WASHINGTON MONITOR

Librarian of Congress adopts new Copyright Office regulations setting rates and terms for statutory licenses under Digital Performance Right in Sound Recordings Act

Digital "pay-radio" stations now know how much they have to pay to record companies for statutory licenses under the Digital Performance Right in Sound Recordings Act. The license fee is 6.5% of their gross revenues from transmissions to residences in the United States. This is the rate Librarian of Congress James Billington has adopted, at the recommendation of Register of Copyrights Marybeth Peters, in newly announced Copyright Office regulations that took effect June 1, 1998.

This new digital performance license fee will be collected for all record companies by the Recording Industry Association of America. (The fee is in addition to public performance fees that all radio stations - digital "pay-radio" stations included - must pay to ASCAP, BMI and SESAC on behalf of music publishers and songwriters.) The RIAA will then allocate and distribute its collections to record companies, after deducting the reasonable costs it incurs in administering the funds.

At the present time, digital "pay-radio" stations are the audio channels provided to subscribers by some cable and satellite TV systems. Most (perhaps all) of these channels are operated by just three companies: Digital Cable Radio Associates (a digital audio service owned by Warner Music, Sony Corporation, EMI, Time Warner Cable, Continental Cablevision, Comcast Cable, Cox Cable, and Adelphia Cable), Digital Music Express (a digital music subscription service owned by TCI

Music), and Muzak (which provides digital music under the name DiSHCD, as part of Echostar's satellite-based DiSH Network).

Before the Digital Performance Right in Sound Recordings Act became law in 1995, record companies and recording artists did not have public performance rights in the United States. This meant they did not receive royalties from the broadcast or other public performances of their recordings. Only songwriters and music publishers received royalties from the public performances of their songs.

The Digital Performance Right Act gave record companies and artists a public performance right, and thus a right to receive royalties, for the first time - but only in specific and quite narrow circumstances. Even then, the Act gives record users the right to obtain "statutory" licenses, under certain circumstances. Like other compulsory copyright licenses found in the

Copyright Act, the statutory digital performance license has one key characteristic: its rate and terms are set by law, rather than by negotiation. (For details, see "A New Music Law for the Age of Digital Technology" by Lionel S. Sobel (ELR 17:6:3).)

The newly-adopted digital performance regulations are the outcome of a multi-step process that began when the RIAA and the three digital audio subscription service companies could not agree on license fee rates or terms. The RIAA requested a royalty rate of 41.5% of a digital music service's gross revenues from U.S. residential subscribers, or in some circumstances, a flat rate minimum fee. (The RIAA argued that 41.5% was appropriate, because that is the revenue percentage that cable movie networks pay for programming they acquire from outside sources.) The three digital audio subscription services requested a royalty rate ranging from a low of 0.5% to a high of 2.0% of their gross revenues from

U.S. residential subscribers, and they unanimously opposed a flat rate minimum fee.

A Copyright Royalty Arbitration Panel was appointed to hear the matter, and the Panel determined that the digital audio subscription services should pay a royalty fee of 5% of their gross revenues resulting from U.S. residential subscribers, without a minimum license fee.

Not surprisingly, the RIAA was not pleased with the Panel's decision. Thus, as permitted by law, it filed a petition asking the Librarian of Congress to set aside the Panel's determination, arguing that the Panel's determination was arbitrary and contrary to law. The RIAA urged the Librarian to set a new rate which it argued should not be less than double the rate the services are paying to ASCAP, BMI and SESAC for public performance licenses for the underlying musical works.

When petitions of this sort are filed, the Register of Copyrights reviews the Panel's report and makes a recommendation to the Librarian of Congress about whether the Report is arbitrary or contrary to the provisions of the Copyright Act, and if so, whether and in what manner the Librarian should substitute his own determination. That is what was done in this case, and "After carefully reviewing the Panel's report and the record in this proceeding," the Register found that the Panel had been arbitrary in using a particular benchmark to reach its 5%-of-gross decision. "This conclusion compel[ed] the Register to set aside the Panel's final determination . . . ."

In making her recommendation, "the Register considered the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings." The actual license fee paid for the performance of the underlying musical works was subject to a protective order, and so hasn't been publicly revealed. The RIAA had asked for a rate that was greater than the rate paid to ASCAP, BMI and SESAC; but the Register concluded that "the value of the performance right in the sound recording does not exceed the value of the performance right in the musical works."

The Librarian of Congress agreed with the Register's recommendations in full, and has adopted new regulations implementing those recommendations. The new regulations are entitled "Use of Sound Recordings in a Digital Performance" and are codified at Part 260 of Volume 37 of the Code of Federal Regulations.

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Copyright

Office, Library of Congress, Federal Register, Volume 63, Number 89, Page 25394-25415 (May 8, 1998) [ELR 20:2:5]

RECENT CASES

Supreme Court rules that public television broadcaster did not violate First Amendment by excluding independent congressional candidate from televised debate, because broadcaster's decision was a reasonable, viewpoint-neutral exercise of its journalistic discretion

The legal right of public television broadcasters to exercise editorial discretion has received an important stamp of approval from the United States Supreme Court, in a case in which that discretion was challenged by a congressional candidate who had been excluded from a televised debate solely because he did not have "strong public support."

In an opinion for the 6-to-3 majority, Justice Anthony Kennedy ruled that state-owned public broadcasters do not have a constitutional obligation to allow every candidate to participate in televised debates. The Court also held that in this case in particular, the Arkansas Educational Television Commission, a state agency, did not violate the First Amendment by excluding Ralph Forbes, a legally-qualified independent candidate for Congress, from a one-hour televised debate between the Republican and Democratic candidates.

There had been a split among federal appellate courts on this issue. In 1990, the Eleventh Circuit had ruled that Georgia's public television system had not violated the First Amendment rights of an excluded candidate (ELR 12:12:13). But in Forbes' own case, the

Eighth Circuit later ruled that Arkansas's public television system had violated those rights (ELR 19:2:22).

With respect to televised candidate debates in particular, the Court's decision does not give public broadcasters completely unfettered discretion. Instead, the Court ruled that a candidate debate on public television is a "nonpublic forum," from which candidates may be excluded only for reasonable, viewpoint-neutral reasons.

(If such a debate had been classified a "public forum," as Forbes had argued, it would have been more difficult to exclude candidates, because then they could have been excluded only for "compelling" reasons. If such a debate had been classified as a "designated" public forum, it also would have been more difficult to exclude candidates, because then the exclusion would have been subject to "strict scrutiny.")

In Forbes' case, the Court held that the evidence had shown that the Arkansas Educational Television Commission's "decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment."

Justices Stevens, Souter and Ginsburg dissented.

Editor's note: Though this case concerned candidate debates in particular, Justice Kennedy's majority decision had something to say about other types of programming too. What he said gives public broadcasters even more reason to cheer this ruling. Justice Kennedy wrote that the public forum doctrine, which often obligates government agencies to permit the use of government property by outside speakers, "should not be extended in a mechanical way to the very different context of public television broadcasting." This is so, he explained, because when it comes to television broadcasting, "broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." Since "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming . . . [c]laims of access under our public forum precedents could obstruct the legitimate purpose of television broadcasters." Candidate debates were held to present a "narrow exception" to the rule that the public forum doctrine does not apply to public broadcasting. Thus, it appears that this decision confirms that public broadcasters have unfettered discretion to make decisions about which entertainment, educational and cultural programs to present.

Arkansas Educational Television Commission v. Forbes, 118 S.Ct. 1633, 1998 U.S.LEXIS 3102 (1998) [ELR 20:2:7]

Court refuses to dismiss concert promoter's breach of contract suit against Michael Bolton complaining that Bolton unjustifiably repudiated agreement to tour Australia

It is a practice in the entertainment industry for people to begin to make expensive commitments based on apparent agreements that have not yet been written or signed. This practice has created problems in the movie business (recall the Kim Basinger/Main Line Pictures case (ELR 14:12:19, 15:2:3, 16:6:8, 17:7:22)), in the book publishing business (the Jennifer O'Neill/

Kensington Publishing case (ELR 17:10:7), and most recently in the music concert business.

At loggerheads in this new case are Michael Bolton and Australian concert promoter Michael Coppel Promotions. Their fight is over whether Bolton agreed, in a legally binding way, to tour Australia; and if so, whether he unjustifiably failed to fulfill that agreement.

In a breach of contract suit in federal court in New York, Coppel has alleged both an enforceable agreement and an unjustifiable breach. Bolton contends otherwise, and made a motion to dismiss. But Judge Denny Chin has denied Bolton's motion, so the case will proceed.

Coppel negotiated his deal with Bolton's agents at ICM and alleges that they reached a binding oral agreement. Coppel alleges that Bolton agreed to do eight concerts, and in return would be paid "the greater of $1,200,000 or 85% of the net door receipts."

Bolton asserted that no agreement had been reached, as was shown by the fact that there were subsequent discussions about several points. But "Under New York law, an agreement is enforceable if a meeting of the minds has occurred as to the contract's `material terms,'" the judge responded. "So long as such an agreement has been achieved, subsequent discussions thereafter over related or tangential matters does not render the contract inchoate or invalid."

Bolton also argued that during the negotiations, Coppel sent a fax that constituted a "counteroffer" that "extinguished" whatever offer Bolton may have made before. But Judge Chin said that the fax was a counteroffer "only if no enforceable oral agreement previously had been reached. . . ." The fax could be construed as a counteroffer, the judge acknowledged; but it also could be seen as dealing with only "secondary issues" that remained after the oral agreement was reached. It will be up to a jury to make that decision, the judge concluded.

Finally, Bolton also argued that Coppel's payment of an advance was a condition precedent to Bolton's obligation to perform, and Coppel never made the payment. The advance was dealt with only in a "rider" that was sent to Coppel a month after the alleged oral agreement was entered into. At this stage of the case, Bolton has not shown that payment of an advance was ever agreed to as a condition precedent, Judge Chin said. Moreover, Coppel alleges that he spent a lot of time and money relying on Bolton's "repeated representations and assurances." And the judge said that this was "an unmistakable signal" that Coppel believed there was a contract in effect.

Michael Coppel Promotions v. Bolton, 982 F.Supp. 950, 1997 U.S.Dist.LEXIS 17931 (S.D.N.Y. 1997) [ELR 20:2:7]

William Morris Agency must share commission on spokesman deal between Andy Griffith and Shoney's Restaurants with agent who introduced Morris to Shoney's, if agent proves he was "procuring cause" of Griffith-Shoney's deal

The William Morris Agency may have to share the commission it earned on a deal it made for client Andy Griffith to be the spokesman for Shoney's Restaurants, a federal District Court in Tennessee has ruled. The ruling came in a case filed by Ratner Media & Associates, an agent and manager for race car driver Willie T. Ribbs.

Ratner apparently sold Shoney's on the concept of having celebrity spokesmen. He then introduced the William Morris Agency to Shoney's in the hopes that it would make a deal for both Ribbs and Morris client Bill Cosby to be those spokesmen. If such a deal were made, the Morris Agency agreed to share commissions with Ratner. But in fact, no such deal was made, because Cosby wasn't interested.

Though Cosby and Ribbs were out of the picture, the William Morris Agency wasn't. It eventually made a spokesman deal with Shoney's for another of its clients, Andy Griffith. Ratner then claimed a right to be compensated for that deal, saying he had introduced the Morris Agency to Shoney's in the first place and thus was entitled to be paid, either pursuant to their oral agreement or as a matter of Tennessee state law under a quantum meruit or unjust enrichment theory.

The Morris Agency made a motion for summary judgment, which has been granted, but only in part. Federal District Judge Thomas Higgins has agreed with Morris that Ratner would not be entitled to compensation simply for introducing the Agency to Shoney's. On the other hand, the judge held, Ratner would be entitled to be paid if he were the "procuring cause" of the Griffith-Shoney's deal. (This would so, the judge said, under the oral agreement between Ratner and the Morris Agency, and under quantum meruit or unjust enrichment law.)

However, the case could not be resolved on summary judgment, because there were disputed facts concerning whether Ratner was the "procuring cause" of the deal. The Morris Agency pointed out that Shoney's had hired an advertising agency a month before Ratner had contracted it, and Shoney's own ad agency had identified Andy Griffith as a possible spokesman "through its own research." On the other hand, a Shoney's executive said in an affidavit that if Ratner "had not made the initial call regarding Bill Cosby, it is very likely that Shoney's would not have gone with any celebrity spokesperson." Thus, the question of whether Ratner was the "procuring cause" would have to be decided by a jury, Judge Higgins' ruled.

Ratner v. William Morris Agency, Inc., 981 F.Supp. 538, 1997 U.S.Dist.LEXIS 16450 (M.D.Tenn. 1997) [ELR 20:2:8]

Composer Ray Repp is entitled to a trial in his copyright infringement suit against Andrew Lloyd Webber, federal appellate court rules

A federal Court of Appeals has breathed new life into composer Ray Repp's copyright infringement suit against Andrew Lloyd Webber - a suit in which Repp claims that the "Phantom Song" from Webber's musical play "Phantom of the Opera" was copied from Repp's song "Till You." Webber of course denied the allegation, and countered with one of his own. Webber alleged that Repp had actually copied "Till You" from Webber's song "Close Every Door," the centerpiece song from "Joseph and the Amazing Technicolor Dreamcoat."

Before the case ever got to the Court of Appeals, it produced four written decisions by District Judge Shirley Kram. In 1994, Judge Kram granted Webber's motion for summary judgment, and dismissed Repp's complaint, for three reasons. First, Judge Kram found that Repp had failed to show that Webber had access to Repp's song. Second, she found that "Till You" and "Phantom" are not strikingly similar. And third, she noted that Repp had failed to submit evidence to contradict Webber's proof of independent creation. (ELR 16:9:3)

Following the dismissal of Repp's complaint, Repp sought summary judgment on Webber's counterclaim, relying on some of the same arguments that had succeeded for Webber. Repp's motion was denied, however, in 1995 (ELR 17:10:5). The following year, after conducting additional discovery, Repp renewed his summary judgment motion, this time arguing that Webber's counterclaim was barred by the statute of limitations; but that motion was denied as well (ELR 18:4:5).

The case then went to trial before Judge Kram, sitting without a jury. At the trial's conclusion, Judge

Kram ruled in favor of Repp, on two grounds. First, the judge found that the evidence would not support an inference that Repp had had access to Webber's "Close Every Door" between the time that song was first published and the time Repp wrote "Till You." Second, while the two songs are similar in many ways, some of those similarities are "musical devices" that are "among the most common devices used in music." Moreover, the two songs are "entirely different" in several other ways. Because the similarities were not necessarily significant, and because of the songs' differences, Judge Kram concluded that Webber failed to establish that Repp copied "Close Every Door." (ELR 19:5:11)

Both Repp and Webber then appealed. Repp appealed Judge Kram's first decision, granting Webber's motion for summary judgment. And Webber appealed her fourth decision, finding that Webber had failed to prove Repp had copied "Close Every Door." In an opinion by Judge Roger Miner, the Court of Appeals has agreed with Repp but not with Webber.

Following a clear and concise statement of the legal principles to be applied in music plagiarism cases, Judge Miner held that in granting Webber's motion for summary judgment, Judge Kram erred because she rejected evidence presented on Repp's behalf by two "highly qualified experts" that "Phantom Song" and "Till You" are "strikingly similar," and she failed to consider the opinion of one of these experts that the two songs could not have been independently created. Juries are permitted to infer access from striking similarities, and Webber's testimony that he independently created "Phantom Song" had been contradicted by Repp's expert. For these reasons, Judge Miner ruled, Judge Kram should not have granted Webber's motion for summary judgment. The dismissal of Repp's case has been reversed, and it has been sent back to the District Court for further proceedings.

Judge Miner was not as receptive to Webber's appeal. That was done after a 5-day trial, Judge Miner noted. Moreover, Judge Kram had "made detailed findings of fact, carefully evaluating all the evidence presented." She "then undertook a pellucid examination of the applicable law," and applied it to the facts. Judge Miner said that he found "no error" in Judge Kram's post-trial ruling and therefore affirmed it.

Repp v. Webber, 132 F.3d 882, 1997 U.S.App.LEXIS 36366 (2d Cir. 1997) [ELR 20:2:9]

La Face Records wins dismissal of federal and common law copyright infringement claims asserted by Fantasy, based on alleged sampling of pre-1972 recording "Mr. Big Stuff" in TLC's 1994 album "CrazySexyCool"

The controversial practice of music sampling has produced countless law review articles, but only a few judicial opinions. The most recent of these was rendered in a federal and common law copyright case brought by Fantasy, Inc., against La Face Records - a case that La Face has won without a trial. (The earlier sampling decisions were reported at ELR 15:12:19, 13:11:8.)

Fantasy owns a recording of "Mr. Big Stuff" that was released twice: first on Fantasy's Stax label in 1971, and again as part of a "Big Hits" compilation album in 1991. According to Fantasy, "Mr. Big Stuff" was sampled, without permission, by recording artists TLC in one of the songs on its "CrazySexyCool" album which was released by La Face in 1994.

Since federal copyright protection for recordings was not available until 1972, the 1971 release of "Mr. Big Stuff" was not protected by federal copyright law, though it was by state common law. On the other hand, when "Mr. Big Stuff" was re-released in 1991, federal copyright protection was available for recordings; and Fantasy registered its copyright in the "Big Hits" compilation album.

Fantasy asserted both of these copyrights in its suit against La Face. But federal District Judge Samuel Conti has dismissed the suit, without even inquiring into the question of whether TLC sampled "Mr. Big Stuff" as alleged.

The judge ruled that Fantasy's federal copyright claim was fatally flawed, because the company's 1991 copyright registration for the "Big Hits" album gave it nothing more than a copyright "to the `compilation of sounds' on Big Hits, but the copyright does not extend to the original songs contained on the album, including `Mr. Big Stuff.'" Moreover, since "Mr. Big Stuff" was first released before 1972, the recording was not entitled to federal copyright protection of its own.

Though Fantasy may have had a common law copyright in "Mr. Big Stuff" itself, that claim too was dismissed, on statute of limitations grounds. The statute of limitations for common law copyright in California (where Fantasy is domiciled) is two years. Judge Conti held that "The statute of limitations in a copyright infringement action begins to run when the alleged infringement occurred." In this case, the final version of the allegedly infringing recording was completed on September 11, 1994, and that is when the two-year statute of limitations "began running." Fantasy's lawsuit was not filed until December 5, 1996 - more than two years later, thus making the action "time-barred."

In a motion for reconsideration, Fantasy argued that "the statute of limitations for common law copyright infringement should run from the date of the most recent, `freshest' infringement, not from the date of the first infringement." But the judge was not persuaded. "Fantasy's `continuing tort' or `rolling statute of limitations' theory is not supported by applicable law or by the cases Fantasy cited," the judge ruled.

Fantasy, Inc. v. La Face Records, 43 U.S.P.Q.2d 1700, 1997 WL 538734, 1997 U.S.Dist.LEXIS 9068; 43 U.S.P.Q.2d 1959, 1997 WL 627544, 1997 U.S.Dist. LEXIS 16360 (N.D.Cal. 1997) [ELR 20:2:9]

Frito-Lay and its ad agency win dismissal of most, but not all, claims by Astrud Gilberto complaining of their use of her recording of "The Girl from Ipanema" in TV commercial for Baked Lays

Readers of a certain age well remember Astrud Gilberto's recording of "The Girl from Ipanema." It was a huge hit in 1964. Younger readers may be familiar with it too, because in 1996, advertising agency BBDO Worldwide produced a television commercial for its client Frito-Lay that used that recording. The commercial was for the Frito snack food Baked Lays, and it featured the Muppet's "Miss Piggy," though not Gilberto's name or likeness.

Viewers may have been entertained and amused by the commercial, but Gilberto was not. She responded with a lawsuit against Frito-Lay and BBDO in federal District Court in New York City which asserted several separate causes of action. Frito and BBDO asked Judge Loretta Preska to dismiss Gilberto's complaint "for failure to state a claim upon which relief can be granted." And the judge has granted much, but not all, of their request.

The portion of Gilberto's complaint that Judge Preska has refused to dismiss, so far, is the cause of action for "false implied endorsement" under the Lanham Act. To win on this claim, Gilberto would have to show (among other things) that "the mere use of her voice as backdrop is in fact a singing endorsement of Baked Lays." While the judge said it was "difficult to imagine" how Gilberto could prove this, "it is not entirely implausible that [she] could properly allege an audience capable of interpreting the presence of the background music as an implied endorsement of Baked Lays." That is why the judge refused to dismiss this claim.

On the other hand, in a footnote that must have given Frito-Lay and BBDO some encouragement, Judge Preska added that although Gilberto's "allegation of endorsement may survive a preliminary motion to dismiss, it is difficult to imagine how this claim could survive a motion for summary judgment, particularly where the strength of the commercial advertisement appears to be the endorsement of Baked Lays by another celebrity, Miss Piggy."

Moreover, Frito-Lay and BBDO did persuade the judge to dismiss Gilberto's other claims. Since "The Girl from Ipanema" was released eight years before the law first gave federal copyright protection to recordings, Gilberto alleged that the commercial infringed her common-law copyright in the recording. But those rights expired when the recording was "published."

Gilberto's tradename claim under New York state law was dismissed, because the offending commercial did not contain either her name or Frito-Lay's name. Likewise, her false advertising claim under New York law was dismissed, because that law protects consumers, and she did not allege that the commercial caused her any injury as a consumer.

Gilberto asserted a defamation claim based on the commercial's association of her with Miss Piggy, though she did not allege that the association exposed her to hatred, contempt or aversion, as required by New York defamation law. "On the contrary," Judge Preska noted, "many noted celebrities and actors have seen fit to appear simultaneously with Miss Piggy and have yet to claim any injury to their reputation."

Finally, Gilberto's right to privacy claim was dismissed, because New York Civil Rights Law sections 50 and 51 prohibit the unauthorized use names, portraits or pictures, including look-a-likes - but not the use of voices.

Oliveira v. Frito-Lay, Inc., 43 U.S.P.Q.2d 1455, 1997 WL 324042, 1997 U.S.Dist.LEXIS 8299 (S.D.N.Y. 1997) [ELR 20:2:10]

Owner of art film theater in Philadelphia is awarded $160,000 in suit against Miramax; federal District Court rejects Miramax's post-trial attack on constitutionality of Pennsylvania Feature Motion Picture Fair Business Practices Law

Fierce competition between two art film theaters in Philadelphia - the Ritz and the Roxy - sparked a lawsuit by the Roxy against Miramax Film Corp. Following a series of pretrial rulings, including a crucial one by a federal Court of Appeals (ELR 18:6:9), the case went to trial on the Roxy's complaint that Miramax had refused to license the Roxy to exhibit 17 movies, in violation of the Pennsylvania Feature Motion Picture Fair Business Practices Law. The movies in question included such Miramax hits as "Mediteraneo," "Reservoir Dogs," "The Crying Game," "Passion Fish" and "Like Water for Chocolate."

The Pennsylvania law was enacted at the behest of exhibitors over the opposition of distributors, so not surprisingly, the Roxy won. A jury returned a verdict against Miramax for almost $160,000. According to the jury, Miramax violated a provision of the Pennsylvania law that prohibits movie distributors from granting exhibitors first run licenses for more than 42 days, and requiring distributors to make their movies available to second run theaters in the same area when the 42-day first run is over.

Miramax then made a motion for judgment as a matter of law or for a new trial. Though in earlier phases of the case, District Judge Curtis Joyner had agreed with many of Miramax's views on the law (ELR 16:3:14, 16:11:16), he has denied Miramax's post-trial motion.

Miramax's motion argued that the Pennsylvania law is unconstitutional for two reasons: because it conflicts with the Copyright Act and thus violates the Supremacy Clause; and because it burdens interstate commerce in violation of the Commerce Clause. Miramax also argued there was insufficient evidence to support the jury's verdict.

According to Miramax, the Copyright Act gives it the right to grant exclusive licenses, and the Pennsylvania law interferes with its exercise of that right - something the Supremacy Clause of the Constitution prohibits. Also, Miramax contended that the Pennsylvania law interferes with its ability to do business in that state - something the Commerce Clause prohibits.

The difficulty with these arguments is that they had been made before, in Pennsylvania, and the federal

Court of Appeals there had rejected them in the case of Associated Film Distribution Corp. v. Thornburgh, 800 F.2d 369 (3d Cir. 1986). Regardless of what Judge Joyner himself may have thought of the merits of Miramax's arguments, he was bound by the appellate court's ruling in the Associated Film case. And thus he had to, and did, deny Miramax's motion. The judge also rejected Miramax's argument that there was insufficient evidence to support the jury's verdict.

Editor's note: Although Judge Joyner was bound by Associated Film, in my opinion, that case was decided incorrectly. The Pennsylvania law does interfere with rights specifically granted by the Copyright Act, and thus it should have been declared unconstitutional under the Supremacy Clause. Associated Film is binding only in the Third Circuit, and a conflict among the Circuits appears to exist with respect to this issue. In ASCAP v. Pataki, 930 F.Supp. 873 (S.D.N.Y. 1996)

(ELR 18:10:8), a federal District Court in the Second Circuit held that a New York state music licensing law (restricting the manner in which ASCAP, BMI and SESAC issue public performance licenses) interferes with rights granted by the Copyright Act and is thus pre-empted under the Supremacy Clause. Because of this conflict among the Circuits, Judge Joyner's ruling in the Miramax case may turn out to be just the first step in a lengthy appeals process that eventually leads to a United States Supreme Court ruling on the constitutionality of state movie and music licensing statutes.

Orson, Inc. v. Miramax Film Corp., 983 F.Supp. 624, 1997 U.S.Dist.LEXIS 17494 (E.D.Pa. 1997) [ELR 20:2:11]

City of Indianapolis violated Visual Artists Rights Act by destroying, rather than removing, large stainless steel sculpture located on land acquired from prior owner, federal District Court rules

In a step-by-step, almost textbook-like, application of the Visual Artists Rights Act of 1990, federal District Judge Sara Barker has held that the City of Indianapolis violated the rights of artist Jan Randolph Martin by destroying, rather than removing, a large stainless steel sculpture he had created working weekends and holidays for more than two-and-a-half years.

The sculpture was entitled "Symphony #1" and was located on land belonging to Martin's employer - land which the City acquired not long before the sculpture was destroyed. Before it was destroyed, Martin told the City the sculpture could be disassembled and moved easily and without damage for about $8,000. But for reasons not explained in Judge Barker's decision, the City chose to destroy it instead, at a cost of about $330.

The Visual Artists Rights Act gives artists the right to prevent the destruction of their works, under certain circumstances. The City argued that those circumstances did not exist in this case. But Judge Barker has concluded otherwise.

The judge found that "Symphony #1" was a "work of recognized stature." She found that it was not a work of "advertising" (the Act does not protect advertising art), even though the sculpture was made from the same materials Martin's employer used in its business, and even though his employer used a picture of the sculpture in its own advertising. And Judge Barker ruled that the sculpture was not a work made for hire (those are not protected by the Act either).

Finally, the judge found that Martin had not waived his rights under the Act. The Visual Artists

Rights Act does permit artists to waive the rights it gives them; and when Martin obtained a permit from the City authorizing him to build "Sculpture #1," he signed an agreement that contained a waiver clause. However, that clause merely provided that if the City determined it was necessary, Martin would "remove" the sculpture at his own cost and would not sue the City to recover those costs. Moreover, the clause required the City to give Martin 90 days written notice to remove the sculpture, if necessary. This clause was of no help to the City, the judge ruled, because it "in no way discusses or contemplates destruction of the sculpture," and the City never gave Martin the written notice it required.

As a result, the judge has denied the City's motion for summary judgment and has granted Martin's motion for summary judgment. Since the sculpture was destroyed before Martin's suit was filed, the only remedy available to him is damages. The judge has directed

Martin and the City to brief that issue or to notify her if a trial will be necessary to determine damages.

Martin v. City of Indianapolis, 982 F.Supp. 625, 1997 U.S.Dist.LEXIS 17073 (S.D.Ind. 1997) [ELR 20:2:12]

Federal "rate court" determines reasonable per-program music license fees payable to ASCAP by religious, classical and foreign-language radio stations

Federal District Judge William Conner has determined the amount and conditions for reasonable per-program music license fees payable to ASCAP by a group of religious, classical and foreign-language radio stations.

Judge Conner's decision was made in a so-called "rate court" proceeding pursuant to a Consent Decree that settled an antitrust lawsuit brought against ASCAP by the federal government more than a half-century ago. The Consent Decree provides that if a music user is unable to agree with ASCAP on a fee for the right to perform music in the ASCAP repertory, the music user may ask the court to determine a reasonable fee.

Historically, ASCAP has issued two types of licenses to radio stations: a blanket license that permits stations to broadcast ASCAP songs as much as they like in return for a fee that is a percentage of their annual revenues from all programs; and a "per-program" license that permits stations to broadcast "featured performances" of ASCAP music in return for a fee that is a percentage of the station's revenue from programs that contain featured performances. Stations that take per-program licenses also must pay an "incidental use" fee for their non-featured performances of commercial jingles, and background and ambient music; this fee is a relatively small percentage of the station's revenue from all programs. The Consent Decree requires ASCAP to offer terms that give music users a "genuine choice" between these types of licenses.

ASCAP has negotiated voluntary blanket and per-program licenses with commercial radio stations represented by the Radio Music Licensing Committee. Also, many stations that were not represented by that Committee nevertheless agreed to the same license terms. However, more than 400 radio stations were not represented by the Radio Music Licensing Committee and did not agree to the license terms it negotiated with ASCAP. Most of those stations broadcast religious, classical music or foreign-language programming; and they are represented by the National Religious Broadcasters Music License Committee.

Negotiations between ASCAP and their Committee reached a deadlock with the two sides quite far apart. ASCAP offered a per-program license fee of 4.22% of station revenues from programs that contain feature performances of ASCAP music, plus an incidental use fee of 1.82% of revenues from programs containing incidental (but no featured) performances. These terms are approximately those agreed to by the commercial stations represented by the Radio Music Licensing Committee.

The stations represented by the National Religious Broadcasters Music License Committee offered less. They proposed a per-program license fee of 1.73% of revenues from programs containing feature performances, plus an incidental use fee of 0.06% of revenues from all programs. ASCAP and the Committee also disagreed about how much information stations should have to submit to ASCAP concerning songs they broadcast, under a per-program license. (No such information has to be submitted at all, under a blanket license.)

When ASCAP and the National Religious Broadcasters Music License Committee were unable to agree, the Committee petitioned the "rate court" as permitted by the Consent Decree. Judge Conner heard what appears to have been an enormous amount of evidence, much of it statistical and economic in nature. The judge's lengthy decision evaluates the evidence and arguments in considerable detail. And he concluded by agreeing with ASCAP on one part of its proposed license, but with the Committee on the other two.

Judge Conner has decided that ASCAP's proposed per-program license fee of 4.22% of revenues from programs containing featured performances is "reasonable." It was, the judge concluded, because the Committee's own evidence showed that at this rate, more than 21% of the stations it represents would find it less expensive to take a per-program license than a blanket license. Thus ASCAP's proposal gave stations a "genuine choice" between per-program and blanket licenses, as required by the Consent Decree.

On the other hand, Judge Conner decided that the 0.06% incidental use license fee proposed by the Committee was reasonable, because the evidence showed that this fee would be sufficient to more than cover the amount that ASCAP pays to its own publishers and songwriters for the incidental use of their music by radio broadcasters.

Finally, Judge Conner also agreed with the Committee that ASCAP had asked stations to provide more information about each featured performance song than was reasonable. Instead, he ruled that stations only have to provide ASCAP with the title of each song and just one other identifying characteristic such as its publisher, composer or recording artist.

United States v. American Society of Composers, Authors and Publishers (Application of Salem Media), 981 F.Supp. 199, 1997 U.S.Dist.LEXIS 14495 (S.D.N.Y. 1997) [ELR 20:2:12]

Lanham Act suit complaining about Evidence Records' exploitation of recordings by three jazz artists who were under exclusive contract to Landmark and Muse Records is dismissed; court rules that Evidence never distributed one complained-of recording, and Landmark and Muse failed to show likelihood of confusion resulting from Evidence's distribution of two others

Landmark and Muse Records have lost a case that on its face seemed to have some merit. Their complaint was that Evidence Records has exploited recordings by three jazz artists - John Hicks, Edward "Sonny" Stitt, and Antoine Roney - that were made while the three were signed exclusively to Landmark and Muse. These claims were asserted in federal court under the Lanham Act and various state law theories. District Judge Denny Chinn has dismissed the case, in response to Evidence Record's motion for summary judgment. But the judge's ruling says more about the limits of the Lanham Act than it does about the merits of Landmark and Muse's case.

John Hicks once had an exclusive recording contract with Landmark records, and in apparent violation of that contract, recorded an album for Evidence. Evidence says that it didn't know about Hicks' contract with Landmark when Hicks made his Evidence recording; but whether that was so or not turns out not to have mattered. What did matter was that Evidence learned about Hicks' contract with Landmark before the album was released, and therefore Evidence never released the album. Judge Chinn explained that the Lanham Act "clearly requires that the goods or services complained of have entered into commerce." Since Hicks' recording for Evidence did not enter into commerce, Landmark's claim based on that recording "fails as a matter of law."

Sonny Stitt once had an exclusive recording contract with Muse Records. During the term of the contract, Stitt made an unauthorized recording for another company which transferred the rights to yet another company which eventually licensed it to Evidence Records. When Evidence released Stitt's recording - ten years after it was made - Evidence credited it to a company named Birdseed Music instead of to Muse Records. This did not violate the Lanham Act, Judge Chinn ruled, because even though Stitt may have made the offending record in violation of his contract with Muse, the record itself had not been made for Muse, and thus

Evidence did not "falsely designate the origin of the Stitt recording" in any way that injured Muse.

Antoine Roney's contract with Muse gave Roney the right to record for other companies, so long as he did so only as a "sideman." Roney in fact made a record for another company, performing as a sideman, and Evidence later acquired the rights to it. Muse complained that Evidence repackaged the recording in a manner that "deceives and confuses consumers by leading them to believe that Roney performs as a lead musician" even though "he performs solely as a sideman." Judge Chinn acknowledged that "the album cover itself is arguably misleading in some respect. . . ." But Muse "presented no concrete evidence of the likelihood of or actual consumer confusion." And without "some evidence that the repackaged . . . album cover is likely to deceive or confuse consumers, [Muse] cannot prevail on its false advertising claim," the judge ruled.

Judge Chinn also dismissed the state law claims (without prejudice), for lack of federal court jurisdiction.

Editor's note: The Stitt recording claim is similar to one that was successful in the Smith v. Montoro case (ELR 3:6:1); and the Roney recording claim is similar to one that was successful in the George Benson case (ELR Preview 4). Neither of those cases was cited by Judge Chinn, perhaps because they could have been distinguished. In Smith, the plaintiff was the actor who actually appeared in the movie and whose role was credited to another actor; Muse Records, by contrast, was not the actual company that made the recording credited to another company. Likewise, in the Benson case, it was George Benson himself who complained that an album cover suggested he was a lead performer rather than merely a sideman; Muse Records, by contrast, only had a contract with the musician whose contribution to the recording was overstated. Moreover, Judge Chinn's opinion suggests that he really was concerned about something else. "It may well be that [Landmark and Muse have] valid claims," he said. But they didn't have them "under the Lanham Act." Moreover, he added, in what may be the most important sentence in the opinion, "The Lanham Act should not be used to transform a breach of contract dispute into a federal cause of action."

Sun Trading Distributing Co. v. Evidence Music, Inc., 980 F.Supp. 722, 1997 U.S.Dist.LEXIS 15997 (S.D.N.Y. 1997) [ELR 20:2:13]

Court dismisses invasion of privacy suit against Fox TV and producer of show "Cops" filed by man who was videotaped as he was being arrested in his home

Willie Reeves, Jr., of Cleveland didn't enjoy his 15 minutes of fame. He liked it so little, in fact, that he sued the companies that brought it to him: the Fox Television Network, which airs the show "Cops," and Barbour-Langley Productions, the company that produces it.

The reason for Reeves' distress was that one segment of a "Cops" episode showed Reeves being arrested in his home by Cleveland police. Though Reeves was charged with felonious assault, and later pled guilty to a fourth degree felony, he nevertheless sued Fox and Barbour-Langley for invasion of privacy and related torts. Following discovery, the two companies responded with a motion for summary judgment. And federal District Judge Donald Nugent has granted their motion.

Judge Nugent has ruled that Reeves failed to establish that his privacy had been invaded by the publication of private facts, for two reasons. First, his arrest was a matter of "legitimate public interest." And second, the "Cops" broadcast did not reveal any personal or private information about him, unrelated to his arrest.

The judge dismissed Reeves' "false light privacy" claim, because Ohio does not recognize that tort.

Reeves' invasion of privacy by appropriation claim failed, because to be successful in Ohio, a plaintiff's name or likeness must have "some intrinsic value," and Reeves' name and likeness did not.

The judge rejected Reeves' emotional distress claim, because Reeves failed to submit evidence showing that he had suffered severe emotional distress following the "Cops" broadcast.

Finally, Reeves' trespass claim failed, because "consent" is a defense to a claim of that sort, and the videotapes made just before and during Reeves' arrest did not show that he had objected to Barbour-Langley's camera crew entering his house.

Reeves v. Fox Television Network, 983 F.Supp. 703, 1997 U.S.Dist.LEXIS 17344 (N.D.Ohio 1997) [ELR 20:2:14]

Design of Portland Trail Blazers' arena violates Americans with Disabilities Act, federal District Court rules

As a result of a ruling by a federal District Court in Oregon, the design of Portland Trail Blazers' home arena will have to be changed in certain ways. Federal

Magistrate Judge Donald Ashmanskas has ruled that the arena's current design violates standards imposed under the Americans with Disabilities Act.

The Portland arena, known as the "Rose Garden," also is home to the Western Hockey League's Winter Hawks, and it hosts other events, too, like indoor football and soccer games, concerts, ice shows, and circuses. Several of the Rose Garden's features have been challenged in a lawsuit brought by Robert Pike, a disabled Portland attorney who must use a wheelchair, and by an advocacy organization known as Independent Living Resources.

Their lawsuit contends that the Rose Garden violates standards adopted to implement Title III of the Americans with Disabilities Act which requires those who build and operate arenas to do so in a way that assures those with disabilities "full and equal enjoyment of the . . . facilities. . . ."

Judge Ashmanskas' opinion was issued in response to a motion for summary judgment by Pike and Independent Living and a motion by the Rose Garden's owner to dismiss certain claims as moot. It is almost 90 printed pages in length, deals with many entirely distinct issue, and reads like a mini-treatise on Title III of the ADA. (It even has a table of contents that itself is longer than a page.)

The judge's ultimate ruling was a split decision, in the sense that he ruled in favor of Pike and Independent Living on some issues, but in favor of the Rose Garden's owner on others.

For example, the judge agreed with Pike and Independent Living that the Rose Garden improperly clusters most of the wheelchair spaces in certain parts of the arena and provides few or no spaces in the rest of the arena. Judge Ashmanskas also agreed that the Rose Garden's "executive suites" are "public accommodations" that must fully comply with the ADA's design standards, and that every such suite has to be made accessible; it was not enough for one token suite to be accessible.

On the other hand, Judge Ashmanskas agreed with the Rose Garden's owners that existing ADA regulations do not require arenas to give wheelchair users lines of sight over standing spectators. And the judge ruled that he would not require the Rose Garden to employ a "qualified" ADA expert to ensure against violations in the future.

Independent Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 1997 U.S.Dist.LEXIS 18349 (D.Or. 1997) [ELR 20:2:14]

Court refuses to dismiss copyright infringement action filed by creators of "Matchsticks" comic against creators and publisher of "Dhampire" comic, because court could not decide they were not substantially similar as matter of law

The creators of the comic book "Dhampire: Stillborn," and its publisher DC Comics, have failed in their bid to have a copyright infringement action against them dismissed without trial. The suit was filed by Francis Hogan and Daniel Masucci, the creators of a comic entitled "Matchsticks" which they allege they submitted to DC Comics two years before it published "Dhampire."

The protagonists of both comics have some things in common. Both are named Nicholas Gaunt, are part human and part vampire, search to uncover their pasts, struggle with good and evil, have sinister genealogies, have mothers who were killed by their vampire fathers, are initiated into the vampire world themselves through killing others, and develop a romantic relationship with a woman vampire.

Federal District Judge Thomas McAvoy has concluded that although these similarities are "arguably commonplace," when they are combined with Hogan and Masucci's allegation that they submitted their comic to DC Comics, they are sufficient to meet their prima facie burden of establishing that "Matchsticks" had been copied.

"Resolution of this issue does not necessarily mean that such use will result in liability," the judge noted. The two works must be "substantially similar" too. But although Judge McAvoy had inspected both comics quite carefully, he said he "cannot conclude at this point that as a matter of law the two works are not substantially similar."

Hogan v. DC Comics, 983 F.Supp. 82, 1997 U.S.Dist.LEXIS 13627 (N.D.N.Y. 1997) [ELR 20:2:15]

NBC wins dismissal of defamation action complaining about Dateline segment entitled "Rambo Goes to Reykjavik"

In 1993, Dateline NBC broadcast a segment entitled "Rambo Goes to Reykjavik" about a security company that specializes in attempting to rescue American children who have been abducted and taken abroad by non-custodial parents. Corporate Training Unlimited was the company in question, and Donald and Judy Feeney are its owners.

The segment was not entirely flattering, and Corporate Training and the Feeneys responded by suing NBC for defamation. Moreover, they were successful in the first round of the litigation when federal District Judge Raymond Dearie denied NBC's motion to dismiss (ELR 16:12:13). Once discovery was completed, however, NBC made a motion for summary judgment. And this time, it is the network that has succeeded.

The judge has ruled that the objected-to statements were either substantially true or not made with actual malice. The Feeneys also complained that NBC had not included favorable statements about them made by people the network had interviewed. But Judge Dearie held that the failure to include favorable statements does not support a defamation claim; and in any event, the broadcast did include many favorable statements.

The "Rambo Goes to Reykjavik" title for the segment also upset the Feeneys. But Judge Dearie said that the segment's "`Rambo' references . . . are the type of hyperbolic speech which cannot be read to assert provable facts and is beyond the scope of defamation law."

Thus, Judge Dearie has granted NBC's motion and has directed his court clerk to "close this case."

Corporate Training Unlimited, Inc. v. National Broadcasting Company, Inc., 981 F.Supp. 112, 1997 U.S.Dist.LEXIS 16383 (E.D.N.Y. 1997) [ELR 20:2:15]

New York appellate court affirms ruling that radio station employee alleged valid cause of action for infliction of emotional distress against competing station and its on-air personalities because of "demeaning and outrageous remarks" made during "Ugly Bride Contest" segment of morning broadcast

Liability may eventually be imposed on a Schenectady-area radio station and its morning on-air personalities, because they made a photograph taken during "one of the most beautiful and memorable occasions of life" the subject of "a feeble and bad taste attempt at humor."

The photo in question was of Annette Esposito-Hilder and her then-new husband. On the morning their photo appeared in the weddings section of a local newspaper, the defendants broadcast their weekly "Ugliest Bride Contest" segment, during which they made "demeaning and outrageous remarks" concerning Esposito-Hilder's "physical attractiveness and desirability." Ordinarily, the defendants do not identify their targeted brides. But on that morning, they included Esposito-Hilder's full name, her employer's name, her position, and the names of her supervisors.

Unfortunately, Esposito-Hilder heard the offending broadcast, as did her supervisors and colleagues; and she responded by filing a lawsuit for intentional infliction of emotional distress. New York Supreme Court Justice Joseph Harris refused to dismiss the suit (ELR 19:6:8). And his refusal to do so has been affirmed by the Appellate Division.

The appellate court acknowledged that the broadcast would not have been grounds for a successful defamation suit, because the offending statements were expressions of opinion. However, in an opinion by Justice Ann Mikoll, the court has ruled that "under the unique factual circumstances" in this case, the broadcast may be grounds for imposing liability for infliction of emotional distress.

The "unique . . . circumstances" noted by Justice Mikoll were that: "(a) the aggrieved party is private individual rather than a public figure, (b) the conduct in question involved no matter of public interest or concern, and (c) the status of the parties as business competitors is relevant to an evaluation of defendants' conduct insofar as an intent to injure is concerned."

Esposito-Hilder v. SFX Broadcasting, Inc., 665 N.Y.S.2d 697, 1997 N.Y.App.Div.LEXIS 12142 (A.D. 1997) [ELR 20:2:16]

Court refuses to dismiss copyright and service mark claims filed by World Wrestling Federation against competing World Championship Wrestling based on WCW's employment of former WWF wrestlers "Razor Ramon" and "Diesel"

The question of whether fictional characters may be protected by copyright was once the subject of law school moot court cases. Now, the answer is clearly "yes." Courts have so held in cases involving "Superman" (ELR 6:3:3) and "Freddy Krueger" (ELR 10:12:14), among others.

Recently, this principle has been applied in a most unusual setting: the "world" of professional wrestling. Character-protectibility is the central issue in a legal match between the World Wrestling Federation (owned by Titan Sports, Inc.) and World Championship

Wrestling (owned by Turner Broadcasting) being fought in a federal District Court in Connecticut.

The dispute between these two competing organizations was sparked by WCW's hiring of two former WWF wrestlers, Scott Hall and Kevin Nash, and by WCW promotions that suggested there soon would be inter-organization competition.

When Hall signed with WWF, it created a wrestling character for him called "Razor Ramon" who had a distinctive Hispanic accent, slicked back hair in a pony-tail, a toothpick in his mouth, a vest, and multiple chains around his neck. Their contract gave WWF (not Hall) exclusive ownership of the "Razor Ramon" character, and WWF registered a "Razor Ramon" service mark and copyrights in videos, magazines and merchandise devoted to the character.

Similarly, when Nash signed with WWF, it created a wrestling character for him called "Diesel" who had a goatee and mustache, black leather pants, a black vest decorated with silver studs and tassels, a black tank-top shirt, fingerless glove on the right hand, black elbow pads, wrist bands, sunglasses and leather boots. By contract, "Diesel" too was owned exclusively by WWF, and he too appeared in videos, magazines and merchandise.

Eventually, Hall and Nash were "enticed" to sign with WCW, on whose broadcasts they appeared as "Razor Ramon" and "Diesel." This is what prompted WWF to sue WCW for copyright and service mark infringement and other things.

WCW made a motion to dismiss WWF's copyright claim based on the "Diesel" character (though apparently not the "Razor Ramon" copyright claim), arguing that "Diesel" was not sufficiently developed as a character to be copyrightable. Judge Peter Dorsey has denied the motion, however. The judge has ruled that

WWF has alleged a detailed description of "Diesel," as well as an explanation for how the character has been "developed into a fully independent character and ultimately became integral to the story lines of many televised events." Thus, the judge refused to hold, as WCW had argued, that the character was not protectable as a matter of law.

Judge Dorsey also has refused to dismiss WWF's service mark infringement claim, because WWF alleged that WCW used its federally registered mark on three occasions as part of a "scheme to defraud the public" into believing that "warfare was going to take place" between WWF and WCW wrestlers.

The judge did dismiss WWF's claim for tortious interference with contractual relations, on the grounds that it was preempted by the Copyright Act; though he refused to dismiss its claim under the Connecticut

Unfair Trade Practices Act, saying that claim was not preempted.

Titan Sports, Inc. v. Turner Broadcasting Systems, Inc., 981 F.Supp. 65, 1997 U.S.Dist.LEXIS 16440, 16442 (D.Conn. 1997) [ELR 20:2:16]

Injured Arena Football Player Cornelius Ross entitled to workers' compensation benefits only as "seasonal employee" and only from beginning of following season, Pennsylvania court rules

Workers' compensation cases are less complex than conventional injury cases in one way: they do not require proof of negligence, or indeed fault of any kind. On the other hand, the method by which the amount of an injured employee's benefits are calculated can be complicated indeed.

Arena Football League veteran Cornelius Ross learned just how complicated benefit calculations can be, when he injured his toe while playing for the Pittsburgh Gladiators in the final game of that team's 1990 season. A Pennsylvania Workers' Compensation Judge awarded Ross benefits, but less than those he had sought. On appeal, Pennsylvania Commonwealth Court Judge Doris Smith has affirmed.

Judge Smith ruled that Ross had been properly classified as a "seasonal employee," because even though football can be played year-round, Arena Football League games are played only during part of the year. Ross argued that the National Football League and Canadian Football League seasons are different from the Arena Football League season, and he might have played in one of those leagues if he had not been injured. But Ross had not shown that either league was interested in employing him. Moreover, he would not have been able to play in those leagues even if he had not been injured, because his Arena Football League contract prohibited him from playing football for others at any time of the year.

The judge also ruled that Ross's benefits properly began at the start of the season following his injury, rather than immediately after his injury. This was so, she explained, because since Ross was injured in the last game of the 1990 season, he was fully paid for that season. Also, his injury didn't cause him to begin losing income until the beginning of the following season, because even if he hadn't been injured, he wouldn't have earned anything until then.

Ross v. W.C.A.B. (Arena Football League), 702 A.2d 1099, 1997 Pa.Cmmw.LEXIS 783 (Pa.Commw. 1997) [ELR 20:2:17]

Spectator injured by hockey puck loses suit against minor-league Milwaukee Admirals, because she failed to prove breach of hockey rink design standards and because her injury was the result of her contributory negligence

"Keep your eyes on the puck . . . at ALL times," the arena announcer for the Milwaukee Admirals tells the crowd at the beginning of every period of every game. And good advice that is, too. Admirals fan Andrea Moulas took her eyes off the puck one evening in 1994 and was severely cut and knocked unconscious by it, even though she was seated in the second row behind an eight-foot clear plastic shield.

The Milwaukee Admirals are a minor league team in the International Hockey League, and Moulas had attended many of its games. She knew that pucks sometimes fly into the stands, but her brother had purchased season tickets in the second row precisely because he thought they'd be safe. Moulas herself did not realize how badly one could be injured by a flying puck.

Hoping to recover for her injuries, Moulas sued the Admirals and the Bradley Center where the team plays its home games. The Admirals and Bradley Center responded with a motion for summary judgment, and their motion was granted by a Wisconsin state trial court. Now, in an decision by Judge Ted Wedemeyer, the Wisconsin Court of Appeals has affirmed that ruling, on two grounds.

First, though Moulas had submitted opinions on how the Bradley Center could have been designed to protect against spectator injuries like hers, none of those whose opinions was offered was qualified as an expert on hockey arena design. Thus, Judge Wedemeyer held that even though "Moulas sustained a serious injury from an errant puck," and even though "the screening could have reached from the rink floor to the Bradley Center's ceiling," no "competent evidence" had been submitted by Moulas to show that design standards for hockey rinks exist or that Bradley Center had breached any such standards.

Second, and of greater significance for other hockey-puck-injury cases (at least in Wisconsin), Judge Wedemeyer held that Moulas' injury was the result of her contributory negligence, and thus she couldn't recover. In ruling against Moulas on the contributory negligence issue, the trial court had applied the "baseball rule." And Judge Wedemeyer "agree[d] with the trial court that the `baseball rule' applies here. Essentially, the baseball rule prohibits a spectator who is injured by a flying baseball to make a claim against the team. . . ." Judge Wedemeyer concluded that "the articulated basis of the baseball rule warrants its application to hockey."

This conclusion was fatal to Moulas' claim. "Because the risks associated with hockey should be known to the reasonable person attending a game, because Moulas was aware of the risks, and because she chose to attend despite her knowledge and the warnings espoused [by the arena announcer, on the back of her ticket, and in the game program], we conclude that summary judgment was appropriate," Judge Wedemeyer said.

Judge Ralph Pine dissented.

Moulas v. PBC Productions Inc., 570 N.W.2d 739, 1997 Wisc.App.LEXIS 1084 (Wisc.App. 1997) [ELR 20:2:18]

Requirement that Fox Television affiliate in Mexico provide issue-responsive programming does not discriminate against Mexican station in violation of NAFTA, federal appellate court rules in case that began when Fox acquired right to broadcast NFL games

When Fox Television acquired the right to broadcast National Football League games in 1994, it wanted to reach the widest possible audience in every market. In order to reach the widest audience in San Diego, the best available affiliate was XETV, a station across the border in Mexico, rather than San Diego's own Channel

51. Fox needed the approval of the FCC to affiliate with a foreign station, and Fox got it (ELR 18:8:8). Channel 51 was the loser in that proceeding, and XETV was the indirect winner. (Fox itself was the direct winner.)

Though the loser, Channel 51 does not appear to have appealed. The winner, XETV did!

XETV was disappointed in a condition the FCC imposed when it granted Fox's request. The FCC ruled that XETV would have to provide "issue-responsive programming" while it was a Fox affiliate - just like a U.S. television station would - in order for Fox to be able to renew that affiliation five years later.

The FCC didn't think this would be a problem for XETV, because the station's overall programming did not suffer from "serious defects" that would affect the public interest. Moreover, Fox programs carried on XETV include news and public affairs shows, as well as NFL games, and the FCC found that these and other planned programs demonstrated that XETV will be providing "issue-responsive" programming.

XETV was not as sanguine about the issue-responsive programming requirement, however, and so it appealed. It argued that the requirement discriminates against it, because it is a Mexican station; and it argued that such discrimination is prohibited by NAFTA which bars the U.S. from discriminating against Mexican (and Canadian) businesses on the basis of their nationality.

A federal Court of Appeals has rejected XETV's position. In an opinion by Judge David Sentelle, the appellate court has held that the issue-responsive programming requirement was not imposed on XETV; it was imposed on Fox's "permission to use a foreign station to service a domestic market." Moreover, the judge added, "There is nothing unreasonable or discriminatory in the Commission's order . . . requiring a domestic network to serve a local market only via an intermediary which adequately serves the public interest, regardless of whether the local affiliate is located within U.S. borders."

Radio Television S.A. de C.V. v. Federal Communications Commission, 130 F.3d 1078, 1997 U.S.App.LEXIS 34793 (D.C.Cir. 1997) [ELR 20:2:18]

Playboy wins (another) copyright case against computer bulletin board system that distributed images scanned from magazine and uploaded to site

Playboy magazine is on a roll. It has won yet another copyright case against a "bulletin board system" that distributed images that had been scanned from Playboy and uploaded to the BBS. Federal District Judge Sam Bell has granted Playboy's motion for summary judgment, ruling that the BBS's owners had committed both direct and contributory copyright infringement.

The BBS's owners argued that they had not infringed Playboy's copyrights, because the magazine's photos had been scanned and then uploaded and downloaded by the BBS's subscribers. Judge Bell was not persuaded, however. He ruled that the BBS's owners themselves committed direct infringements by distributing and displaying copies of Playboy's photographs, for two reasons. First, they had a policy of encouraging subscribers to upload files. And second, they used a screening procedure in which their employees viewed all uploaded files and then moved those selected for distribution into the directory of files available to subscribers.

In addition to finding the corporate owner of the BBS liable for copyright infringement, Judge Bell also found its president and sole shareholder to be liable, because he had the authority and ability to control the content of the bulletin board and its operations.

The judge also held them liable for contributory copyright infringement, because they induced, caused, and materially contributed to infringements committed by the BBS's subscribers.

The BBS's owners prevailed, at least temporarily, on one issue. Playboy also sued them for Lanham Act violations, arguing that they had misled their subscribers concerning the true source of Playboy's photographs. Judge Bell denied Playboy's motion for summary judgment on this one issue. He ruled that Playboy would have to produce evidence at trial that the bulletin board's subscribers had actually been misled.

Editor's note: This is the third such case Playboy has won. It also prevailed against the operator of another bulletin board system, in what was the first copyright-in-cyberspace case (ELR 16:4:10); and more recently it won a similar lawsuit against the operator of a World Wide Website (ELR 19:11:11).

Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F.Supp. 503, 1997 U.S.Dist.LEXIS 19310 (N.D.Ohio 1997) [ELR 20:2:19]

Musicians are "employees" of booking agent for bands, so agent had to make unemployment insurance contributions, New York appellate court affirms

Musicians are "employees" of Faze 4 Orchestras Ltd., for unemployment insurance purposes, the Appellate Division of the New York Supreme Court has held. Faze 4 is a booking agent for bands.

The appellate court acknowledged that "professional musicians are not subject to direct supervision or control." The court "nevertheless" affirmed a ruling by the Unemployment Insurance Appeal Board that "Faze 4 exercised sufficient direction and control over the musicians' work to establish their status as Faze 4's employees."

As a result, the court upheld the Board's decision that Faze 4 must make additional unemployment insurance contributions based on the money musicians were paid for performances booked by the agency.

Matter of Faze 4 Orchestras Ltd., 666 N.Y.S.2d 857, 1997 N.Y.App.Div.LEXIS 13594 (A.D. 1997) [ELR 20:2:19]

DEPARTMENTS

In the Law Reviews:

Entertainment Law Review, published by Sweet & Maxwell Ltd, FREEPOST, Andover, Hants SP10 5BR, United Kingdom, has published Volume 9, Issues 3 and 4 with the following articles:

The Reform of United Kingdom Competition Law and its Implications for the Entertainment Industry by Diana Guy and Luisa Edwards, 9 Entertainment Law Review 101 (1998) (for address, see above)

Fair Dealing-Running Like Clockwork? by Richard Munden and Lawrence Abramson, 9 Entertainment Law Review 105 (1998) (for address, see above)

British Film Copyright and the Incorrect Implementation of the E.C. Copyright Directives by Pascal Kamina, 9 Entertainment Law Review 109 (1998) (for address, see above)

The Law on Sports Broadcasts: One More "Battle" in the Spanish Digital Television "War" by Santiago Martinez Lage and Javier Viaz Alonso, 9 Entertainment Law Review 115 (1998) (for address, see above)

German Football Broadcasting at a Turning Point: The Supreme Court's Decision on the Central Marketing of Television Rights by Peter Brautigam and Stefan Schmitz, 9 Entertainment Law Review 122 (1998) (for address, see above)

The OECD Multilateral Agreement on Investment (MAI) Project: The Possible Consequences of Including

Intellectual Property by Stefania Ercolani, 9 Entertainment Law Review 125 (for address, see above)

Photographs, Commercial Exploitation of the Image and Copyright in Spain by Luis Gimeno, 9 Entertainment Law Review 131 (1998)

Book Reviews: Intellectual Property & Media Law Companion by Marcus Anselm and Alasdair Bleakley; Broadcasting Law and Fundamental Rights by Rachael Craufurd Smith; and Le Droit et l'Objet d'Art: Le Droit de Suite des Artistes Plasticiens dans l'Union

Europeenne by Carine Doutrelepont, 9 Entertainment Law Review 139 (1998) (for address, see above)

Turning "Expired" Copyright into a Gold-mine by Adam Sutcliffe, 9 Entertainment Law Review 143 (1998) (for address, see above)

The Protection of Film Soundtracks under British Copyright after the Copyright Regulations 1995 and 1996 by Pascal Kamina, 9 Entertainment Law Review 153 (1998) (for address, see above)

Conflicts of Law in International Copyright Assignment Contracts by Mario Fabiani, 9 Entertainment Law Review 157 (1998) (for address, see above)

Government Banning of Foreign Publications in France by Emmanuel Dreyer, 9 Entertainment Law Review 163 (1998) (for address, see above)

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