RECENT CASES

Supreme Court rules that copyrighted goods - like recordings, videos and books - purchased abroad may be imported into and resold in the U.S. without the consent of the U.S. copyright owner; concurring opinion says Court's ruling applies only to goods manufactured in U.S., not to those made abroad

In a setback for copyright owners, the United States Supreme Court has ruled that copyrighted goods purchased abroad may be imported into and resold in the U.S. without the consent of the U.S. copyright owner.

The decision came in a case brought by the manufacturer of hair care products that were packaged in containers bearing copyrighted labels. Though shampoo and conditioner are far removed from the entertainment industry, the Supreme Court itself recognized that the issues raised by the case would affect readers of the Entertainment Law Reporter. Justice John Paul Stevens' opinion specifically stated that although the hair product labels "have only a limited creative component, our interpretation of the relevant statutory provisions would apply equally to a case involving more familiar copyrighted materials such as sound recordings or books."

At first glance, the Court's conclusion looks surprising, because a copyright owner's exclusive right to import goods into the U.S. seems to be unqualified. This is so because section 602(a) of the Copyright Act clearly states that "Importation into the United States, without the authority of the owner of the copyright . . . is an infringement of the exclusive right to distribute. . . ."

However, the scope of this right is not as sweeping as it seems at first, because of the "first sale doctrine." That doctrine is found in section 109(a) of the Copyright Act which provides that despite the exclusive right to distribute, "the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose" of it.

The question that has been presented to courts many times in many contexts is whether the exclusive right to import applies even to goods that have been purchased abroad (despite the first sale doctrine), or whether instead the first sale doctrine applies to goods purchased abroad and thus permits them to be imported even without the consent of the copyright owner. Over time, court decisions have worked out an accommodation of these two sections, so both have been given effect.

Thus, earlier cases had held that goods manufactured and purchased abroad could not be imported into the U.S. without the copyright owner's consent, for two reasons: the first sale doctrine (like the rest of the Copyright Act) simply does not apply abroad; and this result is the only way to give effect to the copyright owner's exclusive right to import.

On the other hand, earlier cases had held that if goods are manufactured in the United States and then sold to a foreign buyer, they may be purchased from that buyer and imported into the U.S. without the copyright owner's consent. Courts have given two reasons for this result as well: the first sale doctrine applies to all goods that are first sold in the United States, even those that are then shipped abroad; and this result still permits copyright owners to get the benefit of copyright ownership when they decide on the price to be charged when they make that first sale. One such decision was rendered in 1988 by the Third Circuit Court of Appeals in Sebastian Int'l v. Consumer Contacts.

The Ninth Circuit Court of Appeals upset this accommodation, however, in a case brought by L'anza Research International, the manufacturer of hair care products bearing copyrighted labels, against Quality King Distributors, a company that imported L'anza's hair care products from abroad without L'anza's consent. The Ninth Circuit ruled that Quality King's unauthorized importation of L'anza's products infringed L'anza's exclusive importation right, even though L'anza's products were manufactured in the United States, and were sold and shipped abroad before Quality King purchased them abroad and then imported them back into the U.S. to sell them here. (ELR 19:2:15) In an opinion by Judge Dorothy Nelson, the Ninth Circuit explicitly "decline[d] to adopt the approach taken by the Third Circuit in Sebastian." This created a conflict between the Third and Ninth Circuits which the Supreme Court granted cert to resolve.

The Supreme Court has resolved the conflict by agreeing with the Third Circuit and reversing the Ninth. Justice Stevens ruled that "After the first sale of a copyrighted item `lawfully made under this title,' any subsequent purchaser, whether from a domestic or from a foreign reseller, is obviously an `owner' of that item," and thus, under section 109 (the first sale doctrine) "`is entitled, without the authority of the copyright owner, to sell' that item." Section 602 (the exclusive right to import), Justice Stevens added, "is simply inapplicable to both domestic and foreign owners of L'anza's products who decide to import them and resell them in the United States."

Editor's note: The Supreme Court's decision does not sanction the importation of pirated goods made abroad. Justice Steven made this clear in a footnote in which he explicitly stated that "The first sale doctrine of [section] 109(a) does not protect owners of piratical copies, of course, because such copies were not `lawfully made.'" On the other hand, the impact of the Supreme Court's decision on the unauthorized importation of goods legitimately manufactured abroad is not clear from Justice Stevens' opinion alone. Fortunately, this ambiguity was sensed by Justice Ruth Bader Ginsburg, and she added a short concurring opinion calling attention to the fact that "This case involves a `round trip' journey, travel of the copies in question from the United States to places abroad, then back again." In a significant sentence, she stated "I join the Court's opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad." Thus, it appears that the Supreme Court's decision restores an accommodation between the first sale doctrine and the exclusive right to import that gives effect to both. Thus, when copyrighted goods are manufactured abroad and first sold abroad, they may be imported into the United States only with the authorization of the U.S. copyright owner; importation of foreign-made goods without the authorization of the U.S. copyright owner would infringe the U.S. copyright.

Quality King Distributors, Inc. v. L'anza Research International, Inc., 118 S.Ct. 1125, 1998 U.S.LEXIS 1606 (1998) [ELR 19:11:4]

In negative pickup deal for movie "The Grass Harp," security interests of distributor and completion bond company were not superior to interest of production company's judgment creditor; distributor and bond company lose effort to prevent sheriff's sale of negative and other film materials to satisfy

Walter Matthau and Jack Lemmon have starred together in a series of "odd couple" themed comedies that have been produced and financed by major studies. Several years ago, however, they co-starred (along with Sissy Spacek, Piper Laurie and others) in a movie of a different type - an independently-financed movie called "The Grass Harp," based on a Truman Capote novel.

"The Grass Harp" was a relatively small budget affair. Grass Harp Productions, the movie's producer, borrowed some $9 million from Banque Paribas in a customary "negative pickup" deal. New Line was the movie's distributor, and Motion Picture Guarantors, Ltd., provided the completion bond. These arrangements were documented with contracts that movie lawyers know well - but which were described as a "tangled web of contractual relationships" by a judge who later reviewed them.

The judge in question was Justice Roger Boren of the California Court of Appeal. He got involved because of a lawsuit filed by Solomon LeFlore who had helped Grass Harp Productions obtain some of its financing. LeFlore, it seems, was entitled to expense reimbursement and a fee for his services, only a small part of which Grass Harp Productions actually paid him. As a result, LeFlore sued Grass Harp for breach of contract, and a $183,325 judgment was entered by stipulation. In an effort to collect on his judgment, LeFlore then had the Los Angeles Country Sheriff serve a writ of execution on the film laboratory holding the movie's negative and other film elements. Next, the Sheriff would have sold those film elements to the highest bidder, and LeFlore would have gotten the money.

After the Sheriff served the writ, but before the film elements were sold, New Line and Motion Picture Guarantors filed claims with the California Superior Court, asserting perfected security interests in the movie's negative and film elements which they argued were superior to LeFlore's interest. What they sought was an order that would have stopped the Sheriff's sale and given them possession of the film elements.

Banque Paribas wasn't involved in those proceedings, because by that time, its loan had been repaid by New Line, just as the negative pickup deal had contemplated. By then, it was New Line and Motion Picture Guarantors who were unrecouped. Nevertheless, the

Superior Court denied their claims; and in an opinion by Justice Boren, the Court of Appeal has affirmed.

The Court of Appeal has held that New Line had not perfected its security interest, in part because the UCC-1 (the financing statement filed to perfect security interests) named New Line Productions as the secured party, while the company that actually repaid Banque Paribas appears to have been New Line Cinema (the parent corporation of New Line Productions). New Line argued that "`there is no legal significance' that a subsidiary corporation rather than a parent corporation is listed on a UCC-1 financing statement because the security interest can be imputed." But Justice Boren rejected that argument, saying "We decline this invitation to allow `New Line' and its subsidiaries to recast themselves when convenient in order to prevail."

Motion Picture Guarantors claimed that over-budget expenses it had paid were covered by its security interest. But Justice Boren ruled otherwise, because the security agreement identified the types of payments secured by the bond company's security interest, and the bond company had not shown that any of the overbudget payments it had made were the types of payments described in the security agreement. (The identified payments included those the bond company would make if it had to "take over" production of the film; but apparently the bond company did not take over production of "The Grass Harp" even though it went over budget and the bond company had to pay production expenses as a result.)

Editor's note: The end result of this case is surprising. If there are lessons to be learned from it, they are these: (1) security agreements and UCC-1s must accurately reflect the exact name of the actual creditor; and (2) security agreements must unambiguously identify all of the advances made (or to be made) to the debtor by the creditor that are to be covered by the security agreement. What ultimately happened to the negative and film elements of "The Grass Harp" is not, of course, reported by Justice Boren's decision, because what ultimately happened to them had to occur after the decision was rendered. However, the decision was not a complete victory for LeFlore, because all the decision created was a standoff between him and New Line. As Justice Boren himself noted, the "film negative . . . does not carry the underlying rights of exploitation and distribution." So LeFlore couldn't distribute the movie himself or license anyone else to do so. On the other hand, if New Line actually needed the negative or other elements for any reason, it couldn't get them without buying them at the Sheriff's sale.

LeFlore v. Grass Harp Productions, Inc., 67 Cal.Rptr.2d 340, 1997 Cal.App.LEXIS 716 (1997) [ELR 19:11:5]

Sondra Locke entitled to trial against Warner Bros. in breach of contract and fraud case based on development deal entered into after Locke's breakup with Clint Eastwood; appellate court rules that Locke raised issues of fact about whether studio had bona fide and genuine reasons for rejecting her movie proposals

A romance began between Clint Eastwood and Sondra Locke in 1975 when the two appeared together in "The Outlaw Josey Wales." Their romance lasted for more than a decade and left a two-fold legacy: several films in which both appeared; and a published judicial ruling on a studio's obligations to those with whom they enter into so-called "development deals."

Locke and Warner Bros. entered into a development deal in 1990. Their agreement provided that she would be paid $250,000 a year for three years in return for her giving Warner Bros. a "first look" at any movies she wanted to develop before she submitted them to other studios. Their agreement also included a "pay or play" directing deal pursuant to which she was to be paid $750,000 whether or not she actually directed a movie.

Warner in fact paid Locke the full $1.5 million called for by her deal. It also provided her with an office on the lot and an administrative assistant. But Warner did not develop any of her proposed projects or hire her to direct any movies.

Locke contends that the development deal was a "sham," secured for her by Eastwood in exchange for her dropping a lawsuit she had filed against him after their breakup. According to Locke, Warner Bros. never intended to make any films with her, and the studio's only reason for entering into the agreement was to help Eastwood settle the lawsuit she had filed against him.

Since Warner Bros. had paid Locke all she was entitled to receive under her contract, the studio made a motion for summary judgment which was granted by California Superior Court Judge Thomas Murphy. Judge Murphy reasoned that a "judge or jury cannot and should not substitute its own judgment for a film studio's when the studio is making the creative decision of whether to develop or produce a proposed motion picture. Such highly-subjective artistic and business decisions are not proper subjects for judicial review."

The California Court of Appeal has reversed, however. In an opinion by Justice Joan Dempsey Klein, that court has said that Judge Murphy's "ruling missed the mark by failing to distinguish between Warner's right to make a subjective creative decision, which is not reviewable for reasonableness, and the requirement the dissatisfaction be bona fide or genuine."

According to Justice Klein, Locke had raised triable issues of fact about whether Warner Bros. had evaluated Locke's movie proposals on their merits. "If Warner acted in bad faith by categorically rejecting Locke's work and refusing to work with her, irrespective of the merits of her proposals, such conduct is not beyond the reach of the law," the Justice said.

Justice Klein rejected Warner Bros.' contention that by paying Locke the full $1.5 million called for by her contract, it had done all that was required of it. Instead, the Justice agreed with Locke that "the value in the subject development deal was not merely the guaranteed payments under the agreement, but also the opportunity to direct and produce films and earn additional sums, and most importantly, the opportunity to promote and enhance a career."

In so ruling, Justice Klein distinguished Third Story Music v. Waits (ELR 18:2:12) in which the California Court of Appeal had ruled that Warner had not breached an implied covenant of good faith and fair dealing when it decided not to license the re-release of certain Tom Waits recordings. According to Justice Klein, the contract in that case expressly gave Warner the right to refrain from marketing those recordings, and thus the implied covenant of good faith and fair dealing did not limit the discretion given to Warner in connection with its decisions concerning the Waits recordings.

"The Locke/Warner agreement did not give Warner the express right to refrain from working with Locke. Rather, the agreement gave Warner discretion with respect to developing Locke's projects," Justice Klein reasoned. "The implied covenant of good faith and fair dealing obligated Warner to exercise that discretion honestly and in good faith. . . . Whether Warner violated the implied covenant and breached the contract by categorically refusing to work with Locke is a question for the trier of fact."

Justice Klein also concluded that Locke had presented evidence from which "a trier of fact could infer that Warner never intended to give Locke's proposals a good faith evaluation" - not even at the time it first entered into the development deal with her. For this reason, the appellate court also reversed the dismissal of her fraud claim.

Locke v. Warner Bros. Inc., 66 Cal.Rptr.2d 921, 1997 Cal.App.LEXIS 676 (1997) [ELR 19:11:6]

Time Warner cable systems agree to carry Fox News even though federal appellate court affirmed preliminary injunction won by Time Warner barring New York City from carrying Fox News on city's governmental and educational cable channels

Time Warner has agreed to carry Fox News on cable systems owned by Time Warner in New York City and elsewhere, as a result of the settlement of lawsuits that erupted when Time Warner originally decided to carry MSNBC on its New York cable systems instead of Fox News. The lawsuits involved a fascinating array of First Amendment, Cable Act, contract and antitrust allegations. And prior to the settlement, Time Warner appeared to have the upper hand, having won at least three major rulings from three federal courts.

The origins of the now-settled cases can be traced to Time Warner's merger with Turner Broadcasting in

1996. As a condition for its approval of that merger, the Federal Trade Commission required Time Warner cable systems to carry an all-news channel in addition to (or instead of) CNN, which is Turner's all-news cable channel and is the one that would be owned by the merged company. According to the FTC, this would enable other all-news cable channels to compete with CNN - something they might not have been able to do successfully if all Time Warner's cable systems carried CNN exclusively simply because CNN became part of the Time Warner corporate family. (See, "Legal Hurdles to `Strategic Visions' in the Entertainment Industry: A Look at the Time Warner - Turner Broadcasting Merger," by Lionel S. Sobel, ELR 18:5:5)

At the time the FTC imposed this requirement on Time Warner, there were two newly-created all-news cable programs eagerly seeking channel space: MSNBC, owned by Microsoft and NBC; and Fox

News, owned by News Corp. In order to satisfy the FTC, Time Warner merely had to carry one of these channels; and it selected MSNBC rather than Fox News, for Time Warner's New York City cable systems.

Fox News is headquartered in New York City, and for that and perhaps other reasons, the City wanted Time Warner to carry Fox News too. New York City even offered to give up one of its own governmental and educational cable channels on Time Warner's cable systems in order to make room for Fox News; but Time Warner declined the City's offer. Ultimately, the City decided to use two of its own Time Warner cable channels for all-news programming: one for Bloomberg TV's business news channel, and another for Fox News. This was done without Time Warner's consent; and it responded by taking its complaints to federal court.

Federal District Judge Denise Cote granted Time Warner's motion for a preliminary injunction, barring

New York from carrying Bloomberg or Fox News on the City's educational and governmental cable channels. The judge did so largely on the grounds that the City had violated a provision of the Cable Communications Policy Act of 1984 that protects the editorial discretion of cable operators (like Time Warner), and on the grounds that the City had violated Time Warner's First Amendment rights.

That preliminary injunction was affirmed by the Second Circuit Court of Appeals, though on somewhat different grounds. In an opinion by Judge Jon O. Newman, that court held that the City's use of its educational and governmental channels on the Time Warner cable systems violated provisions of the City's cable franchise agreements with Time Warner. Judge Newman concluded that those franchise agreements "do not authorize the City to use [its cable channels] for programming beyond the categories of `educational' and `governmental' as those terms are used in the [Cable] Act," and that "Fox News and [Bloomberg TV] were not within these categories, even if in some circumstances [those] channels may properly be used for programming that is in some sense `commercial.'"

In a separately filed but related case, Fox News accused Time Warner of antitrust violations, based on its refusal to carry Fox News. Not to be outmaneuvered, Time Warner counterclaimed with allegations that Fox News had conspired with New York City to deprive Time Warner of First Amendment, Due Process and statutory rights. Fox News' motion to dismiss that counterclaim - on the grounds that it was barred by the Noerr-Pennington doctrine which prevents suits interfering with the right to petition the government - was denied. Federal District Judge Jack Weinstein ruled that Fox's alleged activities went outside of activity protected by the doctrine.

Editor's note: These cases were settled just a few weeks after the Second Circuit affirmed the preliminary injunction Time Warner had won - leaving outsiders to speculate why Time Warner had acquiesced after doing so well in court. Three reasons have been suggested. News Corp. reportedly agreed to pay Time Warner $10 per subscriber to carry Fox News - much more than other programmers pay. Time Warner decided to convert WTBS from a "superstation" to a regular cable channel (see, "Superstation Era May be Coming to an End," by Philip R. Hochberg, ELR 19:10:5); but since WTBS carries Atlanta Braves games, and since Fox Broadcasting has a contract with Major League Baseball, Fox could have blocked the WTBS conversion. And Time Warner's cable franchises in New York City will soon expire, so reconciliation with the City was important.

Time Warner Cable of NYC v. Bloomberg L.P., 118 F.3d 917, 1997 U.S.App.LEXIS 16283 (2d Cir. 1997); *Fox News Network v. Time Warner Inc.*, 962 F.Supp. 339, 1997 U.S.Dist.LEXIS 4588 (E.D.N.Y. 1997) [ELR 19:11:7]

Scotti Brothers Records wins dismissal of many, but not all, claims made by Beaver Brown Band's John Cafferty, sparked by failure to pay royalties on "Eddie and the Cruisers" and other albums

John Cafferty and Scotti Brothers Records appear to have had a good relationship at the start, back in the 1980s. Those were the days when Cafferty and his Beaver Brown Band wrote and recorded the soundtracks for the "Eddie and the Cruisers" movies - soundtracks that were licensed to Scotti Brothers for release as albums.

The first of these soundtrack albums did so well, eventually selling more than two million copies domestically, that Scotti Brothers signed Cafferty to a recording agreement for Beaver Brown Band albums that were unrelated to the fictional "Eddie and the Cruisers" band. Unfortunately, the Beaver Brown Band albums - "Tough All Over" and "Roadhouse" - did not do as well as hoped, and that may have been when Cafferty's relationship with Scotti Brothers began to turn sour.

In a nutshell, what happened was this. Scotti Brothers released four more "Eddie and the Cruisers" albums consisting of outtakes, cues and demos from the movies, recordings of live Beaver Brown Band performances, and cuts from "Tough All Over" and "Roadhouse." While this may have been a masterstroke of marketing on Scotti Brothers' part, two things allegedly slipped through the cracks: permissions from Cafferty, and the payment of royalties.

As a result, Cafferty filed suit against Scotti Brothers, alleging a total of 19 separate claims for copyright infringement, unfair competition, breach of contract, breach of fiduciary duty, and unauthorized use of name and likeness. In response to cross motions for partial summary judgment, federal District Judge Denny Chin has dismissed many, but not all, of Cafferty's claims.

What appears to remain, in wake of the judge's long, detailed and methodical opinion, are Cafferty's claims for unpaid mechanical and performer's royalties, a claim for mislabeling "Beaver Brown Band" recordings as "Eddie and the Cruisers" recordings, and a claim for the unauthorized use of Cafferty's name and likeness. Those claims may involve a lot of money; it's difficult to tell how much from the published opinion. However, what is likely to be of greater interest to others in the music industry are those claims that were dismissed.

Cafferty's copyright claims asserted that Scotti Brothers continued to sell albums of songs Cafferty had written, even after Cafferty had given the record company notice of its failure to pay mechanical royalties. According to a provision of the mechanical license agreements between Cafferty and Scotti Brothers, the licenses "automatically terminated" 30 days after the notice, because Scotti Brothers failed to remedy the "default."

If the mechanical license agreements were all that were involved, Cafferty may have won. But by their own terms, the mechanical licenses did not affect "any prior agreements"; and there were two such prior agreements. With respect to some songs, there was a prior license that "irrevocably" granted the movie's producer and its "licensees" the right to sell recordings of those songs. Scotti Brothers was a licensee of the movie producer, and thus Judge Chin ruled that its license could not be revoked, even for non-payment of royalties. With respect to other songs, there was a prior agreement that made Scotti Brothers a co-owner of their copyrights; and as a co-owner, it could not infringe its own copyrights.

The judge also dismissed Cafferty's claim for royalties on recordings that Scotti Brothers had given away free for promotional purposes, because "the underlying contracts clearly do not obligate Scotti to pay royalties on such `free goods.'"

Cafferty's attempt to rescind his contracts with Scotti Brothers failed, despite his seemingly sound argument that the record company's failure to pay royalties went "to the heart of its contractual relationship with Cafferty. . . ." Judge Chin said, however, that the "law is clear" that rescission is not an appropriate remedy in a case like this. The judge cited Nolan v. Sam Fox Publishing Co., 499 F.2d 1394 (2d Cir. 1974), where the court held that in the absence of fraud, contracts may not be rescinded unless no royalties at all are paid. In this case, Scotti Brothers had "made at least partial payment of the royalties due Cafferty and there is no allegation of fraud on Scotti's part."

Cafferty's breach of fiduciary duty claim also has been dismissed. Judge Chin quoted the by-now well-settled principle that "In the absence of special circumstances, no fiduciary relationship exists between a music publisher and composers as a matter of law."

The most interesting of Cafferty's remaining claims is the one for unfair competition. It is based on Scotti Brothers' re-release of the Beaver Band Brown albums under the titles "The Voice of Eddie and the Cruisers - `tough all over'" and "The Voice of Eddie and the Cruisers - Roadhouse." Although Cafferty and the Beaver Brown Band are identified by name on the albums' covers, the covers feature the likeness of the actor who played "Eddie" in the movies, even though neither of these albums had any connection with the movies at all.

Scotti Brothers says that album buyers were not confused because they are likely to have seen the movies. But the judge rejected this argument, saying that it raised questions of fact that must be decided at trial. Moreover, the judge seemed to sympathize with Cafferty, saying that "In essence, he [Cafferty] found himself competing against himself. At the same time that he was continuing to try to establish himself as a songwriter and performing artist in his own right, his songs and recordings that had nothing to do with Eddie and the Cruisers were being sold as the music of Eddie and the Cruisers."

Cafferty v. Scotti Brothers Records, Inc., 969 F.Supp. 193, 1997 U.S.Dist.LEXIS 9279 (S.D.N.Y. 1997) [ELR 19:11:8]

Suit alleging that Collin Raye's recording of "Every Second" infringed copyright to plaintiff's song "Every Minute . . . " is dismissed, because plaintiff failed to show access or striking similarity

It may pain country music fans to admit it, but the lyrics and chord progressions of their favorite songs are sometimes similar. This may be why songwriter Maree McRae concluded that her 1983 song "Every Minute, Every Hour, Every Day" had been copied by Gerald Smith and Wayne Perry when they wrote "Every Second" in 1990 - a song that was recorded by Collin Raye on his Sony Music album "All I Can Be."

Unlike others who may have attributed any similarities between the songs to elements that are common to country music in general, McRae attributed the similarities she perceived to copyright infringement. And she sued Smith and Perry, and their publishers, and Sony Music.

The defendants responded - as defendants in copyright infringement cases so often do - with a motion for summary judgment. They argued that Smith and Perry had not copied McRae's song - had not even had access to it. After a careful evaluation of the facts, federal District Judge Alan Johnson agreed, and has granted their motion.

McRae had distributed 200 to 500 tapes of her song "Every Minute . . . ," and had performed it in Colorado and Wyoming. The song also was included in a compilation tape distributed at the Rocky Mountain MusicFest and at several stores in Colorado. But there was no evidence that Smith or Perry or anyone connected to them had received any of the tapes or heard any of McRae's performances.

McRae argued that a reasonable probability of access was established merely by showing that her song had been distributed to the public. But Judge Johnson disagreed. He explained that "the public dissemination necessary to infer that a defendant might have had access to the work is considerable." The facts offered by McRae "do not begin to show wide dissemination . . . " he said. In order to infer a reasonable probability of access from dissemination, it must be shown that "the song was disseminated nationally or that it was played or heard via any national medium such as radio or television."

McRae also argued that access could be shown by evidence of striking similarity between the two songs. Judge Johnson, however, found no such similarities. True, the chord progressions of the two songs were somewhat similar. But those progressions "are the most common chord progressions in all of the music of Western civilization," he found. Also the two songs have lyrics with six words in common: "every minute, every hour and every day." But "that phrase is not unique or original. . . . That phrase appears in at least 8 songs that predate the songs at issue. In some combination or another over 100 songs written before the two at issue contain some combination of the phrases `every second,' `every minute,' `every hour,' and/or `every day' in the same context." Thus, the judge concluded that there are no striking similarities between the songs from which access could be inferred.

Editor's note: In looking for evidence of striking similarity, Judge Johnson said that there must be such similarity between "protectable elements" of the two songs. That appears inconsistent with prior striking similarity cases, though it doesn't seem to have affected the outcome of this particular case. Naturally, elements which are not protectable because they are common cannot, by definition, be evidence of striking similarity. On the other hand, some cases may involve elements that are not protectable - such as word or musical note phrases too short to be protectable, or decoy streets in a map, or factual mistakes - which may be evidence of striking similarity. Of course, even if access is inferred from striking similarities between unprotected elements, that would not be enough for the plaintiff to win the case. It would still be necessary for a plaintiff to prove substantial similarity of protectable elements, as a separate and subsequent step in the proof of infringement.

McRae v. Smith, 968 F.Supp. 559, 1997 U.S.Dist.LEXIS 9496 (D.Colo. 1997) [ELR 19:11:9]

Minor league baseball team had non-exclusive license to perform song written for it, even though team did not satisfy all terms of oral agreement with songwriter

The Miracle has won a copyright infringement lawsuit filed against it by the composer of "Cheer! The Miracle Is Here" - a promotional song written especially for the minor league baseball team. The Miracle may not have escaped all liability however; the songwriter has simply been told to pursue his claim for breach of contract in state court.

In an opinion by Judge Levin Campbell, the Eleventh Circuit Court of Appeals has ruled that the songwriter had granted the Miracle an implied non-exclusive license to perform the song at the Miracle's stadium in Ft. Myers, Florida. Thus, when the Miracle did so, no infringement of the song's copyright occurred.

The songwriter contended otherwise for two reasons: first, the team had orally agreed to reimburse him for his production costs, but didn't; and second, the team had orally agreed to give him credit whenever the song was performed, but didn't. These failures may have amounted to a breach of the parties' oral agreement, and may even have been grounds for the songwriter to rescind his implied license, Judge Campbell said, but they were not conditions that had to be satisfied before the license became effective. In so ruling, the judge cited and relied on a similar decision of the Ninth Circuit Court of Appeals in Effects Associates v. Cohen (ELR 12:4:12).

The songwriter said the Effects Associates case was different, because the oral agreement in that case was not for an exclusive license, and thus the court there could properly find an implied non-exclusive license. In this case, however, the songwriter had orally agreed to grant the team an exclusive license; so no non-exclusive license could be implied when the parties failed to document their exclusive deal in writing, as required by the Copyright Act, the songwriter contended.

Judge Campbell disagreed, however. He noted that the songwriter had given the team a tape of the song, and had urged the team to play it, even though he wasn't fully paid as promised. Moreover, it took four months for the songwriter to object to the team's continued performances of the song, even though he hadn't been paid or given credit as its author. The implied license arose from these facts, the court held, though it was non-exclusive because it wasn't in writing.

Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 1997 U.S.App.LEXIS 7625 (11th Cir. 1997) [ELR 19:11:10]

New York City Consumer Protection Act permits Department of Consumer Affairs to bring suit against seller of sports card broker training materials, customer leads and cards, and against celebrity endorser Steve Yeager, federal court rules

Former professional baseball player Steve Yeager must respond to a lawsuit filed against him by the Commissioner of New York City's Department of Consumer Affairs, as a result of his endorsement of Collectibles International, Inc., a sports collectibles company. (Collectibles International is named in the suit too.)

The Commissioner's lawsuit was sparked by more than 60 complaints from people who had purchased sports card broker training materials, customer leads, and cards from Collectibles, but apparently found they were unable to resell the cards as had been suggested by Collectible's promotional materials. Yeager was named because he had endorsed Collectibles, had appeared in its broker training material ads and videos, and had even made personal phone calls to interested customers.

Yeager made a motion to dismiss the lawsuit on the grounds that the New York City Consumer Protection Act, under which it was brought, applies only to offerings of "consumer goods or services"; and he argued that sports card broker training materials, customer leads and cards were neither.

Federal District Judge Lewis Kaplan has disagreed, however. He has concluded that "the customer leads, vocational training and materials and sports cards [Collectibles and Yeager] offered all qualify as consumer goods and services," within the meaning of the New York City Act. And thus the judge has denied Yeager's motion to dismiss.

Maldonado v. Collectibles International, Inc., 969 F.Supp. 7, 1997 U.S.Dist.LEXIS 9629 (S.D.N.Y. 1997) [ELR 19:11:11]

Playboy wins copyright case against operators of website that distributed images to subscribers that had been copied from magazine and uploaded to site

Playboy Enterprises has been awarded $310,000 plus its attorneys' fees in a copyright infringement suit against the operators of a website called Neptics. Webbworld, Inc., the corporate operator of Neptics, makes adult images available to those who pay a monthly subscription fee of $11.95. Some of the images available at the Neptics site were scanned from Playboy magazine, without the publisher's consent.

Neptics' operators denied that they had scanned images from Playboy themselves. Instead, they said they obtained material from adult newsgroups where it had been posted by persons over whom they had no control. Federal District Judge Dale Saffels was not persuaded this was relevant, however. While acknowledging that Neptics may not have any control over those who post images to the adult newsgroups from which it gets its material, "Neptics surely has control over the images it chooses to sell on the Neptics' website," the judge said. "Even the absence of the ability to exercise such control, however, is no defense to liability. If a business cannot be operated within the bounds of the Copyright Act, then perhaps the question of its legitimate existence needs to be addressed."

Judge Saffels awarded Playboy statutory damages of $5,000 for each of the infringing images Neptics had on its server. Moreover, the judge entered judgment not only against Webbworld, Neptics' corporate operator, but also against the individual who is its sole officer, director and shareholder, and the individual who runs Neptics' day-to-day operations. They were found vicariously liable for Neptics' infringements.

Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F.Supp. 1171, 1997 U.S.Dist.LEXIS 15674 (N.D.Tex. 1997) [ELR 19:11:11]

Sports agent's defamation action against ex-Buffalo Bills quarterback Jim Kelly, complaining of statements made in his autobiography "Armed and Dangerous," withstands defense motion for summary judgment; but jury ultimately finds for Kelly

When Jim Kelly played professional football for the Buffalo Bills, he led the team's offense as its quarterback. For the last few years, however, he's had to play defense. Despite playing defense aggressively, Kelly's opponent secured good field position, but in the end, was unable to score.

Lately, Kelly's opponent has been his former sports agent, A.J. Faigin. Their field of play has been a federal District Court in New Hampshire, where Faigin has sued Kelly for defamation on account of statements made in his autobiography Armed and Dangerous. Faigin complained that a six-paragraph passage in the book, which Kelly co-authored with sportswriter (and co-defendant) Vic Carucci, falsely accused Faigin of breaching his fiduciary duties while handling Kelly's affairs when Faigin was Kelly's agent.

Early in the case, Kelly and Carucci sought dismissal of the case on the grounds that the New Hampshire court did not have personal jurisdiction over them. Both live in New York, and Faigin lives in California. But 36 copies of Armed and Dangerous were sold in New Hampshire, and that was enough to confer jurisdiction, federal District Judge Shane Devine ruled (ELR 18:6:16). (Faigin also filed a separate defamation case against the book's publisher, Doubleday Dell, in federal court in Wisconsin. Initially, the publisher won dismissal of that case on statute of limitations grounds. But Faigin won a reversal of that ruling (ELR 19:2:20), so unless it has since been settled, that case is still pending.)

Compelled to litigate their defense in New Hampshire, Kelly and Carucci tried to blitz Faigin with a motion for summary judgment. But the ex-agent's line held: Judge Devine denied Kelly and Carucci's motion. The judge ruled that the book's offending passages included statements that were not mere opinions, but were instead factual allegations that could be proved true or false. The judge ruled that there were disputed issues of fact concerning whether the offending statements were true or false. The judge ruled that although Faigin is a public figure, reasonable jurors could find that Kelly (though not Carucci) knew they were false. And the judge ruled that a jury should decide whether Faigin was damaged by the book.

According to news reports (Publishers Weekly 4/27/98), the case went to trial, and the jury found that Kelly's book had not libeled Faigin after all.

Faigin v. Kelly, 978 F.Supp. 420, 1997 U.S.Dist.LEXIS 14891 (D.N.H. 1997) [ELR 19:11:11]

Defamation claims against Notre Dame, its head football coach and fan magazine, asserted by former offensive line coach following his termination, are dismissed

Joseph Moore was Notre Dame's offensive line coach for nine years, and a successful one at that. During his tenure, the Fightin' Irish offensive line was ranked in the top ten in the country. But at the end of the 1996, Notre Dame terminated Moore, for reasons that are hotly disputed.

Notre Dame has said that Moore intimidated, abused and made offensive remarks to players. Moore says Notre Dame fired him because at 64 years of age, he was "too old."

Moore's assertions are made in a lawsuit he filed under the federal Age Discrimination in Employment Act. In addition to his age discrimination claim, Moore also asserted defamation claims against Notre Dame, its head football coach Robert Davie, and the publisher of "Blue and Gold Illustrated," a publication distributed nationwide to Fightin' Irish fans.

Moore's defamation claims were based on Coach Davie's statements, printed in the "Blue and Gold," that "At 64, Moore no longer was physically capable of putting in the hours of his coaching cohorts," and that because of his age, Moore "would only be able to coach another year or two, at most."

In response to a motion made by all three defendants, federal District Judge Allen Sharp has dismissed Moore's defamation claims. The judge ruled that the objected-to statements were not defamatory, had not caused any special or specific damages, and had not been made with actual malice.

Moreover, the judge stated his "opinion that football, and specifically Notre Dame football is a matter of public interest." As a result, the Blue and Gold had a qualified privilege to print Coach Davie's statements, and in the absence of "evidence of malice Moore cannot defeat the privilege."

Moore's age discrimination claims remain in the case, and Judge Sharp concluded by observing that "It would behoove the able counsel in this case to concentrate their attention on prosecuting and defending these claims of age discrimination. . . ."

Moore v. University of Notre Dame, 968 F.Supp. 1330, 1997 U.S.Dist.LEXIS 9418 (N.D.Ill. 1997) [ELR 19:11:12]

Defamation claim by former Secret Service Agent, who complained about assertion in book "Mortal Error" that President Kennedy was killed by a shot from Agent's rifle, is barred by statute of limitations

The assassination of President Kennedy has produced countless theories about who did it and why. In 1992, St. Martin's Press published a book that recounts one of the more imaginative of these theories, Mortal Error by Bonar Menninger.

Mortal Error argues that the President was fatally wounded by a shot from a rifle being carried by George W. Hickey, Jr., a now-retired Secret Service Agent who was riding in the car immediately behind the President's during the fateful motorcade in Dallas in 1963. According to the book, as Agent Hickey was reacting to the shots filed by Lee Harvey Oswald, Hickey's vehicle abruptly changed speed, Hickey lost his balance, and accidentally discharged his rifle in President Kennedy's direction.

Hickey responded to the book by filing defamation actions in three states and four different courts, apparently searching for a jurisdiction where his claim would not be barred by the statute of limitations. This was necessary, because Hickey waited more than three years from the book's original publication to file even the first of his cases. That delay has turned out to be fatal to at least three-quarters of his case.

Three of Hickey's suits were filed in federal courts, and those were consolidated before federal Judge Alexander Harvey in the District of Maryland. Once they were consolidated, the defendants moved for summary judgment; and Judge Harvey has granted their motion.

The judge has ruled that Maryland law applies, and that Maryland follows the "single publication rule" which says that damages may be collected only for one publication of a defamatory statement, and that the statute of limitations on such a claim begins with the first publication. Hickey unsuccessfully attempted to persuade the judge that Maryland would apply the "multiple publication rule" which says that each publication of a defamatory statement gives rise to a separate cause of action.

Since Hickey waited far too long to file his suit, it was barred by the statute of limitations, Judge Harvey concluded.

Hickey v. St. Martin's Press, Inc., 978 F.Supp. 230, 1997 U.S.Dist.LEXIS 15066 (D.Md. 1997) [ELR 19:11:12]

Constitutional rights case filed by extra in "The People vs. Larry Flynt," who wasn't paid because he refused to provide Social Security number to payroll company, is dismissed

Justin Read Sanders was an extra in "The People vs. Larry Flynt." He worked 43.5 hours on the movie, for which he was entitled to be paid $6.25 per hour, and more, $9.38 an hour, for overtime.

The casting company for which Sanders worked, Code Pink, Inc., would have been happy to pay him, no doubt. But he refused to provide Code Pink with his Social Security number. He said his religious beliefs prevented him from obtaining a Social Security number, so he didn't have one.

When Code Pink refused to pay him without a Social Security number - explaining it would be illegal to do so - Sanders filed suit in federal District Court in

Tennessee, alleging that his constitutional rights had been violated. Sanders, in fact, asserted a wide variety of violations, including a First Amendment freedom of religion claim, a Thirteenth Amendment involuntary servitude claim, and a Fourteenth Amendment due process claim.

Federal District Judge Bernice Donald has dismissed Sanders' lawsuit. The judge ruled that Sanders had not alleged he had been compelled to work on the movie, and thus he failed to state an involuntary servitude claim.

The judge also ruled that the movie's production did not involve state action, which was required for his other claims. Though Tennessee cooperated with the movie's producers by allowing them to film in real courtrooms, this "cannot reasonably be stretched to embrace the State of Tennessee in the decision making processes involved in filming `The People vs. Larry Flynt," Judge Donald concluded.

Sanders v. Prentice-Hall Corp. System, Inc., 969 F.Supp. 481, 1997 U.S.Dist.LEXIS 17796 (W.D.Tenn. 1997) [ELR 19:11:13]

New Jersey court has personal jurisdiction over professional boxer from Ghana, in breach of contract lawsuit filed by Maryland boxing manager

Ike Quartey, a professional boxer from Ghana, will have to defend himself in New Jersey against a breach of contract suit filed against him by his former American boxing manager, Frederick Burke. Federal District Judge Stanley Brotman has denied Quartey's motion to dismiss for lack of personal jurisdiction or pursuant to the doctrine of forum non conveniens.

Quartey entered into a management agreement with Burke in 1989, pursuant to which Burke was to receive a percentage of Quartey's earnings. In 1991, Quartey fired Burke and hired a new manager. Quartey has boxed in the United States at least four times since firing Burke, once in Atlantic City, New Jersey.

Burke claims he is entitled to be paid a percentage of Quartey's earnings, despite being fired, and Burke sued Quartey in federal court in New Jersey to collect what he says is owed him. According to Burke, the court has personal jurisdiction over Quartey on account of his participation in a fight in Atlantic City, because Quartey's failure to pay Burke after the Atlantic City fight constituted a breach of their management agreement in New Jersey.

Judge Brotman has agreed. The judge has ruled that he has specific jurisdiction over Quartey, because Burke's lawsuit arose out of Quartey's contacts with New Jersey when Quartey purposefully availed himself of the benefits of doing business there by taking advantage of the opportunity to box professionally in that state.

Quartey argued that New Jersey did not have jurisdiction to hear the case, because Burke is a Maryland resident, and because Burke was not registered as a boxing manager with the New Jersey Athletic Control Board at the time Quartey fought in Atlantic City. Judge Brotman rejected this argument, however. The judge reasoned that the "licensing requirement was intended to prevent parties from conducting boxing matches in contravention of Board regulations. . ." and that "denying relief on the basis of this technicality would unduly protect a boxer who fought without informing his manager."

The judge also rejected Quartey's forum non conveniens argument, saying that Quartey had not shown that Ghana or France would be an adequate alternate forum, nor had he shown that private or public interest factors warranted dismissal.

Burke v. Quartey, 969 F.Supp. 921, 1997 U.S.Dist. LEXIS 9717 (D.N.J. 1997) [ELR 19:11:13]

Trial court used wrong legal standard when it enjoined NCAA from barring freshman from playing basketball for, or receiving scholarship from, Fairfield University, appellate court rules

Darren Phillip is locked in a dispute with the NCAA over whether he took enough math while in high school to be eligible to play basketball for, and receive a scholarship from, Fairfield University. The exact nature of the dispute is subtle and complex and unlikely to re-occur. But the NCAA asserted its position with a full-court press, and ordered Fairfield not to play Phillip or give him a scholarship.

Phillip can play offense as well as defense, and he sued the NCAA to prove it. So far at least he's come out ahead. A federal District Court granted a preliminary injunction barring the NCAA from enforcing its decision against Phillip (ELR 19:7:17). But the NCAA is attempting to stage a comeback, and may even succeed.

In a Per Curiam ruling, the Second Circuit Court of Appeals has remanded the NCAA's appeal to the District Court, with instructions that it apply a different legal standard at trial when deciding whether the NCAA violated Phillip's rights by barring him from playing basketball and receiving a scholarship.

The issue in the case is whether the NCAA breached a contract with Phillip "in bad faith" when it denied him a waiver of the high school math requirement. The District Court thought it had, because he found that it had acted "arbitrarily" in denying Phillip the waiver he needed.

But according to the appellate court, Connecticut state law applies to this issue, and under Connecticut law, "bad faith" involves more than "arbitrary" decision making. "Bad faith" actions are only those "prompted by an interested or sinister motive" or a "dishonest purpose."

Thus at trial, the judge will have to decide whether the NCAA's refusal to grant Phillip a waiver of the math rule meets this tough standard. Phillip, however, may get another season of basketball under his belt before the case is over, no matter what eventually happens, because the appellate court declined to vacate the preliminary injunction.

Phillip v. Fairfield University, 118 F.3d 131, 1997 U.S.App.LEXIS 18881 (2d Cir. 1997) [ELR 19:11:14]

User of mark "Greatest Bar on Earth" did not "willfully" infringe Ringling Bros.-Barnum & Bailey's "Greatest Show on Earth" trademark, so circus company is not entitled to jury trial

Ringling Bros.-Barnum & Bailey has suffered another setback in its efforts to prevent others from using marks similar to its own "Greatest Show on Earth."

One of the circus company's many trademark targets is a bar on the 107th floor of the World Trade Center in New York City, which has been known as "The

Greatest Bar on Earth" since it reopened following the 1993 World Trade Center bombing.

Early in the case, Ringling Bros. sought a preliminary injunction barring the bar from using that name, relying on the then new federal trademark antidilution act. Federal District Judge Shira Scheindlin denied the circus company's motion, however (ELR 18:12:11).

Later, the bar company made a motion for partial summary judgment, seeking dismissal of Ringling Bros.' "willful" infringement claim. Successful trademark plaintiffs are entitled to an accounting of an infringer's profits only if the infringement is "willful," so this was a significant claim. But now it is gone, because Judge Scheindlin has granted the bar company's motion.

Infringements are not "willful" if the mark used by a defendant reflects the product's characteristics, if the defendant requested a trademark search, or if the defendant relied on the advice of counsel. In this case, the judge found that "The Greatest Bar on Earth" does reflect the bar's characteristics, and a trademark search revealed no other use of the mark "The Greatest Bar on Earth."

Although the judge has dismissed Ringling Bros.' "willful" infringement claim, this does not bring the case entirely to an end. In trademark cases, offending infringements do not have to be "willful" for the trademark owner to win. A successful trademark owner is entitled to an injunction against continued infringement, even if the infringement was not willful. In those cases, however, the plaintiff is not entitled to a jury trial, because injunctions are granted by judges. So Judge Scheindlin also has entered an order denying Ringling Bros.' request for a jury trial.

Ringling Bros.-Barnum & Bailey Combined Shows v. B.E. Windows Corp., 969 F.Supp. 901, 1997 U.S.Dist. LEXIS 11202 (S.D.N.Y. 1997) [ELR 19:11:14]

Court dismisses some claims, including all against Don King Productions, in lawsuit by boxing promoter who alleges that Craig Houk lost 1995 fight with Julio Cesar Chavez because fight was fixed

In July 1995, Julio Cesar Chavez beat Craig Houk in the first round of a professional boxing match at the United Center in Chicago. The fight took only 96 seconds, because Houk allegedly threw the fight in return for $10,000 paid by Don King Productions, the corporation to which Chavez was then under exclusive contract. This allegation was made by the fight's promoter, Jose Venzor, in a civil complaint charging boxing promoter Don King, King's corporation and both fighters with fraud and violations of the federal RICO Act and the Illinois Professional Boxing and Wrestling Act. According to Venzor, his business as a fight promoter was injured by Houk's allegedly intentional loss to Chavez.

As fight fans might have expected, the case raises a host of hotly disputed factual issues, as well as some interesting legal ones. The most important legal issue to those in the professional boxing business is the question of whether the Illinois Professional Boxing and Wrestling Act creates a private cause of action that can be asserted in a civil lawsuit. In an earlier ruling in this case, federal District Judge Marvin Aspen ruled that it does, so he denied the defendants' motion to dismiss Venzor's claim under that Act (ELR 18:11:12).

During discovery, however, the defendants learned an interesting fact: Venzor had never applied for a promoter's license under the Act. Thus, in response to the defendants' second motion to dismiss Venzor's suit, Judge Aspen has held that "Venzor's failure to obtain a promoter's license prevents him from proceeding under the Act." And the judge has partially granted the defendants' motion by dismissing Venzor's Boxing Act claims.

The judge also has dismissed Venzor's RICO claims, because no reasonable juror could find that Chavez had conducted or participated in the alleged RICO enterprise, and because Venzor's RICO evidence against Don King Productions was inadmissible.

Judge Aspen also dismissed Venzor's breach of contract claim against Don King Productions, even though King had allegedly misrepresented Houk's win-loss record, because Venzor had offered no evidence he was damaged by that misrepresentation.

As a result of these rulings, Venzor's case has been limited to his fraud claims against Chavez and Houk. Don King Productions is out of the case entirely.

Venzor v. Chavez Gonzalez, 968 F.Supp. 1258, 1997 U.S.Dist.LEXIS 9052 (N.D.Ill. 1997) [ELR 19:11:15]

Copyright to "Television & Cable Factbook" is not valid, because selection, coordination and arrangement of data are not sufficiently original, appellate court rules en banc

Copyright protection for factual compilations is exceedingly thin, especially since the Supreme Court's 1991 decision in Feist Publications v. Rural Service Co. (ELR 12:12:17). Many post-Feist cases have involved copyright claims for telephone books, just as Feist itself did. But one case in the Eleventh Circuit involves the "Television & Cable Factbook," a valuable collection of thousands of bits of information useful to those who do business with cable television systems.

The "Factbook" is a printed volume, similar in format to a telephone book, and is published by Warren Publishing, Inc. "Cable Access" is a computerized database of similar information, published by Microdos Data Corp. Warren claims Microdos copied from the "Factbook" in compiling "Cable Access," pointing to fictitious cable systems Warren had inserted in the "Factbook" as decoys which also show up in "Cable Access."

The District Court agreed with Warren that the arrangement of the information in its "Factbook" is original and creative and thus was protected by copyright. The District Court also agreed with Warren that "Cable Access" is substantially similar to the

"Factbook." And thus the court enjoined Microdos' distribution of "Cable Access."

The injunction was affirmed by a three-judge panel of the Eleventh Circuit Court of Appeals (ELR 17:4:25). But at Microdos' request, the Eleventh Circuit reheard the case en banc, and has now vacated the injunction.

In an opinion by Judge Stanley Birch, the full court has ruled that the selection, coordination and arrangement of the information in the "Factbook" are not sufficiently original to be protected by copyright. Three judges disagreed and dissented.

Editor's note: This case perfectly illustrates how difficult it is to obtain copyright protection for databases under current copyright law. Since databases are so valuable to users, and so expensive to compile and maintain, there is a world-wide movement afoot to provide legal protection for them. However, in order to preserve the central characteristic of all copyright-protected works - their originality and creativity - it is likely that database protection will have to be provided in a new law, distinct from traditional copyright.

Warren Publishing, Inc. v. Microdos Data Corp., 115 F.3d 1509, 1997 U.S.App.LEXIS 13649 (11th Cir. 1997) [ELR 19:11:16]

Enforcement of New York state statute criminalizing computer communication of harmful sexual material to minors is enjoined as unconstitutional under the Commerce Clause

Federal District Judge Loretta Preska recognizes that the "protection of children from pedophilia is an entirely valid and laudable goal of State legislation." She said so herself, in a case that challenged the constitutionality of a New York statute that makes it a crime to use computers to communicate harmful sexual material to minors.

The problem with state regulation of computer communications is that there are fifty states whose regulations may be inconsistent. This problem was at the heart of a challenge to the New York statute brought by the American Libraries Association and ten other organizations representing publishers, software companies, Internet service providers, artists, and even minors. Their claim was that the New York statute is unconstitutional under the Commerce Clause.

Judge Preska has agreed. "The menace of inconsistent state regulation," she explained, "invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers' reaction to overreaching by the individual states that might jeopardize the growth of the nation - and in particular, the national infrastructure of communications and trade - as a whole."

The judge also agreed that although New York's effort to protect children "was entirely valid and laudable," the statute's efforts to do that "fall afoul of the Commerce Clause for three reasons." First, the "practical impact" of the statute was that New York law would apply to "transactions involving citizens of other states," which made it a "per se" violation of the Commerce Clause. Second, the "benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce." And third, "the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes."

Judge Preska therefore issued a preliminary injunction barring the state of New York from instituting any prosecutions under the statute, until further order.

American Libraries Association v. Pataki, 969 F.Supp. 160, 1997 U.S.Dist.LEXIS 8793 (S.D.N.Y. 1997) [ELR 19:11:16]

Previously Reported:

The United States has denied petitions for certiorari in: Nelson v. Grisham, 118 S.Ct. 1166, 1998 U.S.LEXIS 1506 (1998), previously reported at ELR 19:2:8; United States v. Valley Broadcasting, 118 S.Ct. 1050, 1998 U.S.LEXIS 966 (1998), previously reported at ELR 19:9:14; and Glendora v. Marshall, 118 S.Ct.

717, 1998 U.S.LEXIS 232 (1998), previously reported at ELR 19:4:23.
[ELR 19:11:16]

DEPARTMENTS

In the Law Reviews:

Entertainment and Sports Lawyer, published by the American Bar Association Forum on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, Illinois 60611-4497, (800) 285-2221,) has issued Volume 15, Number 4 with the following articles:

Empowering Celebrities in Cyberspace: Stripping the Web of Nude Images by Mitchell D. Kamarck, 15

Entertainment and Sports Lawyer 1 (1998) (for address, see above)

Will the Reel, er, Real Bill Clinton Please Stand Up: The Unauthorized Use of the President's Image- A New "Contact" Sport by Joseph J. Beard, 15 Entertainment and Sports Lawyer 3 (1998) (for address, see above)

LeFlore v. Grass Harp Productions: The Negative Pickup Deal Survives, for Now by Nicholas A. Carlin, 15 Entertainment and Sports Lawyer 7 (1998) (for address, see above)

Book Review: International Sports Law and Business by Aaron N. Wise and Bruce S. Meyer, reviewed by Mark T. Gould, 15 Entertainment and Sports Lawyer 10 (1998) (for address, see above)

Book Review: Clearance & Copyright: Everything the Independent Filmmaker Needs to Know by Michael C. Donaldson, reviewed by Robert L. Seigel, 15 Entertainment and Sports Lawyer 11 (1998) (for address, see above)

Los Angeles Lawyer, published by the Los Angeles County Bar Association, 617 S. Olive Street, Los Angeles, CA 90014, (213) 896-6503, has released Volume 21, Number 2 as its 14th Annual Entertainment Law Issue with the following articles:

Caught in the Act: News-Gathering Rights of the Media and Privacy Rights of Individuals by Neville L. Johnson, Brian A. Rishwain, and David A. Elder, 21 Los Angeles Lawyer 32 (1998) (for address, see above)

Doing Lunch: Oral Contracts Aren't Worth the Paper They're Printed On by Edward A. Klein, 21 Los Angeles Lawyer 37 (1998) (for address, see above)

Coming Soon: Interpreting the Scope of Future Technology Clauses by Kenneth A. Linzer, 21 Los Angeles Lawyer 42 (1998) (for address, see above)

IDEA: The Journal of Law and Technology, published by Franklin Pierce Law Center, 2 White Street, Concord, New Hampshire 03301, (603) 228-1541, ext. 1178, has released Volume 38, Number 2 as a Special Internet Edition with the following articles:

Panel Discussion: Link Law on the Internet, Trademark and Unfair Competition, Copyright, and Defamation, 38 IDEA: The Journal of Law and Technology 197 (1998) (for address, see above)

Hyperlinks, Frames and Meta-tags: An Intellectual Property Analysis by Jeffrey R. Kuester and Peter A. Nieves, 38 IDEA: The Journal of Law and Technology 243 (1998) (for address, see above)

The gTLD-MoU: A Yellow Flag for Trademark Owners on the Information Superhighway by Eric T. Fingerhut and P.L. Skip Singleton, Jr., 38 IDEA: The Journal of Law and Technology 281 (1998) (for address, see above)

Does Cyberspace Expand the Boundaries of Personal Jurisdiction? by Ryan Yagura, 38 IDEA: The Journal of Law and Technology 301 (1998) (for address, see above)

New Legislation Regarding On-Line Service Provider Liability for Copyright Infringement: A Solution in Search of a Problem? by Daniel R. Cahoy, 38 IDEA: The Journal of Law and Technology 335 (1998) (for address, see above)

The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution by June Chung, 39 University of Arizona Law Review 1361 (1997)

Children's Television: The FCC's Attempt to Educate America's Children May Force the Supreme Court to Reconsider the Red Lion Rationale by Roxana Wizorek, 47 Catholic University Law Review 153 (1997)

Reno v. ACLU: The Communications Decency Act Hits a Red Light on the Information Superhighway by John

M. Beahn, 47 Catholic University Law Review 333 (1997)

What Is Really Rotten in the Food Lion Case: Chilling the Media's Unethical Newsgathering Techniques by Lori Keeton, 49 Florida Law Review 111 (1997)

Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law by Wm. Tucker Griffith, 30 Connecticut Law Review 675 (1998)

Expanded Notions of Copyright Protection: Idea Protection Within the Copyright Act by Jonathan S. Katz, 77 Boston University Law Review 873 (1997)

Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works by Michael J. Meurer, 45 Buffalo Law Review 845 (1997)

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Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring by Craig F. Arcella, 97 Columbia Law Review 2420 (1997)

Note: Fixed Book Prices in the Netherlands and the European Union: A Challenge for Community Competition by Christine E. Zandvliet, 3 The Columbia Journal of European Law 413 (1997/98)

The Journal of Arts Management, Law and Society, published by Heldref Publications, 1319 18th St. NW, Washington, D.C. 20036-1802, has issued Volume 27, Number 4 as a Symposium The Arts and Entertainment in Comparative Perspective: France, Germany, Norway, the United States, Canada, Japan, and the United Kingdom with the following articles:

Cultural Patronage in Comparative Perspective: Public Support for the Arts in France, Germany, Norway, and Canada by Kevin V. Mulcahy, 27 The Journal of Arts Management, Law and Society 247 (1998) (for address, see above)

Comparing Cultural Policies in the United States and Japan: Preliminary Observations by Margaret Jane Wyszomirski, 27 The Journal of Arts Management, Law and Society 265 (1998) (for address, see above)

Regulating the Media in the United States and France by Harvey B. Feigenbaum, 27 The Journal of Arts

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Holiday Entertainment in a British Seaside Resort Town by Howard Hughes and Danielle Benn, 27 The Journal of Arts Management, Law and Society 295 (1998) (for address, see above)

Intellectual Property in East Asia by Charles Irish, 15 Wisconsin International Law Journal 257 (1997)

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The 1996 United States Federal Anti-dilution Statute by J. Thomas McCarthy, 9 Australian Intellectual Property Journal 38 (1998) (for address, see above)
[ELR 19:11:17]