WASHINGTON MONITOR

Librarian of Congress adopts decision of Copyright Arbitration Royalty Panel awarding $63.74 to songwriter-publisher as his share of 1991 compulsory cable-TV royalties for two retransmissions of song "Misery" as part of WWOR-TV's "Joe Franklin Show"

Songwriter James Canning, and his publishing company Can Can Music, have been awarded $63.74 on account of two cable-TV retransmissions of the song "Misery" as part of WWOR-TV's "Joe Franklin Show" during 1991. Though the amount was small, there wasn't much at stake to begin with. Canning claimed he was entitled to $2,400.00; ASCAP, BMI and SESAC argued he was only entitled to $9.99.

The money due Canning for "Misery" was just a tiny slice of some $500 million in royalties paid by cable-TV companies on account of their retransmissions of distant signals broadcast by independent television stations during 1990, 1991 and 1992, under the "compulsory cable license" provision of the Copyright Act (section 111).

The compulsory cable license gives cable-TV companies the right to retransmit distant TV station signals in return for a royalty set by law, rather than by negotiation. Cable companies pay these royalties to the Copyright Office which then divides and distributes them among the owners of copyrights to the retransmitted programs (including the owners of the copyrights to the songs that are part of those programs).

The distribution of these royalties is done in two phases. In the first phase, royalties are divided among eight groups of copyright owners, including movie and

TV program producers, professional sports leagues and collegiate associations, public TV and radio broadcasters, religious programmers, Canadian program producers, and songwriters and music publishers. In the second phase, royalties are divided among individual copyright owners within a group.

The royalties collected from cable companies during 1990, 1991 and 1992 were divided among the eight groups by a "Phase I" decision of the Librarian of Congress announced in 1996 (ELR 18:7:14). Individual copyright owners within seven of the eight groups were able to agree among themselves on how to divide the share of royalties awarded to their groups.

The group consisting of songwriters and music publishers was represented by ASCAP, BMI and SESAC. It was awarded 4.5% of the $500 million pool for 1990 to 1992. All but one of the songwriters and publishers were able to agree on how their group's share should be divided. Canning, and his Can Can Music publishing company, was the one who would not agree. Thus, the Librarian of Congress convened a Copyright Arbitration Royalty Panel to resolve the dispute between Canning and the other music claimants.

Canning claimed to be entitled to $2,400.00 for two performances of his song "Misery" on WWOR-TV, because once - when he was a BMI member - a BMI-appointed arbitrator awarded him $4,800.00 for four performances of his song "Reggae Christmas" on WWOR-TV. That was back in the 1980s, however, and that arbitration did not involve compulsory cable-TV re-transmission royalties. When it came to divvying-up the 1991 compulsory cable-TV royalties, the other music claimants argued that Canning was only entitled to $9.99, because they calculated that each minute of music on WWOR-TV was worth $7.49 in cable retransmission royalties, and "Misery" was a 1-minute and 20-second song.

The Copyright Arbitration Royalty Panel was not persuaded that either approach was correct. Instead, it decided that the best "simulated market" for determining the value of Canning's share was the amount BMI paid its affiliated songwriters and publishers for featured performances on WWOR-TV in 1991. The distant signal rate paid by BMI to songwriters and publishers for those performances came to $63.74 for two performances. And that is what the Panel decided to award to Canning.

The Register of Copyrights recommended that the Panel's award be adopted. And the Librarian of Congress has done so.

Determination of the Distribution of the 1991 Cable Royalties in the Music Category, Library of Congress, Copyright Office Docket No. 94-3 CARP CD 90-92, 63 Federal Register 20428 (Apr. 24, 1998) [ELR 19:12:4]

Copyright Office publishes additional lists of foreign works whose once-expired copyrights have been restored and whose owners have filed Notices of Intent to Enforce Restored Copyright

The United States Copyright Office has published two additional lists of foreign works whose owners have filed Notices of Intent to Enforce Restored Copyrights.

The foreign works in question are those that once were in the public domain in the United States, but whose copyrights were restored on January 1, 1996, as a result of Congress' enactment of a new section 104A of the Copyright Act as required by the Uruguay Round Agreements Act. (See, Lionel S. Sobel, "Back from the Public Domain: Congress Restores Copyrights to Many Foreign Works" (ELR 17:3:3)

Though the Copyright Office has announced that another list will be published in August 1998, these lists are likely to be the final lists with any significant number of titles, because the Act required Notices of Intent to Enforce to be filed with the Copyright Office by December 31, 1997.

Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act, Library of Congress, Copyright Office, 63 Federal Register 5142 (Feb. 1998), 63 Federal Register 19287 (Apr. 17, 1998) [ELR 19:12:5]

RECENT CASES

Supreme Court rules that TV station owner has constitutional right to jury trial in copyright infringement action brought by Columbia Pictures seeking "statutory damages" for continued broadcasts of TV shows after Columbia terminated license for failure to pay fees

Columbia Pictures Television has suffered a surprising setback in its effort to collect copyright infringement damages from C. Elvin Feltner, the owner of three television stations that continued to broadcast such series as "Who's the Boss," "Silver Spoons," "Hart to Hart" and "T.J. Hooker" even after Columbia terminated the stations' licenses for non-payment of delinquent fees.

Earlier in the case, Columbia sought and was awarded "statutory damages" of $8.8 million against

Feltner - $20,000 for each of the 440 series episodes his stations broadcast after their licenses were terminated. Columbia elected to seek "statutory damages" rather than its actual damages and the stations' profits, as it had a right to do under section 504(c) of the Copyright Act. Columbia also asked federal District Judge Edward Rafeedie to determine the amount of statutory damages himself, rather than let a jury do it as Feltner had requested.

There has been a split among the circuits about whether parties have a right to a jury trial in cases where statutory damages are sought (rather than actual damages and profits). Judge Rafeedie agreed with Nimmer on Copyright that the "better view" was that judges, not juries, award statutory damages. So the judge rejected Feltner's request for a jury trial and awarded Columbia the $8.8 million himself; and the Ninth Circuit Court of Appeal affirmed (ELR 19:9:9). The Supreme Court then agreed to hear the case, in order to resolve the conflict among the circuits.

Now, in an opinion by Justice Clarence Thomas, the Supreme Court has ruled that Feltner was entitled to a jury trial after all, so it has reversed the judgment Columbia had won and has remanded the case to the lower courts for further proceedings.

The Supreme Court agreed with Columbia the Copyright Act itself does not grant a right to a jury determination of statutory damages. When section 504(c) says that the "court" shall determine statutory damages, the word "court" means "judge," not "jury," the Court confirmed.

However, the Seventh Amendment to the Constitution guarantees that "[i]n Suits at common law . . . the right of trial by jury shall be preserved. . . ." Justice Thomas reviewed the history of copyright infringement litigation in England as well as the United States, back to the middle of the 17th century; and he concluded from this history that even suits for statutory damages were and are "Suits and common law."

Columbia had argued that statutory damages "are clearly equitable in nature," rather than common law suits. But Justice Thomas responded for the Court by saying "We are not persuaded."

Editor's note: Feltner's victory before the Supreme Court may turn out to be Pyrrhic. It is not apparent (from any of the decisions in the case) why Feltner thought he would do better before a jury than he did before Judge Rafeedie. Section 504(c) authorizes statutory damages of from $500 to $20,000 per infringed work in ordinary cases, and up to $100,000 per work in cases where the infringement is "committed willfully." In fact, Judge Rafeedie found that Feltner's stations had infringed "willfully" but only awarded $20,000 per infringed work nonetheless. On remand, a jury may award more, and Feltner will have fought his case all the way to the Supreme Court, only to find that his victory flipped him from the frying pan into the fire.

Feltner v. Columbia Pictures Television, Inc., 118 S.Ct. 1279, 1998 U.S.LEXIS 2301 (1998) [ELR 19:12:6]

Supreme Court to review actress' claim that SAG violated federal labor law by requiring her to pay initiation fees and dues before appearing in episode of television series; lower courts had ruled against actress and in favor of SAG

The saying that "tall oaks grown from little acorns" is certainly accurate, and is well illustrated by a case now pending before the United States Supreme

Court. The case was brought by part-time actress Naomi Marquez against the Screen Actors Guild - over a dispute about whether she was legally required to pay $500 in SAG initiation fees and dues in order for her to be able to earn $550 for appearing in an episode of the television series "Medicine Ball."

At first, Marquez did not object to paying SAG's initiation fees and dues; she merely wanted to be able to do so after she was paid by Lakeside Productions, the series' Seattle-based production company. SAG, however, insisted on payment in advance, and Marquez said she couldn't afford to. The role for which Marquez had been cast was then given to another actress, because SAG's collective bargaining agreement required Lakeside Productions to hire only actors and actresses who are SAG members, if they had previously worked for more than 30 days in the motion picture industry, as Marquez once had.

That was when Marquez sued. Represented by the National Right to Work Foundation, Marquez made two significant allegations. First, she asserted that SAG had breached its duty of fair representation by negotiating a collective bargaining agreement that requires covered actors to be SAG members, rather than simply those who paid "core" dues and fees. Second, she asserted that SAG violated federal labor law by requiring actors and actresses to pay initiation fees and dues within 30 days after their first employment in the motion picture industry, rather than within 30 days after a starting the first jobs for which they must pay fees and dues.

A federal District Court in the state of Washington granted SAG's motion for summary judgment and dismissed the case. Marquez appealed, and the appellate court has affirmed as to those two issues.

In an opinion by Judge Diarmuid O'Scannlain, the Court of Appeals held that SAG had not breached its duty of fair representation by requiring covered employees to be union "members," because union membership now includes "financial core" membership which simply requires payment of fees and dues rather than actual membership. (See "The Origins and Evolution of `Financial Core' Union Membership and its Significance in the Entertainment Industry," by Lionel S. Sobel, ELR 10:7:3)

Judge O'Scannlain also rejected Marquez's challenge to SAG's requirement that dues be paid within 30 days after an actor's first employment in the movie industry. He did so on the grounds that the NLRB has exclusive jurisdiction to hear that claim, so it couldn't be asserted in federal courts.

The Supreme Court has granted Marquez's petition for certiorari.

Marquez v. Screen Actors Guild, 124 F.3d 1034, 1997 U.S.App.LEXIS 22796 (9th Cir. 1997), cert. granted, 118 S.Ct. 1298, 1998 U.S.LEXIS 1801 (1998) [ELR 19:12:6]

Oral agreement by which producer Elliot Kastner allegedly aquired movie rights to article, about Giancarlo Paretti's takeover of MGM, from writer David McClintick and Fortune magazine was invalid, and producer's alleged right of first refusal was unenforceable, federal District Court rules

Movie mogul Sam Goldwyn once said that "An oral agreement isn't worth the paper it's written on." The truth of that malapropism has been proved again, insofar as movie rights to a copyrighted work are concerned.

In this case, the work in question is a fascinating magazine article about how Giancarlo Paretti duped Credit Lyonnais Bank into funding his takeover of MGM. The article, entitled "The Predator," appeared in the July 8, 1996 issue of Fortune magazine; it was written by David McClintick (author of the book Indecent Exposure) pursuant to a work made for hire agreement that made Fortune the owner of the article's copyright.

Fortune has sold movie rights in the article to Hallmark Entertainment which has hired McClintick to write the screenplay. But before the Fortune-Hallmark deal was made, producer Elliot Kastner allegedly entered into oral agreements with McClintick and Fortune to acquire those rights for his own company. A lawsuit was the result - by Fortune against Kastner for declaratory relief, and a counterclaim by Kastner against Fortune and McClintick for breach of contract.

Federal District Judge Harold Baer has granted a summary judgment motion by Fortune and McClintick, dismissing Kastner's breach of contract counterclaims.

Kastner alleged that he acquired movie rights to the article as a result of oral agreements he reached with Fortune and McClintick during conversations he had with the magazine's managing editor and the author before the article was published. But Kastner conceded that the agreement was never put in writing. Since section 204 of the Copyright Act requires a writing in order to validly transfer copyright interests, Judge Baer concluded that the producer's breach of contract claim must fail.

Kastner also argued that McClintick had granted him a right of first refusal to the article's movie rights. But this claim failed for two reasons. First, since the article was a work made for hire, McClintick did not own any rights to which he could have agreed to give

Kastner a right of first refusal. Second, the judge found that even if McClintick were the owner of the movie rights to the article, the alleged right of first refusal agreement was too vague to be enforceable, because essential terms like the time and manner of Kastner's performance and the price he was to pay were missing.

Time, Inc. v. Kastner, 972 F.Supp. 236, 1997 U.S.Dist.LEXIS 11181 (S.D.N.Y. 1997) [ELR 19:12:7]

Appellate court affirms judgment in favor of Clint Eastwood against National Enquirer for damages resulting from false assertion that actor had granted tabloid an exclusive interview

In a case that once again pitted Clint Eastwood against the National Enquirer, federal appeals court

Judge Alex Kozinski couldn't resist the urge to begin with a pun. "Enquiring judges want to know," Judge Kozinski said - referring to the issues in the case: whether the Enquirer had falsely asserted that Eastwood had given it an "exclusive interview" and had done so with "actual malice," as the jury apparently found; and whether the jury's award of $150,000 in damages was supported by adequate evidence. Ultimately, Judge Kozinski answered both questions "yes."

The case was provoked by a 1993 article in the Enquirer that was billed as an "Exclusive Interview," that included a supposedly "Exclusive Photo" of Eastwood's baby, and that was - according to the article's byline - written by an Enquirer assistant editor. In fact, according to Eastwood, the article was a complete fabrication, as he had never been interviewed for it by the Enquirer or by anyone.

The article's contents were not defamatory, but Eastwood sued the Enquirer nonetheless, alleging claims for invasion of his privacy, misappropriation of his name and likeness, and misdesignation of origin. After a seven-day trial and four days of deliberations, a jury returned a verdict in Eastwood's favor for $150,000 - half for injury to his reputation, and half for profits unjustly obtained by the Enquirer. The trial judge awarded the actor an additional $653,156 in attorneys' fees (though the judge denied Eastwood's request for $185,163 in expert witness fees).

In order to uphold the jury's verdict, the Court of Appeals had to agree that the article was false and that the Enquirer published it knowing that it was false. Judge Kozinski did. He ruled that the assertion that the article was the result of an exclusive interview with an Enquirer assistant editor was false, and that the Enquirer knew it was false. "This intentional conduct satisfies the `actual malice' standard, permitting a verdict for Eastwood," Judge Kozinski concluded.

The judge also agreed that the $150,000 verdict was supported by the evidence. He explained that "the jury could have found that Eastwood's fans would think him (1) a hypocrite for giving the Enquirer an `exclusive interview' about his private life (plus access to an `exclusive' baby picture), and/or (2) essentially washed up as a movie star if he was courting publicity in a sensationalist tabloid. This would have been sufficiently damaging to Eastwood's reputation to support an award of this magnitude."

Eastwood v. National Enquirer, 123 F.3d 1249, 1997 U.S.App.LEXIS 22628 (9th Cir. 1997) [ELR 19:12:8]

NBC and The WB win dismissal of case alleging that their short-lived series "Brotherly Love" infringed copyright to proposed series "Genuine Gypsy"; plaintiff failed to show access or substantial similarly, District Court rules

"Brotherly Love" was a television series set in an auto-repair garage, one of whose mechanics was a woman who had a romantic relationship with another mechanic. The show was broadcast by NBC during the 1995-96 season and by The WB the following season, and then it went off the air.

Before "Brotherly Love" was canceled, it became the subject of a plagiarism lawsuit against both networks - as well as against the show's producer, Witt Thomas, and its creators, writers Jim Vallely and Jonathan Schmock.

The lawsuit was brought by Wendy Easton, who in 1992 had written a script and other materials for a proposed show of her own. Eaton's proposed series, entitled "Genuine Gypsy," also was set in a car-repair garage and also featured a female mechanic who becomes romantically involved with a male tow truck operator. Moreover, Eaton had submitted her script and materials to NBC in 1994, and had been told by an administrative assistant that her proposal was being "passed around the table" at that network.

Witt Thomas, Vallely and Schmock were dismissed from the case by consent, for unreported reasons. (They may have been dismissed for lack of personal jurisdiction, because the case was filed in federal court in Alexandria, Virginia.)

Thereafter, NBC and The WB sought dismissal too, arguing, in a motion for summary judgment, that the creators of "Brotherly Love" had not had access to

Eaton's submission, and that in any event, "Brotherly Love" was not substantially similar to "Genuine Gypsy." Judge T.S. Ellis has agreed, and has granted their motion.

According to the testimony of an NBC administrative assistant, Eaton's submission got only as far as a large stack on the cabinet behind his desk, and no further. He did not show or discuss it with anyone else, let alone Vallely or Schmock, he said. Eaton argued that the administrative assistant had lied. But Judge Ellis ruled that Eaton "cannot base her opposition to summary judgment `entirely on the hope that a fact finder will disbelieve the persons who have submitted affidavits.'"

Eaton also offered other theories about how the creators of "Brotherly Love" may have had a copy of her submission, but the judge rejected those as well, saying that her "tortious chain of hypothetical transmittals . . . is insufficient to infer access."

Moreover, Judge Ellis also found that "Brotherly Love" and "Genuine Gypsy" were not substantially similar. While the judge acknowledged that there were some similarities between the two, "they represent only superficial, haphazard, and at most skeletal resemblances." After synopsizing both works, the judge concluded that "the respective plots and the sequences of events of the two pilot shows are wholly unrelated and dissimilar."

Eaton also had relied on similarities between her characters and those in "Brotherly Love." But "even a cursory review of the shows' characters reveals overwhelming differences," Judge Ellis said, "for the only likenesses here involve gross generalizations." Again the judge acknowledged that both shows have "two female mechanics, two young boys, and two garage owners. . . ." But, he said, "there are no meaningful or substantial similarities between them. And, in any event, the basic human traits that certain characters share, including age, sex, and occupation, `are too general or too common to deserve copyright protection.'"

The judge therefore granted NBC's and The WB's summary judgment motion and dismissed the case entirely.

Eaton v. National Broadcasting Co., 972 F.Supp. 1019, 1997 U.S.Dist.LEXIS 12603 (E.D.Va. 1997) [ELR 19:12:8]

United States court has subject matter jurisdiction over copyright infringement claim against Canadian Broadcasting Corporation, because offending broadcast was received in U.S. even though it originated in Canada

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.

LA News makes its living by licensing rights to its news tapes to television stations and others; so the unauthorized broadcast of its tapes cuts directly into the company's business. As a result, LA News has been vigorous in enforcing its copyrights. LA News infringement lawsuits involving the Reginald Denny tapes have produced at least three published decisions already - including two involving international copyright issues.

The most recent decision involves an infringement action brought by LA News in federal District Court in Los Angeles against the Canadian Broadcasting Corporation. CBC maintains an office in Los Angeles, so personal jurisdiction is not an issue in the case.

On the other hand, the question of whether the court has subject matter jurisdiction is an issue, because the suit complains about an unlicensed broadcast, in Canada to Canadians, that unavoidably spilled over the border and was received and viewed by some 7,800 households in the United States. CBC does not admit that the tape it broadcast was the one shot by LA News. But even if it was, CBC argued, a United States District

Court does not have jurisdiction to hear the case, because the alleged infringement took place in Canada.

Judge Kim Wardlaw has rejected that argument, however. She has ruled that if the tape broadcast by CBC was produced by LA News, "an act of infringement was committed within the United States when the Canadian transmission was received and viewed here." As a result, Judge Wardlaw has denied CBC's motion to dismiss the action.

The judge also rejected CBC's argument that it is immune from suit under the Foreign Sovereign Immunities Act. However, Judge Wardlaw has granted CBC's motion to sever claims against it from similar claims made against other defendants in the same lawsuit. Severance is required, the judge concluded, because LA News' claims against other defendants will be tried to a jury, while the Foreign Sovereign Immunities Act requires that its claims against CBC by tried by a judge.

Editor's note: In this case, the principle that an infringement occurs in the country where an unlicensed transmission is received worked in favor of LA News. In an earlier case, however, this principle worked against the company, because Judge Wardlaw ruled that she did not have subject matter jurisdiction to award damages to LA News for allegedly infringing transmissions received in Africa and Europe, even though those transmissions originated in the United States (ELR 19:2:17).

Los Angeles News Service v. Conus Communications Company, 969 F.Supp. 579, 1997 U.S.Dist.LEXIS 13939 (C.D.Cal. 1997) [ELR 19:12:9]

Inflatable costumes based on existing cartoon characters were not original enough to be copyrightable, and confidential disclosure agreement was not breached because costume design and manufacturing techniques had not been kept confidential, appellate court affirms

Entertainment Research Group makes inflatable costumes that once were sold and serviced by Genesis Creative Group. Entertainment Research's customers were companies like Pillsbury and Quaker Oats that ordered costumes of their own cartoon characters, like the "Pillsbury Doughboy" and "Cap'n Crunch," for use in shopping mall openings and other publicity events.

According to Entertainment Research, it had developed its own techniques for making these costumes - techniques which it alone used for many years. Eventually, however, Aerostar International began to compete with Entertainment Research, using Entertainment Research's techniques and selling to Entertainment Research's former customers.

Adding insult to injury, Genesis Creative Group terminated its relationship with Entertainment Research and began selling Aerostar's costumes. Moreover, and again according to Entertainment Research, Genesis had helped Aerostar by giving it information about Entertainment Research's design and manufacturing techniques in violation of a written Confidential Disclosure Agreement.

Entertainment Research responded by filing a copyright infringement and breach of confidence lawsuit against Genesis and Aerostar. But Entertainment Research has not been successful. Both claims were dismissed by a federal District Court (ELR 16:7:9), and those rulings have been affirmed on appeal.

In an opinion by Judge William Rea, the Court of Appeals has ruled that Entertainment Research's designs were not sufficiently original to be eligible for a derivative work copyright of their own.

Judge Rea also ruled that Entertainment Research's breach of confidence claim was properly dismissed, because the information that Entertainment Research conveyed to Genesis, and Genesis alleged conveyed to Aerostar, was not "confidential and novel." The judge explained that none of Entertainment Research's customers had been required to sign non-disclosure agreements, nor had Entertainment Research ever taken "any steps to prevent other manufacturers from looking inside Entertainment Research's costumes and reverse-engineering them." As a result, Entertainment Research "gave up any ability it may have had to claim that the manufacturing and design information disclosed to Genesis was `confidential in nature.'"

The United States Supreme Court has denied Entertainment Research's petition for certiorari.

Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1997 U.S.App.LEXIS 21731 (9th Cir. 1997), cert. denied, 118 S.Ct. 1302, 1998 U.S.LEXIS 1864 (1998) [ELR 19:12:10]

New Jersey Sports & Exposition Authority enjoined from interfering with OzzFest concert in Giants Stadium, including performance by heavy metal band Marilyn Manson, on First Amendment and contract grounds

The heavy metal band Marilyn Manson won a preliminary injunction that barred the New Jersey Sports & Exposition Authority from interfering with the

OzzFest '97 concert in Giants Stadium - a concert in which the band was scheduled to appear, along with Ozzy Osbourne, Black Sabbath and others.

The day before tickets were scheduled to go on sale, the Authority canceled the concert, because it objected to Marilyn Manson's participation in it. The concert's promoters had maintained that Osbourne and others would not perform if Marilyn Manson were excluded. According to the Authority, it objected to Marilyn Manson because of the group's rumored "antics" at earlier concerts.

Federal District Judge Alfred Wolin granted a preliminary injunction against the Authority on both First Amendment and contract grounds.

The judge found that Manson and the concert's promoters were likely to establish that Giants Stadium is a limited public forum, but even if the Stadium were a non-public forum, they were likely to succeed because the Authority's exclusion of Marilyn Manson was either unreasonable or based on the anticipated "contents" of the band's performance. In either event, the exclusion of the band would violate the First Amendment.

The judge also found that the concert's promoter was likely to succeed with its breach of contract theory, even though no written contract had ever been signed. The judge found that the parties had orally agreed on the rent ($175,000 plus expenses) and other essential terms of an agreement to use the Stadium for the OzzFest concert. And he said he was persuaded that "contracts in the concert music industry are not reduced to writing until a late date." In any event, the judge also said that if a jury were to find that a contract was not formed, the concert's promoter was likely to succeed "on a promissory estoppel theory."

Marilyn Manson, Inc. v. New Jersey Sports & Exposition Authority, 971 F.Supp. 875, 1997 U.S.Dist.LEXIS 9607 (D.N.J. 1997) [ELR 19:12:10]

Dismissal of licensing agency's suit against Andy Warhol Estate is affirmed; RICO allegations inadequate, and fraud verdict improper because agency could not have reasonably relied on Estate's misrepresentations, appellate court rules

The Estate of Andy Warhol, and its executor and attorney, have prevailed in a RICO and fraud action brought against them by Schlaifer Nance & Company, a successful licensing agency with which the Estate had entered into an agreement for the licensing of Warhol's many works of art.

The dispute between the Estate and Schlaifer Nance arose after their agreement had been signed, when the Estate began to notify the licensing agency that many of Warhol's artworks were in the public domain, and that some of his works had already been licensed to other companies. Indeed, Schlaifer Nance received an arbitration award of $4 million in actual and punitive damages on account of Estate misconduct that occurred after the execution of their agreement.

Schlaifer Nance also sought additional damages in a federal court lawsuit, for misrepresentations the Estate allegedly made before the agreement was signed. But the agency has not been successful with that proceeding. Early in the case, federal District Judge Louis Stanton dismissed Schlaifer Nance's RICO claims. And after a jury returned a more than million dollar verdict in Schlaifer Nance's favor on its fraud claims, federal

District Judge Denny Chin set aside the verdict (ELR 18:9:21).

The Court of Appeals has affirmed these two lower court rulings. In an opinion by Judge Joseph McLaughlin, the appellate court has held that even if the Estate had engaged in fraudulent activity, the complained-of fraudulent acts "were either not sufficiently related or continuous to sustain a RICO conspiracy claim."

In analyzing the fraud claims themselves, Judge McLaughlin accepted Schlaifer Nance's assertion that the Estate failed to reveal copyright problems in order to deceive the agency. "Nevertheless," the judge said, "it was unreasonable for [Schlaifer Nance], a sophisticated licensing concern, to rely on these misrepresentations or material omissions." This was so, the judge explained, because the "Estate's actions, the Agreement, and other circumstances should have raised more than one eyebrow, compelling [Schlaifer Nance's] officers or employees to investigate the extent of the Estate's control over Warhol's works."

Judge McLaughlin rejected the agency's argument that the warranty clause in the licensing agreement had guaranteed that the Estate had control over every Warhol work. Instead, the judge explained, it "merely guaranteed the Estate's exclusive control over Existing Artworks" - a category which was defined by the agreement to mean only those the Estate knew of at the time the agreement was signed, not all of Warhol's works.

The judge also noted that the agreement contained an inadvertent breach provision, which testimony showed was included "to ensure that any copyright problem revealed after the signing of the Agreement would not be deemed a material breach of the warranties as long as the Estate acted in good faith."

Schlaifer Nance & Company v. Estate of Andy Warhol, 119 F.3d 91, 1997 U.S.App.LEXIS 17901 (2d Cir. 1997) [ELR 19:12:11]

Simon & Schuster and William Bennett win lawsuit asserting that their "Book of Virtues" trademark was infringed by title of Dove Audio's "The Children's Audiobook of Virtues"

Imitation may be the sincerest form of flattery, but when it comes to selecting book titles, it's no virtue. That at least is the lesson suggested by the outcome of a trademark lawsuit filed by Simon & Schuster and William Bennett to protect their rights to the title of The Book of Virtues.

The target of their suit was Dove Audio, Inc., which published a tape entitled "The Children's

Audiobook of Virtues" several months after Bennett's Book of Virtues hit the best-seller lists. Though Dove stipulated to a preliminary injunction early in the case, it otherwise defended itself vigorously. Indeed, it went so far as to make a motion for judgment on the pleadings, arguing that even if Simon & Schuster and Bennett proved everything they alleged in their complaint, they would not be entitled to recover. But federal District Judge Allen Schwartz did not agree; he denied Dove's motion and allowed the case to proceed (ELR 18:12:10).

In due course, the lawsuit was transferred to Judge Leonard Sand who conducted a bench trial and has ruled in favor of Simon & Schuster and Bennett on virtually every issue.

The judge ruled The Book of Virtues is a descriptive mark, not a generic mark as Dove had argued, and thus was protectible if it had acquired secondary meaning. The judge then found that the title had acquired secondary meaning, so it was protected.

The judge also found that Dove's use of "The Children's Audiobook of Virtues" would create a likelihood of confusion. Moreover, he found that the likelihood of confusion was sufficiently compelling that it outweighed any First Amendment interests that might otherwise have permitted Dove to use its title.

Judge Sand permanently enjoined Dove from using "The Children's Audiobook of Virtues" title and ordered Dove to recall and destroy any tapes with that title already in circulation. In addition, the judge awarded Simon & Schuster and Bennett Dove's profits of $23,000, earned by it from sales of its tape before the stipulated injunction was issued, in order to deter Dove from infringing again. On the other hand, Judge Sand denied Simon & Schuster and Bennett's request for attorneys' fees, saying that although Dove willfully infringed their title, the case "presented a number of close and contested issues, and the outcome was by no means a foregone conclusion."

Simon & Schuster, Inc. v. Dove Audio, Inc., 970 F.Supp. 279, 1997 U.S.Dist.LEXIS 9925 (S.D.N.Y. 1997) [ELR 19:12:11]

ABC did not violate the law by surreptitiously taping producer's conversation with flight attendant who refused to appear on program "Day One" to be interviewed about O.J. Simpson

Airline attendant Beverly Deteresa had a brush with celebrity when O.J. Simpson showed up on her flight from Los Angeles to Chicago shortly after the murder of his ex-wife Nicole Brown Simpson and

Ronald Goldman. In the wake of reports that Simpson had flown with his hand in a bag of ice, television producer Anthony Radziwill went to Deteresa's home to persuade her to be interviewed on his ABC program "Day One."

The interview would have been interesting, because Deteresa told Radziwill that Simpson had not kept his hand in a bag during the flight. But Deteresa decided not to reach for her proverbial fifteen minutes of fame, and she declined Radziwill's offer to put her on the air.

Like most successful salesmen, Radziwill wouldn't take no for answer. To be certain he got at least part of the story, he had surreptitiously taped Deteresa during their original conversation. Moreover, over her objection, "Day One" broadcast a five-second clip of the videotape Radziwill had arranged to be made, without Deteresa's knowledge, from a public street adjacent to her home.

Deteresa responded with a five-prong lawsuit against ABC and Radziwill. But her case has not been successful. Federal District Judge Linda McLaughlin granted the network's motion for summary judgment, dismissing her lawsuit. And the Court of Appeals has affirmed.

In an opinion by Judge Diarmuid O'Scannlain, the appellate court has ruled that Radziwill's surreptitious taping of his conversation with Deteresa did not violate California or federal eavesdropping statutes. Judge O'Scannlain also ruled that the taping was not sufficiently offensive to support a common law right of privacy claim. Nor did Radziwill's failure to tell Deteresa he was taping her constitute a fraud. Finally, though ABC allegedly used hidden cameras in other cases, Deteresa had not shown that ABC is engaged in a "massive scale" of crimes and torts of the kind that would be necessary to prove it had violated California's unfair business practices statute.

Deteresa v. American Broadcasting Companies, Inc., 121 F.3d 460, 1997 U.S.App.LEXIS 19481 (9th Cir. 1997) [ELR 19:12:12]

ABC did not commit fraud or violate federal wiretapping statute by using hidden camera to tape employees of Psychic Marketing Group for broadcast on "PrimeTime Live"

ABC has won the dismissal of lawsuit that complained about its use of a hidden camera and microphone to surreptitiously tape interviews with employees of the Psychic Marketing Group for broadcast on "PrimeTime Live."

A "PrimeTime Live" journalist was able to interview the company's employees by falsely telling them she worked at another Psychic Marketing Group office and was seeking a transfer to theirs. The journalist recorded these interviews using a hidden camera and microphone, and the tapes she made were later broadcast on the show.

Psychic Marketing Group's employees claimed that they were injured by the broadcast, and sued ABC for fraud and violation of the federal wiretapping statute. Their suit has not been successful, however.

In response to an ABC motion for summary judgment, federal District Judge James Ideman has ruled that the fraud claim had no merit, because the employees' depositions showed that all of their claimed injuries resulted from the broadcast itself, rather than from the journalist's misrepresentation concerning why she wanted to interview them. The judge also ruled that the fraud claim was barred by California's one-year statute of limitations for invasion of privacy, because although the fraud claim was "wrapped in the rubric of fraud, Plaintiffs' claims more accurately assert personal privacy interests. . . ."

Judge Ideman also rejected the employees' wire-tapping claim. He ruled that the legislative history of the federal wiretapping statute showed that it was amended in 1986 to protect journalists from claims based on recordings of conversations to which they were a party, as the ABC journalist was in this case.

For these reasons, Judge Ideman has granted ABC's motion for summary judgment and has dismissed the case.

Sussman v. American Broadcasting Companies, Inc., 971 F.Supp. 432, 1997 U.S.Dist.LEXIS 16600 (C.D.Cal. 1997) [ELR 19:12:12]

Following remand from United States Supreme Court, federal District Court orders new trial in suit by photographer William Gasperini against Center for Humanities, unless Gasperini accepts $375,000 for lost transparencies rather than $450,000 awarded by jury

Over a period of seven years, William Gasperini took thousands of photographs in Central America, many of them in active war zones. Gasperini sent 300 of those transparencies to the Center for Humanities for its use in producing a video entitled "Conflict in Central America: An Historical Commentary." Unfortunately, the transparencies were lost. The Center admitted liability, but could not agree with Gasperini on the amount he ought to be compensated.

A jury trial resulted in a verdict of $450,000 which amounted to $1,500 per lost transparency - an amount that is customarily provided for as liquidated damages in printed forms used by professional photo libraries, and an amount that had been awarded in other unrelated lawsuits involving lost slides.

The Center contended the verdict was excessive, but the trial judge denied its motion for a new trial. On appeal, however, the Center did better. The Court of Appeals ordered a new trial unless Gasperini accepted $100,000 (ELR 17:12:13).

To this point in the case, the dispute had been over the actual value of the lost transparencies. But when the appellate court reduced the jury's verdict, its decision injected a new issue in the case - one quite foreign to the thinking of most photographers and their lawyers. That new issue involved the legal standard federal judges should apply in reviewing the jury verdicts in cases, like this one, that arise under state law (and are heard in federal court on diversity of citizenship grounds). Though far removed from the everyday concerns of photographers, this question was of interest to federal litigators, and to the United States Supreme Court. The nation's high court agreed to hear the case and ultimately ruled that federal judges should apply state standards of review, rather than the slightly different federal standard of review the Court of Appeals had used (ELR 18:2:4). Thus the case was remanded to the lower courts, for that to be done.

In an opinion that will be of interest to photographers and their lawyers, District Court Judge Charles Brieant has ruled that the Center is entitled to a new trial unless Gasperini is willing to accept $375,000 in damages (rather than the $450,000 originally awarded by the jury). To reach this conclusion, Judge Brieant reviewed in some detail how the lost photos came to be shot, the manner in which they were used by the Center, their subject matter, and the extent to which Gasperini could (or could not) replace them with new photos. On the basis of factors like these, the judge concluded that all but about 70 of the lost transparencies had a reasonable value equal to or greater than the $1,500 each sought by Gasperini and awarded by the jury. The other 70 were not quite as significant as the rest, Judge Brieant found, and he valued those at just $200 each.

This is how the judge calculated that $375,000 was the greatest amount the jury could have awarded "without deviating materially from what would be reasonable compensation" - the standard of review required by New York statute.

Gasperini v. Center for Humanities, Inc., 972 F.Supp. 765, 1997 U.S.Dist.LEXIS 11031 (S.D.N.Y. 1997) [ELR 19:12:13]

Federal court dismisses most, but not all, of Upper Deck's claims against Score Board and other sports memorabilia dealers alleging violations of Upper Deck's rights to sell Mickey Mantle and Joe Montana autographed merchandise

The sports memorabilia business is as competitive as professional sports itself, and two of the industries' leaders - Upper Deck and the Score Board - are battling one another in federal courts from coast to coast. So far at least, the Score Card is ahead on points, though none of the legal contests is over yet.

In one recent case, a federal court in New Jersey gave the Score Card a preliminary injunction that barred Upper Deck from selling Ken Griffey autographed merchandise to certain types of retailers (ELR 19:10:14). Now, a federal court in California has granted the Score Card another interim victory: District Judge Barry

Moskowitz has dismissed most of Upper Deck's claims alleging violations of the company's right to sell Mickey Mantle and Joe Montana memorabilia.

Upper Deck's California case is a multipronged attack (against other sports memorabilia dealers, as well as the Score Card) on competitors' sales of merchandise signed by Mickey Mantle, Joe Montana, Michael Jordan, Wayne Gretzky, Ted Williams and Reggie Jackson. Upper Deck's complaint asserts claims involving California's Autograph Sports Memorabilia statute, trademark and dilution law, right of publicity law, contract law, unjust enrichment, unfair competition, declaratory relief and defamation.

The Score Card (and its co-defendants) responded with a motion for summary judgment to some of these claims with respect to Mickey Mantle and Joe Montana merchandise in particular. Both of these athletes had once been under contract to sign merchandise for sale by the Score Card, and then later signed with Upper Deck. (Upper Deck's claims based on Mickey Mantle merchandise are somewhat ironic, because in an unrelated case, Mantle's estate has been awarded $4 million on account of Upper Deck's breach of its agreement with Mantle. (ELR 19:10:14))

The Score Card continued to sell its existing inventory of merchandise signed by Mantle and Montana, even after they switched to Upper Deck; and the Score Card continued to sell Mantle and Montana merchandise that Score Card had purchased in the secondary market. Upper Deck objected to both of these practices. But Judge Moskowitz has found them to be legal.

The judge carefully reviewed both athletes' contracts with the Score Card, and found that Mantle's explicitly permitted, and Montana's implicitly permitted, the sell-off of existing inventories after their contracts with the Score Card ended.

With respect to the Score Card's resale of merchandise it purchased on the secondary market, Judge Moskowitz found that the "first sale doctrine" permitted the Score Card to do so, even if there is a likelihood of consumer confusion. This is so, he explained, because the first sale doctrine "states that once a product enters the market, its trademark is not infringed by subsequent sales."

The California Autograph Sports Memorabilia statute requires dealers to provide customers with certificates of authenticity - something which the Score Card does. Since the Score Card does comply with the statute, it also sought dismissal of Upper Deck's claim based on that statute.

However, Judge Moskowitz ruled that mere compliance with the statute's certificate requirement would "eviscerate the effectiveness of the statute," if dealers had no reasonable basis for believing the items it was selling were in fact authentic. Thus, the judge ruled that "dealers must satisfy the facial requirements of the statute and have a reasonable basis in fact for believing that an item of autographed sports memorabilia is authentic." The judge was quick to point out that this does not mean that dealers must witness the signing themselves. But they must have some basis for believing the items they sell are real.

At this point in the case, there were disputed facts and unfinished discovery related to whether the Score Card satisfied the statute. So the judge denied the Score Card's motion for summary judgment on this claim.

The judge did however dismiss some of Upper Deck's other claims. For example, the judge dismissed Upper Deck's trademark infringement claim, because its right to sell Mantle and Montana merchandise is not exclusive, and thus Upper Deck does not have standing to assert trademark and dilution claims based on the use of their names. Likewise, the judge held that Upper Deck does not have standing to assert right of publicity claims based on the use of their names, again because its right to use their names is not exclusive. On the other hand, the judge refused to dismiss Upper Deck's false advertising claim, because such claims may be brought by anyone who suffers a competitive injury.

Upper Deck Authenticated, Ltd. v. CPG Direct, 971 F.Supp. 1337, 1997 U.S.Dist.LEXIS 16964 (S.D.Cal. 1997) [ELR 19:12:14]

Dismissal of former Russian dissident's defamation suit against author John McPhee is affirmed, because offending passages in "The Ransom of Russian Art" were opinion rather than fact

Murder mysteries are the stuff of fiction - and sometimes the subject of fact as well. In his non-fiction book The Ransom of Russian Art, author John McPhee writes about the death of dissident Russian artist Evgeny Rukhin who was killed in a mysterious studio fire in Leningrad in 1976.

The exact circumstances of Rukhin are disputed; McPhee's book recounts five versions that were told to him by five separate sources. Two versions blame former Russian dissident Ilya Levin for Rukhin's death: according to one, Levin killed Rukhin for the KGB; according to the other, Levin was a coward and did nothing to save Rukhin from the KGB.

Following the publication of The Ransom of Russian Art, Levin (who now lives in Washington, D.C.) sued McPhee and his publishers for defamation. The case, however, was dismissed by federal District Judge Lewis Kaplan (ELR 18:5:13). And now, that ruling has been affirmed by the Court of Appeals.

In an opinion by Judge Jon O. Newman, the appellate court has held that the book could fairly be read as implying that Levin was a murderer, and thus was "susceptible of a defamatory meaning."

On the other hand, Judge Newman concluded that "McPhee uses a number of clear signals to indicate to the reader that the versions of the events surrounding the studio fire were nothing more than conjecture and speculation." Thus, "any allegation of Levin's possible involvement in a murder [are] in the category of opinion - opinion based on speculation without any implication of fact." Since expressions of opinion are not actionable, Levin's suit was properly dismissed, the appellate court concluded.

Levin v. McPhee, 119 F.3d 189, 1997 U.S.App.LEXIS 26235 (2d Cir. 1997) [ELR 19:12:15]

Court denies motion for summary judgment by authors and publisher of "Masters of Deception," in defamation action filed by computer hacker portrayed in the non-fiction book

Even unindicted co-conspirators are entitled to their day in court, if they are portrayed in print in an unflattering light - at least in Pennsylvania. That is one conclusion to be drawn from an opinion by Federal Magistrate Judge Thomas Rueter in a defamation action filed by Allen Wilson against the authors and publishers of Masters of Deception: The Gang That Ruled Cyberspace - a non-fiction book about a group of "hackers," some of whom were indicted by the federal government on charges involving their illegal use of computers.

Wilson was a member of the group, and though not prosecuted himself, he was an unindicted co-conspirator who cooperated with the government in the prosecution of the others. Wilson is not one of the main characters in Masters of Deception. But authors Michelle Slatalla and Joshua Quittner do refer to Wilson on several occasions, in ways that Wilson says have injured his reputation. As a result, he filed a defamation action against Slatalla and Quittner and against HarperCollins Publishers, Inc., the company that published their book.

The defendants responded with a motion for summary judgment, arguing that the book's objected-to passages are not capable of defamatory meaning, are protected by the fair report privilege, are substantially true, and were not published with the required degree of fault. The motion has been largely unsuccessful however. While Judge Rueter granted portions of it, he has denied most of their motion, thus allowing the suit to proceed.

The judge agreed with Wilson that all of the objected-to passages are capable of defamatory meaning. While some of those passages were protected by the fair report privilege, summary judgment could not be granted with respect to others, because there were disputed facts concerning whether the privilege had been abused as to those. Similarly, while some passages were substantially true, disputed facts concerning the truth of others meant summary judgment could not be granted as to those.

Finally, although Judge Rueter agreed with the defendants that the book was about a matter of public concern, he decided that Pennsylvania (rather than New

York) law applied; and Pennsylvania law requires a private figure plaintiff, such as Wilson, to prove only that defendants acted negligently, even if the subject matter is of public concern. This was an important ruling, because the defendants argued that even if the objected-to statements were false, defamatory, and not privileged, they had not been published with the required degree of fault. Judge Rueter rejected this argument however, because "summary judgment is rarely appropriate in a negligence action."

Wilson v. Slatalla, 970 F.Supp. 405, 1997 U.S.Dist.LEXIS 8781 (E.D.Pa. 1997) [ELR 19:12:15]

Dismissal of Israeli residents' defamation and emotional distress suit against Village Voice, an Israeli newspaper and two journalists is affirmed

An article published by the Village Voice in 1985 about "Israel's Jewish Terrorists" sparked the filing of a defamation and emotional distress lawsuit by John and Chaiken, two former residents of Boston who had emigrated to Israel's West Bank and were interviewed and quoted by the article's author, Robert I. Friedman. According to the Chaiken's complaint, originally filed in Massachusetts, the article falsely portrayed them as terrorists, thus injuring their reputations and disturbing their emotional tranquillity.

The Chaikens' lawsuit named the Village Voice and Friedman as defendants, and also named Maariv, an Israeli newspaper that published a report about the

Village Voice article, and Maariv's New York correspondent.

From the start, the suit involved more procedural issues than substantive ones. Maariv and its correspondent were dismissed from the case on the grounds that Massachusetts did not have personal jurisdiction over either. The case was then transferred to New York where federal District Judge John Keenan dismissed Friedman, because the statute of limitations on claims against him had already run.

Finally, the Chaikens' remaining claims against the Village Voice were dismissed on the merits. District Judge Shira Scheindlein held that the Voice had not been grossly irresponsible in publishing the article, and thus, since the article dealt with a matter of public concern, neither the defamation nor the emotional distress claim could survive the Voice's motion for summary judgment (ELR 18:3:13).

The Chaikens have fared no better on appeal. In an opinion by Judge Pierre Leval, the Court of Appeal has affirmed the dismissal of their entire case. Though Judge Leval wrote a long opinion of his own, carefully evaluating each of the Chaikens' contentions, he affirmed the dismissal of their case for the reasons cited by the District Court judges who originally ruled against them.

Chaiken v. VV Publishing Corp., 119 F.3d 1018, 1997 U.S.App.LEXIS 18143 (2d Cir. 1997) [ELR 19:12:16]

Colorado Rockies may not prohibit publishers of "alternative" baseball programs and scorecards from distributing their publications outside Coors Field on game days, Colorado Supreme Court rules

The Colorado Rockies may not control who sells baseball programs and scorecards outside Coors Field on game days, the Colorado Supreme Court has ruled, because the team's efforts to do so violated the First Amendment.

The Rockies' right to control game-day sales outside Coors Field was challenged by the publishers of "alternative" programs and scorecards who did not have permission to sell their publications, because the Rockies have a contract with ARA Leisure Services giving that company exclusive concession rights both inside and outside the stadium.

The Rockies of course are a privately-owned company, but Coors Field and its surrounding sidewalks are owned by a public entity. As a result, the Rockies' policies concerning the use of the property - especially the sidewalks - are subject to First Amendment principles concerning the protection of free speech.

In an opinion by Justice Mary Mullarkey, the Colorado Supreme Court has ruled that the sidewalks surrounding Coors Field are public forums, and thus restrictions on free speech - including the sale of publications - on those sidewalks must be content-neutral, must serve significant state interests, and must be narrowly drawn, in order to be constitutional.

In this case, the Rockies were able to satisfy only some of those requirements. Justice Mullarkey agreed with the team that its policy concerning the sale of programs and scorecards was content-neutral. Also, while one of the interests urged by the Rockies - maximizing its concession revenues - was not significant, other interests - like crowd control, safety and pedestrian movement - were significant.

Nonetheless, these significant interests did not win the case for the Rockies, because Justice Mullarkey ruled that the Rockies' ban on the sale of alternative programs and scorecards was not narrowly tailored to satisfy those interests, and the ban did not allow for ample alternatives for the sale of those publications.

As a result, the Colorado Supreme Court has affirmed an injunction that barred the Rockies from prohibiting the sale of alternative programs and scorecards from sidewalks surrounding the stadium.

Lewis v. Colorado Rockies Baseball Club, 941 P.2d 266, 1997 Colo.LEXIS 520 (Colo. 1997) [ELR 19:12:16]

Basketball coach was not deprived of due process or liberty when university suspended him without pay and issued allegedly harmful press release following school's investigation of student-athlete's complaint

Ferris State University has successfully defended against a lawsuit filed by its former basketball coach Horace Ludwig, in the wake of Ludwig's suspension without pay and the issuance of an allegedly harmful press release. Ludwig's downfall was initiated by a student-athlete who complained that Ludwig repeatedly made derogatory remarks concerning the student's Polish ancestry and was then cut from the basketball team in retaliation for his complaints.

Following an in-house investigation which apparently confirmed the student's complaints, Ferris State suspended Ludwig for 60 days without pay and terminated him as of the end of the year. The University also issued a press release about the matter which prompted articles in local newspapers.

Ludwig responded by filing a lawsuit against the University, alleging that he had been denied due process in connection with his suspension, and that the press release violated his liberty interests. A federal District Court disagreed and dismissed Ludwig's complaint for failure to state a claim.

The dismissal of Ludwig's case has been affirmed on appeal. Writing for the appellate court, Judge Cornelia Kennedy has rejected Ludwig's due process claim on the grounds that he did not have a "property interest" in continued pay during his suspension. Ludwig had based his claim on the University's written personnel policies. But the judge said that those policies authorized, but did not require, the university to pay personnel while they are suspended; and thus the

University did not violate its policies when it elected to suspend Ludwig without pay.

The press release issue presented a greater threat to the University, because the Supreme Court has held that an injury to a person's reputation constitutes a deprivation of a liberty interest when the injury occurs in connection with an employee's termination. Moreover, "when a deprivation of a liberty interest of this kind occurs, the employee must be afforded notice and an opportunity to be heard to refute the charges disseminated against him." In this case, however, Ludwig lost his liberty claim, because the court found that he "failed to sufficiently apprise the University of his desire for a name-clearing hearing" after the press release was issued.

Ludwig v. Board of Trustees of Ferris State University, 123 F.3d 404, 1997 U.S.App.LEXIS 21729 (6th Cir. 1997) [ELR 19:12:17]

Assistant women's basketball coach who was terminated for NCAA rule violation loses discrimination and breach of contract case against Wright State University

NCAA rules can be strict, even overly so in some contexts; but a college coach's failure to follow them can be fatal to his or her career. This at least is the lesson that Rochelle McKenzie must have learned from her violation of an NCAA rule that prohibits school officials from providing transportation to student athletes except in connection with team activities.

Rochelle McKenzie was once the Assistant Women's Basketball Coach at Wright State University in Ohio. Twice, while going to visit her parents in Cleveland, McKenzie gave rides to one of her team members, knowing that she was violating NCAA rules by doing so.

When Wright State's Athletic Director learned of McKenzie's violation, McKenzie was told she could resign (with employment benefits) or she would be fired. McKenzie resigned, but then sued Wright State for race and sex discrimination and for breach of contract. An Ohio Court of Claims ruled against her, and the Court of Appeals has affirmed.

In an opinion by Judge Michael Close, the appellate court has ruled that McKenzie failed to prove her discrimination claim, because she didn't show that Wright State had replaced her with a white or male coach. Moreover, even if Wright State had done so, McKenzie had not shown that her termination was for any reason other than her violation of NCAA rules. While other coaches had received less significant punishment for rule violations, none of them had violated rules intentionally and then willfully failed to report their violations, as McKenzie had. "In fact," Judge Close observed, "the record shows that another WSU coach, a white male, was terminated for a transportation violation because he failed to cooperate with WSU's investigation after failing to report that violation himself."

The appellate court also affirmed the dismissal of McKenzie's breach of contract claim. Her contract contained a clause stating that NCAA rules violations could result in disciplinary action "up to and including termination." Thus, Judge Close concluded, "WSU cannot be held liable for breach of contract in exercising the discretion which the contract grants."

McKenzie v. Wright State University, 683 N.E.2d 381, 1996 OhioApp.LEXIS 4294 (Ohio App. 1996) [ELR 19:12:17]

High school athletic association did not violate ADA or Rehabilitation Act by refusing to waive eight-semester eligibility rule to permit student with attention deficit disorder to play basketball during his fifth year in high school, federal appellate court rules

The Michigan High School Athletic Association has finally been vindicated. A federal Court of Appeals has ruled, in an en banc decision, that the Association did not violate the Americans with Disabilities Act or the Rehabilitation Act when it refused to grant Dion

McPherson's request for a waiver of its eight-semester eligibility rule.

McPherson, who had attention deficit hyperactivity disorder and thus didn't graduate from high school on time, sought the waiver so he could play basketball during his fifth year at Huron High School. When the association refused to grant the waiver, McPherson sued, and won a preliminary injunction that permitted him to play during that year.

The Association appealed, and in an earlier ruling, the injunction was vacated as "moot," because by then, McPherson had graduated (ELR 16:6:15, 19:1:13). Nonetheless, Court of Appeals then reheard the case en banc, and has now awarded the Association a victory on the merits.

In an opinion by Judge James Ryan, the appellate court has ruled that the eight-semester rule is necessary to "create a more even playing field for the competitors," to "prevent widespread red-shirting abuses," and to preserve the philosophy "that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics."

The ADA and Rehabilitation Act did not require the Association to waive the rule, Judge Ryan said, because doing so "would work a fundamental alteration in Michigan high school sports programs" and would "impose an immense financial and administrative burden" on the Association.

In so ruling, Judge Ryan relied on an earlier decision he had written rejecting an ADA and Rehabilitation Act attack on the Association's 19-year age limit eligibility rule (ELR 17:11:11). There is "no principled distinction between the nature and purpose of the age-limit rule and the eight-semester rule," the judge said.

At earlier stages of this case, one of the issues was whether the Association could penalize Huron High School for allowing McPherson to play pursuant to the original preliminary injunction. Judge Ryan's en banc decision does not address this issue. But in a dissenting opinion, Judge Gilbert Merritt said that if the Association "is permitted to retaliate against the school district for its compliance with a district court injunction, then the power of district courts to issue injunctions will be undermined."

McPherson v. Michigan High School Athletic Association, 119 F.3d 453, 1997 U.S.App.LEXIS 18826 (6th Cir. 1997) [ELR 19:12:18]

Florida ticket scalping statute is constitutional, state appellate court rules

A Florida District Court of Appeal has upheld the constitutionality of that state's ticket scalping statute which makes it illegal to resell tickets for more than $1 above the retail admission price. The constitutionality of the statute was challenged by the owner of a business that had resold tickets to sports and entertainment events, apparently at substantial markups.

In an opinion by Judge Rodolfo Sorondo, the appellate court rejected the ticket seller's challenge. "We think the statute attempts to regulate areas of legitimate state concern . . . " the judge said. "Its obvious goal is to protect the consuming public and event promoters from the economic harm done to them by persons who artificially corner the market for tickets to public events. . . . [T]icket scalpers deprive consumers of a valuable service - the availability of low-cost tickets through box office sources."

The statute exempts registered travel agencies, if they resell tickets on behalf of the tickets' original sellers as part of travel packages. The ticket seller also attacked the constitutionality of the travel-agency exemption, saying that it was irrational. But Judge Sorondo rejected this argument as well. Registered travel agencies are subjected to "heightened duties and responsibilities," the judge explained; and these duties and responsibilities "provide a legitimate basis for allowing them to sell tickets in a manner different from that allowed to a general member of the public."

State of Florida v. Sobieck, 701 So.2d 96, 1997 Fla.App.LEXIS 10873 (Fla.App. 1997) [ELR 19:12:18]

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