strong, widely-recognized and highly-identifiable to the university, Chief Judge Waters adverted to the university's ownership of 25 federal registrations for the Razorback marks, use of the marks for more than 80 years, expenditure of more than $1 million in promoting the marks, and a profitable licensing program.

The clinic next contended that many local and state businesses use the Razorback marks in their trade names and that the university would not be identified as the source of a businesses' goods or services simply because Razorback marks appear in the trade name. Chief Judge Waters found that the clinic offers services that directly compete with those offered by the university, or offers services that are so related to those offered by the university as to imply a common source. There was no evidence, as argued by the clinic, that other Razorback businesses compete with the university on a widespread basis; that the university tolerates such competition; or that any overlap has occurred where the infringing trade name and mark have been selected "to emphasize a connection with the University, as was done in this case."

The competitive proximity of the products was a "crucial" factor weighing in favor of the university, continued Chief Judge Waters. The clinic offers services such as physical therapy, athletic training, and occupational therapy. The university also offers such services, through its extensive athletic program, to its student athletes and to the public on an in-patient and out-patient basis.

The court proceeded to find that the "Razorback" element of the clinic's mark not only was the dominant element of the mark but was identical to the university's mark. The clinic colored the mark in red, the university's school color, and, initially, used a Razorback hog logo.

Chief Judge Waters declined to resolve the issue of intent to confuse on summary judgment, stating that the issue of intent was not determinative with respect to a finding of likelihood of confusion. And neither party presented any evidence as to actual confusion by the consumers of the clinic's services or the public at large.

After finding that the likelihood of confusion would be increased by the close physical proximity between the clinic and the office of the university medical clinic, by the presence of university employees at the clinic, and by the clinic's use of promotional materials to emphasize its relationship to the university, the court concluded that there was a "serious risk to the University that it will lose control over its public image as a provider of medical service, if the Clinic continues to use its marks," and granted partial summary judgment to the university on the Lanham Act cause of action. The court rejected the clinic's motion for summary judgment as to the university's remaining claims.

Trustees of the University of Arkansas v. Professional Therapy Services, Inc., 873 F.Supp. 1280, 1995 U.S.Dist.LEXIS 867 (W.D.Ark. 1995) [ELR 17:1:15]

Publisher may continue to use "Dun & Bradstreet" name for revisions of investment guide

In 1977, the predecessor in interest of Harpercollins Publishers purchased the Thomas Y. Crowell book publishing subsidiary of Dun-Donnelly Corporation, the predecessor in interest of the Dun & Bradstreet Corporation. At the time of the Harpercollins purchase, Crowell's publications included "Dun & Bradstreet's Guide to $Your Investments$: 19XX;" the guide, as revised, was published annually.

Dun & Bradstreet claimed that Harper's right to use the Dun & Bradstreet name in the title expired when C. Colburn Hardy stopped writing the guide. Following the 1985 edition, Harper bought out Hardy's royalty rights and hired a new author to write the 1986 and subsequent editions of the guide. It also was alleged that Harper failed, until 1987, to submit revisions of the guide to

Dun & Bradstreet for approval, as required by a 1977 license agreement. Dun & Bradstreet sued Harper, alleging trademark infringement, false designation of origin in violation of the Lanham Act and unfair competition.

Federal District Court Judge Kaplan, after setting forth the terms of a letter of intent between Harper and Dun-Donnelly and the terms of a license granting Crowell the right to use the Dun & Bradstreet name, stated that Harper's failure to obtain approval of revisions to the guide did not affect its right to use the Dun & Bradstreet name in revisions other than those for which it did not submit manuscripts to Dun & Bradstreet.

Judge Kaplan then found that Crowell, as the owner of the copyright in the 1977-78 guide, had the exclusive right to revise the guide; the right "passed into Harper's sphere" when Harper acquired all of the issued and outstanding shares of Crowell, "quite apart from the

License Agreement." The license agreement, reiterated the court, was not the sole source of Harper's right to revise the guide. And the termination of the Hardy contract did not end Harper's right to use the Dun & Bradstreet name in the title of revisions of the guide.

The court cautioned, although not deciding the issue, that at some point changes in the guide will likely make it a new work, rather than a revision. Harper then might not have the right to use the Dun & Bradstreet name in the title of the guide.

Judge Kaplan dismissed Dun & Bradstreet's complaint, stating that the company failed to demonstrate that Harper's right to use the Dun & Bradstreet name in the title of revisions of the guide had terminated.

Dun & Bradstreet Corporation v. Harpercollins Publishers, Inc., 872 F.Supp. 103, 1995 U.S.Dist.LEXIS 110 (S.D.N.Y. 1995) [ELR 17:1:16]

New Line Cinema must pay Stephen King $10,000 per day for failing to cure contempt of consent decree entered in dispute over "The Lawnmower Man" videocassette credits

In 1992, a Federal Court of Appeals (ELR 14:8:9) ruled that New Line Cinema, the distributor of "The Lawnmower Man," could state that the film was "based upon" a Stephen King story, but was not entitled to use a possessory credit. King had claimed that the film did not resemble his 1975 story, and that the use of "possessory" and "based upon" credits violated the Lanham Act.

A May 1993 settlement agreement among the parties incorporated a final consent decree which prohibited the use of King's name in connection with "The Lawnmower

Man" film and all related properties and products, in all media. New Line agreed to take "immediate steps" to provide "paste-over" stickers or otherwise remove any references to King on videos of "The Lawnmower Man," and to provide compliance instructions to its distributors and wholesalers.

Federal District Court Judge Constance Baker Motley, as reported at ELR 16:3:4, found that New Line, with respect to its compliance efforts, was in contempt of the consent decree and ordered the company to cure the contempt or to face sanctions.

In February 1995, the court found that New Line had not cured itself of contempt of the decree in that the company did not take effective steps to supply corrective materials to the marketplace "in a manner designed, and in sufficient quantities, to enable the removal of Stephen King's name from the Lawnmower Man videos remaining in the marketplace" that bore the offending credits. New Line did not use certified mail, as required by the court's order, to notify its licensees and distributors of the terms of the consent decree, and did not follow up with the parties who did not respond to the initial mailing - the company's actions affected, at most, 23 percent of the market.

In all, New Line repeatedly failed to comply with the terms of the decree and the court ordered the company to pay a fine to King in the amount of $10,000 per day from the date of the entry of the instant opinion until the noncompliance is cured, and awarded King all costs and attorneys' fees with respect to the various proceedings.

King v. Allied Vision, Ltd., 877 F.Supp. 185, 1995 U.S.Dist.LEXIS 2251 (S.D.N.Y. 1995)[ELR 17:1:16]

Cabbage Patch Kids licensee is not entitled to share of $7 million "Garbage Pail Kids" settlement

As reported at ELR 13:1:6, Original Appalachian Artworks, the owner of the Cabbage Patch Kids copyrights and trademarks, in 1983, granted S. Diamond Associates a license to market Cabbage Patch Kids puffy sticker products. Diamond agreed to pay Original Appalachian a fee of $45,000 and ten percent of sales revenues. Original Appalachian retained exclusive rights to the goodwill associated with the Cabbage Patch name, and the sole right to determine whether to pursue any action in connection with any infringements or imitations of the licensed products.

In 1986, Original Appalachian obtained a preliminary injunction (ELR 8:5:9) barring Topps Chewing Gum from selling Garbage Pail Kids products, including a sticker type of bubble gum trading card; the Topps items featured characters that were "strikingly similar to the Cabbage Patch Kids, but depicted in less than flattering situations." Topps eventually agreed to a $7 million settlement payment; Original Appalachian agreed that it would not authorize any of its licensees to sue Topps for copyright or trademark infringement related to the Garbage Pail Kids.

Diamond had sought to intervene in the above proceeding before the court dismissed the case, but the District Court denied Diamond's motion.

Original Appalachian then sought a declaratory judgment that Diamond had no right to share in the settlement proceeds. The District Court held that Diamond had no right under the licensing agreement to a share of the compensation recovered by Original Appalachian from an infringer, and granted summary judgment to Original Appalachian.

A Federal Court of Appeals panel reversed the District Court decision and remanded the matter for a determination as to whether, and to what extent, Diamond may have suffered injury as a result of Topps' conduct.

On remand, the District Court concluded that Diamond had only a limited item license which did not extend to the type of bubble gum trading card stickers marketed by Topps and that Topps did not appropriate Diamond's exclusive license.

It was further found that the evidence did not demonstrate that there was direct competition between Topps' Garbage Pail Kids stickers and Diamond's Cabbage Patch Kids stickers; that Diamond failed to show any injury as a result of Topps' conduct; and that Diamond did not prove that Original Appalachian breached any fiduciary duty it owed to Diamond.

A Federal Court of Appeals has affirmed the District Court's decision entering judgment in favor of Original

Appalachian, noting, in part, that Diamond produced no evidence of actual harm.

Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc., 44 F.3d 925, 1995 U.S.App.LEXIS 1482 (11th Cir. 1995) [ELR 17:1:17]

Damage award of $140,000 in copyright infringement claim involving unregistered jukeboxes is upheld

Star Amusements operated more than 200 jukeboxes each year between 1984 and 1990; only a small number of the jukeboxes were registered with the United States Copyright Office during this period. By failing to register all of its jukeboxes, Star Amusements avoided paying the Copyright Office more than $75,000 in fees, according to Federal Court of Appeals Judge Cummings. In 1987, Star had gross revenues of more than $1.5 million.

BMI sued Star, alleging 29 infringements at three different bars in Indiana at which Star operated allegedly unregistered jukeboxes. A Federal District Court jury determined that Star engaged in non-willful infringement at one of the three locations and no infringement at the other two. The court awarded BMI the maximum statutory damages of $10,000 for each of the 14 infringing performances, for a total of $140,000.

Judge Cummings upheld the damage award, stating that "unpaid registration fees actually provide a superior yardstick than total infringements for measuring appropriate damages," for "[w]hen the infringer is a jukebox operator, the transgression really occurs when the operator places an unregistered jukebox into operation in a public establishment." The number of unregistered jukeboxes for each year was known, and the District Court was not required to speculate, as argued by Star, concerning the amount of unpaid registration fees.

The District Court had "almost unfettered discretion" in setting the statutory damage award within the prescribed range, and was entitled to consider a multiple of Star's unpaid jukebox registration fees as an appropriate measure for purposes of deterrence and compensation.

Broadcast Music, Inc. v. Star Amusements, Inc., 44 F.3d 485, 1995 U.S.App.LEXIS 114 (7th Cir. 1995) [ELR 17:1:17]

Cable TV company obtains $390,000 in damages and permanent injunction barring sale of unauthorized signal decoders

Cablevision Systems Corporation and other parties have prevailed in an action alleging that Can Muneyyirci, also known as Jon Neyir, engaged in illegal sales of cable television equipment in violation of 47 U.S.C. sections 553 and 605. A Federal District Court in New York granted partial summary judgment with respect to 390 sales and set the sum of $10,000 per sale as an appropriate measure of damages.

Judge Dearie noted that Cablevision previously had obtained a preliminary injunction against the continued sale by Neyir and other parties of devices used to descramble the company's cable signals without payment, and that the court had authorized the seizure of Neyir's inventory of decoding equipment.

Neyir conceded liability for 17 illegal sales of decoders. Cablevision sought summary judgment and statutory damages for an additional 2,609 mail order sales, pointing out that there is no legitimate retail market for decoders or combination units since these units are provided by cable companies as part of the cable service.

Judge Dearie, after commenting on Neyir's failure to introduce any evidence of legitimate sales of decoders or combination units, stated that summary judgment would be limited to sales of single units.

In turning to the issue of damages, the court found that the sale of the decoders violated section 553(a)(1). After careful consideration of case law and the legislative history of the Cable Act of 1984, Judge Dearie held that the term "radio communications" under section 605(a) includes cable-borne television signals. It is a violation of section 604(e)(4)to sell or distribute equipment knowing or having reason to know that such equipment is primarily of assistance in the unauthorized interception of cable-borne television signals, continued the court, and the Neyir parties violated both section 605(e)(4) and section 553(a)(1) when they sold the decoders and combination units knowing that they would be used to intercept premium cable services without authorization.

In addition to damages, the court permanently enjoined the Neyir parties from engaging in any business or transaction involving, directly or indirectly, the cable industry.

Cablevision Systems Corporation v. Muneyyirci, 876 F.Supp. 415, 1994 U.S.Dist.LEXIS 19166 (E.D.N.Y. 1994) [ELR 17:1:18]

British satellite television service prevails in action against unauthorized distributions of unscrambling device

British Sky Broadcasting owns and operates a satellite television service; the company's television signals are encrypted and subscribers must purchase a decoder to view programming.

A company identified as Lyons imported "smart cards," and sold the cards in Great Britain. The cards, when inserted into a decoder, enable the purchaser to receive, without authorization, British Sky's programs.

A British Chancery court ruled that Lyons was liable with respect to the complained-of acts, rejecting a defense under section 298 of the Copyright, Designs and Patents Act 1988.

Lyons also cited Article 7 of the Treaty of Rome which prohibits discrimination on the grounds of nationality, and argued that section 298 was a prohibited quantitative restriction in that it provided a right to broadcasters who uplift from the United Kingdom while not providing the same rights to broadcasters who uplift from other member states.

British Sky did not accept that section 298 contained any quantitative restriction. But the company's primary argument was that section 298 was concerned with protecting industrial and commercial property within Article 36, and that any restriction was justified.

Judge Aldous noted that although industrial and commercial property rights are governed by national law, they must not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states. Section 298 grants a person, whether a resident or a national of the United Kingdom or another country, a transmission right, provided the transmission takes place from within the United Kingdom. In so doing, stated the court, there would be no discrimination on the grounds of nationality. The condition that there must be transmission from the United Kingdom does not amount to a means of arbitrary discrimination or a disguised restriction on trade between member states, in Judge Aldous' view - the condition applies to everyone and is similar to national conditions for obtaining rights such as copyright.

In all, section 298 does not offend any provision of the Treaty of Rome, declared the court, which proceeded to comment that if the requirement in section 298 that the transmission should take place in the United Kingdom before the rights subsists amounts to an arbitrary discrimination or a disguised restriction on trade, that would not provide Lyons with a defense. According to Judge Aldous, Lyons was "a parasite" and would not be a party against whom section 298 would discriminate.

In granting British Sky's motion for summary judgment, Judge Aldous also concluded that it would not be appropriate for the court to order a reference to the European Court of Justice.

British Sky Broadcasting Group Ltd. v. Lyons, U.K.Chancery Division (Patents) [LEXIS Intlaw Library, UK Cases File] (Dec. 1994) [ELR 17:1:18]

Owner of "The Sports Authority" stores may not prevent use of similar name by sports-theme restaurants

A Federal District Court in New York has ruled that The Sports Authority, the owner of a chain of warehouse-type sporting goods stores called "The Sports Authority" was not entitled to enjoin Prime Hospitality's use of the name "Sports Authority Food, Spirits and Sports" for sports-theme restaurants located in several of the company's hotels.

In conducting the review of the factors relevant to the likelihood of confusion, Judge Martin stated that "The Sports Authority" is a descriptive mark but that The Sports Authority did not prove that the words "Sports Authority" indicated a single source to consumers. However, since The Sports Authority registered its mark in 1989 and used it at all times since then, the mark, though descriptive, is incontestable, stated the court and is entitled to trademark protection as a strong mark.

In Judge Martin's view, the differences in the logos used by the parties, and the fact that Prime Hospitality uses the words "food, spirits and sports" in its logo meant that the visual impact of the two marks was very different. And Prime Hospitality advertises its restaurants only in conjunction with its hotels, again creating a differing context that "greatly reduces the similarity of the impressions created by the two marks."

It was further found that the goods and services provided by the companies were totally dissimilar, and that the average consumer would not perceive a natural connection between selling sports equipment and selling food and beverages, even in a sports-oriented setting. And The Sports Authority did not state that it intended to enter the restaurant and bar business.

The court commented that it was extremely unlikely that the evidence presented concerning consumer confusion involved the type of confusion that would enable a seller to pass off its goods as those of another; in all, The Sports Authority did not present evidence of confusion of the sort that would support a Lanham Act claim.

Judge Martin proceeded to find that The Sports Authority did not conclusively show that Prime Hospitality adopted its mark in bad faith, i.e., to trade off The Sports Authority's goodwill and reputation.

The balance of factors did not support The Sports Authority's claim of trademark infringement, concluded the court in dismissing the company's Lanham Act claims, as well as claims under New York's anti-dilution statute.

The Sports Authority, Inc. v. Prime Hospitality Corp., 877 F.Supp. 124, 1995 U.S.Dist.LEXIS 6103 (S.D.N.Y. 1995) [ELR 17:1:19]

Radio station defeats application for injunction in dispute with creator of promotional call-in contest

CMM Cable Rep, Inc. creates radio promotions, such as "Payroll Payoff," which promises 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.

When WMGX, CMM's regular client in the Portland, Maine market rejected the Payroll Payoff promotion, a competing station, WPOR, unsuccessfully tried to acquire the right to run the contest. WPOR, owned by Ocean Coast Properties, Inc. then broadcast its own contest-type promotion called "Payday."

CMM brought an action alleging copyright infringement, trademark infringement and unfair competition. A

Federal District Court granted a limited preliminary injunction prohibiting further production and distribution of the station's promotional brochures, but refused to enjoin WPOR from broadcasting the contest.

When CMM appealed the District Court decision, WPOR moved to dismiss the appeal on the grounds of mootness, stating that the station no longer was broadcasting the Payday contest.

Federal Court of Appeals Judge Selya, in dismissing the appeal, ruled that no justiciable controversy existed. CMM's lawsuit remains pending in the District Court and if the company prevails, the court may award money damages, attorneys' fees and other relief. There was no reasonable expectation that WPOR was planning the imminent repetition of its contest, a situation which might provide an exception to the application of the mootness rule.

CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 1995 U.S.App.LEXIS 4299 (1st Cir. 1995) [ELR 17:1:19]

Eye clinic may proceed with defamation claim against "PrimeTime Live," but dismissal of trespass, illegal wiretapping, and fraud claims is upheld

As reported at ELR 16:6:28, Dr. James Desnick allowed John Entine, the producer of "PrimeTime Live," to interview the medical staff and to film cataract surgery at the Desnick Eye Center in Chicago. Entine apparently had assured Desnick that the program segment would not involve "ambush" interviews or "undercover" surveillance, and that it would be "fair and balanced." However, Desnick learned that the program had hired "undercover" patients to visit branch offices of the eye center, and that concealed videotaping and audio recording equipment was used during those visits. Prior to the June 1993 broadcast, Desnick also learned that PrimeTime Live allegedly was relying upon information provided by a former employee of the eye center. The former employee appeared during the broadcast and stated, in part, that eye center technicians "tampered with auto-refractors when older patients came in for eye exams so that it would appear that they had cataracts."

A Federal District Court dismissed the complaint for failure to state a claim.

Federal Court of Appeals Chief Judge Posner noted that the Desnick parties' defamation claim arose from the charge that two doctors at the center tampered with a "glare machine." For the court, it was not clear at this stage of the proceedings that the defamation cause of action could properly be dismissed.

With respect to the cause of action for trespass, Chief Judge Posner found that there was no invasion in this case of any of the specific interests that the tort of trespass seeks to protect - "no embarrassingly intimate details of anybody's life were publicized...There was no eavesdropping on a private conversation...There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations."

It was further found that the Desnick parties failed to state causes of action for violation of the rights of privacy, illegal wiretapping, or fraud.

Chief Judge Posner concluded by commenting that "If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability....), then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."

Desnick v. American Broadcasting Companies, Inc., 44 F.3d 1345, 1995 U.S.App.LEXIS 454 (7th Cir. 1995) [ELR 17:1:20]

Appeals court, over strong dissent, denies rehearing of decision upholding recordkeeping provisions of Child Protection and Obscenity Act

As reported at ELR 16:8:12, a Federal Court of Appeals, in American Library Assn. v. Reno, upheld the recordkeeping provisions of the Child Protection and Obscenity Act. In February 1995, the court denied a suggestion for rehearing in banc.

Judge Tatel, with whom Judge Wald joined, would have granted the suggestion. Judge Tatel stated that the challenged statute and regulations would require every "producer" to maintain copies of photo IDs of every performer, regardless of age, who is "visually depicted" engaging in "actual sexually explicit conduct." The records, according to Judge Tatel, must be cross-indexed by every name that the performer has ever used, and by every work in which the depictions appear; every book, magazine, photograph, videotape or movie containing such depictions must have affixed to it, in a prominent place, a label disclosing the name and address of the individual who maintains the records. A violation of the recordkeeping requirements is a felony, with a first offense punishable by a fine and up to two years in prison and a second offense punishable by up to five years in prison.

As applied to the American Library Association parties, the statute's burden on speech, in the dissent's view, "may well be too great and its effects too tenuous for it to be constitutional." Even if content-neutral, the statute may burden substantially more speech than would be necessary to further the government's legitimate interests.

Judge Tatel expressed doubt that the statute will accomplish its otherwise compelling purpose of aiding the prosecution of child pornographers and deterring older minors from modelling for sexually explicit material. Producers who knowingly use minors in sexually explicit materials already are subject to criminal penalties, and it would be possible to rewrite child pornography statutes to impose criminal liability upon those who recklessly or negligently violate such statutes.

Furthermore, stated Judge Tatel, whatever marginal deterrence the statute achieves "may well be overshadowed by its unprecedented imposition of a permanent and pervasive regulatory burden on a single class of speakers. All those who include sexually explicit material in their work will be affected, including some of society's most biting commentators on sex and sexuality." Speakers must comply with the statute "at great cost of time, money and effort" or risk the penalty of up to five years in prison; either alternative would significantly impact protected speech.

The dissent also observed that requiring artists to reveal their studio or home addresses on the face of their work might subject them to the risk of harassment and physical threat; that adult models may refuse to participate because they do not want their names, photos, addresses or histories associated with their sexually explicit work; and that the records will be available to secondary producers and law enforcement officers. Thus, the statute may not only restrict child pornography, but "the flow of protected speech into the hands of galleries, stores, libraries, artists, and every adult who desires to see or hear it."

Judge Tatel noted that the District Court found the statute unconstitutional and that the panel which reversed the decision was itself split, and concluded by emphasizing that "if we ignore our First Amendment guarantees in the face of words and thoughts that are unpopular, unconventional, or even detestable, we create precedents that may later be used to silence the speech we value."

American Library Association v. Reno, 47 F.3d 1215, 1995 U.S.App.LEXIS 3791 (D.C.Cir. 1995) [ELR 17:1:20]

Court issues rulings in dispute over competing interactive football games

In the early 1980s, as described by Federal District Court Judge Whyte, NTN Communications developed "QB1," an interactive game played in conjunction with televised football games; the game was first used in sports bars and restaurants. In 1990, Interactive Inc., under a license from NTN, began selling a version of QB1 to subscribers of its home interactive television system. Subsequently, Interactive developed its own interactive football game called "IN The Huddle," for use in homes on Interactive's system.

In 1993, Interactive brought a declaratory judgment action seeking a determination that its game did not infringe QB1; NTN filed a counterclaim alleging various causes of action.

In January 1994, Interactive obtained a new, temporary sublicense to offer QB1 to its subscribers through March 1995. Interactive removed IN The Huddle from the market. NTN sought to dismiss Interactive's complaint as moot because Interactive allegedly agreed not to use IN The Huddle until April 1995 and not in conjunction with NFL broadcasts, for which NTN holds an exclusive license.

The court held that Interactive's claims were not moot as to its use of IN The Huddle with non-NFL games, such as college and Canadian Football League games; the company intends to offer IN The Huddle for those games sometime in 1995.

Judge Whyte, in considering Interactive's motion for summary judgment on its declaratory action and on NTN's counterclaims, first found that QB1 would be protected, if at all, as an "audiovisual work" under 17 U.S.C. section 102(a)(6). Interactive argued that any elements of QB1 allegedly infringed by IN The Huddle were unprotected ideas and functional features rather than copyrightable expression. NTN responded that Interactive copied the unique elements and distinctive arrangement constituting QB1's expression, such as the three-level play prediction structure; the scoring system, including a "Game Breaker" feature; the "consecutive bonus" feature; the layout and arrangement of the graphical user interface; and various other nonfunctional features. It also was argued that Interactive copied the format of NTN's real-time data feed, used to transfer coded information regarding play outcomes.

The court found that QB1 was entitled to at least some copyright protection for its original combination of elements.

Judge Whyte then determined that the idea of both games - a live, play-along, interactive game involving predictions regarding plays in a football game - was substantially similar.

Furthermore, given the concept of a predictive football game, there would be only a limited number of ways of organizing play predictions, and NTN was not entitled to use its particular "three-tiered scheme" to monopolize the idea of a such a game. Certain aspects of the scoring in QB1 also were common among video games and, according to Judge Whyte, "perhaps are inherent in any interactive, predictive game."

The court declined to find, as a matter of law, that the remaining similarities in the format and scoring systems of QB1 and IN The Huddle were not substantially similar. Judge Whyte cited such elements as the "consecutive bonus" and the "clutch pick" bonus as not necessarily derived from the idea of an interactive football game.

In all, the similarities between the games involved some elements "not as standard and not as fundamentally related to the nature of the underlying sport." A reasonable jury could find that the games contained substantial similarities among protectible elements and summary judgment as to noninfringement would be inappropriate as to those elements.

Judge Whyte next found that, as a matter of law, there was no substantial similarity between the data feed structures of the two works at issue and granted summary judgment of noninfringement as to this element of QB1. With respect to the claims that IN The Huddle infringed QB1's graphical user interface, screen displays and opening animation, the court found that Interactive, as a matter of law, did not infringe NTN's copyright because Interactive, not NTN, was the author of those features.

In turning to the Lanham Act claims, the court concluded, after careful analysis, that no reasonable jury could find that QB1's copied features which were protectible as trade dress. The three-level prediction scheme and the scoring and bonus systems were "essential to how consumers enjoy the QB1 game..."

NTN, continued the court, did not sufficiently allege, in the pleadings and interrogatory answers, the claimed trade dress features of the screen layout, opening animation sequence, expert player feature, or color commentary, but did assert a claim of trade dress infringement as to the instruction in the "How to Play" guide.

In considering the issues raised as to the guide, the court noted that under the licensing agreement at issue, whereby NTN allowed Interactive to provide its customers with QB1, NTN required Interactive to protect its trademark with appropriate trademark notices and to acknowledge NTN's ownership of the QB1 trademark.

NTN required Interactive to bear the costs of adapting its rules to Interactive's system. It appeared to the court that Interactive did not copy or otherwise misappropriate NTN's trade dress features because those features were Interactive's. The evidence also showed that several elements of Interactive's version of QB1 were taken from other Interactive games.

The court then found that, as a matter of law, the arrangement and composition of the protectible elements of QB1's trade dress were functional - there were no features of QB1's trade dress that were created by NTN that did not "constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product." No reasonable jury could find that, individually or together, QB1's trade dress features were not essential to the use or purpose of QB1 or did not affect the cost or quality of QB1 and were therefore nonfunctional.

The court permitted NTN to proceed with a claim alleging that Interactive acted to create consumer confusion through various misleading press releases in violation of California law, and denied Interactive's motion for summary judgment as to the claims regarding trademark dilution and misleading advertising, because of the existence of genuine issues of material fact.

Summary judgment also was found inappropriate with respect to NTN's claim of interference with prospective economic advantage.

Interactive Network, Inc. v. NTN Communications, Inc., 875 F.Supp.1398, 1995 U.S.Dist.LEXIS 1548 (N.D.Ca. 1995) [ELR 17:1:21]

Courts issue rulings on overtime pay for newspaper reporters under Fair Labor Standards Act

In 1981, United States Secretary of Labor Robert B. Reich sued Newspapers of New England, Inc., doing business as The Concord Monitor, and George Wilson, the newspaper's publisher, alleging that the newspaper violated the overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938 with respect to the wages paid to reporters, "low-level" editors and photographers.

A Federal District Court, in 1993, found that the newsroom employees were not entitled to the professional exemption from the statute's overtime requirements and awarded back wages and liquidated damages to twelve employees. The court also found that The Monitor did not commit the violations willfully and limited the damages to the two-year period before the filing of the lawsuit rather than the three-year period applicable to willful violations.

A Federal Court of Appeals has affirmed the District Court's decision. Chief Judge Torruella first noted that for more than forty years, the Secretary of Labor's position, pursuant to non-binding departmental interpretations, has been that the majority of journalists are not exempt professionals under the statute. The court agreed with the District Court's rejection of the Monitor's argument that the interpretations should be declared invalid because of their age. There was little or no evidence suggesting that the newspaper employees performed "analytical, interpretative or highly individualized" work; that the reporters were "editorial writers, columnists, critics and `top-flight' writers of analytical and interpretative articles;" or that the work of The Monitor staff differed from the work done at other newspapers.

Chief Judge Torruella set forth the overtime provisions of the statute which require that employees must be compensated at a rate not less than one and one-half times their regular rate for all overtime hours. Overtime is defined as any employment in excess of 40 hours in a single workweek. The overtime compensation provisions, under 19 U.S.C. section 213(a)(1), do not apply to "any employees employed in a bona fide executive, administrative, or professional capacity..."

In reviewing the relevant interpretations for determining whether an employee is an exempt professional (29 C.F.R. sections 541.301, 541.3012, 541.303), Chief Judge Torruella observed that the learned professional exemption deals with occupations which have specific educational requirements and that the interpretations state that the exemption does not encompass "such quasi-professions as journalism..." The court also declined to find that the artistic professional exemption would extend to reporters whose work depends "primarily on intelligence, diligence, and accuracy," rather than on "invention, imagination, or talent." It was further found that the Monitor's employees were not within the scope of the statute's professional exemption.

The District Court's decision to accept the interpretations as persuasive authority was not clearly erroneous, continued the court, notwithstanding the newspaper's argument that the interpretations, which have not significantly changed since 1949, do not reflect the technological and societal changes confronting modern journalism.

Chief Judge Torruella cautioned that the court's decision should not be read to mean that all journalism work is nonexempt; that whether an employee is an exempt professional does not depend upon the title the employer applies to a position; and that the determination of whether the exemption applies to a given employee depends on the specific duties and characteristics required by the position rather than its actual title. However, in the instant case, the District Court did not err in finding that the subject employees were not exempt from the statute.

The court concluded by upholding the District Court's findings that the Monitor did not willfully violate the overtime provisions of the statute; that the Secretary was not entitled to injunctive relief barring the Monitor from committing future violations of the statute; and that there would be no award of monetary relief for any violations that allegedly occurred after the Department of Labor concluded its investigation at the Monitor.

In a separate lawsuit, Thomas R. Sherwood, a former employee of the Washington Post, argued that the newspaper violated the Fair Labor Standards Act by refusing to pay him an overtime rate for all hours worked in excess of 40 hours a week for the period from October 1, 1983 through November 1, 1989.

A Federal District Court in Washington, D.C. concluded that Sherwood was not entitled to overtime pay because his primary duty as a reporter involved work requiring invention, imagination and talent and his work therefore was exempt from the overtime provisions of the statute.

Judge Norma Holloway Johnson noted Sherwood's extensive experience as a journalist, his responsibilities and salary at the newspaper, and the fact that working at the Washington Post is "a prestigious, competitive job among journalists." According to Judge Johnson, Sherwood's job "required him to originate story ideas, piece together seemingly unrelated facts, analyze facts and circumstances, and present his news stories in an engaging style...[h]e was required to cultivate sources, utilize his imagination and other skills in seeking information, and continually develop his finely tuned interviewing skills."

The court also found that the responsibilities of reporters in the 1940s differed from the responsibilities of reporters in the 1980s at the Washington Post and that modern reporting jobs at the Post, such as the one held by Sherwood, require invention, imagination and talent.

Judge Johnson noted that the court was not obligated to follow the Department of Labor's interpretation of section 514.3, an interpretation which has not been revised since 1949, and which, in the court's view relies upon "an outdated conception of the news profession." Sherwood, in any event, was not the type of reporter who was given specific instructions to cover particular stories, and his work, as described above, was exempt from the statutory overtime provisions.

Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1995 U.S.App.LEXIS 1290 (1st Cir. 1995); Sherwood v. Washington Post, 871 F.Supp. 1471, 1994 U.S.Dist.LEXIS 20035 (D.D.C. 1994) [ELR 17:1:22]

Briefly Noted:

Jurisdiction/Clint Black Concert.

In a decision issued in January 1994, but only recently published, a Federal District Court in Georgia granted Susan Fountain's motion to remand an action against Clint Black to a Georgia trial court.

Fountain planned to attend the performer's concert scheduled for July 16, 1993 at Hilton Head, South Carolina; the ticket stated "rain or shine." Black canceled his performance due to a rainstorm that began after another performer had completed her portion of the concert and later held a make-up concert in Savannah, Georgia for all ticketholders.

Fountain sought certification of a class comprised of others who had attended the concert; reimbursement for the concert tickets; mileage and parking reimbursement; attorneys' fees; and $1 million in punitive damages.

Clint Black and the concert promoter petitioned to remove the claim to Federal District Court, alleging diversity and an amount in controversy exceeding $50,000.

In granting Fountain's motion, Judge Nangle noted that the $1 million amount in controversy was asserted on behalf of the entire class that Fountain sought to certify and did not confer federal jurisdiction over the action since it represented an aggregation of the claims of all putative members of the class.

After considering various approaches to the aggregation issue, the court determined that Fountain, in any event, would have to claim individually an amount in controversy exceeding $50,000.

Since Fountain's complaint did not assert an amount in controversy meeting the $50,000 jurisdictional requirement and the Black parties did not affirmatively show that the amount in controversy was sufficient to a legal certainty, the matter was remanded to a state trial court.

Fountain v. Black, 876 F.Supp. 1294, 1994 U.S.Dist.LEXIS 19816 (S.D.Ga. 1994) [ELR 17:1:24]

Copyright Infringement/Music.

A Federal District Court in New Jersey has granted a motion for default judgment sought by Broadcast Music, Inc. in a copyright infringement action against DeGallo, Inc., doing business as Club Cocomo, and other parties.

Judge Wolin found that the DeGallo parties engaged in willful copyright infringement, and permanently enjoined further violations of the copyrighted musical compositions owned by the complaining parties or any copyrighted musical compositions licensed by BMI. The court awarded damages of $3,500, rather than the $14,000 requested by BMI for the infringement of the seven copyrighted works at issue. The court observed that this amount was substantially more than the license fee (which would have been $702), and thus would serve the deterrent purposes of the statute. And the award was "within the upper ranges" of awards made by other courts in similar circumstances, measured as a multiple of the amount the DeGallo parties refused to pay. The court reserved judgment on that part of the proposed order relating to an award of attorneys' fees, pending additional information from BMI.

Broadcast Music, Inc. v. DeGallo, Inc., 872 F.Supp. 167, 1995 U.S.Dist.LEXIS 169 (D.N.J. 1995) [ELR 17:1:24]

Trademark Infringement/Fishing Lures.

Sports Design and Development, doing business as Bill Lewis Lures, manufactures fishing lures under the registered mark RAT-L-TRAP. Bill Lewis Lures sued Larry Schoneboom alleging trademark infringement.

A Federal District Court in Iowa described the differences in the lures, but noted that the packaging of Schoneboom's lures was identical to that of Bill Lewis Lures and that the only way to distinguish between the lures was through comparing the measurements of the items. The court granted Bill Lewis Lures' motion for a temporary restraining order, stating that the company demonstrated a prima facie case of infringement of the RAT-L-TRAP mark and trade dress and had a substantial likelihood of success on the merits of its claim under section 43(a) of the Lanham Act.

The court denied Bill Lewis Lures' request for the civil seizure of items from Schoneboom's home and prior business, but granted the company's request for expedited discovery.

Sports Design and Development, Inc. v. Schoneboom, 871 F.Supp. 1158, 1995 U.S.Dist.LEXIS 234 (N.D.Iowa 1995) [ELR 17:1:24]

Foreign Libel Judgment.

Vladimir Telnikoff brought a libel action in England against Vladimir Matusevitch. During the trial, according to Federal District Court Judge Urbina, the court, while not considering Matusevitch's degree of fault, determined that Matusevitch's use of inverted commas around certain words may have falsely misled readers to believe that Telnikoff actually wrote those words. Matusevitch argued that his statements were "plainly hyperbolic" in describing Telnikoff's political position. However, the British judgment was based on jury instructions which asked the jury to ignore the context of the challenged statements.

When Matusevitch brought an action seeking to preclude the enforcement of Telnikoff's libel judgment, Judge Urbina observed that there appeared to be no proof that Matusevitch made the statements with actual malice, and therefore was entitled to the constitutional protection for speech directed against public figures. Telnikoff, under Maryland law, held an unrecognized foreign judgment. And, continued Judge Urbina, because recognition and enforcement of a foreign judgment, "based on libel standards that are repugnant to the public policies of the State of Maryland and the United States, would deprive [Matusevitch] of his First and Fourteenth Amendment rights," the court granted summary judgment on behalf of Matusevitch.

Matusevitch v. Telnikoff, 877 F.Supp. 1, 1995 U.S.Dist.LEXIS 1352 (D.D.C. 1995) [ELR 17:1:24]

Adult Use Ordinance.

A Federal District Court in Chicago has ruled that BBI Enterprises, the owner and operator of the "Top Shelf" adult entertainment establishment was not entitled to a preliminary injunction barring the City of Chicago from enforcing its adult use ordinance.

Senior Judge Shadur noted that the ordinance, among other restrictions, prohibits the establishment of any adult use within 1,000 feet of any area zoned for residential purposes. A portion of the Top Shelf premises is about 969 feet from a residentially-zoned parcel. BBI's voluntary selection of its location, "which it could have known was too close to a residential area had it conducted a wholly feasible investigation of the zoning maps," would preclude the company from attacking the ordinance as applied to BBI, declared the court.

It then was noted that the ordinance did not eliminate all reasonable opportunities to engage in the adult entertainment business and that there was no basis for challenging the constitutionality of the ordinance on its face. In all, BBI did not sufficiently show the required likelihood of succeeding on the merits of its First Amendment claim.

BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890, 1995 U.S.Dist.LEXIS 1141 (N.D.Ill. 1995) [ELR 17:1:25]

Vintage Car Sale.

Spyder Enterprises, a corporation solely owned by Everett Anton Singer, agreed to purchase, for $255,000, a 1962 Lotus 24 Formula One vintage race car from Richard Ward. Singer claimed that it was represented that the car contained a particular engine, "a rare and fragile piece of machinery," according to Federal District Court Judge Trager, which traditionally had been paired with the Lotus 24 chassis. The car did not contain the engine anticipated by Singer and he sued to rescind the sale.

Judge Trager, after describing the development of Grand Prix racing and the equipment used in such races, found that Ward made affirmative fraudulent misrepresentations to Singer in order to induce the purchase of the car; that the car's provenance was highly material to Singer; and that Singer was entitled to the remedy of rescission and prejudgment interest.

Spyder Enterprises, Inc. v. Ward, 872 F.Supp. 8, 1994 U.S.Dist.LEXIS 18950 (E.D.N.Y. 1995) [ELR 17:1:25]

Advertising.

In July 1993, the Procter & Gamble Company began a television advertising campaign in which its Spic and Span products were compared to the products of an unnamed competitor. The unnamed product in each commercial was Lysol Deodorizing Cleaner, manufactured by L&F Products. The commercials indicated that the

Lysol product left a residue on an apparently clean surface, while the Spic and Span products did not leave a residue.

When L&F sued Procter & Gamble, a Federal District Court determined that the Procter & Gamble advertisements were neither false nor misleading and dismissed the complaint.

A Federal Court of Appeals has affirmed the District Court decision, stating that there was no clear error in the court's conclusion that product superiority was the only message conveyed by the commercials. L&F did not establish at trial that the message as to the products' cleaning effectiveness was false, stated Judge Altimari, who rejected the company's remaining arguments concerning the alleged use in the commercial of undisclosed devices constituting false advertising.

L&F Products v. Procter & Gamble Company, 45 F.3d 709, 1995 U.S.App.LEXIS 1534 (2d Cir. 1995) [ELR 17:1:25]

First Amendment.

As reported at ELR 16:2:23, a Florida appellate court found unconstitutional a statute which mandates criminal sanctions for identifying a victim of a sexual offense in any instrument of mass communication. Globe Communications was charged with violating the statute in connection with the publication, in April 1991, of two articles concerning the sexual battery allegedly committed by William Kennedy Smith on Patti Bowman.

In affirming the appellate court decision finding that the statute violated the free speech and free press provisions of both the United States and Florida constitutions, and was unconstitutional both on its face and as applied in this case, the Florida Supreme Court agreed that the "broad sweep" and the "underinclusiveness" of the statute were particularly troublesome given the mandate of criminal sanctions. The court declined to conduct the extensive rewriting and broadening of the statute's scope which would be required to construe the statute in a manner consistent with the Florida and federal constitutions and with legislative intent.

State of Florida v. Globe Communications Corporation, 648 S.2d 110, 1994 Fla. LEXIS 1871 (Fla. 1994) [ELR 17:1:25]

Golf Bystander Injury.

A Federal District Court in Kansas granted Ryoji Kurotsu's motion for summary judgment in a negligence action brought by Florence Ludwikoski. Ludwikoski claimed that she suffered facial injuries as a result of being hit by a golf ball allegedly hit by Kurotsu. At the time of the purported injury, Ludwikoski was sitting in her car in a driveway located across the street from the golf course; the golf ball apparently traveled over various fences and trees and into the open car window.

The court found that Ludwikoski did not present evidence to support a finding by a reasonable jury that Kurotsu hit his tee shot in a negligent manner; that Kurotsu, in the circumstances of the case, had no duty to give a warning prior to hitting his tee shot on the 18th hole; and that there was no question of material fact as to the adequacy of Kurotsu's warning when he recognized that his golf ball was heading off the course.

Ludwikoski v. Kurotsu, 875 F.Supp. 727, 1995 U.S.Dist.LEXIS 1377 (D.Kan. 1995) [ELR 17:1:26]

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Previously Reported:

The United States Supreme Court has let stand the Federal Court of Appeals decision in Ayeni v. Mottola (16:9:15) in which the court upheld the denial of qualified immunity to a Secret Service agent in an action involving the unauthorized taping, by a CBS "Street Stories" crew, of a government search.

Additional citations have become available for the following previously reported cases: Artwear, Inc. v. Hughes (16:6:25), 202 A.D.2d 76, 615 N.Y.S.2d 689; Continental Basketball Assn., Inc. v. Ellenstein (16:9:19), 640 N.E.2d 705; Copeland v. Hubbard Broadcasting (16:10:28), 526 N.W.2d 402, 23

Med.L.Rep. 1441; Jacksonville TV, Inc. v. Florida Department of Health & Rehabilitative Services (16:10:27), 23 Med.L.Rptr. 1254; La Cienega Music Company v. ZZ Top (16:10:13), 44 F.3d 813; Lark v. Post-Newsweek Stations (16:10:27), 1994 Conn. Super.LEXIS 3055, 23 Media L.Rep. 1329; National Basketball Assn. v. Williams (16:11:15), 45 F.3d 684; NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center (16:7:23), 879 P. 2d 6, 23 Media L.Rep. 1417; Shoen v. Shoen (16:11:11), 48 F.3d 412; South Boston Allied War Veterans Council v. City of Boston (16:10:22), 875 F.Supp. 891; US West, Inc. v. United States (16:9:10), 48 F.3d 1092; Stern v. Delphi Internet Serv. Corp., 1995 N.Y.Misc.LEXIS 197 (16:12:9). [ELR 17:1:26]

DEPARTMENTS

In the Law Reviews:

Columbia-Volunteer Lawyers for the Arts has published Volume 19, Numbers 1 and 2 of Columbia-VLA Journal of Law & the Arts with the following articles:

Exploiting the Artist's Commercial Identity: The Merchandizing of Art Images by Jane C. Ginsburg, 19 Columbia-VLA Journal of Law & the Arts 1 (1995)

So What Do We Name the Team? Trademark Infringement, the Lanham Act and Sports Franchises by Ted Curtis and Joel H. Stempler, 19 Columbia-VLA Journal of Law & the Arts 23 (1995)

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Ellipses...Anyone? Lish v. Harper's Magazine by Anthony J. Rella, 19 Columbia-VLA Journal of Law & the Arts 85 (1995)

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The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?) by David J. Goldstone, 46 Hastings Law Journal 335 (1995)

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The ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 13, Number 1 of Entertainment and Sports Lawyer, with the following articles:

Major Beleaguered Baseball: The Pincipals in Their Words by Allan H. (Bud) Selig and Donald Fehr, 13 Entertainment and Sports Lawyer 1 (1995)

The Baseball Monopoly as Public Utility: Is It Time for Regulation? by John C. Dodge, 13 Entertainment and Sports Lawyer 3 (1995)

The Brave New World: Baseball in the Twenty-First Century by Kenneth L. Shropshire, 13 Entertainment and Sports Lawyer 7 (1995)

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Book Review: Lords of the Realm: The Real History of Baseball by John Helyar, 13 Entertainment and Sports Lawyer 12 (1995)

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Broken Promises in the Aftermath of Cohen by Barbara W. Wall and John P. Borger, 13 Communications Lawyer 1 (1995)

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Censorship and Silencing by Katha Pollitt, 3 Temple Political & Civil Rights Law Review 19 (1994)

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In Search of a New Paradigm by Owen Fiss, 104 The Yale Law Journal 1613 (1995)

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Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces by Anne Wells Branscomb, 104 The Yale Law Journal 1639 (1995)

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[ELR 17:1:27]