## INTERNATIONAL DEVELOPMENTS

# Fairness in Music Licensing Act Challenged at the World Trade Organization

by Laurence R. Helfer*

The Fairness in Music Licensing Act of 1998 (FMLA) is under attack at the World Trade Organization (WTO).1 On January 29, 1999, the European Union (EU) began formal consultations with the United States to discuss a complaint by the Irish Performing Rights Organization that the FMLA is causing its members to lose $1.36 million annually in music licensing revenues.2 The dispute heated up in mid-February when Australia, Canada, and Switzerland joined the EU in challenging the new statute, claiming that copyright owners in their countries were also losing significant performance royalties in the United States.3 Under

WTO rules, if the countries cannot reach a mutually satisfactory solution within sixty days, the complaining nations may ask the WTO to set up a dispute settlement panel to rule on whether the FMLA violates the United States' international treaty obligations to protect music written by foreign authors.

At issue in the talks is whether the FMLA violates the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) by authorizing, under certain conditions, the public performance of music in bars, shops, and restaurants without the payment of licensing fees. The challenge to the FMLA is the first time since the creation of the WTO in 1996 that US copyright laws have come under attack as violating international trade agreements. Until now, the United States has been the complaining party in copyright matters. It has used the

WTO's dispute settlement procedures to challenge the failure by its European trading partners to implement their obligations under the Berne and TRIPs treaties, thereby diminishing the rights of US copyright owners in these countries. In the last eighteen months, for example, the US has reached favorable settlements in complaints against Ireland and Sweden. Both counties agreed to beef up their domestic copyright laws to provide the level of copyright protection and enforcement that the US claimed was compelled by the two treaties.4

The shoe is now on the other foot for the United States in seeking to defend the FMLA. The heart of the FMLA is an amendment to section 110(5) of the Copyright Act of 1976, a provision of US copyright law which, since 1978, has granted to commercial establishments a limited exemption from paying license fees for playing music to entertain customers who eat, drink or shop in their establishments.5 Section 110(5) was not designed as a broad exception to copyright owners' exclusive right to perform their works publicly. To the contrary, the exemption applied only if a number of important requirements were met. First, commercial establishments could only perform music or other copyrighted works by the reception of a radio or television broadcast; direct performances of recorded music or video tapes required a license. Second, the store, bar or restaurant could not collect a "direct charge" to see or hear the broadcast. Third, the commercial establishments were required to perform the works using a "single receiving apparatus of the kind commonly used in private homes."[6] And finally, a few courts had limited the exemption to businesses whose total square footage fell below a certain threshold.[7]

Notwithstanding these limitations, section 110(5) was a thorn in the side of performing rights organizations such as ASCAP, BMI and SESAC who collect license fees on behalf of both domestic and foreign authors of copyrighted music. The organizations brought numerous challenges to the law, urging courts to limit the exemption exclusively to small businesses which use an ordinary stereo system and are "not of a sufficient size to justify, as a practical matter, a subscription to a commercial background music service . . . . "8 Most of these challenges were unsuccessful, however, with courts in several high profile cases upholding the exemption's application to large commercial businesses, provided that they used stereo equipment readily available to private consumers.9

Business groups were also dissatisfied with section 110(5), but for very different reasons. They argued that songwriters, composers, and publishers of copyrighted music were seeking to "double dip" for licensing royalties by charging for the secondary use of a performance that had already been licensed to be broadcast by radio and television stations. Led by the National Restaurant Association, these groups began to lobby Congress in 1994 to enact a blanket licensing exemption for commercial establishments performing music transmitted over radio and television. ASCAP, BMI and SESAC stridently opposed any relaxation of the existing section 110(5) limitations and successfully blocked any change in the law for several years.

The Fairness in Music Licensing Act of 1998 represents the legislative compromise Congress brokered between these two interest groups. Specifically, the new law effectively eliminates the requirement that businesses use a "home-style" stereo receiver to qualify for a music licensing exemption, a vague and technologically-sensitive benchmark that judges had particular difficulty in applying. In its place, the FMLA imposes bright line rules based on the size of the establishment.10 It grants a blanket exemption to stores that are smaller than 2000 square feet, and to restaurants and bars that are smaller than 3750 square feet, regardless of the type of receiver or number of speakers used to transmit the music to customers. Larger businesses are also exempt, provided that they use fewer than a specified number of speakers or television sets.11 Taken together, these new rules will make it significantly easier for business establishments to avoid paying license fees to the performing rights societies for playing radio and TV music broadcasts for their customers.12

The problem for the United States from an international trade perspective is that, in its rush to split the difference between domestic interest groups, Congress either forgot or chose to ignore our treaty obligations. Under the TRIPs Agreement, article 9(1) of which incorporates by reference nearly all of the Berne Convention, the United States must provide a minimum level of copyright protection to all foreign authors and copyright owners who are nationals of the 130-plus counties that have ratified the two treaties. In particular, Article 11bis of the Berne Convention grants to foreign authors the exclusive right to authorize the public broadcasting and wireless communication of their copyrighted works, including "the public communication by loudspeaker or any other analogous instrument transmitting . . . the broadcast of the work."13 Although Article 11bis also allows the United States to place "conditions" on the exercise of this exclusive performance and broadcasting right, those conditions cannot prejudice the copyright owner's "right to obtain equitable remuneration."14 According to the EU, the FMLA violates both of these clauses by barring foreign songwriters, composers, and publishers from collecting royalties from a large segment of stores, bars, and restaurants in the United States.15

The United States may seek to defend the new statute on the ground that the licensing exemption is merely a "minor reservation" to the broadcast and performance rights. However, these reservations have traditionally been limited to de minimis non-commercial uses of copyrighted works, such as singing at religious ceremonies or performances by military bands at public festivals.16

A more important defense for the United States is found in Article 13 of the TRIPs Agreement, which allows treaty nations to impose "limitations or exceptions" on copyright owners' exclusive rights. However, these restrictions must be "confined . . . to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."17 Given the widespread debate that exists on the meaning of this language, it is difficult to predict whether the WTO's dispute settlement bodies will find the FMLA to violate the TRIPs Agreement.18 A ruling by the WTO in favor of the complaining states would obligate the United States to repeal or substantially revise the new law, pay compensation, or face the prospect of the retaliatory trade sanctions.19

Although the outcome of negotiations at the WTO is uncertain, this much is clear: the United States is not immune from challenges to its copyright laws by its trading partners, and Congress ignores international copyright law at its peril.

NOTES

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international courts and adjudication, and international human rights law. Thanks to Jay Dougherty for comments on an earlier draft. Copyright 1999 Laurence R. Helfer.

1. For the complete text of the FMLA, see 14 Patent, Trademark & Copyright Journal (BNA), No. 1396, 701, 735 (Oct. 15, 1998). For an overview of the statute's provisions, see ELR 20:6:9.

2. Daniel Pruzin, EU Seeks WTO Talks on 1998 Changes to U.S. Music-Licensing Copyright Rules, 16 Int'l Trade Reporter (BNA) 224 (Feb. 10, 1999).

3. Australia, for example, alleged that the United States is "a major source of performance royalties for its copyright holders, whose losses from the Fairness in Music Licensing Act are estimated at over $1 million per year." Daniel Pruzin, Three Countries Joint EU-U.S. Talks on Rules Violations Under Copyright Act, 16 Int'l Trade Reporter (BNA) 321 (Feb. 24, 1999).

4. Gary G. Yerkey, U.S., Sweden Settle Dispute Over Intellectual Property Protection, 15 Int'l Trade Reporter (BNA) 2065 (Dec. 9, 1998) (Swedish Parliament adopted new legislation to enhance provisional remedies available to copyright owners in civil cases); U.S. Withdraws Request for WTO Panel on Ireland IP After Understanding Reached, 15 Int'l Trade Reporter (BNA) 269, 270 (Feb. 18, 1998) (US and Ireland concluded an "understanding" in which Ireland committed to enact copyright legislation relating to translations of official works, architectural works, anonymous and pseudonymous works, ownership of rights in films, and exceptions to exclusive rights).

5. 17 U.S.C. section 110(5).

6. Id. It is this technological limitation that has led some courts and commentators to refer to section 110(5) as the "homestyle" exemption.

7. See, e.g., Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1039 (D. Mont. 1990) (finding an 880 square foot establishment too large to fall within section 110(5) exemption) (ELR 13:1:15).

8. Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F.2d 1482, 1489 (7th Cir. 1991) (citing H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976)) (ELR 14:1:12).

9. See, e.g., Edison Bros. Stores v. Broadcast Music, Inc., 954 F.2d 527 (8th Cir. 1991), cert. denied, 112 S. Ct. 1995 (1992) (rejecting exemptions application to chain of over 2,000 clothing and shoe stores with an average size of 2268 square feet, "where each store operated a single radio receiver with two attached shelf speakers to play radio broadcasts in the stores for the enjoyment of employees and customers") (ELR 13:9:8).

10. The FMLA does not, however, repeal the pre-existing "homestyle" exemption, but rather adds a

separate and additional exemption for "nondramatic musical works" only. This exemption is likely to encompass most commercial establishments previously protected by the old section 110(5).

11. For example, the statute provides that stores greater than 2000 square feet and bars and restaurants greater than 3750 square feet are exempt from paying a license to the owner of the music copyright if, in the case of a performance "by audio means only, the performance is communicated by means of a total or not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room of adjoining outdoor space." FMLA, sections 202(a)(1)(B)(i)(I), 202(a)(1)(B)(ii)(I). Similar equipment restrictions are placed on transmissions of music "by audiovisual means." Id. sections 202(a)(1)(B)(i)(II), 202(a)(1)(B)(ii)(II).

12. BMI and ASCAP Reject Licensing Legislation, <http://www.ascap.com/press/legislation-100898.html> at 2 (reporting that Congressional Research Service determined that FMLA will allow "more than 70% of bars and restaurants to use radio and TV music for free").

13. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971, 828 U.N.T.S. 221, art. 11bis(1)(iii).

14. Id. art 11bis(2).

15. According to the European Commission, the old "homestyle" exemption applied to between 20% and 35% of US small businesses with less than 20 employees, and 6% to 12% of small businesses employing more than 20 persons. 1998 O.J. (L 346) 60, 63 (Dec. 12, 1998). See also note 12 supra.

16. Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 533-36 (1987).

17. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, reprinted in 33 I.L.M. 1197 (1994), art. 13.

18. For a discussion of how article 13 may be interpreted by the WTO dispute settlement bodies, see Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy, 39 Harv. Int'l L. J. 357, 436-38 (1998).

19 See id. at 384-86.

[ELR 20:11:4]

## RECENT CASES

### NCAA not subject to Title IX ban on sex discrimination simply because it receives dues from federally-assisted colleges, Supreme Court holds; whether Title IX applies to NCAA for other reasons is remanded for further proceedings

The National Collegiate Athletic Association is not subject to Title IX - the federal statute that bans sex discrimination by educational institutions that receive federal financial assistance - simply because the NCAA receives dues from colleges and universities that do receive such aid. The United States Supreme Court has so ruled in a case that challenges that legality of the way in which the NCAA applies its "Postbaccalaureate Bylaw." This tongue-twister of a rule is one that makes graduate students ineligible for intercollegiate sports, unless they play for the same schools where they earned their undergraduate degrees.

The NCAA has been sued by Renee Smith, a graduate student at the University of Pittsburgh, who played intercollegiate volleyball for two seasons while an undergraduate at St. Bonaventure University, and wanted to continue doing so at the University of Pittsburgh. Pittsburgh applied to the NCAA for a waiver of the Postbaccalaureate Bylaw on Smith's behalf; but the NCAA denied Pittsburgh's request. According to Smith, the NCAA administers the "Postbaccalaureate Bylaw" in a way that violates Title IX, because, she alleges, it grants more waivers to male than female postgraduate student-athletes.

The factual accuracy of Smith's allegations has not yet been litigated, because so far, courts have disagreed about whether Title IX applies to the NCAA at all. A District Court dismissed Smith's suit entirely, because it concluded that since the NCAA does not itself receive federal financial assistance, Title IX does not apply to it. The Court of Appeal, however, reversed. It noted that a Department of Education regulation says that Title IX applies to any program which receives "or benefits" from federal aid; and thus Title IX would apply to the NCAA if Smith proved that it receives dues from schools that receive such aid (ELR 20:5:20).

Now, in a short opinion, the Supreme Court has reversed again. Writing for a unanimous Court, Justice Ruth Bader Ginsburg said that the Court of Appeals had misread the Department of Education regulation.

Properly interpreted, she said, it "makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding." In this case, "At most, the [NCAA's] receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage."

Smith's case is not over yet, however. With the support of the United States as amicus curiae, Smith also argued that Title IX applies to the NCAA for two other reasons: because it receives federal aid through the NCAA-administered National Youth Sports Program; and because the NCAA's members have given it authority to control their athletic programs. Since neither of these arguments had been addressed by the lower courts, the Supreme Court remanded the case to them for further proceedings.

National Collegiate Athletic Association v. Smith, 119 S.Ct. 924, 1999 U.S.LEXIS 1511 (1999)[ELR 20:11:7]

## Federal appellate court upholds arbitrator's award requiring Tristar Pictures to include disclaimer in version of "Thunderheart" that studio edited for television over objections of director Michael Apted

The theatrical version of "Thunderheart" ran 118 minutes - too long to be shown in a two-hour television slot, after time is reserved for commercials. So Tristar Pictures, the movie's distributor, asked director Michael Apted to help edit "Thunderheart" down to 90 minutes. Apted refused, and when he did, the studio edited the film itself.

Tristar made 270 cuts totaling 22 minutes, sped up the credits by two minutes, and electronically compressed the rest of the film to shorten it four minutes more. Tristar did this over Apted's objections that the edits infringed on his creative role as a director and violated his moral commitments to the Sioux, on whose South Dakota reservation the movie was filmed.

Disagreements about editing are not unusual. In fact, the DGA Basic Agreement contains a section that permits a director to demand that a pseudonym be used, if the director is able to persuade three members of a four-person panel that a pseudonym is warranted by studio cuts. Since two members of such panels are studio representatives, and only two represent the DGA, at least one studio representative must agree with the director, before a pseudonym may be required.

In Apted's case, the DGA called for a panel to be convened, but because of delays, it had not yet met less than a week before "Thunderheart's" scheduled broadcast. The DGA therefore sought an expedited arbitration under a separate provision of the DGA Basic Agreement.

The arbitration clause of the Basic Agreement is "very broad" but does not explicitly cover pseudonym disputes. The pseudonym clause, by contrast, is quite narrow, but it covers exactly the sort of dispute that had arisen between Tristar and Apted. Tristar therefore argued at the arbitration hearing that the arbitrator lacked authority to hear the dispute. But instead of walking out after making its jurisdictional argument, Tristar continued by presenting evidence of its good faith in editing the movie.

The arbitrator agreed with Tristar that arbitration was not the "most appropriate way" to resolve the pseudonym issue. But rather than dismiss the claim, the arbitrator ruled on its merits, where Tristar came up short. Indeed, on the merits, the arbitrator concluded that Tristar's cuts were so severe that they breached the studio's duty of good faith and fair dealing set forth in yet another section of the Basic Agreement. The arbitrator therefore made a conditional award: if Apted didn't win the right to a pseudonym from the four-person panel, Tristar would have to include a disclaimer indicating Apted's view that the studio's alterations changed the movie's narrative, characterizations and pace, and indicating that Apted "is not associated with it."

Forced to choose between the evil of using a pseudonym or the evil of using Apted's name with such a disclaimer, Tristar used a pseudonym. When "Thunderheart" aired on Fox, it was called "An Adam Smithy Film." Tristar also filed a petition to vacate the arbitrator's award, arguing he had overstepped his authority. But Tristar has lost that proceeding too.

In an opinion by Judge Alex Kozinski, the Ninth Circuit Court of Appeals has held that "Regardless of whether" the arbitrator's "solution" is one that it would have "come up with through our own independent interpretation of the Basic Agreement, we must abide by the arbitrator's plausible interpretation of the agreement." The appellate court therefore affirmed a district court ruling upholding the award.

In so ruling, Judge Kozinski noted that the DGA Basic Agreement "gives the arbitrator ample leeway in fashioning remedies." And he quoted Supreme Court authority for the principle that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." In this case, the judge concluded that "the arbitrator's ruling that the covenant of good faith and fair dealing gives an aggrieved director more remedies than just seeking a Smithee [i.e., a pseudonym] is not completely implausible."

Moreover, Judge Kozinski emphasized that the arbitrator's disclaimer award "didn't take away the studio's right . . . to edit the film as it sees fit. It only required Tristar to disclose Apted's view of the changes Tristar made to his film."

Tristar Pictures, Inc. v. Director's Guild of America, 160 F.3d 537, 1998 U.S.App.LEXIS 28023 (9th Cir. 1998)[ELR 20:11:7]

**TV producer's lawyer is not required to indemnify producer's agent for damages allegedly suffered because producer's contract with Lorimar for series "Full House" allegedly did not adequately protect producer against loss of benefits**

TV-producer Jeff Franklin created the series "Full House" and entered into a contract with Lorimar Productions to serve as the series' executive producer. At the time the contract was negotiated, Franklin was represented by Major Clients Agency and by attorney John Diemer.

It was no doubt a happy time. Among other things, Franklin's contract provided he would receive certain financial benefits, including a participation in the series' profits, if he served as its executive producer for at least one year. The contract also provided, however, that Lorimar had the right to remove Franklin from his executive producer position; and it did, before even one year had passed.

Lorimar therefore took the position that Franklin was not entitled to the financial benefits or profits he expected. Franklin sued Lorimar, asserting otherwise. Franklin and Lorimar settled that lawsuit, on terms they agreed to keep confidential. But that lawsuit was only the first of three cases that eventually resulted from Franklin's loss of his executive producer position.

The second case arose out of a dispute between Franklin and Major Clients concerning the amount of the agency's fee, and how that fee would be affected by the earlier settlement of the Franklin-Lorimar lawsuit. That case was decided in arbitration, on terms that have not been made public either.

The arbitration result led to the third case: a suit brought by Major Clients against John Diemer. Major Clients alleged that Diemer failed to recognize and alert their mutual client Franklin that the "lock in" and "vesting" provisions of his Lorimar contract were worded in a way that permitted Lorimar to remove him from the series he had created and thereby deprive him of profits and other benefits. According to Major Clients, this alleged failure led to the lawsuit between Franklin and Lorimar, and the settlement of that case had caused damage to Major Clients, for which it sought equitable indemnity from Diemer.

Diemer responded to Major Clients' suit by filing a demurrer (under California practice, a motion to dismiss for failure to state a recognized legal claim). The trial court sustained the demurrer and dismissed the case. And the California Court of Appeal has affirmed. The appellate court offered several reasons for its conclusion that Major Clients failed to state a claim. One of those reasons is unique to this case, but the others will be of interest to entertainment lawyers and talent agencies generally.

The reason that is unique to this case is that Major Clients' complaint alleged that its fee dispute with Franklin had been decided by arbitration - but the complaint did not describe the arbitration decision, did not allege that Major Clients had been found liable to Franklin, and thus did not allege that Major Clients had discharged any such liability. "Inasmuch as the basis for the remedy of equitable indemnity is restitution," the appellate court explained, "a pleading is fatally defective if there is an absence of an allegation that Major Clients has discharged a liability that it should be the responsibility of Diemer to pay."

Of more general interest was the appellate court's conclusion that Diemer had no obligation to indemnify Major Clients, because the agency's complaint "does not allege that Major Clients engaged Diemer as its attorney or that it had in any manner established an attorney-client relationship with Diemer."

The appellate court acknowledged that those who jointly injure a third party may have equitable indemnity obligations to one another. But, the court added, "indemnification is not automatically available" in all such cases. "In this case," the appellate court said, "we hold that indemnity would be inappropriate. Major Clients was an entity ostensibly expert in the type of negotiations in which it engaged and the negotiations were carried out by a Major Clients representative who was an attorney." It was inappropriate in this case for a "public policy" reason: "an attorney's duty of loyalty to his client should not be diminished by imputing to him legal obligations to the client's other advisors, be they attorneys or acting in some other capacity, unless such parties are clearly intended beneficiaries of the legal services being rendered."

Major Clients Agency v. Diemer, 79 Cal.Rptr.2d 613, 1998 Cal.App.LEXIS 943 (Cal.App. 1998)[ELR 20:11:8]

## Quilt designer established prima facie claim of copyright infringement against those involved in producing and merchandising movie "How to Make an American Quilt," federal court rules

Barbara Brown is a Maryland lawyer and an African American quilter. These seemingly unrelated aspects of her life came together in 1994 when she received a telephone call from a woman named Patricia McCormick, the President of the Southern California Council of Quilt Guilds. McCormick had been retained as a technical consultant to Amblin Entertainment and Universal City Studios in connection with their production of the movie "How to Make an American Quilt."

McCormick asked Brown to design a fifteen-block quilt pattern for use in the movie; and, as a quilter, Brown agreed to do so. As a lawyer, Brown added that she would do so for $750, if she could retain the copyrights in all of her designs. McCormick later reported to Brown that "the studio" had approved Brown's retention of the "design rights" to her quilt patterns. And shortly thereafter, McCormick sent Brown a letter agreement that also confirmed that Brown would "retain all creative rights" to Brown's designs.

Brown's quilt - entitled "The Life Before" - was used in the movie, without objection or complaint. Brown has however objected to several other uses of her quilt, so much so that she filed a lawsuit in federal District Court, alleging copyright as well as other causes of action, against McCormick, Amblin, Universal and others.

In brief, Brown complained that her quilt was used in two unauthorized ways: (1) in movie-related merchandise licensed by Universal; and (2) in a second quilt - designed by McCormick and entitled "Where Love Resides" - that is featured in the movie and in most movie-related merchandise. The second of these claims arose because McCormick's "Where Love Resides" quilt contains sixteen blocks, one of which McCormick copied from one of the blocks in Brown's "The Life Before" quilt.

In cross-motions for summary judgment, the defendants argued that Brown's copyright was invalid, because her quilt - especially the block copied by McCormick - was not sufficiently original. Brown's quilt was in fact based on public domain quilts in the Smithsonian Museum. Brown of course argued to the contrary, and Judge Benson Legg agreed with her. Under the "minimal degree of creativity" standard established by the Supreme Court in Feist v. Rural Telephone (ELR 12:12:17), Brown's quilt is sufficiently original to be protected by copyright, the judge concluded.

Apparently the defendants did not dispute they had engaged in unauthorized copying with respect to merchandising uses of Brown's "The Life Before" quilt. Judge Legg also ruled that they had engaged in unauthorized copying with respect to the one block that had been copied by McCormick in creating the "Where Love Resides" quilt. The judge acknowledged that copying is unauthorized only if "original" material is copied; and he acknowledged that some features of the copied block were not protectible. But he found that McCormick had copied original features of Brown's quilt block, because McCormick herself had noted (in a book she wrote about the making of the movie) how earlier designs for this block had been unsatisfactory even though earlier designers had based their designs on the same public domain quilts used by Brown.

Judge Legg rejected the defendants' argument that the "Where Love Resides" quilt was a "joint work" created by McCormick along with Brown - an argument they made, because the use of a joint work by one author does not infringe the copyright interest of the other author. "Where Love Resides" was not a joint work, the judge held, because the copied block from Brown's quilt was neither "inseparable" from nor "inter-dependent" with the rest of "Where Love Resides."

The judge also rejected the defendants' arguments that their use of the block from Brown's quilt in "Where Love Resides" was a fair use. He found that each block in Brown's quilt was a separate copyright-protected work, so that all of one of Brown's works had been copied. He also found that even though the use of her quilt in the movie increased its value for other purposes, its unauthorized use eliminated the "most profitable market: namely, the sale of licenses for her designs to the defendants themselves for use in the movie and associated merchandising."

Judge Legg declined to rule in either party's favor on one issue. The defendants argued that McCormick's use of Brown's quilt block in "Where Love Resides" was authorized by their written agreement. That agreement did authorize the defendants to make "two quilts" with Brown's designs. Brown said that meant they could make two copies of her "Life Before Quilt," not that they could make one copy of that quilt and then use part of it to create a separate quilt. The judge said that the proper interpretation of the agreement was a material question of fact which could not be decided on summary judgment.

Finally, the judge ruled in the defendants' favor on one issue. He dismissed Brown's state law claims on the grounds that they were preempted by federal copyright law.

Brown v. McCormick, 23 F.Supp.2d 594, 1998 U.S.Dist.LEXIS 17130 (D.Md. 1998)[ELR 20:11:9]

## Copyright to script of John Wayne movie "McLintock!" went into public domain, along with movie itself, when movie's copyright was not renewed, federal appellate court affirms; thus script's copyright cannot be used to prevent unauthorized homevideo copies of movie

GoodTimes Home Video has now received the secular "blessing" of four federal courts, permitting it to distribute videos of the 1963 John Wayne western "McLintock!"

"McLintock!" went into the public domain at the end of 1991, because its copyright was never renewed. That is why GoodTimes thought it could distribute homevideo copies without a license. But Batjac and Maljack Productions - the companies that produced the movie and now distribute authorized videos of it - thought otherwise, and made at least four legal arguments in two separate cases, in an effort to preserve their rights. One of their arguments was successful. By itself, however, that success wasn't sufficient to prevent all unauthorized "McLintock!" videos, and that's why the other arguments were so important that Batjac and Maljack took them to the Court of Appeals.

The successful argument was that Maljack's "pan and scan" video version of "McLintock!" is sufficiently original to be eligible for a copyright of its own, and thus unauthorized copies of that particular version infringe its copyright (ELR 19:9:10). Copies of other versions of the movie were not barred by that ruling however. In an effort to prevent unauthorized copies of other versions, Batjac argued that it owned the copyright in the movie's soundtrack as well as a trademark in its title. Those arguments were not successful (ELR 16:6:16, 18:7:19). Now Batjac's final argument has failed as well.

Batjac also attempted to obtain federal copyright protection for the "McLintock!" screenplay, in order to use it as a basis for stopping unauthorized videos. But the Copyright Office refused to register the screenplay's copyright, on the grounds that the movie's theatrical release in 1963 published the screenplay as well as the movie itself; and thus the screenplay went into the public domain along with the movie, when the movie's copyright wasn't renewed.

Batjac argued that the movie was a derivative work based on the screenplay, and that the publication of the movie did not publish the screenplay. The District Court, disagreed, however. Judge Dean Pregerson concluded that the theatrical release of "McLintock!" in 1963 did publish the movie's screenplay. And thus he ruled that the Copyright Office had properly refused to register a copyright for its screenplay when Batjac sought do so in 1996 (ELR 19:9:10).

In an opinion by Judge Betty Fletcher, the Court of Appeals has affirmed that decision. The appellate court relied in part on a similar ruling by a different court in a case from the late 1970s called Classic Film v. Warner Bros. The court in Classic Film had reasoned that if movies did not publish the screenplays from which they were made, the copyrights to pre-1978 movies would never expire, because their screenplays were protected by common law copyright which is perpetual. Since it was clear that Congress did not intend movies to have perpetual copyright protection, Classic Film concluded that screenplays are published when their movies are released.

Batjac argued that the rationale of Classic Film no longer applies, because once the Copyright Act of 1976 became effective in 1978, even previously unpublished works were given a definite duration. Their copyrights would last until 50 years after their authors' deaths or until the year 2002, whichever was later.

Judge Fletcher was not persuaded, however. She agreed with the Register of Copyrights that even if the duration of copyright for unpublished works is no longer perpetual, Batjac's argument would nevertheless give copyright protection to pre-1978 movies beyond the limits set forth in the Copyright Act.

Finally, Judge Fletcher noted that the result reached in this case is consistent with her court's 1995 decision, in the LaCienega Music v. ZZ Top case, that the release of a record constitutes the publication of the songs recorded on it (ELR 16:10:13). The judge acknowledged that Congress overruled that decision by enacting section 303(b) of the Copyright Act which provides that the pre-1978 distribution of "phonorecords" should not be deemed to publish the musical works "embodied therein" (ELR 19:7:4). But, Judge Fletcher said, the reasoning of the LaCienega Music case is "still sound," and if Congress wants to protect the common law copyrights of pre-1978 screenplays, it can do so by passing another law similar to section 303(b).

Batjac Productions Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223, 1998 U.S.App.LEXIS 28103 (9th Cir. 1998)[ELR 20:11:10]

## Dismissal of slander lawsuit by Michael Jackson against "Hard Copy" producer and reporters is affirmed; appellate court rules that inflammatory language about sex video did not make truthful statements defamatory, and that allegedly untrue statements were not made recklessly

Some stories linger longer than their subjects would like. In 1994 and '95, one of these involved the sex life of Michael Jackson. Some reports claimed that the superstar recording artist had molested young boys, and that security cameras at Jackson's home had once caught the act on videotape.

The existence of such a videotape has never been proved. But Jackson prolonged the story's shelf life by filing a slander suit against Paramount Pictures, the company that produces "Hard Copy," and two of the programs' reporters. Jackson's complaint alleged that statements made by the reporters on the program and during an interview on KABC radio's "Ken and Barkley Show" were false and defamatory.

Michael Jackson has been a party to many other cases reported in these pages, and he's always been successful (ELR 15:11:26, 17:9:17, 18:10:4, 20:1:8, 20:10:19). In this case, however, he was not. A California Superior Court granted a defense motion for summary judgment and dismissed his slander suit. And a California Court of Appeal has affirmed.

The offending statements asserted that investigators for the District Attorney were then looking for the videotape. Uncontroverted evidence established that they were, so that statement was not false. Jackson argued, however, that the statement was defamatory because it included inflammatory language such as "racing," "scrambling," and "hot on the trail," as well as language which suggested that a previously closed investigation had been reopened. The Court of Appeal was not persuaded that the use of this "colorful language" changed "a truthful report" into a defamatory statement.

Jackson also argued that the offending statements conveyed the impression that such a videotape actually existed - not merely that investigators were looking for it - and Jackson wanted an opportunity to prove at trial that no such tape does exist. The Court of Appeal didn't give him that chance, however. The Court of Appeal explained that the law "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." In this case, the reporter asserted that she did believe such a tape existed, and she backed up her assertion with evidence that her source for information about the tape had been reliable in connection with other stories.

Jackson v. Paramount Pictures Corp., 80 Cal.Rptr.2d 1, 1998 Cal.App.LEXIS 984 (Cal.App. 1998)[ELR 20:11:11]

**Appellate court affirms dismissal of defamation and privacy suit by man who claimed he was referred to as "Cookie" in "Heidi Fleiss" HBO documentary; documentary did not suggest that plaintiff and "Cookie" were same person**

The Heidi Fleiss story made interesting news for months, and then became the subject of an HBO documentary. The documentary was produced by Nick Broomfield who appears on camera in many scenes, interviewing subjects and sharing his thoughts with viewers.

In one key scene, a subject tells Broomfield that a man named "Cookie" worked for Fleiss as "an enforcer or procurer," and that Cookie "operates" a beeper store called "J & J Beep" in Hollywood. The documentary suggests in a number of ways that Cookie may have harmed several people. But Broomfield was never able to locate Cookie, despite several on-camera efforts to do so; and thus the documentary never reveals to viewers Cookie's real identity.

There is no store called "J & J Beeps." But there is one called "J & J Beepers," and it's owned by a man named Jacob Orgad who is sometimes called "Cookie." Orgad was once in business with another man named Juda Alszeh, and when the two men dissolved their partnership, Alszeh began doing business as "J & J The King of Beepers."

With "J & J" and "Beepers" in the names of both businesses, it's not surprising that someone looking for one would notice billboards posted by the other. That is exactly what happened to Broomfield. In one scene of his documentary, the camera focuses on one of Alszeh's billboards, and over the image of Alszeh and the title "J & J King of Beepers," Broomfield says: "With Cookie on my mind, I imagined I saw him everywhere."

Alszeh claimed that the documentary suggested that he was the unsavory "Cookie," and he sued HBO and Broomfield for defamation and invasion of privacy (though Alszeh's former partner, Jacob "Cookie" Orgad, did not). A California Superior Court dismissed Alszeh's lawsuit, in response to a motion for summary judgment; and a California Court of Appeal has affirmed.

The appellate court ruled that although the documentary raised the "possibility" that Alszeh and Cookie were the same, "the documentary, taken as a whole, does not support the reasonable inference that the individuals are identical." The court explained that "when Broomfield's view of Alszeh's billboard triggers Broomfield's reflection that he `imagined [he] saw [Cookie] everywhere" (emphasis added), a viewer could reasonably infer that Broomfield is speculating that . . . virtually anyone associated with J & J Beepers might be Cookie, but not that Broomfield is insinuating that Alszeh is Cookie." Moreover, the court added, "Any suggestion that Broomfield might be able to identify Cookie by sight is undermined by the events portrayed in the documentary."

Alszeh v. Home Box Office, 80 Cal.Rptr.2d 16, 1998 Cal.App.LEXIS 982 (Cal.App. 1998)[ELR 20:11:12]

## Request by Led Zeppelin members for pre-concert ex parte restraining and seizure orders against unknown bootleg merchandise sellers is denied by Federal District Court

Federal District Judge James Lawrence King seems not to be a Led Zeppelin fan. He certainly isn't a fan of their lawyers. When those lawyers appeared before Judge King the day before a Led Zeppelin concert in Miami, seeking ex parte restraining and seizure orders against unnamed but anticipated sellers of bootleg t-shirts and other merchandise, all the lawyers got for their efforts was caustic criticism of their own behavior and an order denying their request and dismissing their case.

Judge King acknowledged that other courts had granted the sort of relief sought by Zeppelin. But he was "convinced" he said that granting it "would neither comport with federal procedural rules nor the dictates of justice."

Zeppelin's suit was based on the rights of two of its members - Robert Plant and Jimmy Page - in their own names and likenesses, and on their ownership of the Led Zeppelin trademark.

Nevertheless, Judge King ruled that he did not have personal jurisdiction over the unnamed and unserved defendants. Zeppelin's lawyers explained to the judge that the defendants could not be named until they actually appeared at the concerts, and that unless the defendants were enjoined, they would "travel on to the next concert" to sell their merchandise. Judge King was not persuaded however that this explanation justified suing unnamed people. According to the judge, the fact that these people "travel on to the next concert" showed that their identities could be learned if only the plaintiffs would "expend a modest amount of their ample resources to do a routine preliminary factual investigation before bringing suit in this federal Court."

The judge also ruled that the "case must fail for lack of justiciability," because the defendants could not be there to defend their position, and because the defendants had not then committed any injurious act and may never have committed such an act in the past.

Finally, Judge King held that "The public interest can hardly be served by this Court ordering armed police personnel to forcibly confiscate the merchandise of unsuspecting vendors at a rock concert where people are probably already in a rowdy mood." If he did so, the judge said, it would create a "hornets' nest of procedural problems."

Editor's note: As soon as Judge King orally denied Zeppelin's request, and before he issued his written decision, Zeppelin's lawyers sought and obtained a TRO from a federal judge in Orlando - a fact which Judge

King noted in the opening paragraph of his opinion. Judge King then went on to castigate those lawyers for creating "an artificial air of emergency" by filing their suit and seeking an ex parte hearing just one day before the Zeppelin concert, even though they had been retained weeks before and the concert had been scheduled for months. The judge also was critical of the lawyers' failure to cite published opinions in which similar requests had been denied in cases filed by other rock stars and the National Football League (see, e.g., ELR 3:6:2, 5:3:13). It's unlikely Judge King would have ruled otherwise if the case had been handled differently, even though the judge said he "recognizes that bootlegging is a social problem." But his negative attitude about Zeppelin's lawyers could not have helped any.

Plant v. Does, 19 F.Supp.2d 1316, 1998 U.S.Dist.LEXIS 14670 (S.D.Fla. 1998)[ELR 20:11:12]

## Suit by successor of New Orleans rhythm-and-blues musician Henry Roeland Byrd to recover possession of master tapes from Bearsville Records is dismissed as time-barred, again

Three federal courts in two different states have entertained the question of who is entitled to possession of master tapes recorded in Louisiana by the late rhythm-and-blues musician Henry Roeland Byrd in the early 1970s. Possession of those tapes has been in the hands of Bearsville Records for more than twenty years. But Byrd's successor, a company known as Songbyrd, Inc., claims that it is entitled to possession; and Songbyrd has filed a lawsuit asserting that very claim.

Originally, Songbyrd filed its lawsuit in Louisiana, even though Bearsville was in New York. Before litigating the merits of Songbyrd's claim, Bearsville sought dismissal of the case on the ground that the court in Louisiana did not have personal jurisdiction over it, and on the ground that Songbyrd's claim was time-barred by Louisiana's statute of limitations. In Louisiana, it's called the "period of prescription."

The District Court agreed the claim was time-barred, and thus granted Bearsville's motion to dismiss on that ground, without reaching the personal jurisdiction issue. But Louisiana's "period of prescription" law is complicated; and the Court of Appeals reversed (ELR 19:7:11). When the case got back to the District Court, it transferred the case to New York, on personal jurisdiction grounds.

Ordinarily, when a case is transferred from one federal district to another, the law of the original jurisdiction continues to be applied. However, this is not done when the case is transferred because the original court did not have personal jurisdiction over the defendant. In such cases, the transferee court applies the law of the jurisdiction in which it is located.

Since Songbyrd's lawsuit was transferred to New York because Louisiana didn't have jurisdiction over Bearsville, this meant that New York's statute of limitations was applicable rather than Louisiana's "period of limitation." That's why Bearsville has won the case again, on the grounds that it was time-barred.

Magistrate Judge David Homer explained that Songbyrd's claim was one for conversion of the tapes, and that the conversion took place back in 1986 when Bearsville first licensed the tapes to Rounder Records so it could make albums from them. In New York, the statute of limitations for conversion is three years. Thus, since the conversion occurred in 1986, and Songbyrd didn't file suit until 1995, Judge Homer held that the case was barred by the statute of limitations.

Songbyrd, Inc. v. Estate of Grossman, 23 F.Supp.2d 219, 1998 U.S.Dist.LEXIS 19691 (N.D.N.Y. 1998)[ELR 20:11:13]

**Assistant football coach is awarded $566,000 for lost pay, attorney's fees and costs, in age discrimination suit against Notre Dame**

Joseph Moore was Notre Dame's offensive line coach for nine years, and a successful one at that. During his tenure, the Fightin' Irish offensive line was ranked in the top ten in the country. But at the end of the 1996 season, Notre Dame terminated Moore, for reasons that were hotly disputed.

Their dispute was litigated in a federal District Court in South Bend, Indiana. It included allegations by Moore of age discrimination and defamation, both of which Notre Dame denied. Early in the case, Moore suffered what seemed to be a setback, when Judge Allen Sharp dismissed Moore's defamation claims (ELR 19:11:12). But lawsuits, like football games, aren't over 'til they're over; and Moore came roaring back.

He persuaded a jury that he had been fired because of age discrimination. The jury awarded him $42,935 in back pay, and another $42,935 in liquidated damages because it found that Notre Dame had committed a "willful violation" of the federal Age Discrimination in Employment Act.

Then, in post-trial proceedings before Judge Sharp, Moore asked to be reinstated to his coaching position, or for an award of additional "front-pay." The judge denied Moore's request for reinstatement, saying that reinstatement "would cause significant friction as well as disruption of the current football program." Moreover, by then, Moore had been replaced by another offensive line coach, so there really wasn't an available position to which he could be reinstated. In such cases, Judge Sharp explained, "front-pay" is the appropriate remedy.

Front-pay is the amount an employee would have received if he were reinstated, less whatever pay the employee earned elsewhere in the meantime. The judge found that Moore would have coached for Notre Dame for another two years, at an annual salary of $84,400, and that he actually had earned only $46,600 a year (working three jobs). The difference for two years came to $75,600; and that is what the judge awarded Moore for front-pay.

Moore's lawyer requested $512,000 in fees. He didn't get all that, but Judge Sharp did award him $394,900, after making a number of downward adjustments explained in detail in the opinion. The judge also awarded litigation costs of $9,675, much less than the

$28,000 that had been requested but a significant sum nonetheless.

The total award came to just over $566,000.

Moore v. University of Notre Dame, 22 F.Supp.2d 896, 1998 U.S.Dist.LEXIS 15459 (N.D.Ind. 1998)[ELR 20:11:13]

**ABC wins copyright suit against PrimeTime 24 on account of satellite retransmissions of network programs; networks and NAB also win dismissal of PrimeTime's separate antitrust suit; Congress considers legislation to give satellite-TV companies permission to serve more customers**

ABC has won its copyright infringement suit against PrimeTime 24 - a company that provides subscribers, either directly or through distributors like DirectTV, with satellite retransmissions of network television signals.

NBC and Fox had already obtained a preliminary injunction in a virtually identical but separate case in federal court in Florida (ELR 20:18:3). ABC sued PrimeTime in federal court in North Carolina, where Judge Frank Bullock used reasoning similar to that of the Florida court to conclude that PrimeTime had signed up subscribers who were not legally eligible to receive network signals by satellite retransmission.

The Satellite Home Viewers Act gives satellite-TV companies like PrimeTime and DirectTV a statutory license that authorizes them to retransmit distant network signals to "unserved households." The Act contains its own technical definition of that phrase. And the heart of the dispute between PrimeTime and the networks has involved the proper interpretation of that technical definition.

PrimeTime's method for determining whether prospective subscribers live in "unserved households" resulted in subscriptions being sold to many households that were not shown to be "unserved," according to the networks and both judges who have now ruled on the dispute. Judge Bullock has granted ABC's motion for summary judgment and has entered an injunction permanently restraining PrimeTime from retransmitting the signals of any ABC affiliate to households within the local market of ABC's owned-and-operated station in Durham.

PrimeTime has not played a passive or purely defensive role in connection with this dispute. It also filed a suit of its own against the networks and the National Association of Broadcasters, in federal court in New York City. In that case, PrimeTime alleged that the networks and the NAB violated federal antitrust law in two ways: by submitting "simultaneous and voluminous challenges to the eligibility of PrimeTime 24's subscribers"; and by refusing, in a "concerted" way, to negotiate license agreements under which PrimeTime would have paid the networks and their affiliates for permission to retransmit network signals to all households, regardless of whether they were "served" or "unserved" under the Satellite Home Viewers Act.

PrimeTime has fared no better with its antitrust case than it has with the networks' copyright cases. In the antitrust case, Judge Lawrence McKenna has granted a motion for summary judgment made by the networks and the NAB. The judge did so on the grounds that the actions about which PrimeTime complains are immune from antitrust liability under the "Noer-Pennington doctrine." That doctrine arose out of a 1961 Supreme Court decision which held that efforts to influence government action do not violate the antitrust laws, even if they are taken jointly and are intended to eliminate competition. Cases have interpreted the doctrine to include pre-litigation communications and conduct related to litigation.

In this case, Judge McKenna held, network challenges to the eligibility of PrimeTime subscribers were equivalent to pre-litigation communications. And the networks' refusal to grant licenses to PrimeTime was related to their refusal to settle the copyright infringement lawsuits they had filed. For these reasons, neither action could result in antitrust liability.

According to news reports, as a result of the injunctions granted in the networks' copyright cases, many PrimeTime and DirectTV subscribers are about to lose access to network signals, especially subscribers who do not have rooftop TV antennas. Congress has therefore entered the fray. Legislation is pending in both the

House and the Senate that would amend the Satellite Home Viewer Act to give companies like PrimeTime and DirectTV authority to retransmit network signals to more households than does current law.

ABC, Inc. v. PrimeTime 24, 17 F.Supp.2d 467, 478,1998 U.S.Dist.LEXIS 13308, 13317 (M.D.N.C. 1998); PrimeTime 24 v. National Broadcasting Company, 21 F.Supp.2d 350, 1998 U.S.Dist.LEXIS 15190 (S.D.N.Y. 1998)[ELR 20:11:14]

# Photographer was successful party in copyright suit even though he was awarded only $1000 in statutory damages; but court awards him only $1900 in attorney's fees rather than the $78,474 he sought

Copyright litigation can be expensive, even for the winning party. That is the lesson to be learned from a case that is making its second appearance in these pages.

Previously, photographer Christopher Scanlon proved that an organization known as Gay Male S/M Activists had infringed his copyrights by posting two of his photographs on the organization's web site without his permission. Judge Constance Baker Motley awarded him $1000 in statutory damages, and ruled that he was entitled to recover "moderate" attorney's fees as well. (ELR 20:8:13)

Thus encouraged, Scanlon sought $78,475 in attorney's fees and another $5877 in costs. For balance, the defendants sought $32,345 in attorney's fees and costs of their own, despite having lost on the merits.

The defendants argued that they - and not Scanlon - should receive attorney's fees, for two reasons: because his success was de minimis; and because no judgment had been entered at all against three directors of the organization who also had been named as defendants.

Judge Motley rejected the defendants' position. Though Scanlon obtained only "a modest statutory damage award," the judge ruled that he was nevertheless the prevailing party, because "He was victorious as to the significant issue at bar, namely proving copyright infringement of his work." Also, the three individual directors who were dismissed from the case "cannot be termed prevailing parties," Judge Motley held, because "they were shielded from liability under [New York] state law [protecting directors of non-profit organizations from personal liability], despite their violation of the [Copyright] Act."

Because Scanlon was the prevailing party, and the director-defendants were not, Scanlon was entitled to recover his attorney's fees - but not all that he sought. His lawyer had billed $245 an hour for 271 hours of work. However, the judge noted that the lawyer been in practice fewer than four years and had little experience in copyright cases. She cited a New York State Bar Association publication that indicated that New York lawyers in practice fewer than five years earn just $125 an hour. And thus she decided that $125 was a "reasonable" hourly rate for Scanlon's lawyer.

The judge also faulted the lawyer for seeking fees for time spent on unsuccessful claims. Thirty hours of pre-trial preparation for a sixteen-hour trial would have been "generous," the judge said. That resulted in a "lodestar" figure of $5750 (46 hrs x $125/hr). The judge then reduced the award further, by two-thirds, because of Scanlon's "limited success" and because of "vague and duplicative time entries" in his lawyer's time records.

As a result, Scanlon was awarded only $1898 in attorney's fees. And because his $5,877 in costs were also reduced by two-thirds on account of "vague" disbursement descriptions, Scanlon was awarded only $1940 in costs. In all then, Scanlon's $1000 statutory damage award, plus his $1898 fee award, plus his $1940 cost award totaled only $4838 - more than a thousand dollars less than his out-of-pocket disbursements for costs incurred in securing his victory.

Scanlon v. Kessler, 23 F.Supp.2d 413, 1998 U.S.Dist.LEXIS 16104 (S.D.N.Y. 1998)[ELR 20:11:15]

## Court grants only part of New York Post's motion to dismiss defamation suit by security guard Richard Jewell alleging that newspaper suggested he was responsible for Atlanta Centennial Olympic Park bombing

Few people knew Richard Jewell's name before July 27, 1996. On that date, a bomb exploded in Atlanta's Centennial Olympic Park, killing one and injuring more than a hundred others. Shortly thereafter, Jewell became famous, because he was an Olympic Park security guard; and at first, it appeared that he had saved the lives of many by warning his supervisor of the existence of a bomb and by ushering people away from it before it went off. Three days later, however, Jewell's "hero" status was shattered when an Atlanta newspaper reported that he had become "the focus" of the resulting "federal investigation."

The Centennial Olympic Park bombing was a world-wide story, coming as it did in the midst of the 1996 summer Olympics. Thus the possibility that Jewell himself had planted the bomb was reported by newspapers everywhere, including The New York Post which ran at least one column, three articles, two photographs and one cartoon to which Jewell took vigorous exception.

In a defamation suit filed against the Post in federal court in New York City, Jewell alleges that these seven items falsely suggested that he was responsible for the bombing and that his reputation has been injured as a result. The case was assigned to Judge Loretta Preska who noted that "if, as it now appears, that charge is untrue, it is defamatory if uttered with the requisite state of mind." Thus, the Post's state of mind is "the core issue" in this case. But before reaching that issue, the Post made a motion for summary judgment, arguing for dismissal on several other grounds.

According to the Post, all seven of the published items were "non-actionable" for one or more of these reasons: they did not have a defamatory meaning; they were substantially true; they were republished from other sources and thus were "privileged"; they expressed opinions rather than facts; they caused Jewell only "incremental" harm beyond the harm he had already suffered as a result of accurate reports that he was the focus of the FBI investigation; and he failed to allege any special damages.

Judge Preska has granted only part of the Post's motion. In a 50-page opinion (that reprints all seven of the offending items), the judge has held that statements reporting that Jewell was a suspect in the case were substantially true and thus not actionable. She also ruled that some of the statements about which Jewell complained did not have a defamatory meaning, and thus those were not actionable either. On the other hand, other statements could have a defamatory meaning, so Jewell is entitled to go to trial with respect to those, the judge held.

The Post's "republication" defense will go to trial too, because there are genuine issues of fact concerning which specific prior publications the newspaper's writers had depended upon for their information. Judge Preska also held that the Post had not established "as a matter of law" that any harm it had caused Jewell was only incrementally more than the harm he had already suffered by being a suspect in the case. Finally, the judge held that Jewell was not required to allege special damages, because the complained-of statements were libelous per se, that is, they could be understood to mean that he had committed an indictable offense and that he had performed poorly in jobs he had held before becoming an Olympics security guard.

Jewell v. NYP Holdings, Inc., 23 F.Supp.2d 348, 1998 U.S.Dist.LEXIS 15327 (S.D.N.Y. 1998)[ELR 20:11:15]

**Oklahoma City radio station wins dismissal of defamation, privacy and emotional distress suit filed by Seattle man whose phone number was broadcast because radio show hosts mistakenly thought he was selling t-shirts bearing offensive slogans about Murrah Building bombing**

The bombing of the Murrah Building in Oklahoma City continues to have painful and widespread consequences. One victim lived as far away as Seattle, and though his injuries were not physical, they were sufficient to cause him to file a lawsuit. Despite an apparent reluctance to do so, federal District Judge Ralph Thompson has dismissed that suit, for reasons that may give relief to radio broadcasters.

The lawsuit was filed by Kenneth Zeran against Oklahoma City radio station KRXO because of things that show hosts "Shannon and Spinozi" said about Zeran on their morning drive time program. "Shannon and Spinozi" - whose real names, Judge Thompson revealed, are Mark Fullerton and Ron Benton - told their listeners that Zeran was selling t-shirts bearing offensive slogans about the Murrah Building bombing. Though they didn't use Zeran's name on the air, they did repeatedly give their listeners his telephone number, and they urged listeners to call him to let him know what Oklahomans thought of him.

Many people did call Zeran; some even threatened him with death. As a result, he suffered sleep deprivation and anxiety.

Zeran was not in fact selling offensive t-shirts, or shirts of any kind. He published a Seattle-area rental guide that said nothing about Oklahoma City, let alone the Murrah Building bombing. For reasons unknown, an unidentified person posted ads on American Online for Murrah Building t-shirts, telling interested customers to call "Ken" at the Zeran's business phone number. An AOL subscriber forwarded the ad as an email to "Shannon and Spinozi"; and that's what sparked their on-air remarks.

Zeran's lawsuit alleged claims for defamation, false light invasion of privacy, and infliction of emotional distress. In the opinion of his expert witness, "Shannon and Spinozi" had been "extremely negligent" in broadcasting Zeran's phone number without first confirming the accuracy of the AOL ad they had received. Judge Thompson agreed. Nevertheless, the judge has granted the radio station's motion for summary judgment.

Zeran's defamation claim was dismissed because there was no evidence that anyone knew his last name as a result of the broadcast, and because he was unable to identify anyone who thought less of him after the broadcast than they did before.

His false light invasion of privacy claim was dismissed because Oklahoma law requires proof that offending statements were made with knowledge of or reckless disregard for their falsity. In this case, Judge Thompson said that "While the defendant's employees acted negligently, there is no proof that they knew that the ads were fictitious or acted `recklessly,' as that term is defined by the controlling authorities."

Finally, the judge dismissed Zeran's emotional distress claim, because Oklahoma law requires proof that: the defendant acted intentionally or recklessly; the defendant's conduct was extreme and outrageous; and the plaintiff suffered severe emotional distress. In this case, there was no proof that "Shannon and Spinozi" acted intentionally or recklessly, or that they behaved in an extreme or outrageous manner towards Zeran. Also, Judge Thompson said that while he "sympathizes" with Zeran and did not mean to "belittle the distress and discomfort he experienced," the evidence did not show that Zeran's level of distress was sufficiently severe to impose liability.

Zeran v. Diamond Broadcasting Inc., 19 F.Supp.2d 1249, 1997 U.S.Dist.LEXIS 23287 (W.D.Okla. 1997)[ELR 20:11:16]

## Television producer wins preliminary injunction requiring cable system public access channel to carry pre-election segment of "The Hippie Talk Show" featuring Marijuana Reform Party candidates

Who knows how many residents in the Town of Brookhaven were interested in hearing from Marijuana Reform Party candidates, shortly before last November's election. All that can be said for sure is that if any residents wanted to, they were able to do so on television, because of a preliminary injunction issued by federal District Judge Arthur Spatt.

The injunction required Cablevision Systems Corporation, the Brookhaven cable-TV franchisee, to carry a segment of "The Hippie Talk Show" on Cablevision's public access channel. The segment in question is one that featured appearances by Marijuana Reform Party candidates for Governor, Lieutenant Governor and United States Senator.

Cablevision refused to carry the segment, because its User Access Contract and Public Access Rules prohibit the use of its access channel for the presentation of programs by, on behalf of, or in opposition to political candidates. Apparently, Cablevision enforces this policy uniformly, with respect to major party candidates as well as others. There was no suggestion, in other words, that the policy was invoked in this case alone, just to keep Marijuana Reform Party candidates off the channel.

Nevertheless, George Moss, the producer of "The Hippie Talk Show," along with the Marijuana Reform Party and its candidates, sued Cablevision for excluding the segment from its access channel. They argued that Cablevision's policy violated the Cable Communications Policy Act of 1984, one section of which (section

531(e)) prohibits cable operators from exercising "any editorial control" over the public's use of access channels. There's just one statutory exception to this rule: cable operators may refuse to transmit programs that contain obscenity, indecency or nudity. But the Marijuana Reform Party segment of "The Hippy Talk Show" contained none of that.

Judge Spatt agreed that Cablevision's policy violated the Act. "While Cablevision's ` . . . policy' may be non-discriminatory since it treats all qualified candidates equally," the judge said, "it nonetheless conflicts with the plain meaning of the statute." For that reason, the judge granted the requested preliminary injunction.

Moss v. Cablevision Systems Corp., 22 F.Supp.2d 1, 1998 U.S.Dist.LEXIS 15877 (E.D.N.Y. 1998)[ELR 20:11:17]

## Previously Reported:

The United States Supreme Court has denied petitions for certiorari in two cases previously reported in the Entertainment Law Reporter: Heusseur v. MLQ Investors, 119 S.Ct. 903, 1999 U.S.LEXIS 760 (1999) (ELR 20:6:24) which held that a creditor may obtain a perfected security interest in the proceeds from the sale of an FCC license; and Reuters Television International v. Los Angeles News Service, 119 S.Ct. 1032, 1999 U.S.LEXIS 1064 (1999) (ELR 20:7:14) which held that Los Angeles News Service is entitled to recover copyright damages for the unauthorized transmission to Europe and Africa of its videotapes of the L.A. riots, because the transmission was made from infringing copies of tapes made in United States.[ELR 20:11:17]

## IN THE NEWS

### Jury awards Columbia Pictures $31.7 million verdict in copyright infringement case against TV station owner that continued to broadcast programs after Columbia terminated license for non-payment of licensee fees

Columbia Pictures has snatched victory from the jaws of defeat by winning a $31.7 million jury verdict in its long-pending copyright infringement suit against Elvin Feltner, the owner of Krypton Broadcasting.

Earlier in the case, District Judge Edward Rafeedie awarded Columbia $8.8 million in statutory damages on account of Krypton's broadcast of episodes of such programs as "Who's the Boss," "Hart to Hart," "T.J. Hooker" and "Silver Spoons" a year and a half after Columbia had terminated its license for nonpayment of license fees. That judgment was affirmed by the Court of Appeals, which rejected Feltner's argument that he should have been given a jury trial on the damage issue, even though Columbia sought only statutory damages rather than actual damages and profits (ELR 19:9:9).

The Supreme Court agreed to hear Feltner's appeal, and eventually ruled in his favor. The Supreme Court held that the Copyright Act did not authorize jury trials in statutory damage cases, but that Feltner did indeed have a constitutional right to a jury trial even though Columbia only sought statutory damages (ELR 19:12:6).

During oral argument before the Supreme Court, Justice John Paul Stevens told Columbia lawyer Henry Tashman (of Davis Wright Tremain in Los Angeles) that Columbia might be better off if the Supreme Court ruled against it "because a jury may come in with a bigger award." Tashman urged Justice Stevens not to rule against Columbia "based upon that." Justice Stevens assured Tashman he "certainly" wouldn't, prompting laughter in the courtroom.

The "irony" that Justice Stevens predicted during his exchange with Tashman is exactly what happened. Judge Rafeedie's original award in Columbia's favor had been at the rate of $20,000 per infringed episode. Following Feltner's Pyrrhic victory in the Supreme Court, the jury awarded Columbia more than $70,000 per infringed episode.

Feltner is reportedly considering another round of appeals, even though the Ninth Circuit has not been a receptive forum for his views of the law. Not only did the Court of Appeals reject his original claim to a right to a jury trial, it also rejected his claim for attorney's fees following his Supreme Court victory (ELR 20:9:15). [April 1999] [ELR 20:11:18]

## NCAA adopts plan for payment of $54.5 million settlement to basketball coaches whose pay was restricted; some colleges are assessed almost $240,000 each

A rule adopted by the NCAA in 1991 to reduce the cost of Division I basketball programs will cost some colleges as much as $240,000 each. The rule in question prohibited Division I schools from paying basketball coaches more than $16,000 a year, except for one head coach and two assistants.

The rule worked as intended, at first. Some coaches who had been earning $60,000 or $70,000 a year had their salaries chopped to just $16,000. Not surprisingly, they responded with an antitrust lawsuit; and they won. The details of their courtroom victories, which led ultimately to a $75 million judgment in their favor, have been chronicled in earlier issues of the

Entertainment Law Reporter (ELR 18:2:10, 20:3:14, 20:7:23). While a second round of NCAA appeals was pending, the case was settled for $54.5 million (ELR 20:10:18).

The amount of the settlement was more than pocket change even for the NCAA, so the organization had to decide how to come up with the money to pay it. The NCAA has now adopted a plan for doing so. The total is being allocated among Division I schools according to a conference-based formula that apparently takes into account basketball revenues and athletic department budgets.

The NCAA itself has announced, for example, that Atlantic Coast Conference members will pay $239,989 each towards the settlement. According to news reports, UCLA and USC (along with other Pac-10 schools) will pay $195,855 each. Smaller schools, like

Cal State Northridge and Loyola Marymount University, will reportedly pay $86,827 and $79,591 respectively.

Fortunately, affected colleges will not have to write checks for the full amount of their shares. The NCAA began to anticipate the eventual result, and thus it set aside $18.25 million in "reserves" (from sources not publicly announced) over the last two years. In addition, the NCAA withheld $10 million in revenues that otherwise would have been distributed to Division I members during the 1998-99 school year, and will withhold $10 million more in revenue-distribution money for the 1999-2000 year. As a result, the NCAA has indicated that Atlantic Coast Conference members owe a balance of $40,533 each. Other colleges owe from $40,000 to $57,000 each. [April 1999] [ELR 20:11:18]

## DEPARTMENTS

### In the Law Reviews:

Loyola of Los Angeles Entertainment Law Journal has published Volume 19, Number 1 with the following articles:

Joint Authorship: An Uncomfortable Fit with Tenancy in Common by Avner D. Sofer, 19 Loyola of Los Angeles Entertainment Law Journal 1 (1998)

Entertainment and Copyright Law: Section 303 of the Copyright Act Is Amended and Pre-1978 Phonorecord Distribution of a Musical Work Is Not a Divestitive Publication by Jonathan C. Stewart and Daniel E. Wanat, 19 Loyola of Los Angeles Entertainment Law Journal 23 (1998)

Why Seeing Is No Longer Believing: Misappropriations of Image and Speech by Lauri Deyhimy, 19 Loyola of Los Angeles Entertainment Law Journal 51 (1998)

Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights by Jane C. Lee, 19 Loyola of Los Angeles Entertainment Law Journal 75 (1998)

Into the Labyrinth: Artists, Athletes, Entertainers and the INS by Farnoush Nassi, 19 Loyola of Los Angeles Entertainment Law Journal 107 (1998)

The Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume 9, Number 1 with the following articles:

Trade Secrets: How Well Should We Be Allowed to Hide Them? The Economic Espionage Act of 1996 by Rochelle Cooper Dreyfuss, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 1 (1998)

Challenging Defamatory Opinions As an Alternative to Media Self-Regulation by James F. Ponsoldt, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 45 (1998)

From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection by Andy Y. Sun, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 67 (1998)

Owning the Law: Intellectual Property Rights in Primary Law by Deborah Tussey, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 173 (1998)

One Trip to the Dentist Is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Areas of the Americas by Owen Lippert, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 241 (1998)

An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System by Steve P. Calandrillo, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 301 (1998)

Illuminating the Law of Copyright: Holographic Data Storage Takes Intellectual Property to a New Dimension by Patti Burshtyn, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 361 (1998)

The Marquette Sports Law Journal has published Volume 9, Number 1 with the following articles:

Why Is the PGA Teed Off at Casey Martin? An Example of How the Americans With Disabilities Act (ADA) Has Changed Sports Law by W. Kent Davis, 9 Marquette Sports Law Journal 1 (1998)

Punitive Damages and Corporate Liability Analysis in Sports Litigation by Gil B. Fried, 9 Marquette Sports Law Journal 45 (1998)

Team Play and the Compensation System in Professional Basketball by Jay R. Mandle, 9 Marquette Sports Law Journal 91 (1998)

A Statutory Analysis of the "Laws" of Little League Baseball (An Essay Urging Changes to the Little League Rules) by Russ VerSteeg, 9 Marquette Sports Law Journal 103 (1998)

A New Defense to the Old Defenses? The EEOC Equal Pay Act Guidelines by Mel Narol and Joseph A. Martin, 9 Marquette Sports Law Journal 175 (1998)

The Punch That Landed: The Professional Boxing Safety Act of 1996 by April R. Anderson, 9 Marquette Sports Law Journal 191 (1998)

Game Misconduct: Alan Eagleson and the Corruption of Hockey by Scott A. Jensen, 9 Marquette Sports Law Journal 217 (1998a)

Power Plays: An Inside Look at the Business of the National Hockey League by Schuyler J. Baehman, 9 Marquette Sports Law Journal 221 (1998)

In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left to Finish Last: The Lack of Access for the "Invisible Woman" by Tonya M. Evans, 42 Howard Law Journal 105 (1998)

The Journal of Intellectual Property Law, published by University of Georgia School of Law, Athens, Georgia 30602-6012, has issued Volume 6, Number 1 with the following articles:

Copyright Misuse and the Limits of the Intellectual Property Monopoly by Aaron Xavier Fellmeth, 6 Journal of Intellectual Property Law 1 (1998) (for address, see above)

Does the Bad Faith Requirement in Accounting of Profits Damages Make Economic Sense? by Eugene W. Luciani, 6 Journal of Intellectual Property Law 69 (1998) (for address, see above)

Uniform Commercial Code Article 2B & the State Contract Law-Federal Intellectual Property Law Interface: Can State Statutes Even Begin to Address Copyright Preemption of Shrink-Wrap Licenses? by Elizabeth J. McClure, 6 Journal of Intellectual Property Law 119 (1998) (for address, see above)

Copyright Protection: A Dead Fish for Sculptors of Taxidermy Mannequins? by Nathan C. Rogers, 6 Journal of Intellectual Property Law 159 (1998) (for address, see above)

The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online, 31 Connecticut Law Review (1998)

Linking and Framing on the Internet: Liability Under Trademark and Copyright Law by Nicole M. Bond, 11 DePaul Business Law Journal 185 (1998)

A Theory of Pure Bufoonery: Fair Use and Humor by Michael J. Lynch, 24 University of Dayton Law Review 1 (1998)

The Media in the New Millennium by Sandra F. Chance, 10 University of Florida Journal of Law and Public Policy 157 (1998)

WWW.OBSCENITY. COM: An Analysis of Obscenity and Indecency Regulation on the Internet by Kelly M. Doherty, 32 Akron Law Review 259 (1999)

National Endowment for the Arts v. Finley: A Dispute Over the "Decency and Respect" Provision by Alicia M. Choi, 32 Akron Law Review 327 (1999)

A Square Peg Trying to Fit into a Round Hole: The Federal Communications Commission's Equal Employment Opportunity Regulations in Lutheran Church Missouri-Synod v. Federal Communications Commission by Pamela J. Holder, 32 Akron Law Review 351 (1999)

The Economics of Expression and the Future of Copyright Law by Adam R. Fox, 25 Ohio Northern University Law Review 5 (1999)

"Recoding" Intellectual Property and Overlooked Audience Interests by Justin Hughes, 77 Texas Law Review 923 (1999)

Legal-Ware: Contract and Copyright in the Digital Age by Michael J. Madison, 67 Fordham Law Review 1025 (1998)

Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking and Inlining by Brian D. Wassom, 49 Case Western Reserve Law Review 181 (1998)

Enduring the Reign of Tweedledee and Tweedledum: How the Court Further Entrenched America's Two-Party Duopoly in Arkansas Educational Television Commission v. Forbes and How It Can Be Dredged Out by

Sutton I. Kinter III, 49 Case Western Reserve Law Review 257 (1998)

Annual Review: United States: The Fifty-First Year of Administration of the Lanham Trademark Act of 1946 by Anthony L. Fletcher and David J. Kera, 89 The Trademark Reporter 1 (1999) (published by The United States Trademark Association, 1133 Avenue of the Americas, New York, NY 10036-6710, (212) 768-9887)

Obscenity Law and the Internet: Determining the Appropriate Community Standard after Reno v. ACLU by Dominic F. Maisano, 29 The University of Toledo Law Review 555 (1998)

When the Dealer Goes Bust: Issues in Casino Bankruptcies by John M. Czarnetzky, 18 Mississippi College Law Review 459 (1998)

Warren Publishing, Inc. v. Microdos Data Corp.: Continuing the Stable Uncertainty of Copyright in Factual Compilations by Ethan R. York, 74 Notre Dame Law Review 565 (1999)

"Baby, It's Cold Outside:" The Chilling Effect of the Decency Clause on the Arts in the Aftermath of National Endowment for the Arts v. Finley by Brenda L. Tofte, 22 Hamline Law Review 303 (1998)

National Endowment for the Arts v. Finley, 9 Seton Hall Constitutional Law Journal 173 (1998)

Domain Names and Trade Marks by J. Thomas McCarthy, 9 Australian Intellectual Property Journal 53 (1998) (published by The Law Book Co Ltd, 44-50 Waterloo Road, N. Ryde, NSW 2113 Australia)

The Capital Gains Treatment of Dealing with Intellectual Property by Phillip Davies, 9 Australian Intellectual Property Journal 83 (1998) (for address, see above)

Expert Evidence in Intellectual Property Cases by Hon Justice Peter Heerey, 9 Australian Intellectual Property Journal 92 (1998) (for address, see above)

The European Intellectual Property Review, Sweet & Maxwell, 100 Avenue Road, London NW3 3PF United Kingdom, telephone international +44 1264 342766 or FAX +44 1264 342761, has published Volume 21, Issues 2 & 3 with the following articles:

Internet and the Applicable Copyright Law: A Scandinavian Perspective by Peter Schonning, 21 European Intellectual Property Review 45 (1999) (for address, see above)

The U.S. Recording Industry and Copyright Law: An Overview, Recent Developments and the Impact of Digital Technology by Victoria Espinel, 21 European Intellectual Property Review 53 (1999) (for address, see above)

Parallel Importing in New Zealand: Historical Origins, Recent Developments, and Future Directions by Abraham Van Melle, 21 European Intellectual Property Review 63 (1999) (for address, see above)

Is the English Law of Passing Off Discriminatory to Continental European Trade Mark Owners? by Laurence J. Cohen and Kate Schmit, 21 European Intellectual Property Review 88 (1999) (for address, see above)

The Digital Millennium Copyright Act: A Balanced Result by Jonathan Band, 21 European Intellectual Property Review 92 (1999) (for address, see above)

The Berne Three-step Test and the Proposed Copyright Directive by Thomas Heide, 21 European Intellectual Property Review 105 (1999) (for address, see above)

Copyright Issues: The Mysteries of Section 18 by John Phillips and Lionel Bentley, 21 European Intellectual Property Review 133 (1999) (for address, see above)

The Trips Agreement by Daniel J. Gervais, 21 European Intellectual Property Review 156 (1999) (for address, see above)

Sports Teams and the Stock Market: A Winning Match? by Brian R. Cheffins, 32 University of British Columbia Law Review 271 (1998)
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