RECENT CASES

Audrey Hepburn's son and executor may pursue false advertising suit against publisher of Hepburn biography, because dust jacket and promotional materials may have falsely suggested that book was an "authorized biography"

There is a line between "puffing" and misrepresentation, though its exact location is often unclear. Wherever that line may be located, a pending lawsuit filed by Audrey Hepburn's son and executor alleges that Carol Publishing stepped over it with promotional statements made on the dust jacket and elsewhere for Audrey Hepburn: An Intimate Portrait, the 1993 Hepburn biography authored by Diana Maychick.

The offending statements suggest that Maychick's biography was "authorized" by Hepburn. Among other things, the dust jacket said that Maychick had "unprecedented access to the reclusive and legendary star" and that "Hepburn and Maychick spent countless hours together in conversation, as Audrey opened up about her childhood, her careers, and the loves of her life." Likewise, a press release for the book reported that Hepburn gave the book her "full cooperation."

In fact, it appears that Maychick never interviewed Hepburn in person, and spoke with her by phone for just three to five hours. At her deposition, even Maychick acknowledged that the "countless hours" assertion was "misleading" and that the statement that Hepburn gave the book her "full cooperation" was "not true."

Hepburn's son and executor have sued Carol Publishing under state law and the federal Lanham Act. According to publishing industry expert Howard Kaminsky, the objected-to promotional statements are understood by those in the publishing business to mean that Maychick's biography was "authorized" by Hepburn. That would make any biography endorsed by her son and executor a second authorized biography, and second authorized biographies are less valuable than first authorized biographies, Kaminsky said in a written report.

Carol Publishing sought dismissal of the Lanham Act claim (though not the state law claim) on two grounds. It argued that Hepburn's son and executor do not have standing to pursue a Lanham Act claim because they were not injured by the offending promotional statements. And it argued that the promotional statements were protected by the First

Amendment, because they were not made with actual malice.

While Carol Publishing may ultimately prevail on one of these grounds, it didn't do so with its motion for summary judgment. Federal District Judge Miriam Cedarbaum has denied the publishing company's motion.

The judge acknowledged that "the question is a close one," but concluded that Hepburn's son and executor "have shown a reasonable basis for believing they are likely to suffer or to have suffered an injury to their alleged interest in writing the only Audrey Hepburn biography authorized by Hepburn or endorsed by her estate and family." This was so, Judge Cedarbaum explained, because "Kaminsky's opinion that the value of [their] interest in writing the first biography of Hepburn endorsed either by themselves or the actress has been injured by Carol's advertising the

Maychick Book as if it were authorized by Hepburn raises a genuine issue of disputed fact about whether Carol's advertising has injured or is likely to injure [their] commercial interest in publishing a biography of Hepburn."

Also, "even if the First Amendment requires a showing that the statements were made with actual malice, the case could not be dismissed on summary judgment" because Hepburn's son and executor "demonstrated the existence of an issue of fact regarding whether Carol knew at the time that it published the Maychick Book that the claims made on the dust cover and in the promotional materials were false."

Ferrer v. Maychick, 69 F.Supp.2d 495, 1999 U.S.Dist. LEXIS 15209 (S.D.N.Y. 1999) [ELR 21:11:4]

Production company's use of actor to portray clarinetist during national television broadcast of Fourth of July concert did not violate rights of principal clarinetist for National Symphony Orchestra; dismissal of clarinetist's lawsuit is affirmed on appeal

To others, it looks like an offer that Loren Kitt would have been happy to accept; but he didn't.

Kitt is the principal clarinetist for the National Symphony Orchestra. In preparation for the national television broadcast of the Orchestra's performance at the U.S. Capitol Fourth of July concert in 1993, the company that produced the concert offered Kitt the opportunity to appear in a 35-second camera shot of him playing the clarinet, apart from the rest of the orchestra, on the balustrade of the Capitol during the opening of George Gershwin's "Rhapsody in Blue."

Why, exactly, Kitt declined this offer hasn't been officially reported. But since he did, the production company broadcast the shot using an actor dressed in a top hat and tuxedo. The actor didn't resemble Kitt or play the clarinet visually the way Kitt does. But Kitt responded with a lawsuit, alleging claims for false light invasion of privacy, fraud and infliction of emotional distress.

A District of Columbia trial court granted the production company's motion for summary judgment. And the D.C. Court of Appeals has affirmed.

In an opinion by Judge Inez Reid, the appellate court ruled that Kitt's false light claim failed for two reasons. Since the actor didn't resemble Kitt or play the clarinet the way he does, "his peers in the music industry would not have mistaken the actor for him." This was especially true, because there were four other clarinetists in the National Symphony Orchestra, and the broadcast did not identify the actor as Kitt or even as the orchestra's principal clarinetist. Thus, the broadcast was not "of and concerning" Kitt. Moreover, the actor did nothing "obnoxious or offensive" during the broadcast, and a shot of a man in a tuxedo "playing" the clarinet would not offend an ordinary, reasonable person.

Kitt's fraud claim was based on his assertion that the production company allegedly had promised not to use an actor. But Judge Reid affirmed the dismissal of this claim too. Kitt's contract with the National Symphony Orchestra required him to perform with it at the Fourth of July concert. Thus, the judge said, there was no proof that "in playing the concert," Kitt had relied on the production company's promise not to hire an actor.

Finally, Judge Reid affirmed dismissal of Kitt's emotional distress claim, because he offered no evidence to prove that his discomfort was greater than a reasonable person could be expected to tolerate. Nor was the production company's allegedly broken promise not to hire an actor so "extreme and outrageous" as to permit recovery for emotional distress.

Kitt v. Capital Concerts, Inc., 742 A.2d 856, 1999 D.C.LEXIS 174 (D.C. 1999)[ELR 21:11:4]

Executor of estate of jazz composer Billy Strayhorn properly terminated copyright assignments to Tempo Music, and thus recaptured ownership of final 39 years of songs' copyrights, federal District Court rules; but further proceedings are necessary to determine whether executor then reassigned copyrights to certain songs to Music Sales

Legendary composer Billy Strayhorn wrote hundreds of songs including such jazz standards as "Take the A Train" and "Chelsea Bridge." Though they were first published in the 1940s, Strayhorn's songs continue to have commercial value even today. And a dispute has arisen over who owns the final 39 years of their copyrights.

On one side of the dispute is Tempo Music Corporation, a music publishing company to which Strayhorn and all of his potential heirs assigned the renewal term rights to his compositions. Following Strayhorn's death in 1967, the executor of his estate, Gregory Morris, duly renewed the songs' copyrights and assigned their renewal terms to Tempo, as Strayhorn and his heirs had previously promised.

Tempo transferred its rights to another music publisher, Music Sales Corporation, in 1993, with the consent of Morris and Strayhorn's surviving heirs. Music Sales is on Tempo's side in the current dispute, claiming to own the copyrights to Strayhorn's songs as Tempo's successor.

On the other side of the dispute is Morris, as the executor of Strayhorn's estate, and Strayhorn's surviving heirs. They claim to be the current owner of the copyrights to the songs, because Morris terminated the prior assignments to Tempo, pursuant to Copyright Act section 304(c), in order to recapture ownership of the final 39 years of their copyright terms.

Section 304(c) of the Copyright Act clearly creates a right to terminate pre-1978 grants, 56 years after a work's federal copyright protection is first obtained. As originally enacted in 1976, this termination right enabled authors or their successors to recapture the final 19-years of a copyright's 75-term term. The passage of the Sonny Bono Term Extension

Act in 1998 extended term of copyright by 20 additional years (ELR 20:6:8). As a result, section 304(c) terminations now enable authors or their successors to recapture the final 39 years of a work's copyright.

While section 304(c) clearly creates a termination right, it must be exercised by the right person in the right way, in order to be effective. This is why a dispute has arisen between Tempo Music and Music Sales on the one hand, and Morris and Strayhorn's heirs on the other.

Music Sales (as Tempo's successor) would like to continue as the publisher of Strayhorn's songs, and it has taken the position: that Morris was not the right person to terminate the assignments; that even if he were, he couldn't do so; that he didn't do so in the proper manner; and even if he did so properly, he then reassigned the 39-year balance of the renewal terms to Music Sales.

So far, Morris and Strayhorn's heirs have prevailed on all but one of these arguments. In a long opinion reflecting careful analysis, federal District Judge Shira Scheindlin has held that Morris was the right person to terminate the assignments, that he could do so, and that he did so in the proper fashion. Further proceedings are necessary, she ruled, to determine whether Morris may have reassigned the renewal terms to some (though not all) songs to Music Sales, so the case is not entirely over yet.

Tempo and Music Sales argued that Strayhorn's heirs, rather than Morris, were the only ones who could have terminated the assignments. This argument was based on quite specific language in section 304(c) concerning which of an author's successors may claim renewal term rights and the right to terminate prior grants. Judge Scheindlin rejected Tempo and Music Sales' interpretation of that provision, and ruled that Morris, as executor, was the person designated by section 304(c) as the one with authority to terminate.

Judge Scheindlin also ruled that Morris was permitted to terminate the assignments, even though it was he who had previously granted renewal term rights to Tempo, in his capacity as Strayhorn's executor.

Finally, the judge ruled that the termination notices sent by Morris were proper in content and were sent to the right company, even though one of the notices was sent only to Tempo and not to Music Sales.

The question of whether Morris may have reassigned the renewal terms of some songs to Music Sales requires further proceedings, because the transaction by which this may have been done was not simple or straightforward. Instead, it resulted from the settlement of an earlier, separate lawsuit filed by Morris and Strayhorn's heirs against Tempo. And it was not apparent to Judge Scheindlin whether the settlement documents constituted a reassignment of renewal term copyrights (as Music Sales contends), or simply a consented-to transfer of Tempo's rights to Music Sales.

Music Sales Corp. v. Morris, 73 F.Supp.2d 364, 1999 U.S.Dist.LEXIS 12736 (S.D.N.Y. 1999)[ELR 21:11:5]

Zappa Family Trust is at least co-owner of copyrights to Frank Zappa videos, and thus has standing to sue MPI Home Video for copyright infringement on account of its continued sales of videos after oral licensing agreement was terminated; whether post-termination sell-offs actually constituted copyright infringement is jury question, but post-termination sales did not constitute trademark infringement, federal District Court rules

Frank Zappa died in 1993, but the legendary rocker's legacy lives on in some sixty albums and several home videos.

Manufacturing and distribution rights to five of those home videos were orally licensed to MPI Home Video in 1987, while Zappa was still alive, and disagreements over MPI's royalty and accounting practices arose just a couple of years later. In 1994, those disagreements finally prompted Zappa's widow Gail to terminate MPI's license. MPI stopped manufacturing Zappa videos, but it continued to sell off its existing inventory.

MPI's continued sales triggered a copyright and trademark infringement suit, as well as a claim for an accounting, filed by Gail's corporation Glovaroma, Inc., and the Zappa Family Trust, as well as by Gail individually. The copyright claim complained of MPI's continued sales of Zappa videos after its license was terminated. The trademark claim asserted that MPI infringed Glovaroma's registered trademark "Honker Home Video" by using that mark on the videos MPI sold. The accounting claim was for allegedly unpaid royalties.

On their face, these claims seem straightforward. But as cases sometimes do, this one took an immediate detour into complex issues of copyright and trademark ownership. It did so, because MPI asserted that the videos' copyrights were not owned by Glovaroma or the Zappa Family Trust. And MPI asserted that it, rather than Glovaroma, was the actual owner of the "Honker Home Video" trademark.

In response to cross-motions for summary judgment concerning these ownership issues, Federal District Judge Ann Claire Williams has held that the Trust is at least a co-owner of the video copyrights, and that it doesn't matter who owns the "Honker Home Video" trademark, because MPI's use of that mark to sell-off its remaining Zappa video inventory was not an infringement, even if Glovaroma owns the mark.

MPI was able to argue that neither Glovaroma nor the Trust owned the videos' copyrights, because the registration certificates for some of them indicated they were "works made for hire" and that the copyright to another was acquired "by agreement" - even though no written agreements were produced to prove either claim.

The absence of written documentation was fatal, MPI argued, because Glovaroma had no employees, which is one of the ways works get to be works made for hire. Although video sleeves and videos themselves are eligible to be classified as works made for hire if they are "specially ordered or commissioned works," there must be a written agreement - between the company that ordered or commissioned the work and the person who created it - in order for those types of works to be "works made for hire."

Judge Williams agreed that in the absence of written agreements, neither the videos nor their sleeves could be works made for hire. On the other hand, the judge found that if Glovaroma was not the "author" of the videos and sleeves (under the work made for hire doctrine), then Frank Zappa individually was at least the co-author of the sleeves and at least four of the five videos (along with others who helped create them). Shortly before he died, Zappa signed a written instrument transferring all his copyrights to the Zappa Family Trust. And that made the Trust at least a co-owner of the video sleeve copyrights and the copyrights to four of the videos.

The copyright status of one of the videos - "The Amazing Mr. Bickford" - was a bit more complicated, because its registration certificate indicated that its author was Cal Schenkel and that Schenkel had transferred his copyright ownership interest to Frank Zappa "by agreement." A copy of that agreement, however, was not produced - thus suggesting the transfer may not have occurred or may have been merely oral and thus ineffective. However, the video's copyright was registered within five years of its first publication, thus creating a statutory presumption that all of the facts stated in the certificate were true - including the copyright's transfer to Zappa. Since Zappa later transferred all his copyrights to the Trust, the Trust acquired the copyright to that video too.

For these reasons, Judge Williams ruled that the Trust had standing to sue MPI for copyright infringement. But she also ruled that whether any such infringement actually took place was a question for the jury. This was so, the judge explained, because she could not determine whether the oral license granted to MPI in the first place included a post-termination sell-off period. If it did, MPI's post-termination sales of existing inventory would not have been an infringement.

MPI claimed that it - rather than Glovaroma - was the true owner of the "Honker Home Video" trademark, because it - rather than Glovaroma - was the company that actually used the mark in connection with video sales. Judge Williams determined that she didn't have to decide which company owned the mark, because even if it were owned by Glovaroma, MPI's use of the mark to sell Zappa videos would not have caused consumer confusion. Those videos actually were what they purported to be. Thus, the judge granted MPI's motion to dismiss that claim.

The judge also dismissed the accounting claim, because it was filed more than five years after accounting disputes first arose and thus was barred by the statute of limitations. Also, there was no federal jurisdiction over the accounting claim.

Glovaroma, Inc. v. Maljack Productions, Inc., 71 F.Supp.2d 846, 1999 U.S.Dist.LEXIS 20814 (N.D.Ill. 1999)[ELR 21:11:6]

Composer's claim to be co-author of songs in Blue Man Group's show "Tubes" is barred by statute of limitations, because claim not made within three years of date by which composer had reason to know suit was necessary, federal District Court rules

Blue Man Group's show "Tubes" opened back in 1991, at the Astor Place Theatre in the East Village. The performance art musical is still there, almost nine years later, with no apparent plans for closing.

An offshoot of "Tubes" was staged briefly in another nearby venue, somewhat south of the East Village. It was a lawsuit filed in federal court by Brian Dewan against Blue Man Group; but that proceeding has closed. District Judge Robert Carter has granted Blue Man Group's motion for summary judgment, and has dismissed Dewan's suit entirely.

At issue in the case was Dewan's assertion that he co-authored most of the show's musical score, but has never been given promised Playbill credits, or royalties. According to Dewan's complaint, he and others involved in creating "Tubes" had several discussions about their respective contributions, from the time the show opened in 1991 to late 1993. Indeed, drafts of written agreements were exchanged, some of which acknowledged Dewan's co-authorship, and at least one of which contained a schedule that showed him to be the co-author of nine songs still being performed in "Tubes."

None of the agreements was ever signed, however. So, in 1998, Dewan filed suit, seeking a judicial declaration that he is the co-author of the songs in question.

Blue Man Group denies that Dewan ever co-authored any of the songs in the show. But Judge Carter didn't resolve that factual dispute. Instead, the judge noted that the statute of limitations in connection with a co-authorship claim is the three-year period found in the Copyright Act, and he ruled that Dewan had waited too long to sue.

Ordinarily, the three-year limitation period begins to run when a plaintiff has reason to know the facts on which his claim is based. In this case, that period might have begun in 1991, when the show first opened without giving Dewan credit as co-author of its score. However, estoppel applies in situations where a defendant lulls a plaintiff into believing that suit is not necessary.

The judge acknowledged that in this case, it "appears that [Blue Man Group] lulled Dewan into believing that no suit was necessary by stating, verbally and in writing, that Dewan was a co-author [of] the compositions, and by engaging in negotiations over an agreement during 1991 to late 1993."

This didn't help Dewan overcome Blue Man Group's statute of limitations defense, however. "By the end of 1994 at the latest, Dewan had ample reason to know a lawsuit was necessary," Judge Carter said. "Faced with this knowledge, Dewan then had three full years to initiate this suit. . . . In light of Dewan's passive and unreasonable reliance on [Blue Man Group's] assurances," the judge found that Dewan's claim accrued well before October, 1995, and thus was barred by the statute of limitations when the suit was filed, more than three years after that.

Dewan v. Blue Man Group Ltd., 73 F.Supp.2d 382, 1999 U.S.Dist.LEXIS 13405 (S.D.N.Y. 1999)[ELR 21:11:7]

Sonny Bono Copyright Term Extension Act is constitutional, federal District Court rules

Sonny Bono would have been pleased - both with Congress' decision to enact a law in his name, and with the decision of federal District Judge June Green upholding the constitutionality of that law.

The Sonny Bono Copyright Term Extension Act of 1998 is the law that added 20 years to the duration of copyright. As a result of the Act, copyrights to pre-1978 works that would have lasted 75 years from their first publication now last 95 years; and copyrights to 1978 and more recent works whose copyrights would have lasted for the lives of their authors plus 50 years now last for the lives of their authors plus 70 years (ELR 20:6:8).

There are people and companies in this country that make their livings by publishing and performing public domain works - those whose copyrights have expired. They of course were not pleased with the Sonny Bono Copyright Term Extension Act. And several of them joined together to file a lawsuit, seeking a declaration that it is unconstitutional.

In response to cross-motions for judgment on the pleadings, Judge Green has ruled against the challengers, in a remarkably short and to the point opinion.

The judge rejected their argument that the Act violates the First Amendment, saying simply "there are no First Amendment rights to use the copyrighted works of others."

Judge Green also rejected the challenger's argument that, as applied to works already in existence when the Act was passed, it exceeded Congress' powers. The Constitution gives Congress the power to enact legislation giving copyright protection to "authors" "for limited times."

The judge noted that even if a limited time is extended, so long as it is extended for a limited time, "it remains a limited time."

Also, she held that authors may transfer to others rights that Congress has given them, and thus term extension is constitutional, even if the extended term granted by the Act is owned by a transferee rather than an author.

The challengers also argued that the Act violates the Public Trust Doctrine. That doctrine applies to navigable and tidal waters, not to copyrights, and thus Judge Green ruled that the retroactive extension of copyright term does not violate that doctrine.

Eldred v. Reno, 74 F.Supp.2d 1, 1999 U.S.Dist.LEXIS 18862 (D.D.C. 1999)[ELR 21:11:8]

Artist loses copyright case against Texas Commission on the Arts; appellate court affirms dismissal on grounds that Congress did not have power to authorize copyright infringement suits against state agencies

Artist Abel Rodriguez has lost his copyright infringement suit against the Texas Commission on the Arts. He lost without a trial, even though, according to federal District Judge Sam Cummings, the Commission's design for a "Texas Commission on the Arts" license plate "bears a striking resemblance" to a license plate design Rodriguez had earlier submitted to the Texas Department of Transportation.

The reason that Rodriguez lost without a trial is that the Commission is an agency of the state of Texas, and states are immune from infringement liability.

Judge Cummings so ruled back in 1998 when he dismissed Rodriguez's lawsuit (ELR 20:5:17).

Rodriguez's appeal was pending until recently, apparently awaiting a United States Supreme Court decision in a patent infringement case against an agency of the state of Florida. In that case, Florida Prepaid v. College Savings Bank, 119 S.Ct. 2199 (1999), the Supreme Court ruled that Congress did not have the power to enact legislation that made states subject to federal patent law.

Congress also enacted similar legislation, called the Copyright Remedy Clarification Act of 1990, designed to make states subject to copyright law (ELR 12:10:20). But in a very short opinion in Rodriguez's case, Court of Appeals Judge Robert Parker held that the Supreme Court's patent decision applied in the copyright context too. This was so, Judge Parker reasoned, because "The interests Congress sought to protect in each statute are substantially the same and the language of the respective abrogation provisions are virtually identical."

As a result, Judge Parker has affirmed the dismissal of Rodriguez's case.

Editor's note: This is not the first time an appellate court has held that states are immune from copyright liability. The same court that did so in Rodriguez's case did so - even before the Supreme Court's patent decision - in a case against Arte Publico Press, a book publisher owned by the state-run University of Houston (ELR 20:5:17). Thus, while the appellate court's decision against Rodriguez was no doubt a disappointment for him and other copyright owners, it was not unexpected.

Rodriguez v. Texas Commission on the Arts, 199 F.3d 279, 2000 U.S.App.LEXIS 214 (5th Cir. 2000)[ELR 21:11:8]

Federal court issues preliminary injunction ordering website to delete addresses of other websites that contain unauthorized copies of copyright-protected "Church Handbook of Instructions"

The Church Handbook of Instructions is not an entertainment book, nor is it meant to be. It's a religious text that provides lay clergy with Mormon procedures and guidelines. Nonetheless, the Handbook is at the heart of a copyright infringement lawsuit that raises issues of enormous significance to the entire entertainment industry.

The plaintiff in the lawsuit is Intellectual Reserve, Inc., a Utah corporation that reportedly owns the Mormon Church's intellectual properties, including the copyright to the Handbook. The defendant is the Utah Lighthouse Ministry, which describes itself as "a Christian non-profit organization providing humanitarian outreach to the Community, and printing critical research and documentation on the LDS [Mormon] Church."

Utah Lighthouse provoked the lawsuit by posting "substantial portions" of the Handbook on its own website, without a license to do so. A temporary restraining order was issued early in the case that required Utah Lighthouse to remove the Handbook from its website. Utah Lighthouse did so, but when it did, it also put a notice on its site indicating that the Handbook was still available at three other websites whose addresses (or URLs) Utah Lighthouse also posted. In addition, Utah Lighthouse posted emails on its site that encouraged readers to browse those three other websites, to print the Handbook, and to send it to others. This merely added fuel to the fire, because none of those other three websites had a license to post the Handbook, either.

In response to a motion for a preliminary injunction, Utah Lighthouse challenged Intellectual Reserve's ownership of a valid copyright. Federal District Judge Tena Campbell made short shrift of that argument, because Intellectual Reserve submitted a copyright registration certificate, which constituted prima facie evidence of the validity of the Handbook's copyright as well as Intellectual Reserve's ownership of it. As a result, Judge Campbell issued a preliminary injunction requiring Utah Reserve to remove the Handbook from its site.

The more serious issue - and the one that makes this case important to others - was whether Utah Reserve also could be ordered to remove the addresses of the other websites that also contain unlicensed copies of the Handbook. Judge Campbell decided that Utah Reserve could be ordered to do so, and thus issued a preliminary injunction that does just that.

While Utah Lighthouse did not operate the other three websites, and thus the activities of those websites - while infringing - did not make Utah Lighthouse a direct infringer. On the other hand, Judge Campbell concluded there was a substantial likelihood that Utah Lighthouse was a "contributory" infringer, because by providing the addresses of the infringing sites, it contributed to infringements committed by those who browse those websites.

Judge Campbell reasoned that those who browse the infringing sites become infringers themselves, because while browsing, they automatically make unauthorized copies of the Handbook in their computers' random access memory. The judge further reasoned that Utah Lighthouse contributed to the browsers' infringements by encouraging them to browse, download and distribute the Handbook to others.

Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F.Supp.2d 1290, 1999 U.S.Dist.LEXIS 19103 (D.Utah 1999)[ELR 21:11:9]

Child Pornography Prevention Act of 1996, making computerized virtual child pornography a crime, is declared partially unconstitutional by federal appellate court

The Child Pornography Prevention Act of 1996 is the latest in a line of statutes dating back to 1977 that make sexual exploitation of children a federal crime. All of the earlier statutes had focused on harm to real children and thus had criminalized only conduct involving real people. Developments in computer technology now make it possible to create virtual people - computer-generated images that appear to be people, but aren't.

Fearful that pornographers would seek to evade existing laws by switching to computerized production, Congress passed legislation in 1996 to criminalize the use of computers to produce pornographic images that look like children. The Child Pornography Prevention Act does so by prohibiting any "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," or that is promoted in a manner that "conveys the impression" that it contains sexually explicit depictions of minors.

The constitutionality of the Act was challenged by a trade association of businesses that produce and distribute "adult-oriented materials," by a book publisher, and by an artist and photographer. At first, the challengers were unsuccessful. In an unpublished opinion, Federal District Judge Samuel Conti found the Act to be constitutional, and he granted the government's motion for summary judgment.

On appeal, however, the challengers have prevailed, for the most part. The Court of Appeals has ruled that the language of the Act that bans images that "appear[] to be a minor" and that are promoted in a manner that "conveys the impression" minors are involved are unconstitutionally vague and overbroad.

Writing for a 2-to-1 majority, Judge Donald Molloy explained that the Act is not content neutral. It therefore had to satisfy a compelling interest - but failed to do so "when no actual children are involved." Moreover, Judge Molloy ruled that the two offending phrases are "highly subjective," because there is "no explicit standard as to what the phrases mean."

Judge Molloy also ruled that the Act is "severable," so that only those phrases were declared unconstitutional, not the Act as a whole.

Judge Warren Ferguson dissented. He found the Act to be "an important tool in the fight against child sexual abuse," and would have found it to be constitutional.

Free Speech Coalition v. Reno, 198 F.3d 1083, 1999 U.S.App.LEXIS 32704 (9th Cir. 1999)[ELR 21:11:9]

Moviefone's unauthorized listings of St. Louis movie theater showings, apparently copied from theater owner's own website and automated phone system, did not constitute misappropriation or false advertising, federal District Court decides

Moviefone has defeated a misappropriation and false advertising lawsuit filed against it by Fred Wehrenberg Circuit of Theaters, Inc., the owner of several St. Louis movie theaters.

Moviefone operates websites and automated phone systems, providing theater-by-theater movie listings and show times in some 34 markets. In 19 of those markets - though not in St. Louis - it also provides teleticketing services that permit patrons to buy theater tickets in advance. Moviefone's services are considered so valuable to theater owners that many of them send Moviefone their movie and scheduling information by computer or fax.

The Fred Wehrenberg Circuit operates its own website and automated phone system for its theaters in St. Louis. Perhaps for that reason, Wehrenberg does not provide Moviefone with its movie or show time information. As a result, Moviefone gets the Wehrenberg Circuit information itself, possibly from Wehrenberg's phone system or website. If that is where Moviefone gets its information, it doesn't always get it accurately, because Wehrenberg complains that Moviefone "frequently provides . . . inaccurate movie theater and show time information in regard to [Wehrenberg's] schedules. . . ."

Wehrenberg made this complaint in a federal court lawsuit against Moviefone, alleging claims for misappropriation and false advertising. In response to cross-motions for summary judgment, District Judge

Catherine Perry has denied Wehrenberg's motion and has granted Moviefone's motion, thus bringing the case to an end by awarding the victory to Moviefone.

Wehrenberg's claim for misappropriation asserted that its movie listings and show time information were a form of "hot news," the unauthorized taking of which was a tort of the kind recognized by the Supreme Court in its International News Service decision in 1918. The existence of the misappropriation tort has been recognized more recently by the Second Circuit Court of Appeals in the National Basketball Association v. Motorola case (ELR 19:4:17) - if five specific circumstances are found to exist. (Otherwise, the tort is preempted by federal copyright law.)

Among the five circumstances that must exist is this one: the use of a plaintiff's "hot news" by others, without authorization, would so reduce the plaintiff's incentive to produce it that its "existence or quality would be substantially threatened." Judge Perry found that this circumstance did not exist in Wehrenberg's case against Moviefone, because Wehrenberg had a strong incentive to produce and distribute information about which movies its theaters were showing and when, "in order to draw people to come to its movie theaters, buy tickets, and purchase concessions." Wehrenberg did not establish that it would stop doing so because of Moviefone's activities, the judge found.

Judge Perry also rejected Wehrenberg's false advertising claim. Even if Moviefone listed Wehrenberg's information incorrectly, the judge observed, Moviefone did not do so in an attempt to persuade audiences to purchase movie tickets from it instead of from Wehrenberg, because Moviefone does not exhibit movies or sell theater tickets for other exhibitors in the St. Louis area.

Fred Wehrenberg Circuit of Theaters, Inc. v. Moviefone, Inc., 73 F.Supp.2d 1044, 1999 U.S.Dist.LEXIS 17574 (E.D.Mo. 1999)[ELR 21:11:10]

Unlicensed posters of photo of Rock & Roll Hall of Fame building do not infringe trademark in building design or Hall of Fame name, federal District Court rules; suit against photographer and his poster publishing company is dismissed

Poster publishers - and movie producers - can now breathe a sigh of relief, because photographer Charles Gentile has defeated a federal trademark suit filed against him by The Rock & Roll Hall of Fame and Museum. Gentile attracted the ire of the Rock & Roll Hall of Fame, because his company, Gentile Productions, sells unlicensed posters of a photograph

Gentile shot of the Hall of Fame's "distinctive" building designed by world-renowned architect I.M. Pei. The poster also uses the words "Rock N' Roll Hall of Fame - Cleveland" in its border.

Early in the case, the Hall of Fame was granted a preliminary injunction, temporarily barring Gentile from selling any more of his unlicensed posters (ELR 18:11:18). On appeal, however, Gentile was successful. The Court of Appeals vacated the preliminary injunction, ruling that for various reasons, it was unlikely the Hall of Fame would prevail (ELR 20:3:9).

The case was then returned to the District Court for further proceedings, where Gentile took the initiative. He filed a motion for summary judgment; and it has been granted by Judge Patricia Gaughan. Most of the arguments the Hall of Fame made in opposition to Gentile's motion were arguments it had made without success to the Court of Appeals.

The Hall of Fame did, however, present one new fact to Judge Gaughan in an effort to stave off Gentile's motion. The Hall of Fame presented the results of a consumer survey that showed that the public recognizes the Hall of Fame building, that half of those asked thought that Hall of Fame posters were published by the Hall of Fame itself, and that three-quarters of those asked thought that if anyone else published a Hall of Fame poster, it would need the Hall of Fame's permission to do so.

However, these survey results were more relevant to "likelihood of confusion" than to whether the Hall of Fame owned a trademark in its building design, Judge Gaughan concluded. "Assuming the survey is offered to establish that [the Hall of Fame has] a protectable trademark, it only shows that, overwhelmingly, respondents recognized the building as a landmark and not as a protected trademark or as source-distinguishing," she ruled. For this reason, the judge found that the Hall of Fame had not used its building design as a trademark, and thus it did not own a trademark in that design in the first place - thus making "likelihood of confusion" irrelevant.

The Hall of Fame does own a registered trademark in the words "The Rock and Roll Hall of Fame." But Judge Gaughan also held that the similar words on the border of Gentile's poster did not infringe that trademark. Instead, the judge ruled that because Gentile's use of his photo of the Hall of Fame building was noninfringing, his use of the words "Rock N' Roll Hall of Fame - Cleveland" also was a noninfringing "fair use," because they are nothing more than a description of the subject matter of his poster's photograph.

Editor's note: The design of a building itself may be protected by copyright law, but this case did not involve allegations of copyright infringement, for a very good reason. Section 120 of the Copyright Act explicitly provides that the copyright in a building does not include the right to prevent taking or distributing photographs of it, if the building is located in or visible from a public place, as the Hall of Fame is. Thus in this case, the Hall of Fame attempted to use trademark law to obtain rights that Congress specifically determined should not be granted as a matter of public policy - at least as a matter of copyright law. Movie producers owe Gentile a debt of gratitude for his continued defense of this case, because producers make frequent use of panoramic shots of the New York City skyline clearly showing distinctive landmarks such as the Empire State Building, the Chrysler Building and the World Trade Center. If Gentile had abandoned the case after the preliminary injunction against him was originally issued, trademark law might be used by building owners to require filmmakers to use other backgrounds for their opening credits.

Rock & Roll Hall of Fame and Museum v. Gentile Productions, 71 F.Supp.2d 755, 1999 U.S.Dist.LEXIS 18729 (N.D.Ohio 1999)[ELR 21:11:11]

New York Stock Exchange loses trademark infringement and dilution suit against New York, New York Hotel & Casino, complaining about Casino's use of replica facade of NYSE building and phrase "New York Slot Exchange"

Themed hotels and casinos have become hallmarks on the Las Vegas strip. For fans of Venice, Rio de Janeiro, New Orleans and ancient Rome, there's The Venetian, the Rio, The Orleans and Caesar's

Palace. And for fans of the Big Apple, there's New York, New York Hotel & Casino.

The spectacular exterior of the New York, New York Hotel & Casino mimics the Manhattan skyline, featuring replicas of the Empire State and Chrysler Buildings, the Statue of Liberty and the Ellis Island immigration center. Inside the hotel, areas recreate scenes from Coney Island, Soho Village, Greenwich Village, and the Financial District.

Many people have long compared the stock market to a gambling casino. And the Financial District area of the Casino reprises that comparison by reproducing the facade of the New York Stock Exchange Building, with one humorous change. In place of the phrase "New York Stock Exchange" that appears on the real building, the Casino's facade says "New York New York Slot Exchange."

The New York Stock Exchange was not amused. It was instead offended, enough so to file a trademark infringement and dilution suit against the Casino. The New York Stock Exchange has not been successful however. Federal District Judge Miriam Cedarbaum has dismissed its lawsuit, in response to the Casino's motion for summary judgment.

Judge Cedarbaum evaluated the Stock Exchange's federal trademark infringement claim by using the Polaroid multi-factor test for likelihood of confusion. The judge determined that "a reasonable trier of fact could not conclude that an appreciable number of customers would be confused into believing that the NYSE supplied, sponsored or approved of the Casino's goods or services or the Casino's use of the NYSE's marks. The obvious pun in the variation of the marks, together with the difference in the services offered by the Casino and the NYSE, dispel the likelihood of confusion."

The Stock Exchange's dilution claims were made under federal and New York state law. Only "distinctive" marks are protected against dilution under the federal Lanham Act. And Judge Cedarbaum pointed out that there is a difference between being a "famous" mark and being a "distinctive" one. Though the New York Stock Exchange and its facade may be famous, the judge concluded that they are not distinctive. She explained that the "New York Stock Exchange" mark is merely a combination of the generic term "Stock Exchange" and the geographic term "New York." And the NYSE building's facade is similar to the classical facades found on many prominent buildings in the United States.

New York state dilution law protects trademark owners against both blurring and tarnishment. But

Judge Cedarbaum found that the Casino had done neither. Blurring was not shown, she explained, because "In the context of the Casino's theme, it is clear that the challenged marks explicitly refer to the NYSE, and their success depends on a customer making a connection with the original marks. . . . In this sense, the Casino's use of the marks is like a parody or another type of joking reference."

Likewise, Judge Cedarbaum found no likelihood of tarnishment. "The NYSE is not likely to suffer injury to its business reputation merely because customers . . . of the Casino make a mental connection at the time they view the challenged marks." This was so for at least two reasons. First, the NYSE itself once ran an ad in the Wall Street Journal that superimposed an outline of a slot machine on a stock quotation for a then-new Stock Exchange listing of securities from the Rio Hotel & Casino. Second, the "NYSE has not shown that it has publicly opposed legal gambling or that legal gambling is so unwholesome or scandalous that any association with it can sustain a claim for tarnishment."

New York Stock Exchange v. New York, New York Hotel, 69 F.Supp.2d 479, 1999 U.S.Dist.LEXIS 15208 (S.D.N.Y. 1999)[ELR 21:11:12]

Agreement settling defamation lawsuit permitted ABC to rebroadcast television docudrama about Foretich child custody dispute, appellate court affirms

ABC has defeated a defamation lawsuit filed against by Eric Foretich, though it has taken three rulings to bring the case to an end.

The lawsuit was triggered by a network television docudrama that depicted Foretich's courtroom battles with his former wife concerning custody of their daughter. Following almost four years of litigation, much of it concerning discovery disputes, a federal District Court granted ABC's motion for summary judgment.

The network then sought to recover its attorneys' fees and costs which, apparently, were substantial, because Foretich's lawyer responded by initiating "settlement" negotiations.

Those negotiations seemed, at first, to be successful, because they resulted in a "walk away" agreement. ABC agreed not to pursue its claim for fees and costs, and Foretich agreed not to appeal and to sign a "full, general release, from the beginning of time to the end of time, for any person or entity involved in any way with the . . . broadcast . . . of the docudrama. . . ."

When, however, ABC submitted a General Release for Foretich's signature, he balked, claiming that he never agreed to permit ABC to rebroadcast the docudrama, as the General Release provided. By then, it was too late for Foretich to file a Notice of Appeal. So instead, he filed a motion for an extension of time within which to appeal. ABC filed a counter-motion, seeking to enforce the settlement agreement.

Again, the District Court granted ABC's motion. And Foretich appealed from that order.

In an opinion by Judge Karen LeCraft Henderson, the Court of Appeals has affirmed. Judge Henderson acknowledged that ABC's written settlement offer did not explicitly refer to rebroadcasts of the docudrama, and thus, the meaning of Foretich's agreement to sign a "full, general release" was "not unambiguous." This meant that parol evidence concerning the parties' negotiations could be considered in determining what they had agreed.

ABC's lawyer submitted an affidavit indicating that all of the parties' settlement negotiations had contemplated rebroadcasts of the docudrama. Among other things, the record showed that Foretich himself had included terms permitting future broadcasts in a counter-offer he had submitted to an earlier ABC settlement offer. For these reasons, Judge Henderson said, it was "not reasonable" for Foretich to read ABC's written settlement offer "so as not to include future broadcasts. . . ."

Since the settlement agreement permitted ABC to rebroadcast the docudrama, Foretich's motion for additional time to file a Notice of Appeal was moot, and the order granting ABC's motion to enforce the settlement was affirmed.

Foretich v. American Broadcasting Companies, 198 F.3d 270, 1999 U.S.App.LEXIS 33980 (D.C.Cir. 1999)[ELR 21:11:12]

Chrysler may deduct overhead in calculating its profit from infringing copyright to ZZ Top song "La Grange" by using it in soundtrack of promotional video, even if infringement was willful, federal District Court rules

ZZ Top's copyright infringement suit against Chrysler Corporation is turning into a multi-opinion case. Federal District Judge Robert Lasnik has already published two pre-trial rulings. In the first, he held that ZZ Top's song "La Grange" is sufficiently original to be protected by copyright (despite an expert's opinion that it is strikingly similar to earlier songs) (ELR 21:8:15).

Now Judge Lasnik has ruled that Chrysler may deduct overhead in calculating its profit from infringing the song's copyright (by using it, without authorization, in the soundtrack of a promotional video) - even if ZZ Top proves the infringement was "willful."

On its face, the judge's ruling is unremarkable, because section 504(b) of the Copyright Act seems to permit all infringers to deduct all of their expenses in calculating the profits they earned from their infringing activities. However, ZZ Top pointed out that "a number of courts have adopted a rule precluding the deduction of overhead expenses where the infringement is found to be deliberate or willful." In its case against Chrysler, ZZ Top took the position that Judge Lasnik should follow this rule.

The judge, however, has declined to do so. Judge Lasnik sits in the Western District of Washington in the Ninth Circuit. In a characteristically short and to-the-point decision, the judge noted that the Ninth Circuit is not one of the Circuits that has "yet" adopted the rule sought by ZZ Top. The Ninth Circuit's 1985 decision in Frank Music v. MGM (ELR 7:6:7) did "leave[] open the possibility that overhead deductions may be precluded where the infringement is intentional. . . ." But that case did not involve an intentional infringement; and, Judge Lasnik observed, "it does not mandate or even endorse such a preclusion."

The judge concluded that overhead deductions should be permitted, even in willful infringement cases, for two reasons. First, section 504(b) (allowing deductions) contains no language that limits it to negligent infringement cases only. Second, another section of the Copyright Act - section 504(c) - does contain language permitting enhanced damages in willful infringement cases, thus showing that when

Congress intended to authorize special remedies for willful infringements, "it clearly knew how to do so."

ZZ Top v. Chrysler Corp., 70 F.Supp.2d 1167, 1999 U.S.Dist.LEXIS 16665 (W.D.Wash. 1999)[ELR 21:11:13]

Sugarhill Music infringed copyright owned by Tuff City Records in Spoonie Gee's "Spoonin' Rap" by licensing others to use it, federal District Court rules; court again rejects Sugarhill's claim that it owns song's copyright

Tuff City Records has won another round in its lawsuit with Sugarhill Music over which of them owns the copyrights to Spoonie Gee's composition and recording of "Spoonin' Rap."

Though the song enjoyed only "minor success" when it was first released in 1979, it appears to have generated significant royalties in more recent years. Indeed, according to Tuff City, Sugarhill improperly received $97,500 for the song's use in the soundtrack of the movie "Love Without Pity," $88,625 for its use in the soundtrack of the movie "Fresh," and $342,000 for its use on four albums.

The case began as one for copyright infringement and other claims filed by Tuff City against Sugarhill. Sugarhill responded with a copyright infringement counterclaim of its own, as well as affirmative defenses. Earlier in the case, Tuff City won an important victory when federal District Judge Robert Sweet dismissed Sugarhill's infringement counterclaim on the grounds that it had never registered the song's copyright, and dismissed its "prior transfer" defense on the grounds that it had been too late in recording an assignment of the song's copyright (ELR 21:7:14).

Before Judge Sweet issued those rulings, Tuff City had filed a still-unanswered amended complaint against Sugarhill. So after those rulings, Sugarhill had to file an answer to the amended complaint. When it did, it realleged the counterclaim and defense that had been rejected less than a month before. Tuff City responded with a motion for summary judgment, much of which Judge Sweet has granted.

The judge again dismissed Sugarhill's infringement counterclaim. Sugarhill argued that the copyright assignment it had recorded in the Copyright Office was sufficient to give the court jurisdiction to hear its infringement counterclaim. Judge Sweet, however, ruled once again that in order for Sugarhill to sue for infringement, it - or one of its predecessors - would have had to register the song's copyright itself.

Recordation of an assignment of an unregistered work is not by itself sufficient.

The judge also dismissed, for the second time, Sugarhill's "prior transfer" defense, saying that the company had not submitted any new facts showing that Tuff City actually knew the song's copyright had been assigned to Sugarhill before that copyright was assigned to Tuff City.

Judge Sweet granted Tuff City's motion for summary judgment on its claim that Sugarhill had infringed the song's copyright. Sugarhill argued that Tuff City's copyright registration for "Spoonin' Rap" covered only the musical composition and not the sound recording itself. But the judge found that Tuff City had registered the copyrights to both the composition and the recording, both on a single Copyright Office Form SR just as Copyright Office Circular 56a permits. The judge also found that by licensing others to use the song, Sugarhill had violated one of the exclusive copyright rights owned by Tuff City.

Tuff-N-Rumble Management v. Sugarhill Music Publishing, 75 F.Supp.2d 242, 1999 U.S.Dist.LEXIS 18253 (S.D.N.Y. 1999)[ELR 21:11:13]

In copyright infringement case alleging unauthorized use of nude photos on website, federal court in California has personal jurisdiction over Florida-based corporation that operates site because it has 2100 paid subscribers in California, but not over individual corporate officers

Badpuppy Enterprise is a corporation that operates "badpuppy.com" - a website that features photographs of male nudes. Colt Studio, Inc., alleges that it owns the copyrights to some of those photographs, and that Badpuppy has used Colt's photos without its consent.

Colt makes these allegations in a copyright and trademark infringement suit it has filed against Badpuppy and two of its corporate officers in a federal court in California. Since Badpuppy is based in Florida, and its officers reside there, the company and its officers responded to Colt's complaint with a motion to dismiss for lack of personal jurisdiction or improper venue. Alternatively, they sought an order transferring the case to Florida, for their convenience and in the interest of justice.

Judge Lourdes Baird has dismissed Badpuppy's officers - but not the company itself - from the case, and has refused to transfer it to Florida.

Badpuppy has some 17,000 subscribers worldwide, 2100 or 12% of whom reside in California. Each subscriber pays $10 a month for access to a members-only area of the "badpuppy.com" website. From these facts, Judge Baird concluded that Badpuppy had continuing contractual obligations to a substantial number of California residents and thus had "purposely availed" itself of the California forum. This gave California courts personal jurisdiction over Badpuppy - jurisdiction that was "reasonable" under "due process" standards.

On the other hand, the officers of Badpuppy had no connections with California, except through the company's activities. That was not sufficient to give California personal jurisdiction over the officers, Judge Laird concluded. (Colt argued that the officers were the corporation's alter ego; but Colt's complaint had not alleged sufficient facts to establish that was so.)

Judge Laird also rejected Badpuppy's argument that California was not the proper venue for the case. Venue in copyright cases exists wherever personal jurisdiction exists, and since California had personal jurisdiction over Badpuppy, California was a proper venue for the case too. Finally, the judge denied Badpuppy's motion to transfer the case, because Badpuppy had not shown that the convenience of the parties would favor Florida over California.

Colt Studio, Inc. v. Badpuppy Enterprise, 75 F.Supp.2d 1104, 1999 U.S.Dist.LEXIS 21029 (C.D.Cal. 1999)[ELR 21:11:14]

Seattle Art Museum does not have standing to sue gallery for allegedly defrauding purchaser of painting by Matisse which purchaser later gave to Museum; federal District Court dismisses Museum's cross-claim against gallery, in case filed against Museum by true owner's heirs to recover possession of painting

"L'Odalisque" traveled a long and winding road, from the painting's creation by Henry Matisse in 1928 to its eventual appearance in the Seattle Art Museum. It was owned at one time by French art collector Paul Rosenberg, from whom it was stolen by the Nazis during World War II. Thereafter it was acquired, in unreported ways, by the Knoedler-Modarco Gallery, which sold it in 1954 to Virginia and Prentice Bloedel, from whom the Seattle Art Museum acquired it in 1991.

All of this came to light, because when Paul Rosenberg's heirs learned the painting was in Seattle, they sued the Museum to recover possession of it. The Museum in turn sued the Gallery, alleging that the Gallery had defrauded the Bloedels when it sold them "L'Odalisque" in 1954.

Though the Gallery denied the Museum's fraud allegations, Federal District Judge Robert Lasnik found that the Museum had come up with enough evidence of fraud to overcome the Gallery's motion for summary judgment - if the Museum had standing to assert a fraud committed on the Bloedels. That turned out to be big "if," however.

There was no evidence the Gallery had defrauded the Museum itself, because there was no evidence the Museum ever relied on anything the Gallery had ever said about L'Odalisque's title. The question thus became whether the Museum had "somehow" obtained the Bloedels' right to sue the Gallery for fraud.

The Museum argued that it had obtained that right in an agreement with the Bloedels' heirs. Washington state law recognizes agreements entered into to resolve disputes that arise "in the administration of" decedents' estates. But that law didn't help the Museum, because the dispute over whether the Gallery had committed fraud arose after the Bloedels' estates were closed. Thus, the judge agreed with the Gallery that the agreement between the Museum and the Bloedels' heirs was "merely a 'collusive modification of a trust or will,' and cannot be used in the manner attempted."

As a result, Judge Lasnik concluded that the Museum did not have standing to assert the Gallery's alleged fraud against the Bloedels, and he granted the

Gallery's motion for summary judgment and dismissed the Museum's cross-claim against it.

Rosenberg v. Seattle Art Museum, 70 F.Supp.2d 1163, 1999 U.S.Dist.LEXIS 15843 (W.D.Wash. 1999)[ELR 21:11:15]

Tenor soloist who performed in Carnegie Hall concert produced by Mid America Productions was an employee of Mid America, for New York unemployment insurance purposes, rather than an independent contractor or employee of talent agency

The difference between an "employee" and an "independent contractor" matters for all kinds reasons, including the question of who must pay unemployment insurance contributions. Mid America Productions learned this, to its chagrin, when a New York state agency ruled that Mid America is the "employer" of soloists it engages to perform at the classical music concerts it produces in Carnegie Hall.

The agency in question was the New York Unemployment Insurance Appeal Board, and as a result of that ruling, Mid America became liable for additional unemployment insurance contributions. The ruling was the result of a claim made by a tenor soloist engaged by Mid America for a 1997 concert. As was its practice, Mid America engaged the tenor through the Safimm talent agency. And as far as Mid America was concerned, the tenor was either an independent contractor or an employee of Safimm.

Disappointed with the decision of the Unemployment Insurance Appeal Board, Mid America appealed to the Supreme Court Appellate Division, where it has been disappointed again. In a very short opinion by Justice Mugglin, the court ruled that "There is nothing irrational in the Board's interpretation of Labor Law [section] 511(1)(b)(1-a) as establishing that claimant and other soloists engaged to perform at Carnegie Hall are employees of the entity that engages them and produces the concert. . . ."

The Labor Law section in question provides that a person is an employee if he or she provides service for an employer "as a professional musician or a person otherwise engaged in the performing arts . . . for a . . . theater . . . unless, by written contract, such musician or person is stipulated to be an employee of another employer."

Though this law would have permitted the tenor to be classified as an employee of the Safimm agency, the letter agreement between Mid America and Safimm did not clearly provide that this was to be so.

Thus, the Appellate Division concluded, "There is no basis to disturb the Board's decisions."

*In re Mid America Productions I*nc., 699 N.Y.S.2d 556, 1999 N.Y.App.Div.LEXIS 12742 (App.Div. 1999)[ELR 21:11:15]

Former NFL player Steve Courson loses claim against Player Retirement Plan for additional disability benefits; federal District Court affirms decision of Retirement Board that alcohol and steroid-related disability was not covered by Plan

Steve Courson played football for the Pittsburgh Steelers and Tampa Bay Buccaneers from 1977 to 1985. Within a few years of his leaving the NFL, he was disabled, as a result of alcohol and steroid abuse that began while he was in the League.

The NFL has a Player Retirement Plan that pays disability benefits. The amount a player is entitled to receive depends on whether his disability is the result of a football-related injury or one that is not football-related. Greater benefits are available for football-related injuries.

Courson sought disability benefits from the Plan, and was awarded them at the lower rate for non-football injuries. Later, Courson petitioned the Player Retirement Plan Retirement Board to reclassify his disability as one that was football-related.

The Board consists of three members selected by the NFL Management Council and three members selected by the NFL Players Association. The Board unanimously denied Courson's petition. And he responded with a lawsuit, under the federal Employee

Retirement Income Security Act ("commonly referred to as "ERISA").

Courson has been no more successful in court than he was before the Board itself. Federal District Judge Robert Cindrich has granted the Plan's motion for summary judgment, finding that the Board's decision to deny Courson additional benefits was not arbitrary or capricious.

Judge Cindrich's opinion is quite fact-specific. Courson's claims - in his reclassification petition to the Board, and in his lawsuit - were undercut by inconsistent statements he had made in his published autobiography False Glory. Among other things, the biography reported that Courson successfully competed as a professional wrestler and weight-lifter after he was cut by the Buccaneers; and thus there was evidence that he was not disabled during those years, as he asserted in his reclassification petition.

In addition, the judge agreed with the Board that Courson's taking of steroids and abuse of alcohol did not fall under the Plan's definition of football-related activities. "The record overwhelmingly supports the Retirement Board's conclusion that Courson decided to overindulge in alcohol and use [steroids] on his own initiative, on his own time, and in knowing contravention of NFL policy."

Judge Cindrich was not unsympathetic to Courson's plight. "There is logic in Mr. Courson's argument that his current condition is directly or indirectly the product of his many years of playing NFL football," the judge said. "It would be hard-hearted to lack compassion for him and for all the young men who are so willing and even eager to sacrifice their lives and bodies for the sake of this modern American spectacle, and, of course, the fame and fortune it brings them."

The judge's compassion was not enough to change the outcome, however. "[I]t is not the role of the court to judge contemporary tastes in sport or entertainment," Judge Cindrich explained. "Nor would it be proper for the court to alter carefully crafted terms and conditions of retirement plans arrived at through the collective bargaining process."

Courson v. Bert Bell NFL Player Retirement Plan, 75 F.Supp.2d 424, 1999 U.S.Dist.LEXIS 9925 (W.D.Pa. 1999)[ELR 21:11:16]

University of Southwestern Louisiana officials acted reasonably when they terminated an assistant football coach whose son accepted a football scholarship to play for Louisiana State; officials were thus immune from assistant coach's denial of constitutional rights claim, federal appeals court affirms

Rexford Kipps used to be an assistant football coach at the University of Southwestern Louisiana. He isn't any more, because his son Kyle accepted an athletic scholarship to play football for Louisiana State University.

Kipps' boss, USL head football coach Nelson Stokley, had warned Kipps that if his son Kyle decided not to play for USL, Kyle had to go to college outside the state of Louisiana. But Kipps' said he couldn't tell his son to turn down an LSU scholarship. So when

Kyle accepted LSU's scholarship, USL head coach Stokley informed Kipps that his employment would not be renewed; and that decision received the approval of USL's athletic director, President and Board of Trustees.

Kipps responded with a federal lawsuit, alleging that his termination violated his constitutional liberty interest in familial association. District Judge F.A. Little disagreed, however, saying that even if such a right existed, USL's officials were entitled to "qualified immunity" from Kipps' claim. Judge Little therefore granted their motion for summary judgment and dismissed Kipps' case.

Kipps did no better on appeal. The Court of Appeals has affirmed the dismissal of Kipps' lawsuit. In an opinion by Judge Robert Parker, a majority of the appellate court agreed that USL's officials were entitled to qualified immunity. Judge Parker explained that

Kipps was terminated "to mitigate the damage that Kyle's attendance at LSU as opposed to USL would have on alumni relations and recruiting efforts" - a motivation which the majority found "objectively reasonable."

Judge Harold DeMoss concurred, but on different grounds. He would have ruled that Kipps' termination did not even violate a clearly recognized constitutional right, and thus he felt it unnecessary to decide whether Kipps' termination was reasonable.

Kipps v. Caillier, 197 F.3d 765, 1999 U.S.App.LEXIS 32067 (5th Cir. 1999)[ELR 21:11:16]

Reducing size of men's teams, and even eliminating men's teams altogether, does not violate Title IX or the Constitution, federal appellate courts hold, in separate but similar cases against Illinois State and California State Universities

At first glance, Illinois State and California State Bakersfield look to be heaven for men students. Women students significantly outnumber men students at both universities: 55% to 45% (in 1993) at Illinois State, and 64% to 36% (in 1996) at Cal State Bakersfield. There was, however, a downside for men in both places, at least those who were intercollegiate athletes.

The downside was triggered by a companion statistic. Though women outnumbered men 55 to 45 at Illinois State, students who participated in athletics there were 66% male and 34% female. And though women outnumbered men at Cal State Bakersfield 64 to 36, those who participated in athletics there were 61% male and 39% female.

Both schools of course are subject to Title IX, a federal statute that since 1972 has prohibited gender discrimination in educational programs - including athletics - at institutions that receive federal financial assistance. Cal State Bakersfield also is subject to a similar California statute.

Both schools decided to do something to comply with the law: Illinois State, in response to the results of a study done by the University's own Gender Equity Committee; and Cal State Bakersfield, in response to a state court lawsuit filed against it by the National Organization of Women. As a practical matter, each school had just two choices: provide athletic participation opportunities for men and women that were substantially proportionate to their respective rates of enrollment; or fully and effectively accommodate the athletic interests and abilities of their women students.

Both schools independently made the same decision. They decided to provide substantially proportionate athletic opportunities by reducing the number of men who participated in athletics. Illinois State did this by eliminating the men's wrestling and soccer teams and by adding a women's soccer team. Cal State Bakersfield did so by reducing the number of spots on the roster of its men's wrestling team (a team that in 1996 won the Pac-10 Conference title and finished third in the nation).

The men at both schools responded by filing similar though separate federal court lawsuits, alleging that their Universities' actions violated Title IX and the Equal Protection clause of the Constitution.

In decisions reached less than two weeks apart, separate federal appellate courts have ruled against the men. Both courts have held that Title IX and the Constitution permit schools to bring their athletic programs into compliance with Title IX by reducing the number of men who participate in those programs.

In the Illinois State case, Judge Joel Flaum reasoned that "a holding that universities cannot achieve substantial proportionality by cutting men's programs is tantamount to a requirement that universities achieve substantial proportionality through additional spending to add women's programs. This result would ignore the financial and budgetary constraints that universities face."

In the Cal State Bakersfield case, Judge Cynthia Holcomb Hall concluded her opinion by noting that in the summer of 1999, "90,185 enthusiastic fans crowded into Pasadena's historic Rose Bowl for the finals of the

Women's World Cup soccer match." Judge Hall, along with many others, credits Title IX for the interest that now exists in women's sports. So though the men of Cal State Bakersfield may have been disappointed, they could not have been surprised, when the judge held "that Title IX does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies" - even when those steps involve reducing the size of men's teams.

Boulahanis v. Board of Regents, Illinois State University, 198 F.3d 633, 1999 U.S.App.LEXIS 31969 (7th Cir. 1999); *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763, 1999 U.S.App.LEXIS 32475 (9th Cir. 1999)[ELR 21:11:17]

NCAA is not subject to Title VI of Civil Rights Act, so case challenging legality of NCAA freshman eligibility standard is dismissed by appeals court

In an effort to increase the number of athletes who graduate from college, the National Collegiate Athletic Association adopted a rule that limits freshman eligibility to students who achieve at least a certain minimum score on standardized college admission tests. Known as "Proposition 16," the rule appears to have achieved its objectives - though it has been controversial nonetheless.

There is a good reason that Proposition 16 has not met with universal acclaim: it appears to have disqualified a greater percentage of minority athletes than non-minorities. This was the allegation made and proved by four African-American students in a lawsuit they filed against the NCAA in federal court under

Title VI of the Civil Rights Act of 1964. District Judge Ronald Buckwalter granted the students' motion for summary judgment and enjoined the NCAA's continued use of minimum standardized test scores as a condition for freshman eligibility (ELR 21:4:20).

The case was not an easy one, because it involved unsettled principles of law as well as disputed facts. Thus, it was not surprising that the NCAA immediately appealed its loss. Nor was it surprising that the Court of Appeals issued a stay of Judge Buckwalter's injunction, pending the outcome of that appeal.

Now, in an opinion by Judge Morton Greenberg, the appellate court has reversed Judge Buckwalter's decision entirely, and has remanded the case to him with instructions to enter summary judgment in favor of the NCAA. Judge Greenberg's opinion rests exclusively on threshold principles of law, which made it unnecessary for him to reach the factual question of whether Proposition 16 had an unjustified impact on minority students.

The threshold - and deciding - legal question in the case was whether the NCAA is subject to Title VI of the Civil Rights Act at all. Judge Greenberg ruled that it is not.

Title VI prohibits discrimination in programs and activities that receive federal financial assistance. The students argued that the NCAA received such assistance in two ways: indirectly, as a result of a federal grant to the National Youth Sports Program which the NCAA controls; and because the NCAA controls its members who receive federal financial assistance and thus are themselves subject to Title VI.

Judge Greenberg ruled that Title VI's ban on discrimination is "program specific." This means that the NCAA could not discriminate in its administration of the National Youth Sports Program. But freshman eligibility rules - indeed, intercollegiate athletic competition generally - is not part of the National Youth Sports Program. Thus, federal financial assistance to that Program does not make the Proposition 16 subject to Title VI, the judge concluded.

Judge Greenberg also ruled that the NCAA does not control its members, at least not in any way that would make the NCAA subject to Title VI.

Cureton v. National Collegiate Athletic Association, 198 F.3d 107, 1999 U.S.App.LEXIS 33441 (3rd Cir. 1999)[ELR 21:11:17]

Ohio State defeats gender discrimination lawsuit filed by Karen Weaver, former coach of women's field hockey team; Weaver failed to produce sufficient evidence to establish claims for retaliatory discharge, disparate treatment or unequal pay

Karen Weaver was a coach at Ohio State University for nine years. For at least several of those years, she was the head coach of OSU's women's field hockey team. But the relationship ended badly. Weaver's employment was terminated in 1996 for reasons that immediately became the subject of dispute.

In a lawsuit Weaver filed in federal court, she alleged that she had been terminated for a variety of gender-related reasons. OSU on the other hand contended it had terminated her because of complaints it had received from Weaver's players concerning her poor performance as a coach.

These conflicting views came to a head in the courtroom of Judge James Graham, as a result of an OSU motion for summary judgment. Judge Graham granted the University's motion in full, and dismissed Weaver's suit, and that ruling has been affirmed by the Court of Appeals (without a published opinion).

Under Title IX of the Education Amendments, Weaver alleged that she had been discharged because of her gender. This claim, however, failed, because the person OSU hired to replace her also was a woman.

Under Title VII of the Civil Rights Act, Weaver alleged that she had been discharged in retaliation for her complaints about the condition of the field on which her field hockey team practiced. While she in fact made such a complaint, she had not framed it in terms of sex discrimination. Moreover, the men's lacrosse team used the same field. For both of these reasons, Judge Graham ruled against her on this claim.

The judge also ruled against Weaver on a claim in which she asserted she had been terminated because of comments she had made about OSU's Title IX compliance to an NCAA committee. OSU, however, proved that Weaver's comments to the committee had been made in confidence, and that no one at OSU ever knew what Weaver had said to the committee.

In addition, OSU submitted evidence that it had terminated Weaver because the school had received complaints concerning her performance from members of her field hockey team - evidence, the judge said, that constituted "a legitimate, nondiscriminatory reason for [her] termination."

Under the Equal Pay Act, Weaver alleged that she was paid less than the coach of the men's ice hockey team. But OSU argued, and Judge Graham agreed, that Weaver had failed "to show that the positions of men's ice hockey and women's field hockey coach are substantially identical," as required to prove discrimination under the Equal Pay Act.

Weaver v. Ohio State University, 71 F.Supp.2d 789, 1998 U.S.Dist.LEXIS 22477 (S.D.Ohio 1998), aff'd without published opinion, 194 F.3d 1315, 1999 U.S.App.LEXIS 33167 (6th Cir. 1999)[ELR 21:11:18]

Wooden baseball bat manufacturer's proposed amended complaint against NCAA and aluminum bat makers states valid claim for tortious interference, federal District Court rules, though amendment to previously dismissed antitrust claim is not allowed

The NCAA is caught in the middle of a legal slugfest between makers of wooden and aluminum baseball bats. The case, which earlier was dismissed in part, is now proceeding apace, on claims by the wooden bat maker that those it has sued have tortiously interfered with its economic relations.

On the plaintiff's side of the case is Baum Research and Development Company. Though its name sounds high-tech, it is the maker of low-tech wooden baseball bats.

On the defendants' side are Hillerich & Bradsby Co., Inc., Easton Sports, Inc., and Worth, Inc., all makers of aluminum bats. They are joined by the Sporting Goods Manufacturers Association and the NCAA. The NCAA has rules concerning the types of bats that college teams are permitted to use - rules that even in Baum's opinion are so "lax" they permit colleges to use aluminum as well as wooden bats.

Apparently as a result of the NCAA's lax rules, many colleges decided to use aluminum bats rather than Baum's wooden ones. This prompted Baum to file an antitrust and interference with economic relations lawsuit.

Early in the case, the antitrust claim was dismissed on the grounds that Baum's alleged injury resulted from competition, not from any conspiracy to restrain competition (ELR 21:3:18). Though Baum's tortious interference claim was found to be defective too, the court gave Baum permission to amend that claim; and it did.

Baum's lawsuit is one of several related baseball bat cases pending in different circuits. Thus, after its antitrust claim was dismissed, the case was transferred from federal court in Michigan (where Baum had filed it) to federal court in Kansas (under rules governing multidistrict litigation). In Kansas, Baum sought permission to amend its antitrust claim as well as its tortious interference claim - a motion the defendants opposed on both counts.

Baum received part of what it sought: permission to file its proposed amended complaint alleging tortious interference. District Judge Kathryn Vratil rejected the defendants' argument that the proposed amendment "would be futile" because it failed to identify specific business relationships or sales that Baum would have made and with which they allegedly interfered. The judge acknowledged that the law requires Baum to allege "more than a mere hope for a future business opportunity or the innate optimism of the salesman." But, she said, Baum isn't required to "demonstrate a guaranteed relationship."

The proposed amended complaint was sufficient, Judge Vratil concluded, because it alleged that Baum's bats had been well-received and enjoyed substantial sales, that there exists an identifiable class of prospects to whom Baum had a reasonable expectation of selling its wooden bats, and that it could have expected better sales and profits from sales to those prospects, had the defendants not engaged in specific conduct that allegedly interfered with those sales.

Judge Vratil did not, however, permit Baum to amend its antitrust claim. The proposed amendments, even if proved, still did not amount to a violation of the antitrust laws, she concluded. Moreover, the proposed amendments were a more elaborate attempt to replead the same facts previously alleged, and as such, the proposed amendment was improper as a procedural matter as well.

In re Baseball Bat Antitrust Litigation, 75 F.Supp.2d 1189, 1999 U.S.Dist.LEXIS 18356 (D.Kan. 1999)[ELR 21:11:19]

Trial required to determine validity of patent on Roger Clemens Instructional Baseball; if patent is valid, it was infringed by instructional baseball sold by Franklin Sports, federal District Court rules

Pitchers hold baseballs in slightly different ways, depending on whether they want to throw fastballs, curveballs, sinkers or sliders. Several years ago, Michael McGinley invented a way that aspiring pitchers could be taught the different ways of holding a baseball in order to throw different pitches. He designed a ball that had colored finger-placement markings for each type of pitch. And he sought - and obtained - a patent for his invention.

McGinley's invention is marketed as the "Roger Clemens Instructional Baseball." It's not the only such ball on the market. Another similar ball is sold by Franklin Sports, Inc., called the Franklin Pitch Ball

Trainer 2705. Indeed, the Franklin Pitch Ball is so similar to the Roger Clemens Instructional Baseball that McGinley has sued Franklin for patent infringement.

The case will be a multi-inning affair. Part of it has been decided by federal District Judge John Lungstrum in response to cross-motions for summary judgment. But the rest - and seemingly most important part - involve disputed issues of fact, and thus will require a trial.

Judge Lungstrum has held that Franklin's ball infringes McGinley's patent, assuming the patent is valid. While Franklin's ball is not identical to the Roger Clemens Instructional Baseball, it performs the same functions in equivalent ways, and infringes for that reason.

The question of whether the patent is valid is more difficult. In a motion for summary judgment, Franklin argued that it is not, for several reasons.

It argued that the patent had been "anticipated" by earlier similar balls, including one designed by a mother and her son, which they had submitted, unsuccessfully, to several sporting goods manufacturers with the hope they would be paid for the design. Franklin also argued the patent is invalid because McGinley's design is "obvious." And Franklin argued that the patent is invalid because McGinley failed to disclose to the Patent Office the "best mode" of his invention and had omitted an essential element from his written description of the ball, namely, that his finger-placement design includes both left- and right-handed markings.

Because Judge Lungstrum concluded that all of these defenses involve disputed issues of fact that require a trial, he has denied Franklin's motion for summary judgment on the patent validity issue.

McGinley v. Franklin Sports, Inc., 75 F.Supp.2d 1218, 1999 U.S.Dist.LEXIS 18725 (D.Kan. 1999)[ELR 21:11:19]

Decision by hockey puck contest judge that contestant had not won million dollar prize is binding, Florida appellate court rules, even though contest judge was Director of Promotions for contest co-sponsor Florida Panthers

Randy Giunto's skill with a hockey stick brought him close - very close - to becoming a millionaire. He would have won $1 million in a contest co-sponsored by the NHL's Florida Panthers, if the puck he'd shot passed "completely through" a specially designed small goal. Instead, his puck hit the corner of the small slot and came to rest just slightly within it. The contest judge was Declan Bolger who is the Panther's Director of Promotions. And Bolger declared the shot was unsuccessful.

With a million dollars at stake, it's not surprising that Giunto sued. Indeed, the rules on Giunto's contest entry form didn't say that the puck had to pass "completely through" the goal; they simply said the puck had to pass "into and through" the goal. According to Giunto, his puck had done that.

A jury apparently agreed with Giunto, because it awarded him a verdict. On appeal, however, the Panthers and their co-sponsors have prevailed.

Writing for a 2-1 majority of the Florida District Court of Appeal, Judge Gerald Cope noted that the contest entry form provided that "entrants agree to abide by and be bound by . . . the decisions of the judges which are final in all matters. . . ." According to Judge Cope, this provision "is akin to an arbitration clause which accomplishes 'the salutary purpose of resolving controversies out of court.'"

Judge Cope therefore reasoned that "When the puck entered the plywood slot but did not pass completely through it, the contest judge was required to decide whether Mr. Giunto had won under the contest rules. The judge's decision was binding on Mr. Giunto."

Judge Alan Schwartz dissented. He would have ordered the entry of judgment in Giunto's favor for two reasons. First, the rules simply required that the puck pass "into and through" the goal, and in Judge Schwartz's opinion, there was sufficient evidence to support the jury's conclusion that Giunto's puck had.

Second, Judge Schwartz rejected the argument that the contest judge's decision was final. He did so because the contest judge worked for the Panthers. "The rule that no person may be a judge in her own case . . . , which applies universally, including to what the court deems the analogous arbitration situation . . . , precludes the defendants' reliance on what amounts to their own denial of their own responsibility," Judge Schwartz said.

Giunto v. Florida Coca-Cola Bottling Co., 745 So.2d 1020, 1999 Fla.App.LEXIS 13443 (Fla.App. 1999)[ELR 21:11:20]

Antitrust claims against sponsors of PGA Senior Tour are dismissed, because evidence did not show that sponsors conspired with PGA concerning eligibility rules objected to by senior golfer Harry Toscano

Harry Toscano is a professional golfer whose age is somewhere north of 50. As a result, the PGA considers him a "Senior" golfer, and in fact, he has participated in at least two tournaments on the PGA Senior Tour. He hasn't, however, participated in all of the tournaments he would have liked, because PGA Senior Tour rules contain eligibility requirements that limit the field to 78 players per tournament. Under those rules, Toscano hasn't been eligible to participate in many tournaments, which he otherwise would have entered.

Toscano responded by filing an antitrust lawsuit against the PGA and several PGA Senior Tour sponsors. In his lawsuit, Toscano alleges that the PGA and its sponsors have conspired with one another in violation of section 1 of the Sherman Act by adopting eligibility rules that restrain trade in senior professional golf.

Like a first tee shot into the rough, Toscano's case has gotten off to a bad start. Federal District Judge

David Levi has dismissed Toscano's claims against the Senior Tour sponsors, in response to their motion for summary judgment.

There are two types of sponsors for each PGA Senior Tour tournament: a local sponsor that actually organizes and runs the tournament, pursuant to a contract with the PGA itself; and a title sponsor that pays the local sponsor for the right to have its name attached to the tournament and the right to display signs and obtain television and print advertising.

At first glance, it might look as though the PGA, local sponsors and title sponsors do agree with one another concerning which types of golfers are eligible to play in Senior Tour events. If they did, such an agreement would satisfy the "concerted activity" requirement for a Sherman Act section 1 violation.

First glances are not sufficient in antitrust cases, however, because in its 1984 decision in Monsanto v.

Spray-Rite, the United States Supreme Court held that a manufacturer may announce the terms under which it will deal with distributors and then refuse to deal with distributors unwilling to accept those terms. According to PGA sponsors, the PGA is analogous to a manufacturer; local and title sponsors are analogous to distributors; and player eligibility rules are analogous to the PGA's announced terms which sponsors have no recourse but to accept.

Judge Levi has agreed. He found that Toscano had not submitted any "concrete evidence" that local sponsors had communicated to the PGA any views about the eligibility rules objected to by Toscano, or that the PGA had considered any local sponsors' views in adopting or amending those rules. "It is equally if not more reasonable to infer," the judge said, "that the [PGA] and local sponsors acted independently with the respect to the challenged rules." Since a conspiracy between the PGA and local sponsors could not be inferred, Toscano's claim against them was dismissed.

Toscano's claim against the title sponsors "is even weaker than his claim against the local sponsors," Judge Levi concluded. "Unlike the local sponsors, the title sponsors do not contract directly with the [PGA]," he explained. Moreover, Toscano "submitted no evidence" showing that any of the title sponsors commented to the PGA on the rules Toscano challenged. Thus, the judge dismissed Toscano's claim against the title sponsors too.

Toscano v. PGA Tour, Inc., 70 F.Supp.2d 1109, 1999 U.S.Dist.LEXIS 15818 (E.D.Cal. 1999)[ELR 21:11:20]

Lawsuit by book authors alleging underpayment and late payment of royalties by Carroll & Graf Publishers should not have been certified as class action, New York Appellate Division rules

In a lawsuit filed in New York state court by several book authors, including mystery novelist Carolyn Banks, Carroll & Graf Publishers has been accused of underpaying royalties, paying royalties late, and withholding royalties by setting reserves for returns in excess of standard industry practice. According to Banks and her fellow plaintiffs, Carroll & Graf did these things not just to them, but as a "pattern of conduct" towards all its authors. As a result, they sought to have their case certified as a class action, and their motion was granted by trial court Judge Barry Cozier.

Carroll & Graf took an immediate appeal from that ruling. And in a short Memorandum Decision, the Appellate Division has reversed.

New York law permits class actions in cases where "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." The Appellate Division acknowledged that "on their face, plaintiffs' claims do appear to have a semblance of commonality. . . ."

On closer examination, however, the appellate court determined that most of the plaintiffs' claims will require "individualized proof." For example, the court said that the reasonableness of Carroll & Graf's reserves for returns depends on the popularity of a book's author, the number of books distributed, the type of book and its market, the amount of promotion and publicity for the book, and the book's past history of returns. The underpayment of royalties claim will require the review of sales of individual books, the number returned, and the royalty provisions of each publishing contract.

The late payment issue may present common issues. But the appellate court was not convinced that this issue "predominates" the issues to be litigated.

For these reasons, the Appellate Division has "decertified" the class.

Banks v. Carroll & Graf Publishers, Inc., 699 N.Y.S.2d 403, 1999 N.Y.App.Div.LEXIS 12638 (App.Div. 1999)[ELR 21:11:21]

Texas appellate court orders dismissal of defamation and related claims against ABC arising out of "Day One" report on failed savings and loan association in San Antonio

In March of 1995, the ABC news program "Day One" broadcast a report on failed savings and loan associations, especially one in San Antonio, Texas, known as Gill Savings. The report did not reflect well on the management of Gill Savings; and four of its employees - Christopher Gill, Laura Gill, Richardson Gill and Peter Gill - sued ABC for defamation and other things.

ABC responded with a motion for summary judgment, but the trial court denied the network's motion entirely. In cases like this one, where the media asserts defenses based on the First Amendment or the Texas Constitution, Texas law permits an immediate ("interlocutory") appeal from the denial of a defense motion for summary judgment. That is the course that ABC followed, with success.

In a lengthy opinion by Justice Sarah Duncan, the Texas Court of Appeals has reversed the trial court's order denying ABC's motion, and has "rendered judgment in ABC's favor."

Certain of the Gills' claims were dismissed for lack of evidence. Among these was a claim for trespass that was unsupported by any evidence that ABC employees had actually entered Gill property to shoot film. Another such claim was for invasion of privacy; it was dismissed because the ABC broadcast showed no more than could be seen from a public street. Abuse of process and tortious interference claims were also dismissed for lack of supporting evidence.

The Gills' central claim was for defamation. But Justice Duncan rejected it, because the statements to which the Gills took exception were either rhetorical hyperbole, non-actionable opinions, or substantially true. Moreover, the Gills were public figures, and there was no showing that ABC broadcast the objected-to statements with actual malice.

ABC, Inc. v. Gill, 6 S.W.3d 19, 1999 Tex.App.LEXIS 4449 (Tex.App. 1999)[ELR 21:11:22]

Texas appellate court orders dismissal of defamation case against Texas Monthly magazine and journalist; offending statements in "King of Bankruptcy" article were fair, true and impartial accounts of earlier lawsuit and thus were privileged, or were substantially true and thus not actionable, under Texas law

Texas Monthly and journalist Gary Cartwright have finally prevailed in a defamation lawsuit filed against them by Transamerican Natural Gas

Corporation and its owner Jack Stanley. The magazine and Cartwright won the case without going to trial, though they did have to go to the Texas Court of Appeals.

Cartwright's offending article, entitled "The King of Bankruptcy," appeared in the July 1995 issue of Texas Monthly. The article was prompted by an $8 million jury verdict against Transamerican, following a trial in which Jack Stanley's own son testified that his father had defrauded creditors, wiretapped litigation opponents and bribed public officials. In writing the article, Cartwright relied on interviews with witnesses and attorneys in the earlier case and on court transcripts of the trial. He also tried to interview Stanley himself, but Stanley refused to talk with him.

In their defamation lawsuit, Transamerican and Stanley complained about eleven specific statements in Cartwright's article. Texas Monthly and Cartwright responded with a motion for summary judgment, which the trial court granted as to four of the objected-to statements. That however left seven statements for trial.

Texas law permits an immediate ("interlocutory") appeal from the denial of a defense motion for summary judgment in lawsuits against the media where the defendants assert a First Amendment defense or one based on Texas law. Texas Monthly and Cartwright had asserted such defenses, and so they did take an immediate appeal -successfully.

Texas law provides that statements published by periodicals are privileged, and thus "not a ground for a libel action," if they are a "fair, true, and impartial account of . . . a judicial proceeding." Texas Monthly and Cartwright claimed the benefit of this privilege with respect to six of the seven statements that were not dismissed by the trial court. In a factually detailed opinion by Justice Davie Wilson, the Texas Court of

Appeals held that all six of these statements were "fair, true and impartial accounts" of matters that had occurred in the earlier lawsuit.

Another principle of Texas law provides that if a statement is "substantially true," it cannot be the basis for a defamation claim. Justice Wilson determined that the seventh offending statement was substantially true.

For these reasons, the Court of Appeals reversed the trial court's order denying summary judgment, and it "render[ed] judgment" that Transamerican and Stanley "take nothing."

Texas Monthly, Inc. v. Transamerican Natural Gas Corp., 7 S.W.3d 801, 1999 Tex.App.LEXIS 9016 (Tex.App. 1999)[ELR 21:11:22]

California "anti-SLAPP" statute results in dismissal of Metabolife's defamation suit against television station, reporter and interview subject

Metabolife is a California company based in San Diego. It makes and sells a dietary supplement whose primary active ingredient is the Chinese herbal supplement known as "ma huang" which is a form of the substance ephedrine. Though ephedrine is a naturally occurring substance, the safety of dietary supplements containing ephedrine is a controversial subject.

Boston television station WCVB-TV broadcast a three-part news report concerning the controversy. The report was the work of reporter Susan Wornick and featured on-camera interviews with researcher George Blackburn. Wornick and Blackburn both said a number of things that greatly upset Metabolife, and the company responded as companies often do in situations like this: it sued the station's owner, Wornick and Blackburn, asserting defamation and related claims.

At the outset of the case, Metabolife made a strategic decision that has now come back to haunt it. It decided to sue in federal court in its hometown of San Diego, rather than in Boston where WCVB-TV and Wornick are located. This decision turned out to be critical, because California law includes what is known as an "anti-SLAPP" statute - one that is designed to deter "strategic lawsuit[s] against public participation." The statute - California Code of Civil Procedure section 425.16 - does so by authorizing defendants to move to strike causes of action brought primarily to chill the exercise of free speech.

Though WCVB-TV and its co-defendants claimed that they were not subject to the jurisdiction of the court in San Diego, they also made an "anti-

SLAPP" motion to dismiss the case entirely. Federal District Judge John Rhoades has granted that motion.

Judge Rhoades explained that "To ensure that participation in public debate is not 'chilled,' the anti-SLAPP statute establishes a procedure for early dismissal of meritless lawsuits against public speech." The statute required Metabolife to establish its prima facie case with competent and admissible evidence. Though Metabolife attempted to meet this burden, the judge found that it couldn't.

In a detailed opinion, Judge Rhoades found that the evidence offered by Metabolife to refute each of the offending broadcast's allegedly defamatory claims was either inadmissible or failed to prove the falsity of the objected-to statements. The judge also found that some objected-to statements were protected by the First Amendment, did not have the defamatory implications attributed to them by Metabolife, or were substantially true.

Metabolife International, Inc. v. Wornick, 72 F.Supp.2d 1160, 1999 U.S.Dist.LEXIS 20554 (S.D.Cal. 1999)[ELR 21:11:23]

Cable television system did not violate ban on editorial control over public access channel programming by refusing to carry segment of program that offered videotapes and transcripts for sale, federal District Court rules in dismissing suit by producer of "America's Defense Monitor"

Robert M. Goldberg is a resident of Oyster Bay and the producer of a public access television program called "America's Defense Monitor." Goldberg's program is carried by Oyster Bay's cable-TV system, Cablevision of Long Island - or at least it was, until he changed the program's format ever so slightly.

Early in 1999, Cablevision took exception to the final 25-second segment of the program during which Goldberg offered to sell videotapes and transcripts of "America's Defense Monitor" for $19.95, chargeable to a Visa or MasterCard. According to Cablevision, public access programs must be non-commercial, and the final 25-second segment was commercial in nature. Cablevision's letter made it clear that it would be happy to continue cablecasting Goldberg's program if the "commercial portion" were removed.

Goldberg, on the other hand, claimed that federal and state law prohibit Cablevision from exercising editorial control over public access channel programs, except for programs that contain obscenity, indecency or nudity. Since "America's Defense Monitor" contained no obscenity, indecency or nudity, Goldberg sued Cablevision, seeking to enjoin it from refusing to carry his program in its entirety.

Federal District Judge Leonard Wexler has dismissed Goldberg's lawsuit, in response to Cablevision's motion for summary judgment.

Judge Wexler noted that by law, cable systems provide both public access and leased access channels, and the law makes an important distinction between these two kinds of channels. While commercial content is permitted on leased access channels, only non-commercial programs must be carried on public access channels.

The judge agreed with Cablevision that the segment in which Goldberg offered tapes and transcripts for sale was "commercial programming." This meant that the segment would have been a "commercial use of [public access] programming time

[that] is not protected by the laws [limiting editorial control to obscenity, indecency and nudity] for the simple reason that this aspect of the program does not fall within the definition or intent of public access programming, but, instead, constitutes the type of programming that is contemplated by the leased access provisions of federal and state law."

Goldberg v. Cablevision Systems Corp., 69 F.Supp.2d 398, 1999 U.S.Dist.LEXIS 15916 (E.D.N.Y. 1999)[ELR 21:11:23]

Federal appellate court upholds FCC decision that operator of satellite master antenna television system does not need cable-TV franchise from local government, because it does not operate a "cable system," even though some of its subscribers receive signals via leased underground cables

Entertainment Connections, Inc. (ECI) operates satellite master television systems in Michigan - one in East Lansing and another in Meridian Township. In the beginning, ECI clearly was not in the cable-TV business, because its antennas were only on the roofs of the apartment buildings it served and its cables ran just from those roofs to its subscribers' apartments. These types of systems are known as "SMATV."

Since ECI's SMATV systems were not cable systems, the company didn't seek cable-TV franchises from East Lansing or Meridian Township; and neither city asked it to.

Then things changed. ECI expanded its business by providing service to additional buildings. But it didn't install additional antennas on the roofs of those new buildings. Instead, it leased one strand of 12-strand cables owned by Ameritech - an unrelated company - and used that leased strand to connect its existing rooftop antennas to those new buildings. As far as ECI was concerned, its business was still strictly SMATV, not cable-TV.

However, East Lansing and Meridian Township now thought otherwise. Ameritech's cables run under public rights-of-way. According to the two cities, that made ECI a cable-TV system operator that now needed city-issued franchises.

ECI brought this disagreement to a head by petitioning the Federal Communications Commission for a declaratory ruling that it didn't need cable-TV franchises. The FCC obliged. It found that ECI is not a cable system operator because it does not provide service through a cable system. Therefore, the FCC ruled, ECI did not need franchises from either city.

Joined by the City of Chicago and other local governments that apparently had similar disputes with SMATV operators in their areas, East Lansing and Meridian Township petitioned the Court of Appeals for review of the FCC's decision. By a vote of 2-to-1, the appellate court has denied their petition - thus affirming the FCC's decision that SMATV operators do not need cable-TV franchises from local governments.

Writing for the majority, Judge Terence Evans closely parsed the language of the federal statute that requires cable systems to get franchises from local governments if they "use" public rights-of-way. In this case, Ameritech had already built its "supertrunking system" of cables, before ECI became one of its customers. As a result, Judge Evans concluded that in an "important and historical sense of the word ['used'], it is reasonable to conclude that ECI has not 'used' the public right-of-way."

In their arguments, the city of Chicago and several others emphasized "the public-interest virtues of widespread local franchising authority over ECI-like SMATV systems." Judge Evans didn't evaluate those arguments, however, saying they had been made in the "wrong forum." As the judge viewed it, "Their real quarrel is with Congress and the authority it has given the FCC under current law."

Judge Ilana Diamond Rovner dissented.

City of Chicago v. Federal Communications Commission, 199 F.3d 424, 1999 U.S.App.LEXIS 32008 (7th Cir. 1999)[ELR 21:11:24]

Federal court in Florida decides that defendant is not entitled to jury trial where National Satellite Sports seeks only statutory damages for unauthorized interception of transmission of 1996 fight between Mike Tyson and Frank Bruno

Conflicts between different federal circuits are common. So it's not surprising that courts in some circuits have held that defendants are not entitled to jury trials in cable piracy cases, while courts in other circuits have held that they are (ELR 16:1:30, 20:10:17).

Conflicts within a single circuit are less common. But the question of whether defendants are entitled to jury trials in cable piracy cases must be a difficult one, because a recent decision on this issue by a federal judge in the Southern District of Florida conflicts with an earlier decision on the same issue in the same District.

National Satellite Sports has sued the Time Out Pub of Sunrise, Florida, for unlawfully intercepting a transmission of the 1996 fight between Mike Tyson and Frank Bruno. National Satellite seeks only statutory damages from Time Out, as authorized by section 605 of the Communications Act.

Judge William Zloch has denied Time Out's request for a jury trial. He did so, even though in an earlier case filed by National Satellite in the same District, Judge James Lawrence King ruled that a restaurant known as Harry's Place was entitled to a jury trial for allegedly intercepting the television transmission of Mike Tyson's 1996 fight against Evander Holyfield.

The reason this is a difficult question is that section 605 provides that statutory damages are to be set by the "court," but "court" could mean either the judge or a jury. The Supreme Court has held defendants are entitled to jury trials in copyright cases, even if the plaintiffs seek only statutory damages which the Copyright Act says are to be determined by "the court." (ELR 19:12:6).

In National Satellite's earlier suit against Harry's Place, Harry's Place was given a jury trial because Judge King determined that cable piracy cases are similar to copyright cases. But in National Satellite's more recent case against Time Out, Judge Zloch reasoned that comparisons between cable piracy and copyright cases "fail to be helpful."

Instead, Judge Zloch decided that the real question was whether statutory damages for cable piracy "are more legal or equitable in nature." He concluded that they are "restitutionary in nature and, therefore equitable. . . ." Since juries determine only "legal" remedies, and judges "equitable" ones, Judge Zloch concluded that Time Out is not entitled to a jury trial.

National Satellite Sports, Inc. v. Prashad, 76 F.Supp.2d 1359, 1999 U.S.Dist.LEXIS 18250 (S.D.Fla. 1999)[ELR 21:11:24]

DEPARTMENTS

In the Law Reviews:

Entertainment and Sports Lawyer, published by the ABA Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, (800) 285-2221, has published Volume 17, Number 4 with the following articles:

Fresh Flowers for Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute by Joseph J. Beard, 17/4 Entertainment and Sports Lawyer 1 (2000) (for address, see above)

Book Review: Law of the Internet (2nd ed.) by George B. Delta and Jeffrey H. Matsuura, reviewed by Robert G. Pimm, 17/4 Entertainment and Sports Lawyer 2 (2000) (for address, see above)

Registration and Ownership of Music Group Names in the Digital Age by Cheryl L. Hodgson, 17/4 Entertainment and Sports Lawyer 3 (2000) (for address, see above)

School Shootings: Are Video Game Manufacturers Doomed to Tort Liability? by Scott Whittier, 17/4

Entertainment and Sports Lawyer 11 (2000) (for address, see above)

Remedies and Roadblocks in the Recovery of Unpaid Music Royalties by Jeanette M. Bazis, 17/4 Entertainment and Sports Lawyer 18 (2000) (for address, see above)

Entertainment Industry Recognizing Benefits of Mediation by Gerald F. Phillips and Vanessa A. Ignacio, 17/4 Entertainment and Sports Lawyer 29 (2000) (for address, see above)

Cardozo Arts & Entertainment Law Journal has published Volume 17, Number 3 with the following articles:

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Who Owns the Movies? Joint Authorship under the Copyright Act of 1976 after Childress v. Taylor and Thomson v. Larson by Seth F. Gorman, 7 UCLA Entertainment Law Review 1 (1999)

A Triple Homicide, A Book Publisher, and the First Amendment: How Will Rice v. Paladin Enterprises, Inc. Impact the Entertainment and Media Industries? By Keith C. Hauprich, 7 UCLA Entertainment Law Review 33 (1999)

Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution by Ryan S. Henriquez, 7 UCLA Entertainment Law Review 57 (1999)

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