BUSINESS AFFAIRS

Twenty-Five Years . . . and Counting: Sports on Cable Television

by Philip R. Hochberg

Twenty-five years ago this summer, America's sports pages discovered cable television. What seems like a "given" now — sports on cable — wasn't even an afterthought in 1971 until *The Sporting News* carried an article talking about what changes might be in the offing.

And no one then had even the slightest inkling that by late 1996, there would be three channels devoted exclusively to sports news. Not events, but the reporting of the events.

More than a few changes have taken place since *The Sporting News* carried the article on cable television twenty-five years ago. And if those changes were mind-boggling, we can't even begin to imagine the changes in the *next* quarter-century, indeed even in the next *five years*.

In July 1971, the cable television industry had all of five million subscribers. The industry saw itself as simply a retransmission service, bringing television to areas that couldn't get signals off the air, including the natural canyons of Texas and the man-made canyons of New York City. The cable system serving Elmira, New York was the fifth largest in the country with 20,000 subscribers and the system serving Cumberland, Maryland was the ninth largest in the U.S. No cable system in the U.S. had more than twelve channels. Four — four — cable systems reported that they originated sports programming.

The big sports news in the industry that year was the re-signing of the Knicks and Rangers to be used as an inducement to gain subscribers in Manhattan. There were so few subscribers that the system didn't bother to sell spots. In fact, during time-outs, the camera panned the crowd with *crowd-noise audio*, "to give the viewer a sense of what it was like being there[!]," according to one official.

What could life have been like without HBO (begun in 1973), Superstation WTBS (which went on the satellite in 1977) or ESPN (which Bill Rasmussen started in 1979 to distribute UConn games to all twelve cable systems in Connecticut)?

Where are we now? Two-thirds of the nation is wired, approaching 70 million subscribers. The Time-Warner system in New York alone has 1.1 million hook-ups. Ninety-seven percent of the nation's subscribers have more than thirty channels available and half, more

than 54 channels. ESPN is in virtually every cable home, as are two of the other major sports providers, WTBS and TNT. Sports cablecasts are continually the highest rated basic cable programs.

With tens of millions of sports fans subscribing, no team or league, college or pro, operates without casting an eye toward the cable industry. The National Football League was the last of the majors to get into cable, signing a deal with ESPN in 1987.

On the local and regional level, sports — another 55 million hook-ups — also drives the cable industry. Here, the industry has almost gone full cycle. In the early days before pay-cable, all sports was part of the basic service. Many of the teams then began shifting those games to a pay tier, but in recent years, the packages have gone back to basic, where greater circulation leads to greater advertising dollars.

Meanwhile, some sports, especially boxing, gravitated from television to cable to pay-per-view, where the boxcar numbers were finally reached in the Holyfield-Foreman fight of April 1991, which grossed $48.9 million.

If that's where we are now, where are we going? To try to visualize where cable and sports might be in five years — to say nothing of twenty-five years — is a daunting task. But let's give it a shot:

Alternative sources of delivery. The hard wire of cable may not be the mode of delivery. Direct-to-Home transmission has made inroads through DirecTV, for example. Or if in fact the wire will continue to be in the future, why does it have to be a cable wire? What about the massive interest of the telephone companies in providing program transmission? It could mean greater competition for sports rights and greater competition for the subscriber dollar, driving subscriber costs down.

The 500-channel universe. With digital transmission opening up five times the number of channels presently available, specialty channels will continue to emerge. We already have Classic Sports Network (with great events of the past), The Deuce (ESPN2, with "extreme" sports), and The Golf Channel on the air and the following proposed channels today: The Auto Channel, The Boating Channel, Chop TV (martial arts and fitness, not cooking), Fitness Interactive, Premier Horse Network, and TRAX Television Network. What's to stop someone from dreaming about twenty-four hours of basketball? You don't have to watch it twenty-four hours a day, but it's there — a "destination channel" in the words of some cable blue-skyers — when you want it.

Up-to-minute sports news. News, highlights, features, interviews all day long as ESPN, CNN, and TCI/Fox all vie to become a continuous sports page.

Every game, every season, (almost) everywhere. Although not available right now by cable, if you're a Dallas fan living in Washington (both of you), you can use satellite delivery to see every game, home and away. (But blacked-out games are still blacked-out in the home territory.)

Interactive television. Talk back to your television and it listens. You decide if you want to watch the entire game from an end zone camera or if you want isolation on Steve Yzerman for the entire game. Or you want to put your money down on the horses; you do it from your living room.

The globalization of sports. ESPN already has fifty percent more viewers overseas than in the U.S. Our sports will be taken worldwide and we'll have immediate access to soccer, rugby, curling, you name it.

The continued use of over-the-air television. For decades — literally, decades — there have been

predictions of cable, pay-cable, or pay-per-view "siphoning" away the crown jewels of sports, such as the Super Bowl and World Series. In fact the 1992 Cable Act required the FCC to study the issue of siphoning. The Commission's report was an answer in search of a problem. Not to worry; it won't happen. Sports still needs the vast and total exposure of conventional, over-the-air tv. And Congress is out there, always looking over sports' shoulder, threatening legislation.

Leverage, it would appear, rather than quarter-backing, will continue to be the name of the game.

Philip R. Hochberg, a member of the ENTERTAINMENT LAW REPORTER'S *Editorial Advisory Board, wrote the original article for* THE SPORTING NEWS *in July, 1971. A Washington lawyer who represents professional and collegiate sports interests, he is also the Stadium*

Announcer for the Washington Redskins, in his thirty-fourth year with the team. [ELR 18:5:3]

LEGAL AFFAIRS

Legal Hurdles to Strategic Visions in the Entertainment Industry: A Look at the Time Warner - Turner Broadcasting Merger

by Lionel S. Sobel

Gerald Levin has just realized (what one judge called) a "strategic vision."

Nine years ago, Mr. Levin — then Executive Vice President of Time Inc. — did some "strategic thinking" about the future of his company, and he came to a significant conclusion. "I am now convinced," Mr.

Levin wrote in a 1987 memorandum, "that our primary long-term objective should be to bring about the strategic consolidation of Time Inc., Warner Communications, and TBS. The resulting company would be a complete, world-class entertainment and publishing giant with well in excess of a billion dollars of operating income."

Mr. Levin's memorandum was addressed to his boss, Time CEO Richard Monroe, and Mr. Monroe agreed with its conclusion. The consolidation of Time Inc. and Warner Communications was accomplished by 1990. It resulted in the company known as Time Warner Inc., and Mr. Levin has played a leading role in its activities ever since. He became its Chief Operating Officer in 1991, its President in 1992, and its Chairman of the Board in 1993.

Now the final piece of Mr. Levin's 1987 vision has fallen into place. Time Warner shareholders, and

those of Turner Broadcasting System, Inc., held back-to-back meetings in New York City on October 10th and voted to approve the merger of their two companies.

Mr. Levin was the "moving power" behind the merger, and he has every reason to be pleased — not only because his vision became a reality, but also because of the accuracy of his predictions. The post-merger company is the "world-class giant" he foresaw. It is in fact the very biggest communications and entertainment company in the world, surpassing the Walt Disney Company, even after Disney's recent acquisition of CapCities/ABC. Moreover, a pro forma financial statement for Time Warner and Turner Broadcasting shows that if they had been one company in 1995, their combined operating income (though not profits) for that year would have been $1.118 billion, exactly as Mr. Levin predicted nine years ago.

The merger and resulting proceedings

The transaction between Time Warner and Turner Broadcasting was complicated. Its essence involved the creation of a new company, temporarily called "New Time Warner," into which both existing companies were merged. After the merger, both of the existing companies became subsidiaries of "New Time Warner" which then was renamed "Time Warner Inc." Shareholders of the existing companies will be issued stock in the new company: Time Warner shareholders will receive one share in the new company for each share of Time Warner stock (common or preferred); Turner shareholders will receive three-quarters of a share in the new company for each share of Turner common stock, and 4.8 shares for each share of Turner preferred.

More, however, was involved than this, largely because Time Warner and Turner both have long and complicated pedigrees. These pedigrees caused concern, among some, about how the genetic makeup of the new company would affect its behavior, once the merger was completed. For this and other reasons, the transaction raised a variety of legal issues — issues which have been and now are being resolved in two dozen legal proceedings in state and federal courts and administrative agencies in Delaware, Georgia, New York and Washington, D.C.

Most of these legal proceedings are shareholder derivative lawsuits, of the type that are common whenever transactions of this magnitude occur between publicly owned companies. Seventeen such cases have been filed on behalf of Turner Broadcasting shareholders; and three more have been filed on behalf of Time Warner shareholders. None of these cases has yet resulted in a

published ruling, and Turner and Time Warner have announced they intend to "vigorously" defend all of them.

Another case has been filed by Bartholdi Cable Company. It alleges that the merger would violate the antitrust laws. This case has not produced any published rulings yet either, and Turner and Time Warner have said they will vigorously defend against it too.

The merger — or at least two aspects of it — has to be approved by the Federal Communications Commission. This is so, because Turner Broadcasting owns television station WTBS in Atlanta, and the Communications Act requires FCC consent to the transfer of control of any broadcast station licensee. In addition, Time Warner owns a cable system in the Atlanta area, and existing FCC rules prohibit the common ownership of cable systems and television stations that serve the same area. Time Warner has asked the FCC to waive this rule

temporarily, to give the company time to sell its Atlanta cable system in an "orderly" way.

The shareholder derivative suits and FCC proceedings are to be taken seriously, of course. But none of them appeared to jeopardize the actual merger between Time Warner and Turner. The Bartholdi Cable antitrust suit seeks an injunction, but it too was unlikely to block the merger completely. The same could not have been said about all of the proceedings however.

Two proceedings did go directly to the heart of the merger and could have prevented Mr. Levin from realizing his strategic vision. Both of these proceedings were the result of the pedigrees of Time Warner and Turner Broadcasting, and the effect those pedigrees may have had on the merged company's behavior. While both proceedings represented high hurdles, neither actually prevented the merger, because Time Warner and Turner overcame one of the hurdles completely, and (at

this writing) have all but overcome the other as well. One proceeding was a breach of contract lawsuit filed against Time Warner by US West Inc., in Delaware Chancery Court. The other was an antitrust proceeding threatened by the Federal Trade Commission. Time Warner has won the US West case. And Turner and Time Warner have agreed with the FTC on the terms of a Consent Order that will permit the merger under specified conditions acceptable to both companies.

US West vs. Time Warner: the background

US West Inc. is a telephone company — one of the "Baby Bells" that were born of the breakup of AT&T several years ago. As a phone company, US West is not really in the entertainment business. Its only prior appearances in the pages of the *Entertainment Law Reporter* have been in connection with its successful

challenge to the constitutionality of a federal statute that once prohibited telephone companies from providing video programming to their subscribers, in competition with local cable-TV systems. (*ELR* 16:7:22, 16:9:10, 17:1:26)

Although US West is not itself in the entertainment business, it is a partner in a company that very much is in that business. That company is a limited partnership known as "Time Warner Entertainment." US West is the limited partner and owns just over 25% of Time Warner Entertainment. Time Warner Inc. is the general partner and now owns the rest of the company. US West's objections to the Time Warner merger with Turner Broadcasting are based on US West's status as a partner in Time Warner Entertainment and on a provision in the limited partnership agreement. In order to understand and assess US West's objections to the merger, it is helpful to look at why Time Warner Inc. has any

partner at all in its entertainment operations, and why a phone company became that partner.

When Time Inc. merged with Warner Communications in 1990, the transaction involved the distribution of cash to Warner's shareholders (as well as stock in the newly created Time Warner Inc.). Those cash distributions were "substantial," and as a result, Time Warner became burdened with "substantial debt." To reduce that debt, Time Warner decided to sell a minority interest in some of its businesses. The vehicle created for that sale was the limited partnership now known as Time Warner Entertainment. As originally conceived and implemented in 1991, Time Warner was the limited partnership's general partner, and two Japanese companies — C. Itoh & Co. and Toshiba Corp. — were the limited partners. Time Warner contributed some — but not all — of its businesses to the partnership in return for an 87.5% share. Itoh and Toshiba together

contributed $1 billion in return for a 12.5% share combined.

US West entered the picture in 1992. It too had been doing some "strategic planning," and it had reached two conclusions: that cable-TV systems would be competing with phone companies to provide information to subscribers (just as phone companies would be competing with cable systems to provide video programming); and the previously distinct industries of telecommunications and entertainment were becoming "interrelated." As a result, US West decided to get into the business of providing information and entertainment by cable, either in partnerships with cable companies or by acquiring cable company assets.

Time Warner was a substantial owner of cable systems, so US West approached Time Warner and expressed interest in participating in some way in that ownership. As it happened, Time Warner's cable

systems were among the businesses it already had contributed to the Time Warner Entertainment limited partnership. Although US West was not at first much interested in the other Time Warner Entertainment businesses — those involving movie and television program production and distribution, cable programming networks, broadcasting and theme parks — US West eventually agreed to make an investment in Time Warner Entertainment. The deal was done in 1993. In return for an investment of $2.5 billion, US West became the third limited partner (along with Itoh and Toshiba) and acquired just over 25% of the partnership.

Time Warner's ownership of some of its businesses directly, and its ownership of other businesses indirectly through the Time Warner Entertainment partnership, created a complex corporate structure. Of course, for $3.5 billion ($1 billion from Itoh and Toshiba plus $2.5 billion from US West), Time Warner was

willing, at first, to put up with a certain amount of intra-corporate complexity. But by 1994, it seemed to Time Warner executives that the complexities caused by the creation of Time Warner Entertainment were having two unanticipated and undesirable consequences.

First, the price of Time Warner stock had dropped below what the company's executives (and shareholders) thought it should be. One possible reason for this was that the stock market may have undervalued Time Warner stock because some of the company's businesses are wholly owned, and their assets and earnings are reported as being Time Warner's own assets and earnings from its own business operations, while the assets and earnings of the businesses owned by Time Warner Entertainment are separately accounted for as "investments" and "equity in [the] income" of what looks like a distinct and only partially-owned entity.

Second, the activities of Time Warner's wholly owned businesses — including magazine and book publishing, and music — were "converging" with the limited partnership's movie and television businesses more quickly than those movie and television businesses were converging with the partnership's cable-TV system businesses. Thus, the organizational groupings of the company's businesses — between those that are wholly owned and those that are partnered — were no longer logical.

The result: Time Warner decided to "simplify" its corporate and operating structure by eliminating the limited partnership. All three limited partners were offered the opportunity to exchange their interests in Time Warner Entertainment for convertible preferred stock in Time Warner itself. Itoh and Toshiba accepted the offer. US West did not.

US West's reasons for declining the offer that Itoh and Toshiba accepted have not been publicly reported. It is likely however that US West was not interested in becoming a Time Warner shareholder, because such a change would have taken the phone company away from, rather than towards, its original goal of becoming a co-owner of Time Warner's cable systems in particular, not its business as a whole. Perhaps for that reason, in early 1995, Time Warner proposed to US West that the two companies restructure their partnership to create a "cable only" telecommunications company — one that would not be involved in movie or TV production, distribution or programming, or theme park operations — just as US West had originally proposed three years earlier. Unfortunately, no such deal was made (in 1995 or even yet), reportedly because the two companies have been unable to agree on control issues or the value of partnership assets. The existence of Time

Warner Entertainment therefore continues. And that in turn set the stage for US West's legal objections to the merger of Time Warner and Turner Broadcasting.

US West s objections

In addition to owning television station WTBS, cable networks like CNN, and the Atlanta Braves and Hawks, Turner Broadcasting also owns three movie production companies. These three companies — Castle Rock Entertainment, New Line Cinema, and Turner Pictures — produce movies in direct competition with Warner Bros. which is owned by Time Warner Entertainment. Thus, as a result of the merger, Time Warner Inc. will own movie three production companies — in which US West has no ownership interest — which compete with Time Warner Entertainment's

movie production company — in which US West does own an interest.

The stated reasons for US West's objection to the Time Warner merger with Turner Broadcasting focused on this competition between Warner Bros. on the one hand, and Castle Rock, New Line and Turner Pictures on the other. US West argued that because of this competition, Time Warner could not legally merge with Turner Broadcasting, for two reasons. First, the Time Warner Entertainment limited partnership agreement contains a non-competition clause that prohibits the partners from separately engaging or investing in the "Filmed Entertainment Business" (or in cable-TV or programming businesses). Second, US West asserted that even if the partnership agreement had not contained such a clause, Time Warner — as the general partner — owes a duty of loyalty to Time Warner Entertainment. That duty, US West argued, prohibits Time Warner

from competing with Time Warner Entertainment, and it prohibits Time Warner from taking business opportunities that fall within Time Warner Entertainment's line of business.

US West's views on this issue were asserted first in a letter to Time Warner and then in a lawsuit filed in the Delaware Chancery Court. The case was tried before Chancellor William Allen. In a lengthy, thoroughly analyzed and extremely well written opinion, Chancellor Allen has ruled against US West, has dismissed its claims, and has entered judgment for Time Warner. (*US West Inc. v. Time Warner Inc.*, 1996 Del.Ch.LEXIS 55, 1996 WL 307445 (Del.Ch. 1996))

Non-competition clause

Time Warner acknowledged that the limited partnership agreement contains a non-competition clause.

But it pointed to a subsection that stated that "[n]othing contained" in the non-competition clause "shall prohibit or otherwise restrict" a partner from owning an interest in any business or entity disclosed on an attached schedule. According to Time Warner, that attached schedule listed Turner Broadcasting as one of the entities that were excepted from the non-competition clause. US West read the schedule differently, and said that Turner Broadcasting was not listed.

The two companies disagreed about whether Turner was listed or not, because the schedule did not simply list company names. Rather, it referred to other documents which in turn referred to other schedules; and in order to see if Turner was listed, it was necessary to follow a trail. Chancellor Allen agreed with Time Warner that as a "technical" matter, the trail does exist and could lead to the conclusion that Time Warner's ownership of Turner Broadcasting was excluded from

the prohibition against partners competing with the partnership. On the other hand, Chancellor Allen also agreed with US West that Time Warner's reading of the non-competition clause was "logically flawed," because the question of whether Time Warner could increase its ownership in Turner Broadcasting was much too important to have been covered in such an indirect manner.

As a result, the Chancellor determined that the clause had "[n]o single clear meaning," and he went on to consider in detail the facts and circumstances that surrounded the drafting of the limited partnership agreement originally and the amendment of the non-competition clause at the time US West was admitted to the partnership. He concluded that Time Warner intended to be able to acquire the rest of Turner Broadcasting, and that US West knew or should have known this. Moreover, the Chancellor found that even if US West actually intended that Time Warner could not

acquire the rest of Turner Broadcasting without US West's consent, Time Warner did not know and had no reason to know of US West's intent. For these reasons, Chancellor Allen concluded that the interpretation of the non-competition clause advanced by Time Warner was the one that identified "the contractual rights and duties created by the parties," and that "US West has no contract right" to prevent Time Warner from merging with Turner.

Duty of loyalty

Chancellor Allen also rejected US West's "duty of loyalty" argument. He did so because he concluded that the opportunity to acquire Turner Broadcasting was not an opportunity "that belongs in equity" to Time Warner Entertainment. Time Warner had committed to contribute Turner Broadcasting assets (except CNN) to

Time Warner Entertainment "at a fair price." Thus, the limited partnership will be able to acquire those assets if US West agrees on what a "fair price" is; and the opportunity to acquire Turner will turn out to be one the partnership will have actually received. If, however, US West and Time Warner are unable to agree on a fair price for those assets, then the opportunity to acquire Turner will turn out to have been an opportunity Time Warner Entertainment chose not to take advantage of; and Time Warner's acquisition of Turner will not have deprived the partnership of anything.

The Chancellor acknowledged that Time Warner's acquisition of Turner's three movie production companies could result in transactions that conflict with the interests of Warner Bros. and therefore with Time Warner Entertainment. However, he declined to enjoin the merger on those grounds. He did so, because he said he "cannot in equity foreclose the fiduciary [Time

Warner] from attempting to meet its obligation of loyalty to [Time Warner Entertainment] in a difficult, case-by-case manner." This was especially true, he said, because Time Warner and US West now "are engaged in fundamental renegotiation of their relationship."

Contract lawsuit as renegotiation tool

Although US West's stated objections to the merger focused on the competition between Warner Bros. and Turner's three production companies, it is unlikely that that competition is what really bothered the phone company. After all, Castle Rock, New Line and Turner Pictures already were competing with Warner Bros., and their acquisition by Time Warner is — if anything — likely to reduce rather than increase that competition, because Time Warner owns almost 75% of Warner Bros. through its own interest in Time Warner

Entertainment. Moreover, US West bought into Time Warner Entertainment in order to become a co-owner of its cable systems, not to get into the movie business.

Thus, it is fair to speculate that US West's real objective in filing suit against Time Warner was to gain some leverage in their negotiations over the restructuring of Time Warner Entertainment into a "cable only" entity. Chancellor Allen himself sensed this, and said so. "Stepping back from the details of the present dispute to look at the parties' situation," he said, "what seems apparent is that if the [Time Warner Entertainment] structure ever represented a sound long-term strategic structure, it probably no longer does, at least for these parties. . . . The most sensible and likely outcome therefore appears to involve an unwinding of the [Time Warner Entertainment] structure. This lawsuit can be seen as a step in that negotiation process."

US West lost the lawsuit, and did not appeal, so the case did not give the phone company as much leverage in those negotiations as it hoped. Nevertheless, according to recent news reports, those negotiations are ongoing. And this time, they are likely to bear fruit, because according to those same news reports, Time Warner has been under "intense pressure" from "major shareholders" to reduce its debt. (WALL STREET JOURNAL, Oct. 7, 1996)

Debt continues to be a drain on Time Warner's profitability. Even though pro forma financials show that Time Warner and Turner would have had a combined "operating income" for 1995 of $1.118 billion, those same financials show that the company would have had interest expenses that year of $1.142 billion. The result of course would have been a loss, rather than a profit (even before corporate expenses or taxes were deducted). And in fact, Time Warner did suffer a loss for

1995 — one that the merger would not have overcome. A more drastic restructuring appears necessary to lighten Time Warner's debt load. The cable systems are the assets that are likely to be sold to accomplish that mission; and US West is the likely buyer.

Federal Trade Commission proceeding: the background

The pedigrees of Time Warner and Turner Broadcasting also raised concerns at the Federal Trade Commission which has responsibility (shared with the Department of Justice) for enforcing federal antitrust laws. According to FTC Chairman Robert Pitofsky, the Commission's concerns could be summarized in a single word: access. The FTC was concerned that as a result of the merger, cable networks owned by other companies would find it more difficult to get access to cable

systems willing to carry their programming. The Commission also was concerned that cable systems would find it more difficult to get access to cable programming.

At first glance, these two reciprocal concerns seem inconsistent with one another, and thus it seems unlikely that both would be potential problems in a single case. But the FTC charged that both types of access could be diminished in this case for four reasons: because of the number of businesses in which Time Warner and Turner are engaged; because of the success they have enjoyed in those businesses; because of the businesses owned by one of Turner's major shareholders; and because of the extent of that shareholder's proposed ownership of the merged company.

FTC s objections

One of Turner Broadcasting's major shareholders is a Tele-Communications, Inc. — commonly known by its initials, TCI. It owns 24% of Turner and is the nation's largest operator of cable TV systems, serving approximately 27% of all homes in the U.S. that have cable television. As originally conceived, TCI would have received (in return for its Turner Broadcasting stock) about 7.5% of the authorized stock in the post-merger Time Warner Inc., as well as a right of first refusal to acquire from Ted Turner the 7.4% of the stock in the merged company he will be receiving.

Time Warner is the nation's second largest operator of cable TV systems, serving approximately 17% of all homes in the U.S. that have cable television.

Thus, as originally conceived, the Time Warner - Turner merger would have meant that cable systems serving 44% of all cable homes in America would have been owned outright by TCI or by a company in which

TCI owned a substantial interest and the influence that usually accompanies such ownership.

Moreover, Time Warner (through its partnership interest in Time Warner Entertainment) owns HBO and Cinemax. And Turner owns CNN, WTBS, TNT, the Cartoon Network and Turner Classic Movies. Together, these networks account for 40% of all cable programming in the country. Some of the rest of that programming is provided by TCI, because (directly or through its Liberty Media Corporation subsidiary) TCI owns the Discovery Channel, the Learning Channel, Court TV and Starz! Thus, as originally conceived, the merger would have put ownership of well over 40% of all cable network programming in the hands two closely related companies.

Moreover, the post-merger integration of TCI with Time Warner would have gone beyond TCI's ownership of stock in the post-merger company. This is so,

because in anticipation of the merger, TCI agreed that virtually all of its cable systems would be obligated to carry CNN, TNT and WTBS for 20 years (in return for license fees that would have been 85% of the industry average or the lowest price charged any cable system, whichever was less).

According to the FTC, this concentration in the ownership of cable systems, especially in the hands of companies that own so many cable programming networks, and TCI's agreement to carry CNN, TNT and WTBS for 20 years, could make it difficult for other cable programmers to get access to cable systems — access which is necessary for programmers to reach their potential audiences. Likewise, this concentration in the ownership of cable programming networks could enable Time Warner to raise the license fees it charges cable systems for access to Time Warner networks, and could

even prevent unaffiliated cable systems from getting access to those networks at all.

In order to prevent these problems from occurring, the FTC threatened to file an antitrust lawsuit unless Time Warner, Turner and TCI agreed to modify the proposed terms of the Time Warner - Turner merger and the terms of TCI's agreement to carry CNN, TNT and WTBS. Negotiations were conducted between the FTC on the one hand and Time Warner, Turner and TCI on the other; and agreement has been reached among them concerning the provisions of a Consent Order spelling out the modifications Time Warner, Turner and TCI are willing to make and the FTC is willing to accept, in order to permit the merger to proceed.

The Proposed Consent Order

The Proposed Consent Order agreed to by the FTC and by Time Warner, Turner and TCI contains six major provisions. (*In re Time Warner Inc.*, Federal Trade Commission, File No. 961-0004 (1996))

First, the proposed order requires TCI to transfer to a separate company the Time Warner stock it will receive (in exchange for its Turner Broadcasting stock) as a result of the merger. The stock of that separate company is then to be distributed to TCI's shareholders (technically, to the shareholders of TCI's Liberty Media subsidiary). That stock is to be freely tradeable on a stock exchange, so that over time, ownership of TCI and the separate company will be different. According to the FTC, this will reduce or even eliminate any anticompetitive concerns that would have arisen from TCI's ownership of a portion of Time Warner, because TCI would no longer have any reason to favor Time Warner programming over programs supplied by others.

Second, the proposed order requires TCI and Time Warner to cancel the agreement by which TCI had agreed to obligate its cable systems to carry CNN, TNT and WTBS for 20 years. According to the FTC, this agreement could have prevented other cable programmers from gaining access to TCI's cable systems, and cancellation of the agreement will reduce that risk. The proposed agreement does permit TCI and Time Warner to enter into agreements with one another concerning cable programming after a six-month "cooling off period." But if such agreements are entered into, they must be for no more than five years at a time, so that other programmers will have opportunities to gain access to TCI's cable systems at least every five years.

Third, the proposed order prohibits Time Warner from bundling HBO — which cable systems consider to be a "must-have" "marquee" service — with any Turner cable channels. And the order prohibits Time Warner

from bundling CNN, TNT or WTBS — also considered to be "marquee" services — with any Time Warner channels. According to the FTC, these provisions will prevent the merged company from increasing its bargaining power with cable systems (concerning the licensing of cable channels) over whatever bargaining power Time Warner and Turner had separately, before the merger.

Fourth, the proposed order prohibits Time Warner from using its post-merger ownership of 40% of all cable programming in order to "disadvantage" companies that compete with cable systems. Such companies include Direct Broadcast Services, wireless systems, and telephone-company operated program distributors. According to the FTC, Time Warner could have used its power in the cable programming business to prevent the development of these types of competing program delivery services, in order to protect Time Warner's own

cable systems. The order seeks to avoid this possibility by prohibiting Time Warner from charging such delivery services licensing fees which differ from those it charges to unaffiliated cable systems by an amount that is greater than the spread between what Turner charged such delivery services what Turner charged large cable systems.

Fifth, the proposed order prohibits Time Warner from making programming decisions for its cable systems that impair the ability of unaffiliated cable programmers from competing with Time Warner cable channels in the programming market. To be certain that Time Warner abides by this provision, the company is required to report its cable programming decisions to a management committee of Time Warner Entertainment which includes representatives of US West. According to the FTC, this reporting requirement will prevent Time Warner from discriminating against unaffiliated

programmers, because US West's limited partnership interest in the cable systems owned by Time Warner Entertainment will give US West an incentive to ensure that programming decisions made by those systems are decisions that benefit those cable systems rather than decisions that benefit the cable channels previously owned by Turner and now owned by Time Warner Inc. (but not by Time Warner Entertainment).

Sixth, and finally, the proposed order requires cable systems owned by Time Warner to carry an all-news channel in addition to (or instead of) CNN, which is the all-news cable channel owned by the merged company. According to the FTC, this will enable competing all-news cable channels to compete with CNN — something they might not have been able to do successfully if all of Time Warner's cable systems carried CNN exclusively simply because CNN is now part of the Time Warner corporate family.

The likely outcome of the FTC proceeding

In accordance with its usual procedures, the FTC has allowed 60 days for public comment on the proposed order. The comment period will expire in November, and then the Commission will decide whether to accept the order as currently written or whether seek further modifications.

Though some may object to the proposed order, it is safe to say that the merger is now a "done deal" as far as the FTC is concerned.

The FTC voted 3-2 to accept the proposed consent order as it is now written, but all five commissioners agreed that the merger could proceed. The two who dissented from the terms of the proposed order were Commissioner Mary Azcuenaga and Commissioner Roscoe Starek. But even they approved the merger. They

dissented only because they found no reason to believe that the merger — as originally structured — would have violated the law, and because they found that the proposed consent order was unnecessary and may be harmful.

Thus, those who may want the FTC to block the merger, or to demand more stringent conditions, will have a heavy burden of persuasion — a burden which on the present record there is no reason to suppose could be met.

The future

Shareholder and antitrust suits are likely to bounce around the courts, some of them for years. Indeed, as this issue of the *Entertainment Law Reporter* went to press, a new dispute arose.

The Time Warner cable system in New York City decided to add an all-news channel, as required by one provision of the proposed FTC consent order. News Corp. — the parent company of Twentieth Century Fox and the Fox Broadcasting Company — recently launched an all-news cable channel of its own called Fox News. The channel is headquartered in New York City, and for that and other reasons, News Corp. thought that its channel should be the one added to Time Warner cable system there.

Instead, Time Warner selected MSNBC — the all news channel started earlier this year by NBC and Microsoft. New York City Mayor Rudolph Giuliani has sided with News Corp., and he decided to carry Fox News on the city's cable access channel. Time Warner objected and according to news reports has won a temporary restraining order from a federal district judge preventing the city from using its access channel to carry

Fox News. News Corp. reportedly plans an antitrust lawsuit of its own against Time Warner.

All of this brings to mind two phrases that are frequently used on news broadcasts of all kinds: "stay tuned" and "details upcoming." What will be coming, however, will be details. The law presented hurdles to Mr. Levin's strategic vision, but has not prevented it from becoming a reality.

Lon Sobel is the Editor of the ENTERTAINMENT LAW REPORTER *and a professor at Loyola Law School in Los Angeles.* [ELR 18:5:5]

RECENT CASES

Federal court remands Columbo plagiarism case to California state court after dismissing claims that were preempted by federal copyright law

Sometime during the 1994-95 television season, ABC broadcast an episode of "Columbo" entitled "Strange Bedfellows." Though that episode had nothing to do with plagiarism, its title — by coincidence — says something accurate about the nature of a plagiarism case that has been filed by Peter Falk's speech coach, in which the speech coach alleges that the "Strange Bedfellows" episode was copied from a script he had written for the show and had submitted to the show's producer. This is so, because "plagiarism" is not a recognized cause of action in itself; rather plagiarism cases are usually pled as claims for copyright infringement,

breach of contract, and breach of confidence, and sometimes as claims for fraud, negligent misrepresentation, unfair competition or misappropriation as well. When combined a single complaint, these various claims make "strange bedfellows" however, because copyright infringement is a claim over which federal courts have exclusive jurisdiction, while the other claims are state law claims over which state courts have jurisdiction or which are preempted by federal copyright law altogether. Thus, plagiarism cases often involve some preliminary procedural fencing between the parties over which claims are valid and what court they ought to be heard in. And that is exactly what has happened in the case involving the "Strange Bedfellows" episode of "Columbo."

Peter Falk's speech coach, Frank Dielsi, filed his plagiarism suit in California state court, alleging six causes of action: breach of contract; breach of

confidence; fraud; negligent misrepresentation; conversion; and negligence. Universal and ABC removed the case to federal District Court, and made a motion to dismiss all of the causes of action except those for breach of contract and confidence, on the grounds they were preempted. Dielsi responded with a motion to remand the case to state court.

Judge Audrey Collins has granted Universal's and ABC's motion to dismiss Dielsi's conversion and negligence claims, because those claims do not involve any "extra elements" (not required in copyright cases), and thus they are preempted under section 301(a) of the Copyright Act. On the other hand, the judge has denied Universal's and ABC's motion to dismiss Dielsi's claims for fraud and negligent misrepresentation, because they require proof of the "extra element" of misrepresentation (an element not required in copyright cases). Thus, Judge Collins ruled, those claims are not

equivalent to copyright infringement and are not preempted.

Because Judge Collins granted Universal's and ABC's motion to dismiss those claims that were equivalent to copyright, the four claims that remain were all based purely on state law; and for that reason, the judge has granted Dielsi's motion to remand his case to California state court.

Editor s note: In analyzing whether Dielsi's fraud claim was preempted, Judge Collins noted that "In essence, a plaintiff may always avoid copyright preemption by further alleging the additional element that a defendant fraudulently promised not to violate his or her authorship rights." This is particularly true in California, the judge observed, because "under the California law of promissory fraud, the facts concerning the alleged violation itself will serve as much of the evidence going to the alleged fraud." Nevertheless, Judge Collins found

herself "bound" to reach the conclusion she did by the Ninth Circuit's decision in *Valente-Kritzer Video v. Pinckney* (*ELR* 11:6:15) which held that a fraud cause of action based on an allegation that the defendant "misrepresented its intent to perform [a] contract" was "qualitatively different" from a copyright claim because of the additional element of misrepresentation. This may be an issue as to which a conflict has developed between the Ninth Circuit and others, because in other circuits, fraud and negligent misrepresentation claims have been dismissed on the grounds they are preempted by copyright law. The most recent example of such a dismissal was in *Wharton v. Columbia Pictures* (*ELR* 18:3:6), where Judge Joseph Young (of the federal District of Maryland) dismissed fraud and negligent misrepresentation claims (as well as others) in a plagiarism case alleging that the movie "Higher Learning" was copied from a script the plaintiff had submitted to Columbia

Pictures. In the "Columbo/Strange Bedfellows" case, Universal and ABC had urged Judge Collins to retain federal court jurisdiction, on the grounds that two of the causes of action were equivalent to copyright infringement. But the judge declined to do so, because Dielsi had not registered his script with the Copyright Office, and such registration is a prerequisite to federal court jurisdiction over copyright cases. This ruling too differed from the approach taken in the "Higher Learning" case where Judge Young converted the preempted state law claims into one for federal copyright infringement, and then retained jurisdiction over the case on that ground, despite the absence of any indication that the plaintiff's script had been registered in the Copyright Office.

Dielsi v. Falk, 916 F.Supp. 985, 1996 U.S.Dist.LEXIS 4953 (C.D.Cal. 1996) [ELR 18:5:12]

District Court denies college baseball coaches motion for a preliminary injunction that would have prevented the NCAA from enforcing a rule limiting their compensation, because coaches had not actually been threatened with loss by any NCAA action

In 1991, the National Collegiate Athletic Association adopted a rule that would have prohibited Division I schools from paying some of their coaches more than a stated (and very modest) amount. Naturally, those coaches affected by the rule objected to it, and they filed a series of lawsuits to prevent its enforcement. The basis for these lawsuits was federal antitrust law.

In a ruling issued in a case brought by basketball coaches, Judge Kathryn Vratil found that even under the more lenient "rule of reason," the NCAA rule does violate antitrust law. (*ELR* 18:2:10) Therefore, just prior to the NCAA's 1996 annual convention, the judge issued

an injunction that barred the NCAA from enforcing its restricted earnings rule; and at its 1996 convention, the NCAA's members ratified the rule's rescission. No similar rule was adopted in its place, and none will be considered before the 1997 convention.

In the meantime, in a separately filed case, several baseball coaches made a motion for a preliminary injunction that would have prevented the NCAA from enforcing its restricted earnings rule as to them. That case too is being heard by Judge Vratil, and the baseball coaches relied on her earlier ruling in the basketball coaches' case in support of their motion.

Judge Vratil, however, has denied the baseball coaches' request for an injunction. In doing so, the judge noted that to obtain an injunction, a plaintiff in a private antitrust lawsuit must show a likelihood of immediate and irreparable injury. In this case, the baseball coaches could show no such injury, because — as a

result of the judge's ruling in the basketball coaches' case — the NCAA had rescinded its restricted earnings rule. Moreover, because the judge expects all of the coaches' cases to be "finally resolved" before the 1997 convention, she found that the baseball coaches are not threatened in a "real and immediate sense" with any injury.

Schreiber v. National Collegiate Athletic Association, 916 F.Supp. 1105, 1996 U.S.Dist.LEXIS 3480 (D.Kan. 1996) [ELR 18:5:13]

Defamation and emotional distress case against author John McPhee and his publishers is dismissed; offending passages in The Ransom of Russian Art were found to be expressions of opinion that were not actionable under libel law, and their publication was

not outrageous as required under emotional distress law

The Zimmerli Art Museum at Rutgers University houses more than 10,000 Soviet dissident artworks that were collected over a period of more than 30 years by a wealthy University of Maryland professor named Norton Dodge. The story of Professor Dodge's trips to the Soviet Union, and his "often clandestine" contacts with artists, was told by author John McPhee in *The Ransom of Russian Art*, a lengthy article first published in *The New Yorker* magazine and then republished in expanded form as a book by Farrar, Straus & Giroux, Inc.

One of the artists featured in *Ransom* was Evgeny Rukhin who accompanied Professor Dodge on some of his collecting trips. Rukhin died in a fire at his studio in Leningrad under mysterious circumstances. McPhee recounts five different versions of those circumstances,

one of which was that Ilya Levin killed Rukhin for the KGB and another of which was that Levin was a coward and did nothing to save Rukhin from the KGB.

As a result of these passages, Ilya Levin sued McPhee, the New Yorker and Farrar, Straus & Giroux for defamation and intentional infliction of emotional distress. The defendants responded with a motion to dismiss — a motion that has been granted by federal District Judge Lewis Kaplan.

Judge Kaplan agreed with a number of contentions made by Levin, rejecting the counter-arguments offered by McPhee and his publishers. The judge agreed, for example, that the offending passages in *Ransom* did have a defamatory meaning. He also agreed that McPhee and his publishers were not protected by the "neutral reportage" privilege, because the sources quoted for the defamatory passages were not "responsible, prominent organizations," because there had been

no newsworthy controversy about the reasons for Rukhin's death until McPhee himself elicited the defamatory theories during interviews he had conducted, and because Rukhin's death had occurred 18 years before *Ransom* s publication.

On the other hand, Judge Kaplan agreed with McPhee and his publishers that the offending passages were statements of opinion, rather than fact, and as such they are not actionable libel under the New York Constitution. For that reason, the judge dismissed Levin's defamation claim. The judge also dismissed Levin's infliction of emotional distress claim, because it was based on the same facts as his invalid libel claim (and under New York law, an emotional distress claim may not be asserted where a defamation claim is invalid), and because (even if his libel claim had been valid), publication of the offending passages did "not meet the

standard of outrageousness established by New York law."

Levin v. McPhee, 917 F.Supp. 230, 1996 U.S.Dist. LEXIS 2453 (S.D.N.Y. 1996) [ELR 18:5:13]

Appellate court affirms dismissal of defamation case filed by an engineer who was called a crank in a book by a math professor entitled Mathematical Cranks ; in context, crank was mere rhetorical hyperbole

Academic controversies are supposed to be fought in scholarly journals — not in courtrooms. This is the lesson to be learned from a decision by federal Court of Appeals Judge Richard Posner in a defamation case that was filed by an "obscure engineer" who was called

a "crank" in a book written by a DePauw University math professor. The math professor's book is entitled *Mathematical Cranks*; it was published in 1992 and seems to deal with obtuse disputes about obscure mathematical theories. The portion of the book devoted to the engineer calls him a "crank" because of an article in which the engineer argued that "Cantor's diagonal process" is a "snare and a delusion." Apparently the math professor thought the engineer's argument was trivial, and thus the engineer was a "crank" in the sense that he was more than "slightly eccentric" though less than a "lunatic."

The engineer's article had been published in 1974 in the journal *Transactions of the Wisconsin Academy of Sciences, Arts and Letters*. The engineer might have been pleased that his 18-year-old article had received attention of any kind in a book. Indeed, Judge Posner (once a professor himself, at the University of Chicago

School of Law) observed that the engineer could have written another article rebutting the claims made in the math professor's book. *Transactions* would have been "eager to publish a rebuttal since its own reputation was impugned by [the math professor's] charges," Judge Posner explained.

However, instead of writing a rebuttal, the engineer filed a defamation lawsuit in federal District Court in Wisconsin. In his complaint, the engineer alleged that since he is not a professional mathematician, he finds it very difficult to get his math articles published, and being labeled a "crank" will make it even harder. The District Court granted the math professor's motion for summary judgment and dismissed the case, ruling that the word "crank" is incapable of being defamatory because it is merely "rhetorical hyperbole."

Acting as his own attorney, the engineer appealed; but the Court of Appeals has affirmed. Judge

Posner explained that "A crank is person inexplicably obsessed by an obviously unsound idea — a person with a bee in his bonnet. To call a person a crank is to say that because of some quirk of temperament he is wasting his time pursuing a line of thought that is plainly without merit or promise. An example of a math crank would be someone who spent his time trying to square the circle. To call a person a crank is basically just a colorful and insulting way of expressing disagreement with his master idea, and it therefore belongs to the language of controversy rather than to the language of defamation. This is especially clear where, as in this case, the word is used in a work of scholarship." Thus, the appellate court held that "where one scholar calls another a 'crank' for having taken a position that the first scholar considers patently wrongheaded, the second does not have a remedy in defamation."

Dilworth v. Dudley, 75 F.3d 307, 1996 U.S.App.LEXIS 1169 (7th Cir. 1996) [ELR 18:5:14]

Playboy wins temporary restraining order barring enforcement of new Telecommunications Act provision requiring scrambling of cable-TV channels dedicated to sexually oriented programming

The Playboy channel offers "sexually-oriented programming," but neither that channel nor *Playboy* magazine itself has ever been found to be "obscene" or "harmful to minors" by any court or administrative agency, federal or state. This is significant, because despite Playboy's unblemished legal record, one provision of a recently-enacted federal statute threatened to knock the Playboy channel (and its sister channel AdulTVision) off of cable systems nation-wide for at least part of

the day. The provision in question — section 505 of the Telecommunications Act of 1996 — requires cable companies to scramble both the video and audio portions of sexually explicit programs on any channel dedicated to sexually oriented programming. Moreover, until they are scrambled, cable companies are prohibited from carrying any such program during times of the day when "a significant number of children are likely to view it."

Section 505 is just a small part of a much larger Act that deals with a wide variety of communications issues; and that Act contains additional provisions — including the "V-chip" provision — that deal with sexually oriented programming in other ways. (*ELR* 17:11:14)

Sex is a matter that appears to be of bi-partisan concern to Congress. The origin of Section 505, for example, was an amendment introduced — in the final days of Congress' consideration of the

Telecommunications Act — by Democratic Senator Dianne Feinstein of California and Republican Senator Trent Lott of Mississippi. A bi-partisan pedigree does not assure Constitutionality, however.

Threatened as it was by Section 505, Playboy filed an action against the federal government, seeking an injunction that would bar the section's enforcement. Just before the section would have taken effect, Playboy sought a temporary restraining order; and that order has been granted by federal District Judge Joseph Farnan, pending review of the section's Constitutionality by a three-judge court.

Judge Farnan acknowledged that the government has an interest in assuring that minors do not have access to non-subscribed adult programming on cable television. But the question is whether Section 505's scrambling requirement is the least restrictive means of achieving that interest. The judge put the burden on

Playboy to prove that Section 505 is not the least restrictive way the government could achieve its interests. And, in Judge Farnan's opinion, Playboy met that burden. He agreed with Playboy that "substantially less restrictive means are available." Playboy suggested, for example, that lockbox technology could be supplied by cable operators to those customers who request it; and the judge agreed that this would be "an effective and reasonable alternative to the methods dictated by Section 505."

The judge also found that Playboy would suffer irreparable harm if a temporary restraining order were not issued, that the public interest would be negatively affected as well, and that the government would not be irreparably harmed if the restraining order were granted. For these reasons, Judge Farnan has granted the restraining order sought by Playboy.

Playboy Entertainment Group, Inc. v. United States, 918 F.Supp. 813, 1996 U.S.Dist.LEXIS 2959 (D.Del. 1996) [ELR 18:5:14]

Movie theater chain must pay city use tax based on license fees it pays to distributors for right to exhibit motion pictures, Colorado appellate court rules

These are taxing times for the movie business. So at least it appears from a recently-released decision of a Colorado appellate court. At issue in the case is a "use tax" imposed by the Colorado city of Westminster. The use tax is a common companion to its better-known sibling, the "sales tax." Westminster levies use taxes on business transactions that permit one party to use tangible personal property owned by another, whenever those transactions have *not* resulted in the payment of sales

taxes. Since retail purchase transactions almost always result in the payment of sales taxes, "use taxes" are designed to impose a similar levy on tangible personal property transactions structured as rentals, leases and licenses.

America Multi-Cinema operates two movie theaters in Westminster, and the city levied a use tax on the amount paid by AMC to movie distributors in return for the rental of movie prints and the right to publicly exhibit those prints to AMC customers. The transactions entered into between AMC and distributors are "licenses," and thus they fall within the literal wording of the Westminster use tax law. On the other hand, virtually all of the money AMC pays distributors is in return for the intangible right under copyright law to exhibit movies; very little of that money is in return for the rental of tangible movie prints which by themselves — that is, without the right to publicly exhibit them — have

no value to AMC. For this and other reasons, AMC argued that it was not subject to use taxes. But the Finance Director for the City of Westminster disagreed; and a Colorado trial court sided with the Finance Director.

Federal copyright law makes a fundamental distinction between the copyright in a work and a tangible copy of the work itself. Use tax law, on the hand, makes no such distinction. In a decision rendered in 1995, but only recently released for publication, the Colorado Court of Appeals has affirmed both the Westminster Finance Director and the trial court, saying, "it is impossible to separate the lease of the tangible object, the film, from the intangible license to use it. Collectively, they constitute a single transaction and should be treated as such for sales and use tax purposes, and a number of courts have so held." Among the recent decisions so

holding, and on which the Colorado court relied, is *May Broadcasting v. Boehm* (*ELR* 15:4:16).

Wholesale transactions are exempt from use taxes, and AMC tried to persuade the court that its movie licenses with distributors fell into that category, because AMC licensed movies for the purpose of exhibiting them to its customers. The court was not persuaded, however, because AMC's customers "simply . . . view images from the film as they are projected onto the screen." That is, there is no re-sale (or re-rental) of films to AMC customers; and the court ruled that it is AMC, "not its customers, who is the ultimate 'user' of such tangible personal property."

Finally, the appellate court also rejected AMC's argument that Westminster was seeking to impose double taxes on the same transaction, because the city does impose — and AMC does collect and pay — an excise tax on admission fees paid by movie theater customers.

The court viewed the excise tax as separate and distinct from the use tax however, because the excise tax is levied on AMC's customers while the use tax is levied on AMC itself.

AMC's petition for rehearing before the Court of Appeals has been denied, as has its petition for certiorari to the Colorado Supreme Court.

American Multi-Cinema, Inc. v. City of Westminster, 910 P.2d 64, 1995 Colo.App.LEXIS 210 (1995) [ELR 18:5:15]

Court denies preliminary injunction to producer of cable access program in case complaining about cable company s decision to cut number of times program is shown from four times a month to twice a month

Glendora — the woman with one name — does two things with her time: she produces a cable access television program entitled "A Chat with Glendora"; and she files *pro per* lawsuits. In fact, according to one description, the primary topic for her program is her many lawsuits. Glendora has enjoyed at least some success in court. Two of her lawsuits — cases brought against cable systems that carry her program — have resulted in decisions that have given at least preliminary support to some of the claims she has made. (*ELR* 16:5:22, 17:11:9) However, her most recent appearance in the advance sheets was in a losing cause, at least as a preliminary matter.

In a suit against Continental Cablevision and several of its executives, Glendora sought a preliminary injunction that would have prevented the cable company from cutting the number of times it shows her program

from four per month to twice. Though Continental had shown “A Chat with Glendora” on the system it operates in Westchester County, New York, four Saturdays a month for almost two years, the program was cut to two cablecasts per month in September 1995. According to Glendora, Continental cut the frequency of her program in response to pressure from Westchester County officials who allegedly object to its content. Cablevision on the other hand was able to show that it had cut the frequency of Glendora’s program — as well as the frequency of many other programs that had been cablecast four times a month — in order to accommodate other producers who had requested cable access time for their own programs.

Judge Barrington Parker (of the Southern District of New York) denied Glendora’s motion for a preliminary injunction, for four reasons. The judge ruled that Continental’s action had not violated Glendora’s First

Amendment rights, because Continental's actions are not "state action." He ruled that she was not likely to succeed with her claim under a Federal Communications Act provision that prohibits cable systems from censoring cable access programming, because it appears that her program was cut in order to make time for others who were equally entitled to it. He ruled that Glendora was not likely to succeed with her New York state law claim, because that law does not create a private right of action. And the judge concluded that Glendora had not shown she would suffer irreparable harm.

Glendora v. Hostetter, 916 F.Supp. 1339, 1996 U.S.Dist. LEXIS 3155 (S.D.N.Y. 1996) [ELR 18:5:16]

Delaware Chancery Court dismisses US West lawsuit seeking to block merger of Time Warner and

Turner Broadcasting; court rejects arguments that merger breaches non-competition clause of Time Warner Entertainment limited partnership agreement, and that merged company s ownership of Turner s movie production companies would violate Time Warner s duty of loyalty to partnership

The Delaware Chancery Court has dismissed a lawsuit filed by US West which sought to block the merger of Time Warner Inc. and the Turner Broadcasting System. US West is the limited partner, and Time Warner Inc. the general partner, in a limited partnership known as Time Warner Entertainment. In its lawsuit, US West asserted that the merger would violate a non-competition clause in the limited partnership agreement. US West also asserted that the merged company's ownership of Turner Broadcasting's three movie production companies — Castle Rock Entertainment, New Line

Cinema, and Turner Pictures — would inevitably result in Time Warner violating its "duty of loyalty" to the limited partnership. The court rejected both arguments and dismissed the case for reasons discussed in the Legal Affairs article in this issue of the *Entertainment Law Reporter*. See, "Legal Hurdles to 'Strategic Visions' in the Entertainment Industry: A Look at the Time Warner - Turner Broadcasting Merger" by Lionel S. Sobel. (*ELR* 18:5:5)

US West Inc. v. Time Warner Inc., 1996 Del.Ch.LEXIS 55, 1996 WL 307445 (Del.Ch. 1996) [ELR 18:5:16]

Briefly Noted:

Indiana High School Athletic Association eligibility rules get mixed reception. The Indiana High

School Athletic Association has a variety of eligibility rules, several of which have been challenged in court by affected student-athletes, with mixed results. (See, e.g., *ELR* 15:3:21, 15:5:22, 15:7:28) Two more decisions have been added to the growing list, also with mixed results. The IHSAA's Transfer Rule — which makes transfer students ineligible for varsity competition for a year after their transfer — has been declared unconstitutional under the 14th Amendment to the United States Constitution, in a case where the affected student, Jason Carlberg, transferred for reasons unrelated to sports. The Indiana Court of Appeals has held that this result was required by an earlier decision of the Indiana Supreme Court, *Sturrup v. Mahan*, 305 N.E.2d 877 (1974), even though that case has been criticized by courts in other states. (The appellate court distinguished one of its own earlier decisions which upheld the constitutionality of the Transfer Rule under the Indiana

constitution, saying that the student in that case, *IHSAA v. Avant* (*ELR* 17:10:10), had not challenged the rule on the basis of the U.S. constitution, as Jason Carlberg had in this case.) In a similar but unrelated case, student Freddy Reyes unsuccessfully challenged the IHSAA's Eight-Semester Rule which limits student eligibility to eight fall and eight spring semesters of competition. The Indiana Court of Appeals found that the rule serves at least some of the IHSAA's purposes and goals and its application to Reyes had not been arbitrary or capricious. In this case, the appellate court also permitted the IHSAA to enforce its Restitution Rule against Reyes' high school, even though the school had permitted Reyes to participate as a result of a trial court order. The Restitution Rule requires schools to forfeit games in which ineligible players have participated, and to return trophies or other awards. There is a split of authority in Indiana concerning whether the Restitution Rule is

constitutional. *IHSAA v. Avant* held it to be unconstitutional; but this case expressly disagreed with that ruling. *Indiana High School Athletic Association v. Carlberg*, 661 N.E.2d 833, 1996 Ind.App.LEXIS 148 (Ind.App. 1996); *Indiana High School Athletic Association v. Reyes*, 659 N.E.2d 158, 1995 Ind.App.LEXIS 1605 (Ind.App. 1995) [ELR 18:5:17]

Court issues preliminary injunction barring use of name Moondog Coronation Ball for oldies rock and roll concert. OmniAmerica, the owner of several radio stations in Ohio, has been granted a preliminary injunction barring Canterbury Productions from using the name "Moondog Coronation Ball" in connection with an "oldies" rock and roll concert that was scheduled to take place at Cleveland State University earlier this year. OmniAmerica used the name

"Moondog Coronation Ball II" for oldies concerts it sponsored from 1992 through 1995. OmniAmerica's concerts were produced for it by Canterbury Productions, pursuant to letter agreements between the two companies. But in 1996, Canterbury indicated it would produce a "Moondog Coronation Ball" concert that would be sponsored by a radio station that competed with OmniAmerica's. OmniAmerica immediately filed suit, alleging that Canterbury's use of the "Moondog Coronation Ball" name would violate OmniAmerica's rights under section 43(a) of the Lanham Act and under the Ohio Deceptive Trade Practices Act. The District Court applied an eight-factor test to determine whether there was a likelihood of confusion between the two virtually identical marks, and it concluded that there was such a likelihood. It also determined that OmniAmerica was likely to suffer irreparable injury if Canterbury were to use the mark, and that the public interest weighed in

favor of the preliminary injunction, which the court therefore issued. *OmniAmerica Group v. Street Gold Records, Ltd.*, 916 F.Supp. 672, 1996 U.S.Dist.LEXIS 5063 (N.D.Ohio 1996) [ELR 18:517:]

Court refuses to dismiss Copyright and Lanham Act case brought by doll manufacturer against Marie Osmond and others who design, make and sell I Can Dream dolls. Marie Osmond, Knickerbocker Creations and Wal-Mart Stores will have to go to trial in a Copyright and Lanham Act case brought against them by a doll designer who alleges that her designs have been copied in dolls that make up the defendants' "I Can Dream" line. Judge Elizabeth Kovachevich has denied the defendants' motion for summary judgment. The judge did so because she found that: there are disputed issues of fact concerning whether the plaintiff's designs

are sufficiently original to be protected by copyright (the defendants contend that the plaintiff's designs were copied from public domain "pouty face" designs); "access" to the plaintiff's designs had been shown because they had been purchased by a woman who said she worked for Osmond; and sufficient similarity had been shown to require a fact finder to determine whether those similarities were substantial. Judge Kovachevich refused to dismiss the plaintiff's Lanham Act claim, rejecting the defendants' argument that it was "subsumed" by copyright law. The judge also refused to dismiss fraud and breach of contract claims based on alleged representations made by the woman who had purchased the plaintiff's designs that they would not be used for commercial reproductions; the question of whether that woman was an agent of the defendants involved disputed issues of fact. *Campbell v. Osmond*, 917 F.Supp.

1574, 1996 U.S.Dist.LEXIS 2909 (M.D.Fla. 1996) [ELR 18:5:18]

Operator of adult entertainment center was obligated to pay federal payroll taxes in connection with earnings of private-booth dancers. The operator of an "adult entertainment" center was required to pay federal employment taxes on the earnings of private-booth dancers, because the dancers were "employees" rather than "independent contractors" or "tenants" for payroll tax purposes, a federal District Court has held. The operator of Show World on West 42nd Street in New York city contended that it was not obligated to withhold federal income taxes from the earnings of its dancers, or to pay Social Security, Medicare or Federal Unemployment Taxes on their behalf, because the dancers signed "leases" for the booths in which they

performed. Under those leases, the dancers paid Show World 60% of the money that customers deposited in the booths' coin slots in order to watch the dancers perform. Judge Leonard Sand ruled otherwise, however. He applied a 20-factor test used by the IRS to determine whether workers are "employees" for tax purposes; and the judge agreed with the IRS that Show World's private-booth dancers are "employees." As a result, Judge Sand granted the IRS's motion for summary judgment, and rejected Show World's claim for a refund of taxes it had paid under protest. *303 West 42 Street Enterprises, Inc. v. Internal Revenue Service*, 916 F.Supp. 349, 1996 U.S.Dist.LEXIS 2274 (S.D.N.Y. 1996) [ELR 18:5:18]

Customs Service classification for electronic synthesizers is upheld. The Court of Appeals for the

Federal Circuit has affirmed a Court of International Trade ruling that Casio synthesizers that have amplifiers and speakers were properly classified by the Customs Service as "electronic musical instruments," while only synthesizers without amplifiers and speakers are eligible for classification as "electric articles that produce sound" rather than as "electronic musical instruments." The distinction makes a difference, because the import duty on "electronic musical instruments" is 6.8% while the duty on "electric articles that produce sound" is only 3.9%. Casio had argued that its synthesizers with amplifiers and speakers were not musical instruments, because they had additional features not found in musical instruments. But the court rejected this argument, because the features in question were simply those designed to make it easier for musicians to create music or embellish sounds; and these features did not take these synthesizers out of the category of musical instruments.

Casio, Inc. v. United States, 73 F.3d 1095, 1996 U.S.App.LEXIS 443 (Fed.Cir. 1996) [ELR 18:5:18]

Mannequins are protected by copyright as sculptural works. Animal mannequins are eligible for copyright protection as sculptural works, even though they have the utilitarian function of acting as mounts for animal skins, a federal Court of Appeals has held. The court reasoned that the mannequins' utilitarian function is "merely to portray the appearance" of animals; and therefore the mannequins are not "useful articles" of the kind that are ineligible for copyright protection. The ruling affirms a judgment for $400,000 in statutory damages — $100,000 for each of four copied mannequins — plus attorneys fees of more than $74,000. The judgment was 40 times the defendant's gross revenues from the sale of copies of the four infringed works and was

more than double the defendant's net income from all sales for a two-year period. Nonetheless, the size of the judgment was justified, the court held, because the defendant had infringed the plaintiff's copyrights "willfully," as shown by the fact that it has been sued many times by many other companies for copyright infringement (see, e.g., *ELR* 17:7:13). Moreover, the defendant claimed and registered copyrights in its own name, even on mannequins it had copied from others; and the defendant's catalog had warned customers to "Beware of looka-likes" because "we are being copied by the desperate 'copy cats' working overtime in an attempt to deceive the public and violate the rights of others." *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 1996 U.S.App.LEXIS 1095 (4th Cir. 1996) [ELR 18:5:19]

Sale of unauthorized cable-TV descramblers violates Communications Act. A federal Court of Appeals has held that the unauthorized sale of cable-TV descramblers violates section 605 of the Communications Act, as well as section 553, and therefore International Cablevision, Inc. is entitled to recover statutory damages and mandatory costs including attorneys fees from two men who had sold such descramblers. The appellate court's ruling is the latest round in what began as two separate cases (*ELR* 15:10:25, 16:9:16) that eventually were consolidated because they presented the same issue of statutory interpretation. That issue was whether section 605 applies to the unauthorized interception of TV signals being transmitted by *cable* or only to signals being transmitted over the air. On its face, section 605 appears to apply only to over-the-air signals. This interpretation appears to be reinforced by the fact that section 553 clearly applies to the interception of cable

signals. The reason this issue matters is that the remedies available under section 605 are greater than those available under section 553. Indeed, in one of the two cases that lead to this ruling, the seller conceded liability under section 553 and only defended against International Cablevision's section 605 claim. Despite appearances, the appellate court concluded that section 605 does indeed apply to the interception of *cable* signals as well as over-the-air signals. The appellate court's conclusion was the result of its careful parsing of judicial precedents interpreting an earlier version of section 605 and the legislative history behind a revision of that section. *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 1996 U.S.App.LEXIS 1080 (2d Cir. 1996) [ELR 18:5:19]

Previously Reported:

The Florida Supreme Court has denied a Petition for Review in *Morsani v. Major League Baseball* (*ELR* 18:1:4), 673 So.2d 29, 1996 Fla.LEXIS 692 (Fla. 1996). The California Supreme Court has denied Petitions for Hearing in *Third Story Music v. Waits* (*ELR* 18:2:12), 1996 Cal.LEXIS 1670, 3332 (Cal. 1996). [ELR 18:5:19]

WASHINGTON MONITOR

Nashville s Country Music Television network regains access to Canadian market as a result of trade law investigation by United States Trade Representative

Nashville-based Country Music Television (CMT) and its Canadian partners have received regulatory approval from the Canadian government for their operation of a new country music television network in Canada. The new network is called "CMT: Country Music Television (Canada)." This approval restores CMT access to the Canadian market — access which it lost in January 1995 when CMT was evicted from the Canadian market after being telecast there for more than a decade.

CMT, which had been available in Canada since 1984, was one of the fastest-growing U.S. services in Canada. It had been carried to almost two million Canadian homes by 450 cable operators. Over those ten years, CMT showcased U.S. and Canadian country artists, not only in their home markets, but also in other markets where CMT is available in Asia, Europe and Latin America. However, as of January 1, 1995,

Canadian cable operators were no longer allowed to provide CMT to their subscribers.

Canadian cable operators were barred from carrying CMT as a result of an order issued by the Canadian Radio-television and Telecommunications Commission (CRTC). That order was not issued because CMT had failed to operate in Canada according to all of that country's laws and regulations. Instead, CMT was banished from Canada simply because it was deemed competitive with a then-new Canadian-owned service called The New Country Network. The CRTC's order barring CMT from Canada was the result of a decade-old Canadian practice of denying market access to foreign-owned television programming services which are directly competitive with Canadian-owned services.

CMT appealed the CRTC's order to Canada's Federal Court of Appeal and then to Canada's Supreme Court. But both courts denied CMT's appeal.

In response to CMT's eviction from Canada, the United States Trade Representative (USTR) initiated a "section 301" investigation in February 1995. Section 301 is a provision of the U.S. Trade Act of 1974. Among other things, section 301 is designed to assure American companies of access to foreign markets. It does this by empowering the U.S. to retaliate against countries who deny such access by authorizing the U.S. to impose punitive tariffs on goods imported into the U.S. from such countries.

Not long after the USTR initiated a section 301 investigation, CMT and The New Country Network reached a tentative agreement-in-principle, and therefore the USTR decided not to proceed with plans to publish a list of proposed "retaliation targets." However, negotiations to finalize their agreement were not concluded prior to the February 1996 statutory deadline by which

the USTR was required to make its determinations under section 301.

As a result, last February, the USTR determined that "certain Canadian broadcasting policies deny national treatment and market access to U.S.-owned television programming services and, on their face, discriminate" against American companies. The USTR set March 7, 1996, as the deadline by which it would act if an agreement were not reached. On that very day, CMT and The New Country Network reached a final agreement to form a single Canadian country music network. The CRTC has now approved the corporate restructuring needed to accommodate the March 7th agreement between CMT and The New Country Network by which they formed a single country music network that Canadian cable systems are permitted to carry. [ELR 18:5:20]

FTC drops Robinson-Patman Act cases against large book publishers arising out of allegedly favorable terms made available to national bookstore chains but not independent book sellers

The Federal Trade Commission has dismissed antitrust cases against several of the country's largest book publishers, without reaching any decision on whether the publishers had violated the Robinson-Patman Act by favoring national bookstore chains with price and promotional discounts that were not made available to independent book sellers. Rather, the Commission found that the public interest would be best served by terminating the cases now rather than "expending the resources needed to pursue consent orders or further litigation."

The cases were filed in 1988 against Harper & Row Publishers, Macmillan, Hearst and William

Morrow and Co., Putnam Berkley, Simon & Schuster, and Random House. The FTC also has closed its investigation of Bantam Doubleday Dell Publishing regarding similar practices.

The FTC had negotiated proposed consent orders in 1992, and thus withdrew the cases "from adjudication" so the Commission could evaluate the consent agreements signed by the six publishers. Since then, the Commission has been considering additional information concerning developments in the book industry. Among those developments was the filing of private litigation by the American Booksellers Association on behalf of independent booksellers covering many of the same issues investigated by the FTC and covered in the proposed consent order. Those private cases already have resulted in consent decrees against four publishers.

As a result of its evaluation, the FTC "has concluded that it is in the public interest to reject the

proposed consent agreements and dismiss the complaints." In announcing its decision, the FTC explained that "[a]lthough the proposed consent agreements prohibit most of the practices that led to the complaints, the industry has changed appreciably since the consent agreements were signed." Among other things, the FTC said that "the dynamics and structure of the book distribution industry have evolved in significant ways," and the companies "generally have replaced the principal forms of alleged price discrimination that prompted the complaints." The Commission concluded that further investigation would "not appear to be a necessary or prudent use of scarce public resources."

The FTC vote was 3-1. Chairman Robert Pitofsky recused himself and Commissioner Mary L. Azcuenaga dissented.

In re Harper & Row Publishers, Inc., FTC Docket Nos. 9217-9222 and File No. 801 0059 (Sept. 1996) [ELR 18:5:20]

FTC approves merger of Time Warner and Turner Broadcasting, with conditions set forth in proposed consent order

The Federal Trade Commission has entered into a proposed Consent Order with Time Warner Inc. and the Turner Broadcasting System which permits the merger of those two companies under specific conditions. The FTC's concerns, and the proposed consent order, are discussed in the Legal Affairs article in this issue of the *Entertainment Law Reporter.* See, "Legal Hurdles to 'Strategic Visions' in the Entertainment Industry: A

Look at the Time Warner - Turner Broadcasting Merger" by Lionel S. Sobel. (*ELR* 18:5:5)

In re Time Warner Inc., Federal Trade Commission, File No. 961-0004 (1996) [ELR 18:5:21]

FCC allows networks to provide air time to President Clinton and Mr. Dole without requiring networks to give time to Ross Perot, Ralph Nader or other presidential candidates under bona fide news event exemption from equal opportunities provision of federal communications law; FCC also rejects Perot s complaint that networks violated his equal opportunity and reasonable access rights

Ross Perot, like Rodney Dangerfield, just isn't getting the respect he thinks he deserves.

In October, President Clinton and Mr. Dole debated one another on national television twice, in settings where Mr. Perot was conspicuous by his absence. He wanted to be included, of course; but the Commission on Presidential Debates ruled that President Clinton and Mr. Dole could debate without him, if they wished. They did, and the courts to which Mr. Perot complained about being excluded declined to overrule that Commission.

Soon, President Clinton and Mr. Dole will receive free airtime from ABC, Fox and PBS. But Mr. Perot will not, nor will Ralph Nader or any other presidential candidate, despite the "equal opportunity" requirements of the federal Communications Act.

Section 315 of that Act provides that when a candidate for public office uses a broadcaster's facilities, the station must afford equal opportunities for such use to all other candidates for the office. However,

appearances by a candidate in a bona fide newscast, news interview, news documentary or on-the-spot coverage of bona fide news events are exempt from this requirement.

In response to requests made by ABC, the Fox Broadcasting Company and PBS, the FCC has ruled that their proposals to offer President Clinton and Mr. Dole free air time are exempt from the equal opportunities requirements of the Communications Act.

ABC proposed a one-hour prime-time special during the final week of the campaign which will be a "live unrestricted event" in which the President and Mr. Dole will appear without interruptions or questions from any third party. Fox proposed a one-hour election eve program in which time will be split evenly between the President and Mr. Dole, and ten 60-second segments in which the candidates will address issue-oriented questions. PBS proposed a series of 2 1/2 minute segments

which will be scheduled at the same time each week-night and rotated between the President and Mr. Dole without restriction as to content.

The FCC has determined that the programming proposed by ABC, Fox and PBS should be deemed "on-the-spot coverage of bona fide news event" under Section 315(a)(4) of the Communications Act, and thus exempt from the requirement that stations afford equal opportunities to all legally qualified opponents. The Commission found that each of the proposals is fully consistent with congressional intent to encourage greater coverage of political news and to allow broadcasters the discretion to determine an event's newsworthiness, and with principles set forth in prior FCC and federal court decisions. The Commission held that each proposal satisfies the two-part test for exemption as a bona fide news event: (1) that the format of the program reasonably fit within the news event exemption category, and

(2) that the decision to carry a particular event was the result of good faith news judgment and not based on partisan purposes.

In a separate proceeding, the FCC has rejected a complaint against ABC, CBS, NBC and Fox, in which Mr. Perot asserted that those networks had violated his rights under the "equal time" and "reasonable access" provisions of the Communications Act.

Mr. Perot's "equal time" complaints were based on a several separate network appearances by President Clinton and Mr. Dole. These included network appearances by the President and Mr. Dole during the Democratic and Republican presidential nominating conventions, on the ABC program "20/20," on Fox programs that involved presentations by the President and Mr. Dole, and their appearances in the presidential debates.

The FCC found that the programs complained of qualified as bona fide news programming under 315(a), and therefore the networks were not required to offer Mr. Perot equal opportunities.

The Commission also found that each network had offered to sell Mr. Perot enough air time to meet their obligations under the "reasonable access" provisions of the Communications Act. Section 312(a)(7) of the Act requires broadcasters to provide or sell "reasonable" amounts of time to legally qualified candidates. Mr. Perot had asked to purchase eight one-half hour blocks of prime time from each network plus time on election eve. Each of the networks responded by offering Mr. Perot a package of time, including a half hour of prime time in the month before the election. The Commission concluded that the networks had properly balanced Mr. Perot's request with their concerns regarding substantial program disruption, and that the amount of

time offered by the networks satisfied their "reasonable access" obligations.

In re Fox Broadcasting Company, Federal Communications Commission Mass Media Bureau, FCC No. MM 96-25 (Aug. 1996); *In re Ross Perot*, Federal Communications Commission Mass Media Bureau, FCC No. MM 96-27, FCC 96-401 (Oct. 1996) [ELR 18:5:21]

DEPARTMENTS

In the Law Reviews:

Entertainment, Publishing and the Arts Handbook, 1996-97 Edition, Edited by John David Viera and Robert Thorne, Consulting Editor Stephen F. Breimer, has been published by Clark Boardman Callaghan, 155

Pfingsten Road, Deerfield, IL 60015, (800) 323-1336, with the following articles:

Copyright Problems in Post-Modern Art by Lori Petruzzelli, 1996-97 Entertainment, Publishing and the Arts Handbook 3 (1996)

The Law of Ideas, Revisited by Lionel S. Sobel, 1996-97 Entertainment, Publishing and the Arts Handbook 37 (1996)

Economic and Moral Rights Under U.S. Copyright Law: Protecting Authors and Producers in the Motion Picture Industry by Laura A. Peter, 1996-97 Entertainment, Publishing and the Arts Handbook 105 (1996)

Some Recent Developments in EEC and Scandinavian Copyright Law by Per Neumann, 1996-97

Entertainment, Publishing and the Arts Handbook 123 (1996)

Copyright Infringement on the Internet by Clark B. Siegel, 1996-97 Entertainment, Publishing and the Arts Handbook 133 (1996)

Computer Bulletin Boards and Software Piracy: Are System Operators to Blame for Acts of Copyright Infringement by Their Users? by Jason K. Axe, 1996-97 Entertainment, Publishing and the Arts Handbook 141 (1996)

Law on the Internet: Sources and Resources by Robert H. Rotstein, 1996-97 Entertainment, Publishing and the Arts Handbook 177 (1996)

Moral Kombat: The Ratings Duel for Computer and Video Games by Jim Dunn, 1996-97 Entertainment, Publishing and the Arts Handbook 183 (1996)

Where the Rubber Meets the Road by Alex B. Gove, 1996-97 Entertainment, Publishing and the Arts Handbook 199 (1996)

The Coverage of O.J. Simpson-Only in America? by David C. Kohler & Rupert Lewin-Smith, 1996-97 Entertainment, Publishing and the Arts Handbook 207 (1996)

First Amendment Issues in the O.J. Simpson Trial by Kelli L. Sager, 1996-97 Entertainment, Publishing and the Arts Handbook 217 (1996)

Facts and Opinions About Cameras in the Courtroom by Court TV, 1996-97 Entertainment, Publishing and the Arts Handbook 227 (1996)

Indecency on the Internet: Lessons from the Art World by Julie Van Camp, 1996-97 Entertainment, Publishing and the Arts Handbook 255 (1996)

CBS Inc. v. Davis: Oddball Lessons from a Typical Prior Restraint Case by Bruce E.H. Johnson, 1996-97 Entertainment, Publishing and the Arts Handbook 277 (1996)

We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity by Rochelle Cooper Dreyfuss, 1996-97 Entertainment, Publishing and the Arts Handbook 291 (1996)

Madison Avenue Discovers Mary Shelley: Deceased Celebrity Product Endorsements by Joseph J. Beard, 1996-97 Entertainment, Publishing and the Arts Handbook 325 (1996)

Challenges and Implications of the On-Line Age for the Music Business by C. Scott Fedewa, 1996-97 Entertainment, Publishing and the Arts Handbook 337 (1996)

Let Them Watch Cable : Financing Public Television in the Wake of Federal Downsizing by Lionel S. Sobel and Karen J. Mandel, 1996-97 Entertainment, Publishing and the Arts Handbook 347 (1996)

The Television Without Frontiers Directive - European Regulation of Programme Content by Timothy

Johnson and Grainne McKenna, 1996-97 Entertainment, Publishing and the Arts Handbook 365 (1996)
How Talent Deals Are Structured Within the Infomercial Industry by Stephen F. Breimer, 1996-97 Entertainment, Publishing and the Arts Handbook 381 (1996)
It s What We ve Been Saying All Along: Lawyers Look at The Nordic Track Case by Barry J. Cutler and Julie A. Oas, 1996-97 Entertainment, Publishing and the Arts Handbook 391 (1996)

What to Know About the Legal Provisions Contained in Scriptwriting Assignment Contracts by Stephen F. Breimer, 1996-97 Entertainment, Publishing and the Arts Handbook 397 (1996)

Communications and the Law, Volume 18, Number 2, has been published by Fred B. Rothman & Co., 10368

W. Centennial Road, Littleton, CO 80127, with the following articles:

Identifying a Victim When the Criminal Is At Large: Is It Negligent or Newsworthy? by Juliet Dee, 18 Communications and the Law 1 (1996) (for address, see above)

Hate Speech Codes: The Constitutionality Issues by Joseph J. Hemmer Jr., 18 Communications and the Law 23 (1996) (for address, see above)

A New Kind of Gag Order: Fortunately, the Appeals Courts Don t Like Them by Deckle McLean, 18 Communications and the Law 43 (1996) (for address, see above)

Lotus v. Borland: Menu Command Hierarchy of Computer Program is Uncopyrightable by Sue Ann Mota,

18 Communications and the Law 59 (1996) (for address, see above)

Cardozo Arts & Entertainment Law Journal has published Volume 14, Number 2 with the following articles:

Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace by Niva Elkin-Koren, 14 Cardozo Arts & Entertainment Law Journal 215 (1996)

Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution, Part Two by Peter Krug, 14 Cardozo Arts & Entertainment Law Journal 297 (1996)

Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel

Discussion, 14 Cardozo Arts & Entertainment Law Journal 343 (1996)

A Call to the Arts: Exploring New Means of Jurisprudential Expression by Christo Lassiter, 14 Cardozo Arts & Entertainment Law Journal 387 (1996)

Painting the Law by Nancy Illman Meyers, 14 Cardozo Arts & Entertainment Law Journal 397 (1996)

Blocking Preemption: Convergence, Privacy, and the FCC s Misguided Regulation of Caller ID by Laura V. Eng, 14 Cardozo Arts & Entertainment Law Journal 407 (1996)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 20, Number 4 with the following articles:

Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World by Paul Edward Geller, 20 Columbia-VLA Journal of Law & the Arts 571 (1996)

Columbia-VLA Journal of Law & the Arts Roundtable on Electronic Arts by Thomas K. Landry, Editor, 20 Columbia-VLA Journal of Law & the Arts 605 (1996)

Movies in the Public Domain: A Threatened Species by Steven Mitchell Schiffman, 20 Columbia-VLA Journal of Law & the Arts 663 (1996)

Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions by David Leichtman, 20 Columbia-VLA Journal of Law & the Arts 683 (1996)

Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume 6, Number 2 with the following articles:

Current Issues in Telecommunications Law and Cable Television: A Symposium, 6 Fordham Intellectual Property, Media & Entertainment Law Journal 427 (1996)

Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy by Lisa M. Brownlee, 6 Fordham Intellectual Property, Media & Entertainment Law Journal 579 (1996)

Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copying After American Geophysical Union v. Texaco, Inc. by Nicole B. Casarez, 6

Fordham Intellectual Property, Media & Entertainment Law Journal 641 (1996)

Childporn.GIF: Establishing Liability for On-Line Service Providers, 6 Fordham Intellectual Property, Media & Entertainment Law Journal 721 (1996)

Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions, 6 Fordham Intellectual Property, Media & Entertainment Law Journal 781 (1996)

Rosenberger v. Rector & Visitors of the University of Virginia: The Myth of the Content Neutral Establishment Clause, 6 Fordham Intellectual Property, Media & Entertainment Law Journal 871 (1996)

The Federal Communications Law Journal, published by Indiana University School of Law-Bloomington, 201 South Indiana Avenue, Bloomington, Indiana 47405, has issued Volume 48, Number 3 with the following articles:

Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee of the Federal Communications Bar Association, 48 Federal Communications Law Journal 389 (1996) (for address, see above)

The FCC s Minority Ownership Policies from Broadcasting to PCS by Antoinette Cook Bush and Marc S. Martin, 48 Federal Communications Law Journal 423 (1996) (for address, see above)

Defining Author for Purposes of Copyright by Russ VerSteeg, 45 The American University Law Review 1323 (1996)

Go Fish: Evaluating the Restatement s Formulation of the Law of Publicity by Oliver R. Goodenough, 47 South Carolina Law Review 709 (1996)

Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vann by Paul J. Heald, 47 South Carolina Law Review 783 (1996)

Not for You ; Only for Ticketmaster: Do Ticketmaster s Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?, 10 St. John’s Journal of Legal Commentary 403 (1995)

Intellectual Property Pirates: Congress Raises the Stakes in the Modern Battle to Protect Copyrights and

Safeguard the United States Economy by Timothy D. Howell, 27 St. Mary's Law Journal 613 (1996)

1995 Antitrust Guidelines for the Licensing of Intellectual Property: Harmonizing the Commercial Use of Legal Monopolies With the Prohibitions of Antitrust Law by Thomas L. Hayslett III, 3 Journal of Intellectual Property Law 375 (1996) (published by University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201-5779)

Seton Hall Journal of Sport Law has published Volume 6, Number 1 with the following articles:

Telling It Like It Is A Tribute to Howard Cosell by John L. Shahdanian, II, 6 Seton Hall Journal of Sport Law (1996)

A Guide to the Legal Liability of Coaches for a Sports Participant s Injuries by Anthony S. McCaskey and Kenneth W. Biedzynski, 6 Seton Hall Journal of Sport Law (1996)

Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years? by Linda S. Calvert Hanson and Craig Dernis, 6 Seton Hall Journal of Sport Law (1996)

No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer s Dream Come True by Stephen L. Ukeiley, 6 Seton Hall Journal of Sport Law (1996)

Illinois State Racing Board Rule Which Provides for Warrantless Searches of Racing Licensee Is Constitutional As Applied to the Search of a Jockey s

Automobile - LeRoy v. Illinois Racing Board by Christopher A. Barbarisi, 6 Seton Hall Journal of Sport Law (1996)

The Right to Participate in Interscholastic High School Athletics Is Not a Constitutionally Protected Right, Therefore, a Rule Suspending the Eligibility of Student-Athletes Who Transfer From One High School to Another Need Only Be Rationally Related to a Legitimate State Objective - Mississippi High School Activities Ass n , Inc. v. Coleman by Wm Nicholas Chango, Jr., 6 Seton Hall Journal of Sport Law (1996)

Athletic Coach s Locker Room Speech Is Not Protected Under First Amendment, Even Though University Policy Is Found Unconstitutional - Dambrot v. Central Michigan University by Michael P. Pompeo, 6 Seton Hall Journal of Sport Law (1996)

Girls of Summer : A Comprehensive Analysis of the Past, Present, and Future of Women in Baseball and a Roadmap to Litigating A Successful Gender Discrimination Case by Matthew J. McPhillips, 6 Seton Hall Journal of Sport Law (1996)

The Men in Black and Blue: A Comment on Violence Against Sports Officials and State Legislative Reaction by Carole J. Wallace, 6 Seton Hall Journal of Sport Law (1996)

The 1994-95 Baseball Strike: A Case Study in Myopic Subconscious Macrocosmic Response to Conflict by Christopher J. Fisher, 6 Seton Hall Journal of Sport Law (1996)

College Athletics: Testing the Boundaries of Contract and Tort by Timothy Davis, 29 U.C. Davis Law Review 971 (1996)

Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9 (c)(3) of the NLRA by Michael H. LeRoy, 29 U.C. Davis Law Review 1019 (1996)

When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics by Rodney K. Smith, 61 Missouri Law Review 329 (1996)

Random Drug-Testing High School Student Athletes in Vernonia School District 47J v. Acton: Is the War on Drugs a Losing Battle for the Fourth Amendment? by

Michael D. Mosser, 17 Whittier Law Review 527 (1996)

On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-line World by Byron F. Marchant, 39 Howard Law Journal 477 (1996)

Copyrights On-Line by Raymond A. Kurz and Celine M. Jimenez, 39 Howard Law Journal 531 (1996)

Law in Cyberspace by Fred H. Cate, 39 Howard Law Journal 565 (1996)

Is the Internet a New Legal Frontier? by Charles H. Kennedy, 39 Howard Law Journal 581 (1996)

The V-Chip: Protecting Children From Violence or Doing Violence to the Constitution? by Steven D. Feldman, 39 Howard Law Journal 587 (1996)

To Slay a Paper Tiger: Closing the Loopholes in Vietnam s New Copyright Laws by Than Nguyen Luu, 47 Hastings Law Journal 821 (1996)

War Over the Airwaves: A Comparative Analysis of U.S. and Cuban Views on International Law and Policy: Governing Transnational Broadcasts by Omar Javier Arcia, 5 Journal of Transnational Law & Policy 199 (1996) (published by Florida State University College of Law, Tallahassee, Florida 32366-1034)

China s Copyright Law and the TRIPS Agreement by Reiko R. Feaver, 5 Journal of Transnational Law & Policy 431 (1996) (for address, see above)

Reexamining Copyright s Incentives-Access Paradigm by Glynn S. Lunney, Jr., 49 Vanderbilt Law Review 483 (1996)

Obscenity in the Age of Mechanical Reproduction by Shayanna Kadidal, 44 The American Journal of Comparative Law 353 (1996) (published by Boalt Hall, University of California, Berkeley, California 94702)

Subafilms, Ltd. v. MGM-Pathe Communications Co., The Berne Convention and the Extraterritorial Application of the Copyright Act by John Patrick Kelsh, Northwestern University Law Review 1839 (1996)

If You Can t Say Something Nice, Can You Say Anything At All? Moldea v. New York Times Co. and the Importance of Context in First Amendment Law by John

Hershey, 67 University of Colorado Law Review 705 (1996)

When It s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses by Jennifer L. White, 94 Michigan Law Review 1041 (1996)

Reconciling the Patent Act and the Lanham Act: Should Product Configurations Be Entitled to Trade Dress Protection After the Expiration of a Utility or Design Patent? by Michael S. Perez, 4 Texas Intellectual Property Law Journal 459 (1996)

Computers, Copyright, and Functionality: The First Circuit s Decision in Lotus Development Corp. v. Borland International, Inc. by Robert L. Bocchino Jr., 9 Harvard Journal of Law and Technology 467 (1996)

Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses by Kenneth Sutherlin Dueker, 9 Harvard Journal of Law and Technology 483 (1996)

Life Plus Seventy: The Extension of Copyright Terms in the European Union and Proposed Legislation in the United States by Shauna C. Bryce, 37 Harvard International Law Journal 525 (1996)
There is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works by S. Priva Bharathi, 27 Texas Tech Law Review 1667 (1996)

Entertainment Law Review, published by Sweet & Maxwell Ltd, FREEPOST, Andover, Hants SP10 5BR,

United Kingdom, has issued Volume 7, Issue 5 with the following articles:

Television without Frontiers: Fact or Fiction? by Mike Pullen, 7 Entertainment Law Review 175 (1996) (for address, see above)

Copyright Protection for Titles, Character Names and Catch-phrases in the Film and Television Industry by Reuben Stone, 7 Entertainment Law Review 178 (1996) (for address, see above)

On-line Services: An Asia Pacific Perspective by Peter Leonard, 7 Entertainment Law Review 188 (1996) (for address, see above)

The Author as First Owner of Copyright in Spanish Law: A Comparison with English Law by Eduardo

Olarte Soto, 7 Entertainment Law Review 201 (1996) (for address, see above)

Moral Rights for the United States Takes a Hit in the Second Circuit: The Carter v Helmsley-Spear Case by Marie Spencer, 7 Entertainment Law Review 206 (1996) (for address, see above)

The Green Paper on the Legal Protection for Encrypted Services in the Internal Market by Mike Pullen, 7 Entertainment Law Review 209 (1996) (for address, see above)

Programme Formats: The Write-in Vote by Richard McD. Bridge and Shelley Lane, 7 Entertainment Law Review 212 (1996) (for address, see above)

Book Reviews: The International Libel Handbook: A Practical Guide for Journalists, Artist and Copyright and Broadcasting Law: A Comparative Study, 7 Entertainment Law Review 219 (1996) (for address, see above)

The European Intellectual Property Review, published by Sweet & Maxwell Ltd., FREEPOST, Andover Hants, SP10 5BR, United Kingdom, has issued Volume 18, Numbers 7 and 8 with the following articles:

Can UK Courts Face the Dutch Challenge on Cross-Border Injunctions in Intellectual Property Cases? by Richard A. Kempner and Joe Fricker, 18 European Intellectual Property Review 377 (1996) (for address, see above)

Copyright Duration: The European Community Adopts Three Score Years and Ten by Justine Antill and Peter Coles, 18 European Intellectual Property Review 379 (1996) (for address, see above)

Technology Dematerialised: Another Approach to Information-related Inventions by Lutz van Raden, 18 European Intellectual Property Review 384 (1996) (for address, see above)

Exclusive Trade Mark Licensing, Article 85 and Market Definition by J. Mark Naftel, 18 European Intellectual Property Review 406 (1996) (for address, see above)

Recent Developments in Australian Copyright Law by Stephen Peach and Simon Gilchrist, 18 European Intellectual Property Review 409 (1996) (for address, see above)

The Diminishing Domain by Jeremy Phillips, 18 European Intellectual Property Review 429 (1996)

A Brave New World of Technical Protection Systems: Will There Still be Room for Copyright? by Thomas C. Vinje, 18 European Intellectual Property Review 431 (1996)

A Proposal for the International Convention for Protection against Unfair Competition by Xiao Yi Chen, 18 European Intellectual Property Review 450 (1996)

The Intellectual Property Review, published by Carswell, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4, Canada, has issued Volume 10, Number 2 with the following articles:

Aspects of Public Policy Regarding Crown Copyright in the Digital Age by W.T. Stanbury, 10 Intellectual Property Journal 131 (1996) (for address, see above)

Crown Copyright in the United Kingdom and Other Commonwealth Countries by J.A. L. Sterling, 10 Intellectual Property Journal 157 (1996) (for address, see above)

Copyright and the State in Canada and the United States by David Vaver, 10 Intellectual Property Journal 187 (1996) (for address, see above)

Restitution for Breach of Confidence by Michael Gronow, 10 Intellectual Property Journal 219 (1996) (for address, see above)

Television without Frontiers: Fact or Fiction? by Mike Pullen, 7 Entertainment Law Review 175 (1996) (for address, see above)
[ELR 18:5:23]