RECENT CASES

Wesley Snipes' personal manager acted "at the request of" and "in conjunction with" Snipes' talent agency, and therefore manager did not violate California law even if manager negotiated movie deals for Snipes without being licensed to do so, state Labor Commissioner rules

Wesley Snipes was represented by personal manager Dolores Robinson from 1990 to 1994. During those years, Robinson allegedly negotiated several movie deals for the actor - an allegation later made by Snipes himself. Robinson herself was more modest; she said she handled Snipes' personal needs, after his deals had been negotiated by the actor's agent and lawyer, Creative Artists Agency and Barry Hirsch.

In most places in the world, an assertion that an actor's personal manager negotiated movie deals would not be an "allegation"; it would be a compliment. But in California, where Robinson is based, those who seek and "exploit" employment offers for actors must be licensed by the California Labor Commissioner. And Robinson admittedly was not.

In California, if a manager gets jobs for clients, or tries to, or even negotiates unsolicited offers, without being licensed, the contract between the manager and his or her client may become unenforceable. More serious yet, the manager may have to refund commissions previously received from the client, even though those commissions were fairly earned for services actually rendered.

When Snipes and Robinson went their separate ways in 1994, Robinson filed a demand for arbitration with the American Arbitration Association, seeking commissions allegedly due her. Snipes responded with a petition to the California Labor Commissioner, seeking an order declaring his contract with Robinson to be void and seeking a refund of commissions he had previously paid her.

Though the question of what services Robinson did render was litigated, the Labor Commissioner ultimately did not have to decide it. Instead, the Commissioner focused on a 1982 amendment to the Talent Agencies Act which exempts from its usual licensing requirement managers who act "at the request of" and "in conjunction with" a licensed talent agency (ELR 4:12:4). In this case, the Commissioner found that whatever Robinson had done, she did "at the request of" and "in conjunction with" Creative Artists Agency; and thus she had not violated the law, even though she was not licensed.

Because decisions of the California Labor Commissioner are not published elsewhere, the full text of the ruling is reproduced here.

Snipes v. Dolores Robinson Entertainment, California Labor Commissioner Case No. TAC 36-96 (1998)

[Full Text]

Wesley Snipes, Petitioner, vs. Dolores Robinson Entertainment, a California corporation; and Dolores Robinson, an individual, Respondents.

Before the Labor Commissioner, State of California
Case No. TAC 36-96

DETERMINATION

A Petition to Determine Controversy was filed in this matter on November 16, 1996. Petitioner [hereinafter referred to as "Snipes"] alleges, inter alia, therein that respondents [hereinafter collectively referred to as "Mrs. Robinson") violated the Talent Agencies Act by acting in the capacity of a talent agent without being licensed, in violation of Labor Code section 1700.5. The Petition recites that earlier Mrs. Robinson filed a demand for arbitration with the American Arbitration Association seeking commissions allegedly due her pursuant to the written agreement under which Mrs. Robinson performed the services in question. Snipes seeks a determination from the Labor Commissioner that this written agreement is void ab initio and is therefore unenforceable. Snipes also seeks restitution of all sums paid to Mrs. Robinson as commissions pursuant to the written agreement.

Mrs. Robinson has conceded that she is not a licensed talent agent but denies that she has violated the Talent Agencies Act. She argues that she did not solicit work for Snipes and, in the alternative, that she acted "in conjunction with, and at the request of, a licensed talent agency" within the meaning of Labor Code section 1700.44(d). In addition, she claims that the Petition is barred by the one-year statute of limitations set forth in Labor Code section 1700.44(c) and has requested dismissal of the Petition on this ground.

The matter came on for two days of hearing on October 29 and 30, 1997, before Thomas S. Kerrigan, Special Hearing Officer, in Los Angeles, California. Snipes appeared through his attorneys, Stanton L. Stein and Karen L. Dillon of Stein & Kahan; Mrs. Robinson appeared through Lawrence Y. Iser and Kristen L. Spanier of Greenberg, Glusker, Fields, Claman &

Machtinger. The matter was taken under submission at the close of the hearing.

ISSUES

The questions presented in this matter are as follows:

1. Did Mrs. Robinson function as a talent agent as defined in the Labor Code?

2. If so, did Mrs. Robinson act "in conjunction with, and at the request of," a licensed talent agent?

3. Is the Petition barred by the one-year statute of limitations contained in Labor Code section 1700.44 (c)1

DISCUSSION AND FINDINGS

The parties stipulated that at all times material to the allegations of the Petition Snipes was an artist within the meaning of Labor Code section 1700.44 (b) and Mrs. Robinson was not a licensed talent agent.

It is uncontradicted that Snipes was represented by Creative Artists Agency [hereinafter referred to as "CAA"], one of the leading talent agencies in the world, in July of 1990, a time when he was first beginning to attain prominence as a film actor. He expressed the desire at that time to be represented by an artist's manager to Donna Chavous who was then his representative at CAA. Chavous recommended to Snipes that he meet with Mrs. Robinson. Snipes subsequently met with Mrs. Robinson and decided to retain her as his artist manager. Shortly thereafter, they entered into the aforementioned written agreement. Mrs. Robinson continued to represent Snipes in this capacity until he purported to terminate their relationship in the middle of 1994.

There was testimony from Douglas Robinson, Snipes' present agent and no relation to Mrs. Robinson, and Barry Hirsch, Snipes' attorney, that though Mrs. Robinson worked mostly in the personal area for Snipes, she also negotiated major film deals on Snipes' behalf. For example, on the film Water Dance, Mrs. Robinson purportedly negotiated perquisites for Snipes, including travel, housing, per diem, and a rental car, though supposedly not requested by CAA to do so. She also had discussions with the producers of the film Sugar Hill about Snipes' compensation for appearing in that film and admitted to Hirsch and Douglas Robinson that she had negotiated the perquisites on that film as well. With respect to the film Star Gate, Mrs. Robinson represented to them that she had received a seven million dollar offer for Snipes' services. She related to them her discussions with the producers of the film White Men Can't Jump about Snipes being "right" for a role in that film.

She also told them she had negotiated an Acura automobile for Snipes as compensation for appearing in a Taco Bell commercial.

Snipes testified that all proposals for his services went through Mrs. Robinson. He claimed that she promised at the beginning of their relationship to seek opportunities for him in films. He claimed she was the person who was primarily involved in obtaining perquisites for him when he worked on these films, including the employment of trainers, bodyguards, and chefs. He first heard about film projects from Mrs. Robinson, not from his agent. On one film, Demolition Man, she told him she was able to double an offer to Snipes from two million dollars to four million dollars.

Chavous, on the other hand, testified that she, Mrs. Robinson, and Barry Hirsch, Snipes' attorney, functioned as a "team" in furthering Snipes' career. To her knowledge, CAA was the only member of the team to solicit deals for Snipes. According to Chavous, Mrs. Robinson worked in the area of attending to Snipes' personal needs after the deal was consummated by Chavous, e.g., making sure he had the proper amenities on the set during filming of a number of motion pictures in which he appeared.

Mrs. Robinson denied that she negotiated any film deals for Snipes, insisting that she primarily worked in the area of handling personal concerns for Snipes while he was making these films, including interceding when Snipes, his attendants, friends, or family ran into personal difficulties that required attention. Evidence of various incidents that required Mrs. Robinson's intervention in this regard was adduced at the hearing. She admitted that as part of coordinating the efforts on behalf of Snipes career she oversaw the efforts of the other members of the "team" and made suggestions, but that

CAA and Hirsch did the direct negotiating on all of Snipes film deals.

There is, as it can be seen, an apparent contradiction between the testimony of Douglas Robinson, Barry Hirsch, and Snipes, on the one hand, and Mrs. Robinson and Donna Chavous, on the other. If the former group of witnesses is to be believed, Mrs. Robinson's actions qualify as those of a talent agent. As counsel for Snipes point out, even negotiations that "exploit" employment offers emanating from the outside constitute prohibited solicitation when done by unlicensed persons within the meaning of the Talent Agency Act (see Hall v. X Management, Inc., T.A.C. 19-90 at pp 29-30).

But if Mrs. Robinson and Donna Chavous were to be discredited in their testimony on this important point, that would not end our inquiry. Mrs. Robinson's second line of defense is that even assuming the Labor Commissioner finds that she acted as a talent agent in negotiating a contract or contracts on behalf of Snipes, she is exempt from the prohibitions of the law under the provisions of Labor Code section 1700.44(d). The assertion of this defense necessitates careful analysis. To qualify under those express provisions requires the satisfaction of a twofold burden of proof, i.e., the person claiming the exemption must prove that he or she acted both (1) "at the request of," and (2) "in conjunction" with, a licensed talent agent during the course of the events in question.

Here, the undisputed evidence is that Mrs. Robinson was introduced to Snipes by Donna Chavous, Snipes agent at CAA, and that Ms. Chavous recommended Mrs. Robinson to Snipes for retention as his artist manager. There can accordingly be no question that at least initially Mrs. Robinson was performing her services in response to a request from CAA. Furthermore, there is no evidence that when Douglas Robinson came into the picture that either he or anyone else from CAA asked Mrs. Robinson to cease what she was doing on Snipes' behalf. In fact, the evidence is squarely to the contrary.2 Accordingly, it appears clear that Mrs. Robinson performed her functions from 1990 through 1994 at the continuing request of CAA.

The second requirement of the exemption is that the artist manager shows that he or she worked "in conjunction" with the licensed talent agent. The arrangement here commenced, according to the testimony of Mrs. Robinson and Donna Chavous, as a bona fide team undertaking. Donna Chavous was responsible for soliciting work for Snipes and negotiating his contracts and Mrs. Robinson was responsible for handling his personal affairs. In this connection Douglas Robinson admitted that after he took over the account he spoke to Mrs. Robinson on the telephone "ten times a day." The exhibits received in evidence, moreover, show that CAA and Hirsch were intimately involved in all of the negotiations and that Mrs. Robinson was at all times working closely with them. This correspondence may be the most reliable indicator of the true relationship between the parties. When viewed in toto, the evidence therefore establishes that Mrs. Robinson acted in conjunction with CAA in performing services on Snipes behalf.

We accordingly find that Mrs. Robinson did not violate the provisions of the Talent Agencies Act because, whether or not she engaged in or carried on the occupation of an unlicensed talent agent without being licensed within the meaning of Labor Code section 1700.5, a disputed factual issue which we do not here resolve, it is clear that she acted at the request of and in conjunction with a licensed talent agent within the meaning of Labor Code section 1700.44(d) at all times.

Counsel for Snipes warns that if the exemption contained in section 1700.44(d) is found to exist in this case, it will be taken by unscrupulous artist managers as a sign that the law may be circumvented by pro forma alliances between artist managers and licensed talent agents with the result that what would otherwise qualify as violations of the law may go unregulated. While we are cognizant of the possibilities of abuse in this area, the determination here is limited to the facts of this case. The undisputed evidence presented, which was well documented by the correspondence and other exhibits offered by Mrs. Robinson, showed a close and continuing relationship between her organization and one of the most well-known talent agencies in the world. Based on this record we find no showing of either subterfuge or an attempt to circumvent the law.

CONCLUSIONS OF LAW

1. Petitioner is an "artist" within the meaning of Labor Code section 1700.44(a). The Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code section 1700.44(a).

2. Respondents acted "in conjunction with, and at the request of, a licensed talent agency" within the meaning of Labor Code section 1700.44(d) and therefore their actions, if any, in the negotiation of employment contracts for petitioner are not unlawful.

DETERMINATION

Petitioner having failed to sustain its burden of proving that respondents violated Labor Code section 1700.5, the Petition is dismissed with prejudice.

Dated: April 1, 1998
Division Of Labor Standards Enforcement

Department of Industrial Relations, State of California
Thomas S. Kerrigan, Special Hearing Officer

Dated: April 27, 1998
The above Determination is adopted by the Labor Commissioner in its entirety.
Jose Millan, State Labor Commissioner

[Footnotes]

1. Mrs. Robinson's position in this regard was rejected in an Order Denying Respondents' Request for certification of Lack of Controversy, which order antedated the hearing, on the ground that the Petition was filed within one year of respondent's demand for arbitration. Her renewed objection on this point is also rejected.

2. Though there was testimony that later on CAA never expressly requested Mrs. Robinson to negotiate this or that perquisite, this testimony must be discounted when the entire arrangement between the parties is duly considered. It is understandable that in daily interaction over the course of time during a continuing series of business transactions the parties tend to begin to deal with one another as though certain things were understood. The requirements of the statute cannot be construed to call for a game of "Mother May I?" every time an artist manager takes some action during a long term relationship of the nature reflected in this case. To find otherwise would be to ignore the realities of day to day life in the film industry.
[ELR 20:1:4]

Actors George Wendt and John Ratzenberger are entitled to a trial in their right of publicity case alleging that figures displayed in airport bars depict them in their roles as "Norm" and "Cliff" in the television series "Cheers," federal court of appeals rules, again

Once, and for many years, actors George Wendt and John Ratzenberger portrayed the characters "Norm" and "Cliff" on the popular television series "Cheers." The show itself has gone off the air (except perhaps in syndication), and Wendt and Ratzenberger have cast themselves in new roles: as plaintiffs in a lawsuit against Host International - the operator of a chain of airport "Cheers" bars.

Host's bars look like the set of the Paramount-produced program, and were equipped with animated robotic figures that sat at ends of the bars, just as

"Norm" and "Cliff" often did in episodes of the television series.

Before building its bars, Host obtained a license from Paramount, but couldn't make a deal with Wendt or Ratzenberger. As a result, the robotic figures in Host's bars were named "Hank" and "Bob," rather than "Norm" and "Cliff." Moreover, and perhaps more important, in the opinion of federal District Judge Manuel Real, "Hank" and "Bob" do not bear "any similarity at all" to Wendt and Ratzenberger, "except that one . . . is heavier than the other. . . ." According to Judge Real, who observed the actors and robots in his courtroom, their "facial features are totally different." As a result, judge Real granted Host's motion for summary judgment and dismissed the actors' suit - twice.

The first dismissal was reversed by the Court of Appeals (ELR 17:4:17), apparently because at that time, Judge Real had only seen photographs of the robots, and photos were not the best evidence of their actual appearance. After robots themselves were shipped into the courtroom, Judge Real dismissed the case again (ELR 17:8:24). But now the Court of Appeals has reversed again.

In an opinion by Judge Betty Fletcher, the appellate court has ruled that under California's right of publicity statute, Civil Code section 3344, the degree to which Host's robots "resemble, caricature, or bear an impressionistic resemblance" to Wendt and Ratzenberger is "clearly material." And the appellate court "respectfully disagree[d]" with Judge Real about whether the robots were similar to the actors. Said the appellate court: "we conclude from our own inspection of the robots that material facts exist that might cause a reasonable jury to find them sufficiently `like' the [actors] to violate [California Civil Code section 3344]."

The degree of similarity between the actors and Host's robots also was relevant to the actors' claims under California's common law right of publicity. Thus, there were "triable issues of fact as to whether or not [Host and Paramount] sought to appropriate their likenesses for their own advantage and whether they succeeded in doing so."

Wendt and Ratzenberger also have asserted an unfair competition claim under Lanham Act section 43(a). This claim is to be evaluated under the eight-factor test used in ordinary trademark cases. One of those factors is the "similarity of the marks"; and Judge Real had dismissed the Lanham Act claim because he found "no similarity at all." But he did not consider any of the other factors, and this was a reversible error, the appellate court ruled. This was so, it explained, because when it did its own evaluation of the other factors, the appellate court concluded that "a jury could reasonably conclude that most of the factors weigh in [Wendt and Ratzenberger's] favor."

As a result, the appellate court reversed the summary judgment and remanded the case to the District Court "for trial."

Wendt v. Host International, 125 F.3d 806, 1997 U.S.App.LEXIS 25584 (9th Cir. 1997) [ELR 20:1:7]

Federal court rejects Smith-Hemion Productions' promissory estoppel claim against Michael Jackson and alter-ego claims against other members of Jackson family, in suit to recover damages suffered by Smith-Hemion when NBC canceled Jackson family TV special after Michael indicated he would not appear at taping

Smith-Hemion Productions was, no doubt, pleased to be chosen to produce a Jackson family television special, when it was offered the opportunity to do so in 1993. The program was to have been broadcast by NBC which would have financed its production costs; and Smith-Hemion would have received a $375,000 fee for its services.

But things didn't work out as expected. After months of preparation, Michael Jackson indicated he would not participate in the show, though he earlier had indicated he would, and NBC canceled the program, as it had a contractual right to do.

Moreover, and what's worse, Smith-Hemion suffered significant damages as a result of the cancellation, and has been left with no one to recover them from. A federal District Court has ruled that Michael Jackson is not liable, because Smith-Hemion's promissory estoppel claim against him was not proved. Also, although Smith-Hemion did obtain a judgment against Jackson Communications, Inc. - a corporation owned by members of the Jackson family - Smith-Hemion was unable to collect the judgment. And the court has ruled that the judgment cannot be collected from the Jackson family, because they are not the corporation's alter egos.

In retrospect, it is now apparent that Smith-Hemion got into this dilemma because it was too trusting. Smith-Hemion had a written contract only with Jackson Communications, Inc., not with Michael

Jackson or any member of the Jackson family. Smith-Hemion knew that NBC had the right to cancel the show if Michael didn't participate, but Smith-Hemion didn't confirm Michael's participation directly with him before incurring unavoidable obligations to others. Instead, Smith-Hemion relied on a letter that Michael had signed at the request of his brother Jermaine which stated that Michael would participate. But as things turned out, Michael didn't know that his participation in the program was an essential element of NBC's contract, nor did Michael know that Smith-Hemion would rely on the letter he had given to Jermaine in making obligations of its own.

The doctrine of "promissory estoppel" is sometimes used to impose liability on people who break promises, even if they received nothing in return for those promises. But the doctrine requires proof of several elements. In this case, Judge Laughlin Waters rejected Smith-Hemion's promissory estoppel claim against Michael, because these elements were not proved. Among other things, Michael had not promised Smith-Hemion he would appear on the show; Michael had not foreseen that Smith-Hemion would rely on the promise he made in the letter he gave to Jermaine; and Smith-Hemion's reliance on Michael's letter was not reasonable.

When a corporation is unable to pay its debts, creditors sometimes attempt to collect from its share-holders under the alter ego doctrine. In order to success-fully show that shareholders are the alter egos of their corporation, several things must be proved. In this case, however, they weren't. Among other things, Judge Wa-ters ruled that there was no showing that members of the Jackson family controlled the day-to-day operations of Jackson Communications, Inc., or intermingled their funds with those of the corporation, nor was there any showing that the corporation "functioned as a mere facade" for members of the Jackson family.

Trans-World International v. Smith-Hemion Productions, 972 F.Supp. 1275, 1997 U.S.Dist.LEXIS 17715 (C.D.Cal. 1997) [ELR 20:1:8]

Artist Faith Ringgold is entitled to trial in copyright infringement claim against HBO and Black Entertainment Television, on account of the use of a poster of her artwork as set decoration in an episode of sitcom "Roc"; Court of Appeals rules that use of poster was not de minimis and may not have been a fair use

Faith Ringgold is a successful contemporary artist who created and owns the copyright to a work of art entitled "Church Picnic Story Quilt." Thousands of copies have been reproduced and sold as posters by the High Museum of Art in Atlanta, with Ringgold's permission. Apparently, one of those posters wound up in the possession of HBO Productions which used it as set decoration in an episode of the sitcom "Roc."

HBO's use of the poster was of course a compliment to Ringgold. But because HBO had used the poster without obtaining a license, it was a compliment Ringgold didn't learn of until, by chance, she saw the "Roc" episode on Black Entertainment Television.

Ringgold responded with a copyright infringement suit. HBO and BET replied by arguing, in a motion for summary judgment, that their use of the poster was not infringing because it was de minimis and a fair use. District Judge John Martin was persuaded by the fair use argument, and he dismissed the case on that ground. On appeal, however, Ringgold has done better. In a thoughtful opinion by Judge Jon Newman, the Court of Appeals has reversed.

The poster appeared in the "Roc" episode nine times, for periods of time from less than 2 seconds to just over 4 seconds. In all, the poster was visible for just under 27 seconds. In one segment, 80% of the poster was visible; in other segments, less was. The poster was plainly visible though not in perfect focus. These uses were non-infringing de minimis uses, HBO and BET argued. But Judge Newman disagreed.

He drew an analogy to Copyright Office regulations prescribing the circumstances under which royalties must be paid by public television broadcasters for their use of pictorial and visual works, under a compulsory license provision of the Copyright Act. These regulations require public broadcasters to pay royalties for "featured" displays which are defined as full-screen or substantially full-screen displays for more than 3 seconds. And the regulations require lesser royalties for "background" displays which are less than full-screen or substantially full-screen displays for less than 3 seconds. HBO and BET are not public broadcasters and thus not entitled to a compulsory license. But using these regulations as a guide, Judge Newman concluded that the display of Ringgold's artwork in "Roc" was "not de minimis copying."

This ruling does not mean that all unlicensed uses of artwork would be infringing. Judge Newman explained that "In some circumstances, a visual work, though selected by production staff for thematic relevance, or at least for its decorative value, might ultimately be filmed at such a distance and so out of focus that a typical program viewer would not discern any decorative effect that the work of art contributes to the set." However, the judge added, " . . . that is not this case. The painting component of the poster is recognizable as a painting, and with sufficient observable detail for the `average lay observer' to discern African-Americans in Ringgold's colorful, virtually two-dimensional style. The de minimis threshold for actionable copying of protected expression has been crossed."

On the fair use issue, Judge Newman concluded that the "purpose and character of the use" factor counted against HBO and BET, because their use of Ringgold's artwork was "the same decorative purpose for which the poster is sold. . . ." Again, the judge was quick to point out that not all television uses of artwork would flunk the "purpose" factor. "It is not difficult to imagine a television program that uses a copyrighted visual work for a purpose that heavily favors fair use," he said. "If a TV news program produced a feature on Faith Ringgold and included camera shots of her story quilts, the case for a fair use defense would be extremely strong."

Nevertheless, the judge added, "[I]t must be recognized that visual works are created, in significant part, for their decorative value, and , just as members of the public expect to pay to obtain a painting or a poster to decorate their homes, producers of plays, films, and television programs should generally expect to pay a license fee when they conclude that a particular work of copyrighted art is an appropriate component of the decoration of a set."

With respect to the fair use factor that looks at the "effect of the use upon the potential market for or value of the copyrighted work," Ringgold alleged she was injured because of HBO and BET's use of her artwork "without paying the customary price." If proved, this would mean that this factor would count against HBO and BET too, because "Ringgold is not required to show a decline in the number of licensing requests for the `Church Picnic' poster since the ROC episode was aired." Instead, this factor will count in her favor "if she can show a `traditional, reasonable, or likely to be developed' market for licensing her work as set decoration. Certainly `unrestricted and widespread conduct of the sort engaged in by the defendant[s] . . . would result in substantially adverse impact on the potential market for [licensing of] the original."

Since Ringgold's work was purely creative, that factor counted in her favor too.

Editor's note: Though Judge Newman's opinion suggests that Ringgold will ultimately prevail in this case, the decision is unlikely to have a significant impact on the way in which movies and TV producers obtain rights to props and set decorations. Careful producers have been routinely clearing props and set decorations for years. See, e.g., "Setting the Stage: Guidelines for Television Prop Clearances" by Jordan Stringfellow and Helene Godin (ELR 15:10:3). Perhaps because clearances have been done with care, there have been only a handful of decisions in cases like this one. In one of those cases, a preliminary injunction was denied, on both de minimis use and fair use grounds, in a case alleging infringement of the copyrights to set dressings in episodes of "Barney & Friends" (ELR 15:10:9). In another, a copyrighted mobile used as a prop in a children's video was held not to be an infringement, because the video's depiction of the mobile was not a "copy" of it (ELR 16:10:10). On the other hand, the French Supreme Court has held that a French television broadcaster infringed the copyrights to murals in the bar of the Theatre des Champs-Elysees, painted by Edouard Vuillard, when the station briefly showed the murals as part of a program on current events in the theater (ELR 17:11:13). In a decision that was rendered only a few weeks before this one (and is reported immediately below, ELR 20:1:10), a federal District Court ruled that the fleeting appearance of Jorge Antonio Sandoval photographs in the movie "Seven" was a fair use.

Ringgold v. Black Entertainment Television, 126 F.3d 70, 1997 U.S.App.LEXIS 24443 (2d Cir. 1997) [ELR 20:1:8]

Fleeting appearance of photographs by Jorge Antonio Sandoval in New Line movie "Seven" was a fair use, federal District Court rules

The 1995 movie "Seven" was a mystery about a serial killer whose murders are connected to the seven deadly sins. It was produced and distributed by New Line, with critical and commercial success - and, now, with legal success too. New Line's legal success has come in a copyright infringement suit filed against the company by photographer Jorge Antonio Sandoval as a result of the unauthorized appearance of at least one of his photographs in one of the movie's scenes.

In the offending scene, two detectives kick open the door of the killer's apartment and find it filled with things that suggest the killer is mentally deranged. A light box is in the background, and several translucent forms hang from it, at least one of which is a Sandoval photograph. The scene is a minute and a half; the light box is visible in ten shots that last from one to six seconds each for a total of at most 30 seconds. In most shots, the photos are obstructed by actors or furniture, and the camera never focuses on the box or the photos. Moreover, the light box is out of focus most of the time because the camera focuses on the foreground.

Sandoval himself was able to identify his photos "only after careful scrutiny." And federal District Judge Sidney Stein, to whom Sandoval's case was assigned, was only able to identify one of the photos as Sandoval's, "and only after repeated viewings. . . ."

New Line made a motion for summary judgment, arguing that the movie's light box images were not "legally cognizable copies," were not a "public display," and in any event were a "fair use." Judge Stein has agreed with New Line's fair use defense (and thus did not rule on the others).

Using the four-part fair use analysis required by the Copyright Act, the judge reached these conclusions. New Line's use of Sandoval's photos was commercial, but it also was transformative, so this factor did not weigh heavily in his overall analysis. Sandoval's photos were creative and original, so this factor weighed in Sandoval's favor. The photos were used in their entirety, so this factor favored Sandoval too, but Judge Stein added that "the obscured and fleeting nature of the use" did not preclude an ultimate finding of fair use. Finally, the judge found that New Line's use of the photos had no impact on the potential market for the value of Sandoval's photos, because they were "virtually undetectable" and "[e]ven widespread uses of Sandoval's Photographs in such a fleeting, obscured, and out-of-focus manner could not begin to encroach on the potential market for his work."

After weighing all of these factors, Judge Stein concluded that New Line's use of the photos was a fair use, and thus he granted the company's motion for summary judgment.

Editor's note: This decision was rendered about three weeks before the Second Circuit's decision in Ringgold v. Black Entertainment Television (the decision reported immediately above, ELR 20:1:8). As a result, Judge Stein's "impact-on-the-market" analysis was not as extensive as it might have been, if Ringgold had been decided first. Nonetheless, it appears that Judge

Stein accurately anticipated what Ringgold now requires, because he evaluated the impact that "widespread" uses of the type made by New Line "would" be likely to have on the value of Sandoval's photos, and concluded that there would be none. Though Judge Stein preferred to jump right to New Line's affirmed defense, this may have been a case in which it would have been better to have started with whether "Seven" infringed Sandoval's photos at all, under the substantial similarity standard. It appears that the use of the photos was so fleeting, obscured and unrecognizable, that such an approach would have led to a no-substantial-similarity and thus no-infringement conclusion, thus making fair use analysis unnecessary.

Sandoval v. New Line Cinema Corp., 973 F.Supp. 409, 1997 U.S.Dist.LEXIS 12512 (S.D.N.Y. 1997) [ELR 20:1:10]

Oprah Winfrey wins dismissal of suit for defamation and related claims filed by man she called a "liar" in response to his assertions they once had a relationship and used cocaine

Randolph Cook has a peculiar sense about what might injure his reputation. Cook claims that he and Oprah Winfrey once had a "relationship" and used cocaine together. Hoping to capitalize on that alleged relationship, Cook attempted to sell his story to several media organizations, including the National Enquirer.

Winfrey got wind of Cook's attempts, and responded by calling him a "liar." Cook replied with a lawsuit against Winfrey for defamation, interference with economic advantage and contract, and infliction of emotional distress. But he has had as little success with his lawsuit as he did with efforts to sell his story. Federal District Judge Charles Kocoras has granted

Winfrey's motion for summary judgment and has dismissed the case entirely.

In connection with Cook's defamation claims, Judge Kocoras skipped over the question of how being called a "liar" by Winfrey could have injured Cook's reputation worse than his own admission of unlawful cocaine use. Instead, the judge treated the defamation allegations seriously, and dismissed them because they were barred by the statute of limitations, did not implicate Cook's business or office and thus did not fall into the category of statements that are defamatory "per se," and because Winfrey's statements were "merely opinion." The judge explained that "Most people, when saying someone is a liar or something is a pack of lies, are expressing their dislike for that person or the information they heard, not setting forth a factual assertion." Statements of opinion are privileged, the judge concluded.

Cook's interference with economic advantage and contract claims were dismissed, because he failed to identify any specific party with whom Winfrey attempted to interfere, and he did not show that she directly attempted to induce the National Enquirer to breach any contract Cook may have had with it.

Finally, the judge dismissed Cook's emotional distress claim, because "Winfrey's denials of Cook's assertions can hardly be called `Outrageous!' conduct - merely stating that something claimed as fact by another person did not happen is not outrageous in the least."

Cook v Winfrey, 975 F.Supp. 1045, 1997 U.S.Dist.LEXIS 9994 (N.D.Ill. 1997) [ELR 20:1:10]

First Amendment does not bar wrongful death lawsuit by victims' survivors against publisher of hit-man how-to manual used by murderer, federal appellate court rules; Supreme Court denies publisher's request for review

In a case that tests the outer limits of First Amendment, a federal Court of Appeals has reactivated a wrongful death lawsuit brought by the relatives of three murder victims, all of whom were victims of a hired killer who apparently learned at least some of his trade from two books published and sold by Paladin Press.

Both books - Hit Man: A Technical Manual for Independent Contractors and How to Make a Disposable Silencer - are how-to manuals. The publisher has sold more than 13,000 copies of each since 1983, many to novelists, screenwriters, law enforcement officials and others who do not intend to kill anyone. However, for the purpose of a motion for summary judgment, the publisher stipulated that it also knew and intended that its books would be purchased, read and used by criminals to plan and commit murders for hire.

One of Paladin Press's customers was a man named James Perry who in 1992 was hired by Lawrence Horn to murder Horn's wife and brain-damaged son so that Horn could inherit a $2-million trust fund established for the boy's care. Perry had purchased Hit Man and Silencer just weeks before he was hired, and using information in those books, Perry killed Horn's wife and son as well as the son's private duty nurse. Both Perry and Horn have been convicted.

The victims' relatives filed a civil lawsuit against Paladin Press, under Maryland state law, for aiding and abetting the murders. Paladin responded with a motion for summary judgment, arguing that its publication of the books was protected by the First Amendment. A federal District Court agreed and dismissed the suit, even though the judge found Hit Man to be "reprehensible and devoid of any significant social value." (ELR 19:1:9)

The Court of Appeals has reversed, however. In a lengthy opinion by Judge Michael Luttig, the appellate court has ruled that the First Amendment does not bar the relatives' lawsuit, and therefore the case has been remanded for trial.

The Court of Appeals ruled that Maryland law recognizes a tort cause of action that victims may assert against those who aid or abet the perpetrator of the tort. And "aid" is defined to include assistance and advice. Judge Luttig's opinion is a long one, in part because it quotes extensively from Hit Man to show how much detailed assistance and advice it actually provided to James Perry and how closely Perry followed that advice.

In response to Paladin Press's First Amendment argument, Judge Luttig said that "every court that addressed the issue . . . has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word." The judge found two federal Court of Appeals decisions to be particularly pertinent. One held that the First Amendment does not provide publishers a defense to charges of aiding and abetting a crime through their publication of instructions on how to make illegal drugs. The other concluded that a defendant could be held criminally liable for counseling tax evasion at seminars held to protest tax laws, even though the advice was motivated by a desire for "political or social change."

Judge Luttig did seem to acknowledge that in cases where aiding-and-abetting liability was to be imposed on publishers, the First Amendment would require proof that the publisher actually intended readers to commit the acts about which advice was given. In this case, for the purpose of its summary judgment motion, Paladin Press had stipulated that it intended readers to use its books to commit murders. That is why the First Amendment did not bar the lawsuit the victims' relatives had filed against the books' publisher, Judge Luttig emphasized.

Amicus briefs were filed in support of both sides of this case by several companies and organizations, including victims rights associations, publishers, broadcasters and even The Horror Writers Association. Those who supported Paladin Press argued that if the court ruled in favor of the victims' relatives, then publishers and broadcasters could be subjected to liability "whenever someone imitates or `copies' conduct that is either described or depicted in their broadcasts, publications, or movies."

Judge Luttig rejected this concern, saying, "This is simply not true." The difference between those cases and this - a difference whose significance would "be difficult to overstate," the judge said - is that in cases against publishers and broadcasters, "it will presumably never be the case" that they intend to assist others to commit violent crimes. "And, perhaps most importantly," Judge Luttig added, "there will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity." For example, he said, "for almost any broadcast, book, movie, or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be (and demonstrably so) a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct."

Paladin Press asked the Supreme Court to review the case, but the Supreme Court has denied its petition.

Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 1997 U.S.App.LEXIS 30889 (4th Cir. 1997), cert. denied, 118 S.Ct. 1515, 1998 U.S.LEXIS 2548 (1998) [ELR 20:1:11]

NFL salary cap was not circumvented by renegotiated contract between Buffalo Bills and Billy Joe Herbert or by contract between Kansas City Chiefs and Elvis Grbac, federal District Court rules

The collective bargaining agreement between the National Football League and the NFL Players' Association is as complicated as the Internal Revenue Code. This is especially true of its Salary Cap provisions, which are subject to creative implementation in ways that some would say may defeat its purpose. (This has always been true of sports league salary caps, even the first one adopted by the National Basketball Association back in 1983. See, e.g., "Playing with the NBA Salary Cap," by Lionel S. Sobel (ELR 6:11:3))

In order to prevent players and willing teams from creatively defeating its salary cap, the NFL collective bargaining Agreement contains a clause, known as the

"Circumvention Rule," that prohibits them from entering into agreements that "contain terms that are designed to serve the purpose of defeating or circumventing the . . . Salary Cap. . . ." Of course, the collective bargaining agreement - being the detailed and complex document that it is - also contains a great many other clauses that specifically permit certain conduct, including conduct that affects player salaries and compliance with the Salary Cap. So to avoid internal contradictions, the Circumvention Rule ends by saying, "However, any conduct permitted by this Agreement shall not be considered a violation of this provision."

The National Football League Management Council interpreted two player contracts entered into in 1997 to violate the Circumvention Rule. One was Billy Joe Herbert's contract with the Buffalo Bills, a contract that was renegotiated after Herbert was traded to the Bills by the Oakland Raiders. The other was a contract between the Kansas City Chiefs and Elvis Grbac. Both contracts made creative use of signing bonuses in order to permit the teams to stay within the Salary Cap.

The specific issues in the two cases were different, but both involved subtle and even difficult questions of contract interpretation. Initially, a Special Master (appointed to resolve disputes under the collective bargaining agreement) agreed with the Management Council's contention that the Herbert-Bills and the Grbac-Chiefs deals both violated the Circumvention Rule. But federal District Judge David Doty has disagreed.

In connection with the Herbert-Bills renegotiation, Judge Doty found that the collective bargaining agreement permits players and teams to restructure their contracts to decrease compensation and increase signing bonuses for the then-current year, without extending the contract for additional years.

In connection with the Grbac-Chiefs contract, the judge found that the collective bargaining agreement permits teams to prorate signing bonuses over the full term of a multi-year contract, even if the player has the right to terminate the contract before it ends, so long as the player's termination right is based on events that are not within his "sole control"; and this is so, Judge Doty concluded, even if those events are "likely" to occur.

While both contracts permitted the teams to stay within the Salary Cap by using terms that in some sense enabled the teams to circumvent it, those terms were permitted by the collective bargaining agreement. Thus neither contract violated the Circumvention Rule, Judge Doty concluded.

White v. National Football League, 972 F.Supp. 1230, 1997 U.S.Dist.LEXIS 11148 (D.Minn. 1997) [ELR 20:1:12]

Johnnie Cochran and F. Lee Bailey did not infringe copyright to photograph admitted into evidence during O.J. Simpson murder trial by using photo in closing arguments, even though they knew that photo would be televised, federal District Court rules

The O.J. Simpson murder prosecution generated many collateral issues, several of which were of interest to readers of these pages (ELR 19:12:12, 19:5:11, 17:8:22, 16:8:3). Surely the strangest and least expected of these collateral issues is the question that was posed in a copyright infringement suit filed against Simpson's lawyers Johnnie Cochran and F. Lee Bailey, on account of an exhibit they showed the jury - and thus the television audience - during their closing arguments.

The exhibit in question was a photograph whose copyright is owned by Kulick Photography. In its lawsuit in a federal court in Virginia, Kulick contended that

Cochran and Bailey "ignored warnings" that its photograph was protected by copyright, and displayed the photo to the jury nonetheless, knowing that it would therefore be broadcast by Court TV to the entire country.

Federal Judge James Cacheris has granted Cochran and Bailey's motion to dismiss the case. Most of the judge's short opinion agrees with their argument for dismissal on personal jurisdiction and venue grounds, because neither resides or does business in Virginia.

But the judge also has granted their motion to dismiss on two more broadly-applicable grounds. Judge Cacheris ruled that Cochran and Bailey's display of the photograph was "privileged" under California state law. And he ruled that it was a "fair use" under federal copyright law, because "Court TV had a legal right to provide television news coverage of the trial," and "`news reporting' is a legally recognized `fair use.'"

In a "final note" of explanation, Judge Cacheris said: "The photograph at issue had already been admitted into evidence by the presiding trial judge, and [Cochran and Bailey] were representing a client who faced two murder charges. This Court cannot agree that [they] did anything wrong in using an item of evidence already accepted into the case during their closing argument. To permit otherwise would permit the copyright laws to trump the constitutional rights of a criminal defendant." Kulick Photography v. Cochran, 975 F.Supp. 812, 1997 U.S.Dist.LEXIS 13801 (E.D.Va. 1997) [ELR 20:1:13]

Jingle-writer loses copyright infringement action against company that provided music to radio and TV advertisers, because even though company did not acquire ownership of copyrights to many (perhaps any) of writer's jingles under work-made-for-hire doctrine, writer gave company oral or implied license to use jingles, federal appellate court rules

Jingle-writer Spencer Michlin and Axcess Broadcasting Services, Inc., were business-like at the outset of their relationship. They agreed that Michlin would write music that Axcess could provide to radio and TV advertisers. They even memorialized their arrangement in writing. Moreover, Axcess added a notation to the writing indicating that the jingles were to be "for hire," thus confirming Michlin's understanding that Axcess would obtain full ownership of his jingles. When that agreement expired, it was orally extended.

Before their relationship turned sour, Michlin wrote 36 jingles for Axcess - seven while their written agreement was in effect, and 29 during its oral extension. Axcess reproduced all 36 jingles, and adapted, distributed and sold them to its radio and TV advertising customers who in turn authorized public performances of them.

The relationship between Michlin and Axcess did go sour, however. And when it did, Michlin sued Axcess for copyright infringement, contending that he owned the copyrights to his jingles because none was a work made for hire.

A federal Court of Appeals has agreed with Michlin that he owns the copyrights to most, and perhaps all, of the jingles, because they were not works made for hire. But the court ruled that Axcess was not an infringer, nonetheless.

The 29 jingles written pursuant to the oral extension of the parties' agreement were not works made for hire, because Michlin was an independent contractor (not an Axcess employee), and because there was no "written instrument" with respect to those jingles, as required by the Copyright Act in order for works by independent contractors to be works made for hire.

The first seven jingles may not have been works made for hire either, the appellate court ruled, even though there was a "written instrument" with respect to those. In an opinion by Judge Carolyn King, the Court of Appeals explained works created by independent contracts may be works for hire, only if they are particular types of works. Works created as contributions to audiovisual works will do.

Television commercials are "audiovisual" works; but radio commercials are not. In this case there was no evidence indicating which of the first seven jingles were written for use in television commercials (and thus could have been works made for hire), and which were written for radio commercials (and thus couldn't be works made for hire).

The exact status of the first seven jingles did not have to be determined in order for the appellate court to resolve the case. This was because Axcess had argued that even if none of the 36 jingles was a work made for hire, and thus Axcess did not own any of their copyrights, it nevertheless had not infringed their copyrights, because it had an oral or implied license to use them.

The appellate court agreed with this argument. Judge King reasoned that because Michlin intended to convey all of the rights associated with copyright ownership to Axcess, he "of necessity intended to convey the lesser-included set of rights associated with a nonexclusive license to use the jingles." As a licensee, Axcess was not an infringer. So the appellate court affirmed the dismissal of Michlin's infringement claim.

Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc., 128 F.3d 872, 1997 U.S.App.LEXIS 31747 (5th Cir. 1997) [ELR 20:1:13]

Mounting of artistic notecards on ceramic tiles does not infringe artist's exclusive right to create "derivative" works, Seventh Circuit Court of Appeals holds in opinion that expressly disagrees with contrary Ninth Circuit rulings

Artist Annie Lee's exclusive right to create "derivative works" based on her works of art was not infringed by a company that mounted notecards bearing Lee's art works onto ceramic tiles, the Seventh Circuit

Court of Appeals has held. In so ruling, the appellate court affirmed a District Court decision dismissing Lee's copyright suit (ELR 18:10:7).

Judge Frank Easterbrook's opinion for the Seventh Circuit is short and to-the-point. Perhaps the most remarkable thing about it is that it expressly disagrees with two contrary decisions in which the Ninth Circuit Court of Appeals held that the same defendant sued by Annie Lee had infringed other artists' copyrights by doing the very things Lee objected to in her suit - Mirage Editions, Inc. v. Albuquerque A.R.T. (ELR 10:9:13) and Munoz v. Albuquerque A.R.T. (ELR 16:4:25).

Judge Easterbrook ruled that a "card-on-a-tile" is not a "derivative work," because the tile is not an "art reproduction," nor did the defendant "recast," "adapt" or "transform" Lee's art works.

Moreover, Judge Easterbrook reasoned that if Lee and the Ninth Circuit were right that mounting artworks on tiles does create derivative works - so that the artist's permission would have to be obtained - "then the United States has established through the back door an extraordinarily broad version of authors' moral rights, under which artists may block any modification of their works of which they disapprove. No European version of droit moral goes this far."

The judge noted that the Visual Artists Rights Act of 1990 "moves federal law in the direction of moral rights. . . ." But that Act gives only certain moral rights, none of which Lee claimed were violated. And that Act gives those rights only to artists who create unique or limited edition artworks, which Lee's were not. This was significant, Judge Easterbrook concluded, because "It would not be sound to use [the exclusive derivative work provision of the Copyright Act] to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act."

Lee v. A.R.T. Co., 125 F.3d 580, 1997 U.S.App.LEXIS 25238 (7th Cir. 1997) [ELR 20:1:14]

Bob Dylan and Sony Music win dismissal of copyright infringement and related claims asserted by songwriter who claims lyrics from several of his songs and music from another were copied

Songwriter James Damiano claims that lyrics from several of his songs, and the music from another, were copied by Bob Dylan and recorded in albums released by Sony Music Entertainment. These assertions were made by Damiano in a suit alleging copyright infringement and other claims, including Lanham Act, RICO and state law theories.

Federal Judge Jerome Simandle has granted Dylan and Sony's motion for summary judgment, and has even invited them to submit a request for Rule 11 sanctions or attorneys fees. The case was complicated by procedural errors on Damiano's part - including his assertions that Dylan had copied songs that Damiano had not yet registered for copyright at the time his suit was filed. Indeed, with respect to one of Damiano's lyric-infringement claims, the judge said that he "suspects that any similarity between these two songs is the result of an appropriation of Dylan's work by Damiano, not the other way around."

Nonetheless, Judge Simandle took Damiano's allegations at face value and ruled on their merits.

The judge dismissed Damiano's lyric-infringement claims, because he found that the "lyrics he claims were infringed are nothing more than unprotectible phrases and cliches, and even when taken as a whole, they are not substantially similar to Dylan's work."

The judge dismissed Damiano's music infringement claim, because even though Damiano had raised a triable issue about whether Dylan had access to a tape of that song, the claim failed for another reason. "To the ear of this court," Judge Simandle said, "there is no substantial similarity in the structure, instrumentation or melody of the two songs." Thus, it could not be inferred that Dylan had copied Damiano's composition.

Moreover, the two songs "just don't sound alike." And this "lack of substantial similarity necessarily leads to a conclusion that Bob Dylan did not improperly appropriate [Damiano's] work. . . ."

The fact that Dylan did not copy Damiano's songs also defeated his Lanham Act and RICO claims, Judge Simandle held. And Damiano's state law claims were dismissed because they were pre-empted or because Dylan had not copied his songs.

Damiano v. Sony Music Entertainment, Inc., 975 F.Supp. 623, 1996 U.S.Dist.LEXIS 12601, 1997 U.S.Dist.LEXIS 21433 (D.N.J. 1997) [ELR 20:1:15]

Provisions of SAG agreement waiving actor's right of publicity did not apply where those who reused actor's filmed image and voice in television commercial did not use SAG procedures for obtaining actor's consent, New York appellate court rules

Liberty Cable has lost its bid to have actor Lenny Grodin's right of publicity lawsuit dismissed without trial. Apparently, Grodin's filmed image and voice were reused in a television commercial, without his consent.

Grodin seeks damages under sections of the New York Civil Rights Law which prohibit the use of a person's name or likeness for commercial purposes without the person's consent.

Liberty sought dismissal on the grounds that Grodin is a member of the Screen Actors Guild, arguing that the SAG agreement contains a provision that constitutes the "consent" required by New York law. Many years ago, in a similar case involving another SAG member, a federal appellate court had so ruled (ELR 8:1:12).

But in Grodin's case, the New York Appellate Division ruled that Liberty could not rely on the SAG agreement, because it had "made no effort to obtain plaintiff's consent to the reuse of his image and voice, either through the means set forth in the Screen Actors Guild agreement or otherwise," and thus "plaintiff cannot be held to the provisions of that agreement waiving the protections of Civil Rights Law [sections] 50 and 51."

Grodin v. Liberty Cable, 664 N.Y.S.2d 276, 1997 N.Y.App.Div.LEXIS 11097 (1997) [ELR 20:1:15]

ABC is entitled to Investment Tax Credit for television series "All My Children," federal appellate court rules

ABC is entitled to claim Investment Tax Credit in connection with its production of the television series "All My Children" for the years 1980 to 1982, a federal Court of Appeals has ruled.

In the years when Investment Tax Credit was still available (it no longer is), the Credit could be claimed only by those who had an "ownership interest" in a film, which meant an "exclusive right to display a qualified film" in the United States. Episodes of "All My Children" were qualified films. But the Internal Revenue

Service contended that ABC was not entitled to the Credit, because the domestic syndication rights to the series were retained by the series' creator, Agnes Nixon.

Initially, a lower court agreed with the government (ELR 17:12:13). But in an opinion by Judge Glenn Archer, the appellate court has reversed. Judge Archer reasoned that ABC was eligible to claim the Credit, because it financed the series' production and owned its copyrights.

American Broadcasting Cos. v. United States, 129 F.3d 1243, 1997 U.S.App.LEXIS 32278 (Fed.Cir. 1997) [ELR 20:1:15]

Washington Redskins must pay $5.3 million more for workers compensation insurance, because players performed "principal services" in District of Columbia where home games were played rather than in Virginia where team practiced

The Washington Redskins have lost a big contest to Hartford Accident & Indemnity - the company that provided the Redskins with their workers compensation insurance for 1990-91. A federal Court of Appeals has ruled that the Hartford is entitled to collect an additional premium for that year amounting to more than $5.3 million.

The genesis of this multi-million dollar judgment occurred in 1991 when, in an entirely separate case, a District of Columbia Court of Appeals ruled that injured Redskin players were entitled to collect workers compensation benefits under the law of the District of

Columbia whose benefits are relatively generous, rather than under the law of Virginia whose benefits are not nearly as generous (ELR 13:3:10).

The court reasoned that the players were entitled to D.C. benefits, because that is where they played their home games, and thus that is where they performed the "principal services" for which they were hired. The Redskins had argued that the players performed their "principal services" in Virginia, because that is where they practiced; but the court disagreed.

This ruling meant that the Hartford had to pay out far more in benefits to injured Redskins than it would have had to pay if Virginia law applied. In response, the Hartford retroactively increased the Redskins' premium by more than $5.3 million. And when the Redskins refused to pay, the Hartford sued.

The Hartford was not acting arbitrarily when it adjusted the Redskins' premium. The team's workers compensation policy was a "retroactive rating" policy. These types of policies require employers to pay estimated premiums based on employer-provided information about their covered employees; and such policies expressly permit retrospective premium adjustments to take into account certain types of information about covered employees learned by insurance companies after such policies are first issued.

Federal Court of Appeals Judge Stephen Williams explained that "Retrospective rating plans of the sort embodied in [the Redskins'] policy are used when the size of the insured's risks is difficult to measure at the beginning of the policy period . . . [and] Courts routinely enforce the retrospective provisions in such plans."

When the Redskins first obtained their workers compensation policy, it was "expressly assumed" that Virginia would be the principal location of the players' services. The Redskins' estimated premium was based on that assumption, which is why the estimated premium turned out to be so inadequate, once a court ruled that players' services were really rendered in the District of Columbia.

The dispute between the Redskins and the Hartford was over whether, under the terms of the policy, new information about where employee services were rendered was the sort of information the Hartford could use to retrospectively adjust the premium. The Redskins of course said it was not. Federal District Judge Joyce Green agreed with the Redskins and granted summary judgment for the team.

On appeal however, the Hartford has prevailed. In an opinion by Judge Stephen Williams, the Court of Appeal has held that the policy terms did permit the Hartford to adjust the premium on the basis of new information about where the players' services were performed for workers compensation purposes.

The Redskins asked the Supreme Court to review the case, but it has denied the team's petition for certiorari.

Hartford Accident & Indemnity Co. v. Pro-Football, Inc., 127 F.3d 1111, 1997 U.S.App.LEXIS 29781 (D.C.Cir. 1997), cert. denied, 118 S.Ct. 1522, 1998 U.S.LEXIS 2590 (1998) [ELR 20:1:16]

NCAA "core course" requirement does not violate Americans with Disabilities Act, federal District Court rules in suit brought by learning disabled student who was ineligible to participate in NCAA football during his freshman year

Athletic association eligibility rules sometimes disqualify disabled students who would like to participate in sports. Since its enactment in 1990, the Americans with Disabilities Act has given those students a tool to contest their disqualification in federal court, and many of them have done so, though with little success. (ELR 19:12:18, 18:12:18, 18:7:30, 18:4:17, 18:3:12, 17:11:11, 16:12:12, 16:7:30)

One such rule is the NCAA's "core course" rule. It provides that in order for students to be eligible to participate in intercollegiate sports or receive athletic scholarships during their freshman years, they must have taken and passed at least 13 high school "core courses" that offer fundamental instruction in specified areas of study.

The NCAA "core course" rule was the target of an American with Disabilities Act challenge brought by Michael Bowers, a 1996 high school graduate who enrolled at Temple University hoping to play football there. Bowers, however, is learned disabled, and while in high school took many special education classes in "core course" areas of study. Only three of those courses satisfied the NCAA core course requirements, and thus he was not certified as a "qualifier."

Bowers sued in federal court in New Jersey, seeking an order declaring him to be a "qualifier" and requiring the NCAA to give him "the benefits and privileges of `qualifier' status." Bowers, however, has not been successful. Judge Stephen Orlofsky has denied Bowers' motion for a preliminary injunction.

Bowers had urged Judge Orlofsky to order the NCAA to consider all of Bowers' special education courses to be "core courses," regardless of their level or content. "By doing so," the judge said, Bowers "seeks a virtual elimination of the `core course' requirement, rather than merely the `modification' or `accommodation' required by the ADA. . . ."

Moreover, the judge found that the NCAA does provide the "accommodation" required by the ADA, for two reasons.

First, the NCAA allows courses for the learned disabled to satisfy "core course" requirements if the student's high school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge as students in other core courses. That was, in fact, why the NCAA treated three, but only three, of Bowers' special education classes as "core courses."

Second, NCAA rules permit it to waive the core course requirement on a case-by-case basis. In this case, however, the four-person committee of special education specialists that considered Bowers' case unanimously agreed that Bowers would not be able to succeed during his freshman year while also participating in intercollegiate sports.

Bowers v. National Collegiate Athletic Association, 974 F.Supp. 459, 1997 U.S.Dist.LEXIS 12078 (D.N.J. 1997) [ELR 20:1:16]

Court awards MPAA-member studios $800,000 in statutory damages against owners of Miami video store that rented counterfeit cassettes in violation of prior injunction

Video piracy can be expensive, especially when it's done in violation of a court order enjoining such activity. This is the lesson learned by the owners of Video 47, a Miami video store that continued to rent counterfeit cassettes after a federal District Court had enjoined it from doing so.

In a lawsuit brought by MPAA-member studios as a result of Video 47's rental of cassettes of

"Dangerous Minds," "Fatal Instinct," "The Lion King" and a dozen other movies, Judge Ursula Ungaro-Benages has awarded the studios $800,000 in statutory damages, at the rate of $50,000 per title, plus attorneys fees.

To receive these enhanced damages, the studios proved that the video store's owners continued to rent videos purchased from individuals who sold them from their cars and from distributors the owners contacted by beeper, even after MPAA representatives had instructed them on how to identify legitimate product and told them to buy cassettes only from legitimate distributors.

The Walt Disney Company v. Video 47, Inc., 972 F.Supp. 595, 1996 U.S.Dist.LEXIS 19077 (S.D.Fla. 1996) [ELR 20:1:17]

Movie distributors are awarded statutory damages and a permanent injunction in copyright suit against video stores that sold and rented illegally duplicated cassettes

Thirteen movie distributors - including all of the major studios, their homevideo affiliates, and Live Home Video - have been awarded $207,000 in statutory damages and a permanent injunction in an action against the owners of two video store chains.

An MPAA investigation uncovered thousands of movie videocassettes that had been illegally manufactured by the stores, which then sold and rented them to the public as though they were authentic.

In an unexplained act of generosity, the movie distributors did not argue that the store owners had "willfully" violated their copyrights. The evidence, described in unusual detail for a case of this sort by federal

District Judge McDade, certainly showed the infringements were willful. Where infringements are committed "willfully," the Copyright Act authorizes judges to award as much as $100,000 in statutory damages for each work whose copyright was infringed.

In this case, the copyrights to 207 movies were infringed, so the judgment could have been more than $20 million. Instead, however, the movie distributors sought only $1,000 per movie in damages. And that is what Judge McDade awarded them, along with a permanent injunction.

Columbia Pictures Industries v. Landa, 974 F.Supp. 1, 1997 U.S.Dist.LEXIS 12920 (D.D.C. 1997) [ELR 20:1:17]

Newspaper did not breach agreement with freelance writer by putting paper, including writer's articles, in computer on-line service, New York city court rules

The electronic republication of newspapers and magazines has become commonplace, and legally controversial - at least as between freelance writers and periodical publishers. In one recent and very high-profile case, federal District Judge Sonia Sotomayor ruled that on-line and CD-ROM republication did not infringe the copyrights owned by freelancers who had written articles for the New York Times, Newsday or Sports Illustrated (ELR 19:10:11).

In a similar, but much lower profile, case filed in the City Court of Albany, New York, Judge John Egan also has ruled that the Times-Union did not violate the rights of freelance writer Pauline Bartel when it put its contents on-line, including ten articles Bartel had written for the newspaper back in 1991, without paying Bartel additional compensation.

This case was not a copyright infringement action. It was a simple small claims proceeding for breach of contract, in which Bartel sought $3,000 for the on-line "republication" of her articles. But Judge Egan did not agree that the articles had been published a second time, as Bartel had argued. "The Times Union has not `republished' the plaintiff's works as that term is commonly understood," the judge said.

The Chair of the Contracts Committee of the American Society of Journalists and Authors testified on Bartel's behalf, but he conceded that Bartel's rights would not have been violated if the Times Union had micro-filmed copies of the paper for viewing years later.

"The placement of each days Times Union `on-line' in electronic format is in the Court's view merely the modern day equivalent of the former practice of micro-filming," the judge reasoned. "While the on-line version of the Times Union did not exist back in 1991, neither did micro-filming back in 1925; in each case technology advanced and the Times Union was able to advantage of that."

Judge Egan therefore dismissed Bartel's suit.

Bartel v. Capital Newspapers, 664 N.Y.S.2d 398, 1997 N.Y.Misc.LEXIS 492 (1997) [ELR 20:1:18]

Original signed will of "Shoeless Joe" Jackson was not owned by his widow, and thus ownership of it did not pass to charities that were beneficiaries of widow's estate

The original signature of the once and still-famous baseball player "Shoeless Joe" Jackson is extremely rare, and thus very valuable. Jackson's signature is on his will, which makes the will itself valuable. And that in turn explains why the American Heart Association and the American Cancer Society want it, and have filed suit to get it.

The two charities are the beneficiaries of the estate of Jackson's widow, and as such, they claimed to be entitled to possession of the will. They argued that Jackson's will, like other personal property, passed to his widow at his death, and to them at her death. The will is in the possession of the probate court of Greenville

County, South Carolina; and the court is unwilling to give it up.

The South Carolina Supreme Court has ruled that the probate court is legally entitled to retain possession of the will, without liability to the charities. In an opinion by Chief Justice Ernest Finney, the court explained that wills are "public records" which are retained by the government.

As a result, Jackson's widow never owned "Shoeless Joe's" original will and thus could not pass ownership of it to the charities. Therefore, the charities were not entitled to possession of the will, and the probate court was not guilty of an unconstitutional taking when it refused to give the will to them.

American Heart Association v. County of Greenville, 489 S.E.2d 921, 1997 S.C.LEXIS 177 (S.C. 1997) [ELR 20:1:18]

Recognition of British libel judgment would be "repugnant" to public policy, Maryland Court of Appeals rules

The Court of Appeals of Maryland has ruled that the enforcement of a British libel judgment for 240,000 pounds ($370,800) would be "repugnant" to Maryland public policy. The judgment in question was in favor of Vladimir Ivanovich Telnikoff against Vladimir Matusevitch, both of whom had once resided in Russia and later squared off against one another in critical exchanges published in the London Daily Telegraph.

Telnikoff attempted to collect his judgment against Matusevitch in the United States, where Matusevitch now lives. But a federal District Court refused to enforce the judgment, on the grounds that it was "repugnant" to the public policies of Maryland and the U.S. (ELR 17:1:24).

Telnikoff appealed the District Court ruling, and the federal Court of Appeals certified this question to the Maryland Court of Appeals: "Would recognition of Telnikoff's foreign judgment be repugnant to the public policy of Maryland?"

The Maryland court has answered the certified question "in the affirmative." In a lengthy opinion by Judge John Eldridge, the court compares the libel laws of England and the United States and observes that "The contrast between English standards governing defamation actions and the present Maryland standards is striking." Moreover, the "principles governing defamation actions under English law, which were applied in Telnikoff's libel suit, are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that Telnikoff's judgment should be denied recognition. . . ."

Editor's note: The result in this case is not surprising. Commentators, including Rodney Smolla and Bruce Sanford, have noted that British law is so favorable to plaintiffs in libel cases that forum-shopping has become common and - in Professor Smolla's words - has made London an "international libel capital." On the other hand, if the defendant's assets are all in the United States, a British libel judgment may not be worth much. This case is at least the second time a U.S. court has refused to enforce a British libel judgment. A New York court refused to do so in Buchchan v. India Abroad Publications (ELR 14:2:13).

Telnikoff v. Matusevitch, 702 A.2d 230, 1997 Md.LEXIS 556 (Md. 1997) [ELR 20:1:18]

Publisher of `TEEN magazine fails in bid to enjoin Time from publishing "Teen People" magazine

Petersen Publishing Company, the publisher of `TEEN magazine, and Time, Inc., the publisher of "People" magazine, have been locked in a dispute over Time's plans to publish a "People" spin-off entitled "Teen People."According to Petersen, "Teen People" will infringe Peterson's federally registered `TEEN mark. But federal District Judge Harold Baer disagrees with Petersen and has denied its motion for a preliminary injunction.

Petersen owns a registered trademark "for the word `teen' in upper-case block letters, preceded by an apostrophe," the judge explained. "Its `TEEN trademark in its distinctive style does not entitled Petersen to prevent a competitor from using the generic word `teen' as part of a different trademark, to denote a magazine that is targeted to teenagers."

In support of his ruling, Judge Baer cited an earlier case which held that although the word "Parents" was protectable as a trademark for a magazine, that did not prevent another publisher from using the word "parents" in a generic sense as part of a different mark (ELR 14:2:17).

Thus, the judge concluded, "the `teen' portion of Petersen's trademark, as divorced from its particular stylized presentation is an extremely weak mark and Petersen is not entitled to enjoin Time from using the `Teen People.'"

Time Inc. v. Petersen Publishing Co., 976 F.Supp. 263, 1997 U.S.Dist.LEXIS 14660 (S.D.N.Y. 1997) [ELR 20:1:19]

DEPARTMENTS

In the Law Reviews:

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 20, Number 2 with the following articles:

Forgive Us Our Press Passes by Daniel Schorr, 20 Comm/Ent, Hastings Communications and Entertainment Law Journal 269 (1998)

The Quality of First Amendment Speech by Randall P. Bezanson, 20 Comm/Ent, Hastings Communications and Entertainment Law Journal 275 (1998)

Race As a Hiring/Casting Criterion: If Lawrence Olivier Was Rejected for the Role of Othello in Othello, Would

He Have a Valid Title VII Claim? by Heekyung Esther Kim, 20 Comm/Ent, Hastings Communications and Entertainment Law Journal 397 (1998)

Curing the Inequitable Conduct Plague in Patent Litigation by Glenn E. Von Tersch, 20 Comm/Ent, Hastings Communications and Entertainment Law Journal 421 (1998)

Has the FDA Bought the Winston Cup? A Takings Analysis of the Proposed Ban on Sports Sponsorships by Tobacco Companies As Applied to NASCAR by Andrew B. Dzeguze, 20 Comm/Ent, Hastings Communications and Entertainment Law Journal 445 (1998)

Stop Relying on Uncle Sam!- A Proactive Approach to Copyright Protection in the People's Republic of China by Eric M. Griffin, 6 Texas Intellectual Property Law

Journal 169 (1998) (published by University of Texas School of Law)

Recent Developments in Copyright Law by Sharon Williamson, 6 Texas Intellectual Property Law Journal 199 (1998) (published by University of Texas School of Law)

Recent Developments in Trademark Law by David L. Hitchcock and Kelly J. Kubasta, 6 Texas Intellectual Property Law Journal 239 (1998) (published by University of Texas School of Law)

Sports and Entertainment Figures (And Others) May Be Able to Deduct Legal Expenses for Criminal Prosecutions (and Wrongful Death Suits) by John R. Dorocak, 13 Akron Tax Journal 1 (1997)

Asserting Copyright's Democratic Principles in the Global Arena by Neil Weinstock Netanel, 51 Vanderbilt Law Review 217 (1998)

Welcome to the 21st Century Classroom-Your Living Room: The FCC Requires Three Hours of Children's Educational and Informational Programming by Richard Cortez Jr., 51 SMU Law Review 413 (1998)

Trash Tort or Trash TV?: Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering by Charles C. Scheim, 72 St. John's Law Review 185 (1998)

Book Review: Quid Pro Quo: What Broadcasters Really Want by Gretchen Craft Rubin, 66 The George Washington Law Review 686 (1998)

Competition Policy and Cross Border Dispute Resolution: Lessons Learned From the U.S.-Japan Film Dispute by William H. Barringer, 6 George Mason Law Review 459 (1998)

Columbia-Volunteer Lawyers for the Arts Journal of Law and the Arts has published Volume 22, Number 1 with the following articles:

A Tale of Two Treaties-Dateline: Geneva-December 1996 by David Nimmer, 22 Columbia-VLA Journal of Law & the Arts 1 (1997)

A Synthesis of the Intellectual Property and Antitrust Laws: A Look at Refusals to License Computer Software by Richard S. Vermut, 22 Columbia-VLA Journal of Law & the Arts 27 (1997)

The Internet and First Amendment Values: Reno v. ACLU and the Democratization of Speech in the Marketplace of Ideas by Jennifer J. Lee, 22 Columbia-VLA Journal of Law & the Arts 61 (1997)

Seminole Tribe: Are States Free to Pirate Copyrights with Impunity? by Jacqueline D. Ewenstein, 22 Columbia-VLA Journal of Law & the Arts 91 (1997)

The University of Georgia School of Law, Athens, Georgia 30602-6012, has published Volume 5 of the Journal of Intellectual Property Law with the following articles:

Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems by Lydia Pallas Loren, 5 Journal of Intellectual Property Law 1 (1997) (for address, see above)

Regents Guide to Understanding Copyright and Educational Fair Use (Preface by L. Ray Patterson), 5 Journal of Intellectual Property Law 243 (1997) (for address, see above)

Making Sense of Georgia's State Law Protections for Trademarks and Trade Secrets by Elizabeth R. Calhoun, 5 Journal of Intellectual Property Law 307 (1997) (for address, see above)

Tee'd Off-Golf Course Designers Score Double Bogey in Search for Protection of Their Hole Designs by Robert D. Howell, 5 Journal of Intellectual Property Law 337 (1997) (for address, see above)
[ELR 20:1:20]