

## RECENT CASES

**Appellate court affirms victory for Michael Jackson, Lionel Richie and Rod Temperton in copyright and RICO case alleging that Thriller, The Girl is Mine We Are The World and Another Part of Me copied motives from several songs written by plaintiffs**

Michael Jackson, Lionel Richie and Rod Temperton have written and recorded some of the most popular songs of all time. Four of their songs — “Thriller,” “The Girl is Mine,” “We Are The World,” and “Another Part of Me” — have something in common. They all contain “motives” (short musical phrases, just a few notes in length) allegedly copied from songs written by Robert Smith and Reynaud Jones. That was the contention

made in a copyright infringement and RICO lawsuit filed by Smith and Jones in federal District Court in Los Angeles.

The case was assigned to Judge Harry Hupp who made two important rulings prior to trial, and then let a jury decide the balance of the case. Both Judge Hupp and the jury ruled in favor of Jackson, Richie and Temperton. So Smith and Jones appealed. But the Court of Appeals has affirmed.

The first important ruling made by Judge Hupp was to dismiss the plaintiffs' RICO claim. RICO claims require proof of "racketeering activity" which can include mail and wire fraud. Smith and Jones contended that Jackson, Richie and Temperton committed that kind of fraud by disseminating Smith and Jones' songs as their own. But Judge Hupp concluded that this was simply copyright-infringement by another name; and since copyright infringement is not "racketeering activity," no

RICO claim had been stated. The Court of Appeals has agreed. In a decision by Judge Michael Hawkins, that court has explained that “without the alleged infringement of copyright, none of the [defendants’] activity in disseminating their songs could be ‘fraudulent’ . . .” Thus, dismissal of the RICO claim was affirmed.

The second important ruling made by Judge Hupp was to grant summary judgment to the defendants on several of the plaintiffs’ copyright infringement claims. The judge did so, because he concluded that the plaintiffs had failed to rebut the declarations of the defendants’ experts that the allegedly infringing “motives were unprotected ‘scenes a faire.’” The appellate court explained that in the context of music, a “scenes a faire” is “a motive that is so common or trite it is not protectable.” On appeal, the plaintiffs contended that the copyright registration certificates for their songs should have rebutted the defendants’ “scenes a faire” evidence,

because the certificates create a presumption of originality. But the Court of Appeal disagreed. The plaintiffs also argued that summary judgment should not have been granted, because it had not been shown that they ever had access to pre-existing scenes a faire motives similar to their own. But the Court of Appeal disagreed with this argument too. The appellate court also rejected the plaintiffs' contention that Judge Hupp should not have considered "scenes a faire" evidence because the defendants had conceded access to certain of the plaintiffs' songs.

Three of the plaintiffs' infringement claims were tried before a jury, and the jury was instructed to render a special verdict. The verdict form asked the jury to decide first whether the defendants' songs were substantially similar to the plaintiffs' songs. The jury answered this question "no," so that was the end of the case. But if the jury had answered the "substantial similarity"

question “yes,” the verdict form then asked the jury whether the defendants had “access” to the plaintiffs’ songs. According to the plaintiffs, the jury should have been asked about “access” first, so the jury could take “access” into account in deciding whether the songs were substantially similar. The appellate court rejected this contention, however, because “Although access is relevant to the extrinsic test, we have not incorporated considerations of access into the intrinsic ‘lay listener’ inquiry.”

*Editor s note:* The decision in this case was correct, though the appellate court’s opinion does more to confuse the law than to clarify it. The RICO ruling is helpful. This decision makes it clear that the sale of allegedly infringing material, by itself, is not the kind of “fraud” that must exist in order to constitute a RICO violation. Thus this decision ought to deter plaintiffs from attempting to bootstrap legitimate infringement

disputes into RICO cases, which the plaintiffs in this case apparently attempted to do simply because the amount of money that may be recovered in a RICO case is greater than what may be recovered in a copyright case. However, this decision muddies the law of copyright in unfortunate ways. Perhaps that is because the plaintiffs made arguments that were so wide of the mark, the appellate court itself was confused about what their contentions were. For example, while a copyright registration certificate does create a presumption that the registered work is original, that presumption applies to the work as a whole, not to every element of it. Thus it is perfectly possible — and usually the case — that original, copyright protected works contain at least some unprotected elements, including scenes a faire. For this reason, the plaintiffs' argument that their copyright registration certificates were sufficient to rebut the defendants' scenes a faire argument is simply wrong.

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Likewise, they were wrong in their argument that the allegedly copied motives from their songs could be scenes a faire only if the defendants had shown that the plaintiffs had access to pre-existing scenes a faire. Copyright protection is denied to scenes a faire, not because they have been copied from elsewhere; protection is denied to scenes a faire because they are inevitable — because, in other words, authors and songwriters are likely to create them independently, and should be permitted to do so without liability. The plaintiffs were also wrong to argue that Judge Hupp should have ignored the scenes a faire nature of the allegedly copied motives, because the defendants had conceded access to some of the plaintiffs' songs. Access would have been pertinent to whether the defendants had actually copied anything from the plaintiffs' songs; but if what they copied was not protected by copyright — because it was scenes a faire, or for any other reason — such copying would not

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have been “infringement.” Finally, the appellate court correctly ruled that the jury could properly consider “substantial similarity” before considering “access.” This is because access — and even admitted copying — is irrelevant, if the work created by a defendant as a result of that access is not substantially similar to the plaintiff’s work. However, the appellate court confused the law by talking in terms of “extrinsic” and “intrinsic” tests. What the court should have said is that “access” is relevant in cases where a defendant denies actual copying; in such cases, evidence of “access” is relevant to whether actual copying occurred. But “access” is completely irrelevant to whether a defendant’s creation is “substantially similar” to a plaintiff’s.

*Smith v. Jackson*, 84 F.3d 1213, 1996 U.S.App.LEXIS 13327 (9th Cir. 1996) [ELR 18:10:4]

**Jurassic Park does not infringe copyrights to children's books set in Dinosaur World because they are not substantially similar, appellate court rules in affirming summary judgment in favor of Michael Crichton and co-defendants**

The story told in Michael Crichton's novel *Jurassic Park* takes place in a dinosaur zoo. And so do the stories in a series of children's books written by Geoffrey T. Williams. *Jurassic Park* takes its name from Crichton's imaginary zoo. Williams' zoo is called "Dinosaur World."

Crichton's novel was a best-seller and was made into an enormously popular movie by Steven Spielberg and Universal Pictures. Geoffrey Williams observed the success *Jurassic Park* enjoyed; and he concluded that its success was due at least in part to something he had created. Crichton's "Jurassic Park" was copied from his

own pre-existing “Dinosaur World,” Williams believed. On the basis of this belief, Williams sued Crichton and his publishers, as well as Spielberg, Universal and others, for copyright infringement in federal District Court in New York City.

In 1994, Judge Lawrence McKenna granted a motion for summary judgment made by Crichton and his co-defendants, on the grounds that *Jurassic Park* and Williams’ books were not “substantially similar” as a matter of law. (*ELR* 16:10:9) In fact, not long thereafter, Judge McKenna ruled that Williams’ claims were “objectively unreasonable,” and thus the judge ruled that the defendants were entitled to recover their attorneys fees from Williams. (*ELR* 17:9:21)

Williams did not agree with Judge McKenna’s assessment of the merits of his case, so Williams appealed. But the Court of Appeals has affirmed. In an opinion by Judge James Oakes, the appellate court has

ruled that Judge McKenna “correctly concluded that the works are not substantially similar.”

The appellate court did its own quite detailed comparison of *Jurassic Park* and Williams’ books. Judge Oakes wrote that “the total concept and feel of two works differ substantially,” because “The total concept and feel of the *Jurassic Park* works is of a world out of control, while Williams’ Dinosaur World is well under control.” The appellate court also concluded that the settings were not substantially similar, because even though both are dinosaur zoos, the concept of a dinosaur zoo is not copyrightable, and specific elements of such a zoo that appear in both works — such as electrified fences and automated tours — “are classic *scenes a faire*” that are not protected by copyright.

Williams’ books featured two children, as did *Jurassic Park*. But Judge Oakes noted that “When one looks beyond the [children’s] superficial similarities . . .

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many differences emerge,” including differences in their motivations, their skills and their interpersonal relationships. Also, the plots were not substantially similar. Williams had made a list of “several specific instances of similarity” in plot; but the appellate court was not persuaded, because “such lists are ‘inherently subjective and unreliable,’ particularly where ‘the list emphasizes random similarities scattered throughout the works.’”

When the appellate court considered the “combined elements” of Williams’ books and compared them to *Jurassic Park*, it concluded that “a lay observer would not find substantial similarities between the protectible material of these works.”

*Williams v. Crichton*, 84 F.3d 581, 1996 U.S.App. LEXIS 11695 (2d Cir. 1996) [ELR 18:10:5]

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**Copyright to film Lenny Bruce in Concert was validly transferred to plaintiff who won infringement suit against distributor of unauthorized videos, even though first transfer was only implied and second transfer was documented years after it occurred, Ninth Circuit Court of Appeals rules; earlier Ninth Circuit decision requiring contemporaneous signing of assignments is distinguished, over one judge s dissent**

Lenny Bruce was one of the most controversial performers of his era. Even now, years after his death, his work continues to create controversy. Though the latest dispute involves an issue that Bruce would have considered exceedingly technical, it's an issue of importance to entertainment industry lawyers. It concerns the means by which a copyright must be transferred, in order for the transfer to be effective.

This issue arose, because Video Yesteryear distributed videos of the 1966 film “Lenny Bruce in Concert” without authorization, in the mistaken belief that the film was in the public domain. The film, however, is not in the public domain, and thus Video Yesteryear was sued by John Magnuson who claimed to be the current owner of its copyright. Video Yesteryear’s defense was that Magnuson’s predecessor had never been the copyright owner — that Lenny Bruce himself was — and that even if Magnuson’s predecessor did own the film’s copyright, that company had never validly transferred the copyright to Magnuson.

District Judge Lowell Jensen ruled in favor of Magnuson and entered judgment in his favor. In cash terms, the judgment was surprisingly modest. Judge Jensen awarded Magnuson only \$375 in damages and denied Magnuson’s request for attorney’s fees. Moreover, Judge Jensen awarded Video Yesteryear its costs,

because prior to trial Video Yesteryear had faxed and FedEx'ed a \$3,000 offer to settle. Though Video Yesteryear escaped from the trial virtually unscathed, it appealed nonetheless; and Magnuson cross-appealed on the attorney's fees and costs issues.

Video Yesteryear lost ground on appeal. In a decision by Judge Dorothy Nelson, the Ninth Circuit Court of Appeals has affirmed Judge Jensen's ruling that the film's copyright was validly transferred to Magnuson. In addition, the appellate court ruled that Magnuson was entitled to reconsideration of his request for attorney's fees, and that Video Yesteryear is not entitled to its costs.

Video Yesteryear challenged Magnuson's ownership of the copyright on the grounds it had never been validly transferred to him. First, when the film was made in 1966, Lenny Bruce initiated and directed the project, and a corporation owned by Magnuson paid for its

production. As a result, both Bruce and Magnuson's corporation owned the film's original common law copyright. Magnuson's corporation transferred its interest to a new corporation formed — at Bruce's suggestion — for the purpose of owning the film. But Bruce himself never transferred his interest in the film to the new corporation, at least not in writing.

This was not fatal, the appellate court ruled, because “Common law copyrights could be transferred either orally, or by implication from the conduct of the parties.” In this case, Bruce had indicated his intent to transfer his interest to Magnuson's original corporation by suggesting that Magnuson create a new corporation to own the film. Then, when the film was transferred to the books of the new corporation, that amounted to a transfer of its copyright to the new corporation too. Thereafter, the film was distributed, and the new corporation registered the film's statutory copyright as its

owner. And that too was effective, the appellate court ruled.

Eventually Magnuson's new corporation was dissolved, and the film's copyright was transferred to Magnuson individually — but not in writing. A written assignment from the corporation to Magnuson was not signed until years after the corporation was dissolved. To be effective, the assignment had to be in writing; and Video Yesteryear claimed that the writing came too late. Judge Nelson disagreed, however, saying that “case law holds that under some circumstances a prior oral grant that is confirmed by a later writing becomes valid as of the time of the oral grant, even if the writing is subsequent to the initiation of litigation on the copyright infringement.”

In so ruling, Judge Nelson distinguished the Ninth Circuit's earlier decision in *Konigsberg International, Inc. v. Rice* (ELR 16:5:12), a case involving the

ownership of movie rights to Anne Rice's "The Mummy." There the court had held that to satisfy the "signed writing" requirement for copyright transfers, "the writing in question must, at the very least, be executed more or less contemporaneously with the agreement. . . ." Judge Nelson observed that in the *Konigsberg* case, the dispute was between the author and the transferee, and the subsequent writing relied on by the transferee did not directly acknowledge that a transfer had occurred. "Thus, the problem with the writing in that case was not so much that it was not contemporaneous with the agreement but that it was 'not the *type* of writing contemplated by section 204' because 'it came far too late to provide any reference point for the parties' license disputes.'"

This case was different, Judge Nelson said, because "Here, there is no dispute between the transferor and the transferee concerning whether the transfer

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actually occurred, or the terms on which it occurred.” Here, the dispute was between the transferee and an alleged infringer. Moreover, Judge Nelson added that “to the extent that some language in *Konigsberg* might be interpreted as requiring a contemporaneous writing even under the facts of this case, it is clearly dicta.”

Judge Ferdinand Fernandez dissented from this portion of Judge Nelson’s decision. While agreeing that “Video Yesteryear’s behavior is far from appealing,” he concluded that the “late writing” from the corporation to Magnuson did not help Magnuson and “does not help authors in general.” Judge Fernandez recognized that there were differences between the facts of this case and those of *Konigsberg*, “but there are always factual differences between cases,” he said, and he did “not think that those differences distinguish the principles involved.” According to Judge Fernandez, requiring writings to be contemporaneous with transfers protects

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authors, as well as those who do business with transferees, while giving effect to late writings creates “uncertainty.”

The appellate court ruled that Magnuson was entitled to reconsideration of his request for attorney’s fees using the *Fogerty v. Fantasy* factors (*ELR* 15:11:14). And it held that Video Yesteryear was not entitled to its costs, because its pre-trial settlement offer was served by fax and Federal Express rather than by mail as required by the Federal Rules.

*Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1996 U.S.App.LEXIS 13824 (9th Cir. 1996) [*ELR* 18:10:6]

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**District Courts disagree about whether unauthorized mounting of art works violates artist s exclusive right to create derivative works**

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Two art work copyright cases were decided within three weeks of one another — but by courts located 2,000 miles apart. That distance made all the difference, because one court is in the Ninth Circuit and the other in the Seventh. Since neither court was bound by rulings from the other circuit, they were free to disagree with one another about what the law is, and they did.

One court held that artist Bev Doolittle’s exclusive right to create “derivative works” based on her paintings was infringed by companies that removed copies of those paintings from a book and mounted the copies (called “bookplates”) on framed canvas or matting. This ruling was made by a federal District Court in California, which is in the Ninth Circuit. In so ruling, District Judge Alicemarie Stotler relied on earlier Ninth Circuit decisions involving similar facts — *Mirage*

*Editions, Inc. v. Albuquerque A.R.T.* (ELR 10:9:13) and *Munoz v. Albuquerque A.R.T.* (ELR 16:4:25) — both of which had concluded that mounted copies are derivative works, and thus infringe the artist’s copyright if made without a license.

The other court held that artist Annie Lee’s exclusive right to create “derivative works” based on her works of art was *not* infringed by a company that mounted notecards containing Lee’s art works onto ceramic tiles. This ruling was made by a federal District Court in Illinois, which is in the Seventh Circuit. District Judge Charles Norgle acknowledged the prior Ninth Circuit decisions in *Mirage Editions* and *Munoz*. Indeed, the defendant in *Munoz* was the same company as the defendant in the case before Judge Norgle. The judge also acknowledged that “the facts and arguments in the *Munoz* case and the case [before him] are analogous. . . .” Confronted with a decision involving the

same defendant and analogous facts and arguments — a decision which he thought was incorrect — Judge Norgle did the only thing he could: he “Respectfully . . . disagree[d]” with it.

Judge Norgle quickly observed that he was not alone in disagreeing with *Munoz*. He noted that *Nimmer on Copyright* does as well. According to the Copyright Act, a “derivative work” includes one in which a preexisting work is “recast” or “transformed.” The Ninth Circuit has concluded that a mounted art work is one in which the art work is recast or transformed, and is thus a derivative work. Others, however — including *Nimmer* and the Copyright Office — have said that to be a “derivative work,” a work also must be sufficiently original to be eligible for a copyright of its own; and a mounted art work is not sufficiently original to be eligible for its own copyright (separate, that is, from the copyright on the art work before it was mounted).

This was the reason Judge Norgle concluded that mounted art works are not derivative works, and thus did not infringe Annie Lee's copyrights. Though the issue had not previously arisen in the Seventh Circuit, it had arisen many years ago in the Fifth Circuit in *C.M. Paula Co. v. Logan*, 355 F.Supp. 189 (N.D.Texas 1973). That case held that mounting art works that had been removed from greeting cards and note cards onto ceramic tiles did not infringe the "derivative work" rights to those art works. Judge Norgle concluded that the points made in *C.M. Paula* were "relevant" to the case then before him.

Since mounting Lee's art works onto ceramic tiles did not involve the creation of derivative works, the only remaining question was whether the company that did so could resell Lee's art works without her permission. The answer to this question was an easy "yes," because the company had purchased Lee's notecards, and thus under

the First Sale Doctrine, the resale of those cards did not infringe Lee's exclusive right to distribute those cards.

*Greenwich Workshop, Inc. v. Timber Creations, Inc.*, 932 F.Supp. 1210, 1996 U.S. Dist. LEXIS 10064 (C.D. Cal. 1996); *Lee v. Deck the Walls, Inc.*, 925 F.Supp. 576, 1996 U.S. Dist. LEXIS 6845 (N.D. Ill. 1996) [ELR 18:10:7]

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**Federal District Court enjoins enforcement of New York statute requiring music performing rights societies to give business proprietors notice of investigations within 72 hours; court rules it is likely that statute is preempted by Copyright Act**

Songwriters and their publishers have a federal right to be compensated when their music is publicly

performed. It says so in the Copyright Act. And ASCAP, BMI and SESAC exist just for the purpose of issuing licenses, collecting fees, and enforcing this right — all as efficiently as possible.

One man's efficiency is another's bane, however. So relations between those who publicly perform music and public performing rights societies have always been strained. The relationship between the performing rights societies and bars and restaurants is especially strained. While broadcasters have been satisfied to work out their differences with ASCAP and BMI within the context of federal law, the hospitality industry has taken its complaints outside the federal arena — to state legislatures from coast to coast.

In recent years, several states have enacted statutes that regulate the manner in which performing rights societies conduct their music licensing activities. (*ELR* 17:6:28, 17:8:22) New York is one of these states.

In 1995, the New York Arts and Cultural Affairs Law was amended to provide, among other things, that performing rights societies must give notice to proprietors within 72 hours after society investigators enter business premises to investigate possibly unlicensed music performances. If such notice is not given in time, the proprietor may file a lawsuit to recover actual damages and reasonable attorneys fees and an injunction.

Before this law was scheduled to take effect in January 1996, ASCAP and BMI filed suit in federal District Court in New York City, and sought a preliminary injunction barring Governor Pataki and other state officials from attempting to enforce the statute. ASCAP and BMI argued that the New York statute is preempted. The court has agreed, and has issued the requested injunction.

The court concluded there is a strong likelihood that the state statute is preempted on the grounds that it

conflicts with the federal Copyright Act. It conflicts because the 72-hour notice requirement would alert proprietors to investigations of suspected unlicensed performances, would enable them to avoid such performances while ASCAP or BMI were conducting follow-up investigations to establish a pattern of infringing activity, and thus would “undermine” infringement investigations and create a “deterrent to the enforcement of copyright.”

The state statute also conflicts with federal law, because the Copyright Act gives copyright owners three years to file infringement actions, and this reflects Congress’s conclusion that three *years* is adequate notice. By contrast, the New York statute requires notice to be given within three *days*.

The court also found a third conflict. If the societies “inadvertently fail to give notice, the proprietor is armed in any future federal infringement action with a

state law counterclaim . . . [that] creates an obligation on the part of a federal judge in an infringement action to assess damages against the plaintiff copyright owner . . . even if the owner were to succeed on his infringement claim.”

The court was satisfied that ASCAP and BMI would suffer irreparable injury if a preliminary injunction were not issued, because the 72-hour notice requirement would deter them “from conducting effective investigations” and thus they would be prevented from negotiating licenses and recovering remedies that depend on proof of a pattern of infringing activities.

*ASCAP v. Pataki*, 930 F.Supp. 873, 1996 U.S. Dist. LEXIS 3247 (S.D.N.Y. 1996) [ELR 18:10:8]

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**District Court denies magazine's motion for summary judgment in copyright infringement case filed by stock photography house; photo commissioned by magazine of husband serving wife breakfast in bed may be substantially similar to photo previously offered to magazine by stock house, court rules**

The distinction between an unprotectible concept or theme and its protected expression is at the “heart” of a copyright case that was sparked by an article about “rekindling romance.” The article appeared in *New Choices for Retirement Living* magazine, and it was illustrated with a photograph of a husband serving his wife breakfast in bed. The photo was commissioned by the magazine especially for the article — but not until after the magazine’s editors had requested, inspected and rejected similar photographs from Sharpshooters, Inc., a stock photography house.

According to Sharpshooters, the photo commissioned by the magazine infringes the copyright to one of the photos it had submitted in response the magazine's request.

While the magazine admits there are certain similarities between the photos, it claims the similarities involve nothing more than the unprotected concept of a husband serving his wife breakfast in bed, and certain elements that inevitably flow from that concept and thus are unprotected *scenes a faire*. As a result, the magazine made a motion for summary judgment, asking District Judge James King to dismiss Sharpshooters' complaint.

Judge King, however, has denied the motion. He agreed with the magazine that "Some of the similarities of which Plaintiff complains inhere in the concept of breakfast being served in bed. For example, street clothing would be incongruous in a depiction of an intimate bedroom scene, as would the serving of a hamburger

and french fries on a breakfast tray.” On the other hand, the similarities pointed to by Sharpshooters went beyond pajamas and breakfast foods; and some of these similarities concerned the judge. “[T]he court deems it significant that each husband offers essentially the same menu and presentation: coffee and a croissant, accompanied by a red flower in a crystal bud vase and served on identical wooden trays,” Judge King said. “Moreover, there is sufficient similarity in the positioning and expressions of the couples that a trier of fact could find ‘substantial similarity’ in the photographs.” For these reasons, he denied the magazine’s motion.

*Sharpshooters, Inc. v. Retirement Living Publishing Co., Inc.*, 932 F.Supp. 286, 1996 U.S. Dist. LEXIS 10054 (S.D. Fla. 1996) [ELR 18:10:9]

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**Continental Basketball Association's failure to comply with Indiana franchise statutes did not give buyer of Evansville Thunder a private cause of action against the league, and purchase agreement was not void, Indiana Supreme Court rules; case remanded to trial court for further proceedings on buyer's claim for damages arising from league's termination of franchise, and for league's claim for unpaid balance of purchase price**

Back in 1984, Ellenstein Enterprises, Inc., entered into a "Franchise Purchase" agreement with the Continental Basketball Association to buy that league's "Evansville Thunder" for \$300,000, apparently payable in installments. The investment did not turn out as Ellenstein had hoped, and things degenerated from there. Ellenstein didn't make all of the payments called for by the agreement. The CBA terminated Ellenstein's

franchise. Ellenstein sued the CBA for damages. And the CBA cross-claimed against Ellenstein for amounts still due.

Though the dispute arose in the sometimes unique context of professional sports, the case rested on two Indiana statutes drafted in the 1970s to deal with widely-owned businesses like auto dealerships, gas stations and fast food restaurants. Indiana's Franchise Acts require franchise sellers to make certain disclosures to prospective franchisees, and they permit termination only under certain circumstances.

Ellenstein claimed that the CBA had not complied with the Indiana Acts, while the CBA claimed — among other things — that although its teams were called “franchises,” they were not “franchises” within the meaning of the Acts and thus those laws did not apply at all.

The trial court agreed with Ellenstein, finding that the Acts did apply and that the CBA's failure to comply with their disclosure requirements made the "Franchise Purchase" agreement void, so the league could not recover the balance of the purchase price still due from Ellenstein. That ruling was affirmed by the Indiana Court of Appeals (*ELR* 16:9:19). But the Indiana Supreme Court has reversed, in part, and has remanded the case for further proceedings.

The Indiana Supreme Court has agreed that CBA franchises are "franchises" within the meaning of the Indiana Franchise Acts, including the provision that requires franchise sellers to make certain disclosures to prospective franchisees. The CBA had not made the required disclosures to Ellenstein. But the Supreme Court has ruled that the Franchise Acts do not create a private cause of action — one that could be asserted by Ellenstein in a civil lawsuit — unless the disclosure amounted

to “fraud.” Indiana law imposes special requirements with respect to the pleading of fraud; and the Supreme Court decided that Ellenstein had not satisfied those requirements, because it had offered only very general statements that did not clearly identify fraudulent statements made by the CBA. Thus Ellenstein could not pursue its claims for damages allegedly arising from the CBA’s failure to comply with the Acts’ disclosure requirements.

The CBA’s failure to comply with the Acts’ disclosure requirements also had a bearing on whether the “Franchise Purchase” agreement was “void.” If it were, the CBA would be unable to recover amounts still due from Ellenstein; and Ellenstein of course argued that the agreement was void. The Supreme Court disagreed, however. It noted that the CBA and Ellenstein appeared to have had equal bargaining power, and that Ellenstein was owned by a sophisticated businessman who was

well-advised in all respects. Under these circumstances, the court believed that “any forfeiture that would be suffered here if the bargain were not enforced would be undeserved,” so the court concluded that the franchise agreement was not void. Thus the CBA’s claim for the balance due was remanded for further proceedings.

The court also remanded Ellenstein’s claim for damages it suffered as a result of CBA’s alleged failure to comply with the Acts’ termination provisions. The Act permits termination only for “good cause,” but Ellenstein and the CBA had not briefed the question of whether the league had good cause to terminate the company’s franchise, and this issue could “turn on a factual determination,” the court explained.

*Continental Basketball Association v. Ellenstein Enterprises, Inc.*, 669 N.E.2d 134, 1996 Ind.LEXIS 63 (Ind. 1996) [ELR 18:10:9]

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**Judgment in favor of *The New Yorker* and journalist Janet Malcolm in libel lawsuit brought by psychoanalyst Jeffrey Masson is affirmed by Court of Appeals**

It took almost twelve years, but the libel lawsuit brought by psychoanalyst Jeffrey Masson against *The New Yorker Magazine* and journalist Janet Malcolm has finally come to a conclusion. *The New Yorker* and Malcolm have prevailed — after two jury trials, three rulings by the Ninth Circuit Court of Appeals, and a United States Supreme Court decision (*ELR* 10:12:10, 11:4:7, 11:9:20, 12:2:18, 14:1:3, 15:3:27, 16:1:21). A judgment in their favor has been affirmed by the Court of Appeals.

Masson's lawsuit was prompted by a two-part article written by Malcolm and published in *The New*

*Yorker* in 1983. The article quoted Masson extensively, and he contended that five quotations were false and injured his reputation. When the case finally went to trial in 1993, the jury ruled in favor of *The New Yorker*. While the jury found that Malcolm had libeled Masson, it was unable to reach a verdict on damages. As a result, the trial court granted Masson a new trial against Malcolm on all issues, but it denied Masson's request for a new trial against the magazine. The second trial took place in 1994, and resulted in a jury verdict in favor of Malcolm. The trial court then entered a final judgment in favor of *The New Yorker* and Malcolm.

Masson appealed to the Ninth Circuit, arguing that jury instructions and an evidence ruling made during the second trial were erroneous, and arguing that the trial court should have granted him a new trial against *The New Yorker* as well as against Malcolm.

The trial court had instructed the jury that in order for Masson to prevail, he had to “prove *both* that he did not utter the words attributed to him, *and* that the quotations represented a deliberate and reckless alteration of words actually spoken by him.” Masson argued this instruction was wrong, because if the jury found that he had not spoken the words attributed to him at the time and place the article said he did, this by itself should have been sufficient to establish malicious falsity. The Court of Appeals rejected this argument, however, in a decision by Judge Arthur Alarcon. Earlier in this very case, the Supreme Court had ruled that the deliberate alteration of the words spoken by a plaintiff does not constitute the “knowledge of falsity” that is required to prove actual malice, “unless the alteration results in a material change in the meaning conveyed by the statement.” Judge Alarcon concluded that the jury instruction given by the trial court “faithfully tracks” the Supreme

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Court decision, and thus the instruction did not misstate the law.

The trial court also had instructed the jury that Malcolm had no duty to check information that contradicted one of the quotations in her article. Masson objected to this instruction too. But Judge Alarcon ruled that his court did not have to decide whether or not the instruction was correct, because the jury decided that the quotation in question was not false, thus making the duty-to-check a moot issue.

The trial court had refused to allow Malcolm to introduce into evidence certain excerpts from a book Malcolm wrote after the case was filed. The book was entitled *The Journalist and the Murderer*, and in it, Malcolm made statements about the case which Masson thought would be helpful to him. The trial court had permitted the introduction of some excerpts, but others had been excluded because they would have been unduly

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time-consuming and might mislead or confuse the jury. Judge Alarcon concluded that the trial court had not abused its discretion in deciding that the value of the excluded excerpts would be outweighed by these factors.

Finally, Judge Alarcon held that Masson was not entitled to a new trial against *The New Yorker*, because the jury's verdict in favor of Malcolm at the second trial compelled a judgment in favor of the magazine under the doctrine of defensive collateral estoppel. That is, since Malcolm was not liable for statements she had written in the article, *The New Yorker* could not be held independently or vicariously liable for its publication of the article either.

*Masson v. The New Yorker Magazine*, 85 F.3d 1394, 1996 U.S.App.LEXIS 13326 (9th Cir. 1996) [ELR 18:10:10]

**ABC and affiliated station win dismissal of privacy and emotional distress lawsuit triggered by undercover hidden camera report about faulty medical tests on Prime Time Live ; federal District Court rules that affiliate is protected by wire service defense, corporations do not have privacy rights, and use of hidden cameras is not outrageous**

ABC's "Prime Time Live" makes regular use of undercover hidden-camera reports. The network was recently stung with a \$5.5 million jury verdict as a result of one such report about the food handling practices of Food Lion supermarkets (*ELR* 18:9:9). But all courts do not take as dim a view of undercover hidden-camera techniques as the Food Lion jury did. Indeed, ABC and its affiliated station in Phoenix recently won dismissal of a lawsuit that was triggered by a "Prime Time Live" report about faulty pap smear tests done by an Arizona

medical lab — a report that was produced in part using undercover techniques and hidden cameras.

The suit was filed by Medical Laboratory Management Consultants, and its complaint alleged claims for invasion of privacy and infliction of emotional distress.

Federal District Judge Roslyn Silver dismissed the Lab's claims against KTVK-TV, because it was not involved in any way in the production of the offending report. Rather, it was a "mere conduit for ABC's 'Prime Time Live' satellite feed," and as such was entitled to the protection of the "wire service defense." Moreover, because the station played "no role in the production of the program," it had not committed "intentional or negligent conduct," and thus could not be found liable to the Lab for that reason as well.

Judge Silver dismissed the Lab's privacy claim against ABC, because the Lab was a corporation, and

corporations have no privacy rights under Arizona law. The judge dismissed the Lab's intentional infliction of emotional distress claim — a claim based on the use of hidden cameras by ABC's reporters — because the judge ruled that the use of hidden cameras “cannot, as a matter of law, be deemed ‘outrageous’ . . . ,” as Arizona law requires for emotional distress claims.

The reason Judge Silver found that the use of hidden cameras could not be found “outrageous” as “a matter of law,” was that in an earlier separate case against ABC, the Seventh Circuit Court of Appeals had affirmed the dismissal of claims brought by medical office employees who had been taped by hidden cameras used by “Prime Time Live” reporters who had posed as patients (*ELR* 16:6:28, 17:1:20). Judge Silver reasoned that practices that gave rise to no liability in an earlier case could not be found “outrageous” in this case.

*Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 931 F.Supp. 1487, 1996 U.S.Dist.LEXIS 10015 (D.Ariz. 1996) [ELR 18:10:11]

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**Emotional distress and other claims made by woman depicted in *Getting the Love You Want* video are dismissed; court rules that video was not false or outrageous, and that woman did not allege severe distress**

It must have seemed like a good idea in the beginning, because Barbara Bass and her husband voluntarily participated in a “Getting the Love You Want” workshop, knowing that it was being filmed for later use as part of a video series that might even be broadcast on television. Indeed, Bass signed a written release

consenting to the use of her “name, picture, portrait, and voice” in the “Getting the Love You Want” video/television project.” The producer’s hopes for the project seem to have been fulfilled, because the video featuring Bass and her husband was aired on the “Oprah Winfrey Show” where it was seen by some of their friends.

By then, however, it no longer seemed like a good idea, and Bass wrote a letter to the video production company withdrawing her consent. The written consent Bass had signed was broadly worded, and it gave the production the company the right to edit the video in its discretion. Moreover, the consent specifically stated that nothing would be submitted to Bass for her further approval. Nevertheless, Bass apparently thought she could withdraw consent, because she and her husband had originally been invited to participate in the

workshop taping in a letter that assured them that “Only what you choose to share will be seen.”

When the production company did not respond to her letter in a way that satisfied her, Bass filed suit. By then, she had moved from Connecticut — where she and her husband lived when they agreed to participate in the workshop, and where most of the filming took place — to Texas. Also, Bass and her husband must have decided they were not getting the love they wanted, despite their participation in the workshop, because by then they had divorced. Since Bass was living in Texas, that’s where she chose to sue the production company, as well as the separate company that trains workshop instructors and may have been the video’s distributor.

In her lawsuit, Bass alleged a claim for intentional infliction of emotion distress. But in response to a motion for summary judgment, a federal magistrate judge has dismissed that claim for three reasons. First, there

was nothing false about the video's depiction of Bass; and the court construed the Supreme Court's decision in *Hustler Magazine v. Falwell* (ELR 9:10:3) to mean that damages for infliction of emotion distress caused by the publication of a statement may not be recovered unless the statement is false. Second, even if *Hustler v. Falwell* were not applicable, the court ruled that Texas law permits recovery for emotional distress only where the defendant's actions are "outrageous"; and disseminating a video that does not contain false or defamatory information is not outrageous. Third, Texas law requires an injury that is "so severe that no reasonable person could be expected to endure it"; and Bass had not alleged an injury that severe.

The court also dismissed Bass's claims for breach of contract and breach of the duty of good faith and fair dealing. It did so, because Bass had entered into a contract only with the production company. That company,

however, had no presence in Texas and had previously been dismissed from the case for lack of personal jurisdiction. The remaining defendant — the company that taught instructors and may have distributed the video — conceded jurisdiction over it in Texas. But Bass had no contract with that company. A breach of contract claim requires privity of contract, the court explained. There was no privity in this case. Since the duty of good faith and fair dealing arises out of a valid contract, the lack of a contract between Bass and the remaining defendant also eliminated that claim. For a similar reason, the court also dismissed Bass's claim that the remaining defendant had negligently failed to comply with a contractual duty to allow her to participate in the editing of the video.

Finally, the court dismissed a claim based on the Texas Deceptive Trade Practices Act. This claim failed because the Act did not apply to her participation in the

production of the video, and because the activities about which Bass complained had taken place in Connecticut and New York, not in Texas.

*Bass v. Hendrix*, 931 F.Supp. 523, 1996 U.S. Dist. LEXIS 9992 (S.D.Tex. 1996) [ELR 18:10:11]

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**New York court dismisses privacy claim against HBO filed by woman shown in crowd scene of program about public nudity; entitled *Real: Sex*, program concerned matter of public interest and thus is not covered by New York Civil Rights Law**

According to received wisdom, curiosity killed the cat. Whether this is so or not, no one can say for sure. But it now appears that curiosity did lead Doreen Gaeta into a situation that has caused her embarrassment

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— embarrassment so severe she filed a lawsuit as a result.

Gaeta’s lawsuit is against HBO which produced and then broadcast a program called “Real: Sex.” The program featured photographer Spencer Tunick and included a segment in which Tunick photographed models posing nude on the streets of New York City. Gaeta was on her way home from work when she happened upon a crowd that had gathered around Tunick and his models. Curious, she “stopped for a look at what the crowd was viewing.” Though there for 30 seconds or less, according to her estimate, Gaeta was caught on film by HBO cameramen. And when the program was broadcast, her face was shown twice along with the rest of the crowd and once in close-up. In both the crowd scenes and the close-up, Gaeta “appears with her hand on her face, shaking her head back and forth.”

Why exactly this embarrassed Gaeta is not clear, but she says that it did, and she sued HBO in New York state court under that state's "privacy statute," Civil Rights Law sections 50 and 51. That statute creates a cause of action for the unauthorized use of a person's name or picture for advertising or trade purposes, which is the only privacy cause of action recognized in New York.

In response to HBO's motion for summary judgment, Judge Marcy Friedman has dismissed Gaeta's privacy claim. Judge Friedman explained that "however genuine and deeply rooted in principle" Gaeta's embarrassment may have been, her expectations of privacy "cannot render the use of her picture actionable under the Civil Rights Law." This was so for a very well-settled reason: from the time the statute was first enacted, New York courts have held that it does not apply to publications concerning newsworthy events or

matters of public interest, because such publications are not for advertising or trade purposes even if they are done for profit. Public nudity, and the public's response to it, is a matter of public interest, the judge ruled. And thus the statute does not apply to the HBO program.

*Gaeta v. Home Box Office*, 645 N.Y.S.2d 707, 1996 N.Y.Misc.LEXIS 205 (N.Y.City Civ.Ct. 1996) [ELR 18:10:12]

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**Lawsuit seeking to compel radio station WABC to include Muslim as panelist on weekly program Religion on the Line is dismissed for failure to state claim**

New York City radio station WABC broadcasts a weekly program called "Religion on the Line." The

program features a discussion among panelists who include a Jewish rabbi, a Protestant minister and a Catholic priest — but no one who is a Muslim. This seemed odd — and perhaps illegal — to the National Council of Islamic Affairs, because the Council estimates that the religion of Islam is “embraced by more than one-fourth of humankind, with more than ten million adherents in the United States.”

As a result, the Council and two American Muslims filed suit against the station in federal District Court, seeking an order that would have compelled WABC to include a Muslim on the panel. The plaintiffs alleged that the station’s failure to have a Muslim on the panel violated “anti-Discrimination laws of the United States” including Title VII of the Civil Rights Act of 1964, and apparently the First Amendment as well.

The station moved to dismiss the case for failure to state a claim; and federal District Court Judge Lewis

Kaplan has granted that motion. The judge dismissed the First Amendment claim, because “the Constitution guarantees freedom of speech only as against governmental interference.” Here, there had been no suggestion that the FCC or any other government agency “required, encouraged or, indeed, is aware of WABC’s actions.” As a result, the station’s decisions about who should be on its program, whether “right or wrong, fair or unfair,” do not violate First Amendment rights.

Judge Kaplan also dismissed the plaintiffs’ Title VII claim. Title VII prohibits employment discrimination. But it requires complaints to be filed first with the EEOC or the New York Division of Human Rights, and the plaintiffs had not filed a complaint with either. Moreover, the judge said he would have reached the same result on the merits, because the panelists on WABC’s programs are not station “employees,” and thus Title VII does not apply to them.

Finally, the judge rejected a claim that WABC's refusal to include a Muslim on the panel violated its obligation to broadcast in the "public interest" as required by the Communications Act. Judge Kaplan stated that the Communications Act does not create a private right of action that the plaintiffs could assert in court.

*M.T. Mehdi v. Boyce*, 931 F.Supp. 268, 1996 U.S. Dist. LEXIS 10037 (S.D.N.Y. 1996) [ELR 18:10:13]

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**Antitrust lawsuits filed by ticket buyers against Ticketmaster are dismissed, because ticket buyers do not have standing to complain about alleged monopolization, price fixing and boycotts in music concert ticket sales business**

The case started with a bang . . . but ended with a whimper.

A few years ago, Ticketmaster's success drew critical attention. Some of that attention came from the Department of Justice, the rest from individual ticket buyers. All of it focused on allegations that Ticketmaster had monopolized the business of selling concert tickets on behalf of music venues, and had engaged in price fixing and boycotts, in violation of the Sherman Act.

The Department of Justice investigated the practices engaged in by Ticketmaster, and then closed its investigation in July 1995. Private individuals, however, filed more than a dozen antitrust lawsuits of their own, in federal courts all around the country. In due course, the Judicial Panel on Multidistrict Litigation transferred all of those cases to the federal District Court in St. Louis where they were assigned to Judge Stephen Limbaugh.

Now, Judge Limbaugh has dismissed the cases entirely — but not on the merits. That is, Judge Limbaugh has not blessed Ticketmaster’s practices as legal, though they may in fact be. Rather, the judge has ruled that the plaintiffs do not have standing to assert the antitrust claims they have made.

The plaintiffs contended they were injured because they paid more for their concert tickets than they would have, if Ticketmaster had not exercised monopoly power. “That is not enough however,” Judge Limbaugh responded, “to qualify as an antitrust injury.” This is so because in order to pursue an antitrust claim, a very particular sort of injury must be suffered. A mere connection between an antitrust violation and harm is not enough. Rather, the injury must be “directly related to the harm the antitrust laws were designed to protect.” In other words, the plaintiff in an antitrust action “must have been the target of the anticompetitive activity, not

one who has merely suffered indirect, secondary, or remote injury.”

Surprisingly perhaps, ticket buyers would not have been the “target” of Ticketmaster’s anticompetitive activity — assuming it engaged in such activity. Judge Limbaugh explained that “If there is an injured party who is the target of Ticketmaster’s alleged antitrust activity, it is the venue — the ‘consumer’ of Ticketmaster’s ticket handling service.” As a result, if a violation occurred, the “appropriate party” to have brought the case would have been concert venues and promoters “who are the ones who ‘consume’ Ticketmaster’s product” and “would suffer any direct loss” from Ticketmaster’s alleged monopoly power.

Judge Limbaugh ruled that even if the plaintiffs had suffered an antitrust injury, they lacked standing to pursue the case nevertheless. This is so, he ruled, because “damages would be speculative and the

apportionment of those damages would present complex problems.” The judge explained that he could not accurately calculate damages because there are so many factors that affect ticket prices and purchasers’ willingness to buy.

*In re Ticketmaster Corporation Antitrust Litigation*,  
929 F.Supp. 1272, 1996 U.S.Dist.LEXIS 8266  
(E.D.Mo. 1996) [ELR 18:10:13]

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**Appellate court upholds \$1.25 million judgment in favor of sportscaster Tom Ryther in age discrimination suit against Twin Cities TV station that terminated him at age 53; court rules that evidence was sufficient for jury to conclude that negative audience survey results which station said were the reason**

## **Ryther s contract was not renewed were just a pretext for station s real reason which was his age**

For much of his career, Tom Ryther sat ring side and reported on the athletic achievements of others. He did this in his position as television sportscaster for KARE, Channel 11 in Minneapolis/St.Paul. Ryther had worked for KARE for 12 years when the station refused to renew his contract and thereby terminated him, at age 53. Then, Ryther stepped into the ring himself and landed a knockout punch of his own by winning a \$1.25 million judgment against KARE in an age discrimination lawsuit.

KARE contended that it hadn't renewed Ryther's contract because audience surveys conducted by Atkinson-Farris Communications, then by the station's in-house research group and then by the Gallup organization all showed by Ryther was not as popular with

viewers as were the station's news and weather anchors, nor as popular as the sportscaster for rival station WCCO.

But Ryther contested the techniques that had been used in conducting these audience surveys, and argued that in any event the survey results were merely a pretext for KARE's real reason for terminating him — his age. His “pretext” argument was bolstered by a former sports department intern who testified that the station's other sports anchor and sports executive producer had repeatedly referred to Ryther as an “old fart” and an “old man” who was “too old to be on the air.”

The jury returned a verdict for Ryther, and after refusing to set it aside or grant KARE a new trial, District Judge David Doty entered a judgment against the station that totaled more than \$1.25 million for back pay, front pay, liquidated damages and attorneys' fees.

(*ELR* 16:11:15) KARE appealed, but without success; Ryther has won that round too.

In a decision by Judge Donald Lay, the Court of Appeals acknowledged that “If an employer’s decision [to terminate an employee] is made on objective, reliable market surveys, it is clearly a policy decision belonging exclusively to the employer.” “However,” Judge Lay added, “if the stated reason is shown by substantial evidence to be pretextual, which is what the present case concerns, then, depending on the overall evidence, the jury may be permitted to consider whether the employer’s stated reason is the actual reason for the employer’s action.”

After reviewing the facts in considerable detail, and reviewing the law concerning the shifting burdens of proof in an age discrimination case, Judge Lay came to the conclusion that “the record as a whole supports a reasonable inference that *age*, and not some other factor,

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motivated KARE 11's decision not to renew Ryther's contract." Judge Lay concurred with the District Court which had concluded that it was "clear the jury believed Ryther's evidence and did not believe defendants' proffered explanation." And thus the Court of Appeals affirmed the judgment.

KARE did persuade one judge, though this was not enough to overcome the force of Ryther's blows. Judge James Loken dissented from the decision of his colleagues on the Court of Appeals. To Judge Loken's way of thinking, "independent market research established that Ryther was the overpaid, underperforming anchor of the least significant segment of KARE 11's news team." And on this basis, he would have ruled that KARE was "entitled to judgment as a matter of law or, at a minimum, a new trial."

*Ryther v. KARE 11*, 84 F.3d 1074, 1996 U.S.App. LEXIS 12545 (8th Cir. 1996) [ELR 18:10:14]

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**Court rejects claim by songwriter Earl Montgomery that his mechanical royalties were converted; though assignee could not produce 1975 contract, court rules that statute of frauds is not applicable and that Montgomery's claim is barred by laches**

It's a sad tale, worthy of a country-and-western song of its own.

In 1975, Emmy Lou Harris recorded "One of These Days," a song written by Earl Montgomery, and it was a "huge hit." Unfortunately, Montgomery needed money in those days. So just a few months before "One of These Days" became a hit, he sold his mechanical

royalty rights for \$10,000 to a Nashville investor named Billy Nunley.

At the time, Montgomery was under contract to AlTam, a music publishing company then owned by Al Gallico and Tammy Wynette. When AlTam was notified that Montgomery had sold his mechanical royalties to Nunley, AlTam began sending Montgomery's mechanicals to Nunley rather than to Montgomery. According to Montgomery, he was aware he was no longer receiving mechanical royalties, but he was unable to contact Gallico to find out why.

Between 1975 and 1995, things happened. The AlTam catalog was sold to Coca-Cola which resold it to MCA. Nunley's home burned down, and with it, all of his business records, including his copy of the assignment of Montgomery's mechanical royalties. Nunley had brain surgery that left him with short term memory loss. And Nunley and his wife were divorced.

In the divorce, Nunley's wife got half of Montgomery's mechanical royalties. For one reason or another, Nunley's wife did not get her share of Montgomery's royalties the way she was supposed to. She thought this was the result of a conspiracy between her ex-husband and Montgomery, and she initiated contempt proceedings against them both.

There was no conspiracy between Nunley and Montgomery, however. In fact, according to Montgomery, this was when he first learned why he had stopped receiving mechanicals from AlTam, 20 years before. Moreover, Montgomery claimed he had not sold his mechanicals to Nunley, and didn't even know who Nunley was. As a result, Montgomery responded to the contempt proceedings by cross-complaining against Nunley and his ex-wife, alleging that they had converted his mechanicals and seeking an accounting and a judgment for their repayment.

The trial court ruled against Montgomery; and the Tennessee Court of Appeals has affirmed.

In a decision by Judge Cantrell, the appellate court has rejected Montgomery's argument that the statute of frauds requires the Nunleys to produce a written contract in order to establish he assigned his royalties to them. Rather, the court ruled that "the contract is no longer executory" because "it was fully performed twenty years ago." And contracts that are completely executed or performed are "taken out of the operation of that statute," even if they otherwise would have been covered by it.

Moreover, the appellate court held, "Even if the Nunleys had converted Mr. Montgomery's property" — something the facts showed "otherwise," the court believed — "Mr. Montgomery would still not be entitled to prevail on his claim," because he was "guilty of unreasonable delay in pursuing his rights." Under the

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circumstances, Montgomery's assertion that he had not been able to reach his publisher to find out why he wasn't receiving his mechanicals "does not strike us as reasonable." Also, the Nunleys suffered clear prejudice by Montgomery's delay, because the 1989 fire that destroyed their records and Nunley's memory loss would make it difficult for them to prove their case now. For these reasons, the court held, Montgomery's claim was barred by laches.

*Nunley v. Nunley*, 925 S.W.2d 538, 1996 Tenn.App. LEXIS 66 (Tenn.App. 1996) [ELR 18:10:15]

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### **Briefly Noted:**

**Waiver in MTV Sports Festival registration form is valid, so court dismisses lawsuit filed by**

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**injured participant.** The sponsors of an MTV Sports Festival have won the dismissal of a tort lawsuit filed against them by a participant who was injured in a fall from some monkey bars. District Judge Elizabeth Kovachevich has granted the defendants' motion for summary judgment, because the plaintiff had signed a Sports Festival registration form containing a clause that released the defendants from liability. The plaintiff contended the clause was unenforceable, because his injuries had been caused by "willful and wanton disregard" for his safety. But the plaintiff failed to identify which specific acts or omissions he considered to be wanton and willful, so the judge rejected this argument. Judge Kovachevich also rejected the plaintiff's argument that the waiver was unenforceable because it did not provide an adequate description of the activities it covered. She noted that the form clearly provided that participants "assume all risks associated with competing in the MTV

Sports Festival including, but not limited to, falls. . . .” Finally, the judge rejected the argument that the waiver was unenforceable because it was vague. She noted that it clearly stated, “I . . . waive and release the MTV Sports Festival . . . and all sponsors . . . from all claims or liabilities of any kind arising from my participation in this event even though that liability may arise out of the negligence or carelessness on the part of the persons named in this waiver.” And she concluded that there was nothing vague or ambiguous about this statement. *Gambino v. Music Television, Inc.*, 932 F.Supp. 1399, 1996 U.S.Dist.LEXIS 10777 (M.D.Fla. 1996) [ELR 18:10:16]

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**Dismissal of defamation and privacy suit triggered by book *The Baby Swap Conspiracy* and TV movie *Switched at Birth* is affirmed on appeal.**

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A Tennessee appellate court has affirmed the dismissal of a defamation and privacy suit brought by Sophia J. Gibbons against those involved in writing, publishing, producing and distributing the non-fiction book “The Baby Swap Conspiracy” and the TV movie “Switched at Birth.” Gibbons claims that the book’s reference to the main character’s sister “Sophie Joanne Gibbons” is a reference to her, and that the book and movie caused her emotional distress and mental anguish because they suggested she was lost and may be dead. Gibbons’ claims against some defendants were dismissed because they had no contacts with the state of Tennessee, and thus Tennessee courts did not have personal jurisdiction over them. Gibbons’ claims against other defendants were dismissed because unrebutted declarations established that the book and movie did not in fact refer to her, and because the statute of limitations had run before Gibbons filed her lawsuit. *Gibbons v. Schwartz-Nobel*,

928 S.W.2d 922, 1996 Tenn.App.LEXIS 57 (Tenn.App. 1996) [ELR 18:10:16]

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**Photographer not joint author of book in which his photographs appeared, because he and book's publisher did not intend joint author status.** A photographer who contributed 450 photographs used in a textbook was not a “joint author” of that book, a federal District Court in Texas has ruled. As a result, the photographer is not a co-owner of book’s copyright, and is not entitled to half the profits earned by subsequent editions of the book. (Ninety percent of the photos in the initial edition of the book were taken by the photographer, and he was paid an agreed-upon fee for those. The photographer’s dispute with the publisher did not arise until subsequent editions were published, apparently without his consent.) Judge Edward Prado has granted

the publisher's motion for summary judgment, because the evidence showed that the photographer and the publisher had not intended to be "joint authors" of it. It was not sufficient, Judge Prado held, that they intended to create a "unitary finished work" by merging photos with text. The question was whether "each of the collaborators intended the other to be a joint author of the work," and the evidence showed that neither the photographer nor the publisher had such an intent. *Clogston v. American Academy of Orthopaedic Surgeons*, 930 F.Supp. 1156, 1996 U.S. Dist. LEXIS 9981 (W.D. Tex. 1996) [ELR 18:10:16]

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**Denial of visas to members of Cuban musical group is upheld by federal District Court, in case brought by sponsors of group's U.S. tour.** A planned U.S. tour by the Cuban musical group Grupo Mezcla

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was canceled when five of the group's eight members were denied visas. The tour's sponsors — Accion Latina, Pastors for Peace, and Global Exchange — challenged the government's visa decision in federal District Court in San Francisco, because at least one performance was to have taken place at a festival in that city. Visas were denied to the group's members under a Proclamation signed by President Ronald Reagan in 1985 which "suspended" entry into the U.S. by individuals who the Secretary of State considers to be "officers or employees of the Government of Cuba or the Communist Party of Cuba." In an opinion that carefully analyzes the nuances of immigration law, Judge Vaughn Walker has rejected some of the tour sponsors' arguments. As a result, Judge Walker has granted parts of the government's motion for summary judgment, ruling that the Presidential Proclamation relied on by the government is not invalid, and the government did not

violate the law by unduly delaying its consideration of the group's visa requests. (The judge denied "without prejudice" other parts of the government's motion.) *Encuentro Del Canto Popular v. Christopher*, 930 F.Supp. 1360, 1996 U.S. Dist. LEXIS 6740 (N.D. Cal. 1996) [ELR 18:10:16]

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**Motel s use of pirate decoder to intercept cable-TV signals violates section 553 of Communications Act, but not section 605.** TCI Cablevision of New England has won a Communications Act lawsuit against the Pier House Inn and its owners. The Inn is an ocean front motel in Narragansett, Rhode Island. In addition to the beach and ocean views, the Inn provided one further amenity for its customers: premium cable-TV channels like HBO and the New England Sports Network. While Cablevision does make these channels available to

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motels at “commercial service” rates, the Pier House Inn got them for free, using a pirate signal decoder. Doing so violated the Communications Act, and Cablevision has been awarded \$20,507 in damages as a result: \$5,000 in statutory damages; \$5,000 in enhanced damages because the violation was willful and for commercial purposes; \$10,000 in attorneys fees; and \$507 in costs. All of these damages were awarded under section 553 of the Communications Act which clearly applies to the unauthorized interception of cable-TV signals. Cablevision had sought damages under a different section of the Act — section 605 — because it provides for greater damages than section 553. However on its face, section 605 applies only to the unauthorized interception of satellite signals, not cable signals. Despite the wording of section 605, the Second Circuit has held that it applies to cable as well as satellite signals; and the Supreme Court has declined to review that ruling (*ELR*

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18:5:19, 18:7:32). Cablevision relied on that Second Circuit case in its lawsuit against the Pier House Inn. But Judge Mary Lisi — who sits in the federal District of Rhode Island, in the First Circuit — declined to follow it. *TCI Cablevision of New England v. Pier House Inn, Inc.*, 930 F.Supp. 727, 1996 U.S. Dist. LEXIS 9939 (D.R.I. 1996) [ELR 18:10:17]

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### **Previously Reported:**

The decision of the Texas Court of Appeals in *Ichiban Records, Inc. v. Rap-A-Lot Records, Inc.* (ELR 17:5:9) has been published at 933 S.W.2d 546 (Tex.App. 1996). This is the case in which the Texas appellate court vacated an injunction that had barred rapper “Willie D” from breaching his contract with Rap-A-Lot Records, on the grounds that the contract period

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was indefinite and the record company could terminate it at any time. The contract in question appeared to contain industry-standard terms; and thus the case was of interest to the entire record industry, in and outside of Texas. Nevertheless, the appellate court initially ordered that its decision not be published. Apparently, the importance of the case was brought to the court's attention, because after the court denied the record company's request for rehearing, the court authorized publication of its decision. [ELR 18:10:17]

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## **DEPARTMENTS**

### **In the Law Reviews:**

The Harvard Journal of Law and Technology has published a Special Issue: Harvard Conference on the Internet and Society with the following articles:

*Brains and Other Paraphernalia of the Digital Age* by David Nimmer, 10 Harvard Journal of Law & Technology 1 (1996)

*Intellectual Property Policy Online: A Young Person's Guide* by James Boyle, 10 Harvard Journal of Law & Technology 47 (1996)

*The Day the Internet Met the First Amendment: Time and the Communications Decency Act* by Charles Nesson and David Marglin, 10 Harvard Journal of Law & Technology 113 (1996)

*The Digital Reformation: Total Freedom, Risk, and Responsibility* by Steven McGeady, 10 Harvard Journal of Law & Technology 137 (1996)

The Connecticut Law Review has published a series of articles on the Telecommunications Act of 1996 including the following:

*The Telecommunications Act of 1996* by Thomas G. Krattenmaker, 29 Connecticut Law Review 123 (1996)

*Comments on The Telecommunications Act of 1996* by Thomas G. Krattenmaker by Loftus E. Becker, Jr., 29 Connecticut Law Review 175 (1996)

*Universal Service Provisions: The Ugly Duckling of the 1996 Act* by Angela J. Campbell, 29 Connecticut Law Review 187 (1996)

*The 1996 Telecom Act: Cutting the Competitive Gordian Knot* by Henry Geller, 29 Connecticut Law Review 205 (1996)

*Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker* by Thomas W. Hazlett, 29 Connecticut Law Review 217 (1996)

*Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996* by Lili Levi, 29 Connecticut Law Review 243 (1996)

*The New Communications Act: A Second Opinion* by Glen O. Robinson, 29 Connecticut Law Review 289 (1996)

*The Telecommunications Act of 1996: A State Perspective* by Phillip Rosario and Mark F. Kohler, 29 Connecticut Law Review 331 (1996)

*Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996* by Matthew Spitzer, 29 Connecticut Law Review 353 (1996)

*Responses* by Thomas G. Krattenmaker, 29 Connecticut Law Review 373 (1996)

*Telecommunications Act of 1996* by Thomas G. Krattenmaker, Editor, 29 Connecticut Law Review 391 (1996)

*The Telecommunications Act of 1996* by Thomas G. Krattenmaker, 29 Federal Communications Law Journal 1 (1996) (published by Indiana University School of Law-Bloomington, 201 South Indiana Avenue, Bloomington, Indiana 47405)

*The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway* by Robert Cannon, 49 Federal Communications Law Journal 51 (1996) (for address, see above)

*Commentary: The Communications Decency Act* by Senator Jim Exon, 49 Federal Communications Law Journal 95 (1996) (for address, see above)

*Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision* (47

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*U.S.C. section 325(B)) of the 1992 Cable Act* by Charles Lubinsky, 49 Federal Communications Law Journal 99 (1996) (for address, see above)

*Hostile Tender Offers for Companies Holding Licenses Issued by the Federal Communications Commission* by Stephen F. Sewell, 49 Federal Communications Law Journal 167 (1996) (for address, see above)

*Creating Local Competition* by Joseph Farrell, 49 Federal Communications Law Journal 201 (1996) (for address, see above)

*Pornography Drives Technology: Why Not to Censor the Internet* by Peter Johnson, 49 Federal Communications Law Journal 217 (1996) (for address, see above)

*Foreign Ownership of Broadcasting: The Telecommunications Act of 1996 and Beyond* by W. Scott Hastings, 29 Vanderbilt Journal of Transnational Law 817 (1996)

The University of San Francisco Law Review has published a Symposium: Picturing Justice: Images of Law and Lawyers in the Visual Media with the following articles:

*Introduction* by Richard K. Sherwin, 30 University of San Francisco Law Review 891 (1996)

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