RECENT CASES

Supreme Court declares unconstitutional two provisions of 1992 Cable TV Act concerning patently offensive sex-related programming on cable access channels, but upholds constitutionality of a third provision

For scientists, the question of what would happen if an irresistible force met an immovable object is a truly interesting but entirely philosophical question. For readers of these pages, an equivalent question is what would happen if lawmakers made a carefully thought-out attempt to minimize (or even eliminate) the transmission of sex-related programming on cable television; but this question is not entirely philosophical. In 1992, Congress made just such an attempt in a statute that contained three closely-related provisions dealing with sex-related programming on certain types of cable channels. As a consequence of legal challenges to the Constitutionality of those three provisions, more than 20 federal judges have had to answer the question. In the course of doing so, they have written more than 11 separate opinions (making up three decisions).

Initially, the challengers to the law were successful, because a three-judge panel of the D.C. Circuit Court of Appeals held that the law violated the First Amendment. (*ELR* 15:11:15) But the full Court of Appeals vacated that ruling, and in an *en banc* decision, a 7-to-4 majority of that court upheld the law's constitutionality. (*ELR* 17:7:10) The final word, of course, comes from the nine Justices of the Supreme Court. Their decision spans 118 pages and consists of six separate opinions that ultimately reach the conclusion that two of the three provisions of the law are unconstitutional and one is constitutional.

The statutory provisions at issue in this case all deal with cable *access* channels — *not* with premium channels (like HBO) or with channels that carry over-the-air stations, superstations, or channels like CNN and ESPN. There are two types of cable access channels: leased access channels and public access channels. Leased access channels are those that federal law requires cable systems to reserve for lease to unaffiliated third parties. Public access channels are those that federal law requires cable systems to reserve for use by the public (and for educational and governmental purposes).

Between 1984 and 1992, federal law actually prohibited cable systems from exercising any editorial control whatsoever over leased access and public access channels. As a result, some of those channels carried sex-related programming. Perhaps the most widelyknown of those programs is Al Goldstein's "Midnight Blue" which is carried in New York City on Time Warner Cable's leased access Channel 35. By virtue of then-existing law, cable systems were statutorily barred from doing anything about such programs, despite criticism by some members of the public, some public officials and some members of Congress. Thus, Congress changed the law by inserting three provisions in the Cable Television Consumer Protection and Competition Act of 1992. Section 10(a) of that Act affirmatively authorizes cable systems to prohibit the transmission of "patently offensive" sex-related programming over *leased access* channels. If cable systems choose not to prohibit such programming (on leased access channels), section 10(b) of the Act requires cable systems to put all such programming on a single channel that is blocked (by scrambling or otherwise) from subscribers unless they make written requests for the channel to be unblocked. Section 10(c) of the Act prohibits the transmission of patently offensive sex-related programming on *public access* channels.

By a vote of 7-to-2, the Supreme Court has upheld the constitutionality of section 10(a) which authorizes cable systems to prohibit patently offensive sex-related programming on leased access channels. The Court found section 10(a) to be "a sufficiently tailored response to an extraordinarily important problem." In an opinion by Justice Stephen Breyer, the majority explained that section 10(a)'s "extremely important justification, one that this Court has often found compelling" is "the need to protect children from exposure to patently offensive sex-related material."

On the other hand, by a vote of 6-to-3, the Court ruled that section 10(b) — requiring cable systems to put all such programming on a single channel that is blocked from subscribers unless they make written requests for it to be unblocked — is unconstitutional. While the majority agreed that this section served the same "compelling interest" as that served by section 10(a), the "segregate and block" provision is not the "least restrictive alternative," is not "narrowly tailored" to meet its objective, and is "considerably 'more extensive than necessary.'" The majority was particularly concerned about the privacy interests of subscribers who might wish to make written requests for the channel to be unblocked, but who would be concerned that the cable system might reveal their identities (even accidentally) to others.

Finally, by a vote of 5-to-4, the Court also declared unconstitutional section 10(c) which authorizes cable systems to prohibit patently offensive sex-related programming on *public access* channels. Despite section 10(c)'s similarity to section 10(a) whose constitutionality the Court upheld, the majority distinguished the two provisions from one another, saying there are "important differences between them." One of the important differences is that public access channels have not been used for sex-related programming as much as leased access channels. And thus, the majority concluded that there was less justification for permitting cable systems to censor programs on public access channels.

Denver Area Educational Telecommunications Consortium v. Federal Communications Commission, 64 USLW 4706, 1996 U.S.LEXIS 4261 (1996) [ELR 18:3:3]

Three-judge District Court again upholds constitutionality of must-carry provisions of Cable TV Act; Supreme Court to hear case a second time

The constitutionality of the "must-carry" provisions of federal cable-TV law is one of the most studied and debated issues in current entertainment law. These provisions require cable systems to carry local over-the-air television stations, without charge to those stations. This requirement was added to federal law by Congress in the Cable Television Consumer Protection and Competition Act of 1992. Congress did so, because it feared that as more of the country received television signals over cable, rather than over the air, the very existence of broadcast television stations would be jeopardized if they were not carried by cable systems, or if they had to pay cable operators to carry their signals to homeowners.

Cable system operators and cable channel programmers disagree with the factual predictions made by Congress in justifying the must-carry provisions. And they contend that the law abridges their free speech rights in violation of the First Amendment. As a result, Turner Broadcasting and several other cable programmers and cable system operators filed a lawsuit against the Federal Communications Commission, seeking a judicial declaration that the must-carry provisions are indeed unconstitutional. Thusfar, however, Turner and its co-plaintiffs have been disappointed — though the United States Supreme Court will give them one more hearing during the Court's coming term.

The constitutionality of the must-carry provisions has been the subject of three judicial decisions already. The 1992 Cable Act itself provided for expedited review before a three-judge District Court. And in the first round, such a court upheld the constitutionality of the must-carry provisions. (*ELR* 15:2:8) On direct appeal to the United States Supreme Court, the Court held that the three-judge District Court had been correct to apply an "intermediate level of scrutiny under the First

Amendment," rather than the higher level of scrutiny urged by Turner and its co-plaintiffs. But the Supreme Court nevertheless vacated and remanded the District Court's decision, because the Supreme Court concluded that the record in the case required further development before the constitutionality of the must-carry rules could be determined. (*ELR* 16:4:16)

The parties then supplemented the record before the District Court, and made cross-motions for summary judgment. On the basis of the augmented record, the District Court has once again upheld the constitutionality of the must-carry rules. But just barely. The difficulty of the issue is reflected in the District Court's long and fractured decision — a decision that is comprised of three separate opinions, one by each of the court's three judges.

Judge Stanley Sporkin concluded that "After three long years of hearings and investigation, Congress made the judgment that the broadcast industry was in need of the protections afforded by the must-carry provisions in order to promote fair competition, preserve free, over-the-air local broadcast television and promote the widespread dissemination of information from a multiplicity of sources." He noted that the Supreme Court had said (in its earlier decision in this case) that "courts are compelled to accord substantial deference to Congress' predictive judgments." Judge Sporkin found in the "extensive record compiled by Congress . . . substantial evidence from which Congress could have drawn reasonable inferences that the must-carry regulations were necessary to protect the economic health of the broadcast industry and that the burden to [the] cable industry imposed by the regulations would not be substantial." He also found that the additional evidence produced by the parties following the Supreme Court's remand "confirms Congress' judgment." For these reasons, Judge Sporkin ruled that the must-carry provisions "do not offend the Constitution."

Judge Stephen Williams agreed (with Judge Sporkin) that summary judgment was proper in this case. But Judge Williams' review of the record led him to conclude that the must-carry provisions are unconstitutional. As a result, Judge Williams dissented.

The third judge, Judge Thomas Jackson, ultimately concurred with Judge Sporkin, thereby creating a two-judge majority in favor of the constitutionality of the must-carry rules. "Left to [his] own inclination," however, Judge Jackson would have denied both sides' motions for summary judgment and would have set the case for trial. Had he insisted on taking the case to trial, he could have done so, even though he was the only one of the three judges who thought a trial was necessary. But he decided that he should not prevail by creating a "stalemate" with his fellow judges, so — "obliged to choose between two forcefully argued but contradictory analyses of what [he found] to be a most ambiguous record" — he elected to concur with Judge Sporkin.

Judge Jackson's concurrence with Judge Sporkin was what gave a majority to the ruling that the must-carry rules are constitutional. But the case is not entirely over yet. In fact, the most important hearing is yet to come. Within days of their loss before the District Court, Turner Broadcasting and its co-plaintiffs appealed to the Supreme Court (for a second time); and the Supreme Court has agreed to hear the case, again, sometime during the Court's upcoming 1996-97 term.

Turner Broadcasting v. Federal Communications Commission, 910 F.Supp. 734, 1995 U.S.Dist.LEXIS 18611 (D.D.C. 1995); probable jurisdiction noted, 116 S.Ct. 907, 1996 U.S.LEXIS 933 (1996) [ELR 18:3:4]

Case alleging that Columbia Pictures movie Groundhog Day infringed copyright to novel One Fine Day is dismissed for lack of substantial similarity of protectible elements; District Court also dismisses Lanham Act and state law claims

The distinction between ideas and their expression is at the very heart of copyright law — particularly in infringement cases that arise in the movie industry. Copyright does not protect ideas; it only protects expression. This simply stated principle has been applied, with clarity and skill, by Judge Denny Chin of the federal District Court in New York City, to resolve a case in which novelist Leon Arden alleged that the Columbia Pictures' movie "Groundhog Day" (starring Bill Murray) infringed the copyright to Arden's novel *One Fine Day*. Judge Chin has ruled that the movie does not infringe the novel's copyright; and thus the judge has granted a motion for summary judgment filed on behalf of Columbia Pictures and its fellow defendants Harold Ramis, Danny Rubin and Trevor Albert.

One Fine Day was published in 1981. It tells the story of a man trapped in a repeating day, forced to live the same day over and over. "Groundhog Day" was released in 1993. It too tells the story a man caught in a repeating day. Judge Chin acknowledged that the novel and the movie "are based on the same idea, a man trapped in a day that repeats itself over and over." (Indeed, Columbia and the other defendants acknowledged this as well.) However, Judge Chin concluded that "the two works express that idea in very different ways."

Judge Chin explained that "The Novel is dark and introspective, featuring witchcraft and an encounter with God. It is marked, for example, by an explosion on an airplane that kills 192 people, the rape of one young woman, and the suicide of another. These tragic events recur as the day repeats itself over and over again. In contrast, the Film is essentially a romantic comedy about an arrogant, self-centered man who evolves into a sensitive, caring person who, for example, in his repeating day, saves a boy falling out of a tree, changes a flat tire for several elderly women, and learns to play the piano." From this, the judge concluded that "Any similarities between the Novel and the Film relate only to unprotectible ideas, concepts, or abstractions." Since copyright infringement results only from "substantial similarity . . . with respect to protectible elements," the Judge Chin dismissed Arden's copyright claim.

Arden also alleged that his rights under the Lanham Act were violated because of the defendants' claim that the movie had been based on an original screenplay by Ramis and Rubin when "in fact" it had been based on Arden's novel. Judge Chin noted that "it is not clear whether the Lanham Act applies to a case such as this in which the makers of a film are alleged to have misappropriated a literary work." Nevertheless, the judge ruled on the claim on its merits, saying "Even assuming the Lanham Act applies in this case . . . , no reasonable jury could find that defendants falsely designated the origin of 'Groundhog Day' by placing [their names] on what was essentially [plaintiff's] product." This was so, the judge explained, "Because the works at issue in this case lack substantial similarity, [and thus] there is no basis for a finding of likelihood of confusion sufficient to support a claim under section 43(a) of the Lanham Act."

Finally, Judge Chin also dismissed Arden's state law claims for unfair competition, unjust enrichment and seeking an accounting. He did so on the grounds that those claims are preempted by the Copyright Act.

The judge did not appear to be without some sympathy for Arden. "I can appreciate his frustration," the judge said, "at seeing his idea of a man trapped in a repeating day used, without his consent, in a movie that has grossed more than $70 million, not one cent of which he has received." However, the judge added, "ideas are not copyrightable, and the law has sought to strike a balance between protecting original works and promoting further creativity, a balance that has resulted in — even assuming defendants did copy Mr. Arden's idea — a creative, entertaining work that is substantially different from his expression of his idea."

Editor s note: Judge Chin's decision does not ask readers to accept his characterizations of the novel and movie. Instead, the opinion includes quite lengthy and detailed synopses of both, so readers can draw their own conclusions. In my opinion, Judge Chin's conclusions are absolutely correct. In addition, Judge Chin has done a remarkably fine job of clearly and correctly doing an infringement analysis — so much so that his approach ought to be used as a model by lawyers and other judges called on to do such analyses. That is, Judge Chin notes that copyright infringement requires proof of two distinct things: "actual copying and improper appropriation." He explains that "Actual copying may be established by direct evidence or by proof of defendant's access to plaintiff's work and *sufficient* similarity between the works to support an inference of copying." I have emphasized the word "sufficient" (Judge Chin did not) to call attention to the fact that the judge did *not* say "substantial" similarity as other judges (especially in the Ninth Circuit) so often do. "Substantial" similarity is essential to prove infringement, but only in connection with the "improper appropriation" step of the analysis. Concerning this step, Judge Chin explained that "To establish improper appropriation, plaintiff must also show that substantial similarity exists with respect to protectible elements of the works." To determine whether substantial similarity exists with respect to *protectible* elements, it is necessary to dissect the works at issue into their elements. In this case, Arden dissected his novel and the movie into seven elements: plot, mood, characters, pace, setting, sequence of events, and an assortment of other specific similarities. Judge Chin then evaluated each of these elements to determine whether they were protected by copyright, and whether the movie's elements were substantially similar to the novel's. The judge did this element by element and in detail. His conclusion was that "the only similarities between *One Fine Day* and 'Groundhog Day' are insubstantial or pertain to non-copyrightable ideas or unprotected *scenes a faire*, and not to protected expression."

Arden v. Columbia Pictures Industries, Inc., 908 F.Supp. 1248, 1995 U.S.Dist.LEXIS 18238 (S.D.N.Y. 1995) [ELR 18:3:5]

In plagiarism case involving Columbia Pictures movie Higher Learning, federal District Court rules that state law claims are preempted by Copyright Act, converts state law claims to one for copyright infringement, dismisses emotional distress claim, and dismisses case against manager of theater that had shown movie

Aspiring screenwriter Darryl Lamont Wharton has received some "Higher Learning" on the fine art of pleading a plagiarism case. Wharton claims that in 1991 he submitted his script "Caught Out There" to Columbia Pictures and that Columbia and others had used his script in 1995 in producing the movie "Higher Learning." As a result, he filed suit in Maryland state court, alleging a large assortment of claims under state law.

Columbia promptly removed the case to federal District Court, and then made a motion to dismiss those state claims. Judge Joseph Young has granted Columbia's motion. The judge explained that the "misrepresentation, civil conspiracy, unjust enrichment, fraud, tortious interference with prospective advantage, and breach of contract claims asserted by Wharton are 'equivalent' to the right to prepare derivative works because each concerns the central allegation that Defendants plagiarized his copyrighted screenplay. Thus these claims are preempted by the Copyright Act." As a result, Judge Young dismissed those claims, and converted Wharton's case into one for copyright infringement.

The judge also dismissed a state law claim for intentional infliction of emotional distress. Wharton had alleged that “he trusted Defendants with his screenplay, that they broke this trust by plagiarizing it, that they refused to compensate him, and that he became distraught and was unable to work creatively.” However, to be successful, emotional distress claims must arise out of “outrageous” and “extreme” conduct; and Judge Young concluded that the conduct alleged by Wharton failed to meet this test. Moreover, allegations that the defendants intended to plagiarize Wharton’s screenplay were not sufficient to show they “desired to cause him emotional distress” which is another required element of a successful emotional distress claim.

Finally, Judge Young dismissed Wharton’s case entirely as to the manager of a Maryland theater that had shown “Higher Learning.” Wharton had not alleged that the theater manager had participated in writing the movie; he merely asserted that she had assisted in its "dissemination" and had thereby contributed to his injury. But the judge emphasized that the right allegedly infringed in this case was Wharton's right to "prepare derivative works" based on his script, and he ruled that the manager had not violated that right.

Wharton v. Columbia Pictures Industries, Inc., 907 F.Supp. 144, 1995 U.S.Dist.LEXIS 18666 (D.Md. 1995) [ELR 18:3:6]

Trademark law protects names of popular musical recording groups, even if not registered, federal District Court rules in denying motion to dismiss infringement action brought by two members of The Impressions against two former members

"The Impressions" is a popular musical recording group that began performing in the 1950s or early '60s. Like many groups from that era, individual members came and went; but the group carried on, under its original name. Among those who left "The Impressions" in 1961 or '62 were Arthur and Richard Brooks. In 1983, however, Arthur and Richard began performing again under the name "The Original Impressions Featuring the Brooks Brothers."

The Brooks Brothers' use of the name "The . . . Impressions" triggered a dispute with Fred Cash and other members of the original "Impressions" over who was entitled to use that name. Part of that dispute was brought to the Trademark Trial and Appeal Board and part to a federal District Court in Tennessee. The Trademark Trial and Appeal Board stayed the proceedings before it, pending outcome of the District Court case.

The Brooks Brothers are the defendants in the District Court, and they sought dismissal of the case on the grounds that no valid claim for trademark infringement had been made against them. That motion has been denied, however. Judge Curtis Collier has ruled that the complaint filed by Cash and his co-plaintiffs contains sufficient facts to justify the conclusion that they — rather than the Brooks Brothers — own the trademark "The Impressions." Moreover, the judge noted that "there is authority holding that the Lanham Act protects names of popular musical recording groups even though that name is not a registered trademark."

Editor s note: The authority cited by Judge Collier for the proposition that trademark law protects group names was the "Lynyrd Skynyrd" case, *Grondin v. Rossington* , 690 F.Supp. 200 (S.D.N.Y. 1988)(*ELR* 11:4:16). Several other cases support this non-controversial conclusion as well. "The Five Platters" have been the subject of many: *Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9th Cir. 1990)(*ELR* 12:8:5); *Robi v. Five Platters, Inc.*, 838 F.2d 318 (9th Cir. 1988)(*ELR* 9:10:8); *Five Platters, Inc. v. Cook*, 491 F.Supp. 1165 (W.D.Pa. 1980)(*ELR* 2:24:7); *Five Platters, Inc. v. Purdie*, 419 F.Supp. 372 (D.Md. 1976). "The Kingsmen" were involved in another: *Kingsmen v. K-Tel International, Ltd.*, 557 F.Supp. 178 (S.D.N.Y. 1983)(*ELR* 5:2:8). And "The Drifters" were the subject of yet another: *Marshak v. Green*, 505 F.Supp. 1054 (S.D.N.Y. 1981)(*ELR* 3:1:1)

Cash v. Brooks, 906 F.Supp. 450, 1995 U.S.Dist.LEXIS 18798 (E.D.Tenn. 1995) [ELR 18:3:7]

District Court refuses to dismiss suit by Don King Productions against restaurants and bars that

intercepted and exhibited closed circuit telecast of Chavez vs. Lopez championship boxing match without paying subscription fees

Championship boxing matches have become valuable pay-per-view television programs, as well as live arena events. At the arena itself, it is easy for fight promoters to get paid: they simply put ticket-takers at arena doorways and deny admission to those who haven't purchased tickets. It is somewhat more difficult for promoters to assure themselves they will be paid by those who watch the fight on pay-per-view channels. Technology helps; and the law does too. Famed boxing promoter Don King is testing various legal theories, to see which work best. And so far, he's been successful with them all.

Don King Productions/Kingvision was the exclusive California licensee of closed circuit TV rights to the

Chavez v. Lopez championship fight in December 1994. Boxing fans who wanted to watch the fight on closed circuit TV were supposed to pay a subscription fee for the privilege of doing so. But apparently, not all of them did. TV signals, being what they are, had to travel from the arena where the fight took place to their ultimate destinations (the TV sets of subscribers) by means of cables and satellites. And while it is not easy to intercept such signals without permission, neither is it impossible. For some, in fact, it is a challenge — like climbing a high mountain just because it's there — as well as a method to make or save a buck.

According to King, several restaurants and bars in California intercepted the signals of the Chavez/Lopez fight, and then exhibited the fight to their customers without permission or payment. As a consequence, King has sued the owners of those restaurants and bars, alleging that their actions violated two provisions of federal cable law and constitute conversion and interference with prospective economic advantage under California state law.

The defendants moved to dismiss these claims, but District Judge Thelton Henderson has denied their motion. The judge has held that federal cable law gives King the right to bring an "unlawful interception" lawsuit even though he is not a cable system operator. Eventually, King may be limited to pursuing this claim under just one of the two provisions asserted in his complaint, because one provision prohibits interception of *cable* transmissions and the other prohibits the interception of *satellite* signals, and thusfar it is not apparent whether the defendants intercepted signals of the Chavez/Lopez fight from cables or from satellites. But for now, King has been permitted to pursue this claim. The judge also refused to dismiss the state law claim for conversion, ruling that California cases have permitted suits for conversion of intangible (as well as tangible) property. Finally, the judge also refused to dismiss the state interference with prospective advantage claim, because even though the allegations of the complaint were "somewhat conclusory" with respect to this claim, the judge was unable to conclude that King would be unable to prove facts that would entitle him to recover under it.

Editor s note: The three claims dealt with in this decision are the only ones the defendants sought to have dismissed. Apparently, the complaint alleges another claim as well in "Count 1." Presumably, that claim is for copyright infringement — namely, the unauthorized public performance of the copyright-protected television transmission of the fight. (This is only a presumption, however, because the decision does not describe or even refer to Count 1 at all.) A copyright infringement claim appears to be King's best bet. If Count 1 is for copyright infringement, however, that would mean that the state law claims for conversion and interference with economic advantage claims would be preempted. In the end, the preemption of those claims should not matter, even to King, because under the copyright claim, King would be entitled to recover his damages as well as the defendants' profits.

Don King Productions/Kingvision v. Lovato, 911 F.Supp. 419, 1995 U.S.Dist.LEXIS 20567 (N.D.Cal. 1995) [ELR 18:3:7]

California law rather than New York law applies in right of publicity case brought by actress Bettie Page against distributor of videos of two of her movies, on account of distributor s use of her likeness in advertising for the videos, even though

Page lived and worked in New York when movies were made

Choice of law issues are procedural and technical, and rarely seem to go to the heart of disputes in which they are raised. Often, however, such issues do affect the ultimate outcome of lawsuits. And that may be so in a right of publicity case brought by actress Bettie Page against the distributor of videos of two movies in which she starred back in the 1950s.

Page did not dispute (at least in connection with the choice of law issue) that the distributor had the right to distribute videos of the two movies, or that the distributor had the right to use photographic images taken from the movies in connection with advertising for them. However, the distributor used an art work “likeness” of Page (in addition to or instead of a photograph from the movies) for the video advertising; and Page did object to that. She filed suit in California, alleging that the distributor's use of an art work likeness of her in connection advertising violates her rights under California's common law right of publicity and under California Civil Code section 3344 (California's statutory right of publicity). The distributor, on the other hand, contended that because Page lived in New York when the movies were made, and made the movies there, New York's right of publicity law should be applied, not California's.

The reason the choice between California and New York law makes a difference is that New York does not have a common law right of publicity. New York does have a statute prohibiting the unauthorized use of a person's "name, portrait or picture . . . for advertising purposes." But the New York statute contains a provision that explicitly permits the use of an artist's "name, portrait or picture . . . in connection with his . . .

productions." In New York, the phrase "portrait or picture" has been defined to include drawings, and thus it appears that under New York law, the distributor would be free to use an art work likeness of Page in connection with the sale of videos of her movies.

In response to a motion to determine which state's law should be applied in this case, federal District Judge Richard Paez has ruled California's law should be used, rather than New York's. Page is now a resident of California, and though the movies were made in New York, the video distributor is from the state of Washington. New York has no connection with the videos or their advertising art work. Moreover, Judge Paez noted that as a general rule, right of publicity actions are governed by "local" law, and when material is distributed in several states, the state of the plaintiff's domicile "usually has the most significant relationship to the action."

Page v. Something Weird Video, 908 F.Supp. 714, 1995 U.S.Dist.LEXIS 19203 (C.D.Cal. 1995) [ELR 18:3:8]

In copyright infringement suit by BMI and music publishers, court rules that fact-finder must decide whether music is publicly performed when played on television sets located at tables in racetrack restaurant; court declines to rule on whether homestyle receiver exemption applies where restaurant has several hundred television sets on premises

On its face, the infringement suit brought by BMI and several music publishers against the operator of Rockingham Park racetrack in Salem, New Hampshire, is just another enforcement action against a venue that publicly performs copyright-protected music without the necessary license. BMI files dozens if not hundreds of these cases every year. This case, however, has a deeper dimension or two, and thus may help to define (or redefine) the circumstances under which performances are truly "public" as well as the proper scope of the so-called "homestyle receiver exemption" (which is an exemption from the usual requirement that licenses be obtained for public performances of copyright-protected songs).

These issues arose because Rockingham Park racetrack has a restaurant and lounge area whose several hundred tables and booths are equipped with 13-inch television sets. The sets permit patrons to watch closed-circuit transmissions of races, and over-the-air television programs whose soundtracks include copyright-protected songs, many of which are in the BMI repertoire. Rockingham was offered, but refused to sign, a

BMI public performance license, and a copyright infringement lawsuit was the consequence. In its defense, Rockingham asserted that the television sets at its tables and booths do not "publicly" perform music, and thus no license is necessary. Rockingham also contended that even if its television sets do publicly perform music, it is exempt from liability under section 115(5) of the Copyright Act which provides that copyrights are not infringed by the public reception of transmissions "on a single receiving apparatus of a kind commonly used in private homes."

On the "public" performance issue, BMI and Rockingham disagreed about whether Rockingham's television sets are more like the video booths that were held to be places where "public" performances occurred in *Video Views v. Studio 21* (*ELR* 13:3:16) or more like hotel rooms that were held to be places where performances were not "public" in *Columbia Pictures v.*

Professional Real Estate Developers (*ELR* 10:9:13). BMI argued that the performances at Rockingham Park were public "because the booths and tables containing the television sets are located in public restaurants and lounges and are in close physical proximity to the other racetrack patrons." BMI also argued that "unlike a hotel room, occupants of these booths and tables have no reasonable expectation of privacy and all activities conducted in these areas — including the broadcast of over-the-air television — is a public performance within the view of others and within the meaning of the Copyright Act." On the other hand, Rockingham Park argued that "the television sets at issue are located at private booths and tables and are provided primarily to view those racing events transmitted through closed-circuit television." Although Rockingham conceded that "the television sets may be tuned to receive over-the-air television stations . . . it lacks control over the television sets because the customer occupying the booth or table alone decides whether to change the channel from a closed-circuit broadcast to view an over-the-air broadcast." Rockingham also argued that "its booths and tables are legally analogous to hotel rooms where parties view television with an expectation of privacy."

District Judge Joseph DiClerico concluded that he could not resolve this disagreement, in response to the motion for summary judgment made by BMI. Instead, Judge DiClerico ruled that whether a performance is "public" or not is a "question for the finder of fact," and thus he denied BMI's motion. The judge also denied Rockingham's motion for summary judgment based on its "homestyle receiver exemption" argument. However, on this issue Judge DiClerico did not rule on the merits of the argument. Rather, he simply said that since the case could not be resolved on BMI's motion for summary judgment, he would leave "to another time the determination as to whether the 'homestyle exemption' would apply" if BMI is able to prove it is otherwise entitled to prevail.

Editor s note: With due respect to Judge DiClerico, he made this case more difficult than need be. There was no factual dispute concerning the physical characteristics of Rockingham's booths and tables; and the question of whether those booths and tables are "public" is one that is — or should be — a matter of law, to be decided by a judge rather than a jury. Moreover, it ought to have been obvious that booths and tables in a restaurant are perfectly analogous to the "public" video booths at issue in the *Video Views* case and nothing at all like hotel rooms. Moreover, the "homestyle receiver exemption" is clearly inapplicable to Rockingham Park, because on its face, that exemption is available only for a "single receiving apparatus" — not even for two, let alone hundreds of television sets.

Broadcast Music, Inc. v. Rockingham Venture, Inc., 909 F.Supp. 38, 1995 U.S.Dist.LEXIS 7711 (D.N.H. 1995) [ELR 18:3:9]

District Court dismisses defamation case filed by televangelist Robert Tilton against ABC, Dianne Sawyer and others, arising out of PrimeTime Live segment entitled Men of God ; Tilton failed to prove falsity and actual malice, court rules

When Judge Billy Michael Burrage was appointed to the federal bench in 1994, he inherited a case that was high profile in his Oklahoma district. Two years earlier, televangelist Robert Tilton had sued ABC, Dianne Sawyer, and others for defamation, on account of things that were said about Tilton and his ministry during a segment of "PrimeTime Live" entitled "Men of God." Tilton was so angry about the way in which he was portrayed in that segment that he had sought a restraining order and preliminary injunction against the network which would have prevented it from rebroadcasting the piece. Judge Thomas Brett denied Tilton the injunctive relief he had sought, in part because Judge Brett found that Tilton had not demonstrated a substantial likelihood he would recover on the merits of his claims. (*ELR* 15:11:20) But Tilton pursued the case nonetheless, seeking money damages.

Following discovery, ABC and its fellow defendants made a motion for summary judgment, seeking dismissal of the case entirely; and Tilton made a motion of his own, seeking partial summary judgment. By then, the case had been turned over to Judge Burrage; and Judge Burrage found no more merit in Tilton's claims than Judge Brett had before him.

In a lengthy decision that reviews the facts of the case in considerable detail, Judge Burrage found that the evidence showed that some of the statements about which Tilton had complained were true; that Tilton had failed to prove that other statements were false; and that Tilton had not shown that the defendants knew of, or recklessly disregarded, the falsity of still other statements. In order to win a defamation case, a public figure — which Tilton acknowledged he is — must prove that the offending statements are false and that they were made with knowledge of their falsity or with reckless disregard for their falsity. Since Tilton had not proved these things, Judge Burrage has granted ABC's motion for summary judgment, and has entered judgment for the defendants.

Tilton v. Capital Cities/ABC Inc., 905 F.Supp. 1514, 1995 U.S.Dist.LEXIS 20389 (N.D.Okl. 1995) [ELR 18:3:10]

Federal court does not have subject matter jurisdiction to hear claim by songwriter Philip Baptiste that he alone wrote Sea of Love, and that George Khoury s name was added to music publishing contract surreptitiously and without Baptiste s knowledge

"Federal jurisdiction in copyright contract cases is a murky area of the law." Judge Nauman Scott has so written, in a case brought in federal District Court in Louisiana by songwriter Philip Baptiste against George Khoury. Baptiste asserts that he, and he alone, wrote the successful song "Sea of Love" in the late 1950s. In

1959, Baptiste assigned his copyright in the song to Kamar Publishing Company pursuant to a written contract that contains George Khoury's name in the space designating the writer. Since then, both Baptiste and Khoury have been credited as the song's co-writers, and both have received royalties in that capacity. But Baptiste contends that Khoury's name was added to the Kamar Publishing contract without his knowledge. In 1995, Baptiste filed suit against Khoury in federal court, seeking an injunction and amount equal to the royalties Khoury has received from "Sea of Love" over the years.

Khoury made a motion to dismiss Baptiste's suit, on the grounds that federal courts do not have subject matter jurisdiction to hear such claims. In response to that motion, the judge explained that federal courts have jurisdiction to hear cases "arising under" the Copyright Act. But not all cases involving contracts concerning copyrighted works actually "arise under" that Act.

Judge Scott observed that "When the face of the complaint alleges both state contract issues and a resultant infringement, the issue is often obscure, and contradictory results have been reached by the courts." A review of existing precedents led Judge Scott to conclude that "If resolution of the issue of state law will resolve the copyright question, or if the copyright issue is merely incidental, then state law should be applied [and federal courts do not have jurisdiction]; but if the federal infringement issue will require a separate and substantial inquiry, then federal jurisdiction exists."

Applying that principle to Baptiste's complaint, Judge Scott found that "resolution of the state contract fraud issue is principal and controlling in this case. If it is found that Khoury did not surreptitiously add his name to the publishing agreement, but signed on with Baptiste's knowledge and consent, then Baptiste's claim for royalties paid to Khoury under the contract will remain a question of state law. However, if Khoury fraudulently collected royalties under this contract from Kamar Publishing Company and its assigns that were owed to Baptiste, the accounting and repayment that may thereby become due can be reached by a state court without reference to the Copyright Act." For this reason, Judge Scott has granted Khoury's motion and has dismissed Baptiste's suit.

Baptiste v. Khoury, 910 F.Supp. 277, 1996 U.S.Dist.LEXIS 288 (W.D.La. 1996) [ELR 18:3:10]

Briefly Noted:

Jury verdict against producer of prank television show. A federal District Court in Puerto Rico has denied a motion for a new trial made by the successful but disappointed plaintiffs in an action against the producer of a segment for the Telemundo CATV television program "TVO." The jury awarded the plaintiffs a total of $65,000 in damages — an amount the plaintiffs asserted was "so low as to shock the judicial conscience." "TVO" consists of segments that capture, on hidden cameras, unsuspecting individuals reacting to scenarios intended to provoke humorous responses. In this case, a mock ambulance driver left a completely bandaged "patient" at the plaintiffs' home and identified him by a name that was similar to that of the plaintiffs' son. The plaintiffs' neighbors thought the prank was funny, but the plaintiffs did not. The "patient's" father had a heart attack later in the day, for which he had to be hospitalized, and the mother experienced mental suffering. Nonetheless, the $65,000 jury verdict did not shock the conscience of Judge Jaime Pieras. The judge agreed that the defendants had been negligent and had caused damages. But, he explained, "the jury could have relied upon the evidence which showed that Mr. Ramos Rosa [the father] based upon his existing medical condition, could have experienced the attack regardless of defendants' negligence, and the plaintiff Lopez Vega [the mother] would have experienced pain and suffering if her husband had been hospitalized, regardless of defendants' negligence." *Rosa v., Telemundo CATV, Inc.*, 907 F.Supp. 39, 1995 U.S.Dist.LEXIS 18311 (D.P.R. 1995) [ELR 18:3:11]

Trademark infringement re TV Land. A federal District Court in Illinois has issued a preliminary injunction barring Viacom from using the phrase "TV Land" in connection with its network or retail operations, because that very phrase was previously used and federally registered as a trademark by an Illinois company that operates retail stores selling merchandise related to television networks, programs and characters. Judge Brian Barnett Duff found that the Illinois retailer, whose company name is “TV Land” and whose stores are called “TV Land” as well, was likely to prevail on its trademark infringement claim, as a result of Viacom’s use of the “TV Land” phrase in connection with its “Nick at Nite TV Land” network and on merchandise which it intends to sell from stores such as Nordstrom and Target. The evidence submitted to Judge Duff showed that Viacom had actual knowledge of the Illinois’ company’s use of the phrase, knew that the Illinois company had registered the phrase as a trademark, and had anticipated that Viacom’s use of the phrase might create confusion in the marketplace. *TV Land, L.P. v. Viacom International, Inc.*, 908 F.Supp. 543, 1995 U.S.Dist.LEXIS 19230 (N.D.Ill. 1995) [ELR 18:3:11]

Trademark registration for SportsChannel. In an action filed by SportsChannel Associates against the Commissioner of Patents and Trademarks, seeking an order compelling the PTO to register the word "SportsChannel" as a service mark for television programming and production services, a federal District Court in New York has ruled that material issues of fact exist concerning how the public perceives the word. The public's perception is important because it determines whether the word is generic (and therefore not eligible for trademark registration as the PTO contends) or whether instead it is descriptive (and thus eligible for registration because it has acquired secondary meaning) as SportsChannel Associates contends. For this reason, federal District Judge Arthur Spatt denied motions for summary judgment made by both parties (and has referred the case to Magistrate Michael Orenstein for trial). *SportsChannel Associates v. Commissioner of Patents*, 903 F.Supp. 418, 1995 U.S.Dist.LEXIS 15990 (E.D.N.Y. 1995) [ELR 18:3:11]

Trademark infringement and dilution. E. & J. Gallo Winery has been granted a permanent injunction against the use of the name "Gallo" by a Mexican company in connection with that company's sale of playing cards and board games in the United States. Federal District Judge Robert Coyle found that the Mexican company's use of the "Gallo" mark was likely to cause consumer confusion, even though playing cards and board games are different products from the wine and cheese products sold by the Gallo Winery, because the "Gallo" mark has become "extraordinarily strong and distinctive." As a result, the Mexican company's use of the mark violated the federal Lanham Act and also California trademark and anti-dilution statutes. *E. & J. Gallo Winery v. Pasatiempos Gallo, S.A.*, 905 F.Supp. 1403, 1994 U.S.Dist.LEXIS 20889 (E.D.Cal. 1994) [ELR 18:3:11]

Division of copyright royalties from work-made-for-hire in divorce. The Tennessee Court of Appeals has held that royalties received by one spouse from post-divorce sales of copies of a book written by that spouse as a work-made-for-hire during marriage are "marital property" under Tennessee law; and therefore, the other spouse is entitled to half of those royalties even after the parties' divorce. The book in question was a work of non-fiction dealing with psychology, and the publishing contract contemplated that revisions or updates might become necessary in the future. The court ruled that any part of future royalties attributable to revisions or updates created after the parties' divorce would not be marital property. *Morey v. Morey*, 1995 Tenn.App. LEXIS 813 (1995) [ELR 18:3:12]

Discharge of college basketball coach. A federal District Court in Kansas has refused to dismiss a wrongful discharge lawsuit brought by the women's basketball coach at Neosho County Community College against the college and its athletic director. The coach alleged that his employment contract was not renewed because he had complained that the college was discriminating against its women athletes in violation of federal law. The coach also asserted that the college's failure to renew his contract violated Title IX (the federal law that prohibits sex discrimination by schools that receive federal financial assistance) and the First

Amendment. In response to a motion for summary judgment made by the defendants, Judge Earl O'Connor ruled that the coach does have a private cause of action against the college (though not its athletic director) under Title IX (even though the coach had not exhausted his administrative remedies under that statute), and that the coach had stated a First Amendment claim against the college because whether the college was discriminating against women athletes was a matter of public concern. While Judge O'Connor did dismiss the coach's breach of contract claim against the college (he was paid through the end of the contract term), the judge did not dismiss the coach's wrongful discharge claim against the athletic director because there was a factual dispute over whether the athletic director's recommendation that the coach's contract not be renewed was "malicious, willful or wanton." *Clay v. Board of Trustees of Neosho Cty.*

Comm. College, 905 F.Supp. 1488, 1995 U.S.Dist.LEXIS 16652 (D.Kan. 1995) [ELR 18:3:12]

Sex discrimination claims by woman coach against university. A federal District Court has granted summary judgment to the University of North Carolina, and has dismissed a sex discrimination case filed by Ellyn Bartges, the former head softball coach and assistant basketball coach of the University's women's teams. Bartges resigned her softball coaching job, because by itself it did not pay her enough, when she was not rehired as an assistant basketball coach. She then sued the University, asserting sex discrimination claims under the Equal Pay Act, Title VII, Title IX, the due process and equal protection clauses of the Constitution, and under state law. Judge Robert Potter has granted the University's motion for summary judgment. In a lengthy and factually detailed decision, Judge Potter has ruled that Bartges failed to produce evidence that the University had violated the Equal Pay Act, Title VII or Title IX in its treatment of her. The judge also ruled that her constitutional claims could be "easily dispensed with," because the University "is not a person" within the meaning of section 1983 of Title 42 of the United States Code (the statute that gives federal courts jurisdiction to hear certain constitutional claims), and because the University is immune from suit for damages under the Eleventh Amendment. The judge also rejected Bartges' state law claims, on the grounds that the University is immune from suit for damages under the Eleventh Amendment, and because if she were seeking injunctive relief, she had failed to show sex discrimination. *Bartges v. University of North Carolina*, 908 F.Supp. 1312, 1995 U.S.Dist.LEXIS 19469 (W.D.N.C. 1995) [ELR 18:3:12]

Athletic eligibility rule under ADA. A federal District Court in New York has denied a motion for a temporary restraining order which would have permitted a 19-year-old high school student to participate in high school football games despite a state regulation that limits athletic eligibility to those younger than 19 years of age. According to the student's mother, her son is mentally disabled, and that is why he was still in high school at age 19. The mother claimed that the state violated the Americans with Disabilities Act by enforcing its eligibility rule against her son. But Judge Michael Telesca ruled otherwise. He held that the ADA prohibits discrimination on account of disabilities, while the eligibility rule at issue barred the student from playing on account of his age — not because of his disability.

Reaves v. Mills, 904 F.Supp. 120, 1995 U.S.Dist.LEXIS 17175 (W.D.N.Y. 1995) [ELR 18:3:12]

Defamation. A defamation and interference with contract lawsuit filed by the Miss Black Virginia Pageant and its president against Associated Press has been dismissed in response to AP's motion for summary judgment. The lawsuit arose out of AP's wire transmission of an allegedly defamatory article that was reported and originally published by the *Virginia-Pilot* (a daily newspaper that is an AP member). Federal District Court Judge John Sprizzo ruled that "Under the so-called wire defense doctrine . . . , the mere reiteration of a news article published by a recognizable reliable source of daily news cannot constitute defamation by endorsement, unless the story was reproduced in a negligent manner." In this case, there was no showing that the AP had been negligent in publishing the allegedly defamatory statements. The judge also dismissed the plaintiffs' interference with contract claim, because there was no evidence the AP had interfered with any contractual relationships. Finally, the judge awarded the AP $12,000 in sanctions against the plaintiffs, on account of their obstruction of discovery. *Winn v. Associated Press*, 903 F.Supp. 575, 1995 U.S.Dist.LEXIS 16339 (S.D.N.Y. 1995) [ELR 18:3:12]

Defamation. A defamation action against *The Village Voice* has been dismissed by a federal District Court in New York City, in response to the weekly newspaper's motion for summary judgment. The suit was filed by John and Marilyn Chaiken, American emigres who had moved from Boston to Israel and had taken up residence in Hebron on the West Bank. The article which triggered the lawsuit was subtitled "Israel's Jewish Terrorists," and it portrays the Chaikens in an allegedly defamatory manner. Nonetheless, Judge Shira Scheindlin dismissed the case, because the article related to a matter of public concern and *The Village Voice* had not acted in a "grossly irresponsible manner." The author of the article had published more than a dozen articles for national publications and the *Voice*, and none had ever before been the target of a defamation lawsuit. The judge also dismissed a claim for infliction of emotional distress, because such claims too require a showing of "gross irresponsibility" by the publisher. *Chaiken v. VV Publishing Corp.*, 907 F.Supp. 689, 1995 U.S.Dist.LEXIS 15517 (S.D.N.Y. 1995) [ELR 18:3:13]

Defamation. A federal District Court in New York City has denied a motion for summary judgment, made by Time magazine, a professional photographer and the photographer's agency, in a defamation action brought by a Brazilian woman who was identified as a prostitute in a photograph and caption published in Time to illustrate an article entitled "The Skin Trade." The plaintiff acknowledged that she once had been a prostitute, but she claimed that she had reformed, married and moved to a new community. Since the plaintiff once had been a prostitute, Time and the other defendants sought summary judgment on the grounds that the photograph and caption were "substantially true" as a matter of law, and that plaintiff's reputation was so notorious and widespread that she was "libel-proof." Judge John Sprizzo has denied the motion however. The judge ruled that disputed issues of fact exist on both the "substantial truth" question and on the question of whether the plaintiff is "libel-proof." *DaSilva v. Time Inc.*, 908 F.Supp. 184, 1995 U.S.Dist.LEXIS 18879 (S.D.N.Y. 1995) [ELR 18:3:13]

Copyright attorneys fees. A federal District Court in Florida has held that in a copyright case, an Offer of Judgment — under Rule 68 of the Federal Rules of Civil Procedure — in a stated "total amount" *includes* attorneys fees, unless the Offer provides otherwise. The issue arose in a case brought by BMI against a restaurant, because the restaurant made an Offer of Judgment "in the total amount of Five Thousand Dollars." BMI accepted the offer and then sought attorneys fees. The restaurant objected, saying the $5,000 included fees; and the court agreed. Judge Elizabeth Kovachevich explained that in the absence of a statement to the contrary, a Rule 68 Offer of Judgment includes "costs," and that section 505 of the Copyright Act authorizes an award of attorneys fees "as part of costs." Thus, in copyright cases, an Offer of Judgment includes attorneys fees, unless the Offer states otherwise. *Broadcast Music, Inc. v. Dano s Restaurant Systems, Inc.*, 902 F.Supp. 224, 1995 U.S.Dist.LEXIS 15367 (M.D.Fla. 1995) [ELR 18:3:13]

Statutory damages and attorneys fees for illegal cable decoders. NewChannels Corporation has been awarded $10,000 in statutory damages and attorneys fees of $1,780 — in addition to $19,200 in actual damages previously awarded — against the user of unauthorized cable television decoders, pursuant to 47 U.S.C. section 553. The award was made by federal District Judge Thomas McAvoy. The defendant had defaulted and failed to defend NewChannels' suit with respect to the liability or damages issues. *NewChannels Corp. v. Koplik*, 903 F.Supp. 333, 1995 U.S.Dist.LEXIS 16230 (N.D.N.Y. 1995) [ELR 18:3:13]

Transfer of suit alleging breach of blues recordings licensing agreement. A federal District Court in Mississippi has transferred to the District Court in Tennessee a lawsuit filed by Fat Possum Records against Capricorn Records. The Mississippi suit was transferred to Tennessee, because Capricorn had filed a suit in Tennessee against Fat Possum before Fat Possum had sued Capricorn in Mississippi. The Mississippi court applied the "first to file" rule in deciding which court should try the case. Both lawsuits involved the same dispute: Fat Possum contends that Capricorn breached a licensing agreement by failing to pay advances and royalties when due, while Capricorn contends the licensing agreement had been modified. Fat Possum produces master recordings of blues artists, and the licensing agreement at issue is one by which Fat Possum authorized Capricorn to make and sell CDs and cassettes of those masters. *Fat Possum Records, Ltd. v. Capricorn Records, Inc.*, 909 F.Supp. 442, 1995 U.S.Dist.LEXIS 18989 (N.D.Miss. 1995) [ELR 18:3:13]

Jurisdiction in defamation action against Canadian Broadcasting Corp. In a defamation case filed by an Orthodox Jewish rabbi as a result of a report aired by the Canadian Broadcasting Corporation (CBC), an excerpt from which was then rebroadcast in the United States by CNN, a federal District Court in New York City has held that federal courts do not have subject matter jurisdiction over the CBC or its employees.

Judge Mariam Cedarbaum noted that the exclusive basis for federal jurisdiction over "foreign sovereigns" is the Federal Sovereign Immunities Act; and that Act makes "foreign states . . . immune from the jurisdiction of the courts of the United States." The Act defines "foreign state" to include a corporation which is an "organ of a foreign state." The CBC is a "crown corporation" that is "wholly owned by the Canadian government," and thus, Judge Cedarbaum concluded, it is immune from suit in federal courts in the United States. The judge also ruled that CBC's immunity extends to its employees acting within the scope of their employment, because a suit against such individuals "is the practical equivalent of a suit against the sovereign directly." *Bryks v. Canadian Broadcasting Corp.*, 906 F.Supp. 204, 1995 U.S.Dist.LEXIS 17974 (S.D.N.Y. 1995) [ELR 18:3:14]

Copyright jurisdiction and venue. An action alleging copyright, trademark, tort and contract claims against EMI and several individuals will proceed in federal District Court in New York City, because Judge Robert Sweet has denied the defendants' motions to dismiss for lack of personal jurisdiction and for change of venue. The lawsuit arises out of a dispute over who owns the renewal term copyrights to several songs. The dispute is between songwriters Sandy Linzer and Denny Randell, who claim that they own the renewal copyrights, on the one hand, and three of EMI's music publishing companies and two former members of the singing group the Four Seasons (and their lawyer) on the other. Judge Sweet's decision does not deal with the merits of that dispute. It only concerns whether the case should be heard in New York, as Linzer and Randell wish, or in California, as the defendants wish. The judge ruled that he has personal jurisdiction over the defendants, because they have sufficient contacts with New York and the case is based on transactions and activity that allegedly occurred in New York. The judge also declined to transfer the case to California, saying that the defendants had not shown that the balance of conveniences weighed in favor of changing venue. Judge Sweet did however dismiss the case as against a corporation that had once owned the Four Seasons, on the grounds that the corporation had been dissolved before the transactions at issue in the case occurred. *Linzer v. EMI Blackwood Music, Inc.*, 904 F.Supp. 207, 1995 U.S.Dist.LEXIS 17020 (S.D.N.Y. 1995) [ELR 18:3:14]

Jurisdiction and venue in suit alleging breach of management contract. In a breach of contract suit brought by a New York City management company to collect unpaid fees from a Houston television newsman, a federal District Court in New York has held that it has personal jurisdiction over the newsman, that venue is proper in New York, and that the case should not be transferred to Texas. Personal jurisdiction over the newsman was based on New York's long-arm statute, which applied in this case because the newsman had retained the management company to provide services in New York City, Judge Peter Leisure has ruled. Venue in New York was proper, because the newsman had refused to pay the management company on the grounds that it had not properly performed; and since its services were to be performed in New York City, the newsman's claims arose there. The judge refused to transfer the case to Texas, because the convenience of prospective witnesses did not weigh heavily in favor of doing so. *Geller Media Management, Inc. v. Beaudreault*, 910

F.Supp. 135, 1996 U.S.Dist.LEXIS 197 (S.D.N.Y. 1996) [ELR 18:3:14]

Removal of book from library. A school district in Kansas violated the First Amendment rights of its students by removing a novel entitled *Annie on My Mind* from school library shelves, a federal District Court has ruled. The novel depicts a fictional romantic relationship between two teenage girls. It has received numerous literary awards and distinctions, including an American Library Association award for "Best of the Best" books for young adults; and it contains no vulgarity, offensive language or explicit sexual content. The Constitutional standards for removing books from libraries on account of their content was articulated by the United States Supreme Court in *Board of Education v. Pico*, 457 U.S. 853 (1982)(*ELR* 4:16:5). The plurality opinion in that case held that although books may be removed from libraries if they are "pervasively vulgar" or lacking in "educational suitability," it is unconstitutional to do so in order to deny students access to ideas with which school officials disagree. Earlier in this case, Judge Thomas Van Bebber ruled that there were issues of fact concerning the motives of the members of the board of education of the Johnson County School District who voted to remove *Annie on My Mind* from school libraries; and therefore the judge denied a motion for summary judgment made by the students who brought the case. (*ELR* 17:12:14) Following a four-day trial, however, the judge determined that the motives of the school district board members ran afoul of the First Amendment. The school board members testified they had voted to remove the book because it was "educationally unsuitable." However, the judge found that "There is no basis in the record to believe that these Board members meant by 'educational suitability' anything other than their own disagreement with the ideas expressed in the book. Here, the invocation of 'educational suitability' does nothing to counter-balance the overwhelming evidence of viewpoint discrimination." As a result, the judge concluded that the school district members "removed *Annie on My Mind* because they disagreed with ideas expressed in the book . . . ." This made the removal decision unconstitutional; and Judge Van Bebber ordered the school district to return copies of the novel to school libraries. *Case v. Unified School District No. 233*, 908 F.Supp. 864, 1995 U.S.Dist.LEXIS 18005 (D.Kan. 1995) [ELR 18:3:14]

Artists challenge of vendor licensing ordinance. A New York City ordinance that requires street vendors to be licensed does not violate the First

Amendment rights of artists who wish to sell their apolitical works of fine art, a federal District Court has held. This is so, Judge Miriam Cedarbaum has ruled, even though the city limits the number of such permits to 853 and there is a three to five year wait to get one. Nor does the ordinance deny fine artists equal protection of the law, even though it exempts vendors of newspapers, periodicals, books and pamphlets. Judge Cedarbaum found the ordinance to be a content-neutral regulation that furthers a substantial governmental interest; and though the ordinance exempts sellers of written matter, the judge concluded that the distinction between written matter and fine art is not irrational. As a result, the judge denied a motion, made by several artists and an artists' rights organization, for a preliminary injunction that would have barred the city from enforcing the ordinance. *Bery v. City of New York*, 906 F.Supp. 163, 1995 U.S.Dist.LEXIS 15757 (S.D.N.Y. 1995) [ELR 18:3:15]

INTERNATIONAL CASES

British judge grants summary judgment to singer Shirley Bassey and David Bainbridge in copyright and performer s rights case against record company that claimed license to distribute records of Bassey s recordings of songs from James Bond movies

Sir John Vinelott, sitting as a Judge in the Chancery Division of the British High Court, has granted summary judgment to singer Shirley Bassey and to David Bainbridge in their lawsuit against a record company known as Icon Entertainment Plc. The suit arose out of Icon's claim that it had acquired a license to manufacture and distribute records of master recordings Bassey had made in 1987, for a company owned by

Bainbridge, of songs from "James Bond" movies. Bassey's agreement with Bainbridge's company gave her the right to veto the distribution of records if she were not satisfied with the masters. As things turned out, she was not satisfied with them and Bainbridge's company never made or distributed records itself for that very reason.

The dispute between Bassey and Bainbridge (on the one hand) and Icon (on the other) arose because Icon asserted that it had obtained a license to make and distribute the Bassey recording from a fellow named Anthony Clarke who at one time was a co-shareholder in Bainbridge's company and who apparently was the producer of Bassey's recordings of "James Bond" songs. Bassey and Bainbridge disputed the effectiveness of the claimed license and sued Icon — Bainbridge for infringement of the copyright in the recording, and

Bassey for violation of her "performer's rights" under British copyright law.

Judge Vinelott has granted a motion for summary judgment in favor of Bassey and Bainbridge. The judge found that the evidence relied on by Icon to prove it had obtained a copyright license from Clarke showed instead that the copyright was owned by Bainbridge's company (which later assigned it to Bainbridge), rather than by Clarke, and that Clarke's interest was simply a contractual right to receive royalties as a producer which did not give him ownership or co-ownership of the recording's copyright. Thus, Icon could not have obtained a license from Clarke to make records; and if it make and distribute any such records, doing so would infringe Bainbridge's copyright.

In addition, the judge ruled that Bassey had the right to prevent Icon from making records from the masters recordings of her performances of "James Bond" songs, under the "performer's rights" provisions of the British Copyright, Designs and Patents Act of 1988. This Act makes it illegal to exploit recordings made without the consent of the performer. Icon said that Bassey had consented to master recordings being made of her performances of "James Bond" songs, and thus it argued that it could make records of those masters without her further consent. But the judge rejected this argument. He noted that while she had consented to making the masters, she had conditioned her consent to making records of the masters on her approval of the masters — and she never approved the masters. Thus, the judge concluded, Bassey had not consented in the manner required by the performer's rights provision of the Act, and her rights would be violated if Icon made or sold records of the masters of her performances of "James Bond" songs.

Bassey v. Icon Entertainment Plc., [1995] EMLR 596 (available in LEXIS Intlaw Library, Engcas File) [ELR 18:3:16]

WASHINGTON MONITOR

FCC adopts new rules for children s television, following agreement between broadcasters and children s TV advocates reached at White House summit meeting; 3-hours per week of children s programming is key feature

A significant milestone has been reached in the history of children's television. For the first time ever, a "quota" of sorts has been set — one that will induce broadcasters to air three hours per week of educational and informative programming aimed specifically at children. This inducement will be provided by new rules adopted by the Federal Communications Commission shortly after broadcasters and children's TV advocates agreed to a compromise at a "summit" meeting in the White House, convened by President Clinton himself.

The question of what, if anything, the law ought to do about television programming for children is a question that has been debated for almost three decades. Indeed, the very first article in the very first issue of the *Entertainment Law Reporter* — an issue published more than 17 years ago — was an article that reported that the FCC had reactivated an inquiry into children's television that was seven years old at that time (*ELR* Preview:1). Since then, Congress has enacted the Children's Television Act of 1990, in response to which the

FCC adopted rules (*ELR* 13:3:20). And amendments to those rules have been the subject of FCC consideration since 1993 (*ELR* 15:1:26). Just last year, the FCC proposed specific amendments to its children's TV rules (*ELR* 17:4:33). But even those specifics failed to find a consensus of support.

At the heart of the continuing debate was the question of whether the FCC ought to require broadcasters to air a specific number of hours per week of children's programming. The Children's Television Act of 1990 did not impose any such quota, but this is what children's TV advocates wanted. Broadcasters contended, at first, that a quota would be unconstitutional, and they opposed it. The FCC's 1995 proposals did not include a quota, and industry and advocacy groups appeared to be deadlocked. At that point, the President convened a White House "summit," and the result was a 3-hour per week "quota" — which the National

Association of Broadcasters has said it will not contest — in return for which broadcasters will receive more predictable treatment from the FCC at license renewal time. This compromise has now been incorporated into new FCC rules which will take effect in September 1997.

The new rules have three important features. The key feature — certainly the most newsworthy one — is that broadcasters may fulfill their statutory obligation to air programming for children by broadcasting three hours per week of such programming. To qualify, programs must have as a significant purpose the educational and information needs of children (16 years of age and younger), must be regularly scheduled on a weekly basis, must be at least 30 minutes in length, and must be broadcast between 7:00 a.m. and 10:00 p.m.

A second feature of the new rules is that broadcasters must identify children's programs as such when they are aired and to publishers of TV program guides. Broadcasters also will have to prepare standardized children's television reports, which must be put in their public files and submitted to the FCC. These reports are intended to help parents guide their children's television viewing and will allow the FCC and the public to monitor broadcaster performance under the new rules.

The third feature is what broadcasters received in return for their agreeing to these rules. The FCC has adopted a guideline for the processing of license renewals. Under this guideline, broadcasters can receive staff-level approval of their renewal applications by checking a box on their renewal applications and providing supporting information indicating that they have aired at least three hours per week of qualifying children's programming. Three hours per week is not a hard and fast quota however. The guideline also provides that broadcasters can receive staff level renewal by showing that they have aired a package of different types of educational and informational programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of children's programming, even if the package contains somewhat less than three hours of qualifying programming. For this purpose, programs that are shorter than 30 minutes or that are not regularly scheduled on a weekly basis can count. Broadcasters that do not qualify for staff-level approval will have their renewal applications referred to the Commission itself where they will have an opportunity to demonstrate they have complied with the Children's Television Act; and in such cases, broadcasters will be able to rely, for example, on their sponsorship of qualifying programs aired by other stations and even on special nonbroadcast efforts which enhance the value of children's educational and informational programming.

In the Matter of Policies and Rules Concerning Children s Television Programming, Revision of Programming Policies for Television Broadcast Stations, MM Docket No. 93-48 (1996) [ELR 18:3:17]

NLRB General Counsel concludes that AFM Phonograph Record Labor Agreement does not violate federal labor law, even though it requires non-AFM orchestras to pay AFM scale wages to musicians when they make recordings to be released by AFM signatory record companies; General Counsel advises NLRB Regional Director to dismiss charge made by Seattle Symphony Orchestra (whose musicians are not AFM members) as a result of requirement that Orchestra pay AFM scale to its musicians

in order to have its recordings released by AFM signatory record companies

The Seattle music scene is synonymous with Grunge — the band Nirvana and the late Kurt Cobain, its most famous performers. But Seattle music has a classical side too. The city has its own symphony orchestra, and it "has become one of the best in the United States," according to some. The Seattle Symphony Orchestra is completely unique in one important respect: it is the only professional orchestra in the United States whose musicians are not represented by the American Federation of Musicians. The Orchestra's musicians are represented by a different union, the Seattle Symphony and Opera Players' Organization. The Orchestra and the Seattle Players' Organization have a collective bargaining agreement that covers recordings (as well as live performances). And therein lies the rub, insofar as the Seattle Symphony is concerned.

Here's why: for 50 years or more, recordings have been made pursuant to a collective bargaining agreement — known as the Phonograph Record Labor Agreement — between the American Federation of Musicians and virtually all record companies. The current Agreement was negotiated between the AFM and six major record companies, and then it was signed by 1600 more record companies, "apparently on a me-too basis." Paragraph 17 of that Agreement prohibits signatory record companies from making records from masters acquired or licensed from others unless the musicians were paid AFM scale (or more). The collective bargaining agreement between the Seattle Symphony and the Seattle Players' Organization requires the Symphony to pay its musicians *less* than AFM scale. The Seattle Symphony has tried to get record deals with AFM signatory record companies, but those companies have told the Symphony that in order to make such a deal, the Symphony would have to pay its musicians the equivalent of AFM scale rather than the lesser amount required by the Symphony's collective bargaining agreement with its musicians' own union. However, the Symphony has not been able to get an AFM-signatory record company to pay "nearly enough money to cover the full labor cost of making any recordings" at AFM scale rates.

Caught on the horns of this dilemma, the Seattle Symphony filed a charge with the Regional Director of the National Labor Relations Board, asserting that Paragraph 17 of the AFM Phonograph Record Labor Agreement violates Section 8(e) of the National Labor Relations Act. That section makes it illegal for a union and an employer to enter into any agreement to cease doing business with another person. According to the Symphony, the AFM Phonograph Record Labor

Agreement is just such an agreement, because it has had the effect of preventing virtually all record companies in America from doing business with the Seattle Symphony.

In response to the Symphony's charge, the Regional Director turned to the NLRB's General Counsel for advice; and the General Counsel's Office has now responded. In the opinion of the General Counsel, the AFM Phonograph Record Labor Agreement does *not* violate Section 8(3) of the Act. This is so, the General Counsel has concluded, because "Not all agreements resulting in a cessation of business are subject to Section 8(e)." Rather, "Union standards subcontracting clauses . . . are . . . lawful." A "union standards subcontracting clause" is a collective bargaining agreement clause that requires employers to use subcontractors who pay their own employees the same amount of money that the employer itself would have paid its employees, if the subcontracted work had been done by the employer rather than by a subcontractor. The NLRB has acknowledged that union standards subcontracting clauses do fall within the literal wording of Section 8(e) — and thus would seem to be prohibited. But the NLRB has reasoned that "It is now well settled that provisions of collective-bargaining agreements prohibiting the contracting-out of unit work are lawful if they are aimed at the primary and permitted object of protecting and preserving unit work and standards and do not have as their real target the imposition of a boycott on third parties who do not recognize or have a contract with the contracting union."

In determining whether a clause is designed to "preserve unit work," the NLRB and courts have looked at whether the signatory-employer and its subcontractor are really "joint employers" of those workers who actually are on the subcontractor's payroll. In the Seattle

Symphony case, the NLRB General Counsel found that AFM signatory record companies and orchestras are "joint employers" of orchestra musicians, for three reasons. First, the Phonograph Record Labor Agreement so provides. Second, the Agreement determines almost all of the musicians' terms and conditions of employment. And third, the record companies retain control over the production of the master recordings.

Based on these findings, the General Counsel concluded that "Paragraph 17 can function to preserve unit work, by preventing signatory record companies from subcontracting to . . . orchestras which pay substandard wages and benefits. All that Paragraph 17 does is to require that a company that does business with a signatory company guarantee that the total compensation . . . provided to the musicians is equal to the total cost of the compensation provided under the [Phonograph Record Labor Agreement]. Thus, if the [Seattle

Symphony Orchestra] wishes to do business with a signatory record company, the record company becomes the joint employer of the symphonic musicians and co-determines their terms and conditions of employment by virtue of the [Agreement]. Thus, Paragraph 17 is a primary union standards work preservation clause and does not violate Section 8(e)."

American Federation of Musicians (Seattle Symphony Orchestra), NLRB General Counsel Case 19-CE-96, 1996 NLRB GCM LEXIS 14 (1996) [ELR 18:3:18]

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