NEW LEGISLATION AND REGULATIONS

Curt Flood Act revokes antitrust exemption for practices that affect employment of major league baseball players

After decades of effort, major league baseball players have finally achieved an historic goal. A portion of professional baseball's 78-year old antitrust exemption has been revoked. Congress did the deed by enacting the "Curt Flood Act of 1998" which President Clinton then signed in a little-noticed White House ceremony on October 27th.

The Act is named after the St. Louis Cardinals' former Golden Glove Award winning center fielder, Curt Flood, who challenged his 1969 trade to the Philadelphia Phillies by suing Baseball Commissioner Bowie Kuhn. Flood's suit was based on federal antitrust law, from which baseball had been held exempt back in 1921 in a ruling that was affirmed by the Supreme Court in 1922 and then reaffirmed again by the Supreme Court, in a different case, in 1953.

By the time Flood sued Kuhn, it had become apparent that baseball's exemption was an historic anomaly. The Supreme Court had specifically ruled that neither professional boxing nor professional football were exempt. So Flood had reason to hope that courts, including the Supreme Court if necessary, would reverse themselves with respect to baseball. Lower courts, however, were unwilling to do so. And when Flood's case got to the Supreme Court, it too refused to reverse itself. The Court explained that Baseball's years of reliance on its exemption meant that Congress should be the one to revoke it, prospectively, if it were to be revoked at all. Flood v. Kuhn, 407 U.S. 258 (1972)

It took Congress 26 years to respond to the Supreme Court's suggestion. But now it has, though only narrowly.

The Curt Flood Act amends the Clayton Act by adding a new section 27, the heart of which provides that "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce."

The Act thus revokes Baseball's antitrust exemption only as it once applied to cases like Curt Flood's - cases involving the "employment of major league baseball players."

Baseball's antitrust exemption also has been significant in other kinds of cases too, like those involving: the movement of teams from one city to another; league expansion; the authority of the Commissioner to impose his decisions on team owners; and others. Congress made certain that the Curt Flood Act would not affect any future cases of that kind, however. It did so by specifically stating that the Act does not apply to practices "that do not directly relate to or affect employment of major league baseball players." Then, for good measure, the Act describes, in separately numbered subparagraphs, six types of practices to which the Act does not apply. These include employment of minor league players and umpires and the player draft, as well as team relocations, league expansion, the Commissioner's authority, and league-wide broadcasting agreements.

Editor's note: The Curt Flood Act has more symbolic than practical significance. This is so, because major league baseball players are represented for collective bargaining purposes by a Players Association. Quite apart from the historic "baseball exemption," there is an entirely separate exemption from the antitrust laws that applies in industries where labor and management engage in collective bargaining. This exemption is known as the "labor exemption from the antitrust laws"; and the Curt Flood Act does not eliminate it. In fact, the Act explicitly states that "Nothing in [it] shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws." Until a few years ago, it looked as though the "labor exemption" might expire when a collective bargaining agreement expired, or at least when collective bargaining reached an impasse. If the labor exemption did expire at either of those times, professional football, basketball and hockey players would have been better off than professional baseball players, because football, basketball and hockey players could then pursue antitrust suits against their leagues while baseball players still could not. This may be why professional baseball players continued to seek Congressional revocation of baseball's antitrust exemption. However, in 1995, a federal Court of Appeals held that the National Football League's "labor exemption" continued to insulate the League from antitrust liability for actions taken by the League even after collective bargaining with the NFL Players Association had reached an impasse (ELR 17:4:19). And in 1996, the United States Supreme Court affirmed that ruling (ELR 18:2:3). Therefore, it now appears that management loses the protective shield of the "labor exemption" only if and when a union votes to decertify itself as the collective bargaining representative of its members. This would mean that in order for major league baseball players to take advantage of the Curt Flood Act, they would have to first vote to decertify their Players Association as their collective bargaining representative; and that would be a truly "scorched earth" and suicidal tactic.

Curt Flood Act of 1998, Public Law 105-297, adding section 27 to the Clayton Act, 15 U.S.C. sec. 12 et seq. (105th Cong. 1998) [ELR 20:7:4]

WASHINGTON MONITOR

Congress adjourns without enacting two bills of interest to the entertainment industry: a bankruptcy bill that would have made it more difficult for recording artists to get out of contracts with record companies; and a bill that would have reduced copyright royalties paid by satellite TV companies to retransmit superstation and network TV signals

Literally thousands of bills are introduced in each Congress, but only a small fraction of them make it to the President's desk to be signed into law. As a result, the Entertainment Law Reporter focuses on only those that are enacted; the rest are usually ignored because they have no effect on industry practices.

When the 105th Congress finished its legislative business, two high-profile bills - bills that had been passed by the House of Representatives - were left on the Senate floor and thus not enacted into law. One was a bill that would have made it more difficult for recording artists to use bankruptcy as a tool for getting out of their contracts with record companies. The other was a bill that would have reduced the royalties that satellite TV companies must pay to copyright owners in order to retransmit superstation and network TV signals.

Nothing prevents these two bills from being reintroduced when the 106th Congress convenes in January 1999. (The Curt Flood Act was first introduced in the 103rd, and then reintroduced in the 104th and 105th Congresses, before it was finally enacted. (See the immediately preceding report; ELR 20:7:4)) But unless and until these bills are reintroduced and enacted, it is possible to view their demise as a Congressional affirmation of earlier developments reported in these pages. And thus - unlike most bills that are never enacted - the death of these two bills may be seen as legally significant.

Recording artist bankruptcy bill

The recording artist bankruptcy bill was just a small part of a much larger and quite significant bankruptcy reform bill, to which the 105th Congress gave significant attention. In the beginning, the bankruptcy reform bill had nothing to do with the recording industry, and contained no provisions that were unique to that industry.

Record companies have long been displeased with Bankruptcy Act provisions that have permitted recording artists to get out of their contracts with large advances still outstanding. Artists like James Taylor (913 F.2d 102), Willie Nile (ELR 4:20:1) and the grunge rock band Gruntruck (ELR 18:9:14) all have done so, as have others. Usually, artists do so in order to sign contracts with other record companies, so that royalties from the sale of their new recordings will not be offset by still-unearned advances for their old recordings.

Since a bankruptcy reform bill was pending anyway, the record industry successfully persuaded the House of Representatives to add a provision dealing with recording artist bankruptcies in particular - a provision that would have made it more difficult for artists to use bankruptcy in this fashion.

The bankruptcy reform bill was controversial - more on account of its provisions concerning consumer credit card debt than because of its recording artist provisions. As a result, the bill was never voted upon in Senate.

Satellite TV royalty bill

Satellite TV companies, like Direct TV and PrimeStar, enjoy a compulsory license that permits them to retransmit superstation and network TV signals, just like the cable TV companies do. Like the cable TV royalty, the amount of the satellite TV royalty is set by a procedure mandated by the Copyright Act, rather than by voluntary negotiations between satellite operators and program copyright owners.

In 1997, the Librarian of Congress took the final step in the statutorily mandated procedure, and affirmed a Copyright Arbitration Royalty Panel decision that substantially increased the satellite TV royalty rate (ELR 19:8:5). As a legal matter, satellite TV companies could have increased the rates they charge their subscribers, in order to compensate for the higher royalties they must pay. But satellite TV companies were concerned that if they did so, they would lose subscribers to cable TV companies. As a result, satellite TV companies turned to Congress for relief, and almost got it.

The satellite TV royalty bill would have had the effect of overturning the decision of the Librarian of Congress by reducing the royalty rate payable by satellite TV companies. The bill was passed by the House of Representatives, but was not voted upon in the Senate. According to news reports, Senator John McCain - a supporter of the bill - explained its failure by saying that the bill did not go far enough to satisfy satellite TV companies, and thus even they failed to support it.
[ELR 20:7:6]

Librarian of Congress sets compulsory license fees payable by PBS, NPR and other public broadcasters for their public performances of copyrighted music

PBS, NPR and certain other public television and radio broadcasters will be paying ASCAP and BMI a total of more than $5.4 million a year for the right to publicly perform music each year from 1998 through 2002, as a result of a recent decision by the Librarian of Congress. ASCAP will receive about 61% of the total, or $3,320,000 a year. BMI will receive 39%, or $2,123,000 a year.

The reason the Librarian of Congress made this decision is that section 118 of the Copyright Act gives public broadcasters a compulsory license to publicly perform nondramatic music (as well as a compulsory license to use published pictorial, graphic and sculptural works). If copyright owners and public broadcasters are unable to agree among themselves on what the licensee fee ought to be, the Copyright Act provides that the fee is to be determined by a Copyright Arbitration Royalty Panel, subject to review by the Register of Copyrights and ultimately by the Librarian.

When ASCAP and BMI were unable to reach agreement with public broadcasters, the matter was litigated before an Arbitration Panel. The Panel's determination satisfied none of the interested parties. The Register of Copyrights carefully considered eleven objections of ASCAP and BMI, and three objections by the public broadcasters. Ultimately, however, the Register recommended that the Panel's decision be adopted. And that is what the Librarian has done.

The Librarian's decision results in an amendment to sub-section 253.3 of Copyright Office Regulations which are codified at 37 CFR Part 253.

Separately, other sub-sections of Part 253 of the Copyright Office Regulations were amended as well. For example, college and university public broadcasters have been ordered to pay ASCAP and BMI $225 each per year, and SESAC $61 per year, for public performance rights.

Also, a per song license fee was adopted for public performances by PBS, NPR and certain other public broadcasters of songs that are not in the ASCAP, BMI or SESAC repertories. These compulsory license fees range from a high of $211.53 for a PBS feature performance of a non-ASCAP/BMI/SESAC song to a low of $0.53 for an NPR background or theme performance of such a song.

Noncommercial Educational Broadcasting Compulsory License, 63 Fed.Regis. 2142, 63 Fed.Regis. 49823, 63

Fed.Regis. 66042 (Copyright Office, Library of Congress 1998)[ELR 20:7:7]

INTERNATIONAL CASES

Commercial for Guinness stout did not infringe copyright to short film "Joy," British Chancery court rules, because "Joy" was not a film of a "dramatic" work, and commercial did not copy a substantial part of "Joy"

Imitation is the sincerest form of flattery, sometimes. Not always though. Director Mehdi Norowzian was not flattered, for example, when his short film "Joy" was imitated by the advertising agency Arks Limited when it created a television commercial for its client Guinness Brewing. Norowzian was in fact so angered by the similarity between his film and Arks' Guinness stout commercial that Norowzian sued Arks and Guinness Brewing for copyright infringement.

Justice Rattee, of the British Chancery Division, agreed with Norowzian that the similarities between "Joy" and the Guinness commercial were "the result of copying, and not independent creation." But this finding was not enough to award judgment to Norowzian. Rather, Justice Rattee concluded that judgment had to be awarded to Arks and Guinness, for two separate reasons.

First, under the U.K. Copyright, Designs & Patent Act of 1988, a "film" is entitled to copyright protection; but that protection only prevents the unauthorized reproduction of the protected film itself. In this case, Arks had not reproduced Norowzian's film. Instead, Arks had hired its own director and actor, and they created a new film - using the same style Norowzian had used in creating "Joy." Thus, in a pretrial ruling, Norowzian's claim that the copyright to his "film" had been infringed was dismissed "on the ground that it was hopeless, since infringement of film copyright requires a copying of the actual film . . . and does not include copying of the subject matter of the film. . . ."

The case went to trial on Norowzian's alternate theory that "Joy" was a filmed recording of a "dramatic work," and the Guinness commercial had infringed the copyright in that dramatic work. "Joy" had no dialogue; it portrayed a single actor performing a dance routine. The film had a "`quirky' or surreal effect produced by the editing techniques used by Mr. Norowzian in the cutting room . . . and, in particular, the technique of jump cutting."

Justice Rattee agreed with Norowzian that "had the finished film been a recording of the dance routine performed by the actor in `Joy' in front of the camera, it might well have represented a recording of a work of dance or mime, and, therefore, a dramatic work." That, however, was not what the film portrayed. "[A]s a result of the drastic editing process adopted by Mr. Norowzian, it is not a recording of anything that was, or could be, performed or danced by anyone." And that meant that the film was not a recording of a "dramatic work."

Second, even if "Joy" were a recording of a dramatic work, the Guinness commercial did not infringe the copyright to "Joy," because the commercial did not "copy a substantial part of that work," Justice Rattee concluded. The stories told by the two works were different, as were their settings and characters and the sequence in which the characters performed their movements. "What are much more strikingly similar between the two films," the Justice said, "are the filming and editing styles used by the respective directors." But this was not enough for Justice Rattee to say that the commercial "reproduces a substantial part of the subject matter of `Joy' or . . . any dramatic work that might be comprised in `Joy.'"

Norowzian v. Arks Ltd. (U.K. Chancery Div. 1998) (available on LEXIS in the Enggen Library, Cases File)[ELR 20:7:8]

RECENT CASES

Supreme Court rules that Screen Actors Guild did not breach duty of fair representation by negotiating collective bargaining agreement with Lakeside Productions that included clause requiring actors to become SAG "members" within 30 days; also holds that NLRB has primary jurisdiction to hear actress' claim that 30-day grace period for becoming SAG member should have begun with employment by Lakeside rather than with earlier employment by another production company

Some legal principles are much bigger than the amounts of money they involve. Take, for example, the legal principles at the heart of the claims made by part-time actress Naomi Marquez in her lawsuit against the Screen Actors Guild. That case began as a dispute about whether Marquez was legally required to pay $500 to SAG for initiation fees and dues in order for her to be able to earn $550 for appearing in one episode of the television series "Medicine Ball."

The case already has been heard by one Federal District Court judge, three Court of Appeals judges, and nine Supreme Court justices. SAG has prevailed in all three courts.

"Medicine Ball" is produced in Seattle by Lakeside Productions which had signed a SAG collective bargaining agreement in 1994. The agreement contains a "union security clause" that requires Lakeside to hire only actors and actresses who are SAG members, if they had previously worked for more than 30 days in the motion picture industry, as Marquez once had.

At first, Marquez did not object to paying SAG's initiation fees and dues; she merely wanted to be able to do so after she was paid by Lakeside, rather than before she began work. SAG, however, insisted on payment in advance. Marquez hadn't done so by the time her episode was about to begin production, so her role was given to another actress.

That was when Marquez sued. Represented by the National Right to Work Foundation, Marquez made two significant allegations.

First, she asserted that SAG had breached its duty of fair representation by negotiating a collective bargaining agreement that requires covered actors to be SAG "members," rather than simply those who paid "core" dues and fees.

Second, she asserted that SAG violated federal labor law by requiring actors and actresses to pay initiation fees and dues within 30 days after their first employment in the motion picture industry, rather than within 30 days after starting the particular jobs which required them to pay SAG fees and dues.

A federal District Court in the state of Washington granted SAG's motion for summary judgment and dismissed the case. Marquez appealed, and the appellate court has affirmed as to those two issues (ELR 19:12:6). Now, in an opinion by Justice Sandra Day O'Connor, the Supreme Court has affirmed SAG's victory again.

Justice O'Connor noted that the SAG union security clause tracks the language of the National Labor Relations Act when it requires employees to become union "members." As a result of earlier Supreme Court decisions interpreting the Act, union "membership" now includes "financial core" membership which simply requires payment of fees and dues rather than actual membership. Moreover, a "financial core" member has to pay only those dues the union uses for "representational activities" (collective bargaining, contract administration, and grievance adjustment activities), which is an amount that may be less than the full dues paid by regular members. (See "The Origins and Evolution of `Financial Core' Union Membership and its Significance in the Entertainment Industry," by Lionel S. Sobel. (ELR 10:7:3))

Marquez argued that the SAG agreement itself should have made it clear that the payment of fees and dues is enough, that actual SAG membership is not required, and that the amount of dues payable by those who choose "financial core" rather than actual membership may be less. Marquez contended that the agreement's failure to make all this clear meant that SAG had breached its duty of fair representation. Justice O'Connor disagreed, however.

SAG would have breached its duty of fair representation, the Justice explained, only if its use of language from the National Labor Relations Act in SAG's collective bargaining agreement was "arbitrary" or "in bad faith." It was neither, she said. "After we stated that the statutory language incorporates an employee's right not to `join' the union (except by paying fees and dues) and an employee's right to pay for only representational activities, we cannot fault SAG for using this very language to convey these very concepts."

The dispute over when Marquez had to pay SAG fees and dues turned on the proper interpretation of the National Labor Relations Act. SAG interprets the Act to require such payment within 30 days of an actor's first employment in the motion picture industry; and that is the interpretation that appears in the SAG agreement. Marquez, however, interprets the Act to mean that an actor must pay fees and dues only within 30 days of starting the particular job which requires union membership. Such an interpretation would have meant she had 30 days after starting work for Lakeshore to pay SAG fees and dues.

The Supreme Court did not resolve this dispute. Instead, Justice O'Connor agreed with the lower courts that this was an issue that must be presented first to the National Labor Relations Board, which has primary jurisdiction to hear it. Marquez's argument that this claim could be heard first by a federal District Court was thus rejected.

Marquez v. Screen Actors Guild, Inc., 119 S.Ct. 292, 1998 U.S.LEXIS 7110 (1998) [ELR 20:7:9]

Dramaturg Lynn Thomson was not co-author of Broadway musical "Rent," because author Jonathan Larson did not intend for her to be co-author, federal appellate court affirms

Rent - the Pulitzer Prize and Tony Award-winning Broadway musical - is based on, or at least inspired by, Puccini's opera La Boheme. There is no dispute about that. There has, however, been a dispute about who "authored" Rent - a dispute that has been important for credit and royalty allocation purposes.

Originally, Rent was credited to the late Jonathan Larson who began work on the project back in 1989. Larson died suddenly of a heart attack in 1996, just weeks before the musical opened off-Broadway to "rave reviews." Before he died, however, he worked closely on the musical with Lynn Thomson, a professor of advanced playwriting at New York University. She had been hired as a "Dramaturg" pursuant to a written agreement that said nothing about copyright ownership of the final work.

Dramaturgs provide "a range of services to playwrights and directors," including, Thomson testified, the contribution of "plot elements, dramatic structure, character details, themes, and even specific language."

Rent was such a success that it moved quickly to Broadway, at which time Thomson asked Larson's heirs for credit and royalties. When no agreement was reached, she sued the heirs for declaratory relief and an accounting, asking that she be declared "co-author" of Rent and for an award of 16% of the author's share of the royalties. After hearing more than two dozen witnesses and considering thousands of pages of documentary evidence, federal District Judge Lewis Kaplan ruled that Thomson was not a co-author of the musical, and thus he dismissed her complaint.

The Court of Appeals affirmed that decision. In an opinion by Judge Guido Calabresi, the appellate court held that Thomson had not proved that Larson intended Thomson to be a co-author of Rent. Since copyright law requires all "putative" authors to fully intend to be co-authors in order for them to be such, Thomson's failure to prove that Larson intended for her to be his co-author was fatal to her claim.

The evidence in fact showed that Larson intended to be the sole author of Rent. Three factors are particularly relevant in establishing co-authorship intent, Judge Calabresi said: decisionmaking authority; billing; and written agreements with third parties. In this case, the evidence showed that Larson retained decisionmaking authority over what would be included in the final version of Rent. Just nine days before his death, in material submitted for Rent's playbill, he described himself as its "author/composer" and Thomson as its "dramaturg."

And in agreements with Rent's off-Broadway producer, he was identified as the musical's "Author" and was promised "billing as sole author."

On appeal, Thomson made the alternative argument that if she were not deemed to be the co-author of Rent, "then `she must have all of the rights of a sole author with respect to her own contribution.'" This would have meant, she argued, that use of her material in stage productions, cast albums and movie versions of Rent would be infringing. But the appellate court refused to rule on this argument, because "Thomson has not brought such an infringement suit."

If she had made such a claim, the District Court would have had to rule on whether she had copyright interests in the material she contributed to Rent, and if so, whether she had expressly or impliedly licensed Larson to use her material. "Because these issues were not raised below," they were not properly before the appellate court, and thus it expressed "no opinion on them," Judge Calabresi said.

After the Court of Appeals affirmed the dismissal of her case, Thomson did file a second lawsuit seeking to prevent the use of material she said she contributed to Rent. According to press reports, that suit has been settled for an undisclosed amount of money and a credit for her as co-author on the title page of the Rent program. (Copies of the pleadings and arguments in the case are available on the Web at www.dramaturgy.net/RENT.)

Thomson v. Larson, 147 F.3d 195, 1998 U.S.App.LEXIS 13177 (2d Cir. 1998) [ELR 20:7:10]

Fleeting and obscured appearance of photographs by Jorge Antonio Sandoval in New Line movie "Seven" did not infringe Sandoval's copyrights, appellate court rules

New Line Cinema has again defeated a copyright infringement claim by photographer Jorge Antonio Sandoval arising out of the company's unlicensed use of as many as ten of his photographs in the movie "Seven."

New Line's first victory was in the District Court. There, Judge Sidney Stein granted the company's motion for summary judgment, ruling that New Line's use of the photographs was a fair use, because they appeared in the movie so fleetingly (ELR 20:1:10).

On appeal, Sandoval argued that Judge Stein had used the same sort of fair use analysis used by the District Court to find fair use in the similar but unrelated case of Ringgold v. Black Entertainment Television - a decision that was subsequently overturned by the Court of Appeals in an opinion that suggested a somewhat different sort of analysis should be used (ELR 20:1:8). Sandoval quite reasonably hoped that since the Court of Appeals had reversed Ringgold, it would reverse his loss as well. But the appellate court has disappointed the photographer.

In an opinion by Judge Michael Telesca, the Court of Appeals noted that Judge Stein had based his decision on New Line's fair use defense without first determining whether the movie's use of Sandoval's photographs amounted to infringement at all. New Line had argued that the movie's use of the photographs was so de minimis that no infringement had occurred. The appellate court said that "it was error to resolve the fair use claim without first determining whether the alleged infringement was de minimis." That error did not help Sandoval, however, because the appellate court agreed with New Line that its use of his photographs was "de minimis as a matter of law," and thus it affirmed the summary judgment that had been entered in favor of New Line.

The appellate court ruled that "To establish that the infringement of a copyright is de minimis, and therefore not actionable, the alleged infringer must demonstrate that the copying of protected material is so trivial `as to fall below the quantitative threshold of substantial similarity. . . .'"

To determine whether copying falls below this threshold, courts should consider the amount of the copyrighted work that was copied, and in cases involving visual works, "the observability of the copyrighted work in the allegedly infringing work." The court explained that "Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work as revealed by the lighting and positioning of the copyrighted work."

In this case, the use of Sandoval's photographs fell below the threshold, because they were "not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them." Instead, they were "displayed in poor lighting and at great distance," and they were "out of focus and displayed only briefly in eleven different shots."

Sandoval v. New Line Cinema Corp., 147 F.3d 215, 1998 U.S.App.LEXIS 13466 (2d Cir. 1998) [ELR 20:7:11]

In case brought by trainer Kevin Rooney against boxer Mike Tyson, New York Court of Appeals rules that contract by which boxer agreed to be trained by trainer "for as long as the boxer fights professionally" is a contract for a definite duration

Trainer Kevin Rooney has scored big points in what turned out to be the fourth round of an on-going legal fight with boxer Mike Tyson. The New York Court of Appeals has ruled, as Rooney urged it to, that a contract between a boxer and a trainer that called for the boxer to be trained by the trainer "for as long as the boxer fights professionally" is an enforceable contract for a definite duration, rather than an "at will" contract that may be terminated at any time by the boxer.

This question was presented to New York's highest court, because in 1983, legendary boxing manager Cus D'Amato, who was then Tyson's legal guardian, promised Rooney that he would be Tyson's trainer for as long as Tyson fought professionally, if Rooney would agree to train Tyson for free until he turned pro. Rooney agreed and actually trained Tyson for more than two years without pay, until Tyson made his pro debut in 1985. Rooney continued to train Tyson until 1988, and was paid 10% of Tyson's winnings, as originally agreed.

In 1988, however, Tyson stopped training with Rooney, apparently as a result of remarks Rooney made to the press at the time of Tyson's divorce from actress Robin Givens. Rooney responded by suing Tyson for 10% of the $44 million he won between 1989 and 1991.

The first round of their legal battle was fought before a jury in federal District Court in New York City, and Rooney landed a knockout blow. The jury returned a verdict in Rooney's favor for the full $4.4 million he sought.

The second round, however, went to Tyson: Judge Thomas McAvoy granted Tyson's post-trial motion for judgment as a matter of law, ruling that the agreement to use Rooney as his trainer as long as Tyson fought professionally was for an indefinite term, and thus, under New York law, could be terminated by Tyson at any time (ELR 19:7:9).

Rooney appealed and the third round was a draw. In a short opinion by federal Court of Appeals Judge Guido Calabresi, the court noted that most cases involving the New York at-will doctrine had been decided by federal courts applying New York law, and there had been "no clear holding by New York's highest court on the scope of the at-will employment rule."

As a result, the federal appellate court certified this specific question to New York's highest court: "Does an oral contract between a fight trainer and a professional boxer to train the boxer `for as long the boxer fights professionally' establish a definite duration, or does it constitute employment for indefinite duration within the scope of the at-will rule?"

Rooney has won the fourth and most recent round, because the New York Court of Appeals has answered the certified question by ruling that such a contract "is a contract for a definite duration." Writing for the majority, Judge Joseph Bellacosa explained that "although the exact end-date of Tyson's professional boxer career was not precisely calculable, the boundaries of beginning and end of the employment period are sufficiently ascertainable." Stated differently, "Though the times are not precisely predictable and calculable to dates certain, they are legally and experientially limited and ascertainable by objective benchmarks."

Judge George Smith dissented, because he would have ruled that the "submitted language indicates employment for an indefinite term."

The case has been remanded to the federal Court of Appeals which ultimately will rule on Rooney's appeal. According to press reports, the appeal raises additional issues besides the question of whether Rooney's employment was at-will, including the issue of whether Tyson is bound by D'Amato's promise that Rooney would be Tyson's trainer as long as he boxed professionally. So a fifth round remains to be decided, and still further rounds may follow before this legal match is finally concluded.

Rooney v. Tyson, 127 F.3d 295, 1997 U.S.App.LEXIS 29097 (2d Cir. 1997); Rooney v. Tyson, 674 N.Y.S.2d 616, 697 N.E.2d 571, 1998 N.Y.App.LEXIS 1422 (N.Y.Ct.App. 1998) [ELR 20:7:11]

Dissemination of Pamela Anderson Lee and Brett Michaels sex video is enjoined; court rules that actress and rock star are likely to succeed on copyright, privacy and right of publicity grounds

Internet Entertainment Group has been double-teamed by Pamela Anderson Lee and her former boyfriend Brett Michaels, in a federal court lawsuit that was triggered by the company's plan to disseminate a videotape of the actress and musician having sex.

Lee of course is the former co-star of the television series "Baywatch." Michaels is best known as the lead singer for the rock band "Poison." The two of them recorded the tape, for their personal use only, in 1994.

Internet Entertainment Group (IEG) is the operator of a subscription web site known as "ClubLove." It got a copy of the tape in 1997 from someone who was an "agent" for Michaels, or from someone who had received a copy of the tape as a "gift" from Michaels, or perhaps even from Lee. To its credit, IEG also claimed to have obtained a "license" from the "agent" to duplicate and disseminate the tape.

Lee and Michaels deny that either of them had authorized any "agent" to license the tape's use, and they objected to IEG's plans to disseminate it. Their objections were forcefully asserted in a federal court lawsuit for copyright infringement, invasion of privacy, and violation of their rights of publicity.

Lee and Michaels sought and obtained a temporary restraining order, and made a motion for a preliminary injunction. In a decision that treats each of their claims, and IEG's defenses, quite thoroughly, federal District Judge Dean Pregerson has granted a preliminary injunction that bars IEG from disseminating the tape and from using Michael's and Lee's names or likenesses in any manner to sell the tape.

Much of the judge's decision is devoted to an evaluation of the facts on which IEG based its assertion that it had obtained an adequate license to use the tape. IEG's assertions made for an interesting if ambiguous tale. But ultimately, Judge Pregerson concluded that IEG had not presented any evidence from which a license could be found or inferred. Without a license, IEG's intended use of the tape would infringe the tape's copyright, which both Lee and Michaels had registered.

IEG also argued that even if it had not proved a license, any injunction should be tailored to allow it to use "small portions" of the tape, because the use of small portions in "public discussions" would be a fair use. After doing the four-factor analysis required by section 107 of the Copyright Act, Judge Pregerson rejected this argument. He concluded that the "nature" of the tape was such that "the display or distribution of images or short segments by IEG would destroy the value of the plaintiffs' exclusive rights in the work."

The judge also found that Lee and Michaels were likely to succeed with their right of publicity claims under California Civil Code section 3344 and common law. These claims were based on IEG's use of their names and likenesses to advertise its planned dissemination of the tape. Judge Pregerson rejected IEG's argument that their publicity rights were preempted by copyright law. The right of publicity injunction was limited to preventing IEG from using their names and likenesses to sell the tape, however. "The injunction may not reach the use of their names and likenesses to report or comment on matters of public interest," the judge said. "Nor may it reach the use of their names or likenesses to attract attention to IEG as a news medium."

Finally, the judge also found that IEG's dissemination of the tape would violate Lee's and Michaels' right to privacy under two branches of California common law: the public disclosure of private facts, and intrusion into private affairs. IEG put up a vigorous if ultimately unsuccessful defense to this claim too. It argued that "because Lee has appeared nude in magazines, movies and publicly distributed videotapes, the facts contained on the Tape depicting her having sex [with Michaels] are no longer private."

(The "publicly distributed videotapes" referred to by IEG are separate tapes of Lee have sex with her husband Tommy Lee. Those tapes are the subject of a separate lawsuit the Lees have filed against IEG. According to news reports, that case has been dismissed by Judge Pregerson on the grounds that the parties' agreement gave IEG broad "video distribution" rights in the tapes, rather than the narrow one-time-only Web rights they said were all they conveyed.)

Judge Pregerson was not persuaded by IEG's arguments (in the Michaels and Lee case), however. Under the heading "Do Sex Symbols Have Privacy?," the judge's decision concludes that they do. The decision first distinguishes between movies in which Lee had appeared nude, saying "The fact that she has performed a role involving sex does not . . . make her real sex life open to the public." The decision then refuses to attribute any significance to the tape of Lee having sex with her husband, saying: "Sexual relations are among the most personal and intimate of acts. The Court is not prepared to conclude that public exposure of one sexual encounter forever removes a person's privacy interest in all subsequent and previous sexual encounters."

Michaels v. Internet Entertainment Group, Inc., 5 F.Supp.2d 823, 1998 U.S.Dist.LEXIS 10678 (C.D.Cal. 1998) [ELR 20:7:12]

Copyright Act preempts screenwriters' state law claims alleging Universal's movie "Daylight" was copied from their screenplay, so federal court denies screenwriters' motion to remand their suit to state court

Universal Studios has won a preliminary, procedural skirmish in a case that alleges that its 1996 movie "Daylight" was copied from a screenplay entitled "The Tunnel" that had been submitted to it years before by screenwriters Howard Worth and Tony Anthony.

The screenwriters sued Universal in California state court, asserting four claims under state law. Universal immediately removed the suit to federal court, and the screenwriters made a motion to remand it state court. Federal District Judge Lourdes Baird has denied that motion, so the case remains in federal court where Universal wants it to be.

The screenwriters' claims were for breach of implied contract, intentional interference with prospective economic advantage, conversion, and an accounting of Universal's profits from the movie. The screenwriters filed their case in state court, because all of their claims are based on state law theories, and because there is no diversity of citizenship between the screenwriters and Universal. Thus, on the surface at least, federal courts would not have had jurisdiction to hear those claims.

Universal, however, argued that the Copyright Act preempts all state law theories that protect rights equivalent to those protected by copyright, and federal law gives federal district courts exclusive jurisdiction to hear copyright claims. The issue in this case thus became whether the screenwriters' state law allegations did state claims for the protection of equivalent rights. Judge Baird has held that all except the accounting claim did, and thus were preempted.

The implied contract claim was preempted because all of the discussions between the screenwriters and Universal had related solely to the possibility of Universal's purchasing their screenplay for production into a movie. The interference with economic advantage claim was preempted, because the interference was directly related to Universal's unauthorized use of the screenplay which, if true, infringed its copyright. The conversion claim was preempted, because the screenwriters did not seek the return of the physical copy of their screenplay or other tangible materials allegedly given to Universal; instead, they sought to recover the studio's profits which it earned from the distribution of the movie, a claim that is "subsumed within federal copyright law."

The judge ruled that the accounting claim was the remedy they sought for the violation of their rights, and thus she had "supplemental jurisdiction" to hear that claim as well.

Judge Baird held that since the screenwriters' state law claims were preempted by copyright, and since federal law gives federal courts "exclusive" jurisdiction to hear copyright claims, Universal had properly removed the case from state to federal court.

Worth v. Universal Pictures, Inc., 5 F.Supp.2d 816, 1997 U.S.Dist.LEXIS 22905 (C.D.Cal. 1997) [ELR 20:7:13]

Los Angeles News Service is entitled to recover copyright damages for unauthorized transmission to Europe and Africa of its videotapes of L.A. riots including Reginald Denny beating, because transmission was made from infringing copies of tapes made in United States, federal appeals court rules; fair use defense is rejected

Los Angeles News Service documented a sad and sorry bit of history when it caught on videotape the beating the Reginald Denny and other scenes during the riots that broke out in Los Angeles in 1992 after city police officers were acquitted on charges they had unlawfully beaten Rodney King. Los Angeles News Service is an independent newsgathering company that makes its living by licensing its videotapes to television stations and others. And that is exactly what it did with its tapes of the beatings of Reginald Denny and a "Man in [a] White Panel Truck."

These tapes have now become part of copyright history too - or at least have contributed to the development of copyright doctrine. That is so because unlicensed broadcasts of the tapes have become the subject of at least two infringement actions, both of which have produced published federal court decisions. So far at least, LA News has been triumphant.

In one case, the Ninth Circuit Court of Appeals has held that an unlicensed broadcast of the tapes by television station KCAL-TV may not have been a fair use (ELR 19:10:13).

Now, in a separate but similar suit, the Ninth Circuit has ruled that the unlicensed taping and retransmission of the tapes by Visnews (a television news service jointly owned by NBC, Reuters and the BBC) definitely was not a fair use.

More significantly, in an opinion by Judge William Schwarzer, the appellate court also held that LA News is entitled to recover damages for the transmission of its tapes to television stations in Europe and Africa. The reason this is a significant ruling is that United States copyright law does not reach foreign countries, so "extraterritorial acts" do not infringe U.S. copyright. The Ninth Circuit so held, as recently as 1994, in the Subafilms case (ELR 16:5:10); and that is the case on which Visnews relied.

LA News, however, sought to distinguish Subafilms by emphasizing that in this case, Visnews had made an unauthorized copy of LA News' videos, and had done so in New York City before transmitting the images from that unauthorized copy to Europe and Africa.

LA News' argument did not persuade the District Court, so Judge Kim Wardlaw awarded the company statutory damages on account of Visnews' U.S. infringements only (ELR 19:2:17).

The Court of Appeals saw things differently. Judge Schwarzer reasoned that the infringing transmissions to Europe and Africa "were made possible by the infringing acts of copying in New York." This was so, he explained, because the offending transmissions "were merely a means of shipping the unlicensed footage abroad for further dissemination."

This view of the case distinguished it from Subafilms, because in Subafilms no infringing copies were made in the United States. No Ninth Circuit decision had previously considered whether "extraterritorial" damages could be recovered if a U.S.-made infringing copy is shipped abroad for further dissemination there; but the Second Circuit has ruled on this issue. In Update Art v. Modiin Publishing, 843 F.2d 67 (2d Cir. 1988), the Second Circuit did permit recovery of damages for a foreign infringement where the foreign infringement consisted of the unauthorized reproduction of work of art that itself had been reproduced without authorization in the United States.

LA News asked the Ninth Circuit to "adopt the Second Circuit's rule"; and the Ninth Circuit has done so.

Los Angeles News Service v. Reuters Television International, 149 F.3d 987, 1998 U.S.App.LEXIS 15767 (9th Cir. 1998) [ELR 20:7:14]

Appeals court upholds $95,000 judgment won by concert promoter against record company that had falsely told promoter that Crystal Bernard and the Don Henley Band would appear in concert with Peter Cetera

E&F Enterprises got off to a good start while still a "young" and "fledgling" concert promoter. It established a rapport with officials at the University of Arkansas and was on its way to becoming a promoter of shows in the school's Barnhill Arena. The first such concert was to have featured Peter Cetera, the former lead singer for "Chicago." And he was to have been joined by Crystal Bernard, the co-star of the television series "Wings," and the Don Henley Band, whose members used to be in the "Eagles."

E&F contracted for all of these performances with Entertainment Artists, Inc., a booking agent retained by the performers' record company, River North Records. E&F even spoke directly with River North Records to obtain promotional materials for the upcoming concert and to confirm the appearances of all of the performers.

Despite River North's confirmation, about a week before the concert was to have been held, E&F learned that Crystal Bernard had never been consulted about performing with Cetera and would not be appearing for the concert. E&F also learned that "the `Don Henley Band' did not exist" and that "name was presumably created to promote ticket sales to the Cetera show."

In the face of these developments, E&F canceled the concert and sued both Entertainment Artists and River North Records for fraud. E&F had more success with its lawsuit than it did with the concert. Entertainment Artists defaulted. The case then went to trial against River North, and a jury found in favor of E&F and awarded it $95,182 in damages: $15,182 for out-ofpocket expenses; $70,000 for lost profits; and $10,000 in punitive damages.

River North appealed, but the judgment against it has been affirmed. In an opinion by Judge Richard Arnold, the Court of Appeals has rejected all three of the grounds the record company asserted in arguing for reversal.

River North argued first that the trial court did not have personal jurisdiction over it, because it was located in a different state. Judge Arnold concluded otherwise, however. The judge noted that the jury had found that River North had "knowingly misrepresented Bernard's appearance and the Don Henley Band's existence," and that this was done in order to "induce commercial activity" in the state where E&F had filed its lawsuit. This was sufficient to give that state personal jurisdiction over the record company, the judge concluded.

River North also argued that since E&F had signed a contract with Entertainment Artists before River North confirmed the performers' appearances, E&F could not have relied on River North's statements in entering into that contract. Reliance on a misrepresentation is an essential element of a fraud claim. But Judge Arnold ruled that reliance had been proved in two ways. First, evidence supported E&F's contention that Entertainment Artists and River North "were engaged in a joint effort to promote Cetera, Bernard, and the label." Apparently, this meant that misrepresentations made by Entertainment Artists were attributable to River North as well. Second, the jury could have found that E&F had relied on River North's misrepresentations "in continuing to spend . . . time and . . . resources promoting the concert."

Finally, River North argued that E&F had failed to prove its damages. The $70,000 in lost profits were not lost profits from the one canceled concert. Testimony showed that the profits from one concert would have been in the $8,000 to $12,000 range. Rather, the $70,000 award was based on E&F's contention that its reputation as a concert promoter had been damaged, and thus it would suffer damages in the future as well. The jury agreed, and so did the appellate court. "In light of the evidence of E&F's damaged reputation at a crucial juncture in its business life," Judge Arnold said, "the jury was provided with sufficient basis from which it could reasonably arrive at this award of damages." The judge also upheld the $10,000 punitive damage award, saying that it was "appropriate under these circumstances" and "not excessive."

Finley v. River North Records, Inc., 148 F.3d 913, 1998 U.S.App.LEXIS 13233 (8th Cir. 1998) [ELR 20:7:14]

Court denies motion for preliminary injunction sought by record producers whose credits were deleted from reissued version of album "Marcy Playground"; producers failed to show irreparable injury

When EMI-America first released Marcy Playground in February 1997, the album cover credited Jared Kotler and his cousin Jeff White as the record's producers. Whether they did, in fact, "produce" the album has since become a matter of considerable dispute. They of course say they did. But Marcy Playground's lead performer, John Wozniak, says they didn't. According to Wozniak, they were given "producer" credits in connection with an anticipated but not yet finalized "settlement" that became necessary when Kotler, who also was Marcy Playground's drummer, was asked to leave the band.

For a while, it apparently didn't matter that no settlement had been finalized, because the album sold poorly in the first weeks after its release, and EMI-America shuttered its record operations entirely shortly thereafter. That might have been the end, for the album and the band, but it wasn't.

Capitol Records - an EMI affiliate - took over the band's recording contract and decided to reissue the Marcy Playground album. In Capitol's hands, the album took off. Reissued in September 1997, it had sold some 1.5 million copies and reached 54 on the Billboard chart by July 1998. From Kotler and White's point of view, however, the re-released album has one serious flaw: it doesn't contain their producer credits.

Settlement negotiations resumed in December 1997. But those negotiations broke down in March 1998, when Capitol released a single from the album, also without Kotler and White's producer credits. In

April 1998, Kotler and White filed suit in federal District Court, complaining that the omission of their credits violated their rights under the Lanham Act. And in June 1998, they made a motion for a preliminary injunction.

Judge Lewis Kaplan has denied their motion. The judge's opinion says little about whether the substantive law supports Kotler and White's claim; the opinion deals instead with what must be shown to justify the issuance of a preliminary injunction.

Judge Kaplan noted that there are significant factual disputes about whether Kotler and White actually performed services that record "producers" customarily perform. And the judge determined that they had not shown they would be irreparably harmed if a preliminary injunction were denied.

Ordinarily, irreparable harm is presumed in intellectual property cases, Judge Kaplan acknowledged. But that presumption may not be made when there has been a delay in seeking relief. In this case, after the single was released and negotiations broke down, Kotler and White waited five weeks to file suit and three months to seek a preliminary injunction. There was "no excuse whatever" for their delay in seeking a preliminary injunction, and the delay was "more than sufficient" to conclude that there had been no irreparable injury, the judge said.

Moreover, the judge added, there was no reason to suppose that there was any real confusion in the market place. "We are dealing, after all, with production credits on printed materials accompanying recorded popular music. There is no reason to suppose that a single recording has been sold or not sold, or that a single consumer cares, whether Kotler is listed as co-producer or White as executive producer. The music is sold for other reasons entirely."

Nor was there any reason to suppose that Kotler or White's careers would be affected "in any material way" by whether they received credit on printed materials. Finally, the judge concluded that any injury they may have suffered by the sale of the reissued album had already occurred, because so many albums had already been distributed and so few remained in Capitol's inventory.

Marcy Playground, Inc. v. Capitol Records, Inc., 6 F.Supp.2d 277, 1998 U.S.Dist.LEXIS 10489 (S.D.N.Y. 1998) [ELR 20:7:15]

Legality of Major League Soccer's player "transfer fee" rule should be evaluated under antitrust rule of reason, not per se rule, federal District Court rules

Ian Fraser and more than a half-dozen of his fellow professional soccer players have sued Major League Soccer and its member teams, alleging that the League's player "transfer fee" rule violates federal antitrust law. In the players' eyes, theirs was a simple case that could be disposed of with a motion for summary judgment. But federal District Judge George O'Toole has ruled otherwise, and thus has denied the players' motion. The judge also denied a cross-motion for summary judgment made by the League.

The League's player "transfer fee" rule provides that if a player signs with a new team, after his contract with his former team expires, the former team is entitled to receive "compensation" from the new team for the player's "training" and "development." If the two teams cannot agree between themselves on how much compensation the former team should receive, the fee is set by the Federation International de Football Association.

FIFA, as the Federation is commonly known, is the international governing body for soccer, and the player "transfer fee" rule actually appears in FIFA's Regulations. Major League Soccer is a member of FIFA, and thus the League follows FIFA Regulations; it even incorporates them by reference into its Standard Player Agreement.

From the point of view of professional team athletes in all sports, league rules that impede player movement from one team to another look like price-fixing agreements and group boycotts. At one time, such rules were used by all professional sports leagues, and some versions of such rules (like salary caps) still are. Since price-fixing and group boycotts are usually illegal under federal antitrust law, players have challenged their use by Major League Baseball, the National Football League, the National Basketball Association and the National Hockey League. Some of those challenges were successful. (The challenge to Major League Baseball's "reserve clause" was not, because Baseball was held to be exempt from the antitrust laws in Flood v. Kuhn, 407 U.S. 258 (1972). Congress has just eliminated that exemption, however. See New Legislation and Regulations section of this issue. (ELR 20:7:4))

Once league rules become the subject of collective bargaining, they are protected by the "labor exemption" to the antitrust laws, which is why things like salary caps are still used today. But Major League Soccer players are not represented by a union and do not engage in collective bargaining with the League, so their antitrust suit follows the well-worn trail cut by their predecessors in other sports.

The reason the soccer players thought that theirs was a simple case is that price-fixing agreements and group boycotts are not only usually illegal, they usually are illegal "per se" under the antitrust laws - meaning they are usually illegal regardless of any reasons, even good pro-competitive reasons, offenders may have had for having adopted such practices.

There was, however, a problem with the soccer players' illegal "per se" argument: the United States Supreme Court has ruled that sports league practices should not be declared illegal "per se." Instead, the Supreme Court held that sports league rules should judged under the more lenient "rule of reason" which evaluates the competitive effects of objected-to rules and permits them to be found legal if their pro-competitive effects outweigh their anti-competitive effects (ELR 6:4:3).

Moreover, even before the Supreme Court so ruled, a federal Court of Appeals held - in Mackey v.

National Football League, 543 F.2d 606 (8th Cir. 1976) - that the National Football League's old "Rozelle Rule" should be evaluated under the rule of reason rather than under the "per se" rule.

The soccer players argued that Mackey and other sports cases were different, because those cases involved rules that applied only within a single league of teams that competed athletically with one another. The FIFA rule, by contrast, appears to apply even to former Major League Soccer players who want to play for soccer teams in other leagues outside the United States, and even to soccer players who formerly played for teams outside of Major League Soccer who want to come to the U.S. to play for Major League Soccer teams.

This distinction may yet turn out to be significant, but it wasn't enough to persuade Judge O'Toole to declare the player "transfer fee" rule illegal in response to a motion for summary judgment. Instead, the judge said that "There is no accumulated judicial experience analyzing the rules of international sports federations in the light of antitrust principles, and `the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed' need to be examined."

Judge O'Toole also rejected the League's argument that since none of its teams had ever paid or demanded a transfer fee, the players' suit either was "not ripe" or is "moot." The judge noted that federal antitrust law authorizes relief for "threatened loss" as well as actual damage. Since the League is a member of FIFA, the transfer fee rule is "presumably" binding on Major League Soccer teams, Judge O'Toole observed. And thus the rule does threaten to impose a loss on players.

Editor's note: Although the soccer players attempted to distinguish Mackey v. National Football League in the unfulfilled hope that Judge O'Toole would declare the "transfer fee" rule illegal "per se," the soccer players may yet embrace Mackey for what it had to say about the "Rozelle Rule" on its merits. The "Rozelle Rule" was the NFL's version of a "transfer fee" rule; and though the legality of the Rozelle Rule was tested under the more lenient rule of reason, rather than under the per se rule, the Rozelle Rule was held to violate federal antitrust law because it was found to be an "unreasonable" restraint of trade. This is what the soccer players will now attempt to prove too, while Major League Soccer will now attempt to distinguish Mackey.

Fraser v. Major League Soccer, 7 F.Supp.2d 73, 1998 U.S.Dist.LEXIS 2171 (D.Mass. 1998) [ELR 20:7:16]

Decision of Librarian of Congress concerning distribution of $500 million in compulsory cable-TV license fees for 1990-92 is affirmed; Court of Appeals rejects challenges by TV and movie producers, broadcasters, and religious programmers

Even a small percentage of $500 million is a whole lot of money. That's the amount that cable-TV systems paid for the right to retransmit non-network television programs broadcast by distant stations during the three years from 1990 through 1992. The owners of the copyrights to those retransmitted television programs each are entitled to a share of that $500 million. But they disagreed on how to divide it. Some copyright owners claimed bigger shares than others were willing to grant them. So, given the amounts at stake, it's not surprising they have thoroughly litigated their competing claims.

Disagreements among competing copyright owners date back to 1978 when cable-TV systems first began paying compulsory license fees. Fees paid from that year through 1989 were allocated among competing copyright owners by the Copyright Royalty Tribunal. Disappointed claimants appealed all but one of the allocation decisions the Tribunal made for 1978 through 1983 (ELR 3:24:1, 5:8:14, 8:6:14, 8:9:10). After 1983, however, there were no appeals; indeed, the proceedings for 1984 through 1988 were settled by agreement among the claimants themselves.

In 1993, Congress eliminated the Copyright Royalty Tribunal and replaced it with ad hoc temporary arbitration panels called CARPs, which is an acronym for Copyright Arbitration Royalty Panels (ELR 15:11:28). (Since the panels make decisions concerning copyright royalties, they should have been called Copyright Royalty Arbitration Panels - but the acronym for that name was problematic.) CARPs are administered by, and report their findings and recommendations to, the Register of Copyrights who in turn makes a recommendation to the Librarian of Congress who then decides how the royalties are to be divided.

When the Copyright Royalty Tribunal was legislated out of existence in 1993, it had begun but not finished work on a proceeding to divide cable royalties paid for 1990. The Copyright Office decided that CARPs could not just take over the Tribunal's work-in-progress; so the 1990 proceeding was redone from scratch. In an effort to achieve some efficiency, the 1990 proceeding was combined with those for 1991 and 1992 - and that is one of the reasons the royalty pot reached $500 million.

In due course, a CARP report was submitted to the Register of Copyrights, and it satisfied none of the participants. Instead, they petitioned the Librarian of

Congress to set aside or at least modify the Panel's decision. The parties' petitions complained about nine separate aspects of the Panel's decision. The Register of Copyrights did not agree with all nine complaints, but she did recommend modifications to some of the Panel's conclusions; and the Librarian of Congress adopted the Register's recommendations in full (ELR 18:7:14).

The Librarian's decision awarded TV and movie producers and religious programmers smaller shares than they had received for 1989; sports claimants, commercial broadcasters and public broadcasters were awarded larger shares than they had received in 1989; and music publishers and Canadian broadcasters were awarded the same shares as 1989.

The Librarian's decision gave TV and movie producers a 7% or so smaller share than they received in 1989. They of course were displeased with this outcome, and so they petitioned the Court of Appeals. The producers argued that they deserved a larger award, and they sought remand to the Librarian of Congress so he could decide the amount and source of the increase. In support of their request for remand, the producers complained that the Librarian's decision was not adequately explained, had failed to take into account an important criterion, and was arbitrary for various reasons (among them, the Librarian failed to correct for the arbitrators' "improper" reliance on certain evidence to determine the share awarded to the sports claimants).

The Librarian's decision gave religious programmers a 0.06% smaller share than they had received in 1989, and they too were displeased. In their petition to the Court of Appeals, the religious programmers argued that they should have received a larger share than before, though they didn't say from whose share their increase ought to come.

The Librarian awarded commercial broadcasters a somewhat larger share than they had received in 1989, but they were disappointed too, because they thought they deserved even more for 1990-92. So they petitioned the Court of Appeals too, seeking an increase in the size of their share which they said should come out of the TV and movie producer's share.

Ultimately, all three groups of petitioning copyright owners were disappointed by the Court of Appeals too. The court denied all three petitions, saying that it found nothing in any of them "that warrants modification or remand of the Librarian's . . . awards."

The appellate court's lengthy opinion by Judge Karen Lecraft Henderson does not review the merits of the petitioners' claims for larger shares. Instead, it deals largely with the appropriate legal standard it should use in reviewing the Librarian's decision. The appellate court ultimately determined that it should give the

Librarian's decision what Judge Henderson herself described as "unusually wide" "deference." This means, the judge explained, that "if the Librarian's final award . . . bears a rational relationship to the . . . evidence, is plausibly explained and . . . does not plainly contravene applicable statutory provisions, our task is at an end and we must uphold the award."

Despite the petitioners' complaints about the Librarian's decision, the decision certainly satisfied this standard, the appellate court concluded. That is why his 1990-92 cable-TV royalty award - the first such award to be made by the Librarian since CARPs replaced the Copyright Royalty Tribunal - was upheld.

National Association of Broadcasters v. Librarian of Congress, 146 F.3d 907, 1998 U.S.App.LEXIS 13692 (D.C.Cir. 1998) [ELR 20:7:17]

Gifts made to Rudolf Nureyev Dance Foundation by Nureyev shortly before his death were valid; federal court rejects effort by sister and niece to void transfers

Rudolf Nureyev, "perhaps the greatest dancer of his time," died in Paris in January 1993 of AIDS-related illnesses. He left behind an enduring legacy as well as one European dance foundation, one American dance foundation, and two litigious relatives - a sister and niece.

Though Nureyev had left gifts for his sister and niece, they apparently wanted more. Nureyev's European foundation fought their claims in courts in New York, Virginia and Monaco - claims that the European foundation eventually settled by paying them more than $1.8 million.

The American foundation did not settle, however. Instead, the Rudolf Nureyev Dance Foundation filed suit against the sister and niece in federal District Court in New York City, seeking a judicial declaration that the gifts Nureyev had made to the Foundation shortly before he died were valid. The gifts at issue were his cooperative apartment in the Dakota in New York City, and all of its contents - gifts worth $7 million, or about a third of Nureyev's $21 million world-wide estate.

Nureyev's sister and niece filed a counterclaim attacking the validity of the gifts on four grounds. They argued: the gifts were improper testamentary substitutes; Nureyev lacked the mental capacity necessary to make such gifts; Nureyev's lawyer, who became president of the Foundation, had unduly influenced Nureyev; and the apartment and its contents had previously been given by Nureyev to his European foundation.

The case was tried before Judge Denny Chin, and the Foundation has emerged the complete victor. The judge's lengthy opinion reads like a chapter from a Nureyev biography or an extremely literate treatment for a TV miniseries. It is rich in detail, relating facts that have ultimate legal significance as well as others that simply illustrate personal aspects of Nureyev's life (like the story of the dancer's pet Rottweiler "Solaria" which he had obtained from a pound for sick dogs).

As explained by Judge Chin, the legal principles surrounding the sister and niece's claims were not difficult, and their application in this case was straightforward, once the underlying facts were established. The judge concluded that: Nureyev's gifts to the Foundation were validly made; Nureyev was of sound mind when he made them; Nureyev's attorney had not unduly influenced Nureyev; and Nureyev had not previously given the Dakota and its contents to his European foundation (an argument that even the European foundation itself had disclaimed).

Judge Chin took particular care in rejecting the assertion that Nureyev's lawyer had unduly influenced the dancer. The judge found that the lawyer, Barry Weinstein, "carried out the wishes of his client in good faith at all times and in an able and conscientious manner." And the judge utterly rejected the contention that Weinstein had benefited from the creation of the Foundation because he was paid $25,000 a year as its president.

As a result, Judge Chin entered judgment in favor of the Foundation, with costs, declaring that the gifts Nureyev had made to it "were and are valid."

Rudolf Nureyev Dance Foundation v. Noureeva-Francois, 7 F.Supp.2d 402, 1998 U.S.Dist.LEXIS 9399 (S.D.N.Y. 1998) [ELR 20:7:18]

Appellate court affirms virtually all of $375,000 judgment won by photographer William Gasperini against Center for Humanities on account of Center's loss of Gasperini's photographs

William Gasperini spent seven years taking photographs in Central America, many of them in war zones. It has taken him somewhat longer than that to recover compensation for the loss of 300 of those photographs by the Center for Humanities which had borrowed them to use in producing a video entitled "Conflict in Central America: An Historical Commentary." Now, however, it appears that Gasperini's quest for compensation is near its end, and that he will awarded between $359,000 and $372,000.

The Center never denied that it was liable to Gasperini for losing his photographs. But the two were never able to agree on their value, or on the legal standards that should be applied in deciding what they were worth and in reviewing the decision made by the jury. Indeed, the question of what standards should be used to review the jury's initial decision that the photographs were worth $450,000 went all the way to the United States Supreme Court (ELR 18:2:4).

On remand from the Supreme Court, and thus armed with the appropriate standard, federal District Judge Charles Brieant concluded that the jury's verdict had been excessive - but only by $75,000 - and so he granted the Center's motion for a new trial unless Gasperini accepted $375,000 (ELR 19:12:13). Gasperini accepted, and the Center appealed.

Gasperini has largely prevailed on appeal, though not completely. Most of the Court of Appeals' opinion is devoted to the issue of what standard an appellate court should apply in deciding whether a federal trial judge properly exercised discretion in reviewing a jury's verdict. Writing for the court, Judge John Walker concluded that the proper standard was "abuse of discretion," and that District Judge Brieant had not abused his discretion in deciding that most of the lost photographs were worth $1,500 each because they had been "unique" and the rest were worth $200 each because they depicted ordinary events and were readily replaceable.

The Center - which had argued that the lost photographs were worth no more than $100,000 - did salvage a small victory on appeal. At trial, there had been conflicting testimony about the number of photographs the Center actually lost. Gasperini said it was 310; others said it was 300; and the jury found that 300 had been lost. Yet when Judge Brieant had reduced the jury's verdict to $375,000, he had explained his calculation using 310 as the number of photographs that had been lost, without explaining why he apparently rejected the jury's finding that the number had been 300. Moreover, it was not possible to tell whether the extra ten photographs had been valued at $1,500 each or $200 each.

Thus, the appellate court felt obligated to remand the case once more, so that damages could be recalculated again, using 300 as the number of photographs that had been lost. If 240 of the lost photographs were worth $1,500, and the other 60 were worth $200, Gasperini's recovery will be $372,000. On the other hand, if 230 were worth $1,500 and 70 were worth $200, his recovery will be $359,000.

Gasperini v. Center for Humanities, Inc., 149 F.3d 137, 1998 U.S.App.LEXIS 16177 (2d Cir. 1998) [ELR 20:7:19]

Judge awards Estate of Andy Warhol $400,000 in sanctions against licensing agency Schlaifer Nance and its lawyers for pursuing frivolous fraud claim against Estate in bad faith

Shortly after Andy Warhol died in 1987, his estate entered into an agreement authorizing Schlaifer Nance & Co. to license other companies to make and sell merchandise bearing reproductions of Warhol's artworks. Schlaifer Nance was a successful licensing company, and Warhol's works were world-renowned. So in the beginning at least, the agreement held much promise for both sides.

Therein lies a cautionary tale for others, because before long, that promising relationship turned sour and then incredibly bitter.

Some observers have laid the fault at the feet of the Estate. Indeed, in 1991, an arbitration panel awarded

Schlaifer Nance $4 million in actual and punitive damages, because it found the Estate had breached its agreement and had acted "in bad faith and in willful disregard of [Schlaifer Nance's] rights" by, among other things, unreasonably disapproving products and failing to cooperate in promoting the licensing program (ELR 15:3:11).

Even that substantial recovery did not placate Schlaifer Nance, however. In addition, it pursued a lawsuit in which it asserted that it had been fraudulently induced to enter into the agreement in the first place when the Estate and its executor and general counsel had falsely represented that the estate "controlled all rights" to Warhol's artworks, when in fact many of those works had fallen into the public domain or already had been licensed to others.

Schlaifer Nance's damages from the alleged fraud were $63,941, but the licensing company's lawyers devoted $2.6 million in time and disbursements bringing the case to trial. Initially, the investment seemed to pay off, because a jury returned a $3 million punitive damage verdict against the Estate and its executor and lawyer, as well as a compensatory damage verdict for the full $63,941.

But that was the high point of the case for Schlaifer Nance and its lawyers; subsequent developments have gone seriously against them. First, District Judge Denny Chin set aside the jury's verdict on the grounds that Schlaifer Nance knew, or should have, that the copyrights to many of Warhol's works had fallen into the public domain and that some had already been licensed to others (ELR 18:9:21). Then, in an opinion by Judge Joseph McLaughlin, the Court of Appeals affirmed that ruling (ELR 19:12:11). Now, Judge Chin has granted the Estate's motion for sanctions against Schlaifer Nance and its lawyers, and has awarded the Estate $400,000.

Judge Chin awarded sanctions, because he was "firmly convinced" that Schlaifer Nance's fraud claim was "frivolous" and its assertion that it had reasonably relied on the Estate's representations was not "colorable." This was so, the judge explained, because "The fact is that [Schlaifer Nance] and its attorneys knew that the Estate did not own all the rights to all of Warhol's works. Their own documents and testimony demonstrated this conclusively." Schlaifer Nance "chose to go forward with the transaction nonetheless, without conducting any investigation or due diligence. Therefore, it could not have reasonably relied on [the Estate's] representations to the contrary, as [Schlaifer Nance] and its attorneys well knew when this case was filed."

Schlaifer Nance argued that its claim was at least "colorable" as shown by the fact that Judge Chin had allowed it to go to the jury and by the fact that the jury had found in its favor. But the judge disagreed. He let the case go to the jury "reluctantly," he said, and only because "the Second Circuit has held that it is the better practice to let a claim go to the jury and then to set it aside, as that practice eliminates the need for a new trial in the event of a reversal." Nor was the judge impressed that the jury had ruled in favor of Schlaifer Nance. That was a "testament, perhaps, to its attorneys' skills as trial lawyers and to little else," Judge Chin said.

Moreover, the judge found that Schlaifer Nance and its lawyers had pursued its fraud claim in bad faith, because they continued with the case "when they knew it was frivolous, when [Schlaifer Nance] had already won a significant victory and the Estate had already been punished, and when the resources [Schlaifer Nance] and its attorneys were pouring into the case were not even remotely justified by the potentially recoverable damages."

In an important message for lawyers, Judge Chin explained that he was imposing sanctions not only against Schlaifer Nance, but also against its attorneys "jointly and severally," for this reason: "Our adversarial system of justice depends on lawyers who advocate for their clients zealously. At the same time, our system works only if attorneys also meet their obligations as counselors and officers of the court. Here, [Schlaifer Nance's] attorneys performed their role as advocates to a fault: they prevailed before a jury on a claim that never should have been brought. They failed, however, in their other two roles. As counselors, they should have advised their client to withdraw the fraud claim. Instead, they permitted their client to prosecute a claim that had no basis in fact and that was not worth pursuing and certainly not in the manner it was pursued here. As officers of the court, they pursued a meritless claim in a vindictive and vexatious manner, spurred on by the belief that they could recover attorneys' fees as punitive damages."

Now, rather than recovering attorneys' fees, Schlaifer Nance and its attorneys have been ordered to pay their quarry.

Schlaifer Nance & Co., Inc. v. Warhol, 7 F.Supp.2d 364, 1998 U.S.Dist.LEXIS 8177 (S.D.N.Y. 1998) [ELR 20:7:20]

Oklahoma City police violated First Amendment by seizing videos of "The Tin Drum" from library and video stores without determining it was obscene in adversary hearing

"The Tin Drum" is an Academy Award winning motion picture that was first released in 1979. It has been available for years, even in Oklahoma, in video stores and libraries; and though it is rated "R", it has been shown on television as well. Despite the film's stature and age, in 1997 it offended some unidentified "citizen of Oklahoma" who complained to the Oklahoma City Police Department that the film violated that state's child pornography laws.

Eager to render service, two police officers immediately got an informal oral opinion from an unidentified Oklahoma state judge that "The Tin Drum" does contain child pornography. No hearing preceded the judge's opinion; indeed no one who may have had a contrary view was notified, let alone heard.

Nonetheless, the two police officers - their confidence thus bolstered but without a search warrant - then seized all of the videos of "The Tin Drum" they could find at their city library and at Blockbuster and Hollywood Video stores. In the course of doing so, the officers learned that one of the video stores had rented one copy of the movie to a customer; so the officers got his name and address, went to the customer's home, and seized his rented copy too.

The Police Chief then consulted with the District Attorney, and a decision was made - though by whom, it wasn't said - not to prosecute anyone. The police, however, refused to return the seized videos, even when asked to do so by those from whom they had been seized. So the Video Software Dealers Association filed a suit against Oklahoma City, the police, and the District Attorney.

The Video Software Dealers' argument was simple and straightforward and would be familiar to any law student who had studied Constitutional Law at any time in the last quarter century. Movies (as well as books and other publications) may not be seized on the grounds they are obscene unless and until there has been an adversary hearing to determine that they are in fact obscene.

Federal District Judge Ralph Thompson was familiar with this legal principle, and recognized that it had been violated by the police in this case. Without deciding whether "The Tin Drum" does or does not violate Oklahoma's child pornography laws - a proposition about which the judge seemed skeptical - he granted the Video Software Dealers' motion for a temporary injunction, solely because of the "procedural infirmities" associated with the "manner in which the movie was removed from public access."

The injunction prohibits the defendants "from continuing to withhold the film" until the case is finally resolved.

Video Software Dealers Association, Inc. v. City of Oklahoma City, 6 F.Supp.2d 1292 (W.D. Okla. 1997) [ELR 20:7:21]

Cable Communications Policy Act creates implied private cause of action that may be asserted against cable-TV company by producer whose program was banned from public access channel because of its sexual content, federal appellate court rules

Jerry McClellan is a TV producer - of programming that once was shown on the public access channel of Cablevision of Connecticut. In August of 1996, McClellan broadcast a show that contained "sexually explicit material" in violation of Cablevision's rules. As a result, Cablevision canceled McClellan's program and told him he could no longer have access to the company's public access studio.

Programs on commercial television stations are canceled all the time, for all sorts of reasons including content, without subsequent litigation. But McClellan thought his case was different. The federal Cable

Communications Policy Act contains a provision - 47 U.S.C. section 531(e) - that says that cable operators "shall not exercise any editorial control" over public access channels. According to McClellan, Cablevision violated this provision when it canceled his program for the reason that it did.

McClellan asserted his claim in a suit filed in federal District Court in Connecticut, where it was promptly dismissed by Judge Peter Dorsey (ELR 19:4:23). Judge Dorsey held that the Cable Communications Policy Act simply does not create a private cause of action, and thus McClellan could not bring his own lawsuit for alleged violations of the Act. Earlier District Court cases had permitted private suits alleging violations of the Act (ELR 16:3:10, 17:11:9). But Judge Dorsey thought that those cases had been undermined by a subsequent Supreme Court decision (ELR 18:3:3).

Apparently, however, Judge Dorsey was mistaken. That at least is what an appellate court has held in response to McClellan's appeal from the dismissal of his case. In an opinion by Judge Gerald Heaney, the Court of Appeals has ruled that section 531(e) "creates an implied private cause of action for cable programmers" that permits McClellan to proceed with his federal court suit against Cablevision.

Judge Heaney concluded that Congress intended such a private cause of action. Such an intention was shown, in part, the judge reasoned, by the fact that Congress amended section 531(e) after District Courts had ruled that it does create a private cause of action; and despite knowing of those rulings, Congress put nothing in the amendment (as it could have) to deprive program producers of the right to file suits asserting the section had been violated.

McClellan v. Cablevision of Connecticut, 149 F.3d 161, 1998 U.S.App.LEXIS 17056 (2d Cir. 1998) [ELR 20:7:21]

Constitutionality of federal statute prohibiting broadcast advertising for casino gambling is upheld, again, by federal appellate court in case brought by New Orleans broadcasters

At least 21 states have legalized gambling, so even though gambling is considered a "vice" by some, it is tolerated and even actively promoted in much of the country. By federal statute, however, Congress prohibited one form of gambling - casino gambling - from promoting itself by radio or television advertising anywhere in the country.

As things now stand, that statute is not enforceable in those western states that are in the Ninth Circuit. It is enforceable in those southeastern states that are in the Fifth Circuit. And its status is uncertain in the rest of the country, though the Federal Communications Commission appears to be taking the position it is enforceable there as well.

The reason this federal statute does not, at the moment, have a uniform nationwide status is that its constitutionality was challenged in federal courts by two groups of broadcasters, one in Nevada and the other in New Orleans. In both cases, the broadcasters contended that the statute violates their First Amendment right to engage in commercial free speech.

In the New Orleans case, the District Court rejected the broadcaster's argument. It agreed instead with the government that the statute is constitutional (ELR 16:11:21), and the Fifth Circuit Court of Appeals affirmed (ELR 18:1:10). But when the New Orleans broadcasters took their case to the Supreme Court, it looked as though the government's victory would be short-lived. The Supreme Court remanded the case to the Fifth Circuit for further consideration in light of a then-recent Supreme Court ruling in the 44 Liquormart case (ELR 18:2:6) which had invalidated a statute that prohibited liquor price advertising.

In the meantime, in the separate Nevada casino advertising case, the District Court agreed with the broadcasters that the statute is unconstitutional (ELR 15:12:24); the Ninth Circuit Court of Appeals affirmed (ELR 19:9:14); and the Supreme Court denied the FCC's petition for certiorari (ELR 19:11:16).

Thus, by the time the Fifth Circuit took up the New Orleans case again, for the reconsideration that had been ordered by the Supreme Court, the Fifth Circuit knew that the Ninth Circuit had declared the statute unconstitutional and that the Supreme Court had refused to hear the government's appeal from that ruling.

Nevertheless, a majority of the Fifth Circuit has upheld the constitutionality of the statute once again. Judge Edith Jones' majority opinion is carefully reasoned, if somewhat disrespectful. The opinion begins, for example, with a number of rhetorical questions, including ". . . has the Supreme Court gone over the edge in constitutionalizing speech protection for socially harmful activities?" (The word "edge" in this sentence is an allusion to the case of United States v. Edge Broadcasting in which the Supreme Court had earlier upheld that constitutionality of a federal statute that restricts advertising for state-run lotteries. (ELR 15:6:7)). Judge Jones then suggests that "the Supreme Court's jurisprudence has become as complex and difficult to rationalize as the statutory advertising regulations the Court has condemned."

Purporting to apply the standards mandated by the 44 Liquormart case, Judge Jones concluded that the statute banning casino broadcast advertising is constitutional. If it were not, she reasoned, "whatever gambling is legal anywhere may be advertised everywhere. No local prohibition of gambling will be meaningful, and communities will be less capable of insulating themselves and their children from the deleterious influence of gambling."

Judge Henry Politz dissented. Now that there is a conflict between the Ninth and Fifth Circuits on the constitutionality of this statute, further review by the Supreme Court seems assured.

Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334, 1998 U.S.App.LEXIS 17608 (5th Cir. 1998) [ELR 20:7:22]

Previously Reported:

During the June to October break between terms of the United States Supreme Court, petitions for certiorari were filed in several entertainment industry cases previously reported in these pages. The Supreme Court has issued orders in response to those petitions - and in all but one case, has denied them.

The United States Supreme Court has granted a petition for certiorari filed by the National Collegiate Athletic Association in a case in which the Court of Appeals held that an NCAA rule concerning the eligibility of graduate students is subject to Title IX (ELR 20:5:20). National Collegiate Athletic Association v. Smith, 119 S.Ct. 31, 1998 U.S.LEXIS 4651 (1998)

The United States Supreme Court has denied a petition for certiorari filed by the National Collegiate Athletic Association in the case in which the Court of

Appeals affirmed (ELR 20:3:14) a District Court ruling (ELR 18:2:10) that an NCAA rule limiting the salaries paid to certain basketball coaches violated federal anti-trust law. Following the Court of Appeals' decision, but before the Supreme Court denied its certiorari petition, the NCAA made several pre-trial motions, most though not all of which were denied by District Court. Judge Kathryn Vratil did agree with the NCAA that earlier rulings in the case had not established the fact that coaches had suffered injuries; and thus the judge agreed that the coaches would have to prove actual injuries at trial. The NCAA's other pre-trial motions, including those for summary judgment as to certain issues, were denied. The case was then tried before a jury, even before the Supreme Court declined to hear the NCAA's appeal. As previously reported (ELR 20:3:14), the jury returned a $22.28 million verdict in favor of the coaches, resulting in a treble damage award of $67 million. The Supreme

Court's recent denial of the NCAA's certiorari petition does not preclude the NCAA from appealing the ultimate judgment entered against it, nor does it prevent it from eventually seeking Supreme Court review of that judgment, should the NCAA choose to do so. Law v. National Collegiate Athletic Association, 5 F.Supp.2d 921, 1998 U.S.Dist.LEXIS 6641 (D.Kan. 1998); National Collegiate Athletic Association v. Law, 119 S.Ct. 65, 1998 U.S.LEXIS 4921 (1998)

The United States Supreme Court also denied a petition for certiorari filed by high school drama teacher Margaret Boring in a case in which she alleged that she had been transferred to another school against her wishes, and in violation of her First Amendment rights, in retaliation for her selection of the play "Independence" for performance by students in her advanced acting class. A federal District Court dismissed Boring's complaint for failure to state claim. A panel of the Court of Appeals initially reversed that ruling and remanded the case for trial (ELR 19:2:20). But the appellate court then granted a rehearing en banc and affirmed the dismissal of the case. The full appellate court ruled that the play was part of the school's curriculum, Boring's selection of it did not involve a matter of public concern and so was not protected speech, and even if her selection of play was protected speech, school officials had legitimate pedagogical interest in regulating that speech, and thus didn't violate Boring's First Amendment rights. The Supreme Court's denial of Boring's petition upholds the ruling against her. Boring v. Buncombe County Board of Education, 136 F.3d 364, 1998 U.S.App.LEXIS 2053 (4th Cir. 1998), cert. denied, 119 S.Ct. 47, 1998 U.S.LEXIS 4802 (1998)

The United States Supreme Court also has denied petitions for certiorari in cases in which Courts of Appeals have held that: the MTA could not refuse to display New York Magazine ad on the sides of its buses, even though Mayor Rudy Giuliani objected to the use of his name in the ad (ELR 20:3:8); composer Ray Repp is entitled to a trial in his copyright infringement suit against Andrew Lloyd Webber (ELR 20:2:9); California's right of publicity statute permits the unlicensed use of clips of Fred Astaire and other deceased celebrities in videos (ELR 19:5:13); and The Kingsmen were entitled to rescind the sale of the master of their recording of "Louie, Louie" and recover possession of it and all royalties earned after the rescission (ELR 20:5:12). Metropolitan Transportation Authority v. New York Magazine, 119 S.Ct. 68, 1998 U.S.LEXIS 4937 (1998); Webber v. Repp, 119 S.Ct. 52, 1998 U.S.LEXIS 4833 (1998); Astaire v. Best Film & Video Corp., 119 S.Ct. 161, 1998 U.S.LEXIS 5584 (1998); Gusto Records, Inc. v. Peterson, 119 S.Ct. 446, 1998 U.S.LEXIS 7135 (1998).

[ELR 20:7:23]

DEPARTMENTS

Book Review:

"Movie Money: Understanding Hollywood's (Creative) Accounting Practices" by Bill Daniels, David Leedy, and Steven D. Sills

Profit participations are a mixed bag. Everyone wants one, though few think they're worth much.

Net profit participations are particularly suspect. Eddie Murphy once described them as "monkey points." Ironically, Murphy did so in a deposition in the very same case in which a California trial court judge later ruled that Paramount Pictures' net profits definition was "unconscionable" (ELR 12:8:3). Those - like Eddie Murphy - with the bargaining clout to get them seek gross profit participations, unaware or unconcerned that gross participations significantly reduce the likelihood of there being any net profits for others to receive.

Why is it that movies like Eddie Murphy's "Coming to America" can be hugely successful at the boxoffice and even profitable for their distributors, yet still not generate a penny of "net profits" for net profit participants? The answer is that "profits" mean different things for different purposes. An article published earlier in these pages explained that there are "at least four ways to calculate a movie's profits, no two of which produce the same result!" ("Accounting for Profits in the Movie Business" by Schulyer Moore (ELR 18:8:4))

The phenomenon of multiple profit definitions is not unique to the movie business. All of us are familiar with it in our personal lives too. The income tax equivalent of "net profits" is something the Internal Revenue Code calls "taxable income." In calculating taxable income, the IRS permits us to deduct home mortgage interest and charitable donations, even though in our own minds, mortgage payments and donations are things we do with our incomes, not things that reduce our incomes. On the other hand, the IRS does not permit us to deduct job commuting expenses or the cost of business suits, even though these are expenses that actually do reduce our net incomes - expenses we would not incur if our jobs didn't require them.

So, if "net profits" are suspect, it is not because movies are sometimes profitable for their distributors without being profitable for net profit participants. If net profits are suspect, it's because many people don't understand how they're calculated - including some people who have a real need to know, because it affects them (or their clients) personally.

The method by which net profits are calculated has not been kept a secret. It's been the subject of law review and bar journal articles. It's been the topic of continuing legal education programs, some of them taught - accompanied by revealing written materials - by studio executives (like Dick Zimbert, back when he was Paramount's general counsel). But none of those articles or CLE materials has ever been available to a wide audience, and some of the best of them assume a degree of financial sophistication that not all readers enjoy.

Now, for those who need to know or want to know or are just intellectually curious, there is a book that makes profit participations clear. Movie Money: Understanding Hollywood's (Creative) Accounting Practices is that book. Weighing in at just under 300 pages, this one volume strips away the veil of confusion that has surrounded profit participation accounting, and reveals profit participations to be exactly what they are:

the end product of a set of individually simple calculations, done in accordance with negotiated contracts whose important terms are defined in those contracts themselves.

Movie Money begins with an introductory overview, and then segues to a chapter on "This Thing Called `Gross'" which explains all the sources from which a theatrical motion picture is likely to earn revenue. This chapter calls attention to the difference between widely-reported boxoffice grosses and the rarely-revealed (at least to the public) but much more significant theatrical film rentals. It also notes the difference between video revenues and the video royalties that are included in a participant's gross receipts.

The book then pauses for a 25-page interlude about the business of movie distribution.

Returning to the topic of participant accounting, Movie Money takes a detailed, two-chapter look at distribution expenses covering everything from advertising and prints to residuals, trade association fees and bad debts. This is followed by a nutshell on the film production process and a breakdown of the expenses incurred during the production stage.

The book reaches its climax in a chapter that explains the various types of participations, from the coveted "gross participations" to the "net profit participations" that Eddie Murphy called "monkey points." Movie Money winds down with a short description of how independent films are financed by pre-sale secured loans and investment equity. The penultimate chapter concerns the audit process. And the book ends with tips on "Negotiating from Power."

Movie Money was written by three uniquely qualified authors: Bill Daniels, David Leedy and Steven D. Sills.

Bill Daniels was once a reporter for Daily Variety for which he wrote the business articles that lawyers were most likely to clip and keep. Though no longer a journalist, he put his experience to good use in writing Movie Money; it's easy to understand and a pure pleasure to read. Bill gave up journalism to attend Loyola Law School, where he was one of my finest students. Now a member of the California Bar, he specializes in civil litigation and has enjoyed notable success: he was co-counsel of record for the successful plaintiff in the California Supreme Court privacy case of Schulman v. Group W (ELR 20:5:13).

David Leedy was once the controller for Universal Pictures. Back in 1980, after he'd left Universal, David was "inspired by the `bad press' received [even then] by motion picture distribution and its related accounting" to write and self-publish a 73-page booklet entitled "Motion Picture Accounting - An Accountant's

Perspective." I thought the booklet was terrific and said so in these pages (ELR 1:24:7). But as the years passed, the booklet's examples became dated. Many people, myself included, urged David to bring out a new edition of his booklet. It took a long time, but Movie Money is that update (and more).

Steven Sills has extensive hands-on experience with the book's topic. Both a lawyer and a CPA, Steven is the president of Sills & Adelmann, a CPA firm that specializes in conducting movie and television profit participant audits on behalf of participants. Before co-authoring Movie Money, he wrote one of the leading bar journal articles on profit participant accounting. He also has taught courses on this subject for UCLA Extension and for the California and New York CPA Societies.

Movie Money is published by Silman-James Press, 1181 Angelo Drive, Beverly Hills, California 90210. It is available at Samuel French bookstores and others that have sections devoted to books about movies, TV and music. Don't be put off by the book's price. It's only $19.95 (retail!), because Silman-James Press prices its publications for "sell-through" to the widest possible audience. Though that price is just 20% of what lawyers are accustomed to paying for single volume treatises, and though Movie Money was written to be understood by non-lawyers as well as lawyers, it is worthy of every minute lawyers will spend reading it.

-Lon Sobel, Editor
[ELR 20:7:24]

In the Law Reviews:

Entertainment and Sports Lawyer, published by the American Bar Association, Forum on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, IL 60611-4497, has issued a symposium on Financing New Ventures as Volume 16, Number 3 with the following articles:

Sports Facility Construction in the Coming Millennium: The Lawyer's Role by Kenneth L. Shropshire, 16 Entertainment and Sports Lawyer 1 (1998) (for address, see above)

From Tee to Green: A Primer on Golf Course Development and Financing by Brent Turley, 16 Entertainment and Sports Lawyer 3 (1998) (for address, see above)

A Practical Guide to Theatrical Financing by Elliot H. Brown and Daniel M. Wasser, 16 Entertainment and Sports Lawyer 6 (1998) (for address, see above)

Other People's Money: Financing the Low-Budget Independent Feature Film with Private Equity Securities Offerings by Daniel M. Satorius, 16 Entertainment and Sports Lawyer 11 (1998) (for address, see above)

Agreements for the Visual Artist by Ralph E. Lerner, 16 Entertainment and Sports Lawyer 19 (1998) (for address, see above)

International Update: Copyright Harmonization in the European Union: The Digital Alibi by Virginie L. Parant, 16 Entertainment and Sports Lawyer 22 (1998) (for address, see above)

Legislative Update: Criminal Copyright Infringement by Mark Traphagen, 16 Entertainment and Sports Lawyer 23 (1998) (for address, see above)

Book Reviews: Sports Law: Cases and Materials by Michael J. Cozzillio and Mark S. Levinstein, reviewed by Mark Gould, 16 Entertainment and Sports Lawyer 24 (1998) (for address, see above)

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Finality of Judgments in Class Actions: A Comment on Epstein v. MCA, Inc. by William T. Allen, 73 New York University Law Review 1149 (1998)

Zoning Out Free Expression: An Analysis of New York City's Adult Zoning Resolution by Herald Price Fahringer, 46 Buffalo Law Review 403 (1998)

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Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA by Darryl C. Wilson, 31 The John Marshall Law Review 1303 (1998)

Is the Green-Eyed Monster Sore or Can Color Really Be Trademarked Under the Lanham Act? Qualitex Co. v. Jacobson Products Co., Inc. by Juanita J. Webber, 21 Thurgood Marshall Law Review 425 (1996)

The Entertainment Law Review, published by Sweet & Maxwell Ltd., FREEPOST, Andover, Hants SP10 5BR, has issued Volumes 7 and 8 with the following articles:

"One In A Million" Domain Names Reconsidered by Mark Haftke, 9 Entertainment Law Review 241 (1998) (for address, see above)

"A Bigger Picture" - A Brighter Future? by Julian Dexter, 9 Entertainment Law Review 245 (1998) (for address, see above)

"Show Me the Money"? Canadian Film Tax Credits by Saverio Coppola, 9 Entertainment Law Review 252 (1998) (for address, see above)

Copyright and International Contracts Concerning Audiovisual Works: Freedom of Contract v. State of Protection by Arnold Vahrenwald, 9 Entertainment Law Review 259 (1998) (for address, see above)

Advertising in Movies and of Movies under Italian Law: Protecting the Interests of Authors, Viewers and Producers by Barbara Bettelli, 9 Entertainment Law Review 266 (1998) (for address, see above)

How to Adopt a Classical Approach to Copyright Infringement: Robin Ray v. Classic FM plc by Simon Smith, 9 Entertainment Law Review 275 (1998) (for address, see above)

Book Reviews: Piracy and Counterfeiting: GATT, TRIPs and Developing Countries and Readings in Intellectual Property: A Selection of Articles fro EIPR and ENT.L.R.., 9 Entertainment Law Review 281 (1998) (for address, see above)

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Collection and Distribution of Performing and Mechanical Royalties: A View from the UK by John Hutchinson, 84 Copyright World 30 (1998) (for address, see above)

European Intellectual Property Review, published by Sweet & Maxwell, telephone international +44 1264

342766 or FAX +44 1264 342761, has issued Volume 20, Issue 10 with the following articles:

Beware of the Danger which Lurks in the Netherlands: The Pan-European Injunction by Geoffrey Gauci, 20 European Intellectual Property Review 361 (1998) (for address, see above)

Protection of Trade Marks: The New Regime-Beyond Origin, 20 European Intellectual Property Review 364 (1998) (for address, see above)

Trade Mark Assignments under E.C. Law by Andrea Filippo Gagliardi, 20 European Intellectual Property Review 371 (1998) (for address, see above)

The Herchel Smith Lecture 1998-Article 86 of the E.C. Treaty and Intellectual Property Rights by Rosa

Greaves, 20 European Intellectual Property Review 379 (1998) (for address, see above)

Wake-up Call for U.K. Law on Trade Mark Licensing by Neil J. Wilkof, 20 European Intellectual Property Review 386 (1998) (for address, see above)

Refusals to License Intellectual Property Rights and Monopoly "Leverage" by Richard H. Stern, 20 European Intellectual Property Review 390 (1998) (for address, see above)

U.S. Circuit Court Addresses 1939 Licence Agreement Involving Disney and Future Technologies by Dov H. Scherzer, 20 European Intellectual Property Review 395 (1998) (for address, see above)
[ELR 20:7:25]