RECENT CASES

California Supreme Court dismisses review, and orders republication, of lower court decision that fictional character "Michael `Squints' Palledorous" in Twentieth Century Fox movie "The Sandlot" did not misappropriate name and likeness or defame plaintiff Michael Polydoros

The end-credits of many movies include a disclaimer that says, "The persons and events in this motion picture are entirely fictitious, and any similarity to actual people or events is unintentional." It's a disclaimer that's hard to take seriously, because it even appears in movies by Neil Simon which are obviously autobiographical.

All writers draw on their own experiences and people in their own lives. In their book Who Was Really

Who in Fiction (Longman 1987), British authors Alan Bold and Robert Giddings identified more than 600 fictional characters that had real-life sources. "Hollywood's Name Game," a Wall Street Journal article by Lisa Gubernick (Apr. 17, 1998), did the same for motion pictures.

Thus, Michael Polydoros could hardly be blamed for thinking he was portrayed in the movie "The Sandlot." The movie has been described as a "comedic coming-of-age story set in the San Fernando Valley in the 1960's." It focuses on a "motley group of boys on a sandlot baseball team," one of whose leaders is a character named "Michael `Squints' Palledorous." The real Michael Polydoros grew up in the San Fernando Valley in the 1960's. He went to school with David Mickey Evans who wrote and directed "The Sandlot." And a 1960's vintage photo of Polydoros is similar to a photo

of the movie's "Palledorous" character, "right down to [his] eye-glasses and the color and design of his shirt."

Polydoros was not pleased or amused by his movie namesake. Instead, he was "embarrassed and humiliated" by the character's nickname "Squints" - a nickname he considered to be "a blatantly derogatory moniker derived from the thick glasses the character wears throughout the film." As a result, Polydoros sued Twentieth Century Fox and others, alleging claims for commercial appropriation of identity, invasion of privacy, negligence and defamation.

Polydoros' suit didn't get far. Fox and its co-defendants filed a motion for summary judgment, and it was granted by a California state trial court. The California Court of Appeal then affirmed that ruling, in an opinion that originally was marked "Not to be published in the Official Reports" (which under California law, would have precluded it from being cited in other

cases). The Court of Appeal later changed its mind about publishing the decision, and it was published in the Official Reports. But then the California Supreme Court granted Polydoros' request to review the case; and under California practice, that had the effect of de-publishing the Court of Appeal decision (and again making it uncitable).

Before the California Supreme Court heard oral argument or ruled on Polydoros' appeal, it issued an unusual two-paragraph order dismissing review and directing the Reporter of Decisions to republish the Court of Appeal decision in the Official Appellate Reports, thus making that decision citable once again.

In an opinion by Justice Roger Boren, the Court of Appeal held that California law concerning commercial appropriation of identity "was never intended to apply to works of pure fiction." Moreover, "mere similarity

or even identity of names is insufficient to establish a work of fiction is of and concerning a real person."

In this case, Justice Boren said, Polydoros could not state a valid claim for the appropriation of his name and likeness for commercial purposes, because "there was a marked difference in age and appearance between . . . the 40-year-old Michael Polydoros, and the 10-year-old character of Squints Palledorous. No person seeing this film could confuse the two," the justice concluded. Also, "the rudimentary similarities in locale and boyhood activities do not make `The Sandlot' a film about [Polydoros'] life. This is a universal theme and a concededly fictional film. The faint outlines [Polydoros] has seized upon do not transform the fiction into fact."

Moreover, Justice Boren ruled that "The Sandlot" is protected by the First Amendment, even though it was produced for profit. Nor did it matter that Twentieth Century Fox had used photos of the "Squints

Palledorous" character to advertise the movie. "It would be illogical to allow [Fox and its co-defendants] to exhibit the film but effectively preclude any advance . . . promotion of their lawful enterprise," the justice explained.

In a paragraph that is of special interest to lawyers who do pre-release clearance work for producers, Justice Boren rejected the assertion that Fox could be held liable for having negligently failed to clear the use of the Squints character. Fox's use of that character was not negligent, even though it had not followed the "entertainment industry custom of obtaining `clearance' of all characters featured in both fictional and nonfiction motion pictures." Justice Boren explained that "It simply was not necessary to do so in this case. The industry custom of obtaining `clearance' establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a

written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one."

Finally, Polydoros' defamation claim also was rejected, for two reasons. It was rejected, first, because the movie was not about Polydoros. "It is about a fictional character." And "There is no law providing relief for defamation by a fictional work which does not portray the plaintiff at all." Second, it was rejected because the language to which Polydoros objected was not actionable at all. "In the context presented here, a playground setting populated by small boys, childish name-calling can hardly be deemed defamatory," Justice Boren ruled.

Polydoros v. Twentieth Century Fox Film Corp., 79 Cal.Rptr.2d 206, 1998 Cal.LEXIS 6651 (Cal. 1998)(dismissing review and ordering publication);

Polydoros v. Twentieth Century Fox Film Corp., 79 Cal.Rptr.2d 207, 1997 Cal.App.LEXIS 724 (Cal.App. 1997) [ELR 20:10:4]

California Supreme Court affirms million-dollar defamation judgment against The Globe in favor of Pakistani photojournalist who was identified as the actual assassin of Robert Kennedy in the book "The Senator Must Die" and then by The Globe in article about the book; plaintiff was a private figure, and "neutral reportage privilege" does not apply to statements about private figures, court rules

California law does not include a "neutral report-age privilege" in cases brought by private figures. The California Supreme Court has so held in a case that

traces its factual origins to Robert Kennedy's assassination in 1968.

Most people believe that Senator Kennedy was murdered by Sirhan Sirhan. Not all do however. Some conspiracy theorists believe the true assassin was someone else, and have written entire books detailing their beliefs. One such book was The Senator Must Die by Robert Morrow which was published in November 1988. Six months later, the tabloid newspaper The Globe published an article about the book's allegations - including its assertion that Senator Kennedy was actually killed by a Pakistani photojournalist named Khalid Khawar who had himself been photographed on the podium near Senator Kennedy the night of the assassination. Photographs of Khawar appeared in the book, and a copy of one of them was republished in The Globe.

Khawar sued The Globe, as well as the book's publisher, for defamation in California state court. The

book publisher settled before trial, but The Globe did not. Khawar won his trial against The Globe, and judgment was entered in his favor for $1,175,000 - $500,000 of which were for punitive damages. The California Court of Appeal affirmed that judgment (ELR 18:9:19). And though the California Supreme Court agreed to review that ruling, the Supreme Court has affirmed the judgment again, for the same reasons relied on by the Court of Appeal.

In an opinion by Justice Joyce Kennard, the California Supreme Court has held that Khawar was a private figure rather than a public figure (or even a limited-purpose or involuntary public figure). This was so, Justice Kennard explained, because Khawar's appearance on the podium with Senator Kennedy did not make Khawar a public figure.

Khawar's status as a private figure, rather than public figure, was significant because The Globe had

asserted the "neutral reportage privilege." This privilege is recognized in some jurisdictions, and it insulates the news media from liability in cases where they merely report defamatory but newsworthy allegations made by others.

However, most jurisdictions that recognize the neutral reportage privilege make it available only for reports about public figures. The Globe, and several media organizations that filed Amici briefs, urged the Supreme Court to adopt the privilege in California and to extend it to reports about private figures as well. But the Court declined to do so. Instead, after reviewing the caselaw and published commentary on the issue, Justice Kennard wrote that the Court was persuaded by those who have argued that the privilege should be limited to reports about public figures. It therefore did not apply to The Globe article. (Indeed, the Court declined to decide

whether the privilege exists at all in California, even for reports about public figures.)

Khawar had to prove malice to be entitled to punitive damages. Justice Kennard agreed that substantial evidence supported the jury's award of punitive damages. She noted that government investigations and Sirhan Sirhan's criminal trial all had concluded that Sirhan Sirhan was the assassin. She also noted The Globe's failure to contact Khawar or other key witnesses, though they could have been located - even in 1989 - had an effort been made to do so.

Khawar v. Globe International, Inc., 79 Cal.Rptr.2d 178, 265 P.2d 696, 1998 Cal.LEXIS 6880 (Cal. 1998) [ELR 20:10:5]

Broadway producer Zev Bufman and partner Elizabeth Taylor are held personally liable to actress Cicely Tyson for balance of salary owed under "pay or play" provision of Tyson's contract to appear in "The Corn is Green"

At the height of her career, actress Cicely Tyson agreed to star in a Broadway production of Emlyn Williams' play "The Corn is Green" and in a video version of the play that was intended for eventual television broadcast. The project required a commitment of nearly a year, during which time she would have had to turn down other movie, TV and stage acting opportunities. So Tyson asked for and was given a $750,000 "pay or play" deal - one which provided that if her weekly salary for the Broadway run did not amount to $750,000, she would be paid the difference when the show closed.

Unfortunately, "The Corn is Green" had just a short run on Broadway, and the contemplated video was never produced. The show's "closing was unlamented by the critics," but it was a financial disaster. Under her "pay or play" guarantee, Tyson was still owed some $600,000. The question was, by whom?

According to Tyson, the balance was owed by Broadway producer Zev Bufman individually, by his company Zev Bufman Entertainment, Inc., and by his producing partner Elizabeth Taylor individually. Tyson in fact obtained a $607,000 arbitration award against Zev Bufman Entertainment, Inc. But Bufman and Taylor claimed that they were not personally liable as individuals.

The reason that Bufman and Taylor's personal liability was uncertain was that Tyson's deal consisted of four distinct agreements. Two were contracts that dealt with "The Corn is Green" in particular, and two were

Actors' Equity documents that dealt with relations between producers and actors in general.

Tyson's "pay or play" guarantee was in her contract to appear in the video version of "The Corn is Green" - a contract which neither Bufman nor Taylor had signed as individuals.

Tyson's contract to appear on stage for the "run of the play" was signed by "The Corn Company" and by Bufman individually, but not by Taylor.

The Actors' Equity collective bargaining agreement made Tyson's "run of the play" contract binding on Bufman and Taylor, individually, as the producers of the play. And the Actors' Equity Security Agreement imposed personal liability on Bufman and Taylor for all contracts entered into "in connection with" "The Corn is Green."

In short, the "pay or play" guarantee appeared in an agreement that was not signed by Bufman or Taylor

individually. And the "run of the play" contract - which Bufman had signed and which was personally binding on Taylor too by virtue of Actors' Equity agreements - did not contain a "pay or play" guarantee.

The dispute was tried in federal District Court in New York. The result, initially, was a jury verdict that found Bufman and Taylor personally liable. But District Judge John Martin granted their post-trial motion for judgment as a matter of law and dismissed Tyson's complaint. Judge Martin did so on the grounds that only the video agreement contained the "pay or play" guarantee; Bufman and Taylor had not personally signed it; and the Actors' Equity agreements applied only to the payments due Tyson under her "run of the play" agreement which did not contain a "pay or play" guarantee.

Tyson appealed and has prevailed once again. The Court of Appeals acknowledged that Judge Martin's view may have been "fairer, and better supported by the

evidence." But in an opinion by Judge Dennis Jacobs, the appellate court said that since there was "some evidence upon which the jury could have held Zev Bufman and Elizabeth Taylor individually liable, we must reinstate the verdict."

The Court of Appeals reached this conclusion because it said that all four contracts should be read together to create a single agreement, and that so read, Bufman and Taylor were personally bound by the video contract contract's "pay or play" guarantee, as well as by the "run of the play" contract.

Judge Jacobs noted that the deal always contemplated both a stage play and video production. There was conflicting testimony about why separate stage and video contracts were drafted; but the jury could have believed testimony offered on Tyson's behalf that it was done to keep the "pay or play" guarantee out of the "run of the play" contract in order to reduce the size of the

bond required under Equity rules. Moreover, the video contract which contained the "pay or play" guarantee cross-referenced the "run of the play" contract which in turn incorporated the Actors' Equity agreements that make producers, like Bufman and Taylor, individually liable to actors.

This Is Me, Inc. v. Taylor, 157 F.3d 139, 1998 U.S.App.LEXIS 24416 (2d Cir. 1998) [ELR 20:10:6]

Daughter of former member of the Temptations was denied injunction that would have barred broadcast of television miniseries; injunction would have violated First Amendment ban on prior restraints, court rules

A television miniseries about the Temptations was shown on NBC last November, as scheduled, despite efforts by the daughter of the late David Ruffin, a former member of the Motown recording group, to enjoin the four-hour broadcast.

Cheryl Ruffin-Steinback has sued the program's producer and others on several theories, including infringement of right of publicity, false light invasion of privacy, defamation, unfair competition, unjust enrichment, and interference with advantageous business relationships.

The miniseries was based on a book about the Temptations written by Otis Williams who was a member of the group at the same time as Ruffin. Apparently for this reason, Ruffin's daughter alleged that the miniseries would necessarily be inaccurate and defamatory. While she acknowledged that the First Amendment protects entirely factual and entirely fictional portrayals, she argued that it does not protect mixtures of fact and fiction.

Ruffin's daughter also acknowledged another reason for bringing suit. She wants to produce her own movie about her father, and she believes it will be tougher for her to do so once NBC broadcast its miniseries.

Without any noticeable hesitation, Federal District Judge John Feikens denied Ruffin-Steinback's request for a preliminary injunction. In a short, two-page opinion, Judge Feikens noted that if granted, the

requested injunction would be a "prior restraint," and that it would therefore violate the free speech protections of the First Amendment.

Ruffin-Steinback v. De Passe, 17 F.Supp.2d 699, 1998 U.S.Dist.LEXIS 14927 (E.D.Mich. 1998) [ELR 20:10:7]

Former major league pitcher Don Newcombe is entitled to trial on right of publicity claims against Coors and its advertising agency as a result of Sports Illustrated ad for Killian's Irish Red Beer, though appellate court affirms dismissal of claims against magazine itself and claims for defamation and infliction of emotional distress

Former major league pitcher Don Newcombe has scored a potentially significant victory in his lawsuit against Adolf Coors and Foote Cone and Belding, the brewery's advertising agency. Newcombe's suit was triggered by an ad for Killian's Irish Red Beer published in the 1994 Sports Illustrated swimsuit edition. Killian's is owned by Coors, and the ad was created by Foote Cone.

Half the full-page ad was text and a picture of a glass of beer; the other half was a drawing of an old-time baseball game, focused on a dark-skinned pitcher

in the windup position. Newcombe played for the Dodgers and other teams from 1949 to 1960 and was one of the first African-Americans to play in the major leagues after Jackie Robinson broke the color barrier in 1947. Though the drawing in the Killian's ad did not depict the uniform of any actual team, the drawing was "virtually identical" to a "newspaper photograph of Newcombe pitching in the 1949 World Series."

Newcombe "immediately recognized" himself as the pitcher in the ad, as did his family, friends and former teammates. As a result, Newcombe sued Coors, Foote Cone Belding, and Sports Illustrated, asserting that the ad appropriated his identify for commercial purposes. It made additional assertions too. Newcombe is a recovering alcoholic who has devoted substantial time to fighting alcohol abuse. He therefore claimed that the ad defamed him and inflicted emotional distress.

Newcombe lost the first inning of his suit. Federal District Court Stephen Wilson granted the defendants' motion for summary judgment and dismissed the case. Newcombe has done better in the second inning, however. In an opinion by Judge Procter Hug, the Court of Appeals has reversed the dismissal of Newcombe's right of publicity claims against Coors and Foote Cone, and has remanded those to the District Court for trial.

Under California common law and Civil Code section 3344, a right of publicity plaintiff must show, among other things, that his or her likeness was actually used. To satisfy this requirement, Judge Hug ruled that Newcombe would have to prove that "the pitcher depicted in the advertisement" was "readily identifiable as Newcombe." The defendants argued this was not so, because the uniform in the ad was not Newcombe's, it bore a different number (39) than the one Newcombe actually wore (36), and the pitcher's facial features were not

entirely visible. But the appellate court disagreed. "Having viewed the advertisement," Judge Hug wrote, "we hold that a triable issue of fact has been raised as to whether Newcombe is readily identifiable as the pitcher in the advertisement."

On the other hand, the appellate court ruled that Newcombe's right of publicity claims against Sports Illustrated had been properly dismissed. The magazine had not "directly benefited" from the use of his likeness, because it was paid for the ad without regard to its contents. Newcombe's Civil Code claim was properly dismissed, because there was no evidence to show that Sports Illustrated knew the ad contained his likeness.

While Newcombe is entitled to proceed against Coors and Foote Cone with his right of publicity claims, the appellate court affirmed the dismissal of his defamation and emotional distress claims.

The defamation claim was properly dismissed, because its defamatory meaning was not apparent on its face. Rather, it was defamatory only if viewers knew that Newcombe is a recovering alcoholic who campaigns against alcohol abuse. Under California law, a defamation claim like this requires proof of special damages - something Newcombe was unable to show.

Judge Hug held that the intentional infliction of emotional distress claim was properly dismissed, because no showing was made that the defendants had intended to cause Newcombe harm, or even that they knew he was a recovering alcoholic.

Newcombe v. Adolf Coors Co., 157 F.3d 686, 1998 U.S.App.LEXIS 23308 (9th Cir. 1998) [ELR 20:10:7]

Recorded short-form assignment did not transfer ownership of Muppet character copyrights to coffee company for which Jim Henson had created television commercials

Sometimes things are not what they appear to be - not even documents recorded in the Copyright Office. Because of this principle, Jim Henson Productions, Inc., has retained ownership of the copyrights to two of its Muppet characters, despite a 1958 assignment which appeared to transfer those copyrights to another company.

The Muppets in question were "Wilkins" and "Wontkins" which Jim Henson had used in television commercials he produced for many years, beginning in 1957, for the John H. Wilkins Company, a coffee distributor that was then doing business in the Washington, D.C., area.

In 1958, Jim Henson signed a short-form assignment which appeared to transfer ownership of the "Wilkins" and "Wontkins" copyrights to the John H. Wilkins Company; and the short-form was recorded in the Copyright Office. Eventually, the John H. Wilkins Company stopped using Henson's commercials and thus discontinued its use of "Wilkins" and "Wontkins" as well. But many years after that, the assets of John H. Wilkins Company were transferred to another coffee company which resumed promotional uses of "Wilkins" and "Wontkins" and which granted yet another company the exclusive marketing rights to the two Muppet characters.

These uses triggered a suit by Jim Henson Productions that included copyright, trademark and related claims, some of which were previously decided in Henson's favor in response to cross-motions for summary judgment (ELR 16:8:7, 16:12:27). Following a seven-

day trial before federal District Judge Loretta Preska, Henson has won the rest of the case too.

The issue at trial was whether Jim Henson Productions actually owned the copyrights to "Wilkins" and "Wontkins," despite the 1958 short-form assignment. On the basis of eye-witness and expert testimony, Judge Preska concluded that Henson does own those copyrights, because the short-form assignment was not in fact what it appears to be. The judge found that the assignment was actually a mere TV-commercial license that was limited in both time and geographic scope. Thus Judge Preska concluded that Henson is entitled to judgment against the defendants, because they do not own the "Wilkins" and "Wontkins" copyrights.

The evidence that led the judge to find that the short-form assignment was merely a limited license was described in considerable detail in her opinion. Among other things, Judge Preska noted that under the

Copyright Act of 1909, which was in effect in 1958, it was common for licensees to obtain short-form assignments which they recorded in the Copyright Office, pursuant to agreements that all of the rights except those that were licensed would thereafter be reconveyed to their authors. This was done in those days, because the 1909 Act did not permit the assignment of selected rights; only the whole of a copyright could be assigned. The cumbersome and artificial assignment and reassignment "tool" was used, because under the 1909 Act, a work had to be published with a copyright notice in the name of its owner, and a licensee was not an owner of the licensed property.

Judge Preska also described other evidence indicating that the 1958 short-form assignment did not reflect the full agreement of the parties, and that only a TV-commercial license was intended by both Henson and John H. Wilkins Company. This evidence included

expert testimony on how much a company would have paid in 1958 to acquire ownership of the copyrights to puppet characters - an amount that was much greater than what Henson had actually been paid for the coffee commercials.

While this ruling would seem to diminish the value of Copyright Office records for the purpose of determining who actually owns copyrights, even the defendants' own expert acknowledged that if he were clearing the "Wilkins" and "Wontkins" characters for use by a client, he would not have relied on the 1958 short-form assignment alone.

Jim Henson Productions, Inc. v. John T. Brady & Associates, Inc., 16 F.Supp.2d 259, 1997 U.S.Dist.LEXIS 22878 (S.D.N.Y. 1997) [ELR 20:10:8]

Federal court refuses to void option contract between boxer Miguel Angel Gonzalez and promoter Don King, even though contract did not explicitly indicate how much Gonzalez was to be paid for his next fight

The difference between an enforceable option contract and an unenforceable agreement-to-agree is sometimes difficult to see. It certainly was for boxer Miguel Anglel Gonzalez who thought that an agreement he once entered into with promoter Don King was unenforceable. The reason Gonzalez thought so was that the contract did not explicitly indicate how much he was to be paid for his next fight. Instead, under the circumstances that existed when King exercised the option, the contract appeared to provide that the amount "shall be negotiated and agreed upon. . . ."

In a lawsuit Gonzalez brought against King in federal District Court, the boxer sought summary judgment voiding the option contract on the ground that it lacks an essential term and is nothing but an unenforceable agreement to agree. Judge Milton Pollack agreed that the contract was "poorly drafted" - but not poorly enough to be declared void in a summary judgment motion.

The contract provided that if Gonzalez won the first fight it covered, King had an option to promote a second fight for an amount to be "negotiated and agreed upon" which would "not be less than" $75,000. If Gonzalez lost the first fight, King had an option to promote a second fight for an amount to be "negotiated and agreed upon" which would "be no less than" $25,000.

The contract did not indicate, however, how much Gonzalez would be paid if the first fight ended in

a draw. That first fight was with Julio Cesar Chavez in March 1998, and it did end in a draw.

Judge Pollack ruled that when an essential term is omitted from a contract, courts should attempt to determine the parties' intention. "Striking down a contract as indefinite . . . is at best a last resort," he said.

In this case, Judge Pollack decided that King might be able to show at trial that he and Gonzalez had treated losses and draws alike for minimum pay purposes, or that it was "typical industry practice" to do so. If so, that might indicate the parties' intent, and make the contract enforceable. As a result, the judge denied Gonzalez' motion for summary judgment.

Gonzalez v. Don King Productions, Inc., 17 F.Supp.2d 313, 1998 U.S.Dist.LEXIS 16042 (S.D.N.Y. 1998) [ELR 20:10:9]

Record company infringed copyrights to "Laurel and Hardy" soundtrack music, appellate court affirms; songs were not works for hire, nor were their copyrights lost when movies were released without copyright notices for songs

"Laurel and Hardy" movies are now 60 to 70 years old, but they continue to be the subject of legal disputes that arise from their exploitation today. The latest case involves albums of "Laurel and Hardy" soundtrack music released by Michael Agee, a "film historian and restorationist" who does business as "L & H Records" and "The Nostalgia Archive."

Agee got permission to release his "Laurel and Hardy" albums from Hal Roach Studios which produced the "Laurel and Hardy" movies in the 1920s and '30s. Though Roach assured Agee that it owned the soundtrack music, Agee's own lawyer advised him that the

copyright situation was "a mess." Agee released his albums nonetheless, and subsequent developments proved his lawyer right.

At least 55 of the "Laurel and Hardy" soundtrack songs were written by the late Leroy Shield in the 1930s while an employee of Victor Talking Machine, the company hired by Roach to create the "Laurel and Hardy" soundtracks. Shield assigned his interest in those songs to a music publisher which then registered their copyrights, naming itself as their copyright owner and Shield as the author. The publisher also granted Roach a synchronization license for the songs' use in "Laurel and Hardy" movies. And when the time came to renew their copyrights 28 years later, the publisher did so, in Shield's name.

After Shield's death, the copyrights eventually passed to his stepsons, Mahlon Dolman and Harold Glaisyer. When Dolman learned of Agee's "Laurel and

Hardy" albums, Dolman demanded that Agee obtain a license and pay fees. Their discussions never resulted in an agreement, but Agee continued to sell his albums nonetheless. A copyright infringement suit by Dolman soon followed.

Agee asserted a two-pronged defense. First, he argued that the songs had been written as works made for hire, so Shield was never the owner of their copyrights and Dolman wasn't now. Second, Agee contended that even if Shield once had been the owner of the songs' copyrights, when the "Laurel and Hardy" movies were released (in the 1930s) without copyright notices for the songs, their copyrights were lost.

Federal District Judge George King rejected both of Agee's arguments, and entered judgment against him, including an injunction, damages and attorneys fees. Agee appealed, but in an opinion by Judge Melvin Brunetti, the Court of Appeals has affirmed.

Although Shield had written the songs while an employee of Victor Talking Machine, he had been the head of Artists and Repertoire and then Musical Director for NBC during the years in question. Dolman therefore argued, and the Court of Appeals agreed, that there was no evidence that composing music was within the scope of Shield's employment, nor any evidence the songs had been written at the "instance and expense" of Hal Roach Studios. For these reasons, the appellate court concluded that Judge King had not erred in refusing to apply the work made for hire doctrine.

In the 1930s, publication of a work without a copyright notice would have put it into the public domain. But there was no evidence to show the "Laurel and Hardy" movies had been "published" in the way that was required to destroy copyright. Agee argued that when the copyrights to the movies themselves were registered, the registration certificates listed publication

dates. The certificates were enough to create a presumption that the movies were sufficiently published to give them federal statutory copyright protection. However, Judge Brunetti added, "it takes `more' publication to destroy a common-law copyright than to perfect a statutory copyright."

Agee had no evidence concerning the nature and scope of the distribution of the "Laurel and Hardy" movies in the 1930s. Thus, said Judge Brunetti, the evidence was insufficient to prove that copyright-destroying publications had occurred.

The Court of Appeals also affirmed Judge King's finding that Agee had infringed "willfully," because Agee sold albums knowing there was a question about the ownership of the songs' copyrights, and continued to do so even after he had been given evidence that Dolman was their true owner.

Dolman v. Agee, 157 F.3d 708, 1998 U.S.App.LEXIS 24607 (9th Cir. 1998) [ELR 20:10:9]

Lawyers for Apple Corps did not act unethically by investigating compliance with consent order by seller of Beatles stamps; seller held in contempt for violating order

The International Collectors Society is a company that sells postage stamps issued by foreign countries to collectors in the United States. Among the stamps once sold by the Society were those bearing the names and likenesses of The Beatles.

In the beginning at least, the Society's sale of these stamps in the U.S. was not licensed. As a result, in 1996, Apple Corps (the owner of The Beatles' names and likenesses) sued the Society in federal court in New

Jersey. The case was resolved with a Consent Order that permitted the Society to continue selling Beatles stamps under very specific circumstances, including advance approval of promotional materials.

Less than two months later, Apple Corps' lawyers suspected the Society was violating the Consent Order, and they commenced an investigation. The lawyers called the Society's toll-free phone number and ordered certain stamps from the Society's sales representatives, without identifying themselves. When their investigation confirmed the lawyers' suspicions, they sought a contempt citation and injunction barring any future sales. The Society responded by seeking sanctions against Apple Corps' lawyers for allegedly violating New Jersey's Rules of Professional Conduct.

Federal District Judge Joseph Greenaway has found that the Society did violate the Consent Order by selling certain Beatles stamps in violation of its

provisions and by using promotional materials without approval. As a result, the judge has found the Society in contempt. Also, as provided in the Consent Order itself, the judge has enjoined the Society from selling any further Beatles stamps and has ordered it to pay Apple Corps' attorneys' fees.

In addition, Judge Greenaway has ruled that Apple Corps' lawyers did not violate New Jersey's Rules of Professional Conduct when they investigated the Society's compliance with the Consent Order. The Society argued that Apple Corps' lawyers had violated three of those Rules: one that prohibits lawyers from communicating with others who are represented by counsel; another that prohibits lawyers from engaging in conduct that involves misrepresentation; and a third that prohibits lawyers from implying they are "disinterested" when dealing with others who are not represented by counsel.

The judge held that although Apple Corps' lawyers did talk by phone with the Society's sales representatives, and although the Society was represented by counsel, the sales representatives themselves were not represented by counsel because they were not part of the Society's "litigation control group." Judge Greenaway explained that the Rule "cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation."

The judge also held that the Rule prohibiting misrepresentations "does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."

Finally, Judge Greenaway held that the Rule prohibiting lawyers from implying they are "disinterested"

did not apply to the lawyers' investigation, because when they were "testing" the Society's compliance with the Consent Order, they "were not acting in the capacity of lawyers."

Apple Corps Ltd. v. International Collectors Society, 15 F.Supp.2d 456, 1998 U.S.Dist.LEXIS 9747 (D.N.J. 1998) [ELR 20:10:10]

Art conservator entitled to jury trial in defamation suit prompted by Wall Street Journal article that was critical of his restoration of vandalized painting by artist Barnett Newman

Art conservator Daniel Goldreyer has won the right to a jury trial in his defamation suit against Dow Jones & Company, as a result of an article that appeared

in the Wall Street Journal that was critical of work he had done restoring a vandalized painting by artist Barnett Newman.

Newman's abstract artwork entitled "Who's Afraid of Red, Yellow and Blue III" was slashed while on display at the Stedelijk Museum in Amsterdam, and the Museum hired Goldreyer to repair it. The Museum's director enthusiastically approved Goldreyer's work, for which he was paid $270,000. But the Museum's conservator and an art historian attacked the quality of the restoration and even accused Goldreyer of ruining the masterpiece.

The controversy made its way back to the United States, where it was reported in the New York Times and Time magazine, as well as by the Wall Street Journal, other newspapers and on National Public Radio. At least some of those reports were critical of Goldreyer. The Wall Street Journal article, for example, was

headlined "For that Price, Why Not Have the Whole Museum Repainted?"

Goldreyer sued Time and Dow Jones, both of which moved for summary judgment early in the case. Neither was successful at first (ELR 15:11:22). Time prevailed on appeal, when the New York Appellate Division ruled that its article was protected "opinion"; but Dow Jones was not, because the Wall Street Journal article was not pure opinion. (ELR 17:11:10) However, the Appellate Division did indicate that if discovery showed that the Journal had not been "grossly irresponsible," Dow Jones could renew its summary judgment motion on that ground.

Following discovery, Dow Jones did just that. But Justice Edward Greenfield has denied its motion, again. The judge compared the Journal article's content with what the reporter testified (by deposition) he had learned; and the judge noted several "variations and

discrepancies." Among other things, the article contained some assertions that were critical of Goldreyer for which the reporter had no source, and the article omitted some things the reporter had learned that were favorable to Goldreyer. These variations and discrepancies raised a triable issue of fact, the judge said, about whether Dow Jones had been "grossly irresponsible."

Justice Greenfield even ruled that Goldreyer may be able to recover punitive damages which in New York requires proof of common law malice.

Daniel Goldreyer, Ltd. v. Dow Jones & Company, Inc., 678 N.Y.S.2d 453, 1998 N.Y.Misc.LEXIS 424 ((Sup. 1998) [ELR 20:10:11]

Federal court dismisses Americans with Disabilities Act suit against Twentieth Century Fox, because film studio is not a "place of public accommodation"

The Twentieth Century Fox film studio is not open to the public. Only employees and their authorized guests are permitted on the lot. And guests - who are permitted to visit for "business purposes only" - may enter only if employees have arranged for "Drive-On" passes in advance. This at least is the company's policy. And in an Americans with Disabilities Act suit filed against Fox, this policy made all the difference.

The suit was filed by Les Jankey, a wheelchair-bound non-employee who testified (by deposition) that he has been on the Fox lot a dozen times in the last twenty years, without a pass, in connection with fund-raising events or to "drop off" items. According to Jankey's complaint, the Commissary, Studio Store, and

ATM were not accessible to the disabled, as required by the ADA.

The ADA prohibits discrimination against the disabled at "any place of public accommodation." Thus, Jankey's suit quickly focused on whether the Fox lot was such a place. Federal District Judge Lourdes Baird has held that it is not, and thus she has granted Fox's motion for summary judgment and has dismissed the suit.

Judge Baird ruled first that the lot as a whole is not a place of public accommodation, because it is open only to employees and their business guests. Though Jankey was sometimes "waived through" without a pass, this was not enough to show that the lot was "available indiscriminately to other members of the public." At most, Jankey showed that access to the lot without a pass was an "isolated incident."

The Commissary, Studio Store and ATM can be reached only by entering the lot first, and thus they too did not appear to be places of public accommodation, even viewed individually.

Nevertheless, Jankey offered evidence showing that on some occasions, the Commissary had been made available to those who were neither employees nor their guests. Those occasions, however, had not been "regular" or "indiscriminate," and thus the Commissary had not become a public accommodation, Judge Baird concluded.

Jankey also offered evidence suggesting that non-employees were permitted to shop in the Studio Store. But Fox showed that the only non-employees who did so were authorized guests or those attending events at the Commissary. Therefore the Studio Store had not become a public accommodation either.

Likewise, the ATM was not a public accommodation, because it is located in the Executive Office Building, a place to which the general public is not invited.

Finally, Judge Baird noted that wheelchair ramps have now been built in all three locations. This made the case moot, because the portion of the ADA on which Jankey's suit was based permits injunctive relief only, not damages.

Jankey v. Twentieth Century Fox Film Corp., 14 F.Supp.2d 1174, 1998 U.S.Dist.LEXIS 17748 (C.D.Cal. 1998) [ELR 20:10:11]

Purple-costumed character in act performed at sporting events by The Famous Chicken is non-infringing parody of Barney dinosaur, federal court rules in dismissing trademark and copyright suit

Texas is known for cattle - not dinosaurs or chickens. Yet Fort Worth was the chosen venue for a recent battle between two of the latter species' most famous members.

The fight was purely legal and began with a trademark and copyright infringement complaint filed by the Lyons Partnership, the owner of the purple Tyrannosaurus Rex named "Barney." The defendant was Ted Giannoulas, who appears as "The Famous Chicken" at some 150 events a year, many of them professional sporting events.

Giannoulas as "The Chicken" is a comic. Umpires, referees and athletes are the frequent targets of his

antics. But Giannoulas also performs skits which parody famous characters, both real and fictional. Michael Jackson and the Energizer bunny are just two of the many he has lampooned. Barney the dinosaur was yet another.

For his Barney skit, Giannoulas worked with a partner whose purple costume admittedly bore a "substantial likeness" to Barney. Indeed, Giannoulas has been told by some viewers that they thought his purple dinosaur was the "real" Barney, and he's even received complaints from parents whose children were upset by the skit.

Giannoulas did not intend to mislead his audience. Instead, he said, he "designed the sketch to parody a number of characteristics of Barney, including his naive, sappy, and corny personality, his general physical awkwardness, and his simplistic, childish body movements." He "intended the parody as a humorous comment on the sheer pervasiveness of Barney."

For these reasons, federal District Judge John McBryde has granted Giannoulas' motion for summary judgment and has dismissed the Lyons Partnership's lawsuit. In connection with its trademark infringement claim, the judge did a complete if succinct likelihood-of-confusion analysis, and concluded there was no such likelihood, largely because the offending skit was a parody. He dismissed the related trademark dilution claim, because the skit did not blur or tarnish the Lyons Partnership's marks.

The judge also dismissed the copyright infringement claim, on the grounds that Giannoulas had made a fair use of Barney's protected elements.

Lyons Partnership v. Giannoulas, 14 F.Supp.2d 947, 1998 U.S.Dist.LEXIS 11755 (N.D.Tex. 1998) [ELR 20:10:12]

Owner of registered trademark for reggae music record company "World Beat" fails in bid to enjoin CNN's use of "World Beat" for international music program and Web site

Evan Richards is known to his fans as "Richard Ace," the head of the reggae band "Sons of Ace." Richards is also a businessman. He owns the reggae record company "World Beat Records and Tapes," for which he obtained, ten years ago, a now-incontestable federal registration for its "World Beat" trademark.

CNN of course is a cable television network, one of whose divisions is CNN International, a network available in 210 countries. Last year, CNN International introduced a new program called "World Beat" covering music news from around the world.

In selecting "World Beat" for the name of its new program, CNN did not intend to use the name of

Richards' record company. Indeed, a CNN executive later testified that he didn't learn of Richards or his record company until Richards sued CNN for trademark infringement.

Not long after Richards filed suit, he sought a preliminary injunction against CNN's continued use of "World Beat," arguing that CNN's use of his company's trademark amounted to "reverse confusion." Federal District Judge Stewart Dalzell did a careful step-by-step analysis of Richards' claim, but denied his request for an injunction.

Judge Dalzell noted first that Richards' trademark registration covered only the production, sale and distribution of "pre-recorded audio cassette tapes, phonograph records, and compact discs." This meant, the judge said, that the impact and scope of the registration "must be strictly limited to pre-recorded music," especially because the Patent and Trademark Office has

issued other trademark registrations for the name "World Beat" in connection with other uses including magazines, clothing, and even musical instruments. Since CNN does not sell pre-recorded music, the judge said, the scope of Richards' registration did not "encompass CNN's use" of the "World Beat" mark.

Moreover, a multi-factor analysis led Judge Dalzell to conclude that CNN's use of "World Beat" in connection with its program and web site pose no likelihood of confusion with Richards' use of that name in connection with his company's sale of pre-recorded music.

The judge also found that "World Beat" is a generic term for a particular genre of music, and thus to the extent CNN or anyone else used that term "to denote a style or genre of music, such use could not be silenced under trademark law."

Judge Dalzell concluded by observing that "To allow Richards any monopoly over the use of the term

World Beat as it pertains to CNN's worldwide dissemination of news in the music industry would stifle the free expression of an important music voice."

Richards v. Cable News Network, 15 F.Supp.2d 683, 1998 U.S.Dist.LEXIS 11537 (E.D.Pa. 1998) [ELR 20:10:12]

Trademark infringement judgment won by video producer Kat Productions against Kat Country radio station is affirmed by North Dakota Supreme Court

It took two trips to the Supreme Court of North Dakota to finally decide the case. But when the last opinion was published, Kat Productions emerged the victor in its trademark infringement suit against radio

station KKCT-FM. Writing for the court, Chief Justice Gerald VandeWalle affirmed a trial court ruling that there was a likelihood of confusion between the name of video producer "Kat Productions" and the "Kat Country" name under which the radio station did business.

Among other factors considered by the court, Justice VandeWalle noted that in addition to broadcasting country music, the radio station did audio production for clients - a business quite similar to Kat Productions' video production business. Moreover, Kat Productions had introduced evidence of several occasions of actual consumer confusion between the two unrelated companies.

At earlier stages of the case, the trial court had dismissed Kat Productions' suit in response to a Kat Country motion for summary judgment. The state Supreme Court reversed that ruling, however, on the grounds that there were disputed issues of fact relevant

to the likelihood of confusion (ELR 19:8:17). Following remand, the trial court found there was a likelihood of confusion. It even granted an injunction that prohibits the radio station from using same-sounding alternatives to "Kat," as well as "Kat" itself.

The radio station appealed not only the judgment, but the breadth of the injunction as well. However, Justice VandeWalle has ruled that "Because the language of the injunction is properly limited to preventing the likelihood of confusion," the trial court "did not abuse its discretion" in prohibiting the station from using same-sounding alternatives.

Kat Video Productions, Inc. v. KKCT-FM Radio, 584 N.W.2d 844, 1998 N.D.LEXIS 187 (N.D. 1998) [ELR 20:10:13]

Federal court in New Jersey rules that it was not proper venue for infringement case filed by "aspiring writer and film-maker" against more than 40 movie studios, television companies, talent agents, advertisers and others; most claims are transferred to courts in other states, though claims against Steven Spielberg, Hanna-Barbera and two others are dismissed for lack of personal jurisdiction

Had the case gone forward as filed, it would have been the most massive in entertainment industry history.

Jay L. Rappoport, a self-described "aspiring writer and film-maker," sued more than 40 movie studios, television networks, stations and cable companies, talent agents, advertisers and others, alleging that they had "incorporated" his work "into some of the most commercially successful and creatively important films, television series, special effects work, and technological

innovations of the decade." The defendants did so, Rappoport asserted, in the movies "Twister," "Forrest Gump," "Jurassic Park" and "Pagemaster"; in the television series "Touched by An Angel" and "Wishbone"; and in Diet Coke commercials.

Rappoport filed his suit in federal District Court in New Jersey, because that is where he now lives. He acknowledged, however, that at the time the defendants allegedly misappropriated his "intellectual property" by means of "industrial espionage," "electronic surveillance" and the theft of confidential materials, he was living in Oregon. That in fact is where he allegedly produced his work - a proposed television series to be called "Portland Stories" - using the facilities of Portland Cable, after a written submission had been rejected by a News Corp executive in New York.

Rappoport's complaint prompted the defendants to file more than a dozen separate motions. None,

however, went to the merits of Rappoport's copyright, implied contract, trademark, antitrust and RICO claims. Instead, all of the motions argued that New Jersey was not the proper venue for the case, and that the New Jersey court did not have personal jurisdiction over some defendants.

Judge Alfred Lechner has agreed with the defendants. His 30-page opinion is a mini-treatise on the law concerning severing unrelated claims, transferring claims to other federal districts, and personal jurisdiction. For reasons explained in detail, Judge Lechner has severed Rappoport's claims against separate defendants from one another, and has transferred most of those claims to federal courts in New York, Georgia, Texas and Oregon. The claims against Steven Spielberg, Hanna-Barbera and two others were dismissed (without prejudice), however, because the judge found that

Rappoport had not shown that New Jersey had personal jurisdiction over those defendants at all.

Rappoport v. Steven Spielberg, Inc., 16 F.Supp.2d 481, 1998 U.S.Dist.LEXIS 12200 (D.N.J. 1998) [ELR 20:10:13]

RICO claims by former hockey players against NHL and former executive director of NHL Players Association are barred by statute of limitations, because investigative reports by Sports Illustrated and others gave players notice of claims more than four years before they filed suit, federal District Court rules

Alan Eagleson was executive director of the NHL Players Association from 1967 to 1991. He also represented players and even management personnel as their

agent and lawyer in individual contract negotiations with NHL team owners. He headed the organization that negotiated international hockey events for Canada. And he owned private hockey-related businesses, including one that placed NHL disability insurance policies and controlled the Players Association's own insurance.

At one time in his career, Eagleson might have been acclaimed as hockey's most influential executive. But by the end, he was vilified rather than praised. In 1994, a federal grand jury charged him with racketeering and other federal offenses; and eventually he pled guilty to mail fraud.

Eagleson's indictment prompted five former NHL players to file a civil RICO lawsuit against him as well as against the NHL itself, its teams, and several league officials. The civil suit alleged that the NHL had maintained a collusive arrangement with Eagleson, pursuant to which Eagleson had abandoned the players' interests

in collective bargaining in return for the NHL's "facilitation of and acquiescence in his self-enriching schemes."

If the players' allegations were true, Eagleson and the NHL would have violated section 302 of the Labor-Management Relations Act which prohibits employers from paying employee representatives, and prohibits employee representatives from accepting payment from employers. This violation would have constituted a "predicate act" under the civil RICO statute, so that it would have been violated too. Thus, the players' civil RICO lawsuit posed a serious risk of liability, not only to Eagleson individually, but also to the NHL and its teams and officials.

As the case developed, however, the defendants were able to avoid liability, not by disproving the players' allegations, but by showing that those allegations were filed too late. Federal District Judge Thomas O'Neill has dismissed the players' RICO claims on the

grounds that they are barred by RICO's four-year statute of limitations. In a 26-page opinion that reviews the facts in detail, Judge O'Neill has concluded that the players knew, or should have known, sufficient facts to show they had a claim, more than four years before they filed suit.

The players knew this, or should have, Judge O'Neill ruled, because as long ago as 1984, Sports Illustrated published a lengthy article entitled "The Man Who Rules Hockey" which reported virtually all of the facts that were later asserted in the players' RICO claim. Moreover, in 1988, several NHL players hired Ed Garvey (once the head of the National Football League Players Association) to investigate the affairs of the NHL Players Association. Garvey then issued a report which accused Eagleson of self-dealing and inadequate player representation and which recommended that players read the Sports Illustrated article, a copy of

which Garvey enclosed with his own report. Finally, in 1991, the Lawrence, Massachusetts Eagle-Tribune published a five-part series about the NHL which reported Eagleson's conflicts of interest and the NHL's awareness of those conflicts.

The players argued that even if these reports had given them notice of the necessary facts, Rule 11 of the Federal Rules of Civil Procedure would have barred them from filing a complaint based merely on news articles. (Rule 11 requires allegations to be based on a reasonable inquiry that shows they have evidentiary support.) Judge O'Neill rejected this argument as "wholly unpersuasive," however. "I do not suggest that plaintiffs should have brought suit merely upon the representations in news articles," the judge said. "Rather, these sources gave notice of both the existence of plaintiffs' potential claim and sources of whom plaintiffs could have inquired for verification and further

information. Plaintiffs would have acted consistent with Rule 11 had they simply contacted sources cited by Sports Illustrated or The Eagle-Tribune to verify those articles' charges."

Moreover, the judge added, the Garvey report was "not merely journalism, but the result of extensive investigations by lawyers and player agents, among others, written by a lawyer. . . . I am inclined to think that such a report would of itself be sufficient foundation for a lawsuit; at any rate, plaintiffs could have assured themselves of compliance with Rule 11's mandate by inquiring of the report's contributors and author as to the evidence supporting their charges." This would have been easy to do, because Garvey was one of the hockey players' lawyers in the case Judge O'Neill has dismissed.

Forbes v. Eagleson, 19 F.Supp.2d 352, 1998 U.S.Dist.LEXIS 13589 (E.D.Pa. 1998) [ELR 20:10:14]

Michigan Supreme Court reverses order that high school wrestling team be permitted to participate in regional tournament and order holding athletic association in contempt for refusing to permit team to participate

High school wrestling tournaments should be decided on the mats, and disputes should be resolved by athletic associations, not by courts. Moreover, while it is generally true that an athletic association must obey a court order even if it is clearly incorrect, there are circumstances under which an association's failure to do so is not contemptuous.

These are the lessons taught by a decision of the Michigan Supreme Court in a case that was triggered when a Lake Fenton High School wrestling coach discovered that one of his wrestlers had been defeated in a district semifinal match by a New Lothrop High School

wrestler who had competed in the wrong weight category.

The weight category error seems not to have been disputed. But the Michigan High School Athletic Association refused to advance Lake Fenton's team to the regional round of the tournament, even though it would have won the district semifinals if the New Lothrop wrestler had been disqualified or the results of his match been disregarded. Instead, the Association applied a long-standing policy that defeated teams are not advanced, even when their opponents' victories are forfeited.

Lake Fenton High School and the father of one of its wrestlers successfully challenged the Association's ruling in court. A Michigan trial court issued a last-minute injunction that required the Association to permit Lake Fenton's team to participate in the regional round of the tournament. However, by the time the injunction

was served on the Association, the regional semifinals had been completed, and the finals were underway. An Association official therefore decided the injunction could not be complied with, and it wasn't. The trial court then held the Association in contempt.

The Michigan Supreme Court has reversed both the injunction and the subsequent contempt citation.

In a Per Curiam decision, the Supreme Court noted that long before the controversy arose, Lake Fenton High School had agreed that it would accept the governance of the Michigan High School Athletic Association when participating in Association-sponsored competitions. "Such an agreement," the court said, "is analogous to the consent given by a party entering arbitration, who agrees in advance to be bound by any ruling that is within the scope of the arbitrator's authority, provided the ruling is not clearly violative of law. Here, the [Association] exercised its authority in the course of

such governance, and made a ruling that has no fundamental flaw. Hence, its decision should be upheld."

The Supreme Court reversed the trial court order holding the Association in contempt, because the Association official had "concluded correctly that it was not possible to grant participation at the semifinal level in a regional tournament where the finals had already begun."

Kirby v. Michigan High School Athletic Association, 585 N.W.2d 290, 1998 Mich.LEXIS 2864 (Mich. 1998) [ELR 20:10:15]

School district and interscholastic wrestling associations win dismissal of Title IX discrimination claim filed on behalf of high school girls who were not permitted to compete against boys in wrestling tournament; but court orders trial of girls' 14th Amendment claim for compensatory damages

During their junior years in high school, Courtney Barnett and Melony Monahan were varsity wrestling team members. Yet, when they sought to participate in mixed-gender matches in the North Texas Open wrestling tournament, they were denied permission to do so. Their mothers quickly filed suit on their behalf, alleging that the school district, the Texas Interscholastic Wrestling Association, and the Texas Wrestling Officials Association all violated Title IX and the 14th Amendment (as well as certain provisions of Texas state law).

Federal District Judge Joe Fish has dismissed some, but not all, of the girls' claims. One claim, he ruled, will have to go to trial.

The girls' Title IX claims were dismissed, because the Federal Regulations that implement Title IX expressly permit schools to sponsor single-sex athletic competition where "the activity involved is a contact sport." Judge Fish noted that wrestling "is the quintessential contact sport." And thus, he ruled, "the defendants were free to exclude Courtney and Melony from participation in boys wrestling without fear of Title IX liability."

The 14th Amendment does not include an express "contact sport" exception, so that claim involved different issues. Nevertheless, Judge Fish expressed surprise that none of the defendants sought dismissal of the 14th Amendment claim on its merits, because he cited many cases which seem to have held that it is constitutional to

exclude girls from boys' teams. Instead, the school district argued that it hadn't violated the 14th Amendment because the decision to bar Courtney and Melony from mixed-gender matches was made solely by the two wrestling associations. And the two wrestling associations argued that they aren't subject to the 14th Amendment, because neither is a state agency. These issues involved disputed issues of fact, however; so Judge Fish has ruled that the girls' claim for compensatory damages must go to trial.

The judge did dismiss the girls' 14th Amendment claim for injunctive relief, because by the time the defendants' motions were heard, both girls had already graduated from high school and thus were no longer eligible to compete, no matter what the outcome of the case. The judge dismissed the girls' state law claims for injunctive relief for the same reason.

Barnett v. Texas Wrestling Association, 16 F.Supp.2d 690, 1998 U.S.Dist.LEXIS 12373 (N.D.Tex. 1998) [ELR 20:10:15]

Connecticut ticket scalping statute does not apply to out-of-state ticket sales, even for in-state events, though misrepresentations concerning seat locations do violate Connecticut law, state Supreme Court rules

In the opinion of some, ticket "brokers" render a valuable service. But one person's "broker" is another's "scalper." And ticket scalping - selling tickets to entertainment and sports events for more than face value - is illegal in some states. Connecticut is one such state. Scalping there is a crime and a civil unfair trade practice.

Roderick N. Cardwell is a Connecticut-resident ticket broker. He does business as there as Ticketworld, selling tickets to out-of-state events. He's able to do so without liability, because the Connecticut scalping law only prohibits the overpriced sale of tickets to events taking place in Connecticut.

In order to avoid Connecticut's ban on scalping tickets to in-state events, Cardwell operates an office in neighboring Massachusetts, from which he sells all tickets to Connecticut events. Cardwell is scrupulous about this: all of his customers for Connecticut events are referred to and sold tickets from his Massachusetts office, including those customers who live in Connecticut and those who see his advertising in Connecticut newspapers.

Though the Connecticut statute clearly applies only to the sale of tickets for events in that state, the statute is not clear about whether it reaches ticket sales

made from outside Connecticut. New York's scalping statute has been interpreted to apply to sales made outside of New York; and the constitutionality of its out-of-state application has been upheld (ELR 17:3:17).

Apparently following New York's lead, Connecticut officials interpreted their statute to apply to out-of-state ticket sales too; and at first, they were successful. A Connecticut trial court ruled that Cardwell had violated the statute and enjoined him from continuing to do so. The trial court also found that Cardwell had committed unfair trade practices by giving three customers incorrect information concerning the location of the seats they had purchased; and the court ordered restitution and assessed fines as a result of those violations.

Cardwell appealed with some, though not complete, success. In an opinion by Justice Robert Berdon, the Connecticut Supreme Court has held that the Connecticut scalping statute does not apply to out-of-state

ticket sales, even when those tickets are advertised in Connecticut and are for in-state events. Justice Berdon first rejected the state's argument that in-state newspapers ads constituted an in-state "offer" to sell tickets (which also is prohibited by the statute). "It is elementary black letter law," he said, "that an advertisement is not an offer, but is merely an invitation to bid or to enter into a bargain." The justice then concluded that the Connecticut statute does not reach ticket sales from out-of-state offices. Neither the statute nor its legislative history reflect any intention that the statute apply to such sales, and thus Justice Berdon applied the usual rule that Connecticut punishes only those offenses committed within the state. The court therefore reversed the injunction that had barred Cardwell from selling tickets to Connecticut events from his Massachusetts office.

Cardwell did not fare so well with respect to the seat-location misrepresentation claims made against

him. Cardwell does not appear to have challenged the out-of-state application of Connecticut's unfair trade practices law with respect to those claims. He merely argued that the trial court had abused its discretion in finding those misrepresentations were "deceptive" practices. Justice Berdon rejected Cardwell's argument, however, saying that his customers should not have been told their seats were well-located unless Cardwell's salespeople actually knew they were. The Supreme Court therefore affirmed the trial court's order that Cardwell refund to his customers the difference between what they had paid and the fair value of their seats, as well as the fines the trial court had assessed for this violation.

State of Connecticut v. Cardwell, 718 A.2d 954, 1998 Conn.LEXIS 338 (Conn. 1998) [ELR 20:10:16]

Erie ordinance banning public nudity is declared unconstitutional by Pennsylvania Supreme Court, even though ordinance was strikingly similar to Indiana law whose constitutionality was upheld by U.S. Supreme Court

Kandyland is an erotic dancing "establishment" in Erie, Pennsylvania. Women dance nude there. So it was a matter of some concern to Kandyland's owner when the city of Erie enacted an ordinance that prohibits nudity in public places.

Erie's ordinance is "strikingly similar" to an Indiana statute whose constitutionality was upheld by the United States Supreme Court in the case of Barnes v. Glen Theatre (ELR 13:4:8). Thus, when Kandyland's owner challenged the constitutionality of the Erie ordinance, the city was probably confident it would prevail.

It didn't - not at first, and not in the end. The Court of Common Pleas declared the ordinance unconstitutional. The city appealed, and the Commonwealth Court reversed. But then Kandyland's owner appealed, and now the Pennsylvania Supreme Court has reversed again, and has held that the ordinance is unconstitutional.

Writing for the court, Justice Ralph Cappy acknowledged the similarity between the Erie ordinance and the Indiana statute upheld in Barnes v. Glen Theatre. But Justice Cappy noted that the justices of the U.S. Supreme Court "splintered" in Barnes and "produced four separate, non-harmonious opinions." Justice Cappy carefully reviewed each of those opinions, but concluded that "aside from the agreement by a majority . . . that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed." As a result, though "we may

find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the [Erie ordinance] passes muster under the First Amendment."

This meant that the Pennsylvania Supreme Court had to do its own "independent examination" of the Erie ordinance. When it did, the ordinance did not pass muster.

Justice Cappy found that the purpose of the ordinance was "linked with the content-based motivation to suppress the expressive nature of nude dancing." Since the ordinance was content-based, it had to pass the "strict scrutiny" test to be constitutional. But it flunked that test.

The ordinance was passed to deter sex crimes, such as prostitution and rape. Those are compelling governmental interests, Justice Cappy acknowledged. On the other hand, the ordinance was not "narrowly

tailored" to accomplish that purpose. Punishing "those who commit sex crimes . . . would be a far narrower way of achieving the compelling governmental interest," the justice concluded.

Since the ordinance was content-based but not narrowly-tailored, Justice Cappy held that it was unconstitutional.

Pap's A.M. v. City of Erie, 719 A.2d 273, 1998 Pa.LEXIS 2307 (Pa. 1998) [ELR 20:10:17]

Federal district courts in New York and Florida disagree about whether those who are sued for intercepting closed-circuit telecasts of boxing matches are entitled to jury trials

In rulings issued just a few weeks apart, federal District Courts in New York and Florida have disagreed about whether those who are sued for intercepting closed-circuit telecasts of boxing matches are entitled to jury trials. Both actions were brought under section 605 of the Cable Communications Policy Act, which provides that damages may be awarded by a "court." The Act says nothing about juries.

Nevertheless, in the Florida action, Judge James Lawrence King ruled that the owners of a restaurant known as Harry's Place are entitled to a jury trial on the question of whether they violated the law by showing the 1996 fight between Mike Tyson and Evander

Holyfield to restaurant patrons, without authorization from National Satellite Sports, the company that was licensed to distribute the fight telecast to commercial establishments in that region. In so ruling, Judge King found that the claim made by National Satellite Sports was analogous to a copyright infringement claim. Thus the judge relied on the Supreme Court's decision in Feltner v. Columbia Pictures (ELR 19:12:6) which held that parties are entitled to jury trials in copyright infringement cases, even when the copyright owner seeks only statutory (rather than actual) damages.

On the other hand, in the New York action, Magistrate Judge David Hurd ruled that the owners of the Hurley Mountain Inn are not entitled to a jury trial in a case brought against them by Joe Hand Promotions, the company that had been licensed to distribute closed-circuit telecasts of the 1996 Holyfield and Czyz fight in that region. Judge Hurd also considered the applicability

of Feltner v. Columbia Pictures to cable TV interception cases. But he noted that cable piracy cases "did not exist in England prior to the merger of courts of law equity," the way copyright cases did. The judge also found that Joe Hand Promotions' claim is different from a copyright claim, because Joe Hand did not have an ownership interest in the boxing match, nor was the match the product of Joe Hand's ingenuity or intellectual labor.

National Satellite Sports, Inc. v. No Frills Restaurant, Inc., 15 F.Supp.2d 1360, 1998 U.S.Dist.LEXIS 12765 (S.D.Fla. 1998); Joe Hand Promotions, Inc. v. Nekos, 18 F.Supp.2d 214, 1998 U.S.Dist.LEXIS 13613 (N.D.N.Y. 1998) [ELR 20:10:17]

Previously Reported:

The National Collegiate Athletic Association has settled Law v. NCAA - a case in which the legality of an NCAA rule that limited the earnings of certain basketball coaches was successfully challenged by affected coaches in a federal antitrust lawsuit. The NCAA has announced that it will drop its appeal and will pay the injured coaches $54.5 million. The case was brought against the NCAA in response to a rule passed by its membership in 1991 that limited earnings for certain basketball coaches to $16,000 a year. In 1995, a federal District Court in Kansas City declared that the rule violated federal antitrust law (ELR 18:2:10). The NCAA lost its appeal from that ruling (ELR 20:3:14), and its petition to have the U.S. Supreme Court hear the case was denied last fall (ELR 20:7:23). A trial on damages was conducted in the spring of 1998; a jury found in

favor of the plaintiffs and awarded them more than $22 million. The court trebled the damages because it was an antitrust case to approximately $67 million. Earlier this year, the judge in the case granted the plaintiffs' motion to increase the damages to nearly $75 million to adjust for inflation to the current value of the damages. The NCAA had appealed what it argued were mistakes made in the damages trial. Mediation services offered by the Court of Appeals enabled the parties to settle the case.

According to news accounts, Michael Jackson has been awarded $200,000 in attorneys fees in a case in which singer-songwriter Crystal Cartier unsuccessfully contended that Jackson's recording of "Dangerous" infringed her copyright in her own song "Dangerous." (ELR 17:9:17)

The United States Supreme Court has granted a petition for certiorari in Greater New Orleans

Broadcasting Association v. United States, 119 S.Ct. 863, 1999 U.S.LEXIS 514 (1999), and thus will resolve a conflict among the Circuits on the issue of whether a federal statute that prohibits broadcast advertising for casino gambling is constitutional (ELR 20:7:22).

The United States Supreme Court has denied petitions for certiorari in: Marcus v. Iowa Public Television, 119 S.Ct. 799, 1999 U.S.LEXIS 139 (1999), in which lower courts held that Iowa public stations could exclude candidates from televised debates if they were not "newsworthy" (ELR 19:2:22); NABET v. ABC, 119 S.Ct. 800, 1999 U.S.LEXIS 141 (1999), in which a federal Court of Appeals affirmed an arbitration ruling against NABET arising out of the union's threat to disrupt the network's broadcast of sporting events in Hawaii (ELR 20:5:18); Campos v. Ticketmaster, 119 S.Ct. 865, 1999 U.S.LEXIS 570 (1999), in which a federal Court of Appeals held that although ticket-buyers have

standing to seek injunctive relief against Ticketmaster for alleged antitrust violations, they do not have standing to seek damages (ELR 20:5:19); Dodds v. American Broadcasting Co., 119 S.Ct. 866, 1999 U.S.LEXIS 579 (1999), in which the dismissal of a defamation suit filed by a judge, complaining about a PrimeTime Live segment, was affirmed (ELR 20:6:23); and SBC Communications v. FCC, 119 S.Ct. 889, 1999 U.S.LEXIS 735 (1999), in which the constitutionality of a federal statute prohibiting the Bell operating companies from engaging in electronic publishing was upheld (ELR 20:9:18).

The Court of Appeals has published a revised and superseding version of its decision in Chavez v. Arte Publico Press, 157 F.3d 282, 1998 U.S.App.LEXIS 27660 (5th Cir. 1998), holding that states are immune from suit in federal courts for copyright and trademark infringement (ELR 20:5:17).

[ELR 20:10:18]

DEPARTMENTS

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Applicability of the Digital Performance Right in Sound Recordings Act of 1995 by Derek M. Kroeger, 6 UCLA Entertainment Law Review 73 (1998)

Punt or Go For the Touchdown? A Title VII Analysis of the National Football League's Hiring Practices for Head Coaches by Jim Moye, 6 UCLA Entertainment Law Review 105 (1998)

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[ELR 20:10:19]