PERSPECTIVE

The Death of Copyright in a Digital World: The Reports Are Slightly Exaggerated

by Alex Alben

Is Copyright Law dead? Does the steamroller of new digital technology threaten to flatten long-standing legal protections for works of fiction and art?

Posed by commentators from Wired Magazine to Forbes Magazine, these questions throw media moguls and copyright lawyers off balance. The specter of valuable works being digitally copied and widely distributed via online electronic services haunts copyright owners like the scene of the multiplying broomsticks in The Sorcerer's Apprentice. Confronted with an electronic frontier populated by brazen copyright pirates, authors (both corporate and individual) will keep their works off the market. Artists will lose revenue and the public will lose access to works that enhance our economy and culture.

Fortunately, the concepts of "duplication" and "distribution" embedded in American copyright law are flexible enough to deal with menacing new technologies. In historical context, copyright has coped with the invention of broadcast media, the photocopy machine, the VCR and other devices that seemed at the time of their invention to challenge core notions of ownership and control over copying.

When the Xerox 914 copier debuted in 1960, many magazine and book publishers feared the invention threatened their core business. By paying perhaps 20 cents to copy an article of interest, a potential consumer could dodge the purchase price of the larger publication. What if libraries allowed rampant photocopying of expensive journals? The right of a scholar to duplicate information for personal use conflicted with the then-existing 56 year copyright monopoly of the copyright holder of the article. Would scholarly journals go out of business if people could copy entire articles willy nilly? A suit posing this issue reached the Supreme Court in 1974 and was resolved in favor of institutions, such as research libraries, to allow for private copying. But Congress soon jumped into the act, adding Section 108 to the Copyright Act to prohibit systematic reproduction of material or reproduction of so many copies as to substitute for the need to buy or subscribe to the original work. Photocopiers didn't kill copyright law, they simply led to an evolution that shifted the balance between the competing interests of authors and readers.

As Stanford Law School Professor Paul Goldstein points out in his new book Copyright's Highway these cases illustrate the ongoing balance in the law of copyright between consumers' need for information and entertainment versus the need to protect the economic incentive of authors to create new works. Since the first Copyright Act of 1790, American jurisprudence has allowed individual courts the flexibility to decide whether instances of copying constitute a "fair use" or whether an author's exclusive right to display the work in public or distribute copies to the public for commercial gain has been violated. This built-in judicial flexibility, matched with timely major revisions by lawmakers in 1909, 1976 and 1992, has kept copyright law relevant with the arts and technology of its times.

Every author must fear that an unauthorized person could put the fruits of his labor - say a novel that took several years to write - into a series of "1's" and "0's," and distribute numerous copies of the file online or from computer to computer in a wide variety of digital formats. Digital processes have lowered the barrier of widespread perfect copying of music, pictures, text and video to the cost of a PC and an online connection. With 100 million PC's in the U.S. and 30 million users of on-line services, it seems impossible to monitor such traffic to detect instances of unauthorized copying. Legal notices posted in the membership agreements of commercial online services and bulletin boards have little deterrent effect.

To put it plainly, one runs a greater chance of being ticketed for jaywalking in New York City than being caught duplicating copyrighted material on the Net and printing it out on a home laser printer. Even worse, where photocopy machines and analog audio taping created bulky or imperfect copies of copyrighted works, the new digital processes create copies that are indistinguishable from the original.

Will the digital revolution break the copyright scale that has kept the rights of consumers and creators in balance for the past 200 years?

Two dynamic forces could come into play to prevent this doomsday scenario for copyright owners: First, the courts and Congress should interpret current law to prohibit digital copying for private use. Unlike home taping of television broadcasts, a potential consumer armed with the ability to make digital copies of a book, sound recording or video program clearly has no incentive to purchase the original product at the original price. The argument that these consumers are making copies simply for the convenience of viewing programs at a later time - an argument the Supreme Court found persuasive in the Sony Betamax case in 1984 - should not prevail in light of the danger of unlimited copying and redistribution of such programs to anyone connected to a home or office modem. Courts should decline to apply the "fair use" safe harbor whenever private digital copying displaces or damages the market for the original work.

Second, new enforcement mechanisms will probably evolve to hold the copyright balance in check. Even with the full support of Congress and American courts on the issue of private copying, copyright law would quickly become irrelevant if digital pirates were allowed to operate at will. Copyright pessimists contend that no extent of revision of the law - even criminal penalties for downloading files from online databases - will address the problem. Should authors therefore despair that copyrighted works can ever be protected in electronic digital environments and therefore withhold music, video, photos and other valuable works from online or other electronic distribution?

On the contrary, we can anticipate that the marketplace for unauthorized works will give birth to new enforcement mechanisms, and that digital technology itself will spawn new means to thwart unauthorized digital duplication.

For example, when the market for unauthorized copies of books grows to a level that threatens traditional distribution channels, publishers will detect this market and fund - singly or collectively - operations to monitor the most egregious pirates and shut them down. The Xerox experience is relevant here. Making single copies for individual use is impossible to monitor and probably does not damage magazine and book publishers. Widespread and systematic copying by universities and photocopy shops does harm the market for books and magazines and, under threat of litigation, these entities have recognized author's rights and prevented their customers from flagrantly duplicating copyrighted works.

The same holds true for record and video piracy. Wherever such activity has mounted to a level threatening the commercial market for music and videos, even in remote sites in Asia, studios and record companies have vigorously cracked down on the pirates. Despite a poor track record, China's recent acceptance of copyright norms bodes well for copyright enforcers.

Similarly, flagrant copying on specific Net sites and on commercial online services can be identified and "watched." The fact that a federal court recently held in Playboy Enterprises v. Frena, 839 F.Supp. 1552 (M.D. Fla. 1993) (ELR 16:4:10), that a bulletin board operator is guilty of copyright infringement occurring on his board, whether he knew of the activity or not, will speed this process along. In the future, where rampant piracy occurs on electronic bulletin boards, publishers will get wind of this activity and hire electronic sleuths to track the culprits down. The Sam Spade of the 21st Century may well trade in his revolver for a laptop armed with Netscape.

"Bounty hunting" presents another option that will protect copyrights in the digital world. In the realm of physical merchandise, Warner Bros. initiated a program in the 1980's to allow third party attorneys to bring suit against merchandise pirates and to keep any damages won against the infringers of Warner copyrights and trademarks. Unauthorized duplication of Batman merchandise dramatically decreased as a result. Copyright holders with significant intellectual property available in digital form could institute similar "bounty hunting," policies, quickly expanding their enforcement capabilities by "deputizing" private parties to root out digital copyright offenders. Those offenders who practice unauthorized copying on the widest scale would be the biggest targets of such private enforcement programs, creating a relatively efficient "enforcement market" as a result.

Finally, digital technology itself will come to the aid of copyright holders. Already, software and music companies offer "crippled" or scaled-down versions of their products on platforms where unauthorized copying is widespread. If the consumer wishes to acquire the entire product, he must purchase it in traditional channels. It's not too far-fetched to think that record companies and publishers will soon develop versions of their products that "self-destruct" within a certain time limit if the product is copied electronically without the permission of - and payment to - the owner. Technology that permits duplication of only a single copy of a software program already exists and can be widely utilized to prevent unauthorized copying of audiovisual works. With these protections in place, online platforms will serve as giant sample warehouses for authors and artists, whose revenues will increase as a result of the promotional benefits of electronic services.

The road to enforcement of "copy rights" in digital environments is surely scarred by electronic potholes and bumps. Yet despite the changes wrought by new technologies, the economic self-interests of copyright holders and the flexibility of American copyright law remain constant. Those who call for drastic revision of copyright law or the elimination of quaint notions about intellectual property, should recall that copyright law has enabled American authors, song writers and filmmakers to flourish at home and in world markets. We should strive to preserve the legal doctrines and economic incentives underpinning this system, even in a universe ruled by bits and bytes.

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LEGAL AFFAIRS

Bootleggers Beware: Copyright Law Now Protects Live Musical Performances, but New Law Leaves Many Questions Unanswered

by Lionel S. Sobel

The last time I attended a concert at Universal Amphitheater, ticket-takers at the entry gates went through a procedure that would have been an unthinkable invasion of customer privacy in almost any other context. They checked the contents of all carry-in bags including purses and the pockets of bulky jackets and coats, looking for tape recorders and videocams, neither of which were permitted into the amphitheater itself.

Tape recorders and videocams are perfectly legal in Los Angeles, even when carried concealed. But tape recorders and videocams are the tools of bootleggers (as well as news reporters and the parents of young children). Bootlegging is a serious problem for the music industry, and the most effective way to prevent it is to separate aspiring bootleggers from their equipment before performances begin. This form of self-help is extreme but has been necessary for two reasons. First, using courts and judges to punish bootleggers after the fact is cumbersome and only occasionally effective. Second, until recently, the question of whether the law prohibits bootlegging has varied from state to state and has been surprisingly uncertain. Reliance on the law, in other words, may have produced disappointing results, and that is why self-help - in the form of purse and pocket searches - has been necessary.

Using the law to punish bootlegging still is and always will be cumbersome. But now at least the law is clear that bootlegging is prohibited. This change was made in the final days of the 103rd Congress, with remarkably little fanfare. In one small part of the GATT Implementation Act, which was signed by President Clinton last December, Congress added anti-bootlegging provisions to the U.S. Copyright Act and Criminal Code. These provisions are now found in section 1101 of the Copyright Act (17 U.S.C. sec. 1101) and section 2319A of the Criminal Code (18 U.S.C. sec. 2319A). This new law is relatively short - relative, that is, to its conceptual significance and practical importance. It takes up only two pages in the official Congressional print of the statute (and even less space as reprinted in last month's issue of the Entertainment Law Reporter (ELR 17:1:3)).

In order to apply this new anti-bootlegging law, five issues must be considered:

-What conduct does the law prohibit?

-How and from whom must consent be obtained to avoid liability?

-What remedies does it make available?

-What affirmative defenses, if any, are recognized? And

-When did it become effective?

The answers to these five questions make it apparent just how significant a departure from existing doctrine this new law is. That in turn raises the question of why the bootlegging law was enacted at all, and especially why it was enacted in the way that it was - as a small part of a much larger statute and without elaborate Congressional hearings or widespread publicity.

Finally, one feature of the new law - its applicability to live performances - raises the issue of Congress's Constitutional authority to have enacted it all; and if there is a Constitutional foundation for this new law, that raises the question of whether Congress has the Constitutional power to enact all sorts of additional amendments to the Copyright Act, including amendments that once were thought to be beyond the Constitutional reach of copyright legislation.

Prohibited conduct

The new anti-bootlegging law prohibits four types of conduct. (The text of section 1101 is appended to this article.)

First, it prohibits making audio or video recordings of live musical performances, without the consent of the performers involved.

Second, it prohibits the reproduction of unauthorized audio or video recordings of live musical performances.

Third, it prohibits the distribution of unauthorized audio or video recordings of live musical performances. And

Fourth, it prohibits the transmission of live musical performances to the public, without the consent of the performers involved.

While these provisions seems clear enough, some points are worth emphasizing.

The new law applies to live musical performances only, not to speeches, lectures, or poetry readings, nor even to purely dramatic performances. Congress didn't focus on musical performances because it considered them worthier of protection than non-musical performances. Instead, the law focuses on musical performances for the same reason it was enacted in the first place - a point that will be covered later in this article.

The new law applies to live musical performances only, not to recordings of musical performances. This is because making and distributing unauthorized recordings and reproductions of recordings already was prohibited by the Copyright Act. That practice is known as "piracy" rather than "bootlegging," and piracy has been prohibited by federal copyright law since 1972.

Moreover, the new law prohibits the unauthorized transmission only of live musical performances, not of musical recordings. The copyright for sound recordings which has existed since 1972 has never included the public performance right; and every one of several attempts to amend the Copyright Act to give performers (and record companies) a public performance right in their recordings has failed because those attempts were vigorously and successfully opposed by broadcasters and music publishers. The incongruity of providing a public performance right for live performances, but not for recorded performances, also is explained by the reason the bootlegging law was enacted in the first place (a reason that is discussed later in this article).

Consent

By its own terms, the new law is violated by doing any of the prohibited acts "without the consent of the performer or performers involved." Thus, if consent is obtained, no violation occurs. But the law says nothing whatsoever about how consent should or may be obtained. Thus it appears that consent does not have to be in writing. Oral and even implied consent should be sufficient (though oral and especially implied consent are often more difficult to prove than written consent).

The new law quite clearly requires the consent of "the performer or performers involved," and because it says nothing further about consent, it leaves some important questions unanswered.

Suppose, for example, the "performers involved" are employees performing within the course and scope of their employment. Such performances would be works for hire - if the work for hire provisions of the Copyright Act apply to live musical performances - and thus the copyrights to such performances would be owned by the employer rather than by the performers. In such cases, consent from the employer, rather than the performers, would be sufficient and also necessary. But the new law seems oblivious to how often performers are employees, and it makes no special provision for obtaining consent when they are. Perhaps Congress did intend to require consent to be given by performers even in the employed-performer situation. But if so, this would be such a radical departure from copyright law in connection with every other right that Congress should have made this departure clear in the new law itself.

The new law also is completely silent about whether the right to consent may be assigned. That is, the law says nothing about whether performers may assign their right to consent. If they may, the law says nothing about whether the assignment should be accomplished the same way other rights of copyright are assigned. And if performers may and do assign their right to consent, the law says nothing about whether that assignment may be terminated 35 years later, the way assignments of other rights of copyright may be terminated.

These unanswered questions are not simply the academic musings of an ivory tower law professor. They are practical questions that should be asked in the real world, even by people who never engage in any behavior that has ever before been considered "bootlegging." They should be asked, for example, every time musicians and background vocalists enter a recording studio, because as written, the new law requires their consent to record their performances. This may be a classic circumstance for the application of an "implied consent" doctrine; but cautious record producers will get their written consent - before the recording session begins. These questions also should be asked by every broadcaster of parades and sporting events featuring musical performances by live bands. Again, unless and until Congress clarifies the new law, cautious broadcasters will require written consents from each of the members of all of the bands whose performances will be broadcast.

Remedies

Those who violate the new law are vulnerable to civil liability and even criminal penalties.

On the civil side, virtually all of the remedies that are available in other types of copyright infringement cases are now available in bootlegging cases as well. These remedies include injunctions, impounding and destruction of infringing recordings and videos, damages, profits, costs and attorney's fees. These are the remedies that have long been specified in sections 502 through 505 of the Copyright Act; and the new law makes these remedies available in bootlegging cases simply by providing that bootleggers "shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright."

Incorporating traditional copyright infringement remedies in this fashion - that is, by simple reference to sections 502 through 505 - was expedient, but it produces some puzzling questions. For example, one remedy available in all other types of copyright infringement cases is the seizure and forfeiture to the federal government of infringing goods as well as the equipment used to manufacture them. However, this remedy appears in section 509 of the Copyright Act - not in sections 502 through 505 - and thus this remedy is not available in bootlegging cases. Was this intentional or an oversight? And if it was intentional, why was it omitted? Neither question is answered by the new law or its meager legislative history. (More about the law's legislative history, below.)

The expedient of specifying bootlegging remedies by referring to "sections 502 through 505" leaves another question unanswered: are states (and their agencies and employees) immune from bootlegging liability? This question arises because until 1990, states were immune from copyright liability under the 11th Amendment to the Constitution; and when Congress eliminated that immunity, it did so in sections 501 and 511 of the Copyright Act, not in sections 502 through 505.

The seizure/forfeiture and state immunity questions make it appear as though Congress may have intended to provide fewer remedies for bootlegging than for other types of infringement. But other unanswered questions cast doubt on that interpretation.

For example, it is clear that Congress intended to permit awards of attorney's fees and statutory damages in bootlegging cases, because those remedies are specified in sections 504 and 505 of the Copyright Act - two sections that are referred to in the remedies provision of the new law. On the other hand, in most other types of infringement cases, attorney's fees and statutory damages are available only if the copyright to the infringed work was registered before it was infringed (or within three months after its first publication). This registration requirement does not appear in sections 504 and 505 however; it appears in section 412 of the Copyright Act. The new bootlegging law does not refer to section 412, however (nor do sections 504 or 505). Moreover, on two previous occasions, Congress did intend to permit awards of attorney's fees and statutory damages even where the work was not registered in advance; and in both of those cases, Congress expressly eliminated the advance registration requirement in the language of section 412 itself. The two cases are those involving infringements of live broadcasts and infringements under the Visual Artists Rights Act.

In other words, in the past, when Congress intended to eliminate advance registration as a requirement for attorney's fees and statutory damages, it knew how to do so, and it did it. Congress did not do so in the new bootlegging law. Ordinarily, this would easily lead to the conclusion that Congress did intend to require advance registration in order for performers to recover attorney's fees and statutory damages in bootlegging cases. But - and this is a big "but" - how are musical performers supposed to register copyrights to their live performances in advance (or for that matter, at all)? The registration provisions of the Copyright Act require the deposit of copies of the work being registered for copyright. In the case of copyright registration for live broadcasts, the Act expressly permits deposits of recordings of live broadcasts, which recordings also are required for live broadcasts to be protected by copyright at all. But the new bootlegging law does not require live musical performances to be recorded in order to be protected; and the new law says nothing at all about how performers' rights in their live musical performances are to be registered.

Registration is not only a requirement for attorney's fees and statutory damages, it also is a prerequisite to the very filing of a copyright infringement suit, in most cases. This is so because section 411 of the Copyright Act provides that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made," except in certain specified types of cases. Section 411 provides that registration is not required if the country of origin of the infringed work is a foreign country that is a member of the Berne Convention. Section 411 also expressly eliminates registration as a requirement in cases brought under the Visual Artists Rights Act. But section 411 says nothing about bootlegging cases - just as the bootlegging law says nothing about registration or section 411.

Perhaps all of this means that registration is not a prerequisite to filing suit under the new bootlegging law, nor a prerequisite to the recovery of attorney's fees and statutory damages. If not, these features of the bootlegging law are more generous to live musical performers than equivalent provisions of copyright law are to authors of other kinds. On the other hand, if registration is required, the Copyright Office will have to adopt regulations and procedures for doing so, without any guidance from Congress whatsoever.

On the criminal side, the new bootlegging law provides for penalties that include imprisonment, fines, and seizure, forfeiture and destruction of infringing recordings and videos. The substantive actions that constitute a criminal violation are the same as those that amount to a civil violation, with one important exception: the acts must be committed "knowingly and for purposes of commercial advantage or private financial gain" in order to be a criminal violation. (This is the same distinction that has long been made between civil and criminal copyright infringements of all kinds.)

Affirmative defenses

Affirmative defenses may be asserted in copyright infringement actions, as in other types actions, and thus it is logical to presume that affirmative defenses may be asserted in bootlegging cases as well. Here again however the language of the new law does not reflect what might logically be presumed. To illustrate the point, consider two affirmative defenses that are available in copyright infringement lawsuits: fair use, and lack of copyright protection for unauthorized derivative works that infringe the copyrights to the underlying works on which they are based.

The fair use defense is found in section 107 of the Copyright Act. The new bootlegging law makes no reference to fair use or section 107. Moreover, section 107 is not a defense to every right conferred in the Copyright Act. As written, section 107 is an exception only to those exclusive rights conferred by the "provisions of sections 106 and 106A." These rights are the traditional rights to reproduce, adapt, perform, display and distribute, and the more recent rights of attribution and integrity with respect to works of visual art. But the right to prohibit bootlegging is not found in section 106 or 106A; it is found in new section 1101, a section that is not referred to in the fair use provisions of section 107. In short, as the Copyright Act is written, fair use is not a defense to bootlegging. This raises the specter that the bootlegging law is itself an unconstitutional infringement of First Amendment free speech rights, because the existence of the fair use doctrine is one of the key reasons that courts have always found copyright law to be constitutional in the face of repeated Free Speech attacks on it.

As a general rule, derivative works are eligible for copyright protection, separate and apart from the protection granted to the underlying works on which they are based. However, a derivative work that uses underlying material "unlawfully" is not eligible for copyright protection. This loss of copyrightability is expressly provided for by section 103(a) of the Copyright Act. Suppose that performers publicly perform copyright-protected songs without a public performance license permitting them to do so. If their infringing performance is bootlegged, will they nevertheless be able to assert their rights under the new bootlegging law? The bootlegging law does not refer to section 103(a) or contain an equivalent provision of its own, so the answer would appear to be "yes," infringing public performers may assert their rights against bootleggers. But could Congress actually have intended such a result, and if so, why did Congress treat infringing live performers of music more kindly than performers who record music without mechanical licenses authorizing them to do so? (Sound recordings of copyright-protected songs would not be eligible for copyright if made without mechanical licenses, by virtue of section 103(a) of the Copyright Act.)

Effective date

The effective date of the new bootlegging law was December 8, 1994 (the date the Uruguay Round Agreements Act, also known as the GATT Implementation Act, was enacted). This means that the bootlegging law will be violated by any unauthorized audio or video recording, or any unauthorized transmission to the public, of a live musical performance occurring on or after that date. Reproduction and distribution of unauthorized audio and video recordings made on or after that date also will violate the bootlegging law.

Suppose, however, that a live musical performance took place prior to December 8, 1994, and an audio or video recording of it was made without the consent of the performers. That unauthorized recording would not have violated the bootlegging law, because it took place before the law became effective. Suppose further, however, that after December 8, 1994, someone reproduces and distributes audio or video recordings originally made before that date. Such conduct also would violate the bootlegging law. Moreover, as written, the bootlegging law would be violated by such conduct no matter how long ago the original bootlegged recording actually was made. In other words, it is now illegal to reproduce and sell a bootlegged recording originally made at a live musical performance that took place long ago - even as long ago as the 1960s or earlier.

Why bootlegging law was enacted

The dramatic significance of the bootlegging law is immediately apparent. As a practical and conceptual matter, this law adds radically new provisions to the Copyright Act - provisions that are far more revolutionary even than those contained in the Visual Artists Rights Act of 1990. This raises the question of why the bootlegging law was enacted at all, and especially why it was enacted in the way that it was - as a small part of a much larger statute and without elaborate Congressional hearings or widespread publicity. The answers to these questions are surprisingly clear.

The bootlegging law was required by the international agreement on Trade Related Aspects of Intellectual Property Rights - commonly known as "TRIPs" - which is an annex to the Uruguay Round revision of the General Agreement on Tariffs and Trade (commonly known as "GATT"). The reason the bootlegging law was enacted as part of a much larger statute is that the

Uruguay Round agreement required changes in countless areas of U.S. law, and those changes literally dwarf - in bulk - the changes that were required in copyright law.

The bootlegging law was enacted without elaborate Congressional hearings because Congressional approval of the Uruguay Round agreement, and adoption of the implementation bill doing so, were done on a "fast track" basis. This meant that members of Congress could vote yes or no on the entire package, but no amendments were permitted - not even for the correction of what now appear to have been drafting errors. Since there were no hearings, the legislative history is shockingly meager. The House Report on the GATT Implementation Act contains only one paragraph about its copyright provisions, and the Senate Report contains only two pages. The Clinton Administration did submit to Congress a Statement of Administrative Action analyzing the GATT Implementation Act; but the copyright discussion in this Statement is fewer than a dozen pages. This is the extent of the legislative history, and it fails to answer any of the questions raised by the bootlegging law itself.

There was little or no advance publicity about the bootlegging law, simply because other issues raised by U.S. adherence to the Uruguay Round agreement were more newsworthy.

The TRIPs agreement is an intellectual property code that requires all GATT members - which are now more properly referred to as World Trade Organization (or WTO) members - to provide certain minimum levels of protection for all types of intellectual property. TRIPs was added to GATT during the Uruguay Round of negotiations largely at the behest of the United States, Europe and Japan.

There are two primary reasons the U.S. sought an intellectual property code within GATT - two reasons, in other words, why the U.S. found the Berne Convention to be insufficient for the protection of U.S. copyrights. The first reason is that although the Berne Convention requires its members to provide a high level of substantive protection for copyrights, it requires very little in the way of remedies for infringements. Countries are eligible for Berne membership even if the only remedy found in their copyright laws is the remedy of seizure and destruction of infringing goods after they have been found to be infringing as a result of a civil lawsuit. Berne does not require countries to provide for the recovery of damages, profits, costs or attorneys fees, nor does it require countries to provide for preliminary injunctive relief or criminal penalties. The second reason is that the Berne Convention does not provide dispute resolution mechanisms for cases where one country (such as the U.S.) claims that another country is failing to comply with its obligations under Berne.

Because Berne is inadequate when it comes to remedies, the United States has resorted to "self-help" measures in dealing with some countries. The U.S. has imposed trade sanctions - or has threatened to - against countries that have not been providing adequate and effective protection for U.S. copyrights (and other types of intellectual property). The U.S. has found this to be an effective method for improving protection for U.S. copyrights abroad, because the U.S. is the world's leading customer for goods made in other countries. The imposition of tariffs on goods made in countries that do not respect U.S. copyrights - or the threat to impose tariffs on such goods - has been helpful in getting those countries to improve their copyright policies. However, some other countries have responded by asserting that the U.S. violates its own obligations under GATT when it imposes tariffs in response to copyright protection complaints, because prior to the Uruguay Round, GATT was not concerned with intellectual property at all. Now, by making respect for copyright a GATT obligation of all WTO members, the failure to respect copyright is a violation of GATT; and in due course that violation authorizes the imposition of trade sanctions as a matter of GATT law itself.

The U.S. also sought an intellectual property code as part of GATT because GATT did (and the WTO now does) have formal procedures for the resolution of disputes (unlike the Berne Convention which doesn't and never did).

TRIPs requirements

The new bootlegging law is a direct consequence of TRIPs, because protection against bootlegging is one of the intellectual property rights which TRIPs requires WTO members to provide. The requirement is found in Article 14(1) of TRIPs which mandates that performers have the right to prevent three things: the unauthorized audio recordings of their live performances, the reproduction of such audio recordings, and the unauthorized broadcasting of their live performances.

The actual language of TRIPs is somewhat awkward, but is worth quoting because it explains in part why Congress limited bootlegging rights to live musical performances, and did not grant such rights to lecturers or actors. TRIPs Article 14(a) states: "In respect of a fixation of their performance on a phonogram performers shall have the possibility of preventing . . . the fixation of their unfixed performance and the reproduction of such fixation . . . [and] the broadcasting . . . and . . . communication to the public of their live performance." When Congress implemented this provision of TRIPs in the new bootlegging law, Congress did more than TRIPs required, and arguably less too.

Congress did more than TRIPs requires, because the bootlegging law prohibits both audio and video recordings of live musical performances without the consent of the performers, while TRIPs itself only requires countries to prohibit unauthorized audio recordings. TRIPs' focus on audio recordings is reflected by its use of the word "phonograms." The word "`phonograms' means any exclusively aural [emphasis added] fixation of sounds of a performance or of other sounds." (This definition does not appear in TRIPs itself; it is quoted from Article 3 of the Rome Convention. The U.S. Copyright Act refers to phonograms as "sound recordings.")

Congress arguably did less that TRIPs requires, because TRIPs mandates that "performers" have the right to prevent the bootlegging of their "performance." TRIPs does not confine its benefits to musical performers nor limit its applicability to musical performances. Apparently, Congress concluded that the only types of performances that would be recorded on phonograms are musical performances; and no doubt, most performances recorded on phonograms are musical. But not all. Audio recordings of lectures may be made without the consent of the lecturer, as might audio recordings of dramatic performances and poetry readings. TRIPs requires that lecturers, actors and poets be given the right to prevent unauthorized audio recordings of their performances. The new bootlegging law fails to do so. Neither the law nor its legislative history explains why.

It is easier to explain why the bootlegging law grants performance rights for live performances only, and does not give performers (or their record companies) the right to prevent (or be compensated for) the unauthorized public performance or broadcast of their pre-recorded musical performances. The reason simply is that TRIPs only requires protection for live musical performances; it does not require a public performance right for the public performance of recordings. (In this respect, TRIPs differs from the Rome Convention which does require compensation for the broadcast or other public performance of "phonograms." U.S. copyright law does not contain such a right at the present time, and never has; and that is why the U.S. has never adhered to the Rome Convention.)

Constitutional foundation for bootlegging law

TRIPs explicitly requires that performers be given the right to prevent unauthorized recordings "of their of their unfixed performances," and the new bootlegging law fulfills this requirement by giving them the right to prevent unauthorized recordings of their "live musical performances." I have italicized the words "unfixed" and "live" in the two clauses just quoted, because these words raise a fundamental Constitutional issue insofar as U.S. copyright law is concerned.

In the United States, copyright protection has been available only to works that have been "fixed in [a] tangible medium of expression," and not to unfixed works. The fixation requirement appears in section 102(a) of the current Copyright Act, but it has been a feature of U.S. law for more than 200 years. The fixation requirement arises from the Constitutional source of Congress' power to enact copyright legislation in the first place - namely, Article I, Section 8 of the Constitution, which gives Congress the power to grant authors the exclusive right to their "Writings." While Congress and the Supreme Court have defined the word "Writings" broadly - so that it includes, for example, photographs and sound recordings - "Writings" has always been construed to mean something that is tangible - something, in other words, that is written or recorded or otherwise "fixed in [a] tangible medium." When Congress decided to grant copyright protection to live television broadcasts - in response to the fervent requests of sports teams and leagues whose games are televised live - Article I, Section 8 of the Constitution required Congress to grant such protection to a live broadcast only if "a fixation" of the broadcast "is being made simultaneously with its transmission."

The new bootlegging law abandons any pretext of requiring live musical performances to be fixed in order for performers to be protected. Congress did not, in other words, require performers to record their performances as they were being given. Since Congress only has the power to protect fixed works under Article I, Section 8 of the Constitution, the Constitutional basis for Congress' power to enact the bootlegging law must be some other provision of the Constitution. Neither the law, nor its meager legislative history, mentions this issue in any way.

This does not mean that the bootlegging law is unconstitutional. It simply means that another Constitutional basis for it must be found. The Commerce Clause is certainly an adequate Constitutional basis for the bootlegging law. Indeed, reliance on the Commerce Clause to amend the Copyright Act opens the door to all types of additional amendments that until now have been thought to be beyond the reach of copyright law. Now that Congress has shown it is willing to exercise its Commerce Clause power to create new rights of copyright, protection for all manner of unfixed works - including lectures, dramatic performances, and improvisational comedy - are possible. Moreover, under the Commerce Clause, Congress would have the power to enact legislation granting copyright protection to works that reflect industrious effort but no "creativity" of the kind previously required - protection for works such as comprehensive data bases and alphabetically arranged telephone directories.

In short, enactment of the bootlegging law was a milestone for musical performers - and perhaps for others in the "information industries" as well.

Appendix

Copyright Act section 1101 (17 U.S.C. 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"

Lon Sobel is the editor of the Entertainment Law Reporter and a professor at Loyola Law School where he teaches Copyright and Entertainment Law. Professor Sobel thanks David Nimmer for sharing the results of his own work and thinking about the new bootlegging law; they were extremely helpful in the preparation of this article. (However, if readers discover any errors in this article, attribute them solely to the author.) [ELR 17:2:6]

RECENT CASES

United States Supreme Court, in 6-3 decision, upholds suspicionless drug testing of student athletes

The Student Athlete Drug Policy adopted by School District 47J in Veronia, Oregon authorizes random urinalysis drug testing of students who participate in the district's school athletics programs. The United States Supreme Court has reversed a Federal Court of Appeals ruling (ELR 16:7:15) and, in a 6-3 ruling, determined that the policy does not violate the First and Fourteenth Amendments of the United States Constitution.

Justice Antonin Scalia, after describing the background of the district's adoption of the policy, reviewed the testing procedures. Students who intend to participate in sports must sign a consent form. Athletes are tested at the beginning of the season for their sport, and the names of athletes are placed in a weekly "pool" from which ten percent of the names are selected for random testing. Justice Scalia set forth the collection and laboratory procedures, and the school policies if there is a second positive test.

In the fall of 1991, James Acton, then a seventh-grader, signed up to play football. Acton was not allowed to participate because he and his parents refused to sign the testing consent forms. A Federal District Court denied the claims and dismissed the action. The Court of Appeals held that the policy violated the Fourth and Fourteenth Amendments and Article I, section 9 of the Oregon Constitution.

The Fourth Amendment provides that the federal government shall not violate the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." The Fourteenth Amendment extends this guarantee to searches and seizures by state officers, including public school officials. The United States Supreme Court has held that state-compelled collecting and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a "search" subject to the Fourth Amendment.

Justice Scalia noted that public schools are not required to obtain a warrant or to establish probable cause in order to conduct searches, and stated that the Fourth Amendment does not necessarily require an individualized suspicion of wrongdoing as the basis for a search.

Justice Scalia next considered the traditional view that unemancipated minors "lack some of the most fundamental rights of self-determination." The power over schoolchildren is "custodial and tutelary," and permits supervision and control that could not be exercised over free adults. Student athletes have even fewer privacy expectations, continued Justice Scalia, given the nature of public school locker rooms and the regulations to which such students generally are subjected, such as academic, insurance, and conduct requirements.

The Student Athlete Drug Policy provides that male students producing urine samples may remain fully clothed and that they are observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside. These conditions, commented Justice Scalia, are nearly identical to those encountered in public restrooms; the privacy interests involved in the process of obtaining the urine sample would be "negligible," in the court's view.

In turning to the information the urinalysis discloses concerning a subject and the materials he/she has ingested, the court pointed out that the drugs for which the samples are screened are standard and do not vary according to the identity of the student. The results of the tests are disclosed only to a limited class of school personnel, and are not turned over to law enforcement authorities. Any invasion of privacy in connection with the testing procedures was "not significant," stated the court.

Justice Scalia next determined that the nature of the government's concern - deterring drug use by schoolchildren - was important, and "perhaps compelling." The drugs screened by the District's policy - amphetamines, cocaine and marijuana - have been demonstrated, according to the court, "to pose substantial physical risks to athletes." Justice Scalia stated that the court was "not inclined to question" the District Court's conclusion that a large segment of the school district's student body "was in a state of rebellion" which was "being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture."

In all, the school district's policy was reasonable and therefore constitutional, declared the court, although cautioning against the assumption that suspicionless drug testing will be upheld in contexts other than those involving the government's responsibilities, under a public school system, "as guardian and tutor of children entrusted to its care." Justice Scalia remanded the matter for further proceedings consistent with the opinion.

Justice Ruth Bader Ginsburg's concurrence expressed the understanding that the court's opinion reserved the question as to whether the school district, on the basis of the evidence presented, constitutionally could impose routine drug testing not only on students seeking to participate in team sports, but on all schoolchildren. Justice Ginsburg noted that the court adverted to the reduced privacy expectation and closer regulation of student athletes; to the fact that drug use by athletes may cause immediate physical harm not only to users, but to their teammates; and to the fact that the most severe sanction under the school district's policy was suspension from extracurricular athletic programs.

Justice Sandra Day O'Connor, with whom Justice John Paul Stevens and Justice David H. Souter joined in dissent, pointed out that the court's decision may subject millions of students, who are not suspected of drug use, to an intrusive bodily search. Justice O'Connor commented that mass, suspicionless searches generally have been considered per se unreasonable within the meaning of the Fourth Amendment, and that judges or government officials should not determine on policy grounds the advantages or disadvantages of blanket searches or those based on individualized suspicion.

After careful historical review, the dissent stated that "[p]rotection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment." Furthermore, the view that mass, suspicionless searches, however evenhanded, are generally unreasonable "remains inviolate in the criminal law enforcement context...at least where the search is more than minimally intrusive."

Justice O'Connor pointed out that there are safeguards against abuses of a suspicion-based testing program; that the required level of suspicion in the school context is objectively reasonable suspicion; that schools already maintain adversarial, disciplinary schemes in areas of student wrongdoing other than drug use; and that a suspicion-based scheme is significantly (emphasis by the dissent) less intrusive in that it invades the privacy of a few students rather than many and gives potential search targets substantial control over whether they will, in fact, be searched.

In the instant case, observed the dissent, the evidence introduced by the school district included information about particular students "acting in ways that plainly gave rise to reasonable suspicion of in-school drug use - and thus that would have justified a drug-related search..." Thus, stated the dissent, imposing suspicion-based testing, along with encouraging participation in the district's voluntary drug testing program, would have helped the school district with its drug problem while preserving the Fourth Amendment rights of students such as James Acton.

Justice O'Connor stated that even if suspicionless drug testing was reasonable in the instant case, the school district's program violated the Fourth Amendment with respect to imposing drug testing in the 7th and 8th grades - there was no evidence of a drug problem in these grades, which Acton attended when the lawsuit began. Even as to the high school, according to the dissent, it was unreasonable to choose student athletes as the class to subject to suspicionless testing. Although there was evidence of a rise in "drug-related disorder" in the schools, the evidence of a drug-related sports injury problem was "considerably weaker." The school district could have focused on the students who had violated published school rules against severe disruption in class and around campus.

The school district's policy was too broad and imprecise to be reasonable under the Fourth Amendment, concluded the dissent.

Veronia School District 47 J v. Acton, 63 U.S.L.W. 4653, 1995 U.S.LEXIS 4275 (1995)[ELR 17:2:13]

NBA's ban of Chicago Bulls games on WGN violates antitrust laws but superstation fee may be valid, rules Federal District Court

During the course of the litigation concerning the National Basketball Association's superstation rules (see ELR 15:3:6; 14:10:6; 12:12:11), a Federal District Court in Chicago enjoined the NBA from reducing to 20 (from 25) the number of games involving the Chicago Professional Sports Limited Partnership's NBA team, the Chicago Bulls, that WGN Continental Broadcasting Company could televise as a superstation. The court concluded that the NBA's proposed reduction in the number of Bull's games was "a naked and unreasonable" restraint on output and distribution which violated federal antitrust laws and was not exempt from the antitrust laws by the Sports Broadcasting Act.

A Federal Court of Appeals affirmed the District Court decision and the United States Supreme Court, in 1992, denied certiorari.

The NBA agreed that for the 1991-1992 season, superstations could carry 30 games; the NBA extended the agreement for the 1992-1993 and 1993-1994 seasons. For the 1994-1995 season, the NBA agreed only to the 25 games specified in the injunction.

In the instant action, the NBA, claiming to have effected certain measures suggested by the Federal Court of Appeals, sought to have the injunction lifted and vacated. The NBA argued that it was entitled to prohibit any distribution of Bulls games by WGN, or if not, that it might impose a superstation fee or tax on the transmission of Bulls' games by WGN.

The Bulls and WGN sought the rights to televise up to 41 Bulls home games on WGN.

Judge Will pointed out that except for the actions taken pursuant to the Court of Appeals' suggestions, the NBA remains a league of professional basketball teams, each individually owned and controlled although subject to league rules. The court nevertheless proceeded to consider the significance of the NBA's actions.

In its previous decision, the court discussed the organization of the NBA and its member teams and concluded that the NBA is a joint venture of rival teams, "necessarily cooperating in the production of games, yet competing for media attention, fan support, general managers, coaching staffs, players, championships, prestige and, last but not least, profits."

The NBA argued that the "economic reality" of its operations demonstrated a collective interest similar to that of a corporation and its wholly owned subsidiary, and that the NBA therefore was exempt from antitrust liability under section 1 of the Sherman Act. Judge Will stated that the relationship between the NBA and its member teams did not demonstrate the requisite "singularity of purpose and control." Again, the NBA teams are actual competitors, as noted above, both on and off the court. Teams keep their own profits and generally earn more for themselves than they do through their combined efforts as a league.

Furthermore, each team is independently owned and operated, elects its own directors and officers, hires it own employees, keeps its own profits and makes its own financial and investment decisions. The court rejected the NBA's claim that the individual teams have no economic significance of their own and found that the NBA was a joint venture of "two or more entities that previously pursued their own interests separately."

The NBA teams cooperate to insure that the quality of the game is maintained, but "when independent actors join in order to achieve mutual benefits, or even to accomplish what they could not on their own, the result is not automatically exempt from antitrust scrutiny," continued Judge Will; thus, the teams were capable of colluding in violation of section 1 of the Sherman Act.

The court proceeded to discuss the effect of the transfer of the teams' copyrights to the NBA. The NBA previously had acted as an agent for the teams with respect to television and radio over-the-air and cable contracts, and with respect to merchandising copyrighted products. Pursuant to the transfer, the NBA ostensibly owns all team copyrights; however, the NBA authorized the individual teams to continue to license local and regional over-the-air and cable television, as well as radio transmissions of their games and the sale of copyrighted products in their own stadiums.

Furthermore, observed Judge Will, the NBA, since acquiring ownership of the copyrights, entered into several new contracts, including contracts with NBC and the Turner TNT cable network and superstation WTBS. The contracts identify the NBA, not as a licensor or principal, but, again, as the agent for the teams.

In all, the court found that there was no change in either the teams' rights to enter into contracts involving local and regional television or radio transmission of NBA games and the sale of other copyrighted products, or in the NBA continuing to act as agent for the teams. The transfer of the teams' copyrights to the NBA did not immunize the NBA from the application of the antitrust laws.

Judge Will proceeded to find that the NBA's decision to restrict the availability of games in the national television market might restrain trade "beyond that contemplated by the copyright laws." The NBA presented no evidence that it suffered any economic loss as a result of the superstation telecasts of NBA games, or that it would have sold more games to NBC, Turner, or any other national television distributor, or received more income if WTBS and WGN had not each distributed 30 NBA games for the past three years; the restraint therefore clearly was not necessary to protect the teams' or the NBA's interests in their copyrights.

In turning to the application of the Sports Broadcasting Act, Judge Will recalled that the court previously had concluded that the NBA was not entitled to antitrust protection under the statute because the Bulls, not the NBA, both owned and licensed the rights to the five games that were transferred to WGN. The Court of Appeals agreed that the statute applies only when a league transfers rights to sponsored telecasting and did not apply to the NBA's attempts to limit the distribution by the Bulls of their games on WGN.

Judge Will found that the effect of various resolutions adopted by the NBA and the new NBC contract, so far as the individual team's local and regional television arrangements are concerned, is that those arrangements were the same as they were before the rights to televise all 1107 regular season NBA games were "ostensibly" given to NBC. NBC, upon receiving the rights, gave back the rights to all but 25 or 26 games and the NBA authorized the individual teams to continue with existing contracts or to enter into new contracts with respect to local and regional over-the-air and cable televising of their games. The NBC contract did not impact on the NBA-Turner enterprises contract, since Turner only contracted for 70 of the 85 excepted national cable regular season games, 45 on TNT and 25 on WTBS.

The court, after careful evaluation, determined that the resolutions adopted by the NBA did not bring the restriction on superstation broadcasts within the Sports

Broadcasting Act. The only change in the prior arrangements was that the member teams no longer were authorized to enter into contracts for telecasts of games with superstations (except that the contract between the NBA and NBC recognized the Bulls and WGN's rights to televise 25 games). As analyzed by Judge Will, the ultimate effect of the NBA- NBC agreement would be to "drastically limit the number of games shown in the national marketplace" the agreement would black out throughout most of the country all but the 25 games shown on NBC and the 85 games which may be shown on national cable networks or superstations. The remaining games will be broadcast only to viewers in the local or regional areas of the two teams engaged in the particular game. Antitrust immunity was not available because the statute "does not grant a blanket exemption for broad reductions in output as the NBA-NBC contract seeks to do."

For Judge Will, the adoption of the resolutions, which essentially resulted only in eliminating 30 Bulls games over superstation WGN, was "an extraordinary exercise in elevating form over substance to the detriment of the consuming public, and is an even more significant naked restraint than the elimination of 5 games which we and the court of appeals previously found were not protected by the NBA."

The court again rejected the NBA's argument that its actions in further reducing superstation telecasts and eliminating the ability of individual teams to have their games telecast in the national market were ancillary to a lawful purpose and necessary to promote competition. Judge Will stated that the broadcast resolutions were a horizontal agreement among competitors to divide markets and restrain output. Instead of attempting to reduce the number of Bulls games telecast on WGN by 5, the NBA sought to exclude WGN altogether, place an overall limit on superstation telecasts, prohibit individual teams from contracting with superstations, and ultimately reduce the number of games televised nationally as well as the number of consumers who can see them.

The court, among other factors, noted that the superstation telecasts have not reduced the revenues that the NBA or other teams received from the national, regional and local distribution of their products, and that under the new NBC and Turner contracts, the NBA may enjoy substantial increases in national television revenues. There was no evidence that superstation telecasts led to financial instability within the NBA or resulted in a greater competitive disparity among the teams. Any restraint on WGN would not enhance the goal of creating a competitive alliance within the NBA and was not the most effective, nor the least restrictive, method for reaching that goal. Judge Will concluded that the attempt to prevent WGN and the Bulls from televising any games violated Section 1 of the Sherman Act as did the earlier attempt to reduce the number of games from 25 to 20.

The NBA further argued that its contract with NBC permits up to 85 games to be televised on cable networks or superstations and that it contracted with WTBS to carry 25 games. The court rejected the argument that the ban on individual teams contracting with superstations was not an unreasonable restraint, and found that the superstation ban violated the antitrust laws in its application to the transmission of Bulls games on WGN.

The Bulls also challenged the NBA's resolution prohibiting any team from televising its games on a superstation on the same night that any game is being shown on any national cable network. The court declined to find at the present time that the superstation blackout is a restraint on output.

Judge Will, turning to the superstation fee, noted that the member teams, in April 1993, agreed that the NBA would assess a fee for team-licensed national telecasts in order to prevent "free-riding," and argued that the fee was lawful because it would require the Bulls to pay no more than the fair market value of the superstation broadcasts. After careful consideration, the court stated that some sort of fee would be reasonable and should be upheld, but cautioned that any superstation fee "may not denigrate the consumers' interests by increasing the costs and decreasing the output of games nationwide." Judge Will left it to the parties to negotiate a reasonable fee; if they fail to do so, the court will consider the matter further.

The court concluded by modifying its previously entered injunction to the extent of changing the number of Bulls home games which may be distributed by WGN from 25 to not less than 30.

Chicago Professional Sports Limited Partnership v. National Basketball League, 874 F.Supp. 844, 1995 U.S.Dist.LEXIS 1019 (N.D.Ill. 1995)[ELR 17:2:14]

Virginia Supreme Court upholds damage award to former football player John Riggins in invasion of privacy action

The ex-wife of former football player John Riggins arranged to sell the couple's former home. In a flyer describing the property, Ms. Riggins, a real estate salesperson associated with Town & Country Properties, used the phrase "John Riggins' Former Home."

Riggins brought a lawsuit alleging various causes of action arising from the unauthorized use of his name for commercial purposes. A Virginia trial court jury awarded Riggins compensatory damages of $25,000 and punitive damages of $28,000 on his statutory right of privacy claim.

Virginia Supreme Court Judge A. Christian Compton noted that code section 8.01-40(A), which is substantially similar to New York Civil Rights Law sections 50/51, establishes a cause of action if a person's "name, portrait, or picture" is used for "advertising purposes or for the purposes of trade" without written consent. Riggins' name was used for advertising purposes and was not merely incidental to the flyer's commercial message. The court, stating that there was no "informational" aspect to the flyer, rejected the argument that the flyer was commercial speech protected by the First Amendment.

The court also rejected the argument that an intangible right, such as a name, cannot be converted. Judge Compton observed that under state law, "one holds a property interest in one's name and likeness." Conversion occurs, as in the instant case, when a party uses another's personal property as its own without the owner's consent.

Judge Compton proceeded to find that the trial court did not abuse its discretion in admitting the testimony of a sports marketing executive who expressed the view that Riggins might expect a fee of about $50,000 for the use of his name on a flyer such as the one at issue, and that there was sufficient evidence to support the jury's assessment of compensatory damages. However, although determining that the proper standard was used for the award of punitive damages, the court reduced the amount of the award to the amount sued for, $25,000, and affirmed the judgment as modified.

Town & Country Properties, Inc. v. Riggins, 1995 Va.LEXIS 54 (Va. 1995)[ELR 17:2:16]

Court affirms $20,000 damage award to contract advisor in representation of NFL football player

Bruce Evon Pickens and Total Economic Athletic Managements of America, Inc., doing business as Team America, disagreed as to whether Pickens hired Team America to act as his contract advisor in negotiating his National Football League player contract. Pickens claimed that he signed a nonbinding form contract and that before the negotiations began, he engaged another contract advisor who actually negotiated the contract. Team America was awarded a $20,000 judgment entered on a jury verdict against Pickens.

A Missouri appellate court has upheld the judgment.

Judge Robert G. Ulrich noted that Pickens signed a series of contracts with the Atlanta Falcons which provided for total compensation and bonuses of about $4 million and other incentive bonuses; the contracts also provided for a guaranteed signing bonus of about $2.54 million payable over five years. Pickens allegedly agreed to pay Team America four percent of all income received by Pickens under his NFL players contracts, excluding certain bonuses and incentives.

The court stated that in the context of professional sports, the player's breach of an agency agreement does not necessarily entitle the agent to a commission. The jury was instructed to award Team America the sum which the jury believed would have been due the company under the representation contract. The $20,000 damage award appeared to Judge Ulrich to be within the range of the evidence and was not unwarranted; the trial court's denial of a new trial on damages was not a clear abuse of discretion.

Total Economic Athletic Managements of America, Inc. v. Pickens, 1995 Mo.App.LEXIS 765 (Mo.App. 1995)[ELR 17:2:17]

Former Chicago Bears player is entitled to wage-loss differential award after career-ending injury

Ted Albrecht was a first round draft choice of the Chicago Bears in 1977 and played as an offensive lineman from 1977 through 1981. In April 1982, Albrecht suffered disc problems after performing exercises at the Bears training camp and underwent back surgery. Albrecht was on injured reserve for the 1982 season; he was paid a salary of $130,000, but did not play.

Albrecht resumed practicing with the Bears at the 1983 training camp, but then decided to resign from professional football.

An Industrial Commission arbitrator awarded Albrecht temporary total disability benefits for about 67 weeks and found that Albrecht was fifty percent permanently disabled under section 8(d)2 of the Workers' Compensation Act. Although acknowledging that Albrecht was forced to change careers due to the injury, the arbitrator determined that Albrecht was not entitled to a wage-loss differential award under section 8(d)1 of the statute.

The Commission affirmed that portion of the arbitrator's decision denying an award under section 8(d)1 and reduced the arbitrator's award from fifty percent to thirty percent under section 8(d)2.

An Illinois trial court, in confirming the Commission's decision, referred to testimony indicating that the average playing time of an offensive lineman is less than ten years. The court stated that any presumption that "but for" his injury, Albrecht could have continued playing football was not applicable and found that Albrecht failed to prove an impairment of earning capacity.

An appellate court has found that Albrecht should have been awarded a wage-loss differential award under section 8(d)l as a matter of law.

Judge Colwell stated that the evidence created a presumption that, but for Albrecht's injury, he would have been fully performing his duties with the Bears after 1983; that professional football players are skilled workers protected by the statute; that any shortened work expectancy did not preclude Albrecht from receiving a wage-loss differential award beginning in 1983 when Albrecht started a travel business; and that the award would be based on the difference between Albrecht's 1982 salary of $130,000 and the amounts he actually earned in the years after the injury.

Presiding Judge McCullough would have ruled that the decision granting an award under section 8(d)2 was appropriate, stating that Albrecht's injury partially incapacitated him from engaging in his usual and customary employment but did not impair his earning capacity.

Albrecht v. Industrial Commission, 1995 Ill.App. LEXIS 148 (Ill.App. 1995) [ELR 17:2:17]

Delaware court rejects challenge involving Credit Lyonnais foreclosure of security interest in MGM and Pathe stock

In May 1992, Credit Lyonnais Banque Nederland N.V. held a perfected security interest in 98 percent of the stock of MGM/UA Communications Corp.; the bank had acquired the stock in connection with a $400 million loan to Pathe Communications Corporation, the then owner of the MGM stock. Credit Lyonnais acquired, at the same time, a perfected security interest in 89 percent of Pathe's stock from Pathe's "parent," Melia International N.V. As described by Chancellor Allen of the Delaware Chancery Court, MGM was the operating entity - it owned a film studio and other assets.

When Credit Lyonnais' loans to the Pathe parties were in default, the bank elected to foreclose on the MGM stock and also elected to foreclose on the 89 percent of Pathe stock that secured its loans to Melia. In connection with the foreclosure sale of the stock, Credit Lyonnais extended to the public shareholders of Pathe an opportunity to sell their stock to the bank at the market price of $1.50 per share.

An individual identified only as Solomon, purporting to represent the class of public shareholders who owned ten percent of Pathe's common stock, challenged the tender offer in an action filed in May 1992. Solomon apparently did not pursue the action and in April 1994, the Pathe parties moved to dismiss the complaint.

Chancellor Allen, after careful review, found that Solomon's amended complaint did not state a claim upon which relief may be granted. The complaint did not allege facts tending to show that the challenged transaction was unfair; there was no allegation that Pathe possessed rights or claims that the company could have used to prevent the foreclosure; and the financial pressure on minority shareholders did not render the tender offer actionably coercive, stated the court, in rejecting the "conclusionary" allegations of the complaint.

Solomon v. Pathe Communications Corp., 1995 Del.Ch.LEXIS 46 (Del.Ch. 1995)[ELR 17:2:18]

Delaware Chancery Court issues pre-trial rulings in action challenging Tri-Star acquisition of Coca-Cola assets

A class of stockholders of Tri-Star Pictures, Inc. challenged a 1987 transaction in which Tri-Star acquired certain assets of the Entertainment Business Sector of the Coca-Cola Company in exchange for about 75 million shares of Tri-Star common stock.

In November 1989, Sony USA acquired Tri-Star in a cash-out merger that eliminated Tri-Star's public stockholders. Tri-Star, Coca-Cola and the persons who were Tri-Star's directors at the time of the 1987 transaction moved to dismiss the stockholders' complaint. The Tri-Star parties alleged that as a result of the merger, the stockholders no longer were Tri-Star stockholders and thus lacked standing to maintain the action.

After lengthy litigation, the Delaware Chancery Court set the matter for trial in May 1995. Prior to trial, Judge Jacobs granted separate motions for summary judgment made by Ira C. Herbert and Frances T. Vincent, Jr. and Michael Fuchs, who were Tri-Star directors at the time of the 1987 transaction. It was noted that these individuals did not attend or otherwise participate in the Tri-Star board meeting at which the transaction was approved and did not vote on that transaction, and did not play "any role, open or surreptitious, in formulating, negotiating or facilitating the transaction complained of."

The court then denied a motion for partial summary judgment sought by E. Thayer Bigelow, Jr. and Joseph J. Collins (sometimes collectively referred to by the court as the HBO/Time directors) with respect to the claim that they breached their duty of loyalty by approving the 1987 transaction. Judge Jacobs stated that further factual inquiry would be required to determine "the intricacies of the corporate relationships economic subtleties of the [transaction]."

In re Tri-Star Pictures, Inc., Litigation, 1995 Del.Ch. LEXIS 27 (Del.Chancery Ct. 1995)[ELR 17:2:18]

Prime Ticket obtains $1 million award in civil contempt action against cable company

Prime Ticket Network is a cable television programmer which provides sports programs to franchised cable television systems in several states. Prime Ticket distributes its programming by sending a scrambled signal to an in-space satellite; the satellite bounces the scrambled signal back to descrambling devices on earth, and the signal then is transmitted to subscribers.

Prime Ticket sued British American Communications, claiming that the cable company willfully violated the Communications Act and the Copyright Act by "pirating" Prime Ticket's programming. It was alleged that British American illegally intercepted and descrambled Prime Ticket's satellite transmitted signal and sold the signal to apartment and condominium complexes.

A Federal District Court, in July 1994, entered summary judgment in favor of Prime Ticket, and permanently enjoined British-American from receiving, descrambling and distributing Prime Ticket's programming without the programmer's written consent. The court ordered British American to pay Prime Ticket $165,000 in statutory damages and attorneys' fees.

In April 1995, Federal District Court Judge Consuelo B. Marshall held British American and its officers in civil contempt for failing to obey the terms of the permanent injunction.

Judge Marshall rejected British American's argument that the settlement agreement, which set forth the conditions of the injunction and statutory damage award, was a contract of adhesion. British American's president, a licensed attorney, participated in negotiating the terms of the agreement; the company had no legal duty to accept the terms of the agreement and could have sought a judicial determination of the statutory damage award and conditions of injunctive relief.

The court then noted that even if the settlement agreement were an adhesion contract, British American still would be bound by its terms since there was nothing objectively unreasonable about the agreement and requiring British American to adhere to the terms of the agreement was "far from unconscionable or unduly oppressive, given [the company's] willful violations of federal law."

British American's claim that it was fraudulently induced to sign the settlement agreement also was rejected - it did not appear to the court that Prime Ticket made any explicit or implied promise to allow British American to purchase Prime Ticket programming.

The court determined that British American's unlawful distribution of Prime Ticket programming occurred during a period of 73 days - the number of days from the discovery of British American's challenged conduct to the date when Prime Ticket filed its motion for contempt. Thus, there were 73 violations of both the Communications Act and the Copyright Act. Judge Marshall, noting the willfulness of British American's conduct, ordered the company and two of its officers to pay Prime Ticket $511,000 for the Communications Act violations ($7,000 per violation x 73 violations) and $511,000 for its Copyright Act violations, for a total award of over $1 million.

Justice Marshall stated that the amount would justly compensate Prime Ticket for British American's "persistent and highly culpable conduct" and would service to deter future illicit conduct. The court also awarded Prime Ticket about $15,000 in legal fees and about $1,000 in investigative expenses.

Prime Ticket Network v. British American Communications, Case No. CV 92-7457 (C.D.Ca., April 21, 1995), Prime Ticket Network v. British American Communications, Case No. CV 92-7457 (C.D.Ca., July 18, 1994)[ELR 17:2:19]

Minors may sue television station for intentional infliction of emotional distress

Mark Saxenmeyer, a KOVR-TV reporter, interviewed several minor children about the tragic murder-suicide which had occurred in the neighborhood earlier in the day. The children, prior to the interview, were unaware of the death of their friends. Saxenmeyer, according to California appellate court Presiding Judge Puglia, knew that the childrens' parents were not present when he questioned the children.

The minors and their parents brought a lawsuit alleging, in part, emotional distress.

Judge Puglia noted that the minors "were obviously too young either to consent to an intrusion by strangers into a private residence or to exercise any control over strangers who appeared there. It does not appear that they were given any choice as to whether their images and voices would be captured on videotape and broadcast publically [sic] on television. The videotape reveals an uninvited, intrusive encounter by adult strangers with children of tender years not in a public place but in their home."

Judge Puglia then stated that even if the reporter was merely gathering news when he began the interview, it could be reasonably inferred that Saxenmeyer abruptly informed the minors that "the mom has killed the two little kids and herself" in the hope of eliciting a "newsworthy" emotional reaction. A jury also could find, continued the court, that a television reporter "who deliberately attempts to manipulate the emotions of young children for some perceived journalistic advantage has engaged in conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency..."

The fact that KOVR did not broadcast the interview would not necessarily preclude a finding of extreme and outrageous conduct.

Judge Puglia distinguished between the inference of tortious conduct which may be drawn from the videotape at issue and legitimate news gathering, and emphasized that if it is found that Saxenmeyer sought to obtain an emotional reaction from the minors "for the voyeuristic titillation" of KOVR's viewers, "this would be shameless exploitation of defenseless children, pure and simple, not the gathering of news..."

The court denied KOVR's petition for peremptory writ of mandate directing the trial court to vacate its denial of KOVR's motion for summary judgment, and vacated the stay of proceedings.

KOVR-TV, Inc. v. Superior Court, 31 Cal.App.4th 1023, 37 Cal.Rptr.2d 431, 1995 Cal.App.LEXIS 43 (Ca.Ct. App. 1995)[ELR 17:2:19]

School district may order removal of profane language from student video

Section 48907 of the California Education Code regulates student publications and provides, in part, that advisors of such publications are responsible for maintaining "professional standards of English and journalism." During the 1991-1992 academic year, several students in the Tulare Joint Union High School District, wrote a script for a video entitled "Melancholianne" in connection with a Film Arts class. The students proposed to address the problems of teenage pregnancy by depicting a day in the life of two teenage parents and their baby.

The school principal and the district superintendent found the use of profanity in the script highly offensive and, according to California appellate court Judge Harris, "educationally unsuitable." They directed the class instructor to have the students remove the profanity and references to sexual activity from the script.

The school district board of trustees, after public hearings, upheld the administrator's directive on the basis of educational suitability; there was no determination as to whether the profanity at issue was legally obscene.

A trial court granted the students' request for a preliminary injunction on the ground that censorship of the script violated section 48907, but the court subsequently granted the Board's motion for summary judgment.

Judge Harris, after carefully reviewing the historical development of student free speech rights, stated that section 48907 does not preclude the Board from ordering the removal of any profanity from the student video. The court stated that the power of prior restraint is found only in section 48907 and only as to official school publications, such as the script at issue.

Furthermore, whether or not the profanity in the script is "obscene" expression, the Board may order its deletion in order to maintain "professional standards of English and journalism." In all, the prior restraint of profane student expression is permitted under the First Amendment and under the California Constitution, declared Judge Harris, in affirming the trial court judgment.

Presiding Judge Ardaiz, in a lengthy concurrence, concluded that section 48907's ban against prior restraint would not apply to the video as an "official school publication," since the video was prepared by students in conjunction with school curriculum. However, the free speech assurance of the statute did not preclude the Board's action because such action was a curriculum decision, not a restraint on free speech generally.

Lopez v. Tulare Joint Union High School District Board of Trustees, 1995 Ca.App.LEXIS 428 (Ca.Ct.App. 1995)[ELR 17:2:20]

Prodigy computer bulletin board service is ruled a "publisher" in libel action over posting by unidentified party

An unidentified bulletin board user on Prodigy's "Money Talk" computer bulletin board posted several statements concerning Stratton Oakmont, Inc., a securities investment banking firm. The statements, as quoted by Acting New York trial court Judge Stuart L. Ain, accused the Stratton Oakmont parties of committing "criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd."

The Stratton Oakmont parties, in addition to suing the unidentified bulletin board user, sued Prodigy, the owner and operator of the network on which the statement appeared.

Judge Ain observed that many of the more than two million subscribers to Prodigy's computer network use the "Money Talk" bulletin board. Prodigy contracts with bulletin board leaders who participate in board discussions and promote the use of the board. Prodigy has stated that it exercises editorial control over the content of messages posted on its bulletin boards and has expressly compared itself to a newspaper, but the company argued that its policies had changed by October 1994, when the allegedly libelous statements were posted.

The Stratton Oakmont parties cited Prodigy's "content guidelines;" the use of a software screening program which automatically prescreens all bulletin board postings for offensive language; the use of board leaders whose duties include enforcement of the guidelines; and testimony indicating that board leaders may exercise an "emergency delete function" to remove a posting and to send a prepared explanatory message.

Judge Ain emphasized that Prodigy held itself out to the public as controlling the content of its bulletin boards, and that the company did not document the purported change in its policy of manually reviewing all messages prior to posting. Furthermore, by actively engaging in deleting notes from the bulletin boards on the basis of offensiveness, Prodigy was making decisions as to content; "such decisions constitute editorial control," declared the court, in finding Prodigy, for the purpose of this action, a publisher rather than a distributor.

Judge Ain compared the board leaders to an editorial staff and commented that Prodigy's current system of automatic scanning, guidelines and board leaders "may have a chilling effect on freedom of communication in Cyberspace...it appears that the chilling effect is exactly what [Prodigy] wants, but for the legal liability that attaches to such censorship."

The court stated that computer bulletin boards generally should be regarded in the same context as bookstores, libraries and network affiliates, but Prodigy's policies, technology and staffing mandated, in this case, the finding that it is a publisher.

Judge Ain concluded by determining that although Prodigy's contract with Epstein expressly rejected an agency relationship, the evidence established that, at least for the limited purpose of monitoring and editing the "Money Talk" bulletin board, Prodigy directed and controlled Epstein's actions, and Epstein acted as Prodigy's agent with respect to the claims alleged by the Stratton Oakmont parties.

Stratton Oakmont, Inc. v. Prodigy Services Company, New York Law Journal, p. 33, col. 3 (Nassau County, May 30, 1995)[ELR 17:2:20]

Court upholds dismissal of libel claim over magazine article

As reported at ELR 16:7:24, Lynette Harris, in 1990, was convicted on charges of income tax evasion. Harris did not report as income money she received from an elderly widower. The court sentenced Harris to serve ten months in prison. A Federal Court of Appeals reversed Harris' conviction, noting the uncertain state of the law at the time concerning payments such as those made to Harris.

James Romenesko wrote an article about the case for the February 1992 issue of Milwaukee Magazine, owned by Quad-Creative, Inc. and published by Betty Ewens Quadracci. Romenesko described Harris' trial and the experiences of Dennis Casey, who planned to write a book about Harris.

A Federal District Court dismissed Harris' libel claim against Quadracci, Romenesko and other parties.

A Federal Court of Appeals, in affirming the District Court decision, agreed that Harris was a limited purpose public figure with respect to the challenged article. Judge Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, observed that the article discussed Harris' 1990 tax evasion conviction and its reversal; that Casey's proposed book was directly linked to the tax dispute; and that Harris expected that the book would help restore her image.

The court then stated that Harris did not claim that the Quadracci parties published the alleged defamatory material with actual malice, and did not present evidence that these parties actually doubted Dennis Casey's comments about Harris. In all, the District Court did not err in granting the motion for summary judgment sought by the media parties and by Dennis Casey.

Harris v. Quadracci, 48 F.3d 247, 1995 U.S. App.LEXIS 2892 (7th Cir. 1995)[ELR 17:2:21]

School district should be held liable for injuries to student gymnast, rules California appellate court

Omar Acosta, a member of the Hamilton High School gymnastics team, was working out in the school gym one night during the off-season. An assistant gymnastics coach supervised Acosta. The young man suffered a fall and was rendered quadriplegic.

A Los Angeles trial court jury found that the coach was negligent in supervising Acosta's practice and that this negligence was a substantial factor in causing the injury. The jury also found that Acosta did not assume the risk of his injury, but determined that Acosta, at the time of the accident, was engaged in a "hazardous recreational activity" and that the coach was not grossly negligent in causing the injury.

Section 831.7 of the California Government Code immunizes a public entity from liability for injuries resulting from participation in a "hazardous recreational activity." In accordance with the jury's special verdict, the trial court rendered judgment for the Los Angeles Unified School District.

Following the entry of judgment, Acosta filed various motions in which he argued that he was injured in the course of a school sponsored and supervised activity which, as a matter of law, is not a "recreational" activity within the meaning of section 831.7. To the extent that there was an issue of fact as to whether Acosta was engaged in a recreational activity, Acosta argued that the trial court erred in its jury instructions.

The trial court agreed that there is a distinction between a recreational activity and a "school directed" activity and that it had failed to properly instruct the jury on this distinction. The court therefore granted a new trial limited to determining whether Acosta's injury resulted from a school-directed activity and, if so, Acosta's comparative negligence, the amount of damages and the apportionment of liability. The court ordered the entry of judgment consistent with the jury's special verdict as to negligence.

Acosta unfortunately died during the pendency of the appeal; his estate pursued the action.

California Court of Appeal Judge Johnson found that Acosta was not engaged in a hazardous recreational activity within the meaning of section 831.7. The issue of immunity under the statute should not have gone to the jury because, as a matter of law, hazardous recreational activities do not include school-sponsored extracurricular athletic activities under the supervision of school personnel, stated Judge Johnson.

Section 831.7 defines hazardous recreational activity as "a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." After careful review, Judge Johnson concluded that the trial court should have granted Acosta's motion for judgment notwithstanding the verdict as to liability and ordered a new trial on damages, including Acosta's comparative negligence if any, and apportionment of liability. Judge Johnson modified the order granting a new trial to provide that the new trial would be limited to Acosta's comparative negligence, the amount of damages and apportionment of liability.

Judge Woods, in dissent, stated that the court erroneously deprived the school district of a trial on the factual question of whether Acosta's activities were school sponsored. In Judge Woods' view, the trial court correctly granted a motion for a new trial limited, among other issues, to a determination of the "school sponsored" question. The dissent set forth facts which supported the trial court's ruling and which indicated the presence of a factual dispute requiring resolution by the trier of fact. The presence of such facts suggested to the dissent that the majority erred in deciding the issue as a matter of law.

Acosta v. Los Angeles Unified School District, 31 Cal.App.4th 471, 37 Cal.Rptr.2d 171, 1995 Cal.App. LEXIS 16 (Ca.Ct.App. 1995)[ELR 17:2:21]

Court issues rulings concerning Memphis ordinance regulating sexually oriented businesses

The Memphis City Council, in 1991, passed an ordinance which imposed a licensing and zoning scheme on all sexually oriented businesses within the city.

When East Brooks Books challenged the ordinance, a Federal District Court ruled that the company lacked standing to challenge the use of prior convictions to deny a permit and the disabling provisions for permit suspension and revocation. The court upheld the constitutionality of all of the other licensing provisions, except the $5,000 permit fee. The city subsequently reduced the licensing fee from $5,000 to $500, and modified the ordinance to allow any adult oriented business operating at the time the ordinance becomes effective to continue to operate pending its permit application, provided the application is submitted within a specified time.

Federal Court of Appeals Judge Kennedy agreed with East Brooks that the ordinance did not insure prompt judicial review of administrative decisions. The court also found that the licensing scheme did not provide sufficient procedural safeguards and was unconstitutional.

Judge Kennedy next found that the ordinance was properly analyzed as a content-neutral regulation - the ordinance did not ban sexually oriented businesses within the city, or regulate the content of the products sold or entertainment provided by those businesses.

The court proceeded to review the provisions challenged by East Brooks to determine whether each provision furthered the government interest in minimizing the secondary effects associated with sexually oriented businesses without imposing more than an incidental burden on First Amendment rights. It was found that the requirement that every person with any ownership interest sign the application for a permit was impermissibly broad and therefore was invalid.

The ordinance also provided that law enforcement authorities might deny the issuance of a permit or suspend an existing permit if an applicant "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." The court agreed with East Brooks that the provision was impermissibly vague and broad and vested unbridled discretion with the Chief of Police Services. It was noted that other provisions of the ordinance already allow for denial, suspension or revocation of a permit for enumerated violations of the law.

Judge Kennedy then found that East Brooks lacked standing to challenge any of the disabling provisions for permit issuance, suspension, or revocation. East Brooks did not allege that any of the disabling factors that would bar the issuance of a permit applied to the company. The court, accordingly, vacated that portion of the District Court opinion upholding the disabling factors other than criminal convictions for permit issuance.

The court concluded by affirming the District Court finding that an "amortization" provision in connection with the zoning regulations of the ordinance was contrary to both Tennessee law and the city charter.

East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 1995 U.S.App.LEXIS 4358 (6th Cir. 1995)[ELR 17:2:22]

Court rejects copyright and trademark claims in dispute over title "Retail Plus"

A Federal District Court in Puerto Rico has granted summary judgment to American International Insurance Company in a copyright and trademark action brought by Gilberto Arvelo concerning the title "Retail Plus."

Arvelo claimed that he created the name "Retail Plus" and that the insurance company's use of the name "Retail Plus" as the title for one of its insurance policies infringed Arvelo's copyright and trademark.

In 1991 Arvelo invented the name "Retail Plus" in the course of creating an advertising campaign for American International. The insurance company notified Arvelo that it was not interested in implementing the entire advertising campaign, but offered to pay him $250 for the use of the name "Retail Plus." Although Arvelo rejected the offer, the company proceeded to use, and obtain trademark registration for, the name. Arvelo did not obtain trademark registration for "Retail Plus."

Judge Pieras rejected Arvelo's argument that "Retail Plus" was an integral part of Arvelo's copyrighted advertising campaign. The court also observed that the words "Retail Plus," in and of themselves, separated from the rest of the advertising campaign, were not copyrightable material. Thus, American International's use of the two words did not constitute copyright infringement.

The court also observed that the insurance policy used the name "Retailers Plus", rather than "Retail Plus" and that the appearance of the words "Retail Plus," once in a twenty-eight page campaign, was not a substantial use of Arvelo's copyrighted work. Arvelo did not show, as a matter of law, that American International copied any protected feature of the advertising campaign.

With respect to Arvelo's trademark infringement claim, the court pointed out that rights in a trademark are not obtained merely by inventing a mark; there must be an actual use of a mark to acquire proprietary rights.

Arvelo's invention of the mark and presenting the advertising campaign to the insurance company was not a sufficient use for trademark protection to attach.

Judge Pieras concluded by finding that American International did not violate Section 43(a) of the Lanham Act. Arvelo alleged that the insurance company engaged in unfair competition through the false designation of goods. The court reiterated that there was no possibility of confusion among the public regarding the source of the services in question; the insurance company's customers or other members of the general public would not associate the name "Retail Plus" with Arvelo's advertising business.

Arvelo v. American International Insurance Company, 875 F.Supp. 95, 1995 U.S.Dist. LEXIS 1771 (D.Puerto Rico 1995)[ELR 17:2:23]

Briefly Noted:

Copyright Infringement/"The Lion King."

Hazel McCormick, in early 1991, wrote an unpublished literary work entitled "The Adventures of King Lionel." McCormick claimed that she submitted the work to the Schlessinger Van Dyck Agency for possible publication, and claimed that Schlessinger provided a copy of the work to The Walt Disney Company or Disney Book Publishing, and that Disney, without permission, copied certain parts of McCormick's work in the book and film entitled "The Lion King."

McCormick did not present evidence that she applied for or received a copyright registration for her literary work, and therefore did not meet the requirements of e411(a) of the 1976 Copyright Act. Section 411(a) provides that a copyright infringement action may not be instituted, for works of authorship whose country of origin is the United States, until there has been a registration of copyright.

A Federal District Court in Pennsylvania, accordingly, granted Disney's motion to dismiss for lack of subject matter jurisdiction.

McCormick v. Fugerson, 1995 U.S.Dist.LEXIS 3706 (E.D.Pa. 1995)[ELR 17:2:24]

"The Cosby Show" Litigation.

In the ongoing dispute involving Hwesu Murray's claim to certain "quasi-property" rights in "The Cosby Show" (ELR 13:12:4; 10:7:8; 9:10:4; 9:5:11), a New York appellate court, among other actions, remitted the matter to the Westchester trial court for the entry of a judgment declaring that Murray "has no right, title, or interest in the television show known as `The Cosby Show' and its spinoff `A Different World...'"

The court, after reviewing the background of the matter, also permanently enjoined Murray from instituting any action against NBC in which Murray claims to be the owner, creator and/or developer of "The Cosby Show" or asserts any right, title or interest in the show unless Murray submits copies, to the administrative judge of the court in which he seeks to proceed, of the decisions of the various courts which already have ruled on Murray's claims.

The trial court had granted NBC's motion to dismiss the complaint as barred by the doctrine of res judicata, but, since the action was for a declaratory judgment, the court should have directed the entry of a declaration in favor of NBC rather than dismissal of the complaint.

Murray v. NBC, 1995 N.Y.App.Div.LEXIS 4534 (N.Y.App. 1995)

Wrestling Match Videotapes.

Larry Shreve, known as "Abdullah the Butcher," claimed that World Championship Wrestling, Turner Home Entertainment International, and Turner Broadcasting Systems wrongfully appropriated his name and likeness by distributing unauthorized videotapes of a wrestling match in which he participated.

A trial court granted judgment on the pleadings on behalf of the Turner parties.

A Georgia appellate court affirmed the trial court decision. Presiding Judge Birdsong noted that Shreve signed a release form before participating in the wrestling match. Shreve agreed that World Championship

Wrestling would have the exclusive, worldwide right, in perpetuity, to exploit any and all recordings of all wrestling matches in which Shreve appeared on behalf of World Championship Wrestling and that World Championship Wrestling had the right to televise the match "in all manners, forms, and media." Presiding Judge Birdsong found that the trial court properly considered the consent form, and that the form clearly authorized World Championship Wrestling to use the videotapes.

Shreve v. World Championship Wrestling, Inc., 216 Ga.App. 387, 454 S.E.2d 555, 1995 Ga.App.LEXIS 152 (Ga.App. 1995)[ELR 17:2:24]

Libel/Computer Network Service.

Rosario Fuschetto posted a note on the bulletin board feature of the SportsNet on-line service concerning a dispute between Fuschetto and Jeff Meneau, a fellow sports memorabilia dealer. Meneau and his company, It's In the Cards, eventually sued Fuschetto, alleging, among other claims, a cause of action for defamation.

A Wisconsin trial court, without deciding whether the information at issue was defamatory, granted Fuschetto's motion for summary judgment on the ground that Meneau did not provide notice to Fuschetto requesting a retraction prior to bringing suit. The court found that the bulletin board communications are a "periodical" under section 895.05(2) of Wisconsin law and that a demand for retraction was required.

An appellate court, in reversing the trial court ruling, noted that periodicals are publications that appear on a regular basis. Posting a message to the SportsNet bulletin board is "a random communication of computerized messages analogous to posting a written notice on a public bulletin board...," and the messages on the bulletin board are not periodicals, stated the court. Presiding Judge Cane declined to extend the definition of periodical under section 895.05(2) to include network bulletin board communications on the SportsNet computer service, leaving to the legislature the issue of libel and defamation on the information superhighway.

It's in the Cards, Inc. v. Fuschetto, 1995 Wisc.App.LEXIS 489 (Wisc.App. 1995) [ELR 17:2:]

Jurisdiction.

Little League Baseball, Inc., a federally chartered corporation, is authorized by statute to conduct its activities throughout the United States and abroad. When Little

League Baseball sued Welsh Publishing Group, Inc., the publisher removed the matter to a Federal District Court. In response to Little League's claim challenging the court's diversity jurisdiction, Welsh argued that the activities of Little League Baseball were localized and that the corporation therefore was a citizen of Pennsylvania.

Judge McClure stated that merely establishing the site of a corporation's principal place of business does not prove that the activities of the corporation are localized for purposes of conferring citizenship upon the corporation. After careful consideration, the court concluded that the activities of Little League Baseball were not localized and that the corporation was a national citizen for purposes of diversity jurisdiction; Little League Baseball therefore was not subject to the court's jurisdiction and the matter was remanded to a

Pennsylvania trial court. The court granted Little League Baseball's request for costs, including attorneys' fees.

Little League Baseball, Inc. v. Welsh Publishing Group, Inc., 874 F.Supp. 648, 1995 U.S.Dist.LEXIS 1292 (M.D.Pa. 1995)[ELR 17:2:25]

Zoning Ordinance.

The Inter Urban Bar Association of New Orleans, a group of about 22 neighborhood lounge owners, sought to restrain the city from enforcing Section 46-1 of the City Code. The zoning ordinance requires a permit to engage in specified economic activity, and subjects certain forms of entertainment to an amusement tax.

A Louisiana appellate court has affirmed a trial court finding that the ordinance does not violate the Louisiana Constitution.

The association had argued that the ordinance was unconstitutionally vague because it did not contain a standard for uniform application and allowed government officials to exercise discretion in granting a permit.

Judge Denis A. Barry stated that the ordinance sufficiently notifies citizens of the regulated activities. The lack of a definition for "live entertainment" did not render the ordinance so unclear as to allow governing officials to exercise "subjective whim."

Judge Barry also rejected the association's equal protection claim, stating that requiring a permit for a business providing music by a disc jockey but not for a business providing taped music monitored by a bartender or a person other than a disc jockey was a distinction rationally related to a legitimate government interest.

A dissenting judge questioned the ordinance's failure to provide a definition for the term "live entertainment."

Inter Urban Bar Association of New Orleans, Inc. v. City of New Orleans, 1995 La. App.LEXIS 558 (La.App. 1995) [ELR 17:2:25]

Civil War Flag.

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to Lon W. Keim in a declaratory judgment action against the Louisiana Historical Association Confederate War Museum.

In 1983, Keim purchased a Civil War flag for $25,000 from Joseph Canole, a war artifacts collector. Canole, who allegedly purchased the flag from another individual, was notified in 1975 that the flag may have once been the property of the museum and may have been stolen; Canole received no further information about the matter.

In 1990, Keim received notice of the Louisiana museum's claim of ownership of the Civil War flag known as the Fifth Company, Washington Artillery Battalion of New Orleans - Louisiana Light Artillery Battle Flag.

A Federal District Court in Nebraska concluded that, under either Louisiana or Nebraska law, the Museum's counterclaim for possession of the flag was barred, and entered judgment declaring that Keim was the lawful owner of the flag.

The Court of Appeals noted that the Museum knew of the flag's whereabouts in 1975 and that the cause of action for recovery of the flag accrued and the applicable statute of limitations started to run, no later than 1975.

Keim v. Louisiana Historical Association Confederate War Museum, 48 F.3d 362, 1995 U.S.App.LEXIS 3709 (8th Cir. 1995)[ELR 17:2:25]

Cabaret Tax.

The Connecticut Supreme Court has affirmed a trial court ruling holding that a restaurant that provides dancing privileges and that employs a disc jockey to play prerecorded music for its patrons is a cabaret and must pay the statutory cabaret tax.

Carpenteri-Waddington, Inc. owned a bar and restaurant known as the Graffiti Lounge; the establishment employed a disc jockey who entertained patrons. Carpenteri-Waddington argued that the disc jockey's performance was "the music of a single performer alone," and that the restaurant therefore was not subject to the statute. The trial court concluded that the restaurant owner did not meet the burden of proving that it was entitled to the exemption.

Judge Katz held that the Graffiti Lounge was a cabaret because it provided dancing privileges. The legislature intended to exclude only those establishments where background music is incidental to dining, stated the court, such as when a musician sings to his or her own musical accompaniment.

Carpenteri-Waddington, Inc. v. Commissioner of Revenue Services, 231 Conn. 355, 650 A.2d 147, 1994 Conn.LEXIS 405 (Conn. 1994)[ELR 17:2:25]

Insurance.

An insurance policy issued by Seaboard Surety Company extended only to certain enumerated acts "committed or alleged to have been committed in the conduct of the Insured's business of Producer or Distributor or Owner of the film for commercial use on television and arising out of the telecasting of the film series."

A New York appellate court stated that the language of the contract was clear and unambiguous and noted that the court previously has held that the terms "television and/or broadcasting" do not extend to or include video-cassettes or video-discs for home use. Without further discussion, the court affirmed the dismissal of Video-Cinema Films' complaint against the insurer.

Video-Cinema Films, Inc. v. Seaboard Surety Company, 1995 N.Y.App.Div.LEXIS 4372 [ELR 17:2:26]

Satellite Dish Restriction.

A Florida appellate court has upheld a homeowner's association restrictive covenant prohibiting the maintenance of any television or other outdoor antenna system or facility on any lot.

A trial court granted summary judgment to the Isle at Mission Bay Homeowners Association, which had ordered the Latera parties to remove a satellite dish from their property.

The appellate court agreed that the satellite dish was included within the restriction despite the fact that a satellite dish is capable of receiving a type of signal that a standard antenna cannot receive. Furthermore, the right to install a satellite dish has not been recognized as a "fundamental" right and the restriction therefore did not violate the First Amendment.

Latera v. Isle at Mission Bay Homeowners Assn., 1995 Fla.App.LEXIS 4622 (Fla.App. 1995)[ELR 17:2:26]

Breach of Contract.

Lee Parker and William Smothers, individually and doing business as Brimstone Minority Productions, Inc., produced a jazz and blues festival in Madison County in May 1992. They hired Johnnie Taylor to be the headline performer.

Brimstone claimed that Taylor failed to appear at the concert in time to perform. A trial court judge entered a judgment based on a jury verdict in favor of Brimstone; the damage award was almost $20,000, including interest.

An Alabama appellate court found that the jury did not err in finding that Brimstone sustained damage or loss.

The damage award placed Brimstone in the same position it would have been in had there been no breach, stated the court, in affirming the trial court decision.

Taylor v. Parker, 1995 Ala.Civ.App.LEXIS 246 (Ala.App. 1995)[ELR 17:2:26]

Student Wrestlers.

St. Lawrence University, in the fall of 1994, announced that it would eliminate the school's intercollegiate wrestling program after the 1994-1995 season. A group of students sought a preliminary injunction to prohibit the elimination of the sport until the May 1998 graduation date of the 1994 freshman class.

A New York trial court dismissed the students' cause of action for breach of contract as barred by the statute of frauds. The court also found that the students failed to state causes of action for misrepresentation, fraud, estoppel and gender discrimination, and granted the school's motion to dismiss the complaint.

Cooper v. Peterson, 1995 N.Y.Misc.LEXIS 179 (St. Lawrence Cnty. 1995)[ELR 17:2:26]

IN THE NEWS

Jimi Hendrix's family settles lawsuit over late performer's music rights

James Al Hendrix, according to news reports, has signed a settlement agreement which grants him and the Hendrix family the rights to the music, name and likeness of the late performer Jimi Hendrix.

Al Hendrix had sued various parties, claiming the unauthorized sale of rights to the Hendrix catalog. The performer's father had signed two contracts in 1974 relinquishing, for $50,000, all rights to his son's "unmastered" tapes to Presentaciones Musicales SA, and transferring all his stock in Bella Godiva, his son's music publishing company, for $50,000.

In 1983, attorney Leo Branton, Jr., who had been managing Hendrix's business affairs, negotiated an agreement among various parties that extended Hendrix's $50,000 annual payment for life. In his lawsuit, Al Hendrix claimed that he never signed this agreement. As part of the settlement, Al Hendrix agreed not to pursue his claims against Branton.

The terms of the settlement were not disclosed, but Hendrix apparently will pay Branton and others between $5 million and $10 million to resolve certain counterclaims, and will repay about $5 million lent to the family by Microsoft co-founder Paul Allen to fund the litigation. Several of the parties in the action will immediately make payments to the Hendrix family in excess of $1 million, presumably representing lump sum payments of back royalties, and will turn over properties including the master discs to Jimi Hendrix's music. [July 1995][ELR 17:2:27]

Federal Communications Commission eliminates prime-time access rule

The Federal Communications Commission has voted to eliminate the prime-time access rule. The rule required the stations affiliated with ABC, NBC and CBS in each of the nation's fifty largest cities to provide original, nonnetwork programming on Monday through Saturdays from 7:00 P.M. to 8:00 P.M.

Network owned and operated stations and network affiliated stations will be allowed to compete to broadcast reruns of network programs, and the networks will be able to sell programs they produce to those stations.

The Commission, according to news reports, found that the networks no longer dominate the television marketplace and that the prime-time access rule placed artificial restraints on programming.[July 1995][ELR 17:2:27]

DEPARTMENTS

In the Law Reviews:

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 17, Number 3 with the following articles:

Reducing the Cost of Free Expression: A Call for Fee Shifting in Cases Challenging Free Expression by Neil L. Shapiro and Ross D. Tillman, 17 Comm/Ent 571 (1995)

The Work Made for Hire Doctrine and California Recording Contracts: A Recipe for Disaster
by Joseph B. Anderson, 17 Comm/Ent 587 (1995)

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