LEGAL AFFAIRS

Superstation Era May be Coming to an End
by Philip R. Hochberg

The end of an era? Or the end of an error?

December 31, 1997 may have marked the "beginning of the end" of the cable superstation, those local independents seen for the last twenty years on cable systems across the country.

On the last day of last year, WTBS, the Atlanta superstation, available to more than 70 million subscribers, converted itself to a proprietary service. Systems desiring to carry the station - which will still be available over-the-air in Atlanta - now have to negotiate for the right to carry it and will pay nearly three times more than they were paying.

Why would they? Primarily because the system can insert advertising when carrying TBS as a proprietary service, forbidden when carrying the very same programming as a distant signal. But to add to the confusion, under the copyright law, the station still can be carried as a distant signal - if the cable system can figure out how to transport the over-the-air signal from Atlanta.

The beginning

This is just the latest twist in the 40-year history of cable systems importing distant signals. Two Supreme Court cases in 1968 (Fortnightly Corp. v. United Artists Television) and 1974 (Teleprompter Corp. v. CBS) had raised problems with their continued carriage, but the passage of the Copyright Reform Act in 1976 legalized distant signal importation. Congress adopted a compulsory license scheme: copyright owners were compelled to offer their programming to cable systems, while cable systems, if choosing to carry the programs, were compelled to pay for that programming at a statutorily-set fee. Cable operators couldn't cherry-pick programming and couldn't insert commercials on the distant signals. Nevertheless, this was quite a bargain for the cable industry, which had few independent programming sources, especially for the basic tier. No negotiations, just carriage and a small payment.

Jack Valenti, then (as now) head of the Motion Picture Association of America, used to point out that cable operators spent more on postage stamps than on early programming costs.

Retransmission fees

The Copyright Act, requiring that the compulsory license fees be paid into the Copyright Office rather than to the copyright owners, created yet another dilemma which continues to this day: Who's entitled to what share of the pool? It spawned one administrative agency which has been abolished (the Copyright Royalty Tribunal) and a complicated administrative procedure to replace it (the Copyright Arbitration Royalty Panel). Claiming parties have gone through six lengthy administrative proceedings over the years - and haven't even begun to work on the proceeds from 1993 yet!

In two decades since the Copyright Revision Act, the dollars have added up. In 1978, the first year of the compulsory license, the cable industry paid about $13 million for the right to carry distant signals. By 1989, the high point, it had risen 16-fold to $208 million. Most of that was due to satellite distribution, which had started with WTBS in 1977. In the 20 years-plus of the cable compulsory license, more than two billion dollars has been paid - which sounds impressive until you realize that it has amounted to less than one per cent of the cable industry's revenues for literally hundreds of millions of hours of programming.

National advertising

Advertising played a significant role in the superstation history. In Hubbard Broadcasting, Inc. v. Southern Satellite Systems (ELR 8:8:11), a 1985 decision, the Eighth Circuit approved the covering-over of local commercials, as long as it was done by the station, not the carrier or the cable system. This "form-over-substance" decision led to dual feeds of superstation signals, one to the transmitter for local distribution and one to the satellite uplink for national distribution. But it allowed the stations to control circulation of national spots.

Superstations - such as WGN-TV - which once fought cable, soon became "passive" superstations, willing to accept the benefits of distant signal carriage and then "active" ones, seeking the distant carriage.

Moreover, the compulsory license changed the television programming industry.

Recent changes

But all of that may be on the verge of changing. Consider as well what has happened in the twelve months to superstations:

- On the last day of 1996, Advanced Entertainment Corporation (Eastern Microwave's successor) announced that it was dropping WWOR-TV, New York, from its satellite service. (It later went back on the satellite, distributed to a smaller universe by Consumer Satellite Systems, Inc.)

- WTBS, Atlanta, available to nearly 70% of the nation via cable, announced that it would convert itself to a proprietary service, as of January 1. (To offer the distant signal for even a single day in 1998 triggers six months of copyright payments from the cable operators.) This change enables Turner Broadcasting to charge cable systems for the right to carry the signal (rather than the fee being set by law) and enables those cable systems to sell advertising on the channel (currently prohibited by the Copyright Act). Reportedly, clearing the rights to carry Atlanta Braves games - a major component of the station's programming - was the last stumbling block.

- WGN-TV, Chicago, available to more than 43 million homes, suffered a severe setback in late 1996 when TCI announced it would drop the Chicago station on many of its systems, citing the loss of Chicago Bulls games in the national feed. After the settlement of the

Bulls case with the National Basketball Association restored 15 games last season to the satellite feed (ELR 18:7:12), TCI reconsidered on systems serving some two million subscribers in the Midwest. WGN-TV now is advertising, seeking to pick up systems which will no longer carry TBS as a superstation.

The future

But what does it all mean? Are new superstations in the offing? How does the 1992 statutory requirement of "retransmission consent" come into play? How about the emergence of huge numbers of niche programmers willing to pay operators to gain access to the systems?

One thing is for certain: the cable industry - as well as the satellite industry - will continue to fight hard on the legislative front to keep the legislative right to carry superstations. Why?

Simple enough: it's inexpensive programming that has appeal to their subscribers. Wouldn't anyone seek to continue a subsidy that their industry has received for years? Why give it up without a fight?

As they used to say in the days of radio drama shows, "Stay tuned."

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[ELR 19:10:5]

WASHINGTON MONITOR

Copyright Office announces increase in fees payable by record companies to music publishers under compulsory mechanical license provision of Copyright Act

The Copyright Office has announced an increase in the statutory mechanical royalty rates payable by record companies to music publishers under the compulsory license found in section 115 of the Copyright Act. For every recording made and distributed on or after January 1, 1998, the royalty payable to the owner of the copyright to each song on the recording is 7.1 cents or 1.35 cents per minute of playing time (or fraction of a minute), whichever amount is greater.

The prior rate, which was in effect during 1996 and 1997, was 6.95 cents per song or 1.3 cents per minute. From 1909 through 1977, the statutory mechanical rate was only 2 cents per song per recording. Since then, the rate has been increased eleven times, including the most recent increase. (ELR 17:7:21)

This latest increase in the statutory rate is the result of a joint proposal made by the National Music Publishers' Association, the Songwriters Guild of America, and the Recording Industry Association of America.

The new rate will remain in effect for two years. Beginning January 1, 2000, the rate will increase again, to 7.55 cents per song or 1.45 cents per minute. Beginning January 1, 2002, it will be 8.0 cents per song or 1.55 cents per minute. Beginning January 1, 2004, it will be 8.5 cents per song or 1.65 cents per minute. And beginning January 1, 2006, the rate will be 9.1 cents per song or 1.75 cents per minute.

These rates apply only when record companies choose to rely on the compulsory mechanical license provisions of the Copyright Act, and when voluntary license agreements simply incorporate the "statutory rate" by reference. Copyright law, however, does not compel record companies to rely on the compulsory mechanical license, and quite often, they do not. Instead, record companies and music publishers frequently negotiate mechanical licenses, including the fees to be paid. As a consequence, record companies often pay less than the compulsory mechanical license fee - say three-quarters of the compulsory license rate.

Also, this new rate applies only in connection with the distribution of physical recordings. It does not apply, in other words, in connection with the distribution of records by "digital transmissions." The distribution of records by "digital transmission" - over the Internet, for example - was anticipated and provided for by Congress in the Digital Performance Right in Sound Recording Act of 1995. (See "A New Music Law for the Age of Digital Technology," by Lionel S. Sobel (ELR 17:6:3)) That Act provides a method for establishing the compulsory mechanical license fee rates for records distributed by "digital transmission." The Copyright Office has initiated proceedings for setting those rates; but those proceedings have not been completed yet.

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, amending 37 CFR section 255.3, Copyright Office, Library of Congress, 63 Federal Register 7288 (Feb. 13, 1998) [ELR 19:10:7]

Federal Communications Commission approves TV industry's voluntary program rating system, and orders TV manufacturers to install V-chips

The Federal Communications Commission has approved the television industry's "TV Parental Guidelines" - a voluntary program rating system created by the National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America.

At the same time, the FCC has adopted technical rules that require television receivers with 13-inch (or larger) picture screens to be equipped with features - commonly referred to as "V-chip" technology - to block the display of television programming with certain ratings.

The FCC's approval of the industry's Parental Guidelines is significant, because one provision of the massive Telecommunications Act of 1996 (ELR 17:11:14) gave the FCC the power to adopt a television programming rating code of its own, unless the television industry itself adopted "voluntary rules" for rating programs. The industry's Guidelines are the "voluntary rules" referred to in the Telecommunications Act. So the FCC's approval of those Guidelines makes an FCC-adopted code unnecessary and perhaps without statutory authority.

The TV Parental Guidelines involve a rating system consisting of six descriptive labels designed to indicate the appropriateness of television programming according to age and/or maturity; content indicators concerning sexual situations, violence, language or dialogue; an agreement to transmit the program's rating as part of the program signal itself; the display of on-screen rating icons and indicators; and the establishment of an Oversight Monitoring Board. The Guidelines will apply to all television programming except for news, sports, and unedited MPAA rated movies on premium cable channels.

The Guidelines that won FCC approval are not those that were originally proposed by the industry. The industry's original proposal consisted of ratings to indicate the appropriateness of programming for viewers according to their age and maturity. (ELR 18:8:7) This proposal was harshly criticized by advocacy organizations outside the television industry who complained that it did not provide parents with enough information about the nature of the content of programs. Critics said they preferred a system that separately rated each program's violence, language and sexual content, in addition to the overall age-suitability rating proposed by the industry.

As a result of discussions between the industry and those critics, the industry's guidelines were revised in August 1997 to add additional letters to the ratings indicating whether individual programs contain sexual situations, violence, course language or suggestive dialogue.

The FCC-approved Guidelines are these:

For 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 fantasy or 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. Note: For those programs where fantasy violence may be more intense or more combative than other programs in this category, such programs will be designated TV-Y7-FV.

For programs designed for the entire audience, the general categories are:

- 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 contains material that parents may find unsuitable for younger children.) Many parents may want to watch it with their younger children. The theme itself may call for parental guidance and/or the program contains one or more of the following: moderate violence (V), some sexual situations (S), infrequent coarse language (L), or some suggestive dialogue (D).

- TV-14 (Parents Strongly Cautioned - This program contains 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 contains one or more of the following: intense violence (V), intense sexual situations (S), strong coarse language (L), or intensely suggestive dialogue (D).

- TV-MA (Mature Audience Only - This program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17.) This program contains one or more of the following:

graphic violence (V), explicit sexual activity (S), or crude indecent language (L).

The rating icons and associated content symbols will appear for 15 seconds at the beginning of all rated programming. Under the TV Parental Guidelines, the rating guidelines will be applied to television programs by broadcast and cable networks and producers, but television stations retain the right to substitute the rating they deem appropriate for their audience. Cable networks and television stations will provide rating information to newspapers and publishers of printed and electronic program guides, and will request that these publishers include the appropriate information in their guides.

The television industry has established an Oversight Monitoring Board to ensure that the rating guidelines are applied accurately and consistently to television programming. The Board will have a chairman and 23 members, including 6 members each from the broadcast television industry, the cable industry, and the program production community, and 5 non-industry members selected by the Chairman from the advocacy community. The Oversight Monitoring Board will provide information to producers and other program distributors concerning the TV Parental Guidelines, as well as address complaints and requests from the public about the TV Parental Guidelines and their implementation. The Oversight Monitoring Board will explore attitudes about the TV Parental Guidelines and the way in which they are being applied to programming, conduct focus groups and commission quantitative studies to determine whether the TV Parental Guidelines are providing useful information to parents, and consider any needed changes to them. The industry has also committed to independent, scientific research and evaluation of the rating system once the V-chip is in place.

The TV Parental Guidelines will work with the V-chip technology to permit parents to block programming with a certain rating from coming into their home. The V-chip will read information encoded in the program and will be able to block programs based on the overall age category, by the S, L, V, or D rating assigned to the program, or by a combination of the two.

Whether the Guidelines are truly "voluntary" - as Congress said they could be, in the Telecommunications Act - is being tested by NBC and BET. Those two networks have not agreed to the August 1997 revision of the Guidelines that added the sex, violence, language and dialogue indications to the original age-category ratings. One member of the FCC, Harold Furchtgott-Roth, has praised NBC and BET for exercising their right to stick with the original version of the guidelines, saying that "programming distributors should look to their own viewing audience, rather than to government, to determine what type of ratings, if any, to employ. When programmers do so, they should be commended, not condemned, for their independence of mind. That, after all, is what the First Amendment is about." On the other hand, another FCC member, Gloria Tristani, has criticized NBC and BET for doing so, saying it will make it more difficult for parents to use V-chip technology to select programs their children may watch.

In the Matter of Technical Requirements to Enable Blocking of Video Programming based on Program Ratings, and Implementation of Section 551 of the Telecommunications Act of 1996, FCC 98-36, ET Docket 97-206 (March 12, 1998) [ELR 19:10:7]

IN THE NEWS

Novelist Barbara Chase-Riboud and DreamWorks settle lawsuit alleging that movie "Amistad" infringes copyright to her book "Echo of Lions"

Barbara Chase-Riboud has settled her high-profile lawsuit against DreamWorks - the one in which she contended that the young studio's movie "Amistad" infringes the copyright to her novel Echo of Lions.

The terms of the settlement have not been disclosed. But in a statement released by DreamWorks, the novelist said: "After my lawyers had a chance to review DreamWorks' files and other documents and evidence, my lawyers and I concluded that neither Steven Spielberg nor DreamWorks did anything improper, and I instructed my lawyers to conclude this matter in a timely and amicable fashion. I think `Amistad' is a splendid piece of work, and I applaud Mr. Spielberg for having the courage to make it."

The settlement came in the wake of a federal District Court ruling denying Chase-Riboud's motion for a preliminary injunction - a motion made shortly before the movie's premier. (ELR 19:8:10) In ruling against Chase-Riboud, Judge Audrey Collins said that the novelist had "raised serious questions going to the merits of her copyright infringement claim," but had nevertheless failed to show that she was likely to succeed on the merits of her claim.

[ELR 19:10:10]

New Zealand playwrights file plagiarism suit against Twentieth Century Fox, alleging that "The Full

Monty" infringes the copyright to their play "Ladies Night"

Shortly after the settlement of the "Amistad" case, another high-profile plagiarism suit was filed - this one involving the movie "The Full Monty."

New Zealand playwrights Stephen Sinclair and Anthony McCarten allege that "The Full Monty" infringes the copyright to their 1987 play "Ladies Night."

The Entertainment Law Reporter does not ordinarily report the filing of new cases, because most are settled before any precedent-setting rulings are issued. While no rulings have been issued in this case yet, the plaintiffs' lawyers, Engel & Engel, have taken the unusual step of arranging for their complaint - and the script of their clients' play - to be posted on the World Wide Web at http://www.ladies-night.com.

Since the most important evidence in this and all other plagiarism cases are the two works in question, the availability of the "Ladies Night" script on the web, and the availability of "The Full Monty" in movie theaters, means that arm-chair plagiarism buffs can make judgments of their own about this case. Some already have, and their conclusions have been posted on the web as well.
[ELR 19:10:10]

RECENT CASES

Electronic republication of newspapers and magazines, on NEXIS and CD-ROM, does not infringe copyrights to individual articles owned by freelance writers, federal District Court rules

The electronic republication of newspapers and magazines has become commonplace. The New York Times, Newsday, and Sports Illustrated are just three of countless periodicals now available in computerized databases and on CD-ROM. The Entertainment Law Reporter is too.

But the Times, Newsday and Sports Illustrated are special, in a way they may not have preferred. They were named as defendants in a copyright infringement case brought by Jonathan Tasini and five other freelance writers whose articles were first published in hard copy (with their consent) by those periodicals, and then were republished electronically (without their consent) by NEXIS and on CD-ROM.

The case involved two groups of issues - one unique to the particular writers and periodicals involved, and one of wider significance. The unique issues involved questions of contract interpretation; and the writers won those issues. The issues of wider significance involved the interpretation of the Copyright Act itself; and the periodicals won those issues, and with them, the entire case.

The contract interpretation issue arose because Newsday and Sports Illustrated (though not the New York Times) argued that they had acquired electronic republication rights from the writers - Newsday by check endorsement, and Sports Illustrated by written contract. Federal District Judge Sonia Sotomayor disagreed, however. The check endorsement gave Newsday "first-time publication rights" and the right to include material "in electronic library archives." The Sports Illustrated contract gave it the "right to first publish." None of these phrases was broad enough to cover NEXIS and CD-ROM republication, the judge concluded.

The contract interpretation issue involved section 201(c) of the Copyright Act, the section that deals with copyright ownership in collective works. Both sides agreed that newspapers and magazines are collective works. ("Collective works" are defined by the Act to be works "such as a periodical issue . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.")

Section 201(c) offered some support to each side of the case. The writers emphasized the first sentence: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." Judge Sotomayor noted that "If the provision ended with its first sentence, plaintiffs would prevail in this action."

But section 201(c) does not end with its first sentence; it contains a second sentence on which the periodicals relied: "In the absence of an express transfer of the copyright or any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

According to the periodicals, electronic republications are "revisions," and thus they are "privileged" to include the writers' articles in electronic republications. The writers of course disagreed, arguing that section 201(c) was not intended to permit electronic revisions of collective works, and arguing that current technologies do not create such "revisions."

Judge Sotomayor has agreed with the periodicals' interpretation of section 201(c). Thus she has granted the periodicals' motion for summary judgment, has ordered the case dismissed, and has denied the writers' motion for reconsideration.

The judge concluded that the revisions permitted by section 201(c) can be in any medium and can be major revisions. The key limitation on the periodicals' privilege is the requirement that an article be reproduced "as part of" a revised version of the collective work in which the article originally appeared. According to the writers, this is not being done, because electronic republications break up newspaper and magazine issues into individual articles, each of which is stored as a separate computer file.

Judge Sotomayor disagreed that this was significant, however. She noted that all articles in each periodical issue are electronically republished, and that each article is tagged with information concerning the periodical and issue in which it appeared. Thus, she concluded, the periodicals' "original selection of articles remains evident," and thus the collective work in which the articles originally appeared is being republished.

In a motion for reconsideration, the writers also argued that the presumed privilege conferred by section 201(c) applies only when there is no agreement between a writer and collective work publisher at all. The judge however disagreed. She ruled that "in the absence of an express transfer of `more,' a publisher is presumed to acquire, at a minimum (i.e., `only'), the delineated privileges."

Judge Sotomayor acknowledged that her interpretation of section 201(c) deprives writers of "certain important economic benefits associated with their creations," - but not all benefits. "The New York Times, for instance, cannot sell a freelance article to be included in Sports Illustrated. . . . A magazine publisher cannot rework a featured article into a full length book. . . . And publishers cannot create television or film versions of individual freelance contributions to their periodicals."

These were the sorts of issues Congress addressed when it enacted section 201(c) in 1976. Online and CD-ROM publishing did not then exist. "If Congress agrees with plaintiffs that, in today's world of pricey electronic information systems, Section 201(c) no longer serves its intended purposes, Congress is of course free to revise that provision to achieve a more equitable result," the judge concluded.

Tasini v. New York Times Co., 972 F.Supp. 804, 1997 U.S.Dist.LEXIS 11988, motion for reconsideration denied, 981 F.Supp. 841, 1997 U.S.Dist.LEXIS 17140 (S.D.N.Y. 1997) [ELR 19:10:11]

Court dismisses suit alleging Time Warner Interactive's "Awesome Possum" infringes copyright to identically named character

A federal District Court in Pennsylvania has dismissed a suit alleging that Time Warner Interactive's video game and comic book character "Awesome Possum" infringes the copyright to a character created by plaintiff Paul Roginski, also called "Awesome Possum."

The evidence showed that Time Warner Interactive had come up with its "Awesome Possum" concept even before Roginski wrote his "Awesome Possum" manuscript. And there was no evidence Time Warner had access to Roginski's manuscript before the game's companion comic book was finished. Roginski argued that a copy of his manuscript may be in the Library of Congress, and that Time Warner employees may have found it there. But Judge Thomas Vanaskie ruled that this was mere speculation and could not be the basis for a finding of access.

The judge also rejected Roginski's contention that access could be inferred from "striking similarities" between his manuscript and Time Warner's comic book. The judge considered each of the asserted similarities and found none of them to be "striking."

Without access, there can be no copying; and without copying, there can be no copyright infringement. As a result, Judge Vanaskie has granted Time Warner Interactive's motion for summary judgment.

Roginski v. Time Warner Interactive, Inc., 967 F.Supp. 821, 1997 U.S.Dist.LEXIS 8979 (M.D.Pa. 1997) [ELR 19:10:12]

Sportscaster Tom Ryther wins age discrimination lawsuit against Twin Cities TV station that terminated him at age 53; en banc ruling of Court of Appeals affirms $1.25 million judgment in Ryther's favor

Sportscaster Tom Ryther has won the third round in his age discrimination lawsuit against his former station, the Twin Cities' NBC affiliate KARE 11. In an opinion by Judge Donald Lay, the Eighth Circuit Court of Appeals, sitting en banc, has affirmed its earlier ruling (ELR 8:10:14) in Ryther's favor, a ruling that itself had affirmed a $1.25 million judgment against the station because it had terminated Ryther at age 53 in violation of the federal Age Discrimination in Employment Act (ELR 16:11:15).

During oral argument before the Court of Appeals en banc, the station challenged only the sufficiency of Ryther's evidence that he had been terminated because of his age. The station, which had offered other reasons for the sportscaster's termination, argued that he had failed as a matter of law to make a "submissible case" to the jury.

A majority of the Court of Appeals disagreed, however. It recounted the facts in considerable detail, and then reviewed the legal standard that trial judges are to apply in deciding whether a plaintiff is entitled to have a jury rule on the case, or whether the trial judge should dismiss the case without sending it to a jury.

On the basis of its review, the court's majority concluded that Ryther had "produced overwhelming evidence as the elements of a prima facie case, and strong evidence of pretext [i.e., that the station's explanations for his termination were mere pretext], which, when considered with indications of age-based animus in Ryther's work environment, clearly provide sufficient evidence as a matter of law to allow the trier of fact [the jury] to find intentional discrimination."

Though Ryther was victorious, his was not an easy case. Judge James Loken filed a vigorous dissent, on two issues. He disagreed with the majority's conclusion that Ryther had presented sufficient evidence to send the case to the jury. And Judge Loken contended that the jury had been improperly instructed. The majority had concluded that read as a whole, the jury instructions were not an abuse of the trial judge's discretion, and thus refused to reverse on those grounds.

Ryther v. KARE 11, 108 F.3d 832, 1997 U.S.App.LEXIS 3897 (8th Cir. 1997) [ELR 19:10:12]

Television station's unlicensed broadcast of videotape of Reginald Denny beating may not have been fair use, federal Court of Appeals rules; Supreme Court denies station's petition for certiorari

In 1992, Los Angeles police officers were acquitted on charges they had beaten Rodney King. Their acquittal sparked a riot in Los Angeles that resulted in more beatings, including that of Reginald Denny. Those beatings, like King's, were caught on videotape too. The "Beating of Reginald Denny" and other scenes of the L.A. riots were taped by Los Angeles News Service, an independent newsgathering company. Los Angeles News Service makes its living by licensing rights to its news tapes to television stations and others; and that is what it did with the video it took of the Reginald Denny beating.

Television station KCAL was one of those that asked Los Angeles News Service for a license, but KCAL's request was "refused." So KCAL got a copy of the tape from another station and broadcast it a number of times on its news programs.

Predictably, Los Angeles New Service sued KCAL for copyright infringement. But KCAL won the first round. Federal District Judge Richard Gadbois granted the station's motion for summary judgment, ruling that its broadcast of the tape was a fair use, because the tape was of significant public interest and KCAL had used it for news reporting.

The second round, however, has been won by Los Angeles News Service. In an opinion by Judge Pamela Rymer, the Court of Appeals has concluded that it could not say that "fair use is the only reasonable conclusion a trier of fact could reach in this case," and thus it reversed and remanded for further proceedings.

The appellate court agreed that KCAL's use of the tape "was arguably in the public interest because it was a percipient recording of a newsworthy event." On the other hand, "KCAL's use was commercial and came in the wake of [Los Angeles News Service's] refusal of a license." Moreover, although KCAL explained that it used the tape "because it recorded news of considerable significance from the best perspective of any witness, there is no evidence that alternatives were not available (albeit from a less desirable vantage point)." Also there was "no dispute that KCAL used the heart of the tape."

The station sought review by the Supreme Court, but it has denied the station's petition for certiorari.

This case is only one of at least two copyright infringement suits Los Angeles News Service filed as a result of the unlicensed broadcast of its tape of the Reginald Denny beating. It was awarded $60,000 in statutory damages in a suit against Visnews, a television news service jointly owned by NBC, Reuters and the BBC (ELR 19:2:17). A fair use defense was rejected in that case as well.

Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119, 1997 U.S.App.LEXIS 4295 (9th Cir. 1997), cert. denied, 118 S.Ct. 81, 1997 U.S.LEXIS 4796 (1997) [ELR 19:10:13]

Pay-per-view TV company scores victories in suits against bars and restaurants that showed professional boxing matches without licenses

Joe Hand Promotions is in the business of issuing pay-per-view television licenses to bars and restaurants, authorizing them to show professional boxing matches to their patrons. The company is as aggressive in federal courts as many professional boxers are in the ring. It has to be, because many bars and restaurants have shown boxing matches without being licensed to do so.

Joe Hand Promotions' primary legal weapon is section 605 of the Communications Act which prohibits the unauthorized reception of programming. It is a weapon that usually works.

In a Pennsylvania case against Rennard Street Enterprises and others, resulting from the unlicensed exhibition of the 1995 championship fight between Riddick

Bowe and Jorge Luis Gonzalez, federal District Judge Herbert Hutton ruled that Joe Hand Promotions had standing to sue for alleged violations of section 605; and thus the judge denied the defendants' motion to dismiss.

The 1995 fight between Mike Tyson and Peter McNeeley generated two separate but similar lawsuits. In a New York case against restaurant owner Mohammed Abu Zahri and others, federal District Judge Frederick Scullin awarded Joe Hand Promotions $11,000 in statutory damages and $1,175 in attorneys fees. And in a Pennsylvania case against Burg's Lounge and others, federal District Judge Curtis Joyner awarded the company $2,000 in statutory damages against each of the taverns it had sued there.

Joe Hand Promotions has lost one case, on statute of limitations grounds. That case was the result of several Louisiana bar owners, including one named Larry Lott, showing the 1995 Whitaker-Vasquez fight without licenses. Joe Hand filed its suit almost a year and a half after the fight took place. District Judge Ginger Berrigan ruled that the federal Communications Act does not contain its own statute of limitations. She therefore "borrowed" Louisiana's one-year limitations period for "tort" cases, and dismissed the case on the grounds it was filed too late.

Joe Hand Promotions v. Rennard Street Enterprises, Inc., 975 F.Supp. 746, 1997 U.S.Dist.LEXIS 12789 (E.D.Pa. 1997); *Joe Hand Promotions v. Abu Zahri*, 969 F.Supp. 849, 1997 U.S.Dist.LEXIS 11766 (N.D.N.Y. 1997); *Joe Hand Promotions v. Burg's Lounge*, 955 F.Supp. 42, 1997 U.S.Dist.LEXIS 2450 (E.D.Pa. 1997); *Joe Hand Promotions v. Lott*, 971 F.Supp. 1058, 1997 U.S.Dist.LEXIS 6609 (E.D.La. 1997) [ELR 19:10:13]

Savannah State College wins dismissal of lawsuit filed by terminated basketball coaches

Phillip Wallace had the best winning percentage of any women's head basketball coach in the history of Savannah State College, until he was terminated in 1995 "for possible NCAA violations." Wallace's assistant coach, Lasonya Stovall, was terminated too, for the same reason.

In response, both sued the college's Board of Regents, alleging several theories. Among their causes of action were those for unconstitutional interference with their property and liberty interests, denial of due process, and violation of the Equal Pay Act and Title VII.

Their case, however, has been dismissed. Federal District Judge John Nangle considered but rejected all of their claims, and the judge has granted the Regents' motion for summary judgment.

Wallace v. Board of Regents of Univ. Sys. of Ga., 967 F.Supp. 1287, 1997 U.S.Dist.LEXIS 9297 (S.D.Ga. 1997) [ELR 19:10:14]

Sports memorabilia dealer is enjoined from selling Ken Griffey autographed merchandise

The Score Board, a sports memorabilia company, has been granted a preliminary injunction that prohibits Upper Deck, a competing sports memorabilia company, from selling Ken Griffey autographed merchandise to television shopping networks, catalogue companies and retail stores.

In 1994, the Major League Baseball Players Association granted the Score Board a license to sell Griffey-autographed merchandise. One clause of that license provided that Griffey, who plays center field for the Seattle Mariners, would autograph sports memorabilia items for the Score Board and would not do so for others who Griffey knew would sell them by television, catalogues or stores.

Two years later, in 1996, Upper Deck entered into a contract of its own directly with Griffey. But Federal District Judge Stanley Brotman has ruled that by doing so, Upper Deck tortiously interfered with Griffey's Player Association contract with the Score Board, and that the Score Board would suffer irreparable harm if Upper Deck were permitted to continue selling Griffey-signed merchandise in ways prohibited by the Score Board contract.

Score Board, Inc. v. Upper Deck Co., 959 F.Supp. 234, 1997 U.S.Dist.LEXIS 2803 (D.N.J. 1997) [ELR 19:10:14]

Court affirms $4 million arbitration award in favor of Mickey Mantle estate against trading card company

Federal District Judge Sidney Fitzwater has confirmed a $4 million arbitration award in favor of the Estate of Mickey Mantle against Upper Deck, a large trading card and sports memorabilia company.

The award included more than $2.7 million in actual damages for Upper Deck's breach of an Endorsement & Personal Services Agreement it had entered into with Mantle in 1992. The award also included $1 million in exemplary damages and more than $1.2 million in attorneys fees.

Upper Deck had sought to vacate the arbitration award on several grounds, all of which Judge Fitzwater rejected.

Mantle v. Upper Deck Co., 956 F.Supp. 719, 1997 U.S.Dist.LEXIS 2939 (N.D.Tex. 1997) [ELR 19:10:14]

Court of Appeals rules that trial is required in trademark infringement case between retail music stores named "Daddy's" and "Big Daddy's" because likelihood of confusion is issue of fact

The owner of a chain of retail music stores scattered throughout the Northeast is entitled to a trial on its claim that its registered trademark "Daddy's Junky Music Stores" has been infringed by an Ohio music stored named "Big Daddy's Family Music Center," a federal Court of Appeals has held.

In an opinion by Judge Cornelia Kennedy, the appellate court has ruled that "there are genuine issues of material fact regarding whether a likelihood of confusion exists" between the two names. And thus the appellate court has reversed a District Court ruling that had granted the defendant's motion for summary judgment (ELR 18:4:18).

Both courts applied the same eight-factor test in determining whether there is a likelihood of consumer confusion between "Daddy's Junky Music Stores" and "Big Daddy's Family Music Center." The District Court thought not, as a matter of law. But the Court of Appeals concluded that there could be confusion, and thus the issue could not be resolved by summary judgment.

Daddy's Junky Music Stores v. Big Daddy's Family Music Center, 109 F.3d 275, 1997 U.S.App.LEXIS 4721 (6th Cir. 1997) [ELR 19:10:15]

DEPARTMENTS

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[ELR 19:10:16]