Business Affairs

Accounting for Profits in the Movie Business

by Schuyler M. Moore

Accounting for profits in the movie business is an endlessly fascinating subject — no doubt because "profits" are so rare. Larry King — author of "The Best Little Whorehouse in Texas" — said it best when he wrote (in his 1986 book *None But a Blockhead*): "I once fleetingly glimpsed that rare bird the whooping crane, but have yet to set eyes on a producer-into-profits." King thought he knew why this was so. "Any accountant careless enough to permit a producer to cross over into profits," he surmised, "shall not in the future find much use for his pencil."

King's attention had been drawn to motion picture profit accounting because he was entitled to a share of the net profits from the movie version of “Best Little Whorehouse.” But statement after statement showed the movie to be in the red. King’s reason for thinking about profit accounting is the most common reason. Virtually all of the attention that has been given to motion picture profit accounting — in CLE programs, articles and courtrooms — has focused on accounting to profit participants, like writers, actors, directors and individual producers. The definition of “net profits” was what the trial court declared unconscionable in the “Coming to America” case (*ELR* 12:8:3, 13:11:3, 17:4:29) — though not in the “Batman” case (*ELR* 16:4:3). And the “net profits” definition is what’s at stake in the currently pending class action lawsuit brought by the estate of Jim Garrison against Warner Bros. and other major distributors.

The “net profits” definition used in profit participant contracts is often criticized because it deviates so significantly from the way in which net profits are defined using "generally accepted accounting principles." The implication, of course, is that if generally accepted accounting principles were used to calculate net profits, movies would be profitable more often, and net profit participants would receive what they thought they had been promised when they made their deals in the first place.

What is less well known than it should be is that "generally accepted accounting principles" differ from industry to industry. And the "generally accepted accounting principles" used in the movie business are not what most people would suppose them to be, based on a knowledge of accounting or business intuition.

The "GAAP" rules applicable to film companies are found in Financial Accounting Standards No. 53, commonly referred to as "FAS 53." These principles are used for calculating the earnings of film companies as reported to the SEC, shareholders, and lenders.

FAS 53 principles are not those used to calculate "net profits" for the purpose of paying net profit participants, such as writers and actors. Nor are FAS 53 principles used to calculate movie profits for income tax purposes, or to calculate how much cash is available for distributions to shareholders. There are, in other words, at least four ways to calculate a movie's profits, no two of which produce the same result!

Each calculation has its own purpose, and film companies have magically found a way to do the calculations differently for each purpose in a way that favors film companies for each purpose.

The GAAP rules applicable to film companies are no different; the rules were created by a working group comprised of people having a vested interest in making the rules favor film companies — and they do! Consider, for example, these issues.

Capitalization of Costs

If costs are "capitalized," it means they are not immediately deducted but are, instead, treated as an "investment" in a film. Thus, capitalization of costs has two salutary benefits. First, it decreases current deductions, thereby increasing reported earnings. Second, it increases film investments which are reported as an "asset" on the balance sheet. The GAAP rules for film companies permit the capitalization of more expenditures than perhaps for any other industry. For example, all of the following items are capitalized:

A. All costs of acquiring stories (such as development costs and scripts); production costs; post-production costs; and interest on all of the above.

B. Distribution costs that benefit future periods. This rule permits the capitalization of theatrical advertising costs (the most significant advertising cost), on the theory that such costs benefits video and television exploitation.

C. The cost of making copies of physical film prints.

D. Participations payable to third parties. These participations are initially calculated based on an estimate of the total revenue and expenses from a film, and this estimate of participations is then capitalized as an investment in the film.

E. A portion of the company's overhead that is allocable to produced films, including depreciation, rent, employee salaries, etc.

F. Remarkably, even the cost of abandoned film projects and scripts (with abandonment presumed to occur after three years) is capitalized as an investment in films in production.

Income Recognition

If you own real property and lease it for ten years for $1,000 a year, you recognize $1,000 per year for ten years as income under normal GAAP. If you enter into the same transaction with film rights, however, you get to report as income the full $10,000 (albeit discounted to present value) in the first year!

In other words, years before film companies have any right to receive the cash (and years before any other industry gets to report income), film companies get to report as income the present value of all payments to be made to it under a license. The theory for this treatment is that a license is supposedly analogous to an installment sale of property, so the payments should be reported on the date of the "sale." Under FAS 53, the only conditions that need to be met before reporting payments under a license as "income" are the following:

A. The amount of the payments must be known.

B. The cost of the film must be known or reasonably determinable.

C. Collectibility of the payments must be reasonably assured (a condition that management will always find exists).

D. The film must be accepted by the licensee in accordance with the conditions of the license.

E. The "availability date" must have occurred, which is the date that the licensee can exploit at least the first showing or broadcast of the film under the license.

If an advance payment is received prior to the date that it can be reported as income (e.g., the availability date has not yet occurred), the advance payment is carried as a liability on the balance sheet and is reported as income at the appropriate time under the rules discussed above.

In the case of direct theatrical exhibition, contingent payments are estimated and reported as income at the time of *exhibition*, even if the actual payment is not received until a subsequent year. This, again, results in the front-loading of reported income.

Film Amortization

The term "film amortization" refers to the calculation of the amount of the total capitalized film costs that are deducted each year. Film costs are amortized applying a method referred to as "income forecast amortization." Under this method, each year the remaining unamortized film costs are multiplied by a fraction, the numerator of which is the current year's reported gross income from the film, and the denominator of which is an estimate of all future gross income from the film (including the current year's income). The formula is:

> [Current Year's Gross Income / Remaining Estimated Gross Income (Including Current Year)] x Unamortized Film Costs = Current Year's Amortization

There are several remarkable benefits to film companies from this calculation, including these:

A. As a general rule, the estimate of future gross income is not discounted to present value, even if the estimate is for revenues over twenty years. (The sole exception is that any estimates based on entering into future licenses must be discounted to present value as of commencement of the license under the rules discussed above.) The general rule of not discounting the estimates to present value results in a large denominator, and thus a smaller fraction and lower amortization each year. For example, if a film costs $1,000, and the company expects to exploit the film directly and receive gross income of $50 per year over twenty years (totaling $1,000), the first year's amortization is calculated as follows:

$$[\$50 / \$1000] \times \$1000 = \$50$$

Thus, the $50 of gross income in the first year is offset by the $50 of amortization, resulting in no profit or loss. If the estimate of future gross income had been discounted to present value, the company would have reported a loss each year from the film.

B. Best of all, the estimate of future gross income is made by management. Other than a weak requirement that management's estimates be reasonable, management is given wide discretion. For example, even though a film flops theatrically, management may decide that the film will make millions when it is released on laser wrist watch video in the year 2010. Overestimating future gross income will, once again, result in a large denominator, and thus a smaller fraction and lower amortization each year.

C. There is no time limitation on estimated future gross income. In theory, the estimate could cover the next 100 years.

D. The estimate of future gross income can take into account inflation, which will drastically increase the total estimate.

E. The estimate of future gross income can take into account future media or markets that do not yet exist.

The result of all of the foregoing is an irresistible incentive on management to set the estimate of future gross income as high as possible in order to keep amortization as low as possible. As with capitalizing costs, reducing amortization has two wonderful effects. First, it decreases current deductions, thereby increasing reported earnings. Second, it increases film costs reported as an asset on the balance sheet.

Writing Off Film Costs

FAS 53 does, in theory, require a write-down of film costs when a film is a turkey. However, film costs are not written down below the total estimate of future net income from the film. For example, assume a film costs $20 million and is a theatrical flop. As long as the company estimates that it will net at least $20 million throughout the life of the film from all media, the company does not have to write down the cost of film, even if the present value of the income stream is only $10 million.

Conclusion

FAS 53 bends over backwards to help film companies by permitting the capitalization of items that should be expensed and by minimizing amortization of film costs and write-downs. The single most important variable in the income forecast calculation — the estimate of future gross income — is left to management's discretion, and management is under an irresistible temptation to come up with the highest estimate possible in order to increase reported earnings and assets. The net result is that the financials for almost every film company artificially inflate film assets and earnings, making the financial statements practically worthless.

This matters to those in the movie business, or ought to.

The amusing thing about "net profit" accounting to profit participants is that by gradually making the concept of contingent compensation meaningless (because "net profits" are so rare), film companies have shot themselves in the foot. What used to be a valid and necessary means for spreading risk in a risky industry is now discounted as a joke. The result is that talent demands money up-front or a *gross* participation, resulting in top star salaries reaching the astronomical figure of $20 million per film. Film companies would be far better served if they were to return to a realistic and fair approach to contingent compensation, which would result in a drastic reduction in fixed film costs and the spreading of risk. Participants would be paid on successful films, where it can be afforded, and unsuccessful films would not be the devastating blow that they are today.

Likewise, FAS 53 rules vary so far from GAAP principles used in other industries that it is absolutely impossible to discern any reliable information from reviewing the accounting statements for film companies. A film company may be reporting huge earnings and a significant positive balance sheet, when in fact the company is running at a significant loss and is on the verge of bankruptcy. This fact has had an enormous dampening effect on financing, both of debt and equity, for film companies, because sophisticated investors know that the accounting statements are meaningless. Thus, film financing is normally based on more tangible factors, such as bankable contracts, or on more intangible factors, such as the sexiness of the industry — neither of which is as desirable from a film company's point of view as investment based on a realistic measure of actual profitability.

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IN THE NEWS

Television industry adopts voluntary program ratings system

The television industry has adopted a "voluntary" program ratings system, with the hope that it will forestall the adoption of a ratings code by the Federal Communications Commission. The industry system is modeled after the MPAA motion picture ratings code, in the sense that the TV ratings system classifies programs into categories that indicate their suitability for viewers of defined age groups. There are six ratings in all — two that will be used for children's programs in particular, and four that will be used for programs designed for the "entire audience."

Even before the ratings system was formally announced, it was harshly criticized by organizations outside the television industry. According to critics, the industry's rating system does not provide parents with enough information about the nature of the content of programs. They would have preferred a system that separately rated each program's violence, language and sexual content, rather than — or perhaps in addition to — the overall age-suitability rating actually adopted by the industry.

The rating system preferred by industry critics is similar to one that has been tried in Canada where violence, language and sex have been separately rated on a five-point scale. For example, according to news reports, an episode of "The Larry Sanders Show" got a Canadian rating of "V-0, L-4, S-3" which meant the episode had no violence, a lot of rough language, and significant sexual content.

Ironically, at the same time that industry critics were praising the Canadian system as the model that should have been followed by the American television industry, the *Wall Street Journal* reported (12-18-96) that the Canadians were shelving their system because it has become "dogged by technical snafus and vexed by an internal debate over how to rate the content of U.S. programs."

Nevertheless, criticism of the industry's rating system cannot be shrugged off or ignored by those who created and support it. One provision of the massive Telecommunications Act of 1996 (*ELR* 17:11:14) gives the FCC the power to prescribe a television programming rating code unless the television industry itself adopts "voluntary rules" for rating programs. The industry's new rating system is intended to be the "voluntary rules" referred to in the Telecommunications Act, thus making an FCC adopted code unnecessary and perhaps without statutory authority. Industry critics, however, contend that the industry system does not satisfy the Telecommunications Act requirement for rating rules, and thus the FCC should proceed to adopt its own code.

Eventually, the Telecommunications Act requires program ratings to be transmitted — as part of the program signal itself — so parents who have "V-chip" equipped television sets will be able to block programming "they have determined is inappropriate for their children."

TV Industry Ratings System

The following categories apply to programs designed solely for children:

TV Y All Children. This program is designed to be appropriate for all children. Whether animated or live-action, the themes and elements in this program are specifically designed for a very young audience, including children from ages 2-6. This program is not expected to frighten younger children.

TV Y7 Directed to Older Children. This program is designed for children age 7 and above. It may be more appropriate for children who have acquired the developmental skills needed to distinguish between make-believe and reality. Themes and elements in this program may include mild physical comedic violence, or may frighten children under the age of 7. Therefore, parents may wish to consider the suitability of this program for their very young children.

<u>The following categories apply to program designed for the entire audience:</u>

TV G General Audience. Most parents would find this program suitable for all ages. Although this rating does not signify a program designed specifically for children, most parents may let younger children watch this program unattended. It contains little or no violence, no strong language and little or no sexual dialogue or situations.

TV PG Parental Guidance Suggested. This program may contain some material that some parents would find unsuitable for younger children. Many parents may want to watch it with their younger children. The theme itself may call for parental guidance. The program may contain infrequent coarse language, limited violence, some suggestive sexual dialogue and situations.

TV 14 Parents Strongly Cautioned. This program may contain some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended. This program may contain sophisticated themes, sexual content, strong language and more intense violence.

TV M Mature Audience Only. This program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. This program may contain mature themes, profane language, graphic violence, and explicit sexual content. [ELR 18:8:7]

WASHINGTON MONITOR

FCC authorizes Fox network to broadcast NFL games and other live programming to San Diego via Mexican television station

Sometimes, the most effective pass pattern in football is circular, rather than direct. And sometimes, the most effective way to reach NFL fans by television is over the airwaves of a somewhat distant TV station, rather than the station closest to those fans. This at least is the conclusion the Fox TV network reached when it decided how best to reach pro football fans in San Diego, California. Rather than affiliate with San Diego's own Channel 51, Fox selected station XETV in Tijuana, Mexico. Fox did so, over the objections of Channel 51, because even though XETV is on the far side of an international border, it "provides much greater coverage to the San Diego market and has an established identity as the Fox affiliate in the market."

In order to use a foreign television station for cross-border broadcasting, Fox had to submit an application to the Federal Communications Commission, seeking authority to do so under section 325(c) of the Communications Act. The FCC has granted Fox's application and has denied Channel 51's petition in opposition.

The central legal issue addressed in the FCC's opinion was *not* whether Fox could be required to affiliate a U.S. television station rather than a Mexican station. Instead, the issue was whether XETV must satisfy the Communications Act requirement that television programming serve the "public interest, convenience, and necessity" of U.S. residents even though it is a Mexican station, in order for XETV to be a Fox affiliate. Earlier cases — including one involving XETV almost 25 years ago — had held that foreign stations must meet that standard. But in the Fox proceeding, it was argued that the earlier cases should be disregarded, because the standard would impose a heavier burden on Mexican stations than on U.S. stations, and would thus violate U.S. obligations under the North American Free Trade Agreement.

The FCC was not persuaded that NAFTA overrides the "public interest, convenience and necessity" standard, however. To the contrary, the FCC concluded that by requiring XETV to meet that standard, "we apply the same . . . programming requirement applicable to domestic stations and thus do not discriminate or impose an 'unnecessary' restriction on trade in violation of NAFTA."

This did not prevent Fox from using XETV to carry its programming however, because the FCC looked at XETV's overall programming and determined that it does not suffer from "serious defects" that would affect the public interest. Moreover, Fox programs to be carried by XETV include news and public affairs shows, as well as NFL games, and the FCC found that these and other planned programs demonstrated that XETV will be providing "issue-responsive" programming that is in the public interest.

In re Application of Fox Television Stations, Inc., for a Permit to Transmit Program Material to Mexican Television Station XETV, Tijuana, Mexico, FCC 96-434, 1996 WL 633338, 1996 FCC LEXIS 6094 (FCC 1996) [ELR 18:8:8]

RECENT CASES

Gene Roddenberry s ex-wife not entitled to share in profits from post-divorce Star Trek TV series, movies or merchandise, but was entitled to punitive damages from Roddenberry s loan-out corporation because it under-reported her share in profits from pre-divorce Star Trek series, California appellate court rules

The late Gene Roddenberry will be remembered forever by legions of science fiction fans as the man who created "Star Trek." By now of course "Star Trek" is almost an industry in itself. There have been three live-action television series, an animated TV series, television specials, seven feature films, merchandise galore and countless conventions.

"Star Trek's" ultimate success could not have been predicted, however. It originated as a TV series that ran on NBC from 1966 to 1969. But it was third in its time slot all three seasons, and NBC considered the series a commercial failure. When "Star Trek" was canceled, the series' producer, Desilu, was left holding a multi-million dollar production deficit.

Roddenberry's loan-out corporation, Norway, had a contract with Desilu that entitled Norway to a defined "Profit Participation" from "Star Trek." But Desilu was entitled to recoup the series' production deficit before

Norway's profit participation would begin. Back in 1969, Desilu's prospects for recouping that deficit must have seemed remote, because "Star Trek's" subsequent "resurgence was unprecedented in entertainment history. Never before had a financially failed television series enjoyed such subsequent popularity, attracted subsequent investment, and inspired subsequent ventures."

The year 1969 was an important one for Roddenberry, because that was the year his marriage — as well as his series — failed. In connection with their divorce, Gene and Eileen Roddenberry entered into a settlement agreement that gave Norway to Gene, but gave Eileen a "one-half interest in all future profit participation income from 'Star Trek'. . . ."

The Roddenberrys' 1969 settlement agreement did not define "profit participation income" or "Star Trek." For a long time, it didn't matter because there was no such income. But 15 years later, in 1984, the original "Star Trek" series earned out its production cost deficit, and Norway began to receive its profit participation. Initially, Norway sent Eileen Roddenberry half the amount it received, as provided in the divorce settlement agreement. But before long, Gene felt that he should be compensated by Eileen for his post-divorce promotional efforts — efforts which in his view were creating the profits in which she was sharing. Thus, Norway began sending Eileen only a third, rather than a half, of what Norway was receiving. But Eileen was not told that her share had been reduced to a third.

Eventually, Eileen realized what had happened and she sued. When she did, she sought punitive damages (as well as the difference between a half and a third).

In addition, Eileen sought half of all the income Norway or Gene had received from *all* of the post-divorce "Star Trek" projects — the second and third live action series, the animated series, the TV specials, the movies and the merchandise. Her claim for half the income from post-divorce "Star Trek" projects was based on the contention that the 1969 settlement agreement gave her half of Norway's income from "Star Trek" — and "Star Trek" was a literary property that included all versions of "Star Trek," not simply the first series.

The trial court agreed with Eileen in part. It agreed that Norway had committed fraud when it reduced her share from half to a third without telling her. Just before trial, Norway had paid Eileen the difference with interest. But the trial court awarded her an additional $900,000 in punitive damages. The trial court also agreed that Eileen was entitled to half of Gene and Norway's income from the second and third live action series and television specials. It reasoned that these were "continuations" of the first series, and income from them should be treated under the settlement agreement just like income from the first series. However, the trial court rejected Eileen's claim for half of Gene and Norway's income from the animated series, the movies and merchandise.

Eileen appealed the trial court's decision denying her half the income from the animated series, movies and merchandise. And Gene's estate and Norway appealed the trial court's decision awarding Eileen punitive damages and half the income from the live action series and specials. In a long and detailed opinion, the California Court of Appeal has affirmed the portion of the trial court judgment from which Eileen appealed and the award of $900,000 in punitive damages to her. But the appellate court has reversed the trial court's decision to award Eileen half the income from the post-divorce live action series and television specials.

The appellate court reviewed evidence concerning what Eileen and Gene actually intended when they negotiated the language of their settlement agreement. And the court concluded from this evidence that when they referred to "Star Trek" in the agreement, they were referring only to the original television series and not to any post-divorce "Star Trek" projects that might later be created. This meant that the trial court had correctly rejected Eileen's claim for a share of the income from the post-divorce animated series, movies and merchandise.

For the same reason, the trial court had been wrong to award Eileen half the income from the post-divorce live action series and specials, a majority of the appellate court concluded. Eileen had argued that under the settlement agreement she was entitled to a share of this income too, for two reasons. First, the agreement gave her half the income from "Star Trek," and "Star Trek" was a literary property that included the first series as well as any "continuations" of that series; and the post-divorce series and specials were continuations of the first series. Second, she argued that the agreement entitled her to half of any profits that resulted from Gene's pre-divorce efforts; and the income from the post-divorce series and specials were profits attributable to his pre-divorce efforts in creating the original series.

A majority of the appellate court rejected these arguments, however. The majority concluded that the settlement agreement did not give Eileen a right to share in the income from "continuations" of the first series; it only gave her a right to share in the income from that series itself. Whether or not the post-divorce series and specials resulted from a license to use copyright protected material from the first series was irrelevant, the majority concluded, because the agreement gave Gene all of Norway (the owner of the "Star Trek" copyright); Eileen retained no interest in the copyright at all. The appellate court rejected Eileen's profits-from-pre-divorce-efforts argument, because the post-divorce "Star Trek" projects were the result of Gene's "extensive post-divorce work," and there was no evidence that "post-divorce profits would miraculously have materialized without any post-divorce effort" by him. (One judge dissented from this conclusion, however, saying that there was substantial evidence to support the trial court's conclusion that the settlement agreement's reference to "Star Trek" meant the original series including any continuations of that series.)

The appellate court also affirmed the award of $900,000 in punitive damages to Eileen. Norway had argued that as Roddenberry's loan-out corporation, it should be treated the same as his estate. Under California law, punitive damages may not be awarded against a decedent's estate; and thus, Norway said, punitive damages should not have been awarded against it either.

The appellate court noted that Norway continued in business after Roddenberry's death; in fact, it pays Roddenberry's second wife a salary of $200,000 a year to be its president. Thus, it was proper to assess it with punitive damages, even though it would not have been proper to assess such damages against Roddenberry's estate.

Eileen petitioned the California Supreme Court for review, but the Supreme Court has denied her petition.

Roddenberry v. Roddenberry, 44 Cal.App.4th 634, 51 Cal.Rptr.2d 907, 1996 Cal.App.LEXIS 333 (1966), pet. denied, 1996 Cal.LEXIS 4246 (1996) [ELR 18:8:9]

Sportscaster injured on sidelines during NFL game wins reinstatement of negligence judgment against

Cleveland Browns; Ohio Supreme Court rules that Browns waived assumption of risk defense by not raising it until after jury had returned verdict in favor of sportscaster

Professional football is a highly structured game that must be played strictly in accordance with the rules. The Cleveland Browns have learned that the same can be said of litigation. In football, even a touchdown will be called back, if the scoring team commits a foul during the play. And in litigation, even a victory will be set aside, if the successful party hasn't followed required procedures. That's exactly what the Ohio Supreme Court has done to a Cleveland Browns victory in a case brought by television sportscaster Michael Gallagher.

Gallagher was covering a December 1988 game at Cleveland Municipal Stadium between the Browns and the Houston Oilers. Equipped with a video camera, he was kneeling at the corner of an endzone during a pass play. An Oilers receiver and a Browns defender crashed into Gallagher as they both went for the ball. Gallagher was badly injured and sued the Oilers and the Stadium for negligently failing to provide him with a safe place to stand and for requiring him to kneel so he wouldn't block the views of fans.

The jury returned a verdict in favor of Gallagher (and his insurance company) for more than $900,000 which was reduced 35% (under comparative fault principles) because the jury found Gallagher was 35% responsible for his injuries. The Browns then asked the trial court to enter judgment in their favor despite the verdict, or to grant them a new trial — arguing for the first time that they did not owe Gallagher any duty of care because he had assumed the risk of his own injury. The trial judge denied the Browns' request. But Gallagher's judgment was reversed on appeal, because the

Ohio Court of Appeal ruled that he had assumed the risk of being injured and thus wasn't entitled to recover anything. (*ELR* 16:3:29)

The Browns' victory was temporary, however. The Ohio Supreme Court has reversed the Court of Appeal and has reinstated the judgment in Gallagher's favor. The Supreme Court did so, because it has ruled that the Browns should have raised the assumption-of-risk defense before or during the trial, and since they did not raise it until after the jury had returned a verdict, they had raised it too late and were precluded from relying on it.

Gallagher v. Cleveland Browns Football Co., 659 N.E.2d 1232, 1996 Ohio LEXIS 80 (Ohio 1996) [ELR 18:8:10]

Connecticut Supreme Court upholds constitutionality of state statute pursuant to which nightclub owner was billed $1992 for police protection for 2 Live Crew concert

In October 1990, 2 Live Crew appeared at the Palace Cafe in Stafford Springs, Connecticut. That concert was one stop on a problem-plagued tour. An earlier concert date in Texas had erupted into a "furniture throwing melee" that had to be quelled by 50 policemen in riot gear when 27 private security guards were unable to control the crowd. At other concerts, weapons had been confiscated from patrons. And during a performance in Florida, the group itself was arrested.

The Palace Cafe date made Connecticut police nervous for these and two other reasons: the Palace Cafe had not sold any tickets in advance, and had only 310 seats to sell the night of 2 Live Crew's performance, though advance publicity was expected to result in a much greater turn-out; and police were informed that street gang members would be among the crowd.

As a result of their concerns, Connecticut police provided security for the Palace Cafe concert, and when the concert was over, the state billed the owner of the Palace Cafe $1992 for police services. The bill was sent pursuant to a Connecticut statute that provides that when police protection is necessary at a "place of public amusement" for "any . . . exhibition," that "protection shall be paid for by the person . . . promoting such . . . exhibition. . . ."

The Palace Cafe's owner refused to pay the bill, however, contending that the statute doesn't apply to music concerts, and that if it does, it is an unconstitutional interference with First Amendment free speech rights. The owner filed suit in Connecticut state court seeking declaratory relief, and the trial judge ruled in his favor. The trial court focused on the constitutional argument and held that the statute is unconstitutional because when it is applied to "performances of music and other protected speech, including the concert in this case, [the statute] treats 'the First Amendment as a privilege to be bought rather than a right to be enjoyed.'"

The state took a direct appeal to the Connecticut Supreme Court, and that court has reversed the trial court's ruling. The state supreme court has ruled that the statute does apply to music concerts and it has upheld the constitutionality of the statute.

The supreme court ruled that the statute applied to the 2 Live Crew concert, because the Palace Cafe is a "place of public amusement" and a music concert is an "exhibition."

In evaluating the constitutionality of the statute, the supreme court did a three-part analysis. First, it ruled that the statute was applied in a content-neutral manner, because the state did not consider the lyrics of the songs 2 Live Crew was likely to perform when it determined that police protection would be necessary. Second, since the statute was content-neutral, it merely had to satisfy a "substantial governmental interest" in order to be constitutional. The supreme court determined that it did satisfy two such interests: it sought to ensure public safety; and it sought to have the promoter of the event pay the expense of doing so, "rather than having the taxpayers foot the bill for a privately sponsored for-profit venture." Third, the supreme court determined that the statute did not unreasonably limit "alternative avenues of communication."

Morascini v. Commissioner of Public Safety, 675 A.2d 1340, 1996 Conn.LEXIS 129 (Conn. 1996) [ELR 18:8:11]

Prepublication review of manuscript of John Lennon biography showed that publisher believed in good faith that book was truthful, and thus New York appellate court affirms dismissal of libel lawsuit against publisher

There is great value in having lawyers do careful prepublication reviews of book manuscripts. Publishers who have wondered whether the effort and expense are worth it need only look at the result in a recent libel case in order to confirm that they are.

The case in question complained of statements made about a former New York city policeman in *The Last Days of John Lennon: A Personal Memoir*. The author of the book, Frederic Seaman, was once an assistant to Lennon and Yoko Ono. In his book, Seaman claims that in 1982 he was apprehended and assaulted by the policeman and then taken to police precinct station. In his defamation action against Seaman and Carol Communications, the book's publisher, the policeman says the incident never occurred.

Before the book was published, the manuscript was reviewed by Carol's outside counsel "who after considerable research and investigation determined that the author's statements with regard to the incident were credible." The lawyer so advised Carol by letter, so when the policeman filed suit, Carol's files contained "direct documentary evidence" concerning its state of mind at the time the book was published. That documentary evidence showed that "both Carol and its outside counsel believed in good faith in the truthfulness of the author's account of the incident and did not entertain serious doubts as to the truth of the incident as described in the book."

Carol's state of mind — and the documentary evidence it was able to produce to prove its state of mind — turned out to be important, because the policeman was a public official, and as such, he could prevail in a defamation action against the publisher only if he could show that it had published the statement with "actual malice" — that is, knowing it was false or with reckless disregard for its falsity.

The policeman simply could not show this, because "Carol's state of mind, as directly documented in [the case] record, cannot support a finding by a reasonable jury that Carol published the challenged statements with actual malice." As a result, the Appellate Division affirmed the dismissal of the policeman's suit against the book's publisher.

Goldblatt v. Seaman, 639 N.Y.S.2d 438, 1996 N.Y.App. Div.LEXIS 2151 (App.Div. 1996) [ELR 18:8:11]

Sony Music wins dismissal of defamation case complaining of statement on jacket cover of Sister Souljah album; offending statement was personal opinion and rhetorical hyperbole, New York appellate court rules

An acknowledgment on the jacket cover of an album is usually a compliment and something to be desired. But not always. Not, at least, in the case of a Sister Souljah album cover that acknowledged songwriter/producer Michael Shinn (and two others) as "Two-Faced Backstabbers." According to Shinn, the assertion that he is a "Two-Faced Backstabber" injured his reputation in the music industry, and he has sued Sister Souljah (whose real name is Lisa Williamson) and Sony Music Entertainment, her record company, for defamation in New York state court.

Sony moved to dismiss the case against it, but the trial court declined to do so, ruling that "Two-Faced Backstabber" is reasonably susceptible of a defamatory connotation and thus a jury must decide whether it libeled Shinn.

Sony has fared better on appeal however. The Appellate Division has reversed and has dismissed the case against Sony. In a very short and to-the-point opinion, it explained, "Our review of the challenged phrase convinces us that it . . . constituted personal opinion and rhetorical hyperbole rather than objective fact, and thus was constitutionally protected."

Shinn v. Williamson, 639 N.Y.S.2d 105, 1996 N.Y.App. Div.LEXIS 2164 (1996) [ELR 18:8:12]

Paramount wins defamation suit brought by people portrayed in photograph displayed during segment of Maury Povich Show dealing with sexual abuse; law does not permit recovery for presumed damages or for emotional distress unless reputation is actually injured, Minnesota Supreme Court holds

Occasionally, mistakes happen. A big one did during a 1992 broadcast of "The Maury Povich Show." One segment of that show featured an interview with a woman named Denise Richie and her lawyer. Richie had recently won a civil lawsuit against her parents for damages she suffered as a result of sexual abuse by her father and the negligent failure of her mother to do anything to prevent it.

During the segment, viewers were shown a photograph of Richie standing between two adults. Though the adults in the photo were not identified, it was displayed in a way that indicated they were Richie's parents. But they weren't. They were her aunt and uncle.

Before the broadcast, the Show's producers had asked Richie for a photograph they could use on the show. Richie had given her photo album to her lawyer for use in connection with the trial, so Richie asked her lawyer to send a photo of herself in a graduation gown with her parents. The lawyer mistakenly selected a photo of Richie with her aunt and uncle; and no one realized the mistake had been made, until after the show was broadcast.

By then of course it was too late. Though neither the aunt or uncle saw the show, family and friends did, and told them about it. The aunt and uncle then filed a defamation and false light invasion of privacy action against Paramount Pictures (the show's producer) and others (including Richie's lawyer) in Minnesota state court. The trial court granted summary judgment to the defendants, but the court of appeals reversed. Now, the Minnesota Supreme Court has reversed again, and has reinstated the summary judgment originally granted to the defendants, thereby bringing the case to an end.

Though the aunt and uncle were private figures (rather than public figures or public officials), the issue discussed during the Povich Show segment — sexual abuse — was a matter of public concern. In such cases, it is necessary for plaintiffs to show they have suffered actual damages; the First Amendment does not permit recovery for presumed damages. In this case, the aunt and uncle had not shown any actual damages such as lost income or expenses resulting from the broadcast.

However, the aunt and uncle had shown they suffered mental anguish and humiliation, and they argued this should be sufficient. The Minnesota Supreme Court disagreed. It held that unless actual harm to reputation is shown, recovery for emotional damages is not permitted. Otherwise, the court explained, "a defamation action would be the practical equivalent of allowing a plaintiff to bring an invasion of privacy claim." The court was not willing to permit that to occur, because neither it nor the Minnesota legislature has ever recognized a cause of action for invasion of privacy, "even though many other states have done so."

Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 1996 Minn.LEXIS 104 (Minn. 1996) [ELR 18:8:12]

California appellate court affirms dismissal of defamation suit by former Cal Berkeley basketball coach based on statements made by athletic director and vice chancellor in interviews with N.Y. Times and S.F. Chronicle after coach was fired

The University of California, Berkeley, and its athletic director and vice chancellor have prevailed in a defamation suit filed against them by Cal's former basketball coach, Lou Campanelli, as a result of statements made to reporters by the athletic director and vice chancellor after Campanelli was fired in 1993. A California Court of Appeal has affirmed a trial court order dismissing the case on the grounds that Campanelli's complaint did not state a valid claim.

The offending statements were published in articles in the New York Times and San Francisco Chronicle. According to Campanelli, Cal's athletic director and vice chancellor had falsely and maliciously told reporters that he had made his players "ill" and had caused them "psychological damage." The appellate court responded that the statements could not be understood as statements that as a matter of fact Cal basketball players had become ill or were psychologically damaged. Instead, the court explained, when considered in context, it was apparent that the statements were "colorful hyperbole" and "nonactionable opinion."

Moreover, the court noted that truth is an absolute defense in a libel action, and it observed that "Campanelli's own allegations . . . show that he engaged in temper tantrums directed at his players which included verbally abusive and profane remarks of a personal nature. . . ." This was fatal to Campanelli's complaints about one of the offending statements, because by these allegations "Campanelli has admitted the essential accuracy of [the athletic director's] statement that the players were 'in trouble psychologically.'"

Campanelli v. Regents of the University of California, 44 Cal.App.4th 572, 51 Cal.Rptr.2d 891, 1996 Cal.App. LEXIS 326 (Cal.App. 1996) [ELR 18:8:13]

Defamation action against host of radio sports talk show, brought by former doctor for University of Minnesota football team, was properly dismissed because doctor was public figure and offending statements were not sufficiently false, Minnesota appellate court rules

Dr. Robert Hunter is an orthopedic surgeon and was a consultant to the University of Minnesota football team through the 1984 season. At the end of that season, Minnesota football coach Lou Holtz replaced Dr. Hunter with another doctor under circumstances that left the doctor angry. Eventually, Coach Holtz left Minnesota too, to become the football coach at Notre Dame.

Almost a decade after Coach Holtz replaced Dr. Hunter as the Minnesota team doctor, Dr. Hunter was quoted in *Under the Tarnished Dome: How Notre Dame Betrayed its Ideals for Football Glory*, a book that stirred up a national controversy about Coach Holtz and Notre Dame. Dr. Hunter said Coach Holtz was "sick" and "repellent" and sacrificed his players' "well-being on the altar of football success." The television series "Nightline" did a broadcast about the book's allegations, and Dr. Hunter appeared in the segment, making statements similar to those he made in the book.

Coach Holtz's reaction to Dr. Hunter's statements is unreported. But the coach has supporters, at least one of whom was as caustic towards Dr. Hunter as the doctor had been towards the coach. Coach Holtz's supporter was Sid Hartman, a well-known sports writer and radio commentator in Minnesota. During a 1993 broadcast of Hartman's radio show, "Sports Huddle," Hartman asserted that Coach Holtz had "discharged" Dr. Hunter because the doctor had operated on 12 Minnesota football players in 1982, and "Hardly any of them came back to play at all." In legal terms, Hartman had attacked Dr. Hunter's professional competence, so if Hartman's statement was untrue, it would be "defamatory per se."

Dr. Hunter did the expected: he sued Hartman for defamation, in state court in Minnesota. The trial court dismissed the case, in response to Hartman's motion for summary judgment, ruling that Dr. Hunter was a limited purpose public figure and that the evidence had not shown that Hartman had made the offending statement with actual malice.

The Minnesota Court of Appeals has affirmed. In an opinion by Judge Gary Crippen, the appellate court agreed that Dr. Hunter had voluntarily injected himself into a public controversy about Coach Holtz's treatment of his players, and thus Dr. Hunter had become a limited purpose public figure. Hartman's statement during "Sports Huddle" was related to that controversy, because Hartman's statement was meant to suggest that the problem with injured football players was not a coach who was too eager to play them but a doctor whose treatments or standards kept them from playing.

In order to succeed in a defamation case, a public figure must show that the offending statement was false and was made with actual malice. Though the trial court had based its ruling on Dr. Hunter's failure to show actual malice, the Court of Appeals focused on the falsity question instead.

The appellate court emphasized that the context in which a statement is made is important in deciding its falsity, and observed that "the context of the live sports talk program . . . overarches all other contextual factors." This is so, because "sports commentary is marked not only by spontaneity, but by the often exaggerated and uncareful exchange of vehemently held opinions." As a result, "listeners understand the atmosphere of overstatement and 'take such railings with a grain of salt.'" In this case, the court concluded, Hartman's statement would be understood by listeners as mere "hyperbole" or as "at least supportable interpretations that do not assert an objective fact."

"Such statements are not sufficiently false as a matter of law to support a defamation claim," the appellate court concluded.

Hunter v. Hartman, 545 N.W.2d 699, 1996 Minn.App. LEXIS 443 (Minn.App. 1996) [ELR 18:8:13]

Injunction barring actor Bo Brinkman from talking to National Enquirer about ex-wife Melissa Gilbert is reversed by California appellate court as unconstitutional prior restraint

Actress Melissa Gilbert has enjoyed a successful career: she spent ten years portraying “Laura Ingalls” in “Little House on the Prairie,” and since then has appeared in other series, in TV and feature films, and in a stage play. Her success has made her life a matter of public interest, even parts she’d prefer to keep private.

For almost five years, she was married to actor/playwright Bo Brinkman. Together, they had a son; but the marriage ended in divorce. And on July 4, 1995, the National Enquirer published "a scathing interview" with Brinkman in which he accused Gilbert of being a "deadbeat mother." That article triggered a defamation and invasion of privacy lawsuit which Gilbert filed in California state court against the Enquirer and her ex-husband. In connection with that lawsuit, Gilbert sought and was granted a preliminary injunction barring Brinkman from making any statements to the National Enquirer, based on information he learned as a result of their marriage, about Gilbert's alleged drug or alcohol use or about her alleged sexual relationships with others.

The Enquirer and Brinkman appealed the preliminary injunction, arguing that it interferes with their First Amendment free speech rights. The California Court of Appeal has agreed, and has reversed the injunction.

The appellate court reasoned that the injunction is an unconstitutional prior restraint. The court recognized that the law permits prior restraints "under some extraordinary circumstances." Gilbert had argued that this case presented an extraordinary circumstance, because the injunction was "a legitimate restraint designed to maintain the sanctity of the former marital relationship." And she argued that her constitutional right to privacy outweighed the Enquirer's and Brinkman's First Amendment rights.

The appellate court was not convinced, however. "The threatened invasion of Gilbert's right of privacy and the threatened harm to her reputation are not the sort of 'extraordinary circumstances' required to justify a prior restraint," it concluded.

On the other hand, the court noted that Brinkman's right to "express his uncensored opinion about her use of drugs and alcohol and her sexual relationships," and the Enquirer's right "to publish that information" are "subject, of course, to possible civil liability for the abuse of those rights."

Gilbert v. National Enquirer, Inc., 43 Cal.App.4th 1135, 51 Cal.Rptr.2d 91, 1996 Cal.App.LEXIS 258 (Cal.App. 1996) [ELR 18:8:14]

Briefly Noted:

Wisconsin Supreme Court upholds constitutionality of Stadium Act used to build new Milwaukee Brewers stadium. The Wisconsin Supreme Court has rejected a multi-prong attack by the Libertarian Party on the constitutionality of a 1995 Stadium Act that is being used to provide financing for a new stadium for the Milwaukee Brewers. Pursuant to the Act, a newly formed Professional Baseball District will provide $160 million towards the stadium's $250 million construction costs. The District's share will come from sales and use tax revenues and from the sale of tax exempt bonds. The Libertarians objected to the Stadium Act, arguing that it violates the Wisconsin state constitution for 15 reasons. The Wisconsin Supreme Court said that "not all of the challenges are meritorious," and thus the court did not discuss those that "lack sufficient merit to warrant individual attention." The Court gave individual attention to several arguments — such as the argument that the Act is a private tax law, and that it permits the state to incur debt without a public purpose — but the court rejected all of those arguments as well. It concluded that "The purpose of the Stadium Act is to promote the welfare and prosperity of this state . . . [and] it is clear that the community as a whole will benefit from the expenditures of these public funds." *Libertarian Party of Wisconsin* *v. State of Wisconsin*, 546 N.W.2d 424, 1996 Wisc.LEXIS 43 (Wisc. 1996) [ELR 18:8:15]

NFL team entitled to workers compensation credit for payments made to injured player only during term of contract. The Tampa Bay Buccaneers were entitled to credit for salary payments made to player Curtis Jarvis following his injury during the 1990 season, against workers compensation benefits Jarvis was entitled to receive under Florida law and the NFL collective bargaining agreement — but only against workers compensation benefits received by Jarvis while his 1990-91 contract was in effect. The Buccaneers had argued that under the terms of their standard player contract with Jarvis, they were entitled to a credit for amounts they paid him for the balance of the 1990 season against all workers compensation benefits he might receive, including those paid to him in future years. A Florida workers compensation judge rejected the Buccaneers' argument, and that ruling has been affirmed as both "reasonable and appropriate" by the Florida Court of Appeal. *Tampa Bay Area NFL Football, Inc. v. Jarvis*, 668 So.2d 217, 1996 Fla.App.LEXIS 376 (Fla.App. 1996) [ELR 18:8:15]

Constructive trust did not arise from arrangement between holder of N.Y. Knicks season tickets and those to whom he sold some of his tickets. When the New York Knicks reached the NBA playoffs in 1994, it tested not only the Knicks' abilities as basketball players, but also the legal nature of the arrangement between season ticket holder Gene Summ and a lawyer and business associate to whom Summ had sold "over the years . . . a very significant number of his very desirable [courtside] tickets." A dispute arose over the playoff tickets, and Summ refused to sell any to the lawyer and business associate. As a result, they sued Summ in New York state court seeking a constructive trust. The trial court dismissed the claim, and the Appellate Division has affirmed. "Summ effectively granted the plaintiffs a revocable license to share in his excess basketball tickets at his pleasure," the appellate court explained. "Clearly, there was no confidential or fiduciary relationship. . . . Summ made no promise, express or implied, to continue offering his tickets to the plaintiffs ad infinitum. Moreover, other than paying face value for each seasons' apportionment of tickets, the plaintiffs transferred no property to Summ, and clearly no transfer was made in reliance upon any promise that tickets would be made available to them ad infinitum. Finally, the plaintiffs have completely failed to demonstrate how Summ would be unjustly enriched by retaining exclusive ownership and control of his tickets." *Copland v. Summ*, 644 N.Y.S.2d 59, 1996 N.Y.App.Div. 6211 (App.Div. 1996) [ELR 18:8:15]

High school athletic association enjoined from prohibiting student from playing basketball after transferring schools. The Pennsylvania Interscholastic Athletic Association has failed in its effort to set aside a preliminary injunction that bars it from declaring a basketball player ineligible because he transferred from one school to another. The Association's rules make transfer students ineligible for a year, except under certain circumstances. The Pennsylvania Commonwealth Court (an appellate court) agreed with the Association that participation in high school sports is not a property right, and thus the student did not have a constitutional right to due process. On the other hand, the appellate court ruled that the student does have a Fourteenth Amendment right to equal protection. In this case, the Association's Transfer Rule merely had to satisfy the "rational basis" test (because no suspect class or fundamental right was involved). But the appellate court ruled that under the circumstances of this case, the Transfer Rule was not rational. The student had transferred schools because his father had been involved in a an "altercation at a local tavern" with the football coach at the student's old high school; and there was no evidence the student had been recruited by his new high school or had transferred for athletic reasons. *Boyle v. Pennsylvania Athletic Association*, 676 A.2d 695, 1996 Commw.LEXIS 111 (Pa.Commw. 1996) [ELR 18:8:15]

Teacher denied unemployment benefits after being fired for showing Silence of the Lambs to

high school class. A Mississippi high school teacher has been denied unemployment benefits after he was fired for showing the R-rated movie "Silence of the Lambs" to his students, some of whom were younger than 17. Under Mississippi law, unemployment benefits are denied to those who are terminated for "misconduct." The Mississippi Supreme Court ruled that the teacher had been terminated for "misconduct," saying that "Anyone born in this century and living on this planet should know the 'R' movie rule, which is 'no one under 17 admitted unless a parent accompanies them into the movie.'" *Mississippi Employment Security Commission v. Harris*, 672 So.2d 739, 1996 Miss.LEXIS 137 (Miss. 1996) [ELR 18:8:16]

Non-competition clause in radio personality s contract is declared void by Louisiana court. A non-competition clause in Ken Battson's employment contract with radio station KRMD has been declared "null and void" by the Louisiana Court of Appeal, thereby freeing Battson to go to work for another station in KRMD's market. Battson's employment agreement contained a clause that provided that he would not go to work for another radio station within 75 miles of Shreveport or Bossier City, Louisiana, for two years after his employment by KRMD ended. A Louisiana statute permits non-competition clauses in employment agreements only if they specify the parishes or municipalities covered. The clause in Battson's contract ran afoul of this statute, the appellate ruled, because the 75-mile radius from Shreveport and Bossier City would include several unspecified parishes and municipalities. *Amcom of Louisiana, Inc. v. Battson*, 666 So.2d 1227, 1996 La.App. LEXIS 1 (La.App. 1996) [ELR 18:8:16]

Songwriter s claim that he had been mislead about assignment of renewal copyrights is barred by statute of limitations. Songwriter Jack Keller alleges that he was misled back in 1960 about the purpose and effect of a contract by which he assigned the copyright renewal terms of his songs to his publisher. So in 1988, when Keller sought to renew the copyrights to some of his songs, EMI Publishing (which had acquired his songs from Keller's original publisher) told Keller that the renewal copyrights belonged to it, not him. Eventually, in 1994, Keller responded by filing a breach of fiduciary duty lawsuit in Tennessee. However, by the time Keller sued, more than three — but fewer than six — years had passed since he learned of the alleged breach. The Tennessee statute of limitations for injuries to personal property is three years; for breach of contract, six years. Thus, the nature of Keller's suit became critical. In an opinion by Judge Ben Cantrell, the

Tennessee Court of Appeals has held that the loss allegedly suffered by Keller was a loss from injury to his property — i.e., his renewal copyrights — and thus the three-year limitations period applied. Since he didn't file suit within three years, the appellate court affirmed the dismissal of Keller's suit. *Keller v. Colgems-EMI Music, Inc.*, 924 S.W.2d 357, 1996 Tenn.App.LEXIS 4 (Tenn.App. 1996) [ELR 18:8:16]

Copyright Act does not preempt state statute requiring manufacturer s name and address to appear on audio and videotape packaging. The Copyright Act does not preempt a Maryland statute that makes it illegal to sell or rent audiotapes or videocassettes unless the packaging contains the name and address of the manufacturer, the Maryland Court of Special Appeals has held. The ruling affirms the conviction of the manager of an adult book store that sold and rented unauthorized copies of videocassettes. Earlier decisions also had rejected preemption attacks on similar statutes in other states (*ELR* 15:3:10, 16:4:24); and the Maryland appellate court found those cases "persuasive." *Hicks v. State of Maryland*, 674 A.2d 55, 1996 Md.App.LEXIS 44 (Md.App. 1996) [ELR 18:8:16]

Warhol Estate attorneys fees are reduced by appellate court. New York Surrogate Judge Eve Preminger awarded attorney Edward Hayes $7.2 million in fees for services he rendered to the Estate of Andy Warhol over a period of several years. (*ELR* 17:7:14). The size of the award was objected to by The Andy Warhol Foundation for the Visual Arts, Inc., an Estate beneficiary. And on appeal, the award has been cut by more than half. The New York Appellate Division has reduced the award to $3.5 million, saying simply that it "disagree[s] with the Surrogate's ultimate valuation of Hayes' services, especially since Hayes was not a specialist in the relevant field and since the award would compensate him at an exorbitant hourly rate." *In re Estate of Andy Warhol*, 637 N.Y.S.2d 708, 1996 N.Y.App.Div.LEXIS 1021 (App.Div. 1996) [ELR 18:8:16]

Artists not entitled to recover for injury to reputation or emotional distress resulting from destruction of artworks by runaway trash truck. Artists Martin and Lorraine Lubner are not entitled to recover damages from the City of Los Angeles for injuries to their reputations or emotional distress resulting from the accidental destruction of their artworks by a runaway trash truck that crashed into their home. The California Court of Appeal rejected the Lubners' argument that they were entitled to recover damages for injuries to their reputation under the California Art Preservation Act. That Act permits recovery for damage to an artist's reputation caused by the *intentional* destruction of the artist's work. But it does not authorize recovery for the *negligent* destruction of artworks, the appellate court has ruled. Also, while California law sometimes permits recovery for emotional distress caused by injuries caused to other people, the law does not permit emotional distress damages for the negligent destruction of property (unless there is a pre-existing relationship between the person causing the destruction and the owner of the property). *Lubner v. City of Los Angeles*, 45 Cal.App.4th 525, 53 Cal.Rptr.2d 24, 1996 Cal.App. LEXIS 429 (1996) [ELR 18:8:17]

Art print publisher is subject to trust provisions of New York Arts and Cultural Affairs Law. In a case of first impression, Judge Beverly Cohen of the New York Supreme Court has held that an art print publisher is an "art merchant" and an artist who conceives an image and delivers it to a printer chosen by the publisher has delivered prints of his "own creation." Whether a publisher is a "merchant," and whether prints are the artist's "own creations" matters, because section 12.01.1 of the New York Arts and Cultural Affairs Law creates a trust relationship between artists who consign their own creations to art merchants. This is useful protection for artists, because it means that art merchants hold the consigned art works and the proceeds from their sale in trust for artists. In a dispute between artist Tom Wesselmann and his publisher, the publisher argued that no trust relationship existed between them because the publisher was not a "merchant" and

Wesselmann had not delivered prints of his "own creation." Judge Cohen disagreed, however. As a result, the judge appointed a receiver to take possession of Wesselmann prints still in the publisher's possession, while the case remains pending. *Wesselmann v. International Images, Inc.*, 645 N.Y.S.2d 263, 1996 N.Y.Misc.LEXIS 184 (Misc. 1996) [ELR 18:8:17]

English law applies to oral agreement for purchase of art between New York resident and English art gallery. English law — rather than New York law — applies to an oral contract by which a New York resident allegedly agreed to purchase six works of art from an English art gallery, a New York trial court has held. The alleged contract was entered into by Edwin Cohen, chairman of General Atlantic Corporation, while he was in London. Cohen admits he looked into the possible purchase of art works from an English gallery, but he denies he made a commitment to do so. Thus, when the gallery sued in New York to collect what was allegedly due on the as-yet-undelivered art works, the question of which country's law should be applied became critical, because New York's statute of frauds requires such agreements to be in writing while English law does not. Judge Edward Lehner has ruled that English law should apply to this case. "While [Cohen and General Atlantic] are New York residents, the place of the alleged negotiation and contracting is England, and the art is located there as is [the gallery's] place of incorporation and place of business. Cohen traveled there . . . and England has an interest in enforcing contracts made there . . . . When a person travels abroad it is not unfair that they subject themselves to the laws of the land which they visit." Judge Lehner rejected Cohen's argument that the New York statute of fraud reflects a "strong public policy" and thus should be applied to deny enforcement to an oral contract, even though English law would enforce it. *Spink & Son, Ltd. v. General Atlantic Corp*, 637 N.Y.S.2d 921, 1996 N.Y.Misc.LEXIS 9 (N.Y.Misc. 1996) [ELR 18:8:17]

INTERNATIONAL CASES

Idea for nightclub is not entitled to legal protection under breach of contract or breach of confidence theories, British court rules, even though plaintiff sowed the original seed for defendants nightclub and was shabbily treated by them

In 1991, a nightclub opened in England called "Ministry of Sound." The club was somewhat unusual at the time, because it was legally open all night and had a dancing area that was separate from other areas of the club.

"Ministry of Sound" was started by James Rudolph Palumbo in response to an idea that had been revealed by Andrew de Maudsley during a dinner party Palumbo had hosted two years before. According to de Maudsley, he was to have been involved in the nightclub in some fashion, if Palumbo were to start one. But when Palumbo opened "Ministry of Sound," de Maudsley was not included.

As a result, de Maudsley filed suit on two theories. The first was that a contract had been formed during the dinner party that called for de Maudsley to share in the nightclub's profits, and Palumbo had breached that contract. The second theory was that de Maudsley had revealed his idea in confidence, and that Palumbo had breached that confidence.

De Maudsley's idea had been to start a nightclub that would have five features: it would be open, legally, all night long; it would be large with a "high tech industrial" decor; it would have separate areas for dancing, resting and socializing, and a VIP lounge; it would have an enclosed dance area with an acoustic design that ensured excellent sound quality, light and atmosphere; and it would employ top disc jockeys.

Following trial in a British court, the judge of the Chancery Division concluded that de Maudsley had been "rather shabbily treated in that he was encouraged to think that he would be part of the enterprise but was only told that this would not be so long after Mr. Palumbo and [his partner] had decided . . . that he would not be included in their project." Moreover, the judge found that "It is the fact that it was Mr. de Maudsley who sowed the original seed in Mr. Palumbo's mind. . . ." This "does go some way to explain his being disgruntled," the judge noted. "However, that is not a matter which supports either of his two claims to breach of contract or breach of confidence."

The judge ruled that de Maudsley's breach of contract claim failed, because the alleged agreement was not sufficiently certain to be capable of enforcement and thus no contract had been formed.

De Maudsley's breach of confidence claim failed, for several reasons. The five features of the proposed club "were individually far too vague to constitute confidential information." Even in combination, the five features did not make the idea original, because "significant aspects of some of the features were not in fact the plaintiff's idea." Moreover, de Maudsley did not disclose his idea under circumstances that required Palumbo to keep it in confidence, because de Maudsley had said nothing that took the dinner party "out of the social sphere and put it in a business one." Finally, Palumbo used de Maudsley's idea "to such a limited extent" that it "would not, in any event, be sufficient to constitute unauthorized use for the purposes of breach of confidence," because "Ministry of Sound" had used only two features suggested by de Maudsley: that it be legally open all night, and that it have a separate dancing area.

As a result, the Chancery Division dismissed de Maudsley's case.

De Maudsley v. Palumbo, [1996] FSR 447 (Chan.Div. 1996) (available on LEXIS in the Intlaw Library, Engcas File) [ELR 18:8:18]

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[ELR 18:8:19]