

LEGAL AFFAIRS

**The Entertainment Industry is Accepting ADR
by Gerald F. Phillips**

"I think arbitration is great and should replace litigation in its entirety due to time and money factors." This view of arbitration was articulated by an executive of a medium size motion picture distribution company in response to a confidential questionnaire sent to entertainment corporations to ascertain the industry's acceptance of mediation and arbitration. The entertainment industry is increasingly using mediation and arbitration to resolve disputes and expects to use both more often in the future, according to a survey conducted by the Los Angeles and New York law firm of Phillips, Salman & Stein.

Seventy-five entertainment companies and attorneys, most of whom are located in the Los Angeles area, participated in the survey, which was conducted in two parts. Questionnaires were sent to large, medium and small film, TV and music companies and were answered by each company's general or deputy counsel. Another questionnaire was sent to entertainment

attorneys practicing at large, medium and small size law firms. The companies and the attorneys included in the sample constitute a representative cross section of the industry.

Survey of Entertainment Companies: Mediation

The results of the survey show that entertainment companies are using mediation, and they classify their company's view of mediation as generally favorable. They report that their companies are "very likely" to use mediation in the future. Most companies stated that their experience with mediation was "excellent" or "good." Companies prefer a strong mediator familiar with the business which is the subject of the mediation. The major findings of the survey relating to the use of mediation by entertainment companies are set forth in Table 1.

TABLE 1 Results of Company Survey on the Use of Mediation	
“How would you classify your company's view as to the use of mediation?”	43% generally favor the use of mediation.
“Were the disputes in which you employed mediation generally resolved during mediation?”	66% replied mediation generally resolved the dispute.
“Does your company usually discuss retaining a mediator at some time after a claim has been made and the parties and counsel have not been able to resolve the dispute?”	29% reported they “often” discuss using a mediator when counsel are unable to resolve dispute.
“Will your company endeavor to use mediation in the future to help resolve disputes.?”	60% stated their company will “very likely” endeavor to use mediation in the future.

"Do you believe that in the future your company will have a provision requiring mediation in more of your agreements?"	40% thought company will "very likely" have more provisions requiring mediation in the future.
"What was your company's experience with the mediation process?"	63% stated the experience of their company with mediation was excellent" or "good."

Though there were a few who did not endorse ADR, the comments by most counsel for entertainment companies indicate strong support for mediation:

- * "It settled what would have been an expensive litigation."
- * "In almost each case we were able to reach a settlement which we believed was reasonable and equitable to both sides, while avoiding the expenditure of high litigation costs."
- * "The settlement encompassed new and additional relationship elements that were extrinsic to the dispute."
- * "Mediation is a useful process because it may promote an opportunity for moderation of an opponent's views and lead to settlement."

* "Mediation experience varied widely based on (1) serious intent of both parties to reach resolution; (2) desire of the parties to maintain/create positive relationships; [and the] (3) ability of the neutral, including knowledge of law, applicable business and the parties."

* "Pick a good mediator who will hang in there."

* "Get strong mediator familiar with business, which is the subject of mediation, even familiar with parties."

* "Generally [mediation] required the cooperation of both parties and often went beyond what a plaintiff was seeking and that a court could order (e.g., new business opportunities which could benefit both sides)."

* "We prefer the structure and formality of the litigation process. We are in the position of being a potential defendant and would prefer for the claimant to have to incur the expense, while we get the benefit of the rules of evidence."

Survey of Entertainment Companies: Arbitration

Most of the companies answering the survey endorse the use of arbitration. They report that their experience with arbitration has been "excellent" or "good."

Companies stated that they have used arbitration or would in the future. One said that it provides for arbitration "in all film distribution agreements and [we] are now beginning to insert an arbitration clause in our film acquisition agreements." Another indicated that it uses arbitration "principally [in] employment-related matters, but also [in] general business/contractual relationships." A third said it uses arbitration provisions in: "license agreements; acquisition agreements; [and] any agreement in which special knowledge would be required by litigators/judges/jury." Other examples of contracts in which arbitration clauses are being used include: "foreign sales agreements"; "joint venture agreements"; "sale of businesses and some partnership agreements"; and "in most agreements that courts have been killing the studios and companies [because] Juries do not understand deals."

The major findings relating to the use of arbitration by entertainment companies are set forth in Table 2.

TABLE 2
Results of Company Survey
on the Use of Arbitration

<p>“How would you classify your company’s view as to the use of arbitration?”</p>	<p>60% favor use of arbitration.</p>
<p>“What was your company’s experience with the arbitration process?”</p>	<p>80% stated the experience of their company with arbitration was “excellent” or “good.”</p>
<p>“Will your company use arbitration more often in the future to help resolve disputes?”</p>	<p>52% stated their company will “very likely” use arbitration more often in the future.</p>
<p>“Do you believe that your company may in the future have more provisions requiring arbitration?”</p>	<p>65% thought their company will “very likely” have provisions in more agreements requiring arbitration in the future.</p>

"Are the executives at your company generally knowledgeable with respect to mediation and arbitration?"	60% reported their executives are not knowledgeable about mediation and arbitration.
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Comments by company counsel concerning arbitration indicate they support this method of resolving disputes.

* Arbitration should be used in "all [disputes] if the other side agrees to it [though] often they won't, if they are . . . deep pocket compan[ies]."

* "Arbitration generally provides a forum for obtaining a reasoned decision on the merits without the substantial delay and expense of litigation. It works well in most instances."

However, some companies in the music business do not accept mediation and arbitration to the same extent as other segments of the entertainment industry. One music executive said: "I am really not sure why the music industry is more resistant to arbitration/mediation than the film/TV industry, but it certainly seems to be the case. Perhaps because so many of the film/TV guilds have some sort of mandatory arbitration, it

means that more experience with the arbitration process and are then more likely to recognize its benefits for other disputes."

The general counsel of one major music company suggested that "Disputes in the music industry usually arise in connection with the interpretation of artist or writer contracts or involve claims for copyright infringement. In such cases, time may be critical which will require application to the court, and mediation and arbitration will be too slow. In addition, the music company may also believe that the issues are of critical commercial importance and require the certainty of the application of law and the publicity of a successful court action. In addition, cost will not be a material consideration to a large music company. There may be cases of disputes between major companies where time is not critical and the need to maintain a continuing relationship after the conclusion of the dispute may suggest that ADR should be considered."

Survey of Entertainment Counsel: Mediation

Although arbitration has been used more in the entertainment industry in the last few years, many entertainment

counsel prefer mediation to arbitration. Those who have used mediation overwhelmingly report that their experience was "excellent" or "good." Most report that the dispute was resolved during mediation. The major findings about mediation from the view point of outside counsel are set forth in Table 3.

"During the past three years did you participate in the mediation of any dispute for an entertainment client?"	30% participated in mediation for an entertainment client.
"What was your experience with the mediation process?"	86% of those that participated in mediation replied their experience was "excellent" or "good."
"During the mediation were the disputes generally resolved?"	75% replied that the dispute was resolved during the mediation.

<p>“How would you characterize your experience with the mediation conducted through AAA and any other organization?”</p>	<p>83% characterized their experience with mediation as “excellent” or “good.”</p>
<p>“During the negotiation of an agreement do you generally recommend a provision requiring mediation?”</p>	<p>90% reported that during the negotiation of an agreement they do not generally recommend a provision requiring mediation.</p>
<p>“How would you classify your personal opinion as to mediation?”</p>	<p>90% stated that they generally are in favor of mediation.</p>
<p>“Do you generally recommend mediation to your client at some time after a dispute has arisen and the parties and their counsel have not been able to resolve the dispute?”</p>	<p>57% reported that they generally recommend mediation at some time after a dispute has arisen.</p>

The responses of outside counsel indicate they are most supportive of mediation, except in the music industry:

* "Mediation cuts through a great deal of bureaucracy and can allow parties to face each other and resolve their differences in an informal way."

* "Very useful if there is an existing dispute which the parties through their own efforts have been unable to resolve."

* "Generally in favor of mediation if there is a knowledgeable mediator."

* "Mediation works only in certain limited circumstances. It works best, however, before the parties have started the litigation process, incurred expenses and hardened in their positions. My recommendation is to do it early - the sooner the better."

* ". . . begin early even if no resolution [is] in sight because [it] can help parties communicate. Take a chance with it."

* "Even if the case does not settle, it helps define and clarify the issues."

* "The key is the right mediator."

* "There seems to be a time in every dispute in which [mediation] makes sense."

* "Use it if possible."

* "The court system is slow and inefficient. Ninety-five percent of the time, cases settle. Why not go straight to the chase and get the dispute resolved."

* "Those with deep pockets disfavor it because they have more leverage against smaller individuals."

* "Mediation of entertainment disputes should be done by mediators with experience in the industry."

* "The parties need to be willing to talk and to pay for the mediator and other costs. If they are, its worth a try."

Survey of Entertainment Counsel: Arbitration

Outside counsel also endorse arbitration. They generally recommend arbitration before permitting the matter to proceed to court and recommend arbitration clauses in agreements. They report that their experience with arbitration has been "excellent" or "good." Table 4 sets forth the major findings concerning the views of entertainment counsel about arbitration.

TABLE 4 Results of Counsel Survey on the Use of Arbitration	
“During the last three years did you participate in arbitration for any entertainment client?”	61% reported that they participated in arbitration during the last three years.
“What was your experience with the arbitration process in which the AAA, AFMA or any other arbitration service organization was involved?”	84% reported their experience with the arbitration process was “excellent” or “good.”
“Do you generally recommend the use of arbitration to resolve disputes, before the matter proceeds to court, if there is no prior agreement between the parties requiring arbitration?”	50% stated they generally recommend arbitration to resolve a dispute if there is no prior agreement requiring arbitration.

"Do you generally recommend an arbitration clause in agreements that you are negotiating?"	70% stated that they generally recommend an arbitration clause in agreements.
"What are your personal views with respect to arbitration?"	87% stated that they personally favored arbitration.
"How would you generally classify your clients' views with respect to the use of arbitration?"	70% classified their client's' views as favorable to arbitration.
"Do you believe that the business executives and talent in the industry are generally knowledgeable with respect to mediation and arbitration outside of labor matters?"	78% stated their clients were not knowledgeable with respect to mediation and arbitration.

Entertainment counsel expressed these views concerning the benefits of arbitration and when to employ it:

* "My client walked away with the impression of having been heard in full and dealt with fairly."

- * "Arbitration saves time and money compared with litigation. Experienced attorneys make the decision."
- * "[There is a] tendency of arbitrator[s] to 'split the difference' which is OK in some cases and not in others."
- * "Arbitration generally provides a forum for obtaining a reasoned decision on the merits without the substantial delay and expense of litigation. It works well in most instances"
- * "Same fees, speeds process, why not."
- * "The threat of swift justice is a good one to resolve disputes."
- * Arbitration is "only as good as administrator and arbitrator."

Finality of arbitration is not a deterrent

Several years ago, the California Supreme Court decided two cases that some predicted would have a serious impact on the future use of arbitration in California, especially in the entertainment industry. Although some companies do refrain from using arbitration because of these decisions, the survey largely disproves this prediction.

In *Moncharsh v. Heily & Blase*, 3 Cal.4th 1 (1992), the Court held that an award reached by an arbitrator pursuant to a

arbitration agreement is not subject to judicial review for errors of fact and law. It reasoned that in return for a quick, inexpensive and conclusive resolution of their dispute, the parties agreed to take the risk that the arbitrator may make mistakes and commit errors of fact and law. The California Code of Civil Procedure (Sections 1280-1294, Section 1286.2) somewhat reduces this risk by providing for judicial review in circumstances involving serious problems with the award or the fairness of the arbitration process.

In *Advanced Micro Devices, Inc., v. Intel Corporation*, 9 Cal.4th 362 (1994), the Court held that - in the absence of specific restrictions in the arbitration agreement, the submission agreement, or the rules of arbitration - the remedy an arbitrator fashions does not exceed his or her power if it bears a rational relationship to the underlying contract as interpreted by the arbitrator and to the breach found by the arbitrator.

In an effort to assess the impact these decisions have had in the entertainment industry, the survey asked: "Does this decision [Moncharsh] deter you from using arbitration in a contractual dispute." The decision does not generally deter them from using arbitration, according to 71% of those who replied. A

like percentage stated that they take comfort in knowing that the arbitrator's award will almost certainly mean an end to the dispute.

Some of the specific reasons companies are ready to assume the risk of an adverse holding without the right to appeal were the following:

* "Sometimes [the] concept is alarming but (1) [it] can be partially dealt with by choosing [the] 'right' arbitrator; [and] (2) [it] can be dealt with, clumsily, by drafting language in arbitration paragraph."

* "Arbitration is a fast track method of resolving disputes, [is] less costly to pursue . . . , and allows the claimant to express issues of fairness and motive in pursuing the issues. The same applies to the respondent."

* "It provides finality. Even an adverse decision will usually be less costly."

* "This is a minimal risk to incur when weighed against all the benefits. In my experience as an arbitrator over the last 25 years, arbitral mistakes of fact or law very rarely affect the final award."

* "That is part of what you tell clients when counseling them on the pros and cons. I have always assumed an understanding that these risks are present and simply counsel the clients to consider them. The arbitrator can be wrong in your favor - or against you."

* "First I believe most arbitrators on the AAA panel (at least attorneys in the entertainment field) do apply the law and facts correctly. Secondly, on balance, the risks are worth the benefits."

The few who stated that the Moncharsh case does deter them from using arbitration explained:

* "In material contracts I want benefit of overturning decisions based on errors of fact and law."

* "Increases risk of bad result, if arbitrator rules incorrectly and adversely."

* "I want to know that if I have a good case on the facts and law I should prevail (or if I have a bad case I should probably lose). I don't have such a certainty in arbitration."

* "Though a trial costs more, there are remedial measures for a lousy judge or jury."

Ninety-five percent of those replying stated that they do not attempt to overcome Moncharsh by inserting a limiting

clause to restrict the power of the arbitrator or to permit greater judicial review. Though one said it "would be nice" to do so, others explained they did not because:

* "If you overcome the Moncharsh case, you defeat the purpose of arbitration [which is] 'speed' and 'fairness'. . . ."

* "Judicial review eliminates the speedier, cheaper aspect of arbitration and can greatly reduce the parties' likelihood of settlement."

The Intel decision does not deter entertainment companies from using arbitration either, according to 85% of those who replied to the survey. They explained:

* "Choice of arbitrator and language in provision can both help get the desired end."

* "Ability of arbitrator to fashion appropriate remedy seems integral to use of arbitration to resolve disputes."

* "There are very few cases in which I believe there is any real risk that the arbitrator will go beyond what I would consider to be reasonable remedies. Moreover, in the entertainment industry, there is a tendency for parties to use incomplete contracts or otherwise fail to specify important parts of the agreement. In these cases, it is essential that the arbitrator be allowed to 'fill out

the contract.' If a party could effectively challenge every arbitration award on the basis of the specific contractual remedy, it would deter finality in many entertainment arbitrations."

* "The [Intel] decision is appropriate and permits the Arbitrator the latitude to make an award appropriate to the facts as found by the Arbitrator to be applicable."

There were very few comments asserting that the Intel case does deter the use of arbitration. One explained that ". . . it goes to the issue of being able to appeal a poor decision." But it certainly appears from the survey and the comments made that most of the industry attorneys usually consider that the benefits from arbitration outweigh the inability to appeal a bad decision.

Conclusion

Both surveys show that the entertainment industry has begun to appreciate the benefits of mediation and arbitration. There are signs that in the future the industry may be moving closer to mediation. The view is that mediation is a win-win situation but that arbitration has some drawbacks.

As a result of good experiences with both mediation and arbitration, companies will resort to these methods of resolving disputes more often in the future, and more agreements will provide for arbitration of disputes.

When mediation has been employed it is not usually by virtue of a contractual agreement but is the result of an agreement made by the parties after a claim has arisen, after a suit has been filed, or sometimes before the filing of an action. Some companies which favor mediation and use it after a claim is made are reluctant to make it mandatory and provide for it in the dispute resolution provisions of their contracts. They believe that for mediation to work it must be completely voluntary.

The greatest obstacle to even a greater use of these processes, according to company and outside counsel, is that many executives are not knowledgeable about mediation and arbitration. It is hoped that the results of this survey will encourage executives to consider the benefits these processes offer.

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Phillips, Salman & Stein, and of counsel to Mannis & Phillips and Manning Marder & Wolfe. He serves as a mediator and arbitrator for the American Arbitration Association and its Center for Mediation (for which he is a member of its Los Angeles Commercial Large, Complex Panel and also its Commercial/Business Mediation Panel), and for AFMA and the Beverly Hills Bar Association.

Mr. Phillips has recently been appointed Chair of the Entertainment Law and ADR Task Force of the American Bar Association Section of Dispute Resolution. If you are interested in joining with him to create the task force and plan its functions for the coming year, please call him at 310-277-7117 or at email gphillips@mpla.com.

[ELR 21:1:5]

WASHINGTON MONITOR

Washington Redskins trademarks are canceled by Trademark Trial and Appeal Board on grounds that "Redskins" marks may disparage Native Americans and bring them into contempt and disrepute

The Washington Redskins have suffered a painful loss in a long-pending legal battle over the validity of its registrations for six trademarks, all containing the word "Redskins." The hotly contested battle has not been with an alleged infringer - though infringers may be the prime beneficiaries of the Redskins' loss. Instead, the battle has been with those who contend that the word "redskin(s)" "was and is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person."

This contention was made by seven Native Americans in a petition to the Patent and Trademark Office that sought cancellation of the Redskins' trademark registrations. Their critical view of the meaning of the word "redskins" was central

to that petition, because section 2(a) of the Trademark Act provides that a mark should not be registered if it "Consists of or comprises . . . scandalous matter; or matter which may disparage . . . persons, living or dead, . . . or bring them into contempt, or disrepute."

The petitioners testified from their own experiences about why they consider the word "Redskins" to be disparaging towards themselves and other Native Americans. Several expert witnesses - including historians, linguists, psychologists and a pollster - offered supporting testimony to the same effect.

There have been other cases in which the registrations for trademarks have been canceled. But the marks in those earlier cases were scandalous or disparaging because of their sexual explicitness or innuendo, or because of their vulgarity, religious significance, or reference to illicit activity. None of those factors was involved in this case. Instead, the petitioners contended that as used in the challenged trademarks, the word "Redskins" is "a deeply offensive, humiliating, and degrading racial slur" to Native Americans.

The Washington Redskins of course deny that the team's use of the word "Redskins" has any pejorative connotations.

Rather, the team - which has used the "Redskins" name since 1933 when it was still located in Boston - argued that its name "reflected positive attributes of the American Indian such as dedication, courage and pride."

Cancellation petitions are heard first by the Trademark Trial and Appeal Board. The Board wrote a 145-page decision explaining its reasoning, no doubt aware of the commercial and legal significance of the ruling it was making. At virtually every stage of its multi-step analysis, the Board agreed with the petitioners rather than with the Redskins, on points both procedural and substantive.

Among other things, the Board ruled that "In determining whether or not a mark is disparaging, the perceptions of the general public are irrelevant. Rather, because the portion of Section 2(a) proscribing disparaging marks targets certain persons, institutions or beliefs, only the perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark are relevant to this determination." This meant that only the perceptions of Native Americans counted; those of the general public did not. Moreover, the Board noted that the specific wording of section 2(a) of the Act didn't require

it to determine whether Native Americans actually perceive the "Redskins" word as disparaging; only whether they "may" have such a perception.

Applying this standard, the Board found that "petitioners have clearly established . . . that . . . the word 'redskin(s),' as it appears in respondent's marks in those registrations and as used in connection with the identified services, may disparage Native Americans, as perceived by a substantial composite of Native Americans." The Board also found that "the marks . . . consist of or comprise matter, namely, the word or root word, 'Redskin,' which may bring Native Americans into contempt or disrepute."

The Board did rule in the Redskins' favor on one point. It found that "petitioners have not established by a preponderance of the evidence that the marks in respondent's challenged registrations consist of or comprise scandalous matter." Standing alone, however, that one ruling did the Redskins no good.

The Board ruled that "the petition to cancel under Section 2(a) of the Act is granted on the grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute."

Editor's note: It is still too early to predict the actual consequences of this ruling, for at least a couple of reasons. First, as the Board itself noted, all it decided was that the challenged marks shall no longer remain registered. "We do not decide," said the Board, "whether the subject marks may be used or whether the word REDSKINS may be used as part of the name of respondent's professional football team." Since section 2(a) of the Trademark Act deals only with registration and not with usage, the Board's ruling does not prevent the Redskins from continuing to use its "Redskins" marks. Nor would the ruling prevent the Redskins from successfully suing infringers, under section 43(a) of the Act which protects unregistered marks or under state law. (There are however procedural benefits available to owners of registered marks, and for the time being at least, the Redskins will not enjoy those.)

Second, an appeal from the Board's ruling seems likely. One of the Redskins' major arguments was that cancellation of the registration of its marks under section 2(a) of the Act would be unconstitutional under the First Amendment, because the term "disparage" is overbroad and not viewpoint neutral. The Board declined to rule on this issue, because it does not have the power

to declare acts of Congress unconstitutional. Courts however do, of course.

Moreover, even without reaching the constitutional issue, two other aspects of the Board's decision seem ripe for appellate review. One of these was the Board's pre-trial rejection of the Redskins' estoppel and laches defense. This defense was based on the fact that the team began using its "Redskins" name almost 60 years before the cancellation petition was filed in this case, and had begun registering its marks a full 25 years before the petition was filed. Indeed, one of the petitioners' witnesses testified that he personally began complaining to the team about its "Redskins" name 20 years before the petition was filed. Nonetheless, the Board rejected the Redskins' estoppel and laches defense, saying that the case involved a broader interest, beyond the personal interests asserted by the petitioners, in "preventing a party from receiving the benefits of registration where a trial might show that [a party's] marks hold a substantial segment of the population up to public ridicule." (ELR 16:5:29) In making that ruling, the Board gave no consideration to the fact that the cancellation proceeding could have been brought earlier by any Native American; the seven petitioners who

eventually did file the case were not the only Native Americans who had standing or authority to do so.

Also, the Board's ultimate conclusion - that the word "Redskins" may disparage Native Americans and may bring them into contempt and disrepute - was not one that all judges would have reached, even using the facts found by the Board and the legal standards it applied. That is, the results of a survey conducted by the petitioners themselves showed that only 36.6% of Native Americans indicated that they found the word "redskin" offensive, even though when the survey was conducted, its scope was limited to the connotation of the word "redskin" as a term for Native Americans, without any reference to the Washington Redskins football team. In other words, almost two-thirds of all Native Americans polled did not think that "redskin" was offensive; and it seems reasonable to infer that if they had been asked about the offensiveness of the word "Redskins" when used as the name of a National Football League team, even fewer would have found the word offensive. This being so, it wouldn't be surprising if other judges found that a "substantial composite of Native Americans" (the Board's own legal standard) would not find "Redskins" disparaging.

Harjo v. Pro Football, Inc., 1999 TTAB LEXIS 181, 1999 WL 329721 (Trademark Trial and Appeal Board 1999)[ELR 21:1:10]

RECENT CASES

Recording entitled "Barbie Girl" did not violate Mattel's trademark rights; federal court dismisses infringement suit against MCA Records, as well as MCA's counterclaim for defamation

MCA Records has defeated a multi-pronged trademark suit filed against it by Barbie doll manufacturer Mattel, Inc. The case was provoked by MCA's release of a recording by the Danish pop group "Aqua" entitled Barbie Girl, without Mattel's advance knowledge or consent.

Though Mattel's own evidence showed that many Barbie doll owners "loved" the song, Mattel itself did not. The toy maker's displeasure is not entirely surprising. The song is performed by two singers - one male, the other female - who

adopt the names "Ken" and "Barbie" to sing to one another about their "life in plastic." Barbie's lyrics include such phrases as "undress me everywhere," "you can touch, you can play, if you say 'I'm always yours,'" and "make me talk, do whatever you please, I can act like a star, I can beg on my knees." Ken too sings what Mattel characterized as "adult-oriented lyrics," including "kiss me here, touch me there, hanky panky" and "come jump in, bimbo friend, let's do it again, hit the town, fool around, let's go party."

After the case was filed, MCA and Mattel engaged in a brief public relations duel in press releases and news interviews. For its part, Mattel characterized MCA as a "bank robber" and used words like "heist," "crime" and "theft" to describe what it thought of MCA's actions. This, not surprisingly, provoked MCA to file a counterclaim against Mattel for defamation.

Shortly before trial, both sides expressed confidence in their respective positions by filing motions for summary judgment, seeking dismissal of the other's claims. Both companies have been rewarded for their efforts. In an exhaustively thorough opinion spanning 44 printed pages,

Federal District Judge Matt Byrne has dismissed the case entirely.

Judge Byrne rejected Mattel's claim that the song Barbie Girl infringes its trademark in the name "Barbie." The judge acknowledged that "some individuals inevitably will believe that titles and lyrics containing a celebrity or icon's name constitute an endorsement. . . ." But, he added, "this risk 'is outweighed by the danger of restricting artistic expression.' The First Amendment interests at stake outweigh the possibility that some people might not interpret the song's light-hearted lyrics as a comment or spoof of the popular Mattel product and might be confused as to whether Mattel put out or authorized the song Barbie Girl."

Mattel also asserted a trade dress claim, based on MCA's use of "so-called Barbie 'pink' in the Barbie Girl packaging and video." This claim was unsuccessful, because Judge Byrne found that Mattel had not shown that its use of the color pink had acquired secondary meaning. "The color pink," the judge observed, "is used on many products associated with young girls," and Mattel provided "no evidence as to how its pink differs from that used on these other products." Moreover, even

if Mattel's pink were unique, "significant differences exist between its packaging and that of the Barbie Girl song to prevent likelihood of confusion. . . ."

The judge also rejected Mattel's dilution claim. "Even if the song did tarnish or dilute the Barbie mark," the judge said, MCA's "speech falls within the 'noncommercial use of a mark' exception to the federal statute."

Judge Byrne was no more receptive to MCA's counterclaim than he had been to Mattel's claims. The allegedly defamatory statements made by Mattel "cannot be seen as anything but hyperbole made in the middle of an attempt to convince the public of Mattel's side in the ongoing litigation," the judge said. As such, they were "not capable of being proven true or false," and thus were non-actionable. Moreover, because MCA is a public figure, it would have had to show that Mattel's statements had been made with actual malice, but it "failed to do so."

Mattel, Inc. v. MCA Records, Inc., 28 F.Supp.2d 1120, 1998 U.S.Dist.LEXIS 20943 (C.D.Cal. 1998)[ELR 21:1:12]

Kato Kaelin wins right to trial in defamation action against National Examiner based on headline saying "Cops Think Kato Did It!" published shortly after O.J. Simpson was acquitted

Headlines are what sell tabloids at checkout stands. And in one case at least, a headline is why the National Examiner will have to defend itself before a jury in a defamation lawsuit.

The headline in question said "COPS THINK KATO DID IT!" Because it was published just one week after O.J. Simpson was acquitted on charges he had murdered Nicole Brown Simpson and Ronald Goldman, Simpson-houseguest Brian "Kato" Kaelin said the headline meant that the police thought that he had committed the murders.

In fact, the police thought no such thing; and the National Examiner's publisher did not believe that they did. The accompanying article did not report that Kaelin was a murder suspect; and the paper's editor admitted in his deposition that he was concerned that the headline did not accurately reflect the article's content.

Why then wasn't the headline rewritten before it was published? Because, the editor testified, he thought the meaning of the headline was clarified by the subhead: ". . . he fears they want him for perjury, say pals." In other words, the word "it" in the headline did not refer to the murders; it referred to perjury.

Whether the headline has the meaning attributed to it by Kaelin, or instead the meaning the National Examiner intended, should be decided at trial by a jury, a federal Court of Appeals has held. In an opinion by Judge Barry Silverman, the appellate court ruled: that reasonable jurors could find that the headline falsely insinuated that the police believed that Kaelin had committed the murders; that this insinuation was not cured by the subhead or the article itself; and that the Examiner knew the headline was inaccurate or recklessly disregarded its inaccuracy, so that Kaelin would be entitled to recover even though he was a public figure.

Judge Silverman explained that the subhead concerning "perjury" did not necessarily explain the headline's suggestion of murder, because the headline refers to what the police thought, while the subhead refers to what Kaelin's friends thought. Thus,

the judge said, the headline and subhead "express two different thoughts and are not mutually exclusive."

For these reasons, the appellate court reversed a District Court order that had granted summary judgment to the Examiner, and has remanded the case for trial.

Kaelin v. Globe Communications Corp., 162 F.3d 1036, 1998 U.S.App.LEXIS 32594 (9th Cir. 1998)[ELR 21:1:12]

California appellate court affirms decision by California Labor Commissioner voiding contract between country western singer Michelle Wright and career consultant, because consultant's petition for review was filed late

Usually it's country western singers who tell tales of woe. But in one recent case, country western singer Michelle Wright has been able to celebrate, while her former "career consultant" has had reason to grieve.

The tale began in 1994 when Wright signed a career consulting agreement with Gilbert Cabot of REO Broadcasting

Consultants. The agreement gave REO a right to a percentage of Wright's gross earnings in return for services he was to render to her. In just a few months, however, Wright terminated the agreement.

In 1996, REO sued Wright in California Superior Court for breach of contract. Wright responded by filing a "petition to determine controversy" with the California Labor Commissioner, under the California Talent Agencies Act. That Act gives the Labor Commissioner the authority to hear and determine various kinds of disputes, including those that involve the validity of contracts between artists and personal managers. The Act also requires those who seek to obtain employment for entertainers to be licensed by the Labor Commissioner. And the law permits the Commissioner to declare void agreements between artists and those who seek employment for them without being licensed to do so.

Though REO denied that it had sought employment for Wright, the Commissioner apparently found otherwise, because on July 10, 1997, the Commissioner ruled in Wright's favor and voided REO's contract with her - thus giving Wright her first occasion to celebrate.

Under the Talent Agencies Act, REO had the right to appeal the Commissioner's ruling. It had in fact the right to seek a "trial de novo" in Superior Court. But the Act required REO to file its petition for a trial de novo within ten days of the Commissioner's ruling. Unfortunately for REO, it didn't file its petition until July 31st which was several days too late. Just a day or two after the Commissioner's decision, REO's lawyer was in an auto accident that kept him out of his office for three weeks; and that may have been why its petition was not filed on time.

REO argued that if its petition were late, it was due to "excusable neglect," and thus it was entitled to a trial de novo. That argument, however, was rejected by the Superior Court. In response to the Commissioner's decision and a motion by Wright, that court dismissed REO's lawsuit entirely - thus giving Wright her second occasion to celebrate.

REO appealed the dismissal to the California Court of Appeal. But the appellate court has given Wright yet a third occasion to celebrate. Writing for the court, Justice Walter Croskey explained that the Talent Agencies Act requires an "aggrieved party" to file a notice of appeal within ten days after

notice of the Commissioner's decision is served, and that the Superior Court had no power to consider a late notice of appeal even if it were late due to "mistake, inadvertence or other excuse."

Moreover, Justice Croskey ruled, the Superior Court had properly denied REO's request for permission to file an amended complaint that would have challenged the constitutionality of applying the Talent Agencies Act to its activities. REO's argument would have been that since it had not sought employment for Wright, it was unconstitutional to apply the Act to it all. But since the Commissioner apparently found that REO had sought employment for Wright, that argument would have been a "collateral attack" on the Commissioner's decision, and in California, agency decisions are immune from collateral attacks of that sort.

REO Broadcasting Consultants v. Martin, 81 Cal.Rptr.2d 639, 1999 Cal.App.LEXIS 51 (Cal.App. 1999)[ELR 21:1:13]

Public radio station did not violate First Amendment rights of Ku Klux Klan by declining its offer to underwrite NPR's "All Things Considered"

Those who listen to public radio are periodically subjected to pledge drives that are more tedious than commercials. Pledge drives are tolerated because listeners know that public stations have expenses, just like for-profit stations do; and contributions are one way money is raised in the non-profit world of public broadcasting. Program underwriting is another.

As essential as underwriting is, some underwriting offers are declined for one reason or another. The University of Missouri's radio station KWMU has declined offers from the organization that conducts "Ultimate Fighting Championships," from a suspected "house of ill repute," and from the American Friends Service Committee. While those decisions cost KWMU revenue in the short run, they apparently went unchallenged. What got the station hauled into court was its decision to decline an underwriting offer from the Knights of the Ku Klux Klan.

The KKK sought to underwrite KWMU's broadcasts of NPR's "All Things Considered." In return, it asked the station to

read a short acknowledgement, as the station does for other underwriters. The station rejected the KKK's offer, because it determined that if it broadcast a KKK acknowledgement, the station and the University would have lost far more money from other sources than it received from the KKK.

Unlike the others whose money had been declined, the KKK didn't suffer in silence. Instead, it sued the station in federal District Court, alleging that the station had violated its First Amendment rights. Magistrate Judge Thomas Mummert has ruled otherwise, however.

Judge Mummert held that even though KWMU is owned and operated by a public university, the station's underwriting decisions are not to be scrutinized under the "public forum doctrine." Thus, the station was not required to accept the KKK's underwriting offer.

Moreover, the judge added, even if he were to engage in the public forum analysis urged by the KKK, he would not have concluded that KWMU is a designated public forum. He would have found instead that the station is a non-public forum. Because it is publicly-owned, its decisions must be viewpoint neutral and otherwise reasonable, even though it is a non-public

forum. But Judge Mummert concluded that KWMU's decision to decline the KKK's underwriting offer satisfied both of these tests.

As a result, the judge has granted the station's motion for summary judgment.

Knights of the Ku Klux Klan v. Bennett, 29 F.Supp.2d 576, 1998 U.S.Dist.LEXIS 19473 (E.D.Mo. 1998)[ELR 21:1:14]

City of Indianapolis must pay artist's attorneys' fees and costs of \$131,253 for destroying, rather than removing, sculpture located on city-owned land in violation of Visual Artists Rights Act, though judge reaffirms decision that city had not been "willful" and thus is not liable for enhanced statutory damages

The City of Indianapolis made an expensive mistake when it destroyed a sculpture located on city-owned land, rather than remove it as artist Jan Randolph Martin had asked. Removing the sculpture would have cost \$8000; destroying it

cost just \$330. While the city saved \$7670 in the short run, it ultimately had to pay Martin and his attorneys \$151,253 in the long run (to say nothing of the city's own attorneys' fees and costs).

Martin's lawsuit against Indianapolis has produced three published decisions, so far. Federal District Judge Sara Barker ruled, first, that the city had violated Martin's rights under the Visual Artists Rights Act by destroying his sculpture (ELR 20:2:12). Then the judge ruled that Martin was entitled to recover \$20,000 in statutory damages (ELR 20:6:19). Now, Judge Barker has awarded Martin \$131,253 in attorneys' fees and costs.

The judge's latest ruling represents a partial victory, of sorts, for Indianapolis. Martin sought reconsideration of Judge Barker's earlier ruling that the city's actions had not been "willful" within the meaning of the Copyright Act provision concerning enhanced statutory damages. Because the city had not been willful, Martin received an award of ordinary statutory damages of \$20,000, rather than an award of enhanced statutory damages of \$100,000. In the copyright context, "willful" means

more than an "intentional" act. It means an act that the infringer knows is an infringement of copyright.

In his request for reconsideration, Martin argued that in cases involving violations of the Visual Artists Rights Act, "willful" should mean something less than in other copyright cases, because Visual Artists Rights Act cases involve the destruction of unique works of art. Judge Barker was not persuaded, however. She noted that Congress had made no distinction between claims under the Visual Artists Rights Act (which added provisions to the Copyright Act) and other types of infringements. "Absent an explicit congressional directive that VARA claims should be treated differently from other copyright claims by the courts in awarding damages, we see no reason to adopt an alternative definition of 'willful,'" the judge concluded.

Martin did better with his request for attorneys' fees and costs. He sought fees of \$132,786 and costs of \$6,969; Indianapolis argued he should be awarded no more than \$75,440 in fees and \$4,331 in costs. After a point-by-point consideration of the city's arguments for reducing the amount sought by Martin, Judge Barker awarded him \$125,603 in fees and \$5,650 in costs - 94% of what he requested.

Editor's note: Among other things, the city had asked the judge to reduce the hourly rates charged by Martin's lawyers, because they were from Chicago and had charged rates appropriate in Chicago which are greater than the lower rates charged in Indianapolis where the case was litigated. Judge Barker refused to do so, however. It was not unreasonable or extravagant for Martin to choose Chicago counsel, the judge concluded, particularly because of the expertise of his lawyer in art law and because "Chicago is a major legal market not far removed from Indianapolis." This ruling contrasts with one recently made by a federal judge in New Jersey who reduced (to New Jersey levels) the hourly rates awarded to New York city lawyers, because they had sought New York rates for a case litigated in New Jersey (ELR 20:12:17).

Martin v. City of Indianapolis, 28 F.Supp.2d 1098, 1998 U.S.Dist.LEXIS 18898 (S.D.Ind. 1998)[ELR 21:1:14]

Scholastic's humanized skeleton character "Curly" does not infringe copyright to skeleton character "Skully" because "Curly" was independently created; nor does "Curly" infringe "Skully" trademark

Scholastic's humanized skeleton character named "Curly" is his own man, not related by blood or copying to a humanized skeleton character named "Skully" created by artist Gregory Speirs. That is the finding of federal District Judge Michael Mukasey in a copyright and trademark case in which Scholastic sued Speirs for a declaration of non-infringement, and Speirs sued Scholastic for infringement. As a result of this finding, Judge Mukasey has granted Scholastic's motion for summary judgment and has resolved the case entirely in its favor.

Scholastic's "Curly" had his origins in a drawing created by artist Tim Jacobus in 1992 to illustrate the cover of "Say Cheese or Die," a book in Scholastic's "Goosebumps" series. Jacobus had been asked by a Scholastic editor "to draw a cover that would look like a photograph of a family enjoying a backyard barbecue, but for one feature: everyone in the family would be a skeleton." According to Jacobus, the appearance and

dress of the skeleton characters on the cover were the product of his own imagination, exclusively. Later, in 1994, Scholastic asked Jacobus to create a skeleton character for a "Goosebumps" calendar. Using only the "Say Cheese or Die" cover as a model, Jacobus created the requested skeleton character, and "Curly" was born.

"Skully" too dates back to 1992 when Speirs drew a skeleton figure as the design for a T-shirt for the Lithuanian Olympic Basketball team. The T-shirt's success prompted Speirs to create another skeleton character - "an athletic skeleton, acceptable to parents, friendly to children but neither scary nor threatening" - and that character was "Skully."

To prove that Scholastic's "Curly" had been copied from "Skully," Speirs would have had to show that Scholastic had access to "Skully" and that "Skully" and "Curly" were substantially similar. Scholastic denied that either was true. But Judge Mukasey said that even if access were assumed, "there is a strong basis for holding that [Speir's] claim would fail on substantial similarity grounds." This was so, the judge explained, because "most representations of Curly bare little resemblance to Skully," and "even in the two illustrations that are the most alike

. . . the similarities are primarily, if not exclusively, in unprotectable elements. . . ."

Nonetheless, Judge Mukasey said it was unnecessary for him to resolve the substantial similarity question, because Scholastic presented "strong, convincing and persuasive evidence" of "independent creation" - namely, Jacobus' creation of a skeleton character for the cover of "Say Cheese or Die" before Speirs developed "Skully." Moreover, although a few of the images of the two characters "are somewhat similar, they are far from 'so strikingly similar as to preclude the possibility of independent creation.'" Scholastic's independent creation of "Curly" defeated Speir's copyright infringement claim.

The judge also rejected Speir's trademark claims. He did so, because he found that "no reasonable jury could find that a consumer would be confused. . . ." Speir's dilution claim failed because the "Skully" mark was not "at all strong, let alone famous," nor was there any showing that "Curly" had "blurred" or "tarnished" the "Skully" mark.

Scholastic Inc. v. Speirs, 28 F.Supp.2d 862, 1998 U.S. Dist. LEXIS 18599 (S.D.N.Y. 1998)[ELR 21:1:15]

Validity of referendum for financing and construction of new Seattle Seahawks stadium is affirmed by Washington Supreme Court

A couple of years ago, it looked as though the Seattle Seahawks might move to California. But a Seattle-area company known as Football Northwest, Inc., acquired an option to purchase the team from the owner who wanted to move it. Football Northwest then announced it would exercise the option, and keep the team in Seattle - but only if legislation were enacted to finance and build a new stadium as a "public-private enterprise."

The Washington state legislature was willing to enact such legislation if it had the support of the people of Washington, but not otherwise. As a result, the legislature passed an act which required the approval of state voters. A referendum was the vehicle for seeking that approval. A special election asked voters to answer the question: "Shall a public stadium authority be authorized to build and operate a football/soccer stadium and exhibition center financed by tax revenues and private contributions?"

There were those in Washington state who opposed the use of tax money to build a stadium for the Seahawks, and one of them, Jordan Brower, filed a suit to prevent the election or to set aside its results if the stadium won voter approval. A Washington state trial court stayed Brower's lawsuit until after the election, so it went forward in June 1997 as originally scheduled.

Voter turnout was just 51%, and just 51.1% of those voted in support of the referendum. But that was enough for the referendum to pass. So Brower's suit resumed.

In response to cross-motions for summary judgment, the trial court ruled against Brower and in favor of the state and Football Northwest. In an appeal to the Supreme Court of Washington, Brower made a multi-pronged attack on the validity of the referendum, challenging it for the most part under provisions of the state constitution.

However, in a decision by Justice Barbara Madsen, the Washington Supreme Court has rejected all of Brower's arguments, and thus has affirmed the validity of the referendum and the manner in which it was conducted.

Brower v. State of Washington, 969 P.2d 42, 1998 Wash.LEXIS 946 (Wash. 1998)[ELR 21:1:16]

In trespass suit by physician against CBS prompted by reporter's posing as potential patient, appellate court affirms dismissal of CBS's First Amendment and consent defenses but rejects physician's claim for punitive damages

CBS has been sued for civil trespass by a New York physician named Dr. Felix Shiffman, in a case that tests the legality of "undercover" reporting. In this suit, a CBS reporter posed as a potential patient, using a false identity and bogus insurance card.

In response to Dr. Shiffman's complaint, CBS asserted several affirmative defenses, including "consent," "implied consent" and First Amendment privilege. A New York trial court dismissed those defenses, however, and the Appellate Division has affirmed.

In a short, unsigned Memorandum Opinion, the Appellate Division ruled that the consent and implied consent

defenses "were legally insufficient since consent obtained by misrepresentation or fraud is invalid. . . ." The Appellate Division also rejected CBS's First Amendment defense, saying that free speech guarantees "confer no privilege for trespass."

CBS did prevail on one issue. Dr. Shiffman's complaint sought punitive damages. The Appellate Division held that punitive damages are not recoverable in this case, because "there is no evidence the complained-of trespass was motivated by malice."

Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 1998 N.Y.App.Div.LEXIS 14517 (App.Div. 1998)[ELR 21:1:16]

Hearing-impaired TV viewers must seek relief from FCC under Video Programming Accessibility Act before suing broadcasters in court under Rehabilitation and Americans with Disabilities Acts, federal judge rules in dismissing suit against Kentucky Educational Television

The Federal Communications Commission has first crack at resolving complaints that broadcasters violate the law by failing to provide enough closed captioned programming. That in effect is what Federal District Judge Joseph Hood ruled when he dismissed a lawsuit filed by Cole Zulauf that complained that the Kentucky Educational Television network illegally discriminated against him by failing to provide closed captioning for all of its programs.

Congress dealt specifically with the closed captioning obligations of broadcasters when it enacted the Video Programming Accessibility Act of 1996 (the VPAA for short). Zulauf's complaint did not allege violations of the VPAA, however, quite probably for two reasons. First, the VPAA gives the FCC exclusive jurisdiction to hear complaints under that

statute. Second, the VPAA specifically provides that it does not create private rights of action.

Instead of suing under the VPAA, Zulauf sued under the Rehabilitation Act and the Americans with Disabilities Act, both of which prohibit discrimination against those who are disabled, and both of which do permit private lawsuits. Neither of those Acts, however, refers specifically to closed captioning nor even to the manner in which broadcasters are supposed to avoid disability-related discrimination.

In order to give "full effect" to all three of these federal statutes, Judge Hood has decided that Zulauf must "exhaust his remedies under the VPAA before filing an action under the [Americans with Disabilities Act] and [Rehabilitation Act]." The judge concluded that this "makes sense because the VPAA is the latest and most specific statute addressing a broadcaster's duty to provide closed captioning. . . ." Moreover, "Congress's intent in giving the FCC exclusive jurisdiction over any complaints filed under the VPAA was to promote uniformity in the area of closed captioning, and . . . the FCC has expertise in the area of broadcasting and has already taken steps to determine how much

closed captioning broadcasters can reasonably provide" by adopting regulations implementing the VPAA.

As a result, Judge Hood dismissed Zulauf's lawsuit "for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. . . ."

Zulauf v. Kentucky Educational Television, 28 F.Supp.2d 1022, 1998 U.S. Dist. LEXIS 19292 (E.D.Ky. 1998)[ELR 21:1:16]

University of Maryland campus newspaper entitled to documents concerning campus parking violations committed by basketball team members and head coach

On-campus parking at most major universities is a rare and desirable thing. So when word leaked out, in 1996, that members of the men's basketball team at the University of Maryland, as well as the team's coach, had been parking illegally, it was news. The story's potential grew when the University notified the NCAA that a former coach had given a player money to pay the player's parking tickets.

While this may not have been grist for the New York Times or Washington Post, it was a big story for the University of Maryland's campus newspaper, The Diamondback.

Maryland has a Public Information Act that gives the public a right of access to "public records" containing "information about the affairs of government and the official acts of public officials and employees." The University of Maryland is a public institution, so the editors of The Diamondback requested copies of the University's correspondence with the NCAA, and records concerning the parking violations committed by members of the basketball team and its head coach.

The University denied The Diamondback's requests, on the grounds that the Maryland Public Information Act did not authorize their disclosure. The Diamondback, however, has proved the University wrong.

In an opinion by Judge John Eldridge, the Court of Appeals of Maryland has affirmed a lower court order requiring the University to give The Diamondback all of the records it requested. Judge Eldridge rejected the University's argument that parking tickets are "personnel records" or "financial information"

and as such are exempt from disclosure. The judge also ruled that the players' tickets are not "educational records" protected from disclosure by the federal Family Education Rights and Privacy Act. And Judge Eldridge held that the University could not withhold the records on the grounds that it would be against the "public interest" to disclose them.

The Diamondback did suffer one setback in the case. It sought but was denied attorneys fees in connection with its victory. Speech may be free in Maryland in the First Amendment sense. But that doesn't mean that it's free in a financial one.

Kirwan v. The Diamondback, 721 A.2d 196, 1998 Md.LEXIS 943 (Md. 1998)[ELR 21:1:17]

Court dismisses some, but not all, claims by art student in case complaining of unauthorized reproduction of her art works by state university, professor and Mercedes Benz

Professor Peter Williams must now be thinking that no good deed goes unpunished. Wayne State University, where Professor Williams teaches art, and Mercedes-Benz must be too.

What these three have in common is that all are defendants in a lawsuit that has been filed by Jocelyn Rainey who in 1996 was a masters student in Wayne State's fine arts program. Mercedes-Benz was then planning an art exhibit for an up-coming auto show, and got Professor Williams involved in the effort. He in turn got Rainey involved, and all went well at first. Mercedes-Benz adopted Rainey's suggestion for the art exhibit's theme; it published a brochure reproducing four of her art works; it paid her \$1,400; and it offered her an expense paid trip to Barcelona to recreate the art exhibit for another auto show there.

Why, then, the lawsuit? According to Rainey's allegations, she had agreed to the reproduction of just one of her art works in the Mercedes-Benz brochure, not four. To make

matters worse, the extra three paintings were published without identifying her as their artist, and one of them was published upside down. Finally, when she protested to Professor Williams, he refused to take any action.

Rainey's allegations have been made in a multi-count complaint alleging copyright infringement and several other legal theories. In a pre-trial effort to focus the case, the defendants sought dismissal of some of Rainey's claims. They have been partially successful.

Federal District Judge George Steeh has dismissed Rainey's claims for intentional infliction of emotional distress and unjust enrichment, on the grounds that they are preempted by federal copyright law. The emotional distress claim was preempted, the judge explained, because the "extreme and outrageous" conduct on which Rainey relies in support of that claim is the unauthorized reproduction of her artworks which is exactly what copyright law protects. The unjust enrichment claim was preempted, because the benefits allegedly obtained by the defendants all came from the unauthorized copying of Rainey's artworks.

On the other hand, the judge refused to dismiss Rainey's breach of fiduciary duty claim against Professor Williams. Judge Steeh ruled that this claim was not preempted, because to prevail, Rainey will have to show that she had a fiduciary relationship with Williams and that he betrayed it. Neither of these elements need be shown in a copyright infringement case.

Judge Steeh also dismissed Rainey's claim for a portion of Mercedes-Benz's profits, because she failed to show that the car company's profits were attributable to the allegedly infringing brochure. Her claim for profits "is pure conjecture," the judge concluded.

In a separate opinion, Judge Steeh granted motions by Wayne State and Professor Williams (insofar as he was sued in his official capacity) for partial summary judgment dismissing Rainey's copyright infringement claims for monetary damages. The judge did so on the grounds that those claims are barred by the Eleventh Amendment. On the other hand, the judge said that Professor Williams does not have Eleventh Amendment immunity from copyright damages to the extent he has been sued in his individual capacity.

The Eleventh Amendment does not bar injunctive relief in copyright cases at all. But Judge Steeh ordered Rainey to show cause why her claim for injunctive relief shouldn't be dismissed too, on the grounds that it became moot when the defendants returned her art works to her.

Rainey v. Wayne State University, 26 F.Supp.2d 963, 973, 1998 U.S. Dist. LEXIS 20192, 20193 (E.D. Mich. 1998) [ELR 21:1:17]

Constitutionality of Kansas City ordinance banning use of amplifiers in public entertainment areas between 11 p.m. and 6 a.m. withstands constitutional challenge by street musician

Westport is an area in Kansas City, Missouri, that is known for its bars and nightclubs. Westport is also a residential area, and many of its homes and apartment buildings are directly adjacent to its entertainment venues. Late-night noise is therefore a problem, and the City responded by adopting an ordinance that

bans the use of amplifiers in public entertainment areas, like Westport, between 11 p.m. and 6 a.m.

One man's noise is another's music. Danny Croman is a street musician who likes to perform in Westport, and the ordinance limits the times he's able to do so. As a result, Croman sued the City in federal District Court alleging that the ordinance violates his free speech and equal protection rights.

Judge Joseph Stevens disagreed. In an opinion rendered in 1997, but only recently published, Judge Stevens concluded that the ordinance is valid, because it is a reasonable time, place and manner regulation.

The judge also rejected Croman's argument that the ordinance denies equal protection to street musicians. "The City could have . . . rationally decided that it would treat amplification on public rights-of-way differently from amplification on private property because it has a greater interest in regulating public rights of way," the judge explained. In any event, the City also has ordinances that control sound levels on private property. All sources of noise do not need to be addressed in a single ordinance for noise regulation to be constitutional, the judge ruled.

Croman v. City of Kansas City, Mo., 29 F.Supp.2d 587, 1997 U.S. Dist. LEXIS 23311 (W.D. Mo. 1997)[ELR 21:1:18]

Wisconsin city ordinance regulating sexually oriented businesses is declared unconstitutional because it also would apply to mainstream movies and plays

A Cumberland, Wisconsin, city ordinance that regulates "sexually oriented businesses" has been declared unconstitutional, because it is overbroad. Among other things, the ordinance prohibits nude appearances and the depiction of "specified sexual activities."

The ordinance was challenged by the owner of the Island Bar, an establishment located in the City of Cumberland that features nude dancers, and by Tonya Norwood, one of the dancers who performs there.

Federal District Judge Barbara Crabb has granted the plaintiffs' motion for summary judgment and has enjoined the city from enforcing the ordinance. The judge explained that the ordinance is overbroad, because it could be applied "to a

commercial establishment featuring mainstream motion pictures or plays of unquestioned artistic merit in which there is a naked female breast or the depiction of two individuals engaging in sexual intercourse."

Schultz v. City of Cumberland, 26 F.Supp.2d 1128, 1998 U.S. Dist. LEXIS 18739 (W.D. Wisc. 1998)[ELR 21:1:18]

Georgia statute that prohibits any off-site outdoor advertising for businesses where nudity is exhibited is declared unconstitutional by state supreme court

Cafe Erotica and the company that carries its outdoor billboard advertising have successfully challenged the constitutionality of a Georgia statute that prohibits any off-site outdoor advertising for businesses where nudity is exhibited. As its name suggests, Cafe Erotica features erotic dancers who "may become nude or partially nude" during their performances. So the statute was a matter of significant concern to the Cafe, because it wanted to do billboard advertising at several sites that

are not part of its premises adjacent to Interstate 75 in Peach County.

A Georgia trial court agreed with the Cafe and its billboard company that the statute impermissibly infringed their First Amendment free speech rights, even under the "less-exacting" test for commercial speech permitted by the United States Supreme Court's decision in the Central Hudson Gas case. As a result, the trial court permanently enjoined enforcement of the statute.

The State appealed, but the Cafe and its billboard company have prevailed again. In an opinion by Justice Hugh Thompson, the Georgia Supreme Court has held that because the statute prohibits "any" off site-advertising for businesses like Cafe Erotica, the statute "has gone further than necessary in seeking to meet its ends."

The state asserted that traffic safety was the key reason the statute was enacted, and Judge Thompson accepted that as a substantial governmental interest. But the justice explained that the statute "is not directed solely at provocative images, . . . it prohibits even a worded sign advertising the location of a business." This was fatal to the statute's constitutionality.

"Because we conclude that traffic safety could be served as well by a more limited restriction on commercial speech, we hold that the legislation is not narrowly tailored to achieve its stated goal."

State of Georgia v. Cafe Erotica, Inc., 507 S.E.2d 732, 1998 Ga.LEXIS 1043 (Ga. 1998)[ELR 21:1:19]

Some amendments to Houston ordinance regulating adult entertainment businesses are declared unconstitutional though others are upheld

Early in 1997, the City of Houston amended its ordinance regulating adult entertainment businesses in ways that sparked opposition by 88 establishments and 105 individuals who own or work in Houston-area cabarets, movie theaters, arcades, mini-theaters, video stores, bookstores, modeling studios and tanning salons. Their opposition took the form of a massive lawsuit that attacked the amended ordinance on federal and state constitutional grounds as well as on federal, state and local statutory grounds.

Portions of the amendments have been declared unconstitutional though others survived. The breadth and complexity of the case is revealed in the length of the opinion rendered by Federal District Judge Nancy Atlas in response to the parties' cross-motions for summary judgment. It took the judge 165 printed pages to explain and support her conclusion that parts of all of the parties' motions should be granted and other parts denied.

Judge Atlas upheld the constitutionality and statutory propriety of amendments that make the ordinance potentially applicable to mainstream bookstores as well as adult mini-theaters; that impose structural, visibility and lighting requirements; that establish a three-foot buffer zone between patrons and adult entertainers, and prohibit them from touching one another; and that require adult-business entertainers to obtain identity cards.

On the other hand, the judge declared unconstitutional amendments that would have broadened restrictions on the locations where adult businesses may be operated, and that would have required identity cards for adult-business managers.

N.W. Enterprises, Inc. v. City of Houston, 27 F.Supp.2d 754, 1998 U.S.Dist.LEXIS 11856, 11884, 21961 (S.D.Tex. 1998)[ELR 21:1:19]

DEPARTMENTS

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Cardozo Arts & Entertainment Law Journal has published Volume 17, Number 1 with the following articles:

Who Authors Trademarks? by Steven Wilf, 17 Cardozo Arts & Entertainment Law Journal 1 (1999)

The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment by Malla Pollack, 17 Cardozo Arts & Entertainment Law Journal 47 (1999)

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Federal Communications Law Journal, published by Indiana University School of Law-Bloomington, 201 South Indiana Avenue, Bloomington, Indiana 47405, 812-855-5952, has issued Volume 51, Number 2 with the following articles:

The Fairness Doctrine Is Dead and Living in Israel by Amit M. Schejter, 51 Federal Communications Law Journal 281 (1999) (for address, see above)

Playing the Name Game: A Glimpse at the Future of the Internet Domain Name System by Rebecca W. Gole, 51 Federal Communications Law Journal 403 (1999) (for address, see above)

To Net or Not to Net: Singapore's Regulation of the Internet by Sarah B. Hogan, 51 Federal Communications Law Journal 429 (1999) (for address, see above)

Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling by Stevie A. Kish, 51 Federal

Communications Law Journal 449 (1999) (for address, see above)

Seton Hall Journal of Sport Law has published Volume 9, Number 1 with the following articles:

Escaping Athlete Agent Statutory Regulation: Loopholes and Constitutional Defectiveness Based on Tri-Parte Classification of Athletes by Rob Remis and Diane Sudia, 9 Seton Hall Journal of Sport Law 1 (1999)

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Defamation-An Athlete's Statements Regarding the Conduct of His Agent Can Be Actionable Under State Defamation Law, A. J. Faigin v. Kelly by Mark Gatto, 9 Seton Hall Journal of Sport Law 263 (1999)

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Torts-New Jersey Tort Claims Act-Unimproved Property Immunity Does Not Relieve Liability from Negligently Supervising an Ocean Beach, Even If Such Supervision Is Voluntary-Fleuhr v. City of Cape May by Jennifer A. Carr, 9 Seton Hall Journal of Sport Law 321 (1999)

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