

LEGAL AFFAIRS

**Police and Emergency "Ride-Alongs" -
Is Viewer Excitement Worth the Risk?**

by Rex S. Heinke and Susan Scheiber Edelman

Television viewers are avid watchers of live news and other on-the-scene coverage of police, paramedics, and other emergency personnel doing their jobs. However, the victims of emergencies and the subjects of law enforcement - when they appear on television without their permission - have recently looked to the courts for redress against the media with some success. Therefore, broadcasters, producers, reporters, and camera crews must be extremely careful in deciding to ride-along, film, and broadcast live emergencies - if they are going on private property. The following cases demonstrate

why the media cannot assume they are immune from liability simply because they are accompanying law enforcement or emergency personnel, even if they were invited along by government officials.

The Ayeni Cases

Recently, one ride-along in Brooklyn spawned a series of cases, all of which were decided against the media. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), 22 Med. L. Rep. (BNA) 1466, cert. denied, __U.S.__, 115 S. Ct. 1689 (1995); *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994); *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), 21 Med. L. Rep. (BNA) 2202.

As previously reported (ELR 16:4:14), in 1992, Secret Service Agent James Mottola obtained a search warrant authorizing government agents to search

Babatunde Ayeni's apartment to gain evidence of Ayeni's suspected involvement in a credit card fraud. 35 F.3d at 683; 848 F. Supp. at 364. Agent Mottola arrived at the scene accompanied by a CBS news crew from the "Street Stories" television news program. The crew entered the apartment with the Secret Service. *Id.*

The suspect was not home when the Secret Service conducted the search. *Id.* Ayeni's wife, clothed only in a dressing gown, and her young son were, however, present, and she objected to the filming, repeatedly requesting that her picture not be taken. 813 F. Supp. at 152. The crew were not identified as being from CBS, and Mrs. Ayeni apparently thought that they were part of the Secret Service team executing the warrant. 813 F. Supp. at 152, 160; 848 F. Supp. 365. Moreover, Mrs. Ayeni "cower[ed], cover[ed] her face with a magazine and direct[ed] her preschool son, . . . sitting beside her

on a couch, not to look at the camera." 813 F. Supp. at 152.

For approximately twenty minutes, the CBS crew filmed the agents searching through the apartment, focusing on items such as the interiors of closets, personal letters, family pictures, and financial statements. 813 F. Supp. at 151-52; 35 F.3d at 683. The agent in charge wore a wireless microphone to aid the CBS crew. 813 F. Supp. at 152; 848 F. Supp. at 365. CBS also interviewed one agent in the Ayeni's foyer regarding the modus operandi of people who commit credit card fraud so that "the imputation of [Ayeni's] guilt is unmistakable." 813 F. Supp. at 152. See also 848 F. Supp. at 365. No evidence of credit card fraud was found during the search. *Id.* Moreover, CBS never broadcast any portion of the video footage. 35 F.3d at 684.

Mr. Ayeni subpoenaed CBS's videotape to assist his criminal defense. *United States v. Sanusi*, 813 F.

Supp. 149 (E.D.N.Y. 1992). CBS's motion to quash the subpoena, on First Amendment grounds, was denied by Judge Jack Weinstein, who found that the tape was highly material and relevant to Ayeni's defense. 813 F. Supp. at 159-60. Judge Weinstein caustically noted that any First Amendment privilege available to CBS "operates weakly, if at all," since CBS "both trespassed upon defendant's home and engaged in conduct, with the connivance of the government, directly contrary to Fourth Amendment principles." *Id.* at 160. (The Court did allow CBS to block out the identity of its source in the Secret Service. 813 F. Supp. at 151, 161.)

Mrs. Ayeni and her son took Judge Weinstein's not too subtle hint and brought a 42 U.S.C. Section 1983 action, alleging that CBS and Agent Mottola conspired to violate their constitutional right to privacy in their own home. *Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). Specifically, they claimed that, largely

due to the videotaping, the defendants violated the Fourth Amendment by conducting an "unreasonable search." *Id.* at 366.

Agent Mottola argued that he was immune from civil liability as a government agent, and CBS joined in his motion to dismiss. *Id.* at 364. (CBS and its crew contended that the immunity doctrine applied to them, as private parties, because plaintiffs had alleged that CBS, like the government employees, was a "state actor" for purposes of Section 1983.) Judge Weinstein, stating that the case "raises grave issues of the right to privacy in the home, free from the intruding eye and ear of a private broadcaster's television camera," refused to dismiss the case. *Id.*

Instead, Judge Weinstein said that the agent's facilitating the camera crew's entry and the crew's filming of the search exceeded the scope of the warrant and that CBS's video and sound recording amounted to

"seizures" within the meaning of the Fourth Amendment. *Id.* at 368. Moreover, the qualified immunity defense was not available, because "CBS has no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record." *Id.* at 367-68. The crew "took from the home, for the purpose of broadcasting them to the world at large, pictures of intimate secrets of the household, including sequences of a cowering mother and child resisting the videotaping." *Id.* at 364.

CBS settled with the plaintiffs (35 F.3d at 684 n.2), but Agent Mottola appealed. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), cert. denied, __U.S.__, 115 S. Ct. 1689 (1995). The Second Circuit agreed with Judge Weinstein's conclusions that "the complaint alleges clear violations of the constitutional ban on unreasonable searches and seizures and that the agent's claim of qualified immunity was properly rejected." *Id.* at 683. The

Second Circuit also agreed that the case had "important consequences for the right of privacy of those inside a home," emphasizing that "[a] private home is not a soundstage for law-enforcement theatrics." *Id.* at 683, 686.

Stating that the CBS crew had "no business being in the [Ayenis'] home at all," the Court held that the CBS crew was not authorized to enter the premises. *Id.* at 688. There was no express authorization because neither the agent's affidavit, submitted in support of the warrant application, nor the warrant itself, requested or permitted the presence of a television camera crew. *Id.* at 686. The Court also rejected any notion of implied authorization because there was no claim that the presence of the CBS camera crew served any legitimate law enforcement purpose (for instance, photographing evidence at the request of the Secret Service). *Id.* In fact,

"the officers were assisting CBS in producing a television show." *Id.* at 687 (emphasis added).

Moreover, the Court was outraged that the agent's action in allowing CBS to film "was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect - the right of privacy." *Id.* at 686. Essentially, the Court held that the qualified immunity defense would never - or almost never - apply in a situation like the one in *Ayeni* because "an objectively reasonable officer could not have concluded that inviting a television crew - or any third party not providing assistance to law enforcement - to participate in a search was in accordance with Fourth Amendment requirements." *Id.*

Until *Ayeni*, courts had generally rejected liability based on alleged Fourth Amendment violations by the press when accompanying public officials executing a search warrant on private property. For example, in

Moncrief v. Hanton, the Court rejected plaintiffs' Section 1983 action against police officials and news media, who had accompanied the police on a search of the plaintiffs' home, pursuant to a search warrant. 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio 1984). The plaintiffs claimed that, while the search was being conducted, one of them was handcuffed, that the media photographers took pictures of him, and that they had not given the police or the media permission to enter their home. *Id.* at 1620.

The Court granted the defendants' motion to dismiss because the alleged constitutional right of which plaintiffs claimed they were deprived - the right to be free from unwanted publicity about one's affairs - was not a right protected by the Constitution, but rather only by state common law. Because "no federally protected right or privilege" had, therefore, been violated, plaintiffs' Section 1983 action failed. *Id.* at 1622.

Similarly in *Higbee v. Times Advocate*, 5 Media L. Rep. 2372 (S.D. Cal. 1981), the plaintiffs claimed that their right to privacy was violated when the police invited the press to be present during the execution of a search warrant and the *Times Advocate* later published a photograph of the inside of plaintiffs' residence, taken during this search. The Court granted the *Times Advocate's* motion for summary judgment as to the Section 1983 claim. The Court held that under Section 1983, "[t]he right of privacy is only deemed worthy of Constitutional protection in certain circumstances, usually involving gross abuses by defendants acting under color of law" and that the conduct of the *Times Advocate* did not constitute "gross abuse." The Court dismissed plaintiffs' invasion of privacy claim leaving plaintiffs to pursue that claim in state court.

The Baugh Case

Before Ayeni, CBS had only slightly better luck with another "Street Stories" segment. In *Baugh v. CBS Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993), 21 Med. L. Rep. (BNA) 2065, a CBS crew accompanied a member of the District Attorney's office's victim support staff to the Baughs' home, in response to Mrs. Baugh's "911" call in which she said she was the victim of domestic violence. *Id.* at 750-52. Baugh said that she assumed the crew was from the D.A.'s office and that she allowed them to enter her home and film only because they had assured her that the tape would not be broadcast. *Id.* at 752.

In fact, CBS was filming a segment about the Alameda County D.A.'s Mobile Crisis Intervention Team. *Id.* at 750. Baugh contended she discovered this just before the "Street Stories" segment was broadcast. *Id.* at 752. After learning this story was going to be broadcast, Baugh allegedly called the show's producer

and stated that she did not want "any of [her] personal life aired on any television show." *Id.* Furthermore, Baugh threatened legal action and wrote a letter to the producer demanding that her image not be used in the program. She was unsuccessful in stopping the broadcast, but, in some localities, her face was obscured. *Id.* at 750 n.1.

Baugh and her daughter sued CBS, alleging causes of action for trespass, intrusion, appropriation of their likenesses, unfair competition, negligent infliction of emotional distress, intentional infliction of emotional distress, fraud and improper disclosure of private facts. Defendants moved to dismiss.

Judge Fern Smith dismissed Baugh's trespass and intrusion claims because Baugh had consented to the camera crew's entry into her home and its videotaping her interview, even though plaintiff claimed CBS had exceeded the scope of her consent or obtained consent

by fraudulently misrepresenting its intentions regarding broadcast of the tape. *Id.* at 756-57. (However, the Court allowed plaintiff to pursue her fraud claim.) The Court also dismissed Baugh's claims for appropriation of her likeness (because the event involved "news" or "public affairs"), unlawful business practices (because this claim was based on the trespass, which the Court found had not occurred and because Baugh's action was for damages, which are not available under the unfair business practices statute), and negligent infliction of emotional distress (because defendants did not have a duty of care to Baugh). *Id.* at 757-58. (However, the Court denied defendants' motion to dismiss regarding the intentional infliction claim, stating that "[a]t this stage of the proceedings, the Court cannot say that Defendants' behavior was not outrageous as a matter of law." *Id.* at 758.)

The Court allowed plaintiff's disclosure of private facts cause of action to proceed, because (1) "the broadcast went far beyond disclosure of facts" which were publicly available; (2) whether the facts disclosed were "degrading" presented a question of fact; and (3) "[w]hile the Court finds the issue of domestic violence . . . to be newsworthy, the Court is not yet convinced that Plaintiffs' personal involvement in an incident of domestic violence is newsworthy as a matter of law." *Id.* at 756. At that point, CBS settled Baugh, just as it later settled Ayeni.

The Defenses of Custom and Practice and Consent

In analyzing whether CBS had to comply with Mr. Ayeni's subpoena of its videotape, the Court, in *U.S. v. Sanusi*, stated that *Florida Pub. v. Fletcher*, 340 So. 2d 914 (Fla. Sup. Ct. 1976), 2 Med. L. Rep. (BNA)

1088 , cert. denied, 431 U.S. 930 (1977), "illustrates the limited circumstances in which trespassory conduct by the press might be excused." Sanusi, 813 F. Supp. at 155-56.

Fletcher was a case "of first impression," decided by the Florida Supreme Court in 1976. In Fletcher, a homeowner brought an action against a newspaper publisher for trespass, invasion of privacy, and intentional infliction of emotional distress, because of the publication of a photograph of the silhouette of her deceased daughter on the floor of her bedroom after a fire. 340 So. 2d at 916.

When the fire broke out in the house, a crowd of "firemen, news media representatives, and onlookers gathered at the scene." *Id.* at 915. The fire marshal and a police officer entered the house to investigate, inviting the news media to accompany them. *Id.* Once inside, the fire marshal wanted a clear picture of the silhouette, and

he asked a news photographer to take a photo, which was made part of the police and fire investigation files. *Id.* at 915-16.

That photo, and others, appeared in the newspaper for which the photographer worked. *Id.* at 916. Because she was out of town, the fire victim's mother first learned of her daughter's death by reading the story and seeing the accompanying photographs. *Id.* She then sued the newspaper publisher.

With their motion for summary judgment, the defendants submitted deposition testimony and several affidavits from both government personnel and media representatives, who stated that it was "common usage, custom and practice" for the news media to enter private property after a disaster. *Id.* at 916-17. The evidence also showed that the media had been invited onto the property by government officials and that the media had caused no physical damage. *Id.* at 915-17.

The trial court dismissed the plaintiff's invasion of privacy claim and granted summary judgment to the publisher on the trespass and emotional distress claims. On appeal, the Florida Supreme Court, in an opinion which dealt only with the trespass claim, agreed that the plaintiff could not recover for trespass because there was implied consent by custom and usage authorizing the photographer's entry into the home. *Id.* at 917-18. The Court did state, however, that this holding was appropriate under "the circumstances present here"-i.e., a circumstance involving a "disaster of great public interest" in which "members of the news media entered the burned home at the invitation of the investigating officers," no damage had been caused to the property, the press had "entered in a peaceful manner," and the plaintiff had not objected to the media's entering her property. *Id.* at 918 (original emphasis).

A few months before Fletcher was decided, a Florida District Court of Appeal considered a case in which a television reporter rode along on a midnight police raid of a boarding school for disturbed children and then broadcast shots of the raid and interviews with children by reporters during the raid. *Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*, 327 So. 2d 810 (Fla. App. 1976). The media had been invited by the Chief Investigator of the Florida Attorney General's Office. *Id.* at 813. The school sued for trespass.

Relying solely on *Fletcher v. Florida Pub.*, 319 So. 2d 100 (Fla. App. 1975), which the Florida Supreme Court later reversed, the Green Valley Court reversed the summary judgment in favor of the media. 327 So. 2d at 819. The Court rejected the argument that the government's invitation to the media shielded the media from trespass liability, even in cases where the plaintiffs did

not explicitly object to the media's presence on their property. *Id.* at 819. Indeed, the Court stated:

To uphold [the media's] assertion that their entry upon appellant's property at the time, manner, and circumstances as reflected by this record was as a matter of law sanctioned by 'the request of and with the consent of the State Attorney' and within the 'common usage and custom in Florida' could well bring to the citizenry of this state the hobnail boots of a nazi storm-trooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera. In this jurisdiction, a law enforcement officer is not as a matter of law endowed with the right or authority to invite people of his choosing to invade private property and participate in a midnight raid of the premises.

Green Valley, 327 So. 2d at 819 (original emphasis; citing Fletcher v. Florida Pub., 319 So. 2d 100 (Fla. App. 1975)).

Green Valley is not good law because it relies upon the Fletcher Court of Appeal opinion that was overturned by the Florida Supreme Court. However, as is evident from the Ayeni and Baugh cases, some courts still reach conclusions like that in Green Valley.

Similarly, in Prah! v. Brosamle, 295 N.W.2d 768 (Wis. App. 1980), a reporter, who had monitored a police scanner, brought a movie camera to the scene of alleged gunshots. Id. at 773. The reporter filmed the officers going up to the building and confiscating plaintiff's guns, and then accompanied the police into his home and filmed part of the police interview of him. Id. The reporter did not have permission to enter the premises or to take pictures inside the building, and the police did not request the cameraman's assistance

(although they did tell him that "he could come forward when the situation was under control"). *Id.* at 773, 780. Plaintiff thought the reporter was an officer and did not tell him to stop or leave. *Id.* at 773. The film was broadcast on the local news. *Id.*

Prahl alleged violation of his civil rights by an unreasonable search and seizure, defamation, and trespass. His civil rights claim was dismissed because "the filming and television broadcast of a reasonable search and seizure, without more" do not result in "unreasonableness." *Id.* at 774-75. Prahl's defamation claim was dismissed because he could not show actual injury from the defamation. *Id.* at 778.

However, the Court rejected the reporter's argument that, under *Fletcher*, custom and usage established implied consent, and ruled that Prahl could proceed with his trespass claim against the newscaster and the news station. *Id.* at 780. The Court distinguished *Fletcher* on

the grounds that, there, implied consent arose out of a "longstanding custom to allow news representatives to enter private property where a disaster has occurred and the officers investigating the calamity invite the entry." *Id.* at 779. By contrast, no official in *Prahl* requested the reporter's assistance in the investigation, nor was there any evidence of "a custom of the type described in *Fletcher*." *Id.* at 780. (Their assistance could not have been essential to the *Fletcher* Court's holding, however, because there the government's request for help came after the media was already on the property. Also, the *Fletcher* Court dismissed all the intrusion and trespass claims against the media, not just the claims associated with the one photograph that the fire marshal requested, indicating that a government request for help was not essential to a finding of no liability.)

The defendants in *Prahl* also argued that "they should be accorded a privilege to trespass stemming

from the first amendment to the United States Constitution." *Id.* The Court rejected that argument, citing the United States Supreme Court's statement, in *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972), that "[n]ews-men have no constitutional right of access to the scenes of crime or disaster when the general public is excluded," *Id.* at 780-81. Accordingly, the Court reversed the trial court's dismissal of plaintiff's complaint and ordered that a new trial be had limited to plaintiff's trespass claim. *Id.* at 783.

In *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 7 Med. L. Rep. (BNA) 1987 (N.Y. Sup. Ct. 1981), in contrast to *Fletcher*, *Green Valley*, and *Prahl*, the plaintiffs did object to the media's intrusion on their property. A Humane Society official invited three television stations to accompany him while he executed a search warrant at the home of an animal abuse suspect. *Id.* at 222. Several television photographers and reporters then

accompanied the official into the home, filming the interior. *Id.* The story was broadcast on the evening news shows of two of the stations. *Id.* The homeowner alleged that she had asked the media representatives to stay out of her house but they ignored her. *Id.*

In addition to suing the Humane Society and its officials, the homeowner sued the three television stations for trespass. *Id.* The Court granted a motion to strike the media's defenses, which were largely based on *Fletcher*, that (1) their crews entered the home to gather news and that their actions were, thus, absolutely privileged, and (2) consent was implied from custom and usage. *Id.* at 222-23, 227.

The Court rejected the first argument, stating that "[n]ews people have no special First Amendment immunity or special privilege to invade the rights and liberties of others," including the right to forbid others from trespassing on private property. *Id.* at 224. Then, indicating

that it agreed with the "principle that consent, whether express or implied, is a defense to an action for trespass and that consent may be implied from custom, usage or conduct," the Anderson Court rejected Fletcher's conclusion. *Id.* at 223. Instead, the Anderson Court held that "[t]he gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice. This is a bootstrap argument which does not eliminate the trespassory conduct of the defendants in this case." *Id.*

The Anderson Court also distinguished Fletcher on its facts. Fletcher concerned what the Court in that case characterized as "a disaster of great public interest" (a fire which took the life of a young girl), while the Anderson case did not. *Id.* at 227 (citing Fletcher, 318 So. 2d at 918). In addition, the newspaper photographer,

who was invited into the house in Fletcher, was asked to take a photograph, which was made part of the official investigation file. In contrast, the television stations sued in Anderson had no role in assisting the official investigation. *Id.* at 227.

Finally, in *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463 (1986), a California Court of Appeal allowed the wife of a man, whom paramedics unsuccessfully tried to revive after a heart attack, to proceed with claims for trespass, intentional infliction of emotional distress, and intrusion against an NBC film crew that had accompanied the paramedics to make a documentary on paramedics and their work. The Court emphasized that the crew had trespassed on private premises and that such behavior was contrary to "widely held notions of decency." *Id.* at 1483.

In its opinion, the Court addressed, at length, NBC's arguments (1) that by calling the paramedics, the

Millers impliedly consented to the entry of the NBC camera crew, and (2) that Mrs. Miller's claims were precluded by NBC's First Amendment right to gather news. The Court first held that consent could not be implied because "[o]ne seeking emergency medical attention does not thereby 'open the door' for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where the medical aid is being administered." *Id.* at 1489-90.

Moreover, the Court indicated that, while First Amendment protections are important, "[t]he First Amendment is not a license to trespass," *Id.* at 1492 (quoting *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 1 Med. L. Rep. (BNA) 2417 (9th Cir. 1971); original emphasis). In sum, said the Court, "the obligation not to make unauthorized entry into the private premises of individuals . . . does not place an impermissible burden on newsgatherers, nor is it likely to have a chilling

effect on the exercise of First Amendment rights." *Id.* at 1492-93.

As evidenced by these decisions, courts are concerned about invasion of the home by the government or anyone else: a person's home is their castle. However, police "possession" of the property may preclude trespass and other claims. In one case - *Wood v. Fort Dodge Messenger*, 13 Med. L. Rep. (BNA) 1610 (Iowa Dist. Ct. 1986) - the Court granted the media's motion for summary judgment in an action charging a newspaper and a television station with invasion of privacy and trespass.

In *Wood*, several news photographers and reporters admitted entering the plaintiff's farm, filming, and then publishing photos of numerous dead cattle, which led to a criminal investigation of the farm's owner for allegedly negligently starving confined domestic animals to death. *Id.* at 1612. The Sheriff confirmed the

existence of the investigation to two television film crews and gave directions to the farm. *Id.* at 1611, 1614. The crews followed the directions, photographed the dead cattle, and broadcast the pictures. *Id.* at 1611. Defendants' employees' unrefuted affidavits stated that there was no gate blocking the driveway to the farm, that they did not disturb or damage any of the property, that the house on the farm appeared abandoned and snowbound, that they had checked in with the Sheriff prior to entering the property, that they had later separately interviewed the Sheriff concerning his investigation, and that the Sheriff had voiced no objection to their filming the cattle. *Id.* The photographer for the newspaper entered the farm, accompanied by the Sheriff, to take photographs. *Id.*

The Court held that there was no invasion of privacy because accounts of 167 dead cattle on plaintiff's farm had already been widely disseminated before

defendants had published their report. Therefore, the existence of the dead cattle was not a private fact. *Id.* at 1613-14. The Court further ruled that, by the time of the publications, the owners of the farm "had involuntarily become public figures and publicity was permissible to the particular events which aroused the public interest. The photos taken by Defendants and their subsequent publication did not, as a matter of law[,] amount to a sensational prying into private affairs. A reasonable person could not find that the disclosure in this case was highly offensive or not of legitimate public concern." *Id.* at 1614.

The Wood Court also rejected plaintiff's trespass claim. The plaintiffs' brother, who had been looking after the farm, gave the Sheriff permission to enter the farm. *Id.* at 1614. Then, "[o]nce the Sheriff had commenced his investigation, he became in effect, the occupier and possessor of the farm and became entitled to

allow or deny entry to other persons." *Id.* Because the Sheriff consented to the media's entry, there was no trespass. *Id.*

Conclusion

These cases are inconsistent. More recent cases have tended to find liability in ride-along cases or to refuse to dismiss them at an early stage. Thus, ride-alongs present substantial risks to the media. However, there are precautions that will minimize these risks, as well as some practical considerations that also reduce them.

First, the desire for even a few brief seconds of fame seems to be almost unlimited. Thus, somewhat surprisingly, it is often possible to obtain consents to filming and broadcasting ride-alongs. Consents that are videotaped are particularly effective.

Second, the media are free to film what they can see, so long as they are not on the plaintiff's property.

Third, members of the media should be sure to prominently identify themselves. More and more law enforcement and other emergency personnel are using video cameras to film their activities to protect themselves from claims, e.g., excessive force. See, e.g., *Oziel v. Superior Court*, 223 Cal. App. 3d 1284, 18 Med. L. Rep. (BNA) 1113 (1990). Thus, people who are being filmed may be unable to tell whether the media are filming, unless media representatives are clearly identified. If at all possible, the media should briefly film themselves before they enter a private residence, so they can easily demonstrate that they were clearly identified. If there is no objection to filming when the media are clearly identified, the media will have a strong argument that there was implied consent to their activities.

Finally, many of those who are filmed while being arrested or searched are eventually charged with criminal activity. Those who are convicted or plead guilty are not likely to sue; if they do, they are unlikely to recover significant sums.

Mr. Heinke and Ms. Edelman are in the Los Angeles office of Gibson, Dunn, & Crutcher. Mr. Heinke is the author of the book *Media Law*, published by The Bureau of National Affairs, Chapter 5 of which discusses the issues addressed in this article. Copyright 1995 by Gibson, Dunn & Crutcher. All Rights Reserved.

[ELR 17:7:3]

RECENT CASES

Constitutionality of ban on television and radio broadcasts of "indecent" programming between 6:00 a.m. and 10:00 p.m. is upheld by federal appeals court

"Obscenity" is one thing and "indecent" is another, in the eyes of the law. Obscene material enjoys no First Amendment protection at all, and thus may be banned entirely. Indecent material, on the other hand, does receive some First Amendment protection and thus may not be banned entirely, though many government bodies have attempted to do so from time to time.

Congress and the Federal Communications Commission are among those who have attempted to ban indecent programming from the airwaves. Both now accept that the First Amendment will not permit them to

impose a 24-hour-a-day bar on indecent programming, though it took a federal Court of Appeals decision to make that plain. *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C.Cir. 1991) (ELR 13:10:7). As a result, Congress and the FCC adopted a more narrowly tailored approach to the goal of protecting children from indecent broadcasts. They banned indecency from 6:00 a.m. to midnight from the airwaves of commercial broadcasters, and from 6:00 a.m. to 10:00 p.m. from the airwaves of public broadcasters that go off the air before midnight. Congress did so in section 16 of the Public Telecommunications Act of 1992; and the FCC did so in regulations it adopted to implement that Act.

The constitutionality of the 6:00 a.m. to 10:00 p.m. or midnight ban was immediately challenged by several broadcasters, trade associations and public interest groups. At first, it looked as though that ban would be declared unconstitutional, just as the 24-hour ban had

been. Indeed, a three-judge panel of the federal Court of Appeals in Washington, D.C., held it was unconstitutional. (ELR 15:11:15) But the full D.C. Circuit Court of Appeals granted the Government's request for a rehearing en banc and that court has now upheld a 6:00 a.m. to 10:00 p.m. ban on indecent broadcasts.

In an opinion by Judge James L. Buckley, a seven-judge majority of the Court of Appeals found that "the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts" and that "the `channeling' of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment." However, the 1992 Act permitted public radio and television stations that go off the air before midnight to broadcast indecent material beginning at 10:00 p.m. - because those stations would not otherwise have been able to broadcast any indecent programming - and thus the

court had to decide whether the more restrictive ban on commercial stations (which had to wait until midnight to broadcast programming that some public stations could carry at 10:00 p.m.) was justified. Since the purpose of the statutory ban on indecency is to protect children, the appeals court could see no reason related to that purpose for permitting some stations to broadcast indecent material at 10:00 p.m. while others had to wait until midnight.

As a result, the court ordered the FCC to revise its regulations so that all broadcasters are permitted to broadcast indecent programming between 10:00 p.m. and 6:00 a.m., thereby limiting the ban to the period between 6:00 a.m. and 10:00 p.m. The FCC has revised its regulations as ordered.

Though a majority of the full D.C. Circuit Court of Appeals upheld the constitutionality of a 6:00 a.m. to 10:00 p.m. ban on indecent broadcasts, the decision was

not unanimous. Four members of the court - Judges Harry T. Edwards, Patricia M. Wald, Judith W. Rogers and David S. Tatel - dissented. Moreover, the case is not entirely at an end yet, because a petition for certiorari was filed with the Supreme Court in September by those who oppose the 6:00 a.m. to 10:00 p.m. indecency ban.

Editor's note: Since the court's majority found that a ban from 6:00 a.m. to midnight would not unduly burden the First Amendment, it would not be surprising if Congress responded to this decision by amending the Act to impose a uniform ban on all broadcasters, including public stations that go off the air before midnight, during those hours.

Action for Children's Television v. Federal Communications Commission, 58 F.3d 654, 1995 U.S.App. LEXIS 16078 (D.C.Cir. 1995); Enforcement of Prohibitions

Against Broadcast Indecency, FCC GC Docket No. 92-223, 1995 FCC LEXIS 5595 (FCC 1995) [ELR 17:7:9]

Constitutionality of FCC procedures for imposing "forfeiture penalties" on television and radio stations that broadcast "indecent" programming is upheld by federal appeals court

Federal law prohibits television and radio stations from broadcasting indecent programming during certain hours of the day, and the constitutionality of that law has recently been upheld by the federal Circuit Court of Appeals in Washington, D.C. (See Action for Children's Television v. FCC, reported in this issue immediately above. ELR 17:7:9) Related provisions of federal law impose penalties - both criminal and civil - for the

violation of the substantive ban on indecent broadcasts; and still further provisions of the law set forth the procedures the Government must follow in imposing those civil penalties.

The FCC is the Government agency that has authority to impose civil penalties. On paper, the FCC's procedures for imposing civil penalties look quite reasonable. When the FCC receives an indecency complaint from a television viewer or radio listener, the Commission reviews the complaint, and sometimes sends a Letter of Inquiry to the broadcaster seeking more information or inviting the broadcaster to respond. If the FCC then decides that a violation has apparently taken place, it issues a Notice of Apparent Liability to the broadcaster, giving it an opportunity to show why no "forfeiture penalty" should be imposed, and giving the broadcaster 30 days to pay a stated amount or otherwise respond. The FCC then decides whether to impose a

forfeiture, and if it decides to do so, it issues an order of forfeiture. The broadcaster may request reconsideration, but once the order of forfeiture becomes final, the broadcaster must pay it. If the broadcaster does not pay, the FCC refers the matter to the Justice Department which files a civil action to recover the forfeiture. The broadcaster may defend that suit by asserting that its broadcast was not in fact indecent, and the broadcaster is entitled to a trial de novo on that question.

What looks reasonable on paper is not always reasonable in practice, and several broadcasters, trade associations and public interest groups have sued the FCC alleging that its forfeiture procedures in indecency cases are not only unreasonable but also unconstitutional. This claim is based on the fact that FCC forfeiture proceedings take years to resolve, and broadcasters assert that "the delay allows the FCC to take action against them without affording them the procedural

safeguards necessary to avoid any abridgment of their first amendment rights."

In an opinion by Judge Douglas H. Ginsburg, the D.C. Circuit Court of Appeals agreed that the FCC's procedures are "potentially troubling in some respects." But the court did not agree that they are unconstitutional. Instead, the court has found them to be constitutional, at least on their face. Broadcasters asserted that the delay causes them to avoid not only speech that is clearly indecent, but also to avoid speech that may be protected rather than indecent. However, according the court, the broadcasters "failed to make any such showing." Moreover, the court concluded that broadcasters themselves could speed up the procedure, either by stipulating to the facts in the Notice of Apparent Liability while stating that payment of the forfeiture will not be made voluntarily, or by bringing a declaratory relief action seeking a judicial determination that certain

material the broadcaster would like to air is not indecent.

Judge Harry T. Edwards concurred with reservations. But Judge David S. Tatel dissented. A petition for certiorari was filed with the Supreme Court in October.

Editor's note: The decision in this case (and in the Action for Children's Television case reported immediately above) resulted in the FCC settling a group of related forfeiture proceedings against Infinity Broadcasting Corporation arising out of assertedly indecent broadcasts by Howard Stern. (See the Washington Monitor section of this issue. ELR 17:7:20)

South Fork Broadcasting Corp. v. Federal Communications Commission, 59 F.3d 1249, 1995 U.S.App. LEXIS 17467 (D.C.Cir. 1995) [ELR 17:7:10]

Constitutionality of FCC regulations concerning "indecent" programming on cable TV public access channels is upheld by federal appeals court; Supreme Court will hear case

"Indecent" programming has been banned from television and radio airwaves for quite some time, and the constitutionality of that ban - at least between 6:00 a.m. and 10:00 p.m. - has recently been upheld by the federal Court of Appeals in Washington, D.C., in the case of *Action for Children's Television v. FCC* (reported above, ELR 17:7:9). By contrast, assertedly indecent programming on cable television has been permitted, because banning non-obscene (even if indecent) programming from cable TV would be an unconstitutional abridgment of free speech guaranteed by the First Amendment. Indeed, in 1984, Congress enacted federal legislation that required cable system operators

to make a certain number of channels available to the public; and that same legislation prohibited cable system operators from exercising any editorial control over programming shown on those "public access" channels. One byproduct of this 1984 statute was a proliferation of indecent programming on cable TV public access channels - much to the chagrin of many members of Congress, at least one of whom has said that public access "clearly . . . has . . . been abused" by the producers of such programming.

As a consequence of this perceived abuse, Congress amended the law in 1992. The amendment did not ban indecent programming from cable TV. Instead, it permits cable system operators to choose not to permit indecent programs on their public access channels; and it requires those cable systems that choose to carry indecent programming on public access channels to place such programs on a separate channel that is blocked

from viewers unless and until they request that the channel be unblocked. The FCC was directed to adopt regulations implementing these statutory provisions, and it did so.

In response to the FCC's regulations, cable access channel producers and viewers filed suit against the FCC, alleging that the FCC's regulations are unconstitutional. Initially, they were successful, because a panel of the D.C. Circuit Court of Appeals held the regulations to be an abridgment of their First Amendment free speech rights. (ELR 15:11:15) But the full Court of Appeals vacated that ruling, and in an en banc decision, a majority of that court has upheld their constitutionality.

In an opinion by Judge A. Raymond Randolph, for a seven-member majority, the court has rejected the contention that the decision of a cable system operator not to carry indecent programming constitutes "state action," even though cable systems were authorized by

Congress and the FCC to do so. The majority also rejected the contention that requiring a separate channel for indecent programming abridged the free speech rights of cable access programmers. According to the majority, requiring a separate channel was narrowly tailored to achieving the government's compelling interest in protecting children from indecent programs, and that alternatives - including the type of "safe harbor" used in connection with indecent broadcasts - would not be as successful in achieving that objective.

Four members of the court - Judges Patricia M. Wald, David S. Tatel, Judith W. Rogers and Harry T. Edwards - dissented. And the Supreme Court granted a petition for certiorari in November, so this case is not concluded as yet.

Alliance for Community Media v. Federal Communications Commission, 56 F.3d 105, 1995 U.S.App. LEXIS 13857 (D.C.Cir. 1995) [ELR 17:7:10]

Brown University violated Title IX by discriminating against women students in the operation of its inter-collegiate athletic program, federal District Court rules

Brown University - already highly regarded in the entertainment industry as the alma mater of a number of the industry's leading talent agents - now will be remembered as a legal test-bed for an important issue in the law of collegiate sports as well. That issue is the extent to which colleges and universities are required by federal law to provide adequate athletic opportunities for their women students. At the conclusion of the third and

final stage (barring appeals) of a vigorously litigated case involving just that issue, a federal District Court in Rhode Island has held that Brown University violated Title IX and its implementing regulations by denying Brown's women students adequate opportunities - compared to those offered to its men students - to participate in intercollegiate athletics.

This landmark case was triggered by Brown's decision to demote its women's gymnastics and volleyball teams from full varsity to "club" varsity status in 1991. In the first round of the case, Senior Judge Raymond J. Pettine issued a preliminary injunction that required Brown to reinstate those two teams to full varsity status, until the case was resolved on its merits. In the second round, that preliminary injunction was affirmed on appeal by the First Circuit. (ELR 15:7:28) Following the appellate court's decision, the case was remanded to Judge Pettine for trial; and in the third round, he has

ruled against Brown on the merits and has ordered it to prepare a "comprehensive plan for complying with Title IX."

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender by federally-funded educational institutions. The Department of Health, Education and Welfare issued implementing regulations in 1975 and a Policy Interpretation in 1979 which specifically prohibit such discrimination in athletics.

Brown is an NCAA Division I school (in all sports but men's football), and it sponsors intercollegiate teams for 342 women in 18 sports and for 555 men in 16 sports. The Title IX regulations provide multi-prong, multi-factor tests for determining whether opportunities for athletic participation for both sexes are "equal." After applying these tests to the Brown athletic program, Judge Pettine determined that the University had not

"fully and effectively accommodated" the interests of its women students, as required by the Regulations. The judge also found that Brown had not provided women athletes with equal "treatment."

Judge Pettine ruled that Brown could comply with Title IX in any of several ways: by eliminating its athletic program altogether; by elevating or creating women's varsity positions, or demoting or eliminating a number of men's positions; or by combining these remedies. "I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes," he said. The judge rejected Brown's argument that it was being forced by "financial constraints" to eliminate men's athletic opportunities in order to comply with Title IX. He said that it was "not true" that there was nothing further Brown could do except "cut, cap or eliminate men's teams." Rather, he observed, "Brown . . . retains the

option to redistribute its resources in a way that may slightly reduce the 'standard of living' for its university-funded varsity sports in order to expand the participation opportunities for its women athletes and closer approach equal opportunity between its male and female athletes. Whether it will follow this course of actions is, of course, well within its discretion."

Editor's note: Some schools have eliminated men's athletic programs in recent years, apparently in order to bring themselves into compliance with Title IX. Doing so, however, has not been controversy-free. In fact, when Drake University did so, some of its male athletes sued the school, contending that their rights under Title IX had been violated! See *Gonyo v. Drake University*, immediately below. (ELR 17:6:12)

Cohen v. Brown University, 879 F.Supp. 185, 1995 U.S. Dist. LEXIS 4278 (D.R.I. 1995) [ELR 17:7:11]

Drake University did not violate Title IX or the Constitution by discontinuing its men's intercollegiate wrestling program

In some ways, Drake University is heaven for its men students. During the 1992-93 school year, for example, fewer than 43% of its students were men - though men made up more than 75% of Drake's intercollegiate athletes. The male-female ratios for that year are significant, because that was the year that Drake's athletic director decided to eliminate the men's wrestling team, as of the following season. Finances were the principal reason for discontinuing the men's wrestling program, though there were others as well. Whether Title IX and gender equity concerns were one of the other reasons was a "matter of some dispute." What is not

disputed is that several wrestlers were sufficiently upset by the athletic director's decision to file suit about it - alleging that the elimination of their team violated Title IX and their Constitutional rights.

The wrestlers lost the first round when federal District Judge Harold D. Vietor denied their motion for a preliminary injunction (ELR 16:3:34). Now they've lost the second round as well, and with it, the match, because Judge Vietor has granted Drake's motion for summary judgment and has dismissed the case.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender by federally-funded educational institutions. The Department of Health, Education and Welfare issued implementing regulations in 1975 and a Policy Interpretation in 1979 which specifically prohibit such discrimination in athletics. In most litigated cases, Title IX has been relied on by women students who have alleged they were

discriminated against in their schools' athletic programs as compared to men. (See, e.g., *Cohen v. Brown University*, reported above at ELR 17:6:11.)

In this case, however, Drake's male wrestlers asserted that their rights under Title IX were violated. They found support for their position in one section of the Policy Interpretation which requires proportionate amounts of scholarship aid to be made available to men and women. The wrestlers contended that Drake violated this provision, because during 1992-93, only 47% of Drake's athletic scholarships went to men even though more than 75% of its athletes were men. On the other hand, the Title IX regulations require colleges to provide athletic opportunities for male and female students proportionate to their enrollments. And by this standard, Drake provided men with many more opportunities than women, because even though almost 53% of

its students were women, less than 25% of its athletes were women.

Thus, the task, as Judge Vietor saw it, was to reconcile Title IX's scholarship requirements with its opportunity requirements, which in Drake's case appeared to conflict with one another. He did so by noting that the "paramount goal of Title IX is equal opportunity to participate," and from this he concluded that "the participation test more comprehensively serves the remedial purpose of Title IX than does the scholarship test and therefore must prevail." By this standard, Drake had not violated Title IX by eliminating the men's wrestling program, and Judge Vietor so ruled.

The judge also concluded that as applied to Drake's wrestlers, Title IX is not unconstitutional, even though it worked to the disadvantage of males. Nor did it deny them Equal Protection of the laws, because

Drake is a private institution, and thus its decisions do not amount to "state action."

Gonyo v. Drake University, 879 F.Supp. 1000, 1995 U.S. Dist. LEXIS 3820 (S.D. Iowa 1995) [ELR 17:7:12]

Animal mannequins may be eligible for copyright protection as sculptural works even though they are useful articles, but a high degree of similarity may be necessary to establish infringement

Many plastic animal mannequins are eligible for copyright protection, though to prove their copyrights have been infringed, a high degree of substantial similarity may have to be shown, a federal District Court in New York has ruled. At issue in this case were several types of animal mannequins used by taxidermists to

mount animal skins. Thus, while mannequins are sculptural works and appear copyrightable as such, their copyrights were challenged on the grounds that they also were "useful articles" that are not eligible for copyright protection.

District Judge Frederick J. Scullin, Jr., acknowledged that "Animal mannequins used for taxidermy present the unique problem of not fitting neatly into any specific definition set forth in the Copyright Act." He noted, however, that even useful articles may be eligible for copyright, if they have sculptural features that "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." Thus, Judge Scullin assumed that the mannequins at issue in this case performed a useful function in connection with mounting skins, and he focused on whether they also exhibited artistic elements that could be separately identified.

He decided that they did, because the "function of mounting skins can be accomplished by almost any crude form that is generally the proper size for the skin," while many of the mannequins at issue in this case also expressed the artists' "conception of what the animal is doing and how that animal would appear while doing that activity." On the other hand, even artistic mannequins may be ineligible for copyright by virtue of the "merger doctrine" which holds that if there are only a few ways to express an idea, even expression is not copyrightable.

This case involves three types of mannequins: fish, full-body animals, and animal heads and shoulders. As to the fish, Judge Scullin could see "no meaningful detail in the mannequins that is not commanded by the idea of a realistic fish," and therefore he held that the fish mannequins were not copyrightable because "there are only a few ways in which to express the idea of a

realistic fish body in a mannequin" and thus "the expression merges with the idea." On the other hand, he ruled that the full-body mannequins and the head-and-shoulders mannequins are eligible for copyright, because they contain expressive features - such as pose, attitude, gesture, muscle structure, facial expression and skin wrinkles - which were added for the purpose of reflecting the designer's artistic judgments, not to accommodate skin mounting.

However, proving infringement of the copyrightable mannequins will require a high degree of substantial similarity. This is so, Judge Scullin explained, because, "Substantial similarity is not a fixed standard, but instead is represented by a sliding scale: The less ways there are to express an idea the more substantial the similarities must be; conversely, the more ways to express an idea the less substantial the similarities must be." Therefore, when, as in this case, "the idea and

expression do not merge, but there is still only a limited number of ways of expressing the idea, `the burden of proof is heavy on the plaintiff who may have to show "near identity" between the works at issue."

Editor's note: This decision is a well-reasoned application of copyright doctrines concerning: (1) the copyrightability of utilitarian three-dimensional works, (2) the idea-expression merger doctrine, and (3) the degree of similarity necessary to constitute "substantial" similarity. Judge Scullin's opinion that "Substantial similarity is not a fixed standard . . ." is correct; at the appellate level, this principle was applied most recently in *Apple Computer, Inc. v. Microsoft Corporation*, 35 F.3d 1435, 1994 U.S.App.LEXIS 25646 (9th Cir. 1994) (ELR 16:10:17), in which the Ninth Circuit held that Apple had to prove that the Microsoft Windows interface was "virtually identical" to the Apple Macintosh interface in order to satisfy the "substantial similarity"

standard for infringement. Judge Scullin's notion that substantial similarity is represented by a "sliding scale" - so that "the less ways [there are] to express an idea the more substantial the similarities must be"- is a useful way to describe the varying degrees of similarity necessary to prove substantial similarity. This "sliding scale" is reminiscent of the "inverse ratio rule" used to determine whether copying has occurred. But Judge Scullin's "sliding scale" and the "inverse ratio rule" should not be confused with one another. The "inverse ratio rule" balances evidence of access and similarity for the purpose of deciding whether copying may be inferred; but even if inferred, copying by itself is not sufficient to prove infringement. Infringement requires two things in addition to the fact of copying: the copying of copyright-protected material, and substantial similarity as a consequence of copying of copyright-protected material.

Hart v. Dan Chase Taxidermy Supply Co., Inc., 884 F.Supp. 71, 1995 U.S.Dist.LEXIS 6809 (N.D.N.Y. 1995) [ELR 17:7:13]

Briefly Noted:

Americans with Disabilities Act.

The operator of Caravan of Dreams - a musical entertainment venue in Fort Worth, Texas - did not violate the American with Disabilities Act by permitting its customers to smoke, even though cigarette smoke is an irritant and the operator was asked by non-smoking patrons to prohibit smoking when they attended performances, a federal District Court has ruled. Judge Barefoot Sanders held that a policy that permits customers to smoke is not prohibited by the Act, because such a

policy does not involve a decision as to who will have access to the venue. "The only criterion for eligibility or access to Defendant's theater," said Judge Sanders, "is the possession of a ticket." Moreover, the judge noted that the Act does not require businesses to modify their policies if doing so would fundamentally alter the services offered. In this case, the judge held, imposition of an anti-smoking policy would "endanger Defendant's viability as a business," because uncontroverted testimony established that it would have a major economic impact on the business and "would result in major national bands not coming to play at Caravan of Dreams."

Emery v. Caravan of Dreams, Inc., 879 F.Supp. 640, 1995 U.S. Dist. LEXIS 3853 (N.D.Tex. 1995) [ELR 17:7:14]

Worker Adjustment and Retraining Notification Act.

The Worker Adjustment and Retraining Notification Act did not apply to the sale by Compact Video Services of its unionized business to ATS Acquisition Corp., a non-union company, the Ninth Circuit Court of Appeals has held. The WARN Act is a federal statute that requires employers to give 60 days notice before any "plant closing" or "mass layoff." The statute defines both of these phrases to mean events that result in an "employment loss." When Compact Video sold its business in 1993, all but five of its 314 employees were offered employment by ATS. Many took pay cuts and all received fewer fringe benefits. But neither the sale of its business by Compact Video, nor the reduction of employee salaries and benefits by ATS, amounted to an "employment loss." Thus neither was a WARN Act

event, the appellate court held in an opinion by Circuit Judge Alfred T. Goodwin, which affirmed a ruling by District Judge Edward Rafeedie. Circuit Judge Warren J. Ferguson dissented.

International Alliance v. Compact Video Services, Inc.,
50 F.3d 1464, 1995 U.S. App. LEXIS 5821 (9th Cir.
1995) [ELR 17:7:14]

College coach discrimination claim.

The former women's basketball and softball coach at Utica College has lost her employment discrimination case against the school. The coach filed her lawsuit after her contract was not renewed, alleging she had been discriminated against on account of her gender in violation of Title VII, Title IX and the Equal Pay Act. Judge

Frederick J. Scullin, Jr., gave each of the coach's claims careful and detailed consideration, and his opinion is a model of clarity and organization. That was of little solace to the coach, however, because Judge Scullin ultimately concluded that the college and its President and Athletic Director (all of whom had been named as defendants) had produced evidence to show that the coach's contract was not renewed for legitimate, non-discriminatory reasons, and the coach had failed to create any question as to the credence of those stated non-discriminatory reasons. Thus, Judge Scullin has granted the school's motion for summary judgment as to all her claims and has dismissed the case.

Harker v. Utica College of Syracuse University, 885 F.Supp. 378, 1995 U.S. Dist. LEXIS 6321 (N.D.N.Y. 1995) [ELR 17:7:14]

Warhol Estate legal fees.

Attorneys Edward Hayes and Frances Harvey, Jr., have been awarded \$7.2 million in fees for work they performed for the Estate of Andy Warhol since the artist's death in 1987. The size of the award was fixed by Judge Eve Preminger, apparently in response to objections asserted by The Andy Warhol Foundation to the amount the two lawyers had originally sought. The estate's executor, Frederick Hughes, had been Warhol's advisor and business partner for more than 25 years, and the executor made what Judge Preminger characterized as "an unorthodox selection for counsel," because Edward Hayes is not an estates and trusts lawyer but is instead "an experienced criminal and civil litigator who had achieved what passes for New York celebrity [by serving] as the model for a character in the best-selling novel 'Bonfire of the Vanities.'" Hayes retained Harvey

who is an estate planning and administration specialist to help with tax and accounting issues. But at the executor's request, Hayes devoted virtually all of his time and attention to the Warhol estate for several years. The executor and Hayes had entered into a twice-amended retainer agreement calling for Hayes to be paid a percentage of the value of the estate for his services, and The Andy Warhol Foundation took exception to the amount that would have been paid to Hayes pursuant to this agreement. Judge Preminger found that the executor understood the retainer agreement, and the judge pointed out that the executor had demonstrated his ability to evaluate the quality of lawyers' services and had shown no reluctance to replace lawyers with whom he had become dissatisfied. Moreover, Judge Preminger acknowledged that the retainer agreement might have been reasonable if the size of Warhol's estate had been as originally estimated. In fact, however, the estate

turned out to be much larger. Thus, because the agreement contained no limit on the amount Hayes could earn, the retainer agreement became "unenforceable," and Judge Preminger had to determine the "reasonable value" of the legal services that had actually been performed. Judge Preminger reviewed these services in some detail, noting how successful Hayes had been in protecting the estate's interests and maximizing its value. For these reasons, the judge awarded Hayes and Harvey \$7.2 million.

Estate of Andy Warhol, 629 N.Y.S.2d 621, 1995 N.Y.Misc.LEXIS 313 (1995) [ELR 17:7:14]

Commissions on sale of Picasso reproductions.

A federal District Court in New York City has granted summary judgment to Roberta Boxer Levi on the liability portion of her breach of contract claim against a fine art publisher and others who reproduced and sold works by Pablo Picasso. The contract in question was entered into because Levi introduced the defendants to the art dealer for Picasso's granddaughter, and that introduction eventually enabled the defendants to obtain the right to reproduce and sell certain Picasso artworks. Levi's contract obligated the defendants to pay her commissions in connection with those sales - commissions which, according to Levi, now amount to \$18.5 million. In granting Levi's motion for summary judgment as to liability, Judge Kevin Thomas Duffy rejected the defendants' contention that the agreement required Levi to do anything more than introduce the defendants to the granddaughter's art dealer. The amount of money to

which Levi is entitled was referred to a magistrate judge for an "inquest."

Levi v. Finesod, 878 F.Supp. 9, 1995 U.S. Dist. LEXIS 2280 (S.D.N.Y. 1995) [ELR 17:7:15]

Music concert pat-down searches.

The 4th Amendment rights of those who attended a Neil Young concert in Utah in 1991 were not violated by "pat-down" searches conducted as they entered the concert hall, because the 4th Amendment prohibits only "state action" and the objected-to searches were conducted by employees of a private security company, the Tenth Circuit Court of Appeals has held. The concert took place on the campus of the University of Utah - a state institution - and thus the plaintiffs argued that the

objected-to searches were the result of "state action." But the District Court ruled otherwise, and the Court of Appeals has affirmed. The appellate court reviewed all of the grounds on which "state action" has been found, based on the actions of non-government personnel; but the court found that none of those grounds was applicable under the facts that existed in this case.

Gallagher v. "Neil Young Freedom Concert", 49 F.3d 1442, 1995 U.S. App. LEXIS 3983 (10th Cir. 1995) [ELR 17:7:15]

Photographer's damages.

Photographer Kathleen Jo Ryan has been awarded \$42,000 in damages in her breach of bailment action against Aer Lingus, an Irish airline, on account of

the airline's loss of 140 color transparencies she had sent it for possible use in advertising. The photographer had sought \$1,500 in damages for each lost transparency, which would have come to a total of \$210,000. But the airline had never agreed - before or after the loss - that the transparencies had that value. Thus, after careful analysis, Judge Robert P. Patterson, Jr., found that the photographer was entitled to damages of \$300 for each lost transparency, because that was the "loss value" another publisher and the photographer had once agreed to, in actual negotiations.

Ryan v. Aer Lingus, 878 F.Supp. 461, 1994 U.S. Dist. LEXIS 14519 (S.D.N.Y. 1994) [ELR 17:7:15]

Cable television.

The City of East Cleveland and its council members have successfully deflected a lawsuit filed against them by I-Star Communications Corporation, the company to which East Cleveland granted a cable television franchise in 1990. Relations between the city and I-Star have been tense for some time, and the city council has taken a number of actions which I-Star construes as attempts to interfere with the exercise of its franchise. Most recently, the city refused to consider I-Star's request that the city give the company permission to assign its franchise to the company's bank as collateral for a \$1.75 million loan the company needed in order to build the cable system. Moreover, the city council has treated a competing cable company more favorably by approving its request for financing and by not requiring it to provide certain financial information in a timely manner. All of this resulted in a lawsuit by I-Star against the city and its council members under section 1983 of

title 42 of the United States Code (which is a federal law that prohibits the denial of Constitutional rights under color of state or local law) and under provisions of the federal Cable Television Consumer Protection and Competition Act. But District Judge Ann Aldrich has dismissed I-Star's case, ruling that none of the acts alleged in its complaint constitute violations of any of the provisions of either federal law.

I-Star Communications Corp. v. City of East Cleveland, 885 F.Supp. 1035, 1995 U.S. Dist. LEXIS 6316 (N.D. Ohio 1995) [ELR 17:7:15]

Cable TV descrambling conviction.

The Fifth Circuit Court of Appeals has affirmed the convictions of the owners of an electronics business

in Mississippi that repaired devices used for the unauthorized interception of cable television signals. In an opinion by Circuit Judge Fortunado P. Benavides, the appellate court rejected the defendants' arguments that their convictions should be reversed: on double jeopardy grounds; because they had given involuntary statements to the FBI; because there was insufficient evidence to support their convictions; because the trial court had given the jury faulty instructions; and because the government had failed to establish the chain of custody of devices that were admitted into evidence to establish their guilt.

United States v. Crawford, 52 F.3d 1303, 1995 U.S. App. LEXIS 10760 (5th Cir. 1995) [ELR 17:7:16]

Candidate debates.

A lawsuit brought against the New Jersey Public Broadcasting Authority by an unsuccessful independent candidate for governor of New Jersey, alleging the inadequate coverage of her campaign, has been dismissed by a federal District Court. Judge John C. Lifland has ruled that no private cause of action is created by section 315 of the Federal Communications Act, which requires broadcasters to operate "in the public interest" and to permit "conflicting views on issues of public importance." While Judge Lifland agreed with the candidate that she did have a qualified First Amendment right of access to the airwaves created by government sponsorship of the Public Broadcasting Authority's programming, the judge ruled that the candidate had not shown she had been discriminated against on account of her views in violation of the First Amendment.

Arons v. Donovan, 882 F.Supp. 379, 1995 U.S.Dist.LEXIS 5406 (D.N.J. 1995) [ELR 17:7:16]

Torts.

A federal District Court in Massachusetts has denied a travel agency's motion for summary judgment in a negligence lawsuit filed by a member of an acting troupe and a hotel guest who had been injured as a result of an accident that occurred during a fire-eating act performed for an audience of customers on a tour arranged by the travel agency. Judge Nathaniel M. Gorton ruled that a jury could find that the accident was foreseeable by the travel agency. On the other hand, Judge Gorton did dismiss the plaintiffs' strict liability claim, because he found that the fire-eating act was not "abnormally dangerous"

and that even if it were, the dangerous activity did not "escape" onto the property of another which is a condition for strict liability to apply. Earlier in this case, Judge Gorton issued an identical ruling (ELR 16:4:28) in response to a summary judgment motion made by Marriott Corporation, the owner of the hotel where the accident occurred.

Thomalen v. Marriott Corp., 880 F.Supp. 74, 1995 U.S. Dist. LEXIS 4477 (D.Mass. 1995) [ELR 17:7:16]

Previously Reported:

The United States Supreme Court has granted a petition for certiorari in *Brown v. Pro Football* (ELR 17:4:19) in order to review a ruling that antitrust laws prohibiting price fixing do not apply to the NFL's

uniform wage for practice-squad players which was imposed by the league after impasse had been reached in collective bargaining with the NFL Players Association. Though this particular case arose in the context of professional sports, the NFL Players Association is not the only entertainment industry union concerned with the issue. Amicus briefs urging the Supreme Court to grant a hearing also were filed on behalf of SAG, AFTRA, the DGA and the WGA and by the Justice Department. [ELR 17:7:16]

INTERNATIONAL CASES

Island Records is entitled to information about sales and profits of infringers of copyrights to Cat Stevens recordings, before Island is required to make

election between damages and profits remedies under British copyright law

In a case of first impression in Great Britain, a Chancery Division court has held that the owner of a copyright that has been infringed is entitled to obtain information concerning the infringer's sales and profits before the copyright owner is required to make an election between the remedies of damages and profits. The issue arose in an infringement action brought by Island Records against companies that had infringed its copyrights to recordings by Cat Stevens.

The issue arose for two reasons. First, British courts have developed the practice of conducting a "split trial" - especially in intellectual property cases - in which the issue of liability is decided before damages are determined, and before discovery is conducted concerning damages. Second, under British copyright law, a

successful plaintiff is entitled to recover its damages or the defendant's profits, and is permitted to make an election between the two; but British law does not specify precisely when that election must be made.

In this case, a "split trial" procedure of sorts was used, in the sense that Island Records made a motion for judgment before it had conducted discovery concerning the defendants' sales or profits, seeking an award of damages or profits in an amount to be determined after an accounting was conducted. The defendants agreed that they had infringed Islands' copyrights. But the defendants contended that Island had to make an election between the two remedies of damages and profits at the hearing on Island's motion, before they were required to respond to discovery or render an accounting.

The court characterized the issue as "novel" and "of some far reaching importance," but appeared to have little difficulty deciding that Island was entitled to

discovery or an accounting before being required to make its election of remedies. The court explained that "a party should . . . not be required to elect . . . between remedies unless and until he is able to make an informed choice. A right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in a case of both the alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits."

The defendants had offered to provide an audited accounting, and thus the court ordered them to do so within two months, and it ordered Island to elect its remedy within seven days after receiving the accounting.

Editor's note: The election of remedies provisions of United States copyright law are similar - but not

identical - to those of British law. Under section 504 of the U.S. Copyright Act, a successful plaintiff is entitled to recover: its actual damages and any of the infringer's profits that are not taken into account in computing the plaintiff's damages; or statutory damages (in an amount fixed by the court, within a range specified by statute). In other words, the election permitted by U.S. law is between actual damages and profits on the one hand, and a statutory measure of damages on the other. Also, section 504 of the Copyright Act clearly specifies that this election may be made "at any time before final judgment is rendered." Thus, in U.S. courts, where "bifurcated trials" also are commonly held in intellectual property cases, copyright owners would be permitted to establish liability - and thus their right to recover - before they conducted discovery as to damages and profits, and they would be permitted to make an election between the available remedies only after discovery was conducted,

and could even wait until a jury returned a verdict concerning actual damages and profits before deciding whether to ask a judge to award greater statutory damages.

Island Records Ltd. v. Tring International, [1995] 3 All ER 444 (available in LEXIS Enggen Library, Cases File) [ELR 17:7:17]

Virgin Interactive prevails in British court in breach of contract action against computer game developer on account of developer's failure to deliver finished version of "Space Shuttle Simulator" game on time and failure to deliver "XF-50 Damoclese" game at all

As computer games have become more complex, and thus more attractive to consumers, they also have become more difficult to develop and perfect. These difficulties are reflected in at least three ways: in the amount of time required to develop computer games; in the expense their development requires; and in the number of "bugs" they contain when first delivered by their developers. All three of these things were present in a recent lawsuit between Virgin Interactive Entertainment and a computer game development company once known as Vektor Grafex Limited.

In 1989, Virgin and Vektor entered into a written contract by which Vektor agreed to develop two games to be published by Virgin. The games were called "Space Shuttle Simulator" and "XF-50 Damoclese," and they were to be delivered to Virgin in a year. During that year, Virgin advanced 170,000 British pounds in royalties to Vektor, but the games were not delivered.

Early in 1991, Virgin and Vektor met and orally agreed that the delivery date would be extended to July of that year, and that Virgin would advance Vektor an additional 52,500 pounds in royalties during that time. Neither of the games was delivered by that date, though a PC version of "Space Shuttle Simulator" was delivered by November 1991 and versions of that game in other computer formats were delivered in 1992. "XF-50 Damoclese" was never delivered. Moreover, according to Virgin, even the November 1991 version of "Space Shuttle Simulator" was not a finished version, but instead contained so many "bugs" it was unplayable; and the finished version of that game was not delivered until February 1992.

A lawsuit ensued. Vektor claimed that the due date for "Space Shuttle Simulator" had been extended even beyond July 1991 and that Virgin had released it from its obligation to develop "XF-50 Damoclese" at all.

Virgin, of course, contested these claims. The dispute between the two companies was largely factual and concerned the meaning of things that were said and done during and after the parties' meeting in early 1991. In a very lengthy decision that reviews the facts (including trial testimony) in explicit detail, a British Chancery Division court has found in favor of Virgin and against Vektor. The court has ruled that Vektor breached its contract with Virgin, because Vektor was late in delivering "Space Shuttle Simulator" and failed to deliver "XF-50 Damoclese," and thus the court has entered judgment for Virgin with "damages to be assessed."

Virgin Interactive Entertainment v. Bluewall Limited (U.K. Chancery Div. 1995) (available in LEXIS Enggen Library, Cases File) [ELR 17:7:18]

WASHINGTON MONITOR

FCC settles "indecent" proceedings with Infinity Broadcasting arising out of radio broadcasts by Howard Stern

Howard Stern is a record-setter. When he goes on tour to autograph copies of his best-selling books, his fans (and customers) turn out in numbers that are larger than any attracted by other authors. Likewise, when he goes on the air as the host of his own syndicated radio talk show, he says things - assertedly "indecent" things - that attract fines that are larger than any others the FCC has ever collected.

Federal law prohibits broadcasters from transmitting "indecent" programming during the hours of the day that "The Howard Stern Show" is on the air. The constitutionality of that law has recently been upheld by the

federal Court of Appeals in Washington, D.C., in the case of *Action for Children's Television v. FCC* (reported in the Recent Cases section of this issue (ELR 17:7:9)). If broadcasters violate that law by broadcasting indecent material, the FCC has a procedure for assessing and collecting "forfeiture penalties" (which are civil fines). The constitutionality of that procedure was recently upheld by the D.C. Circuit Court of Appeals as well, in *South Fork Broadcasting v. FCC* (reported in the Recent Cases section of this issue (ELR 17:7:10)).

"The Howard Stern Show" is carried by radio stations in New York, Pennsylvania and Virginia that are owned by Infinity Broadcasting Corporation (and by other stations). As a result of things Stern said on the air, the FCC ordered Infinity to forfeit \$6,000 and issued Notices of Apparent Liability totaling \$1.7 million more. In the wake of the FCC's victories in the *Action for Children's Television* and *South Fork Broadcasting*

cases, Infinity and the FCC have settled all of the indecency proceedings that were pending against the broadcaster. In return for the FCC's dismissal of those proceedings, Infinity has agreed to make a "voluntary contribution" of \$1.715 million to the U.S. Treasury. According to FCC Chairman Reed Hundt, this is "the largest amount ever contributed to the U.S. Treasury by a broadcast station licensee."

In addition to making this voluntary contribution, Infinity has agreed to educate its on-air personnel concerning the FCC's indecency actions and to issue a policy statement to on-air personnel directing them to be "cognizant" of the federal law that prohibits the broadcast of indecent speech.

FCC Mass Media Action, Report No. NM 95-89 (Sept. 1, 1995) [ELR 17:7:19]

Copyright Office adopts regulations concerning restoration of copyrights to certain foreign works

The United States Copyright Office has adopted final regulations concerning the procedures that are to be followed for the filing of documents that will be important in connection with the restoration of the copyrights to certain foreign works. The foreign works in question are those that have been in the public domain in the United States, but whose copyrights will be restored on January 1, 1996, as a result of Congress' enactment of a new section 104A of the Copyright Act. (See, Lionel S. Sobel, "Back from the Public Domain: Congress Restores Copyrights to Many Foreign Works" in the August 1995 issue of the Entertainment Law Reporter. (ELR 17:3:3))

Although eligible works will have their U.S. copyrights restored automatically, the owners of

restored copyrights will be able to enforce their rights against "reliance parties" (namely, those who relied on the public domain status of such works by using them before their copyrights were restored) only by filing with the Copyright Office a document known as a "Notice of Intent to Enforce" copyright, or by personally serving such a Notice on reliance parties. That is, the law permits "reliance parties" to continue to exploit works whose copyrights have been restored - even after their copyrights are restored - for a period of time whose duration will depend on whether and when the owners of restored copyrights file or serve "Notices of Intent to Enforce."

The Copyright Office has decided not to publish a printed form "Notice of Intent to Enforce." But in its newly adopted regulations, the Office has described the specific items of information that should be included in such a Notice. Notices of Intent to Enforce must be in

English, and should be typed or printed by hand legibly in dark, preferably black, ink, on 8 1/2 by 11 inch white paper of good quality, with at least a one inch margin. The document should be clearly designated as ``Notice of Intent to Enforce a Copyright Restored under the Uruguay Round Agreements Act."

Notices of Intent to Enforce must include: (A) The title of the work, or if untitled, a brief description of the work; (B) An English translation of the title if title is in a foreign language; (C) Alternative titles if any; (D) Name of the copyright owner of the restored work, or of an owner of an exclusive right therein; (E) The address and telephone number where the owner of copyright or the exclusive right therein can be reached; and (F) The following certification signed and dated by the owner of copyright, or the owner of an exclusive right therein, or the owner's authorized agent: "I hereby certify that for each of the work(s) listed above, I am the copyright

owner, or the owner of an exclusive right, or the owner's authorized agent, the agency relationship having been constituted in a writing signed by the owner before the filing of this notice, and that the information given herein is true and correct to the best of my knowledge."; and the Notice should end with a Signature, Name (printed or typed), As agent for (if applicable), and Date.

The Notice also may contain the following optional but essential information: (A) Type of work (painting, sculpture, music, motion picture, sound recording, book, etc.); (B) Name of author(s); (C) Source country; (D) Approximate year of publication; (E) Additional identifying information (e.g. for movies: director, leading actors, screenwriter, animator; for photographs or books: subject matter; for books: editor, publisher, contributors); (F) Rights owned by the party on whose behalf the Notice of Intent to Enforce is filed (e.g., the

right to reproduce/distribute/publicly display/publicly perform the work, or to prepare a derivative work based on the work, etc.); and (G) Telefax number at which owner, exclusive rights holder, or agent thereof can be reached.

Notices of Intent to Enforce may cover multiple works provided that each work is identified by title, all the works are by the same author, all the works are owned by the identified copyright owner or owner of an exclusive right, and the rights owned by the party on whose behalf the Notice of Intent is filed are the same. In the case of Notices of Intent to Enforce covering multiple works, the notice must separately designate for each work covered the title of the work, or if untitled, a brief description of the work; an English translation of the title if the title is in a foreign language; alternative titles, if any; the type of work; the source country; the

approximate year of publication; and additional identifying information.

The Copyright Office has set the filing fee for such Notices at \$30 for one work, plus \$1 for each additional work by the same author listed on a single Notice.

The Copyright Office also has adopted new regulations and new forms for registering the copyrights to restored works. Works whose countries of origin are Berne Convention members are not required to be registered in order for their copyrights to be enforced by litigation in U.S. courts; but certain procedural advantages and remedies are available to owners of registered copyrights that are not available to the owners of unregistered copyrights to Berne Convention works. Thus the owners of restored copyrights, including those to works of Berne Convention origin, will be well-advised to register their restored copyrights. The new forms for registering restored copyrights are Form GATT (for

individual works and series published under the same title), Form GATT/GRP (for groups of two to ten related restored works), and Form GATT/CON which is a continuation sheet for providing additional information. The Copyright Office fee for registering restored copyrights will be \$20 (though groups of two to ten related works published during the same calendar year may be registered with a single form for a fee of \$10 per work).

The Copyright Office has established a special address for filing Notices of Intent to Enforce and for registering restored copyrights: URAA/GATT, NIEs and Registrations, P.O. Box 72400, Southwest Station, Washington, D.C. 20024, USA.

The new regulations have been codified at 37 CFR sections 201.31, 201.33 and 202.12.

Restoration of Certain Berne and WTO Works, Copyright Office, Library of Congress, 60 Fed.Regis. 50414 (Sept. 29, 1995) [ELR 17:7:19]

Copyright Office announces cost-of-living increase in statutory mechanical royalty rates payable by record companies to music publishers under the compulsory license

The United States Copyright Office has announced an increase in the statutory mechanical royalty rates payable by record companies to music publishers under the compulsory license found in section 115 of the Copyright Act. For every recording made and distributed on or after January 1, 1996, the royalty payable to the owner of the copyright to each song on the recording will be 6.95 cents or 1.3 cents per minute of playing

time (or fraction of a minute), whichever amount is greater.

This increase in the statutory rate is the result of a proposal made in 1987 by the National Music Publishers' Association, The Songwriters Guild of America and the Recording Industry Association of America, in which they agreed that the statutory mechanical rate should be adjusted every two years based on changes in the Consumer Price Index. That proposal was accepted by the Copyright Royalty Tribunal and was written into the Code of Federal Regulations. The Copyright Royalty Tribunal has since been legislated out of existence, but its Regulations have been adopted by the Copyright Office. Thus the mechanical rate provisions now are found at 37 CFR section 255.3.

Editor's note: From 1909 through 1977, the statutory mechanical rate was only 2 cents per song per

recording. Since then, the rate has been increased ten times, including the most recent increase.

Effective date of new rate	Cents per song	Cents per minute
January 1, 1978	2.75	0.5
July 1, 1981	4	0.75
January 1, 1983	4.25	0.8
July 1, 1984	4.5	0.85
January 1, 1986	5	0.95
January 1, 1988	5.25	1
January 1, 1990	5.7	1.1
January 1, 1992	6.25	1.2
January 1, 1994	6.6	1.25
January 1, 1996	6.95	1.3

Cost of Living Adjustment of the Mechanical Royalty Rate, Copyright Office, Library of Congress, 60 Fed.Reg. 55458 (Nov. 1, 1995) [ELR 17:7:21]

IN THE NEWS

Kim Basinger and Main Line Pictures settle breach of contract suit arising from actress's refusal to appear in the movie "Boxing Helena"

Actress Kim Basinger and Main Line Pictures have settled the production company's breach of contract lawsuit against her - a suit that arose when Basinger refused to appear in the movie "Boxing Helena" despite Main Line's allegation that she had agreed to do so in a legally binding way.

At one point, it looked as though the case would become an entertainment industry landmark - one that would clarify whether oral agreements and unsigned deal memos are binding contracts in Hollywood. The first round of the case suggested that they are binding, because a trial court judge entered a more than \$8 million judgment against Basinger confirming a jury verdict that the actress had breached her agreement with Main Line when she backed out of her promise to appear in its movie. (ELR 14:12:19; and Douglas Kari, "Basinger in a Box: Verbal Contracts in the Film Industry," ELR 15:2:3)

The size of the judgment forced Basinger into bankruptcy. But before the bankruptcy proceeding was finished, the judgment was reversed by the California Court of Appeal. The basis for the appellate ruling had nothing to do with the central issue in the case - whether she had entered into a binding contract. Instead, the

appellate court ruled that the trial judge had committed reversible error by instructing the jury to decide whether Ms. Basinger "and/or" her loan-out corporation had entered into and then breached a contract with Main Line. The instruction had failed to distinguish between the actress and her loan-out, even though Main Line had not proved (or even attempted to) that she was the alter ego of her corporation. (See ELR 16:6:8 for the full text of the otherwise unpublished opinion.)

The case was scheduled for retrial when it was settled. As a result of the settlement, Main Line reportedly will be paid \$3.8 million in installments.

[Dec. 1995][ELR 17:7:22]

CompuServe settles copyright infringement lawsuit filed by Frank Music based on subscribers' uploading and downloading of "Unchained Melody" and other songs

CompuServe has settled a two-year-old class action lawsuit filed against it by music publisher Frank Music which alleged that the computer online service had infringed Frank Music's copyrights in "Unchained Melody," as well as the copyrights to more than 900 other songs, by permitting CompuServe subscribers to upload and download recorded versions of those songs without a license. According to news reports, CompuServe has agreed to require the managers of its online music bulletin boards to obtain licenses from the Harry Fox Agency which is the agency that represents Frank Music and most other music publishing companies for the purpose of issuing mechanical and synchronization

licenses. According to one report, CompuServe also agreed to pay \$568,000 to music publishers for the on-line service's prior use of their copyright-protected songs. [Dec. 1995][ELR 17:7:22]

Apple Computer and Dr. Carl Sagan settle defamation lawsuit over Apple's use of "Butt-Head Astronomer" as code name for new project

Apple Computer and Dr. Carl Sagan have settled the astronomer's defamation lawsuit - a suit that arose out of the computer maker's use of the phrase "Butt-Head Astronomer" as a code name for a new project. The terms of the settlement were not announced, though both sides said it was "amicable." The objected-to phrase was not the first one Apple had used as a code name for its project. Originally, it had used the

astronomer's actual name, "Carl Sagan." Apple allegedly changed its code name to "Butt-Head Astronomer" when Dr. Sagan demanded that it stop using his name. Apple won dismissal of the lawsuit when a federal District Court found that the new code name did not imply an assertion of objective fact, and thus the statement was protected under the First Amendment and California law. (ELR 16:12:8) Sagan appealed, but the case was settled before the appeal was decided. [Dec. 1995][ELR 17:7:22]

DEPARTMENTS

Letters to the editor:

A favorable view of *Playboy v. Dumas*

To the Editor:

I wanted to offer a thought about [Playboy v. Dumas] after reading your note in the Entertainment Law Reporter. [ELR 17:5:12] (By the way, I like the addition of the editor's notes; they're most helpful.)

From our particular perspective here, the Second Circuit's view that a pre-creation contract may be oral, and even implied, is helpful and important. We find that even in circumstances where the understanding of the parties with respect to rights and other material issues is perfectly clear, it is not always easy to get signed documents in a timely fashion.

The important example is our engagement of screenwriters. We require writers to sign a certificate of authorship or long-form contract prior to getting paid. Both contain the usual work for hire language. Because it often takes some time to negotiate all the language of the long-form, the certificates are usually signed first and returned promptly. But not always. Delays occur -

sometimes for weeks - and they are virtually never the result of a dispute between the parties over rights. In the meantime, our creative executives and producers often give the writers the go-ahead, and work on the screenplay begins before execution of any form of contract. Sometimes a substantial amount of writing - even a whole draft - is completed before we get the signed document.

You get the point. Since there is never any dispute about the fact that the screenplay is being written as a work for hire, I would be opposed to a legal rule that overrides the parties' clear expectation because of the unintentional timing of events. I recognize that in the magazine industry, from which the Playboy case arises, the expectations of the parties with regard to rights are often different from those in the motion picture industry. And I agree with your statement that the approach taken in the Playboy case produces some uncertainty; that's

always true when the law permits implied results. But certainty may be less important here than carrying out the business expectations of the parties - even if in some cases there may be some uncertainty about what they were.

A final point. In the case of our writing engagements, I would like to believe that the writers are not independent contractors in the first place. Thus I am arguing a point here that I hope never to have to win. I hope that a court would find our writers, and the other talent we engage, to be actual employees for hire, even if they are engaged via their personal loanout companies. But, alas, there's another annoying uncertainty.

A continuing thanks for your exceptionally useful, one-of-a-kind magazine.

Sincerely,
Jeremy N. Williams

Senior Vice President & General Counsel, Theatrical
Warner Bros.

Burbank, California

[ELR 17:7:23]

**Error concerning California libel law in report of
Rudin v. Kelley**

To the Editor:

I am a subscriber to the Entertainment Law Reporter and I regularly enjoy reading your publication. Your editorial comments add considerable interest to the reported cases.

In the September 1995 edition of the Entertainment Law Reporter (Volume 17, No. 4), there was an error in reporting the case of Rudin v. Kelley. On page 24 of that edition the Reporter states ". . . and to prevail in a California libel case it is necessary to prove `special

damages' which are damages to one's property, business, trade, profession or occupation." [ELR 17:4:24]

As I am sure you are aware, it is not necessary to prove special damages "to prevail in a California libel case." In a case where the statement is defamatory on its face (libelous per se) no proof of special damages is required. However, as in the Rudin case, where the defamatory character requires an explanation of the surrounding circumstances ("innuendo"), it is not libel per se and therefore requires pleading and proof of special damages.

Again, I want to complement you on the fine job you are doing with the Entertainment Law Reporter.

Very truly yours,

Barry B. Langberg

Langberg, Cohn & Drooz

Los Angeles, California

[ELR 17:7:23]

In the Law Reviews:

Entertainment and Sports Lawyer, issued by the ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 13, Number 3 with the following articles:

"Let Them Watch Cable:" Financing Public Television in the Wake of Federal Downsizing by Lionel S. Sobel and Karen J. Mandel, 13 Entertainment and Sports Lawyer 1 (1995)

Income Tax Benefits from Private Funding for the Arts by Ralph E. Lerner, 13 Entertainment and Sports Lawyer 3 (1995)

Sponsorship and the Arts: A Brief Overview of Legal Issues for Not-for-Profits by Mary Hutchings Reed, 13 Entertainment and Sports Lawyer 9 (1995)

"Plus Ca Change, Plus C'est La Meme Chose:" European Coproduction Remains Viable, For Now by David M. Given, 13 Entertainment and Sports Lawyer 14 (1995)]

Book Review: Taxation of the Entertainment Industry by Schuyler M. Moore, reviewed by John J. O'Neill, 13 Entertainment and Sports Lawyer 19 (1995)

Book Review: 43 Ways to Finance Your Feature Film: A Comprehensive Analysis of Film Finance by John W. Cones, reviewed by Kirk T. Schroder, 13 Entertainment and Sports Lawyer 20 (1995)

The End of Copyright by David Nimmer, 48 Vanderbilt Law Review 1385 (1995)

Second Wind by David Nimmer, 18 Los Angeles Lawyer 28 (1995) (available from the Los Angeles County Bar Association, 617 S. Olive Street, Los Angeles, CA 90014)

Communications Lawyer, a publication of the Forum on Communications Law of the American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 13, Number 3 with the following articles:

Cameras in the Courtroom: An Overview by Anton R. Valukas, William A. Von Hoene, Jr., and Liza M. Murphy, 13 Communications Lawyer 1 (1995)

California's Anti-SLAPP(Strategic Lawsuit Against Public Participation) Statute by James E. Grossberg and Dee Lord, 13 Communications Lawyer 3 (1995)

The New Long Distance Marketplace by Stephen A. Augustino, 13 Communications Lawyer 9 (1995)

Commercial Speech Redux in the 1994 Term by P. Cameron Devore, 13 Communications Lawyer 12 (1995)

Villanova Sports & Entertainment Law Forum has published Volume II, Issue 2 with the following articles:

Introduction to the Thirty-fifth Annual Theodore L. Reimel Moot Court Competition, II Villanova sports & Entertainment Law Forum 161 (1995)

Baseball's Antitrust Exemption: Petitioners' Brief by William D. Georges and Sidney S. Liebesman, II Villanova Sports & Entertainment Law Forum 167 (1995)

Baseball's Antitrust Exemption: Respondents' Brief by Joanne M. Judge and Barbara A. Williams, II Villanova Sports & Entertainment Law Forum 189 (1995)

A History and Analysis of Baseball's Three Antitrust Exemptions by Joseph J. McMahon, Jr. and John P. Rossi, II Villanova Sports & Entertainment Law Forum 213 (1995)

Regulation of the Video Marketplace: Access Duties Under the Video Dialtone Order & the Cable Television Consumer Protection and Competition Act of 1992 by Robert K. Hahm, II Villanova Sports & Entertainment Law Forum 261 (1995)

The "Fair Use" Doctrine and *Campbell v. Acuff-Rose*: Copyright Waters Remain Muddy by Melissa M. Francis, II Villanova Sports & Entertainment Law Forum 311 (1995)

Player Discipline in Team Sports by Jan Stiglitz, 5 Marquette Sports Law Journal 167 (1995)

Title IX: The Mandate for Equality in Collegiate Athletics, 41 The Wayne Law Review 203 (1994)

The Drug Testing Project in International Sports: Dilemmas in an Expanding Regulatory Regime by James B. Jacobs and Bruce Samuels, 18 Hastings International and Comparative Law Review 557 (1995)

Asserting the Spouse's Community Property Rights in
Copyright by Peter J. Wong, 31 Idaho Law Review
1087 (1995)

The First Amendment and Cable Television: Turner
Broadcasting System, Inc. v. FCC, 18 Harvard Journal
of Law and Public Policy 916 (1995)

Advertisers, Celebrities, and Publicity Rights in New
York and California by Paul Cirino, 39 New York Law
School Law Review 763 (1994)

Obscentiy Law and the Equal Protection Clause: May
States Exempt Schools, Libraries, and Museums from
Obscentiy Statutes? by Ian L. Saffer, 70 New York Uni-
versity Law Review 397 (1995)

Computer Bulletin Board Operator Liability for Users' Infringing Acts by M. David Dobbins, 94 Michigan Law Review 217 (1995)

Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications by Robert F. Goldman, 29 Georgia Law Review 1075 (1995)

Natural Born Writers: The Law's Continued Annoyance with Criminal Authors by Kathleen M. Timmons, 29 Georgia Law Review 1121 (1995)

Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace by Jane C. Ginsburg, 95 Columbia Law Review 1466 (1995)

Domestic and International Copyright Issues Implicated in the Compilation of a Multimedia Product by Jane C. Ginsburg, 25 Seton Hall Law Review 1397 (1995)

Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech by James N. Horwood, 25 Seton Hall Law Review 1413 (1995)

First Amendment Issues Presented by the "Information Superhighway" by Norman Redlich and David R. Lurie, 25 Seton Hall Law Review 1446 (1995)

Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on

Broadcast Television, 60 Brooklyn Law Review 1101 (1994)

Through Seamless Webs and Forking Paths: Safeguarding Authors' Rights in Hypertext, 60 Brooklyn Law Review 1175 (1994)

Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence by Patricia M. Wald, 23 University of Baltimore Law Review 397 (1994)

Media Self-Regulation of Depictions of Violence: A Last Opportunity by Kevin W. Saunders, 47 Oklahoma Law Review 445 (1994)

A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good

Faith Purchasers of Stolen Art by Ashton Hawkins, Richard A. Rothman and David B. Goldstein, 64 Fordham Law Review 49 (1995)

The Journal of College and University Law, published by Notre Dame Law School, Notre Dame, Indiana 46556, has published a Focus on Intercollegiate Athletics with the following articles:

Sports Reform: College Athletics in Flux: 1995 Symposium, 22 The Journal of College and University Law 1 (1995)

Par for the Female Course: Cohen v. Brown University Mandates an Equal Playing Field in Intercollegiate Athletics by Jill Mulderink, 22 The Journal of College and University Law 111 (1995)

Coercian Theory and the State Action Doctrine As Applied in *NCAA v. Tarkanian* and *NCAA v. Miller* by Betty Chang, 22 *The Journal of College and University Law* 133 (1995)

Lights, Camera, and Action for Children's Television v. FCC: The Story of Broadcast Indecency, Starring Howard Stern by Kristin A. Finch, 63 *University of Cincinnati Law Review* 1275 (1995)

Abstraction-Filtration-Comparison Analysis and the Narrowing Scope of Copyright Protection for Computer Programs by Andrew O. Martyniuk, 63 *University of Cincinnati Law Review* 1333 (1995)

Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right for the Digital

Transmissions of Sound Recordings by Jay L. Bergman,
24 Southwestern University Law Review 351 (1995)

Communications and the Law, published by Fred B. Rothman & Co., 10368 W. Centennial Road, Littleton, CO 80127, has published Volume 17, Number 2 with the following articles:

Cable's Future: Aground on Indecency Regulation or Ahead with Constitutional Recognition? by Paul H. Gates, Jr., 17 Communications and the Law 3 (1995)

Hepps Revisited: Were the Dissenters' Fears Realized? by Chris Lamb, 17 Communications and the Law 15 (1995)

Protection of Journalists Under International Humanitarian Law by Dr. Amit Mukherjee, 17 Communications and the Law 27 (1995)

Victims, Crime and the Media: Competing Interests in the Electronic Society by Emilio Viano, 17 Communications and the Law 41 (1995)

Turner Broadcasting System, Inc. v. FCC: The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry by Jeff Gray, 29 University of San Francisco Law Review 999 (1995)

The Journal of Art and Entertainment Law, published by De Paul University College of Law, 25 East Jackson Blvd., Chicago, IL 60604, has issues Volume 5 with the following articles:

Regulating Publicity: Does Elvis Want Privacy? by Larry Moore, 5 Journal of Art and Entertainment Law 1 (1995)

The RICO Threat to Artistic Freedoms: An Indirect Consequence of the Anti-Pornography Crusade? by Aaron Zarkowsky, 5 Journal of Art and Entertainment Law 81 (1995)

Copyright Problems in Post-Modern Art by Lori Petruzzelli, 5 Journal of Art and Entertainment Law 115 (1995)

Congress Drops the Ball Again: Baseball's Antitrust Exemption Remains in Place by Alison Cackowski, 5 Journal of Art and Entertainment Law 147 (1995)

Sex Discrimination and the Equal Pay Act in Athletic Coaching by Gregory Szul, 5 Journal of Art and Entertainment Law 161 (1995)

When Drug Testing Violates the Student Athlete's Right to Privacy by Paul Porvaznik, 5 Journal of Art and Entertainment Law 173 (1995)

Gallagher v. Cleveland Browns Football Co. by Ted Lagerwall, 5 Journal of Art and Entertainment Law 183 (1995)

Technical Innovation and Modernist Ideologies: Commercial and Artistic Conjunctions in the Appropriation of New Painting Media by Jan Marontate, 25 The Journal of Arts Management, Law and Society 93 (1995)

Market Economy Discourse in Nonprofit High-Status Art Worlds by Gerald S. Kenyon, 25 *The Journal of Arts Management, Law and Society* 109 (1995)

Minimum Employment Guarantees in Musical Theater Orchestras: Labor Relations on Broadway and at the John F. Kennedy Center for the Performing Arts by Reed Vernon Waller, 25 *The Journal of Arts Management, Law and Society* 141 (1995)

The Minimum Basic Agreement of the Dramatists' Guild: A History of Inadequate Protection by Joel Bassin, 25 *The Journal of Arts Management, Law and Society* 157 (1995)

Ornamental Use of Trademarks: The Judicial Development and Economic Implications of an Exclusive

Merchandising Right by Veronica J. Cherniak, 69 Tulane Law Review 1311 (1995)

Public Performance Rights in Sound Recordings and the Threat of Digitilization by Kamesh Nagarajan, 77 Journal of the Patent and Trademark Office Society 721 (1995)

Lotus Development v. Borland International: Determining Software Copyright Infringement Is Not As Easy As 1-2-3 by Dennis M. Carleton, 56 University of Pittsburgh Law Review 919 (1995)

Enforcement of Intellectual Property Protection Between Mexico and the United States: A Precursor of Criminal Enforcement for Western Hemispheric Integration? by Bruce Zagaris & Alvaro J. Aguilar, 5 Fordham

Intellectual Property, Media & Entertainment Law Journal 41 (1994)

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