LEGAL AFFAIRS

Catapult to Oblivion: Recent Court Decisions Threaten Ability of Bankruptcy Debtors to Retain or Sell Intellectual Property Licenses

by Evan M. Jones

Imagine that Big Pics, Inc., a movie production company, has invested millions of dollars to make "Copyright Lawyers in Love." The movie's soundtrack features popular recordings, for which Big Pics obtained non-exclusive master use licenses from record companies and non-exclusive synchronization licenses from music publishers. Several of the movie's scenes were filmed on sets decorated with distinctive and recognizable works of art, for which Big Pics obtained non-exclusive copyright licenses as well. Finally, in some scenes, characters are shown wearing caps with Major League Baseball logos, jackets with National Basketball Association logos, and jerseys with National Football League logos. All of these clothing items are authentic licensed merchandise that were purchased in retail stores. But to be safe rather than sorry, Big Pics also obtained non-exclusive trademark licenses, authorizing the use of these caps, jackets and jerseys as movie costumes, from the licensing arms of all three leagues.

Impact of bankruptcy

Unfortunately, Big Pics is having financial problems and may need to reorganize through bankruptcy. Big Pics has paid in full for these licenses and is fully capable of performing whatever remaining obligations it may have to the licensors. But the firm's

lawyers warn Big Pics that filing bankruptcy could permit the licensors to terminate their licenses, and thereby prevent the movie's distribution, while pocketing the upfront license fee payments.
Can this be?

Two recent court decisions seriously threaten the ability of entertainment companies to use the bankruptcy process to reorganize, or even to efficiently liquidate. These decisions hold that a debtor's benefits under a copyright or patent license may be forfeited by the commencement of a bankruptcy case. Because of their unique reliance upon intellectual property licenses, entertainment companies, as well as high technology ventures, may be uniquely effected by these decisions.

While legislative relief has been proposed, it is uncertain when or if such relief will arrive.

Licenses as "executory contracts"

Under federal bankruptcy law, "executory contracts" of a bankruptcy debtor must either be assumed, assumed and assigned, or rejected.1 In order for a bankruptcy debtor to continue to enjoy rights under an executory contract after reorganization, the contract must be assumed in the bankruptcy. Contracts are generally found to be executory where each party has unperformed material obligations.2 While certain outright transfers of intellectual property may escape classification as a executory contracts, the courts have gone to great lengths to find that nearly any non-exclusive license agreement - even some that are fully paid - constitute executory contracts because of the licensor's obligation not to sue for infringement and the licensee's obligations such as cooperation in third party infringement actions and the like.3

Entertainment companies almost uniformly are dependent on such executory contracts. Even companies that view themselves as owners of intellectual property, often acquire some portion of those rights through licenses-in. For example, a production company may not own all copyrighted material relevant to its product, but hold some of these rights under license agreements. Similarly, with the increasing importance of technology, patent licenses may be critical to a content producer. Even those companies that do not hold licenses-in will typically exploit their intellectual property through licenses-out. Thus, they may find themselves applauding these recent court decisions.4

The Bankruptcy Code generally permits a bankruptcy debtor to override contractual prohibitions on assumption or assignment, but this rule does not apply to certain types of contracts. Specifically, contracts where the law would find a bar on delegation even if such a bar is not expressed the contract cannot be assigned without the consent of the non-debtor party.5 Bankruptcy lawyers refer to this rule as the personal services exception; even a lawyer foolish enough to omit an anti-delegation clause into a contract hiring Pavorotti to sing at an opera will find himself protected from assignment to a stand-in in the event of Pavorotti's bankruptcy.

Catapult Entertainment decision

In Catapult Entertainment, Inc. v. Perlman (In re Catapult Entertainment, Inc.),6 the Ninth Circuit held that the rule against assignment barred even assumption by the debtor of a patent license absent consent of the licensor. Thus, by entering bankruptcy the debtor corporation was unable to assume the very rights it enjoyed prior to the bankruptcy under the license agreement and was precluded from enjoying these identical rights following reorganization.[7] While a licensor might choose to permit assumption by a well-performing licensee, the consent may be costly. Particularly where the license involved significant up-front payments, consent may be expensive. As noted when the Catapult decision was rendered, it presented grave threats to reorganization in the Ninth Circuit of entertainment and technology entities,[8] as the rule likely applies not only to patent licenses, but also equally to copyright licenses.

A second shoe has now dropped in the Catapult line. The federal bankruptcy laws permit a debtor to file either in its principal place of business or in its state of incorporation. Thus, Delaware - a common state of incorporation - has become a favorite venue for corporate bankruptcies. Many practitioners reacted to

Catapult as "yet another reason to file in Delaware." At the time, the law in Delaware was not entirely clear whether a debtor might assume its own non-assignable personal contract. While Catapult seemed sound as a matter of statutory construction, and an earlier Third Circuit decision suggests a similar conclusion,9 at least the First Circuit had reached a different conclusion with reasonable logic,10 and the Delaware courts are noted for their pro-debtor attitude. The alternative view, found in the First Circuit's Pasteur ruling, is that a debtor should be permitted to assume even a non-assignable contract so long as the non-debtor party received "the benefit of its bargain." In short, if a debtor reorganized and maintained the same general characteristics (key employees, size, operations, etc.) post-reorganization as it had pre-bankruptcy, the reorganizing debtor would be permitted to assume the contract because the non-debtor continued to deal with the same essential entity. Thus, the non-debtor received the "benefit of its bargain."

Access Beyond decision

In In re Access Beyond Technologies,11 Delaware Bankruptcy Judge Walrath rejected this "benefit of the bargain" analysis. Rather, following the same analysis the Ninth Circuit applied in Catapult, Judge Walrath concludes that a non-exclusive patent license may not be assumed by a bankruptcy debtor without the consent of the non-debtor licensor. In doing so, Judge Walrath found the Third Circuit's earlier decision controlling, and further emphasized that consent to the assignment must be express.

No simple solutions

The one-two punch of Catapult and Access Beyond poses a real dilemma for businesses that see themselves as net licensees of intellectual property. No simple solution is apparent. At least one circuit decision holds that the problem may be resolved by a clear contractual consent to assumption in the event of a future bankruptcy.12 However, at a minimum this will require renegotiation of many existing contracts, and a plausible argument can be made that a pre-bankruptcy consent does not satisfy the requirements of the statute.

A second option would be prayer for reversal of Catapult by the Supreme Court. However, while a petition for certiorari was filed, no decision on the petition has yet been issued. Indeed, a review could result in a nationwide endorsement of Catapult.13

Finally, legislation has been proposed in Congress that would statutorily override Catapult. The current House version of the annual omnibus effort at bankruptcy reform would permit assumption by a debtor.14 The Senate version contains no such provision.15 The fate of this legislation is far from certain. Similar bills have failed in each of the past several years, and the White House has threatened to veto the House version. As noted above, businesses that on balance see themselves as owners of intellectual property may support the Catapult rule as strengthening their ability to control their property.16 In the meantime, lawyers drafting license agreements for intellectual property should specifically address the effects of bankruptcy. Two ways to consider resolving these issues are specific contractual consents, and use of a special purpose licensee entity. Each should be carefully considered - both have advantages and drawbacks - when the contract is entered and before the threat of bankruptcy arises.

Evan M. Jones is a partner in the bankruptcy department of O'Melveny & Myers LLP, with extensive experience in entertainment and high-tech bankruptcies and related issues. He may be reached at (213) 430-6236.

Notes

1 11 U.S.C. sec. 365. This assumption may be accomplished either by a trustee or a debtor in possession. For simplicity, I will refer only to the "debtor."

2 In re Robert L. Helms Constr. & Dev. Co., 139 F.3d 702, 705 (9th Cir. en banc 1998); Sharon Steel Corp. v. National Fuel Gas Distr., 872 F.2d 36, 39 (3d. Cir. 1989); In re Wegner, 839 F.2d 533 (9th Cir. 1988).

3 See, e.g., In re Everex Systems Inc. v. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673 (9th Cir. 1996);

Lubrizol Enters. Inc. v. Richmond Metal Finishers (In re Lubrizol), 756 F.2d 1043 (4th Cir. 1985); cert. denied, 475 U.S. 1057 (1986).

4 Whether an entity views itself on net as a licensor or a licensee may control its view of the decisions discussed herein and legislative efforts to reverse them.

5 11 U.S.C. sec. 365(c).

6 165 F.3d 747 (9th Cir. 1999) (ELR 21:2:16).

7 The author is a partner in O'Melveny & Myers LLP. O'Melveny & Myers filed a petition for certiorari in Catapult. The views expressed herein do not necessarily represent those of the firm or its clients.

8 See, e.g., Sandburg, "Tech Licensing at Stake in Bankruptcy Ruling, S.F. Recorder, Feb. 5, 1999 at 1; ELR 21:2:16 (Editor's note).

9 In re West Electronics, Inc., 852 F.2d 79 (3d Cir. 1988).

10 Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir.) cert. denied 521 U.S. 1120 (1997).

11 237 B.R. 32 (Bankr. D. Del. 1999).

12 In re Midway Airlines, Inc., 6. F.3d 492 (7th Cir. 1993).

13 Thus eliminating Rhode Island and Vermont's opportunity to become bankruptcy havens for technology and entertainment companies taking advantage of the First Circuit's Pasteur decision.

14 106 H.R. 833 sec. 305; see also H. Rep. 106-123.

15 106 S. 625.

16 The First Circuit's Pasteur decision is of note here. In that case, the licensor through a bankruptcy reorganization in which its arch rival acquired the stock of a small biotech company was found to have licensed its key intellectual property to the arch rival. While one

may argue that this stemmed from careless drafting of the license agreement - which permitted sublicenses to affiliates and did not restrict ownership of the licensee - the result should certainly concern those who see themselves as intellectual property owners, and cause them to consider carefully whether Catapult requires legislative relief.

[ELR 21:5:4]

INTERNATIONAL DEVELOPMENTS

Shania Twain biography infringed copyright to book by Barbara Hager about successful Canadians; Federal Court of Canada rules that Hager owns copyright to quotations of statements made by Twain during personal interviews, and that recoverable damages include profits from sales of biography in United States as well as Canada

Shania Twain was born and raised in Canada. As a result, author Barbara Hager included a chapter about the country music superstar in Honour Song: A Tribute, Hager's 1996 book about well-known native Canadians. In order to write the nine-page chapter, Hager personally interviewed Twain, first by phone from Vancouver and then in person in Los Angeles.

Shortly after Hager's book was published, Twain also became the subject of a full-length biography by "Dallas Williams" - a pseudonym for Michael Holmes who was the poetry editor for ECW Press Ltd., an academic book publisher that had recently decided to expand into books for the popular market. Holmes' book, entitled Shania Twain: On My Way, received a mixed reception from reviewers. One called it a "200-page press release," though others said it was a "standard pop bio" and even "thorough and comprehensive."

Barbara Hager was considerably more critical. She said Holmes' book "constitute[d] plagiarism," because it copied a third of her own book's chapter about Twain. As a result, Hager sued Holmes and ECW Press in the Federal Court of Canada, alleging infringement under the Canadian Copyright Act.

Hager has won her lawsuit. Following a non-jury trial, Judge Reed found that Holmes' book infringed Hager's copyright, and the judge has awarded Hager $12,405 in damages and profits. Though the amount of the judgment was not very great, the case involved significant issues - including one of continuing importance to writers and publishers of celebrity biographies.

Much of the material Holmes copied from Hager's book consisted of quotations of statements Twain had made during her interviews with Hager. Holmes and ECW Press argued that the copied quotations should not be considered in deciding how much material had been taken from Hager's book, because, they said, Hager did not own a copyright in things said by Twain.

There are in fact some United States cases supporting that argument (see, e.g., ELR 3:7:3). But

Judge Reed declined to follow those cases. Instead, he ruled that "under Anglo-Canadian law, in so far as private interviews are concerned, it is the person who reduces the oral statements to a fixed form that acquires copyright therein. That individual is considered to be the originator of the work." This meant that Hager's copyright does include the passages in which she quoted Twain's interview statements.

Judge Reed therefore concluded that Holmes had copied a "substantial part" of Hager's book, both because of "the quantity of the material taken and the quality of that material (the direct quotes from Shania Twain)."

Holmes and ECW Press also argued that the "fair dealing" provision of the Canadian Copyright Act permitted Holmes to copy what he had. "Fair dealing" under Canadian law is similar, but not identical, to "fair use" under United States law. The Canadian doctrine only permits copying for the specific purposes identified in the statute. Those purposes include "research or private study" and "criticism or review." But Judge Reed found that "The use made of the quotations and paraphrases from Ms. Hager's work was not for the purpose of doing research, nor was it for the purpose of criticizing either the text or the ideas in Barbara Hager's book."

Finally, Holmes and ECW Press contended that what Holmes had done was "industry practice." They showed, for example, that biographies of Alanis Morissette, Sarah McLachlan and Neil Young had used quotations from other sources. Judge Reed was not persuaded, however. He said these other biographies told him "nothing," because it wasn't apparent "whether the words of the quotations were spoken in a public forum where the individual was in a sense giving them out to all the world, whether they were spoken in a public forum but the speaker asserted a right to control their subsequent use, or whether they were said in a private interview such that the reporter could hold copyright." "Indeed" the judge said, "I doubt that 'industry practice' can sanction breaches of copyright."

Canadian law, like United States law, provides that a successful copyright owner is entitled to recover his or her damages from the infringement as well as the infringer's profits. In this case, damages "were difficult to assess," the judge thought; and thus he decided to award Hager an amount equal to what a "reasonable fee" would be. Taking into account the quantity of what was copied and the use to which Holmes put it, the judge decided that $9,000 would be a reasonable fee.

Judge Reed also awarded Hager an additional $3,405, which was 10% of ECW's revenues from sales of the book in Canada and the United States, less ECW's proven expenses. ECW had argued that its "non-Canadian revenues should not be considered," because the Canadian Copyright Act "does not have extraterritorial effect." Judge Reed rejected this argument, however, saying simply that "The books were published in Canada, sent from Canada for sale abroad and the revenues were paid to the defendants."

Hager v. ECW Press Ltd., 1998 Fed.Ct.Trial LEXIS 1549 (Can.Fed.Ct. 1998), available on the Internet at www.fja.gc.ca/en/cf/1999/vol2/html/1999fca23716.p.en.html [ELR 21:5:7]

RECENT CASES

Miramax finally defeats claims of Philadelphia art film exhibitor; federal appeals court rules that Copyright Act preempts Pennsylvania statute's 42-day limit on exclusive first runs

Miramax had to make two trips to the Court of Appeals to do so, but it finally defeated the claims of an exhibitor that once owned an art film theater in Philadelphia known as The Roxy. Miramax's victory must have been doubly sweet. Not only has Miramax won the reversal of a $320,000 judgment against it - $160,000 in damages (ELR 20:2:11), plus another $160,000 in attorneys' fees (ELR 20:9:14) - it also received a Court of Appeals opinion that can fairly be called a landmark, one that will benefit the entire movie distribution industry as well as Miramax itself.

The Roxy's former owner, a company known as Orson, Inc., filed suit against Miramax, because Orson was angry that Miramax seemed to be favoring The Ritz - a Roxy competitor - when it came to licensing such Miramax hits as "Mediteraneo," "Reservoir Dogs," "The Crying Game," "Passion Fish" and "Like Water for Chocolate." Orson's complaint accused Miramax of violating both federal antitrust law and Pennsylvania's Feature Motion Picture Fair Business Practices Law.

Orson's antitrust claims were dismissed by the District Court early in the case (ELR 16:3:14), and that ruling was affirmed by the Court of Appeals (ELR 18:6:9). Orson's state law claims (under the Pennsylvania Feature Motion Picture Fair Business Practices Law) were dismissed by the District Court too; but those claims were reinstated by the Court of Appeals, on the grounds that the District Court has not properly interpreted the statute's language (ELR 18:6:9).

The case therefore went to trial on Orson's claim that Miramax had violated the Pennsylvania Act's 42-day limit on exclusive first runs when Miramax refused to grant licenses to Orson for movies Miramax had exclusively licensed to others for more than 42 days. After the jury returned a verdict in Orson's favor, Miramax unsuccessfully argued that Pennsylvania's 42-day limit was preempted by the Copyright Act. But the District Court ruled otherwise, saying that earlier rulings of the Third Circuit Court of Appeals had "effectively foreclosed" it from agreeing with Miramax on the preemption argument.

Miramax appealed a second time, this time with success. In an opinion by Judge Dolores Sloviter, the Third Circuit Court of Appeals has ruled that Pennsylvania's 42-day limit on exclusive runs is preempted by the Copyright Act. This is so, Judge Sloviter, explained, because there exists a conflict between the Copyright Act and the Pennsylvania Act.

In reaching this conclusion, the judge reasoned that the Copyright Act grants copyright owners the "exclusive" right to "distribute" and "publicly perform" their works, and to license others to do so. Yet, a "distributor who exercises its federal right to grant an exclusive license to an exhibitor of choice will be subject to liability under the Pennsylvania Act for refusing to grant licenses to other exhibitors in the same geographic area after the forty-second day." The Pennsylvania Act therefore "'stands as an obstacle' to the federally created exclusive rights given to a copyright holder . . . to distribute the copyrighted work. . . ."

Therefore, Judge Sloviter held that the Pennsylvania Act is preempted, and she ordered that judgment be entered for Miramax.

Orson, Inc. v. Miramax Film Corp., 174 F.3d 377, 1999 U.S.App.LEXIS 7965 (3rd Cir. 1999)[ELR 21:5:9]

California Supreme Court to review constitutionality of state's "Son-of-Sam" statute in case in which Frank Sinatra, Jr., objects to Columbia Picture's payment for movie rights to magazine article based on interview with Sinatra's kidnapper

Columbia Pictures prompted a test of the constitutionality of California's "Son of Sam" statute when it acquired the movie rights to a New Times magazine article entitled "Snatching Sinatra." The article was based on an interview conducted by reporter Peter Gilstrap with Barry Keenan, who is one of the men who kidnapped Frank Sinatra, Jr., in 1963. Keenan was convicted and imprisoned for his part in the Sinatra kidnapping.

The "Snatching Sinatra" article was written with a possible movie rights sale in mind. Indeed, New Times, Gilstrap and Keenan specifically agreed to share any movie rights money the article might earn. And that is why Columbia was prepared to pay Keenan when the studio acquired the rights to the article.

When Sinatra got wind of the Columbia Pictures deal, he sued the studio, along with Keenan, Gilstrap and New Times, under California's "Son of Sam" statute, California Civil Code section 2225. Moreover, Sinatra obtained a preliminary injunction requiring

Columbia to withhold payment to Keenan, pending the outcome of the case.

The California statute - like "Son of Sam" statutes enacted by other states and the federal government - is designed to prevent criminals from profiting from their crimes. In 1991, in Simon & Schuster v. N.Y. State Crime Victims Board, the United States Supreme Court held that New York's "Son of Sam" statute unconstitutionally interfered with First Amendment rights (ELR 13:8:3). New York thereafter amended its statute in an effort to cure its constitutional defects (ELR 14:11:18); and the constitutionality of the amended statute has not been challenged (at least not in any case that led to a published opinion).

Though the California "Son of Sam" statute was enacted before the Supreme Court's decision in the Simon & Schuster case, the impact of that decision on the California statute had not been tested before Columbia made its "Snatching Sinatra" deal. Keenan was the first to do so, in an effort to defeat the preliminary injunction that stands between him and his share of Columbia's money.

Thusfar, Keenan has not been successful. A California trial court judge overruled Keenan's motions to dismiss and to dissolve the preliminary injunction. And the California Court of Appeal has affirmed that ruling. In an opinion by Justice Miriam Vogel, the appellate court noted that the United States Supreme Court declared the New York statute unconstitutional because it was overinclusive. California's statute is not identical to the old New York statute, however; and thusfar, the differences have been critical.

Justice Vogel concluded that the California statute "does not include any of [the] defects" emphasized by the Supreme Court in the Simon &

Schuster case: it does not apply to merely "incidental" references to past criminal acts; it applies "narrowly" only to those who have been convicted of a felony; and it does not allow the state to escrow or confiscate the income of an author who has never been convicted. For these reasons, the appellate court concluded that Keenan's claim the statute is overclusive "was properly rejected by the trial court."

Keenan has not given up, however. He petitioned the California Supreme Court to review the case, and it has agreed to do so. Thus the final word on the constitutionality of the California statute awaits at least one more hearing and judicial ruling.

Keenan v. Superior Court, 85 Cal.Rptr.2d 417, 1999 Cal.App.LEXIS 531 (Cal.App. 1999), hearing granted by the California Supreme Court (Sept. 1, 1999) [ELR 21:5:9]

New Line wins dismissal of plagiarism suit alleging movie "Set it Off" was copied from submitted screenplay "Sister Sarah"; neither access nor substantial similarity were shown, federal court rules

New Line's movie "Set it Off" was about four African American women who commit bank robberies. Just three years before New Line released that movie in 1996, the company had received and rejected a screenplay from a writer named Christopher Robinson entitled "Sister Sarah" which was about six women - five of them, African Americans - who commit robberies. The robberies in Robinson's "Sister Sarah" were of small businesses, not banks. But in the opinion of Robinson, this difference was offset by other similarities, including sibling and romantic relationships among allegedly corresponding characters.

Convinced that New Line's "Set it Off" had been plagiarized from his screenplay "Sister Sarah," Robinson sued New Line for copyright infringement and false designation of origin, in federal court in Maryland. Confident that its movie had not been plagiarized, and that Robinson could not show otherwise, New Line made a motion for summary judgment. Judge Andre Davis has granted that motion, for two reasons.

First, even though New Line admitted that Robinson had submitted his screenplay to it, the judge agreed with New Line that Robinson had not proved that New Line had "access" to that screenplay. In copyright infringement cases, "access" means a "reasonable opportunity" to copy a work. However, the submission of a screenplay to a corporation does not automatically mean that everyone associated with that corporation had access to that screenplay.

Under what is known as the "corporate receipt doctrine," access may be inferred only if there is "physical propinquity" between the corporate employee who received the screenplay and the person who allegedly did the actual copying. In this case, New Line showed that its Acquisitions Department and its Productions Department were physically separate, and that the Acquisitions Department had not given Robinson's screenplay to anyone involved in writing or producing "Set it Off." This also meant that Robinson could not succeed with his alternate "third party intermediary" theory of access.

Moreover, Judge Davis noted that even if access could be inferred, Robinson would still have to prove that his screenplay and New Line's movie were "substantially similar." The judge made a lengthy and detailed comparison of the two works and concluded that a reasonable jury could not find them to be substantially similar. Judge Davis found that their plots were "similar only to the extent that both works describe a story about African American women committing crimes," which is an idea that is not protected by copyright. The judge found the themes of the two works were not substantially similar. He found that Robinson's characters were not sufficiently developed to be protected by copyright. And the judge found that the settings, dialogue, mood and pace of the two works were not substantially similar. Finally, Judge Davis ruled that "Sister Sarah" and "Set if Off" were "quite different" in "total concept and feel."

The judge also rejected Robinson's Lanham Act "false designation of origin" or "reverse palming off" claim. Earlier cases have held that in order to succeed with such a claim in a case involving creative works, a plaintiff would have to prove "substantial similarity" of the kind that must be proved in a copyright case. Since Robinson had not proved "substantial similarity," the judge dismissed his Lanham Act claim too.

Robinson v. New Line Cinema Corp., 42 F.Supp.2d 578, 1999 U.S.Dist.LEXIS 5157 (D.Md. 1999) [ELR 21:5:10]

Appellate court affirms dismissal of claim against Mark Goodson Productions, because profits from proposed but unproduced television game show were too uncertain

Whether any new television program will be successful is one of the great uncertainties of the entertainment business. Ordinarily, that's a drawback.

In one case, though, that uncertainty worked to the advantage of Mark Goodson Productions. The TV production company used it to win the dismissal of what apparently was a breach of contract claim that had been filed against it by Steven Zink and others.

Zink and his colleagues proposed a new television game show to Goodson, which was to have featured a little-known host who had never before hosted a game show. Zink himself had no track record with television productions of any kind. And the proposed show had not tested well in a focus group survey done for a TV network.

Perhaps for these very reasons, the proposed show was not produced. This in turn led Zink and the others to sue Goodson in state court in New York - without success. The trial court granted Goodson's motion for summary judgment and dismissed the case. Now, in a very short Memorandum Decision, the

Appellate Division of the New York Supreme Court has affirmed.

The appellate court explained that under New York law, damages for lost profits may not be recovered "unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty." New York courts have "long recognized the inherent uncertainties of predicting profits in the entertainment field in general."

Given the uncertainties surrounding Zink's proposed show, the appellate court concluded that his claim for lost profits was properly dismissed. Zink's claim was based "upon nothing more than assumptions, speculation and conjecture respecting the performance of the game show," the appellate court explained, not the "reasonably certain assessment" required by New York law.

Zink v. Mark Goodson Productions, Inc., 689 N.Y.S.2d 87, 1999 N.Y.App.Div.LEXIS 4644 (App.Div. 1999) [ELR 21:5:11]

Constitutionality of anti-bootlegging statute is upheld; Congress had power under Commerce Clause to protect live musical performances, federal appeals court rules

Ali Moghadam is a confessed bootlegger, though not a record pirate.
Record piracy - the unauthorized reproduction of pre-existing recordings - has been a federal offense since 1972. Bootlegging - which is the manufacture and sale of unauthorized recordings live musical performances - is a federal offense of more recent vintage.

The bootlegging provisions of federal law - both criminal and civil - were enacted in 1994 as a small part of the international trade statute that implemented U.S. adherence to the agreement which created the World Trade Organization. Intellectual property protection for live performances was required by one part of that international agreement - the part commonly referred to as "TRIPs" - and that is why Congress created copyright-like protection for live musical performances when it approved U.S. membership in the WTO.

Ali Moghadam sold bootlegged CDs of live performances by Tori Amos, the Beastie Boys and others. And for that, he was charged with violating section 2319A of Title 18 of the United States Code - the criminal counterpart to section 1101 of the Copyright Act, which makes bootlegging an act of infringement in the civil sense.

The anti-bootlegging provisions of the 1994 federal statute were brief and failed to answer several questions. (See, e.g., "Bootleggers Beware: Copyright Law Now Protects Live Musical Performers, but Leaves Many Questions Unanswered," by Lionel S. Sobel, ELR 17:2:6.) One of the unanswered questions was whether Congress has the constitutional power to protect live performances. The Copyright Clause of the Constitution appears to require that works be fixed in a tangible medium in order to be protected by copyright. And that is the way the Copyright Clause always has been construed.

When Ali Moghadam was charged with violating the anti-bootlegging provisions of the 1994 statute, the government apparently had an airtight case, on the facts. Its legal case against Moghadam was less strong, however, because of the possibility that Congress had exceeded its constitutional power by purporting to give copyright-like protection to live performances, which by definition are not fixed. Moghadam urged a federal District Court to dismiss the prosecution against him for this very reason. And when the District Court refused to do so, Moghadam pleaded guilty, but preserved his right to appeal this issue.

In an opinion that will provide pleasure to performers and their record companies, the Court of Appeals has upheld the constitutionality of the federal anti-bootlegging statute. Judge Lanier Anderson acknowledged the possibility that Congress did not have the power to protect live performances under the Copyright Clause of the Constitution, precisely because they are not fixed as the Clause seems to require. The judge specifically declined to rule on that question, however, because, he said, even if Congress did not have the power to ban bootlegging under the Copyright

Clause, it did have the power to do so under the Commerce Clause.

Judge Anderson reasoned that bootlegging has a substantial effect on interstate and foreign commerce, because bootleggers depress legitimate sales by satisfying demand, in international as well as domestic markets, with their unauthorized merchandise.

The Commerce Clause does not empower Congress to enact any legislation it may wish, not even when interstate and foreign commerce are affected. There is Supreme Court authority holding that if Congress' authority is limited by one Constitutional provision, Congress may not skirt that limitation by relying on the Commerce Clause. In this case, however, Judge Anderson concluded that the "fixation" requirement of the Copyright Clause is not a limitation on Congress' authority, because anti-bootlegging legislation is not inconsistent with protection for songs and sound recordings.

Editor's note: Though Judge Anderson's decision is a significant victory for the music industry, its silver lining is wrapped in what could become a gray cloud. This is so because, in addition to the fixation requirement, the Copyright Clause contains another provision which might be a limitation on Congress' power to enact the particular anti-bootlegging statute it did. The Copyright Clause authorizes copyright protection only for "limited times." The anti-bootlegging statute prohibits the manufacture and sale of unauthorized recordings, no matter how long ago the bootlegged performance took place. This may mean that the anti-bootlegging statute is "inconsistent" with the Copyright Clause, and may thus be beyond Congress' power for that reason. Moghadam did not challenge the constitutionality of the statute on this ground, however; and Judge Anderson declined to raise the issue himself (beyond mentioning it in his decision). Thus, in some future case, a bootlegger may attack the constitutionality of the statute on the grounds that the Copyright Clause does limit Congress' power to enact perpetual protection for live performances. If the current statute is declared unconstitutional on that ground, it seems that Congress could re-enact it with duration limits - such as the life of the performer plus 70 years, or 95 years from the performance - on the protection it provides.

United States v. Moghadam, 175 F.3d 1269, 1999 U.S.App.LEXIS 9510 (11th Cir. 1999) [ELR 21:5:11]

Former drummer for "Better Than Ezra" was not a joint author of rock band's songs, because his contributions were not fixed in tangible form, federal District Court rules

Cary Bonnecaze used to be the drummer for the rock band "Better Than Ezra." Then, for reasons no longer pertinent, he and the band went their separate ways. The band conceded that Bonnecaze was the joint author of the Better Than Ezra recordings he had played on. But Bonnecaze claimed more: he claimed he also was the joint author of the songs the band had recorded, and thus was entitled to part of the songwriters' mechanical royalties (as well as his share of recording artist royalties).

This is where Better Than Ezra drew a line in the sand. As far as it was concerned, the songs were written solely by Kevin Griffin, the band's lead vocalist and guitarist. A lawsuit was the inevitable result - one that Bonnecaze has lost.

In response to the band's motion for summary judgment, federal District Judge Thomas Porteous has ruled that Bonnecaze was not the joint author of the songs the band had recorded, even if, as he claimed, he had collaborated in their creation by making "valuable" contributions to what were nothing more than "rough drafts" supplied by Griffin. Judge Porteous reasoned that in order for Bonnecaze to be a joint author, his contributions had to be independently copyrightable. This meant, among other things, his contributions had to be fixed in a tangible medium of expression. But they weren't.

Bonnecaze argued that his contributions were fixed when the band recorded the songs. But the judge emphasized that there is an important distinction between the copyright in an underlying song and the copyright in the recording of that song. "The sound recordings of the songs cannot serve as the tangible form required for Bonnecaze to meet the independently copyrightable test required for proving joint authorship," the judge held.

Editor's note: The result in this case may well be correct. But the judge selected the thinnest available reed to support that result. The opinion contains a very thorough synthesis of recent cases on "joint authorship," including an excellent review of the requirement that all authors intend to contribute to a joint work, in order for it to be a work of joint authorship. In this case, Griffin did not intend to create jointly authored songs, so that would have been a sufficient and stronger basis for concluding that the songs were not jointly authored. While there is a distinction between the copyright to a song and the copyright to a recording of that song, a sound recording can serve as the fixation of a song, in order to confer copyright on it, at the same time it is a copyright-protected work in its own right. Many songwriters record their songs to fix them for copyright registration purposes, rather than write musical notes on paper. This decision unfortunately, incorrectly and unnecessarily calls into question the legal effectiveness of that practice.

BTE v. Bonnecaze, 43 F.Supp.2d 619, 1999 U.S.Dist.LEXIS 4895 (E.D.La. 1999) [ELR 21:5:12]

Sole surviving member of the original "Platters" is entitled to continue using group's name, rather than widow of member who left the group, federal appellate court affirms

Herb Reed founded "The Platters" in 1953 and has performed with that legendary group ever since. He is in fact the sole surviving member of the original "Platters." Other members came and went over the last 46 years, including Paul Robi.

The group's fluid membership contributed to a number of lawsuits over which of them could call themselves "The Platters." Five Platters, Inc. v. Cook, 491 F.Supp. 1165 (W.D.Pa. 1980)(ELR 2:24:7); Five Platters, Inc. v. Purdie, 419 F.Supp. 372 (D.Md. 1976). Two of them involved Robi.

Robi joined "The Platters" in 1954 and left in 1965; but even after he left the original group, he continued to perform with a "Platters" group of his own. Robi even won a lawsuit that determined that he could use "The Platters" name, even though he and others in the original group had once assigned their rights in the name to a corporation formed by the group's manager. Robi v. Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990)(ELR 12:8:5); Robi v. Five Platters, Inc., 838 F.2d 318 (9th Cir. 1988)(ELR 9:10:8).

Robi has since passed away. But before he died, he assigned his rights in the "Platters" mark to his wife Martha Robi, and she has managed a group called "The Platters" ever since. None of Martha Robi's singers ever performed with the original "Platters." Nevertheless, on the strength of the assignment she received from her late husband Paul, she sued Herb Reed to prevent him from using the "Platters" name, claiming she had the exclusive right to it.

As a result of her lawsuit, Martha Robi is now out of "The Platters" business. A federal District Court ruled that her husband Paul had no right to use the group's name, and thus his purported assignment to her was invalid. The District Court further held that Herb

Reed has the right to use the name, to the exclusion of Martha Robi. Though Robi appealed, she did not succeed.

In an opinion by Judge Judith Keep, the Court of Appeals noted that Paul Robi's earlier case dealt only with whether the corporation formed by the group's manager could prevent Robi from using the name. It had not addressed the question of whether the proper owner was Paul Robi or Herb Reed, which was the issue presented in Martha Robi's case.

Judge Keep cited with approval earlier decisions holding that "members of a group do not retain rights to use the group's name when they leave the group," in part because "there is no inalienable interest at stake that would attach to the departing member." Instead, "it has . . . been held that a person who remains with the group and is in a position to control the quality of its services retains the right to use of the mark, even when that person is a manager rather than a performer."

In this case, Judge Keep said, "Reed is the person who has maintained continuity with the group and has been in a position to control the quality of its services." Paul Robi, on the other hand, "left the group and never returned to it; moreover, he ceased to perform at all for a period of years, and is now deceased."

Judge Keep therefore concluded, "that when Paul Robi left the group, he took no rights to the service mark with him. Rather, the mark remained with the original group. Paul Robi therefore had nothing to assign to Martha Robi. Reed . . . retains the right to use of the service mark to the exclusion of Robi."

Robi v. Reed, 173 F.3d 736, 1999 U.S.App.LEXIS 5937 (9th Cir. 1999) [ELR 21:5:13]

Record producer owns copyright to "Titanic" dance music CD, rather than dancer who proposed idea of creating the CD and who paid for its production

Corky Ballas is a competitive ballroom dancer. In 1998, he had what he thought was a good idea - one in which he was willing to invest thousands of dollars of his own money. The idea was to record and sell CDs of competitive dance music featuring music from the movie "Titanic."

In pursuit of that idea, Ballas made a tentative deal with record producer Gennaro Tedesco. Tedesco was supposed to arrange, produce, mix and master the "Titanic" dance music CD. In return, Ballas was to pay Tedesco $15,000 for doing so and for the exclusive right to manufacture and sell 5,000 copies of the CD. Ballas paid Tedesco a $7,500 down payment to get started on the project, and Tedesco did - even before a complete contract was agreed to or signed. Unfortunately, Ballas and Tedesco never did agree about some terms of their proposed contract, and their relationship fell apart.

Tedesco finished the CD, registered its copyright in his own name, and proceeded to sell it himself. Litigation was the inevitable result. Ballas sued Tedesco for breach of contract in New Jersey state court. Tedesco responded by removing the case to federal District Court, on the grounds that it really is a copyright infringement case. Motions thereafter made by both parties have produced rulings favoring Tedesco. Federal District Judge Joseph Greenaway has denied Ballas' motion to remand the case to state court and has granted Tedesco's motion for a temporary restraining order barring Ballas from making or selling copies of the CD.

In making these rulings, Judge Greenaway has held that Tedesco - not Ballas - is the owner of the CD's copyright. Ballas had argued that he was at least a joint author of the CD because he had suggested its contents. The judge rejected this argument, however, saying Ballas "cannot claim joint authorship in the sound recordings merely because he contributed the idea for the work in the form of suggestions and desire."

The judge also rejected Ballas' argument that he owned the CD's copyright because the CD had been created at his behest as a work made for hire. Tedesco had not been Ballas' employee, nor had there been any written agreement between the parties indicating the CD would be a work made for hire.

Finally, Judge Greenaway rejected Ballas' argument that he had an exclusive license to sell 5,000 copies of the CD. Exclusive licenses must be in writing, the judge explained. And though emails had been exchanged concerning an exclusive license, "The exchange of e-mails . . . does not satisfy the statutory requirement of a written instrument signed by [Tedesco]," the judge held.

Ballas v. Tedesco, 41 F.Supp.2d 531, 1999 U.S.Dist.LEXIS 2531 (D.N.J. 1999) [ELR 21:5:13]

Missouri appellate court affirms $350,000 verdict in favor of promoters who introduced Wayne Newton to developers of theater in Branson; court rules that evidence was sufficient to support promoters' "quantum meruit" claim

Gary and Patsy Snadon are developers in Branson, Missouri - a city that many folks consider to be the music-performance capital of America. Several years ago, the Snadons were given what turned out to be a good idea by an acquaintance named Charles Luna. Luna's idea was to hire Wayne Newton to perform in Branson, in a new theater the Snadons would build and Luna would manage.

As originally conceived, the idea had but a single glitch. Neither the Snadons nor Charles Luna actually knew Wayne Newton. That glitch was overcome with surprising ease, however. It turned out that Charles Luna's brother, Larry, knew a guy named Howard Cotner who had co-produced Wayne Newton concerts with a fellow named Steve Litman. So Larry Luna set up a meeting with Cotner and Litman, to discuss the possibility of hiring Newton to perform in a new Snadon-owned theater in Branson. (As Dave Barry would say, I am not making this up.)

Cotner and Litman understood that they would be paid management fees and booking commissions if they could arrange to have Newton perform in Branson. Cotner and Litman then set up meetings with Newton, the Snadons and the Lunas. And in relatively short order, the hoped-for deal was done. Newton signed a contract to appear in what became the Wayne Newton Theater.

Before the theater was built, however, the original deal changed in just one respect. The Snadons told Cotner and Litman they would be paid only if they invested money in the theater or moved to Branson to participate in its management. Instead, they sued, alleging a claim for "quantum meruit."

In Missouri (as elsewhere), "Quantum meruit is a remedy to enforce quasi-contractual obligations and is generally justified on the theory of unjust enrichment." It is "based on a promise implied by law that a person will pay reasonable compensation for valuable services . . . provided at his request or with his approval."

A jury awarded Cotner and Litman a total of $350,000, based on their quantum meruit theory - a verdict to which the Snadons took vigorous exception. On appeal, the Snadons argued that the evidence had not been sufficient for the jury to make such an award. But the Missouri Court of Appeals thought it was.

In an opinion by Judge James Prewitt, the appellate court has affirmed the judgment. It held that Cotner and Litman "arranged for the meeting with Wayne Newton which resulted in a contract being entered into by him with the corporation formed by [the Snadons]. . . . It seems obvious to us that by attending the meeting with Newton and discussing his proposed performances in Branson, [the Snadons] accepted the services performed by [Cotner and Litman]." Moreover, Judge Prewitt added, "There was evidence that the Snadons agreed to a percentage fee, and an expert witness testified that a fee for these services would be twenty to twenty-five percent of what the entertainer, in this case Newton, was to make."

Cotner Productions, Inc. v. Snadon, 990 S.W.2d 92, 1999 Mo.App.LEXIS 269 (Mo.App. 1999) [ELR 21:5:14]

Columbia and Academy Pictures are awarded more than a million dollars in attorneys' fees and costs in successful trademark infringement suit against producers of movie "Return from the River Kwai"

Many years ago, Kurt Unger produced a movie which he entitled "Return from the River Kwai." Unger's selection of that particular title turned out to be a foolish and expensive mistake - and a cautionary tale for other producers - as recent judicial rulings show.

Unger's movie is not a sequel to "Bridge on the River Kwai." Indeed, Unger's movie is not related in any to "Bridge on the River Kwai." Nor did Unger get permission from Columbia or Academy Pictures, the owners of the 1956 Oscar-winning film, to use the "Return from the River Kwai" title.

Unger's brazen approach to title selection (in Japan, he released his movie as "Bridge on the River Kwai II") got him sued by Columbia and Academy. After years of litigation, Judge David Edelstein found that Unger had intentionally infringed the trademark rights of Columbia and Academy, and the judge enjoined the release of Unger's movie under the "Return from the River Kwai" title (ELR 20:9:4). Moreover, Judge Edelstein ruled that Unger's behavior made the case "ripe for an award of attorney's fees," and he invited Columbia and Academy to apply for them.

They did. And the judge has awarded them - more than a million dollars worth in the aggregate, when costs are added in. (It remains to be seen whether Columbia and Academy will actually be able to collect the award. Unger appealed the original infringement judgment. When he did, he argued that he should not be required to post a $50,000 appeal bond, because requiring such a bond would deny him his right to an appeal. Judge Edelstein required the bond, nonetheless, in part because Unger does not appear to have sufficient assets in the United States to cover even Columbia and Academy's costs on appeal (ELR 21:3:11).)

Howeover, the judge denied Columbia and Academy's request that Unger's lawyers be ordered to pay the million fee and costs award. In some "exceptional" cases, lawyers have been ordered to pay fee awards to opposing counsel. However, Judge

Edelstein did not believe that the actions or tactics used by Unger's lawyers made this an "exceptional" case.

Tri-Star Pictures, Inc. v. Unger, 42 F.Supp.2d 296, 1999 U.S.Dist.LEXIS 3268 (S.D.N.Y. 1999) [ELR 21:5:15]

Woman basketball referee wins gender discrimination suit against NBA, but trial judge reduces jury verdict from $7.85 million to $346,929

Sandra Oritz-Del Valle has made professional basketball history, though not the way she wanted to. She wanted to become the first woman NBA referee. Instead she became the first woman to win a gender discrimination suit against the league.

Her victory was stunning, at first. A jury found that the NBA had discriminated against her on account of her gender, and it gave her a verdict of $7.85 million - $100,000 for back pay, $750,000 for emotional distress, and $7 million in punitive damages.

In post-trial motions (for judgment as a matter of law, or for a new trial), the NBA hoped to persuade federal District Judge Sidney Stein to set aside that verdict entirely. Judge Stein refused to that - thus preserving Ortiz-Del Valle's place in the history books. He did, however, reduce the verdict to $346,929 - $76,926 for back pay, $20,000 for emotional distress, and $250,000 in punitive damages. (Technically, the judge denied the NBA's motion for a new trial, "conditioned upon" Ortiz-DelValle's agreeing to accept this smaller, though still substantial, amount.)

The NBA argued that it should not have been found liable at all, on the grounds that Ortiz-Del Valle's suit was barred by the statute of limitations. Her case did seem to be filed too late, but she relied on the "continuing violation" doctrine - a doctrine that extends the filing deadline if an employer engages in "ongoing discriminatory policies or practices." Judge Stein ruled that the jury had heard evidence from which it could have found "a continuous policy barring women from employment as NBA referees." The judge therefore rejected the NBA's statute-of-limitations defense.

Judge Stein reduced Ortiz-Del Valle's back pay award from $100,000 to $76,926, because that is all the evidence showed she would have earned as an NBA referee, over and above what she did earn from her actual employment. Ortiz-Del Valle argued that the jury probably awarded her interest on that amount too, thus bringing the total to $100,000. But the judge said that no evidence had been offered that would have permitted the jury to include interest in its verdict.

The judge agreed with the NBA that Ortiz-Del Valle's evidence was insufficient to permit her to recover damages for emotional distress, under federal law. However, she also had asserted a claim under the New York State Human Rights Law which permits an award of emotional distress damages based on the type of evidence Ortiz-Del Valle had presented. The amount awarded in other discrimination cases brought under the New York law were far less than the $750,000 the jury had awarded Ortiz-Del Valle, however. Judge Stein reduced the emotional distress award to $20,000, for that reason.

Finally, the judge reduced the punitive damage award from $7 million to $250,000, because the jury's punitive award was more than 58 times as great as Ortiz-Del Valle's compensatory damages. That ratio was "high," the judge said. Moreover, the jury's award was "far too great" by comparison with the amounts awarded in other cases involving similar conduct.

Ortiz-Del Valle v. National Basketball Association, 42 F.Supp.2d 334, 1999 U.S.Dist.LEXIS 4615 (S.D.N.Y. 1999) [ELR 21:5:15]

NFL and NBA Properties win trademark and counterfeiting claims against company that sells sports trading cards depicting professional football and basketball players in actual team uniforms, but trial is required in connection with claims based on cards depicting players in uniforms from which team names and logos were removed

The licensing arms of the National Football League and National Basketball Association have won part of their trademark infringement case against Chattanooga Coin & Sportscards, a company that sells sports trading cards and other memorabilia. Chattanooga attracted the ire of NFL Properties and NBA Properties by selling sports cards depicting NFL and NBA players, in team uniforms, without a license from either organization.

The unlicensed cards fell into three design categories. In one, players are shown wearing their actual team uniforms, team names and logos included. In another, players are shown wearing NFL and NBA uniforms from which the team names and logos have been removed. In the third, the players are shown wearing football and basketball uniforms, but not those of any NFL or NBA team.

Early in the case, NFL and NBA Properties took the offensive by making motions for summary judgment with respect to two of these types of cards:

those depicting actual uniforms, and those depicting league uniforms with team names and logos removed. Federal District Judge Harold Murphy ruled in favor of the two organizations on some, but not all, of their claims.

Chattanooga made one aspect of the case easy for Judge Murphy. The company stipulated that it infringed NFL and NBA Properties' trademarks by selling cards depicting players wearing actual uniforms that include team names and logos. On the basis of that stipulation, the judge granted summary judgment to the two organizations on their trademark infringement claims concerning that card design.

NFL and NBA Properties also asserted a counterfeiting claim against Chattanooga, on account of its sale of cards depicting actual uniforms that included team names and logos. Chattanooga did not stipulate to the counterfeiting claim. But Judge Murphy granted summary judgment with respect to this claim too. (The judge's analysis of this claim was surprisingly brief - just one paragraph - and it failed to explain why these cards were "counterfeits" rather than merely infringements.)

NFL and NBA Properties have yet to succeed with their trademark and counterfeiting claims, based on the card design that depicts players in league uniforms from which team names and logos were removed. Judge Murphy ruled that he could not grant summary judgment as to these claims, because of the possibility that the absence of team names and logos would indicate to consumers that NFL and NBA Properties did not license those cards. In other words, jurors might conclude that consumers would not be confused about whether the cards were licensed. Judge Murphy therefore concluded that a trial is necessary as to these claims.

NBA Properties, Inc. v. Dahlonega Mint, Inc., 41 F.Supp.2d 1341, 1999 U.S.Dist.LEXIS 21049 (N.D.Ga. 1999) [ELR 21:5:16]

Vanderbilt wins ruling that former football coach Gerry DiNardo must pay at least one year's liquidated damages because he took LSU coaching job before his Vanderbilt contract ended; trial is required to determine whether DiNardo's two-year contract extension was valid, because if it was, he will have to pay three year's damages

Football coach Gerry DiNardo is in demand. In fact, he is in so much demand that he may have to pay liquidated damages to Vanderbilt University, because he left Vanderbilt to become LSU's coach at least one year - and maybe as many as three years - before his Vanderbilt contract ended.

DiNardo got himself into this unusual position because of provisions in his Vanderbilt contract. In those provisions, the coach did three things. First, he acknowledged that his "long-term commitment" was "important to the University's desire for a stable intercollegiate football program." Second, he acknowledged that "the entire term of this 5-year contract is of the essence of this Contract to the University." And third, he agreed that if he resigned before the contract ended, "he would pay the University as liquidated damages an amount equal to his [net salary]" for each of the years still remaining on the contract.

Three years into that five-year contract, DiNardo signed a two-year extension, though at the time he did so, he told Vanderbilt's athletic director that the contract would not be effective until DiNardo's lawyer approved the extension. Then, after the fourth year of the original five-year contract, DiNardo asked for, and received, Vanderbilt's permission to talk with LSU about the coaching job it then had available.

LSU then offered DiNardo the job, and he took it. Vanderbilt responded by demanding that DiNardo pay it an amount equal to the salary he would have received during the last three years on his extended contract. And when DiNardo didn't pay, Vanderbilt sued.

DiNardo defended by arguing that the liquidated damages clause was an unenforceable penalty under Tennessee state law. A federal District Court disagreed, however; and that ruling has been affirmed on appeal. In an opinion by Judge John Gibson, the Court of Appeals noted that "In Tennessee, a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages."

In this case, a majority of the three-judge appellate panel concluded that the agreed-upon damage amount was reasonable in relation to the amount of damages Vanderbilt could expect from DiNardo's breach. Moreover, it was reasonable in relation to the expenses Vanderbilt actually incurred in recruiting a new coach and in moving expenses and additional compensation for the new coaching staff.

DiNardo also argued that Vanderbilt had waived its right to liquidated damages when it gave him permission to talk with LSU. The appellate court disagreed with that contention too. Vanderbilt had authorized the coach to talk with LSU - not to terminate his contract, or to do so without paying liquidated damages.

On the basis of these two rulings, DiNardo was found to owe Vanderbilt liquidated damages for at least the final one year of his original five-year contract.

Whether he will owe more will depend on the outcome of a trial on whether his two-year contract extension was valid. The District Court ruled that it was, in response to a Vanderbilt motion for summary judgment. The Court of Appeals, however, decided there were facts in dispute concerning whether the extension had to be approved by DiNardo's lawyer before it was valid, and if so, whether the lawyer waived that requirement by failing to object to the extension. If the extension is found to be valid, DiNardo will owe Vanderbilt an amount equal to his net pay for the final three years of his contract - some $282,000.

Vanderbilt University v. DiNardo, 174 F.3d 751, 1999 U.S.App.LEXIS 7184 (6th Cir. 1999) [ELR 21:5:16]

Minnesota Twins win protective order against civil investigative demands served by Minnesota Attorney General in connection with antitrust investigation arising from Twins proposed move to North Carolina; state Supreme Court rules that business of professional baseball is exempt from antitrust laws

Some issues never die; and the antitrust status of professional baseball is one of these. As long ago as 1922, the United States Supreme Court held that professional baseball is exempt from the antitrust laws. It has reaffirmed that ruling twice since, in 1953 and then again in 1972. Because no other sport is exempt, the baseball decisions are anomalous - thus encouraging many efforts to distinguish or overturn them.

The most recent attack on baseball's exemption was launched in Minnesota, where the Minnesota Twins makes its home. The Twins don't much care for their current stadium, the Hubert H. Humphrey Metrodome. Indeed, they like the Metrodome so little that in 1997 the Twins' owner announced he intended to sell the team to buyers in North Carolina, unless the Minnesota legislature authorized public funding for a new baseball stadium. When the governor of Minnesota asked Commissioner Bud Selig about the proposed sale, Selig opined that unless Minnesota built a new publicly funded stadium for the Twins, other Major League Baseball team owners would approve the Twins' move to North Carolina.

This prompted the Minnesota Attorney General to serve civil investigative demands on the Twins, the Commissioner, the American and National Leagues, and on the North Carolina group that wanted to buy the Twins. These demands, commonly referred to as CIDs, were issued in connection with the Attorney General's investigation into possible violations of Minnesota state antitrust laws.

Believing that they were exempt from Minnesota as well as federal antitrust law, all of those served with these CIDs sought a protective order that would have excused them from having to respond. They were, however, disappointed, at first. A Minnesota trial court ruled that only the baseball "reserve clause" is exempt from antitrust law, not other aspects of baseball's business. In so ruling, the trial court was persuaded by just such a ruling in the case of Piazza v. Major League Baseball (ELR 15:12:26) which arose out of Florida's efforts to get the San Francisco Giants to move to that state.

The Piazza decision, however, is itself something of an anomaly. When the Twins and their colleagues got to the Minnesota Supreme Court, they got the protective order they had sought - for the very reasons they had sought it.

In an opinion by Justice Paul Anderson, the Supreme Court said that it chose "to follow the lead of those courts that conclude the business of professional baseball is exempt from federal antitrust laws," and "that the sale and relocation of a baseball franchise . . . is an integral part of the business of professional baseball and falls within the exemption." Minnesota state antitrust law is interpreted the same as federal antitrust law, so this meant that the business of professional baseball is exempt from Minnesota antitrust law as well.

"Enforcement of the CIDs against the Twins is therefore outside the scope of the Attorney General's authority because no enforcement action could follow," Justice Anderson concluded.

Minnesota Twins Partnership v. State of Minnesota, 592 N.W.2d 847, 1999 Minn.LEXIS 249 (Minn. 1999) [ELR 21:5:17]

Professional hockey player not entitled to worker's compensation benefits for injury incurred while playing summer hockey, because injury was not suffered in course of player's employment

Staying in shape and being employed are two separate things, even for a professional hockey player. That is the conclusion to be drawn from a ruling of the

Commonwealth Court of Pennsylvania, in a case in which Eric Dandenault sought worker's compensation benefits for an injury he suffered while playing hockey during the summer of 1993.

At the time of his injury, Dandenault was signed to the Philadelphia Flyers, which had assigned him to its American Hockey League affiliate, the Hershey Bears. Dandenault was hurt while playing a summer game near his home in Canada "in order to get in shape for the upcoming season."

Two facts seem not to have been in dispute. First, players are expected to report to pre-season training camp in shape, and most hockey players get in shape by playing hockey during the summer. Second, players are not permitted to participate in any sports activities without their clubs' written permission - permission that Dandenault did not have.

Under Pennsylvania law, an "injury arises in the course of employment when it occurs 'while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere . . . .'" This language is "liberally construed," so a worker's compensation judge ruled in favor of Dandenault.

On appeal, however, the Commonwealth Court has reversed. It held that while Dandenault was required to report to training camp in good physical condition, playing hockey was only one of several activities he engaged in to stay in shape during the off-season. Moreover, while Dandenault believed that his team knew he and other team members played during the summer, Dandenault did not establish that his team either required or encouraged him to play summer hockey.

For these reasons, the Commonwealth Court held that Dandenault had not been injured in the course of his employment, and thus he was not entitled to worker's compensation benefits.

Dandenault v. W.C.A.B. (Philadelphia Flyers), 728 A.2d 1001, 1999 Pa.Cmwlth.LEXIS 259 (Pa.Comwlth. 1999) [ELR 21:5:18]

Adidas fails to get preliminary injunction against enforcement of NCAA bylaw limiting logos on student-athletes' uniforms; federal court rules that bylaw is not subject to antitrust laws

Adidas and the National Collegiate Athletic Association are at loggerheads over an NCAA bylaw that limits the size of advertising logos on the uniforms worn by student-athletes during NCAA competitions.

Adidas is a leading manufacturer of athletic footwear and apparel, and it has contracts with several NCAA schools and their coaches for the promotion of its products. Adidas' distinctive logo is a prominent feature of its apparel and athletic uniform designs.

NCAA Bylaw 12.5.5 provides that commercial logos may not exceed two and one-quarter square inches. The application of that Bylaw to specific uniform designs is apparently more subjective than it would seem to outsiders. And in the opinion of an NCAA committee, some of Adidas' uniforms have logos that are too big.

Adidas responded to the rejection of its uniform designs by suing the NCAA under federal antitrust law. Taking the offensive, Adidas sought a preliminary injunction that would have barred the NCAA from enforcing Bylaw 12.5.5, pending a final outcome in the case. But the NCAA put up a successful defense. Federal District Judge Thomas VanBebber has denied Adidas' request, ruling that it had not shown that it needs a preliminary injunction to avoid irreparable harm, nor had it shown that it was likely to succeed on the merits.

Judge VanBebber found that Adidas failed to show irreparable harm for three reasons. Its evidence of harm was speculative. Its injuries were "self-inflicted," because it failed to accept the NCAA's offer to review proposed uniform designs before they were manufactured. And any harm actually suffered could be compensated in damages as part of a final judgment.

More significantly, the judge concluded that Adidas had failed to show it was likely to win the case, because Bylaw 12.5.5 is not subject to the antitrust laws. Judge VanBebber found that the Bylaw has three purposes: to maintain amateurism by protecting student-athletes from commercial exploitation; to preserve the integrity of intercollegiate sports by preventing schools from turning their athletes into billboards; and to avoid excessive advertising that could interfere with the ability of uniforms to identify athletes and their teams.

These purposes are not commercial, the judge concluded. Moreover, Judge VanBebber found, the NCAA does not compete with Adidas and does not realize any financial advantage by "limiting the amount of advertising allowed on the backs of students-athletes." As a result, "the NCAA's enforcement of the bylaw is a noncommercial activity not subject to the antitrust laws," the judge concluded.

Adidas America, Inc. v. National Collegiate Athletic Association, 40 F.Supp.2d 1275, 1999 U.S.Dist.LEXIS 4198 (D.Kan. 1999) [ELR 21:5:18]

Utah Supreme Court orders reconsideration of whether "Redskins" license plates, issued to Utah fans of the Washington Redskins, are offensive to reasonable people and should be revoked

Though Utah is a couple thousand miles away from Washington, D.C., at least two Utah residents are big fans of the Washington Redskins. They are in fact such big fans that they have personalized Utah license plates reading "REDSKIN" and "REDSKNS." The only reason they requested these plates "was to show their support and admiration" for the team. They certainly did not intend to offend anyone with their personalized plates, nor did they intend to convey any negative message.

Nonetheless, two other Utah residents are offended. Michael McBride and Jay Brummett are

Native Americans, and they say that the term "redskin" is "offensive and derogatory, and expresses contempt and ridicule toward their heritage, ethnicity, and race." The reason their views have become legally significant is that Utah law prohibits the state Motor Vehicle Division from issuing personalized license plates that are derogatory or express contempt or ridicule of an ethnic heritage.

Relying on this law, McBride and Brummett petitioned the Motor Vehicle Division to revoke the license plates of the two Redskins fans. The Division's Commissioners denied their petition, however. Two Commissioners found that the license plates were not offensive to them, and one Commissioner ruled that the plates were not offensive to the "general public." A fourth Commissioner dissented, saying that the plates are offensive to "some people" and should have been revoked for that reason. In other words, the

Commissioners disagreed not only on the result, but also on what standard should be applied. They were able to reach a decision only because three of the four agreed on an ultimate result.

That result, of course, displeased McBride and Brummett; and they appealed to the Utah Supreme Court. There, they achieved at least some procedural success, because they won an order that requires the Motor Vehicle Division to reconsider its decision, using a different standard. In an opinion by Justice Leonard Russon, the Utah Supreme Court has held that the proper test for determining whether license plates are offensive and derogatory is the "objective, reasonable person" standard. And that is the standard the Motor Vehicle Division has been ordered to use in its reconsideration.

Editor's note: This year has not been a good one for the Washington Redskins' name. This case may yet result in a judicial ruling that "Redskins" is offensive and derogatory. Moreover, in an entirely separate proceeding, the U.S. Trademark Trial and Appeal Board canceled the team's trademark registration for "Redskins" on the grounds it may disparage Native Americans and bring them into contempt and disrepute (ELR 21:1:10). Though the Utah case turned on whether the offensiveness of a license plate should be judged by reference to "some people," a "reasonable person" or by the Commissioners themselves, the ultimate outcome of "Washington Redskins" disputes should probably turn on another factor altogether - namely, whether the offensiveness of the word "redskins" should be evaluated by looking solely at that one word, outside the context of the NFL team whose name it is, or whether the offensiveness of the term "Washington Redskins" should be evaluated as whole. This is so, because considered alone, the word "redskins" does have an offensive connotation. But "Washington Redskins" does not. Indeed, evidence submitted to the Utah Motor Vehicle Division showed that even among Native American tribal leaders, 72% (of the 425 who were surveyed) did not find the term "Washington Redskins" offensive.

McBride v. Motor Vehicle Division of Utah State Tax Commission, 977 P.2d 467, 1999 Utah LEXIS 8 (Utah 1999) [ELR 21:5:19]

Federal appellate court asks New York Court of Appeals to clarify state's right of publicity statute in connection with "YM" magazine's appeal from $100,000 judgment won by teen model whose photos were used to illustrate sex advice column

When Jamie Messenger's case against the publisher of "YM, Young & Modern" magazine last appeared in these pages, Federal District Judge Lewis Kaplan had just denied the magazine's motion to dismiss the lawsuit (ELR 20:5:23). The magazine had used photos of the teenage model to illustrate a sex advice column, and did so in a way that might have led readers to incorrectly conclude that Messenger had sex with three guys and had written to the magazine for guidance.

The case eventually went to trial on Messenger's claim that the magazine had violated her rights under New York Civil Rights Law sections 50 and 51, that state's right of publicity statute. A jury ruled in Messenger's favor and awarded her $100,000 in damages. Judge Kaplan denied the magazine's motions for judgment as a matter of law and for a new trial, and entered judgment.

The magazine then appealed, focusing on the very issue it had first raised in its original, unsuccessful, motion to dismiss. It argued that teenage sex was a matter of public interest, that Messenger's photos were reasonably related to that subject, and that New York law therefore gave the magazine a privilege to publish those photos, even without Messenger's consent.

This is in fact an accurate statement of New York law. Judge Kaplan had rejected the magazine's argument - both before and after trial - on the grounds that the magazine had fictionalized its sex advice column by using Messenger's photos in a way that suggested that it was she who had written the I-had-sex-with-three-guys letter. For a long time, New York case law did indicate that the "public interest" privilege could be lost if the offending publication were fictionalized. But some observers believe that the "fictionalization" exception to the privilege was eliminated by Finger v. Omni Publications (ELR 13:1:9), a 1990 decision by the New York Court of Appeals.

When Messenger's case got the federal Court of Appeals, the current status of the "fictionalization" exception was the central issue. If it still exists, Messenger would be entitled to prevail. If, however, the Finger case eliminated the exception, the magazine would have been privileged to publish Messenger's photos, just as it originally argued; and it would be entitled to prevail.

Since Finger was a decision of the New York Court of Appeals, the federal appellate court (to which Messenger's judgment has been appealed) has asked the New York Court of Appeals to provide "guidance" on whether a plaintiff may recover under sections 50 and 51, if the defendant used the plaintiff's likeness in a fictionalized way in connection with a newsworthy column.

After the New York Court of Appeals answers that question, the case will be returned to the federal Court of Appeals which will then rule on the magazine's appeal.

Messenger v. Gruner + Jahr, 175 F.3d 262, 1999 U.S.App.LEXIS 8190 (2d Cir. 1999) [ELR 21:5:20]

Appellate court reinstates defamation action against Daily News and columnist Linda Stasi on account of articles about personal manager Charles Huggins, the former husband of singer Melba Moore; not all offending statements were protected opinion, and Huggins need only prove negligence because he is not a public figure, appellate court rules

The Daily News and gossip columnist Linda Stasi have been ensnared in the aftermath of the acrimonious divorce of singer Melba Moore from personal manager Charles Huggins. As a result of three columns Stasi wrote in 1993, Huggins sued Stasi and the Daily News for defamation.

Initially, it looked as though Huggins' case failed, because a New York state trial court dismissed his claims entirely, for two reasons. First, the trial court considered the offending columns to contain statements of protected opinion. Second, the trial court considered Huggins to be a public figure who would have to prove the offending statements were published with "actual malice," a standard he would not be able to satisfy.

An appeal, however, has breathed new life into Huggins' case. The Appellate Division of the New York Supreme Court has reinstated it.

Stasi's columns contained 18 separate assertions, which Huggins alleges are defamatory. The appellate court agreed with the trial court that many of these assertions are protected opinion - but not all. In an opinion by Justice Peter Tom, the appellate court held that several statements were assertions of fact rather than opinion. These statements included Stasi's report of Moore's assertions that her name had been forged on tax returns and divorce papers; that Huggins had obtained an out-of-state divorce by stealth so he could embezzle assets from her; and that Moore had gotten a protective order against Huggins under circumstances suggesting he had physically abused her.

The appellate court also ruled that Huggins is not a public figure, and thus will only need to prove that the offending statements were published negligently - not with "actual malice" - in order to prevail. Although Huggins has enjoyed business success, and although his business is to "promote celebrities," he has not sought publicity for himself personally, the appellate court reasoned.

Moreover, the court held that Moore's divorce from Huggins was not a matter of public concern, even though it involved prominent people and thus may be of interest to the public for that reason. New York decisions have said that "divorce . . . is no more than 'a private matter of public concern merely to gossips.'" If their divorce had been a matter of public concern, Huggins would have had to prove the offending columns were published with "gross irresponsibility." However, since it is not a public concern, simple negligence will be sufficient.

Huggins v. Moore, 689 N.Y.S.2d 21, 1999 N.Y.App.Div.LEXIS 3651 (App.Div. 1999) [ELR 21:5:20]

Weather Channel did not owe duty of care to viewer who drowned when thrown from fishing boat by storm that had not been forecast, federal court rules in dismissing wrongful death suit

The Weather Channel has escaped liability for the death of a viewer who was drowned when he was thrown from a fishing boat by weather conditions the television channel had not forecast. Federal District Judge James Paine ruled that the Weather Channel does not owe a duty of care to its viewers, and thus the judge has dismissed a wrongful death lawsuit filed by the drowned viewer's personal representative.

In a terse opinion, Judge Paine agreed with the Weather Channel that if the law did impose a duty on it, "the duty could extend to farmers who plant their crops based on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who go to the beach for a weekend based on a forecast of sunny weather." Moreover, such a duty could be extended to non-weather forecasts such as traffic reports on which some viewers may rely to arrive on time at scheduled events.

Such a duty would "chill" the "first amendment rights of broadcasters," Judge Paine said. No such duty has ever been imposed on book or financial information publishers, though in several earlier cases, courts had been urged to do so.

Brandt v. Weather Channel, Inc., 42 F.Supp.2d 1344, 1999 U.S.Dist.LEXIS 3998 (S.D.Fla. 1999) [ELR 21:5:21]

Home Shopping Club is entitled to injunction against affiliated TV station barring station from preempting HSC programming in favor of more lucrative infomercials and religious programs, appellate court affirms

Roberts Broadcasting Company owns a television station in East St. Louis, Missouri. The station - WHSL, Channel 56 - is a network affiliate, of sorts. Its network is the Home Shopping Club, which by agreement, supplies WHSL with round-the-clock programming Mondays through Saturdays, and 20 hours of programming on Sundays.

After carrying HSC programming, as agreed, for some seven years, Roberts began to preempt HSC shows in favor of other programs. In place of HSC's shows, Roberts substituted infomercials (for such products as George Foreman's Lean Mean Fat Grilling

Machine and Vanna White's Perfect Smile tooth whitening system) and paid religious programming (like Jerry Falwell's The Old Time gospel Hour).

Roberts' reasons for doing this were easy enough to understand. Roberts received $190 per hour to carry HSC's programs. Roberts received $500 to $1,100 per hour to carry infomercials. The difference could amount to as much as a million dollars in just ten months, Roberts' chairman acknowledged.

The only wrinkle in Roberts' strategy for earning all this extra money was that its network affiliation agreement with HSC was not terminable at will; it runs until the year 2003. HSC thus did the obvious. It sued Roberts, though not for damages. It sought instead an injunction, and it got one. A Missouri state court permanently enjoined Roberts from preempting HSC programming for any paid infomercial or commercial advertising program. And the Missouri Court of Appeals has affirmed.

Writing for the appellate court, Judge Kathianne Crane acknowledged that the HSC affiliation agreement authorized Roberts to preempt HSC programs for others that in Roberts' opinion were "of greater local, or national importance." However, the judge added, Roberts had to hold such an opinion in good faith. In this case, the trial court found that Roberts substituted other programs solely for economic reasons, and its testimony that it thought infomercials and paid religious programs were of greater importance "was not credible."

Judge Crane also rejected Roberts' First Amendment argument. When Roberts voluntarily entered into its contract with HSC, the judge said, it "bargained away any First Amendment claims" it might otherwise have had. Roberts "cannot invoke the First

Amendment to regain rights it has contracted away," she concluded.

Finally, Judge Crane held that injunctive relief was a proper remedy in this case. Otherwise, HSC would have to sue for damages every time Roberts preempted HSC programming for economic reasons, and that would not be an adequate remedy.

Home Shopping Club, Inc. v. Roberts Broadcasting Company, 989 S.W.2d 174, 1998 Mo.App.LEXIS 1482 (Mo.App. 1998) [ELR 21:5:21]

Art print publisher is subject to trust provisions of New York Arts & Cultural Affairs Law, even though its agreement with artist Tom Wesselmann entitled it to be reimbursed for printing costs, New York appeals court affirms

Art publisher International Images, Inc., has lost another round in its long-running legal battle with artist Tom Wesselmann. The Appellate Division of the New York Supreme Court has held, as had a lower court twice before (ELR 18:8:17, 19:6:12), that International Images is subject to the trust provisions of the New York Arts & Cultural Affairs Law.

This was so, the Appellate Division affirmed, even though International Images' agreement with Wesselmann gave the publisher the right to reimburse itself for printing and related costs. The Appellate Division also ruled that the publisher's contractual right to reimbursement did not give International Images a security interest in Wesselmann's unsold art works.
International Images and Wesselmann have been ordered to account to one another.

Wesselmann v. International Images, Inc., 687 N.Y.S.2d 339, 1999 N.Y.App.Div.LEXIS 3252 (App.Div. 1999) [ELR 21:5:22]

Publisher of "MovieBuff" database software wins preliminary injunction barring video store chain from using "moviebuff.com" as Internet domain name or web site metatag

A "movie buff" is a "motion picture enthusiast." But "MovieBuff" is a software database published by Brookfield Communications, Inc. The distinction is small but significant, because "MovieBuff" is also Brookfield's registered trademark. So it wasn't surprising that Brookfield took exception to West Coast Entertainment Corporation's use of "moviebuff.com" as West Coast's Internet domain name.

West Coast is the owner of a video store chain, and its "moviebuff.com" web site contained information that was similar to that in Brookfield's database software. West Coast felt justified in using "moviebuff.com," because it had been calling itself "The Movie Buff's Movie Store" even longer than Brookfield had been using "MovieBuff." Indeed, West Coast had registered its "Movie Buff's Movie Store" phrase as a trademark before Brookfield registered "MovieBuff."

Brookfield, however, thought there was a significant difference between West Coast's phrase and Brookfield's own mark. Moreover, as far as Brookfield was concerned, West Coast's Internet domain was Brookfield's mark, not West Coast's phrase. And to make matters worse, Brookfield wanted to start a web site of its own, using its "MovieBuff" trademark as its domain name. A trademark infringement suit was the result - one in which Brookfield took the offensive by seeking a preliminary injunction.

At first, Brookfield's efforts went unrewarded. A federal District Court denied Brookfield's motion for a preliminary injunction, ruling that West Coast was the senior user of the contested mark and that Brookfield had not established a likelihood of confusion.

Persistence sometimes pays; and in this case it did. Brookfield pursued its quest for a preliminary injunction to the Court of Appeals, where it found a more receptive audience. Writing for the appellate court, Judge Diarmuid O'Scannlain reversed the District Court and ordered it to enter a preliminary injunction barring West Coast from using "moviebuff.com" as a domain or as a web site metatag.

Judge O'Scannlain acknowledged that West Coast could claim trademark rights in "moviebuff.com" if its earlier use of "The Movie Buff's Movie Store" constituted the "constructive use" of "moviebuff.com" too. The judge explained that "This constructive use theory is known as 'tacking,' as the trademark owner essentially seeks to 'tack' his first use date in the earlier mark on the subsequent mark."

Judge O'Scannlain ruled that "tacking should be allowed if two marks are so similar that consumers would regard them as essentially the same." In this case, however, West Coast couldn't meet that standard. "'The Movie Buff's Movie Store' and 'moviebuff.com' are very different," the judge said, "in that the latter contains three fewer words, drops the possessive, omits a space, and adds '.com' to the end." Since West Coast couldn't use the "tacking doctrine," Brookfield was the senior user, and thus owner, of the contested "MovieBuff" mark.

In addition, a lengthy appraisal led Judge O'Scannlain to conclude that Brookfield had shown a likelihood of confusion. Brookfield was therefore entitled to an injunction against West Coast's use of "moviebuff.com" as its Internet domain. But Brookfield sought an even broader injunction, one that would bar West Coast from using "moviebuff.com" as a metatag in West Coast's other web site.

Judge O'Scannlain acknowledged that Internet users would not be confused as to the source of West Coast's other web site, even if they were mistakenly led to those sites by "moviebuff.com" metatags invisibly imbedded in them. On the other hand, the judge said, "there is nevertheless initial interest confusion in the sense that, by using 'moviebuff.com' or 'MovieBuff' to divert people looking for 'MovieBuff' to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark."

The judge therefore concluded that this "initial interest confusion" entitled Brookfield to a preliminary injunction barring West Coast from using "moviebuff.com" or "MovieBuff" as metatags. The injunction would not bar West Coast from using "MovieBuff" in a manner permitted by the trademark fair use doctrine, Judge O'Scannlain said. West Coast can continue to use the words "Movie Buff," but "it cannot . . . omit the space." Also, West Coast can include an advertising banner on its web page saying "Why pay for MovieBuff when you can get the same thing here for FREE?" West Coast can't, however, use Brookfield's trademark to attract people to West Coast's web site.

Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1999 U.S.App.LEXIS 7779 (9th Cir. 1999) [ELR 21:5:22]

Alta Vista literary agency fails in bid to enjoin use of "AltaVista" as name for Internet search engine, because public is unlikely to be confused and harm to Internet company would outweigh harm to literary agency

Alta Vista Corporation is a London-based literary agency that also has offices in New York and Los Angeles. The company has been using its "Alta Vista" name in New York and L.A. since 1993, some two years before Digital Equipment Corporation began using "AltaVista" as the name for its Internet search engine.

Concerned that the near identity of the two names would cause confusion, the literary agency sued the Internet search company for trademark infringement, and sought a preliminary injunction.

The agency did not succeed. On the basis of a multi-part analysis, federal District Judge Nancy Gertner concluded that it was unlikely the public would be confused into believing that the Internet search engine was affiliated with the literary agency. The judge also concluded that the harm that would be suffered by the Internet company if a preliminary injunction were issued would be greater than the harm suffered by the agency if no injunction were granted.
For these reasons, Judge Gertner denied the agency's motion for a preliminary injunction.

Alta Vista Corp. v. Digital Equipment Corp., 44 F.Supp.2d 72, 1998 U.S.Dist.LEXIS 18843 (D.Mass. 1998) [ELR 21:5:23]

Florida appellate court reverses defamation judgment won by Cuban American National Foundation against professor interviewed in PBS documentary "Campaign for Cuba"; in context, professor's statement was not defamatory, appellate court rules

Johns Hopkins University Professor Wayne Smith has finally prevailed in a defamation action filed against him by an organization known as the Cuban American National Foundation. Smith had to take the case to the Florida Court of Appeal to do so; and there were some unpleasantly anxious moments for him along the way. To win the case, Smith had to persuade the Court of Appeal to reverse a $40,000 judgment that had been entered against him. That was the amount a jury had awarded the Foundation in nominal and punitive damages, on account of a brief statement

Smith made in a PBS documentary entitled "Campaign for Cuba."

In a Per Curiam opinion, the Court of Appeal reversed the judgment against Smith for three reasons.

First, the trial court judge had not permitted the jury to view the entire documentary. Instead, jurors only saw excerpts in which Smith was interviewed. This was in error, the appellate court said, because the excerpts provided no context for Smith's statements.

Second, the trial court judge refused to instruct the jury that it should rule in Smith's favor if it found that his statements were "substantially" true. Ever since the United States Supreme Court decided Masson v. New Yorker Magazine (ELR 13:4:4), the First Amendment has required that "substantial truth" be recognized as a defense, the appellate court ruled, for both public and private figures. Thus, the trial judge erred by refusing to give a "substantial truth" instruction, as Smith had requested.

Third, the appellate court determined that when Smith's statement was considered within the context of the entire documentary, the statement was not defamatory. The Foundation complained that Smith had accused it of criminal activity. But facts reported in the documentary showed that what Smith said the Foundation had done was not, under the circumstances, a crime.

Smith v. Cuban American National Foundation, 731 So.2d 702, 1999 Fla.App.LEXIS 851 (Fla.App. 1999) [ELR 21:5:23]

California gross receipts tax on pay-per-view telecasts of boxing matches is unconstitutional, federal court rules

The 1997 match between Evander Holyfield and Mike Tyson has earned a place in tax - as well as boxing - history, because of a lawsuit filed by a satellite TV company that sold the fight to California viewers on a pay-per-view basis.

California has a statute, commonly known as the "Boxing Act," one provision of which imposes a five percent gross receipts tax on all pay-per-view telecasts of boxing, wrestling, kickboxing and similar events. The 1997 fight between Holyfield and Tyson took place in Nevada, and USSB sold a pay-per-view telecast of the fight to its customers in California. The California Boxing Act thus obligated USSB to pay the tax; but it didn't. Instead, it sued in federal court, arguing that the Act is unconstitutional under the First and Fourteenth Amendments.

Judge William Shubb has agreed, and has enjoined further enforcement of the Act.

Judge Shubb reasoned that "On its face, the Boxing Act taxes some telecasts, and not others, based on the content of those telecasts." This means that the Act must "survive strict scrutiny," in order to be constitutional. That is, the state would have to show that the Act is necessary to serve a "compelling" state interest, and that it is "narrowly drawn to achieve that end." California attempted to justify the tax, in the way required by the "strict scrutiny standard"; but it failed.

California does have an interest in raising revenue, which was one justification offered for the tax. But this interest does not justify a content-based tax on speech, the judge ruled.

The tax also helps to defray the cost of running the California State Athletic Commission. But California presented no evidence concerning what costs the Athletic Commission incurred in connection with USSB's "telecasts into private homes of boxing matches which occur in another state."

Finally, California argued that the pay-per-view tax was necessary to equalize the tax burden between live boxing matches that take place in the state and out-of-state boxing matches that are televised for pay into the state. Judge Shuff was not persuaded this was a compelling interest, however. "The fact that a tax is imposed on tickets sold to live boxing events held in California does not automatically justify an extension of that tax to satellite broadcasts held in or out of California," he said. Equalization would be "better served," it seemed to the judge, "by an overall taxation scheme which made no reference to the content of the speech to be taxed."

United States Satellite Broadcasting Co., Inc. v. Lynch, 41 F.Supp.2d 1113, 1999 U.S.Dist.LEXIS 2929 (E.D.Cal. 1999) [ELR 21:5:24]

DEPARTMENTS

In the Law Reviews:

Entertainment and Sports Lawyer, published by the American Bar Association Forum on Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, Illinois 60611-4497, has issued Volume 17, Number 2 with the following articles:

Fashion Modeling: From Contract Clauses to the Rigors of the Runway by Louis Tertocha, 17 Entertainment and Sports Lawyer 1 (1999) (for address, see above)

Legislative Update: Internet Services and Globalization Drive Developments by Mark Traphagen, 17 Entertainment and Sports Lawyer 2 (1999) (for address, see above)

A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry by Bobby Rosenbloum, 17 Entertainment and Sports Lawyer 3 (1999) (for address, see above)

Book Review: Blackjack and the Law by I. Nelson Rose and Robert Loeb, reviewed by Mark T. Gould, 17

Entertainment and Sports Lawyer 10 (1999) (for address, see above)

Europe: Big Ideas in Audiovisual Policy for the New Millennium by Nicholas Fitzpatrick, 17 Entertainment and Sports Lawyer 13 (1999) (for address, see above)

The UCLA Entertainment Law Review has published Volume 6, Issue 2 with the following articles:

Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers by Sharon Appel, 6 UCLA Entertainment Law Review 149 (1999)

Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System by Kelly L. Cripe, 6 UCLA Entertainment Law Review 235 (1999)

Meet the Television of Tomorrow. Don't Expect to Own it Anytime Soon. By Julie Macedo, 6 UCLA Entertainment Law Review 283 (1999)

Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced by Erica Bose, 6 UCLA Entertainment Law Review 321 (1999)

Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume 9, Number 3 with the following articles:

Trademark Vigilance in the Twenty-First Century: A Pragmatic Approach by Peter S. Sloane, Bret I. Parker, Eric A.

Prager, and Kathleen Donohue, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 823 (1999)

The Extraterritorial Reach of United States Trademark Law: A Review of Recent Decisions Under the Lanham Act by Erika M. Brown, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 863 (1999)

To Tax or Not to Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States? By John J. Coneys, Jr., 9 Fordham Intellectual Property, Media & Entertainment Law Journal 885 (1999)

The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the "Elgin Marbles" Must Be Returned to Greece by Michael J. Reppas II, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 911 (1999)

Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law by Margot S. Fell, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 981 (1999)

WWW.Foreign Corporation.Com: The United States Taxation of International Business Transactions Conducted Over the Internet by Auri Weitz, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 1035 (1999)

Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes by Raymond Iryami, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 1083 (1999)

Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries by Keshia B. Haskins, 9 Fordham Intellectual Property, Media & Entertainment Law Journal 1125 (1999)

Sound Recordings: Copyright and Contractual Differences Between the United States and Japan by John D. DeFrance, 21 Loyola of Los Angeles International and Comparative Law Journal 331 (1999)

Intellectual Property and Antitrust: A Comparison of Evolution in the European Union and United States by Sara M. Biggers, Richard A. Mann and Barry S. Roberts, 22 Hastings International and Comparative Law Review 209 (1999)

Applying the Fair Use Defense in Traditional Trademark Infringement and Dilution Cases to Internet Meta Tagging or Linking Cases by Katherine E. Gasparek, 7 George Mason Law Review 787 (1999)

A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional? By Eric P. Enson, 21 Loyola of Los Angeles International and Comparative Law Journal 159 (1999)

Radio Infringement of Music Copyright by Paul Gitlin, 46 Journal of the Copyright Society of the USA 7 (1999) (published by The Society at the Center of Law and the Arts, Columbia University School of Law, 435 West 116th Street, New York, NY 10027)

Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remedying Infringement by Paul Edward Geller, 46 Journal of the Copyright Society of the USA 39 (1999) (for address, see above)

Candle in the Wind: Would Elton John's Publicity Rights Extinguish With His Death? By Stanley Rothenberg and Eric P. Bergner, 46 Journal of the Copyright Society of the USA 75 (1999) (for address, see above)

Whittier Law Review has published a symposium How the East Was Won: Legal Aspects of the Entertainment Business in Russia in Volume 20, Number 4 with the following articles:

The Structure of the Russian Entertainment Industry by Elena Muravina, 20 Whittier Law Review 825 (1999)

Piracy in Russia: An Epidemic by Tim Kuik, 20 Whittier Law Review 831 (1999)

Motion Pictures in Russia by Howard M. Frumes, 20 Whittier Law Review 839 (1999)

The Changing Face of Russian Television by Jeffery D. Holmes, 20 Whittier Law Review 853 (1999)

Live Entertainment Events in Russia by Nataly Scherbakova, 20 Whittier Law Review 859 (1999)

Son of Sam Laws: Killing Free Speech or Promoting Killer Profits? By Orly Nostrati, 20 Whittier Law Review 949 (1999)

The Copyright Grab by Pamela Samuelson, 29 University of West Los Angeles Law Review 129 (1998)

Advertising and the Public Interest: Legal Protection of Trade Symbols by Ralph S. Brown, Jr., 108 The Yale Law Journal 1619 (1999)

Freedom to Copy by Robert C. Denicola, 108 The Yale Law Journal 1661 (1999)

Breakfast with Batman: The Public Interest in the Advertising Age by Jessica Litman, 108 The Yale Law Journal 1717 (1999)

The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II? by Barbara J. Tyler, 30 Rutgers Law Journal 441 (1999)

Rosencrantz and Guildenstern Are Dead, But Are They Copyrightable?: Protection of Literary Characters with Respect to Secondary Works by Matthew A. Kaplan, 30 Rutgers Law Journal 817 (1999)

Decency v. The Arts: And the Winner Is...The National Endowment for the Arts?, Seton Hall Law Review 1513 (1999)

What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law? By Tyler G. Newby, July Stanford Law Review 1633 (1999)

The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven? By Robert J. Gutowski, 47 Buffalo Law Review 713 (1999)

Nova Law Review has published a symposium entitled The Internet and the Law as Volume 23, Number 2 with the following articles:

Privacy in the Digital Age: Work in Progress by Jerry Berman and Deirdre Mulligan, 23 Nova Law Review 549 (1999)

Searching for Security in the Law of Electronic Commerce by Amelia H. Boss, 23 Nova Law Review 583 (1999)

The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace by Ira Glasser, 23 Nova Law Review 625 (1999)

Copyright and "New Use" Technologies by I. Trotter Hardy, 23 Nova Law Review 657 (1999)

Can Congress Regulate "Indecent" Speech on the Internet? By Marc Rohr, 23 Nova Law Review 707 (1999)

Taking a Byte Out of Minimum Contacts: A Reasonable Exercise of Personal Jurisdiction in

Cyberspace Trademark Disputes by Veronica M. Sanchez, 46 UCLA Law Review 1671 (1999)

Preventing Gray Markets: Is Copyright Law the Solution?, 26 Syracuse Journal of International Law and Commerce 315 (1999)

The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World by Jane C. Ginsburg, Santa Clara Computer and High Technology Law Journal 347 (1999)

The Criminalization of Copyright Infringement in the Digital Era, 112 Harvard Law Review 1705 (1999)

An Overview of Intellectual Property Issues Relating to the Internet by Dale M. Dendali, Charlotte E. Forssander and Ronald J. Turiello, Jr., 89 The

Trademark Reporter 485 (1999) (published by The United States Trademark Assn, 1133 Avenue of the Americas, New York, NY 10036-6710)

Wet Footprints? Digital Watermarks: A Trail to the Copyright Infringer on the Internet by Rosemarie F. Jones, 26 Pepperdine Law Review 559 (1999)

The Origin of the Contemporary Standard for Copyright Infringement by Douglas Y'Barbo, 6 Journal of Intellectual Property Law 285 (1999) (published University of Georgia School of Law, Athens, Georgia 30602-6012)

"March Madness": An Examination of Dual-Use Trademark Terms and Reverse Confusion by David Y. Gan, 50 Hastings Law Journal 223 (1999)

Recent Developments in Copyright Law by Thomas L. Casagrande, 7 Texas Intellectual Property Law Journal 445 (1999)

Indecency on the Internet: Reno and the Communications Decency Act of 1996 by April Bailey Cole, 27 Capital University Law Review 607 (1998)

Resolving a Dilemma: The Inheritance of Jewish Property by Michael J. Kurtz, 20 Cardozo Law Review 625 (1998)

Looted Art: What Can and Should Be Done by Lawrence M. Kaye, 20 Cardozo Law Review 657 (1998)

Sounds Unlimited 2: Music and Copyright in Cyberspace-An Update by Euan Lawson and Andrew

Steed, Copyright World 16 (1999) (published by LLP Limited, 69-77 Paul Street, London EC2A 4LQ, United Kingdom)

Are States Immune from Copyright Suits? The Story Continues... by Edwin Komen, Copyright World 21 (1999) (for address, see above)

Copyright and Design Right Licences of Right: Ten Years On by David Barron, Copyright World 28 (1999) (for address, see above)

Are There Any IP Rights in the New York Times Best Sellers List? By Robert C. Cumbow, 92 Copyright World 12 (1999) (for address, see above)

Millennium Musing: 'New Uses' and the Public Domain by Alan J. Hartnick, 92 Copyright World 16 (1999) (for address, see above)

Unfair and Unlawful: The Debate Over Receiving Network Television Signals Through Direct-to-Home Satellite Dishes by Paula Deza, 7 CommLaw Conspectus Journal of Communications Law and Policy 279 (1999) (published by The Catholic University of America Columbus School of Law, 3600 John McCormack Road NE, Washington, DC 20064)

The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears by Robert D. Richards and Clay Calvert, 7 CommLaw Conspectus Journal of Communications Law and Policy 291 (1999) (for address, see above)

Creating a Diversity of Voices: Local Expression Through a Low Power Radio Service by Fatima Fofana, 7 CommLaw Conspectus Journal of Communications Law and Policy 409 (1999) (for address, see above)

Seeking Shelter From the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach? By Jennifer E. Markiewicz, 7 CommLaw Conspectus Journal of Communications Law and Policy 423 (1999) (for address, see above)

Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised by Pamela Samuelson, 14 Berkeley Technology Law Journal 519 (1999)

National Endowment for the Arts v. Finley: Viewpoint Discrimination Masked As the Government's Foray Into the Realm of Art Patron by Kimberly A. Schmaltz, 26 Northern Kentucky Law Review 337 (1999)

The Domain Name System: A Case Study of the Significance of Norms to Internet Governance, 112 Harvard Law Review 1657 (1999)

The Criminalization of Copyright Infringement in the Digital Era, 112 Harvard Law Review 1705 (1999)

When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany by John F. McGuire, 74 New York University Law Review 750 (1999)

The New German Internet Law by Lothar Determann, 22 Hastings International and Comparative Law Review 113 (1998)

Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran? By David Wiener, 39 Santa Clara Law Review 905 (1999)

Tasini v. New York Times: The Write Stuff for Copyright Law? By Michael A. Forhan, 27 Capital University Law Review 863 (1999)

The First Amendment as Shield and Sword: Content Control of PEG Access Cable Television by Ed Foley, 27 Capital University Law Review 961 (1999)

A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime by Joshua P. Jones, 33 Georgia Law Review 639 (1999)

Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction by Christopher M. Schultz, 41 Arizona Law Review 573 (1999)

Salvage Rights and Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. TITANIC? By Rachel J. Lin, 23 Tulane Maritime Law Journal 483 (1999)

The Right to Privacy Is Coming ot the United Kingdom: Balancing the Individual's Right to Privacy From the Press and the Media's Right to Freedom of

Expression by Sara Haenggi, 21 Houston Journal of International Law 531 (1999)

Are You My Mommy, or My Big Brother? Comparing Internet Censorship in Singapore and the United States by Lewis S. Malakoff, 8 Pacific Rim Law & Policy Journal 423 (1999) (published by University of Washington School of Law, 1100 NE Campus Parkway, Condon Hall, Seattle, Washington 98105)

The Sports Lawyers Journal, published by Tulane Law School, 6329 Freret Street, New Orleans, Louisiana 70118-5670, has issued Volume 6, Number 1 with the following articles:

The Regulation of Sports Agents and the Quest for Uniformity by Philip N. Fluhr, Jr., 6 Sports Lawyers Journal 1 (1999) (for address, see above)

Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in the New Millennium by Joseph D. Wright, 6 Sports Lawyers Journal 27 (1999) (for address, see above)

Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance by K. Todd Wallace, 6 Sports Lawyers Journal 57 (1999) (for address, see above)

Dispute Resolution in Motor Sports by Paul L. Robson, 6 Sports Lawyers Journal 87 (1999) (for address, see above)

St. Augustine v. LHSAA: Discrimination, Desegregation, and the State Action Doctrine by Derek

M. Mercadal, 6 Sports Lawyers Journal 107 (1999) (for address, see above)

Professional Sports Leagues and the Single Entity Defense by Brad McChesney, 6 Sports Lawyers Journal 125 (1999) (for address, see above)

The Reconciliation of Antitrust Laws and Labour Laws in Professional Sports by Derek D. Yu, 6 Sports Lawyers Journal 159 (1999) (for address, see above)

Making the Grade: Learning Disabled Student-Athletes and the NCAA's Eligibility Requirements by James A. Lovegren, 6 Sports Lawyers Journal 189 (1999) (for address, see above)

Welcome to the Club: Upstart Major League Soccer Gets Sued by Sarbjit Singh, 6 Sports Lawyers Journal 217 (1999) (for address, see above)

An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation by Holly M. Burch and Jennifer B. Murray, 6 Sports Lawyers Journal 249 (1999) (for address, see above)

Book Review: Sports Law by Simon Gardiner, Alexandra Felix, John O'Leary, Mark James and Roger Welch, 6 Sports Lawyers Journal 273 (1999) (for address, see above)

Substantial Proportionality Not Required: Achieving Title IX Compliance Without Reducing Participation in

Collegiate Athletics by Mark Hammond, 87 Kentucky Law Journal 793 (1999)

Washburn Law Journal has published its Volume 38, Number 3 as a Symposium on Torts and Sports with the following articles:

Sports, Assumption of Risk, and the New Restatement by Professor William Powers, Jr., 38 Washburn Law Journal 771 (1999)

Defamation of Sports Officials by Darryll M. Halcomb Lewis, 38 Washburn Law Journal 781 (1999)

Emphasizing Torts in Claims of Discrimination Against Black Female Athletes by Dean Alfred Dennis Mathewson, 38 Washburn Law Journal 817 (1999)

Leveling the Playing Field by Noreen L. Slank, 38 Washburn Law Journal 847 (1999)

Taking Into Consideration the "Decency Clause" (National Endowment for the Arts v. Finley) by Brian R. Collignon, 38 Washburn Law Journal 929 (1999)

Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship by Mark A. Graber, 16 Constitutional Commentary 293 (1999) (published by University of Minnesota Law School, 229 19th Avenue South, Minneapolis, Minnesota 55455)

A Team With No Name, A City With No Name: Trademark Issues Relating to Sports Franchise Relocation by Jennifer E. McGarry, 6 University of Baltimore Intellectual Property Law Journal 71 (1999)

The Development and Role of Free Agency in Major League Baseball by Susan H. Seabury, 15 Georgia State University Law Review 335 (1999)

Gender Equity in Athletics: Should We Adopt a Non-Discriminatory Model? By Roy Whitehead, Walter Block, and Lu Hardin, 30 University of Toledo Law Review 223 (1999)

Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement, 32 Columbia Journal of Law and Social Problems 331 (1999)

Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy by Robert R. Hunt, Brigham Young University Education and Law Journal 51 (1999)

Casey Martin v. PGA Tour, Inc.: Introducing Handicaps to Professional Golf by Widening the Scope of the ADA by Matthew Kensky, 9 George Mason University Civil Rights Law Journal 151 (1998)

The Americans with Disabilities Act and Professional Golf-Breaking Par for the Sake of Equality (Martin v. PGA Tour, Inc.) by Bryon L. Koepke, 38 Washburn Law Journal 699 (1999)

The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent by Arturo J. Marcano & David P. Fidler, 6 Indiana Journal of Global Legal Studies 511 (1999)

Rules Restricting Player Movement Under the Federation Internationale de Football: Do They Violate

U.S. Antitrust Law? By Mark D. Mako, 18 New York Law School Journal of International and Comparative Law 407 (1999)

Pete Rose, Bart Giamatti, and the Dowd Report by Ronald J. Rychlak, 68 Mississippi Law Journal 889 (1999)

Statement of Commissioner A. Bartlett Giamatti, 68 Mississippi 903 (1999)

In the Matter of: Peter Edward Rose, Manager, Cincinnati Reds Baseball Club Report to the Commissioner, 68 Mississippi Law Journal 911 (1999)

The Athlete as Judge: The Man Who Once Was Whizzer White by Dennis J. Hutchinson, reviewed by

John C. Jeffries, Jr., 66 The University of Chicago Law Review 495 (1999)

Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy by Robert R. Hunt, Brigham Young University Education and Law Journal 51 (1999)

The Courts v. the FCC: Diversity and the Broadcast Provisions of the 1996 Telecommunications Act, 21 Communications and the Law 19 (1999) (published by Fred B. Rothman, 10368 West Centennial Road, Littleton, CO 80127)

"Dear Friends and Gentle Hearts": The Ironic Relationship Between American Copyright Law and the Artist by Joseph Figliulo, 60 University of Pittsburgh Law Review 641 (1999)

If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech That Incites Dangerous or Illegal Activity by Jeffrey Haag, 30 Texas Tech Law Review 1421 (1999)

Are Finders Keepers? The Need for a Uniform Law Governing the Rights of Original Owners and Good Faith Purchasers of Stolen Art by Adina Kurjatko, 5 U.C. Davis Journal of International Law & Policy 59 (1999)

Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Work Environment Claim Brought by a Nude Dancer? By Joshua Burstein, 24 New York University Review of Law & Social Change 271 (1998)

The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur? by Thom Hardin, 19 Journal of Juvenile Law of the University of La Verne 376 (1998)

From the Providence of Kings to Copyrighted Things (and French Moral Rights) by Calvin D. Peeler, 9 Indiana International and Comparative Law 423 (1999)

Food (Lion) for Thought: Does the Media Deserve Special Protection Against Punitive Damage Awards When It Commits Newsgathering Torts?, 45 The Wayne Law Review 203 (1999)

The Entertainment Law Review, published by Sweet & Maxwell, Legal Information Resources Ltd, The Hatchery, Hall Bank Lane, Mytholmroyd, Hebden Bridge, West Yorkshire HX7 5HQ, United Kingdom, has published Volume 10, Number 4, 5 and 6 with the following articles:

Commercial Life Imitates Art: What's Law Got To Do With It? By Anthony Robinson, 10/4 Entertainment Law Review 95 (1999) (for address, see above)

Selling Your Movie: The Role of the Producer's Representative by Harris E. Tulchin, 10/4 Entertainment Law Review 102 (1999) (for address, see above)

Aspects of Italian Constitutional Law Relating to the Administration of the Internet by Michele Vitale, 10 Entertainment Law Review 107 (1999) (for address, see above)

"Unless Otherwise Agreed..." Presumption of Partnership for Musical Artists by Paul Graznak, 10/4 Entertainment Law Review 113 (1999) (for address, see above)

Pro Sieben Media AG v. Carlton UK Television Ltd and Twenty-Twenty Vision Ltd by Mark Haftke, 10/4 Entertainment Law Review 118 (1999) (for address, see above)

Copyright, Fair Dealing and the Mandy Allwood Case: The Court of Appeal Gets the Max Out of a Multiple Pregnancy Opportunity by David Bradshaw, 10/5 Entertainment Law Review 125 (1999) (for address, see above)

Licensing Motion Pictures in the International Market Place by Harris E. Tulchin, 10/5 Entertainment Law Review 136 (1999) (for address, see above)

Filming in the Isle of Man: A Survey of Incentives Available by Helen Tulley, 10/5 Entertainment Law Review 153 (1999) (for address, see above)

Character Merchandising-All Shook Up? (Court of Appeal Re-mix) by Brian Cordery and Justin Watts, 10/5 Entertainment Law Review 155 (1999) (for address, see above)

Public Interest Immunity in Defamation and the Democratic Imperative: Reynolds v. Times Newspapers (1998) by John O'Keefe, 10/5 Entertainment Law Review 158 (1999) (for address, see above)

Aries and Annahold BV v. Paravision International and PH. Meyer by Emmanuel Dreyer, 10/5 Entertainment Law Review 161 (1999) (for address, see above)

In Defence of Luvvies-Ridicule & Context in Libel Law-Time for a Re-think? By John O'Keefe, 10/6 Entertainment Law Review 167 (1999) (for address, see above)

Format Rights: A Never-ending Drama (or not) by David Rose, 10/6 Entertainment Law Review 170 (1999) (for address, see above)

The Good, the Bad and the Ugly: The Spandau Ballet Case and Oral Agreements in the Entertainment Industry by Paul Graznak, 10/6 Entertainment Law Review 175 (1999) (for address, see above)

Character Merchandising: Does English Law Recognise a Property Right in Name and Likeness? By Hamish Porter, 10/6 Entertainment Law Review 180 (1999) (for address, see above)

ISPs Cannot Turn a Blind Eye to Material on Their Systems by David Engel, 10/6 Entertainment Law Review 184 (1999) (for address, see above)

A New Dawn in the Japanese Fight Against Piracy by John Tessensohn, 10/6 Entertainment Law Review 186 (1999) (for address, see above)
[ELR 21:5:25]