IN THE NEWS

Franklin Mint wins lawsuit filed against it by Princess Diana Estate complaining of Mint's unlicensed sale of Princess Diana merchandise; court awards Mint $2.3 million in attorneys' fees after ruling that amendment to California right of publicity statute did not authorize suits by estates of non-resident decedents, and that Mint's merchandise did not violate Diana Estate's trademark rights

After two years of legal wrangling - before two federal District Court judges, the Ninth Circuit Court of Appeals, and the California legislature - the Estate of Princess Diana has lost its lawsuit against the Franklin Mint complaining that the Mint's unlicensed sale of Princess Diana merchandise violated the Estate's right of publicity and trademark rights. Moreover, the Estate has been ordered to pay Franklin Mint more than $2.3 million to compensate it for part of the attorneys' fees the Mint incurred in successfully defending itself against the Estate's claims.

Following her tragic and untimely death in 1997, Princess Diana's Estate granted an exclusive license to use her name and likeness to a charitable Memorial Fund. The Fund in turn has authorized their use on certain products and services in the United States. Though the Franklin Mint is not one of the Fund's licensees, the Mint continued to sell merchandise bearing Princess Diana's name and likeness - a practice it actually had begun as long ago as 1981.

The Diana Estate and Memorial Fund sued Franklin Mint in federal court in California, asserting claims under that state's right of publicity statute and under federal trademark law. Federal judges in

California are probably the most receptive of all judges in the country to claims of this type. But the Diana Estate never enjoyed as much success as it hoped for with its suit against the Franklin Mint.

Early on, the Estate sought a preliminary injunction that would have barred the Franklin Mint from continuing to sell unlicensed Diana merchandise. But federal District Judge Richard Paez disappointed the Estate by denying its motion.

Worse yet, Judge Paez granted Franklin Mint's motion to dismiss the Estate's right of publicity claim on the grounds that British law, not California law, would apply to the Estate's right of publicity claim, and British law doesn't recognize a right of publicity for the living let alone for the deceased. The only thing that prevented Franklin Mint from winning the case entirely right then was Judge Paez's conclusion that although the Estate had not shown it was likely to prevail on its trademark claims, disputed issues of fact concerning those claims prevented their immediate dismissal. (ELR 20:12:11)

Bruised but not defeated, the Estate aggressively pursued the case on two fronts. It took an interlocutory appeal of Judge Paez's rulings to the Ninth Circuit Court of Appeals; and it went to the California legislature for an amendment to the California right of publicity statute which, if obtained, would have authorized the estates of non-California decedents to assert claims under that statute.

The Estate was not successful before the Court of Appeals. In an unpublished ruling, the Ninth Circuit affirmed Judge Paez's dismissal of the Estate's right of publicity claim.

On the other hand, it appeared to some that the Estate was successful before the California legislature. The Astaire Celebrity Image Protection Act contained one provision that looked - at least to some - as though it amended the California right of publicity statute to make it applicable to acts (such as the sale of merchandise) that take place in California, even if the decedent (whose name or likeness was used without authority) was domiciled elsewhere at the time of his or her death.

That's the way the amendment was described in these pages shortly after the Astaire Act was passed (ELR 21:6:18). And that's the way the Ninth Circuit initially construed the amendment, in its unpublished ruling affirming Judge Paez's dismissal of the Estate's right of publicity claim. However, in response to Franklin Mint's petition for rehearing, the Ninth Circuit amended its initial ruling to eliminate its prior assertion that the Astaire Act contained a provision authorizing suits by the estates of decedents who were not domiciled in California.

Despite the Ninth Circuit's ruling, the Diana Estate pressed on - not just with its trademark claims, but with its right of publicity claim too. It did so by filing a motion to reinstate that claim, on the grounds that the Astaire Act had amended California law to permit it to sue Franklin Mint for violating the Estate's rights of publicity, at least for merchandise sales that took place after the amendment's January 1, 2000 effective date.

Judge Richard Paez was not persuaded. He held that the amendment is not a choice-of-law provision that gives the estates of non-resident decedents the right to assert violations of the statute. It is instead, the judge concluded, a provision that limits the applicability of the California right of publicity statute solely to unauthorized uses of names and likenesses that take place in California. Judge Paez thought that on its face, the amendment did this and no more. But he also reviewed the legislative history of the amendment; and that confirmed his conclusion.

The legislative history of the amendment showed that initially, the bill that eventually became the Astaire Act did contain exactly the language that the Diana Estate wanted - language that would have expressly authorized lawsuits by non-domiciliaries. Before that bill was enacted, however, that language was removed, intentionally. The bill's sponsor, California Senator John Burton, tried to get the language reinserted in the bill, but the Chair of the Assembly Judiciary Committee - Assembly Member Sheila Kuehl - stated on the record that she "didn't want to go that far." In response, Senator Burton withdrew his attempt to have the language reinserted in the bill, saying that he might try to have it reinserted "later." When the bill was enacted, it did not contain the language that Senator Burton - and the Diana Estate - wanted.

For these reasons, Judge Paez denied the Estate's motion to reinstate its right of publicity claim. That still left the Estate's trademark claims to be decided. And Franklin Mint took the offensive with respect to those claims by filing a motion for summary judgment, seeking their dismissal. By that time, Judge Paez had been elevated from the District Court to the Court of Appeals, so the case was reassigned to District Judge Florence-Marie Cooper.

Judge Cooper was no more inclined towards the Diana Estate than Judge Paez had been. She granted Franklin Mint's motion for summary judgment and dismissed the Estate's remaining trademark claims asserting false endorsement, dilution, and false advertising.

Judge Cooper found that Franklin Mint's use of Princess Diana's name and image on its products simply did not imply that the Estate had endorsed those products. Moreover, the judge found that there was no likelihood that consumers would be confused about the Estate's endorsement of the Mint's products, because so many companies have been selling Diana merchandise since 1981 that "Her image has truly lost any significance as a mark identifying the source of a product."

The judge also rejected the Estate's claim that Franklin Mint's merchandise dilutes Princess Diana's title by lessening their ability to identify and distinguish their own charitable services by using her name. Judge Cooper found it "absurd" for the Estate to contend that Princess Diana's name has acquired secondary meaning associated with charitable works.

Finally, the judge dismissed the Estate's claim that Franklin Mint had falsely advertised that the proceeds from the sale of its merchandise would go to Princess Diana charities. In fact, the Mint made such an assertion only with respect to one product - a tribute plate - and the evidence showed that Franklin Mint had contributed more than $1.5 million to the Great Ormond Street Children's Hospital, and had interpleaded with the court more than $2.5 million more to be given to charity when the case is resolved. This $4 million represented the amount the Mint had collected from sales of the tribute plate, thus making the Mint's advertising claims "literally true," the judge found.

With the merits of the case decided entirely in Franklin Mint's favor, the Mint sought to recover more than $3.1 million in attorneys' fees it had incurred in winning the case. It was entitled to seek its fees under a provision of the California right of publicity statute that entitles the prevailing party to attorneys' fees, and under a provision of the Lanham Act that authorizes an award of attorneys' fees "in exceptional circumstances," which have been defined as those in which the loser's case was "groundless" or "unreasonable."

Though Judge Cooper did not award Franklin Mint all the fees it sought, she did award it more than $2.3 million. Those fees consisted of $683,000 for its successful defense of the Estate's right of publicity claim plus $1,635,000 for its successful defense of two of the Estate's three trademark claims, less a $10,000 "courtesy credit" apparently granted to Franklin Mint by its law firm, Loeb & Loeb. With respect to the trademark fees, Judge Cooper found the dilution and false advertising claims (though not the false endorsement claim) to be "groundless and unreasonable."

Cairns v. Franklin Mint Co., 2000 U.S.Dist.LEXIS 8739, 9157, 13360 (C.D.Cal. 2000)[ELR 22:5:5]

Greco-Roman wrestler Matt Lindland needed judicial help to win his place on U.S. Olympic team, before he won Silver medal in Sydney; federal Court of Appeals confirmed arbitrator's decision, under Olympic and Amateur Sports Act, that Lindland was entitled to re-wrestle his pre-Sydney qualifying match against Keith Sieracki, because referees erred in scoring original match, and court ruled that as winner of rematch, Lindland was entitled to position on U.S. team

Greco-Roman wrestler Matt Lindland won a Silver medal in Sydney as a member of the U.S. Olympic team. To make the team, Lindland had to win pre-Sydney qualifying matches conducted by USA Wrestling, the governing body of that sport. And Lindland had to win two legal proceedings before a federal Court of Appeals as well as a third before the United States Supreme Court.

Federal judges don't ordinarily get involved in selecting athletes for Olympic teams. But Lindland's case was not an ordinary one. Greco-Roman wrestling is an entirely different sport than the type of wrestling popularized by the WWF; it's even different from Olympic freestyle wrestling, in which athletes are permitted to use their legs as well as their arms and upper bodies. In Greco-Roman wrestling, athletes may use only their arms and upper bodies. And that is why Lindland had to go to court to win a spot on the U.S. Olympic team.

According to the officials who refereed Lindland's pre-Sydney qualifying against Keith Sieracki, Lindland lost. But Lindland claimed that Sieracki had used his legs in violation of the rules, and thus should not have been declared the winner. USA

Wrestling rejected Lindland's protest and sent Sieracki's name to the U.S. Olympic Committee as USA Wrestling's nominee to the team.

Under the federal Olympic and Amateur Sports Act, "A party aggrieved by a determination of [an amateur sports governing body] may obtain review by . . . the American Arbitration Association." Lindland did just that, and arbitrator Daniel Burns ruled in his favor. Arbitrator Burns ordered that the Lindland-Sieracki match "will be re-wrestled in accordance with the USA Wrestling rules. . . ." The rematch was held, and Lindland won; but USA Wrestling still did not make Lindland its nominee for the team.

With the start of the Olympics fast approaching, Lindland went to court, seeking judicial confirmation - under the Federal Arbitration Act - of the arbitrator's award. The federal District Court dismissed his petition, ruling (orally and in a minute order) that it didn't have jurisdiction and that in any event, the arbitrator merely ordered a rematch, not that Lindland be named to the team if he won the rematch.

Lindland successfully appealed. Judge Frank Easterbrook held that the District Court did have jurisdiction, because there was diversity of citizenship and because "the value of a position on the Olympic team cannot be said . . . to be less than $75,000." In addition, Judge Easterbrook held that the arbitrator's award entitled Lindland to a place on the team if he won the rematch - not merely a rematch.

"The arbitrator did not order an exhibition match between Sieracki and Lindland," the judge explained. The arbitrator ordered that the championship match be re-wrestled; and that was the match whose winner was entitled to be nominated to the team under USA Wrestling's own rules - rules to which the arbitrator had "pointedly referred" in his award, Judge Easterbrook said.

As a result, Judge Easterbrook held that the arbitrator's "award requires USA Wrestling to certify to the USOC that the winner of the rematch (which is to say, Lindland) is the category champion and thus its nominee for the Olympic Games."

Judge Easterbrook was particularly offended by USA Wrestling's "suggestion . . . that Lindland has demonstrated unfitness for the team by initiating litigation, rather than by accepting the results of USA Wrestling's internal processes. . . ." The judge responded by observing that "Congress gave athletes not only a right to arbitration but also a right to judicial enforcement of ensuing awards. To propose that competitors forfeit their rights as athletes when they use legal entitlements under the . . . Olympic and Amateur Sports Act and the Federal Arbitration Act is to confess antipathy to one's legal obligations - a step that makes judicial enforcement of the award all the more vital."

Remarkably, this was not the end of the matter. USA Wrestling still refused to nominate Lindland to the team, perhaps because Sieracki had initiated his own arbitration, and the arbitrator in that proceeding ordered USA Wrestling to ignore the results of the rematch and to send Sieracki's name to the USOC as its nominee! Lindland responded by seeking to have USA Wrestling held in contempt of court; but the District Court denied his motion, saying it lacked jurisdiction to do anything.

Lindland appealed that ruling too, and Judge Easterbrook ruled in his favor again. He held that "USA Wrestling must immediately perform its obligations, and if it does not do this the district court must hold it in contempt of court and impose a sanction adequate to ensure that our directions are implemented immediately and unconditionally." The second arbitrator's award in favor of Sieracki was irrelevant, Judge Easterbrook explained, because it had not been subject to judicial review or enforcement. "On the other hand," the judge said, "the Judicial Branch of the United States of America has instructed it to implement the Burns Award [in favor of Lindland] by making Lindland its nominee. Choosing which instructions to follow should not be difficult. . . ."

USA Wrestling sought immediate review by the U.S. Supreme Court. But Justice John Paul Stevens denied its petition without comment.

Lindland v. United States of America Wrestling Association, Inc., No. 00-3177 (7th Cir. 2000), available at www.ca7.uscourts.gov. [ELR 22:5:6]

WASHINGTON MONITOR

Copyright Office criticizes dismissal of infringement suit filed by Raquel against Geffen Records and Nirvana on grounds that Raquel incorrectly described its song as an "audiovisual work" in "nature-of-work" space in copyright registration form; Copyright Office explains that "nature-of-work" space in registration Form PA may be used to describe physical nature of deposit, rather than work being registered, so long as "nature of authorship" space properly describes work for which copyright is claimed

In an unusual "Statement of Policy," the Copyright Office has politely but clearly criticized a recent Court of Appeals decision in an infringement suit filed by the singer-songwriting group "Raquel" against Geffen Records, Nirvana and others. "If applied strictly," the Copyright Office explained, "the decision could jeopardize the validity of copyright registrations of musical works in a number of instances." And the Office said that it "hope[s]" its policy statement will "prevent" that from happening.

In the case that prompted the Copyright Office's policy statement, Raquel claimed that its copyright in the song "Pop Goes the Music" had been infringed. However, when Raquel registered its copyright, it described its work as an "audiovisual work," in space 1, the "nature of work" space, on Copyright Office Form PA. Apparently Raquel did so, because in order to satisfy the deposit requirement for copyright registration, it sent the Copyright Office a videotape of the song being performed in a television commercial. Unfortunately, Raquel did not own the copyright to the videotape; one of those whom it had sued owned that copyright. Since copyright registration is a prerequisite to filing suit for infringement, and since - in the opinion of the Court of Appeals - Raquel had never registered its claim to copyright in its song, the appellate court affirmed the dismissal of Raquel's suit.

This result troubled the Copyright Office, because in space 2, the "nature of authorship" space, of its Form PA, Raquel had properly described the nature of its authorship as "All music and lyrics and arrangement." As a result, the Copyright Office "regarded [Raquel's]copyright claim to be in a musical composition" - just as Raquel later alleged in its lawsuit.

Moreover, the Copyright Office never even wrote to Raquel to question its description of the "nature of [its] work" as an "audiovisual work." The Office didn't, because although "Ideally, the nature-of-work space should describe the work being registered," the Office recognizes that "In practice, [the nature-of-work space] has served a variety of functions . . . ," including "as a description of the physical nature of the deposit. . . ." In its policy statement, the Copyright Office has explained that it has treated as "acceptable" the use of the nature-of-work space to describe the physical nature of the deposit "where the nature of authorship statement and deposit make clear the scope of the claim being registered."

The Office said that it "will continue to accept applications in which the 'nature of this work' space describes the physical nature of the deposit rather than the scope of the copyright claim." However, since the Copyright Office does not have the power to overrule federal courts, the policy statement warns copyright owners that "the decision . . . in Raquel demonstrates that there is some risk in engaging in this practice."

Registration of Claims to Copyright, Statement of Policy, Library of Congress, Copyright Office 65 Federal Register 41508 (2000)[ELR 22:5:8]

NEW LEGISLATION AND REGULATIONS

Illinois and Ohio enact right of publicity statutes barring the unauthorized commercial use of the identities or persona of living and deceased individuals

Illinois and Ohio have enacted right of publicity statutes, and in doing so have joined 16 other states with similar legislation on their books. Courts in Illinois and Ohio had already recognized a common law right of publicity in those states, so the new Illinois and Ohio statutes are not a revolutionary addition to pre-existing law there.

On the other hand, both new statutes include a postmortem right of publicity - that is, one that survives the death of the person whose identity is used without consent. Illinois and Ohio common law did not appear to include postmortem rights. Indeed, in Ohio, in the "Raging Bull" case, it had been held that the common law right of publicity did not descend to the widow of boxer Jimmy Reeves (ELR 7:6:9).

So the new statutes, while not revolutionary, do add something to the law of those states that didn't exist before. Moreover, in Illinois, the statute entirely "supplant[s]" that state's common law right of publicity with respect to violations that have occurred since January 1, 1999.

Illinois Right of Publicity Act

The Illinois Right of Publicity Act begins with a simple and surprisingly eloquent statement of its purpose. "The right to control and to choose whether and how to use an individual's identity for commercial purposes is recognized as each individual's right of publicity," the law says.

The attributes of an individual's "identity" protected by this statute include his or her name, signature, photograph, image, likeness and voice, as well as anything else that would identify a person to an "ordinary, reasonable viewer or listener."

The unconsented-to commercial uses that the statute bars are those that involve the sale of goods and services, as well as advertising and fundraising.

These rights may be enforced by the person whose identity was used without consent, or by those to whom it was transferred, during that person's lifetime.

For those who die after January 1, 1999, it may be enforced for 50 years after the person's death by those to whom it was transferred or by his or her spouse, parents, children or grandchildren. If the person did not transfer his or her rights (though a transfer by will is adequate), and does not leave a living spouse, parent, child or grandchild, the rights "terminate."

A number of specifically identified uses are exempt from the statute. For example, the statute does not apply to the portrayal or impersonation of a person in a live performance, or to the use of a person's identity in an original work of art, book, article, musical work, film, television program or video (so long as they are not themselves advertisements).

Likewise, the statute doesn't apply to the use of a person's identity in news, public affairs or sports broadcasts or in political campaigns. Also, the statute doesn't apply to the use of a person's identity to advertise other exempt uses, or to the works of professional photographers in their portfolios or studios.

Those who violate the statute may be held liable for actual damages and profits or $1,000, whichever is greater; and if the violation is done "willfully," for punitive damages. Injunctive relief and attorneys fees may be awarded as well.

Ohio statute

The Ohio statute contains no eloquent statement of its purpose. Instead, gets right to the point by prohibiting the unauthorized "use of any aspect of an individual's persona for a commercial purpose during the individual's lifetime or for a period of sixty years after the date of the individual's death."

Aspects of the "persona" that cannot be used without consent include the "name, voice, signature, photograph, image likeness, or distinctive appearance," but - interestingly - only "if any of these aspects have commercial value."

The statute doesn't indicate how to determine whether a persona does have "commercial value." But if it does, the statute prohibits "commercial purpose" uses on goods, services and places, for advertising and promotions, and for fundraising.

The Ohio statute contains several exemptions - uses, in other words, for which no consent is necessary. Among these are uses of an individual's persona in connection with news, public affairs and sports broadcasts, and uses in connection with a political campaign.

The benefits of the statute also are limited to living individuals whose domicile or residence was

Ohio on or since November 22, 1999, and to deceased individuals who died on or since January 1, 1998 and whose domicile or residence was Ohio the day he or she died.

The statute may be enforced by the person whose persona was used without consent, or by the then-current owner of the right if that person transferred his or her right of publicity - something that can be done in several ways, including by contract, license, will and the laws of intestate succession.

Those who violate the statute may be liable for actual damages and profits or statutory damages from $2,500 to $10,000, and for punitive damages under certain circumstances.

Illinois Right of Publicity Act, Illinois Compiled Statutes, Property, 765 ILCS 1075 (1999); *Ohio right* *of publicity statute*, Title 27 Ohio Revised Code Section 2741 (1999)[ELR 22:5:9]

RECENT CASES

Court of Appeals refuses to set aside jury's verdict that Michael Bolton's song "Love is a Wonderful Thing" was copied from Isley Brothers' identically-titled song, despite slight evidence of access; $5.4 million judgment is affirmed, even though case "may" have been "weak" and "circumstantial"

According to a federal jury, when Michael Bolton and Andrew Goldmark co-wrote Bolton's 1991 hit song "Love Is a Wonderful Thing," they copied a substantial part of it from an identically-titled song that had been written and recorded by the Isley Brothers some 25 years before.

The jury made this finding in a copyright infringement suit filed by the Isley Brothers against Bolton and Goldmark and their publishers, as well as against Sony Music, the company that released the album that contained Bolton's recording of the song ("Time, Love and Tenderness"). The jury also found that 28% of the profits from Bolton's album were attributable to "Love Is a Wonderful Thing," and that 66% of the song's profits resulted from its infringing elements.

Based on this jury verdict, federal District Judge Lourdes Baird entered a judgment in favor of the Isley Brothers for more than $5.4 million: $932,924 against Bolton; $220,785 against Goldmark; $75,900 against their publishers; and $4,218,838 against Sony Music.

Apart from showing how profitable a successful song and recording can be, this case also shows how risky the music business can be. This is so, because to the end, Bolton and Goldmark denied they had copied the Isley Brothers - denied in fact that they had ever heard the Isley Brothers' recording of "Love Is a Wonderful Thing." And their denial was backed by significant evidence.

Though the Isley Brothers have had a very successful career, their "Love Is a Wonderful Thing" recording contributed little to that success. It wasn't released on an album until after Bolton and Goldmark wrote their allegedly infringing song. And though a single of the Isley Brothers' song was released 25 years before, that single never reached Billboard's Top 100, or any other Top 100 chart either.

On the other hand, three disk jockeys did testify that the Isley Brothers' single was broadcast on radio and television stations where Bolton and Goldmark grew up, and Bolton acknowledged that he had been a huge fan of the Isley Brothers and a collector of their music. The jury apparently was persuaded by this circumstantial evidence, and not convinced by Bolton and Goldmark's evidence that they had independently created their song.

It's not clear whether judges would have reached the same conclusion, if they had been the triers of fact rather than a jury. When Bolton and his co-defendants appealed, the appellate court judges indicated that the Isley Brothers "may" have presented a "weak case" concerning the most significant issue in dispute - whether Bolton and Goldmark had access to the Isley Brothers' song - and they said that "we might not reach the same conclusion as the jury" on that issue. But these statements produced little or no consolation for

Bolton and the others, because the appellate court affirmed the judgment against them anyway.

In her opinion for the Court of Appeals, Judge Dorothy Nelson repeatedly emphasized that the law required the appellate court to defer to the findings of the jury rather than substitute its own judgment. Thus, on the issue of whether Bolton and Goldmark had heard the Isley Brothers' single and copied it subconsciously, Judge Nelson found that evidence concerning airplay of the single where Bolton and Goldmark grew up, coupled with Bolton's being a fan and collector of their music, was "substantial evidence" that supported the jury's verdict. And therefore, the appellate court would not disturb that verdict.

The trial also produced conflicting evidence about whether Bolton and Goldmark's song is substantially similar to the Isley Brothers'. On this issue too, Judge Nelson said, "We refuse to interfere with the jury's credibility determination, nor do we find that the jury's finding of substantial similarity was clearly erroneous."

The jury rejected Bolton and Goldmark's evidence that they had independently created their song. And "Once again, we refuse to disturb the jury's determination about independent creation," Judge Nelson wrote. "The substantial evidence of copying based on access and substantial similarity was such that a reasonable juror could reject this defense."

Three Boys Music Corp. v. Bolton, 212 F.3d 477, 2000 U.S.App.LEXIS 9163 (9th Cir. 2000)[ELR 22:5:11]

Rock band Filter and singer-songwriter Richard Patrick win dismissal of copyright infringement suit complaining that Patrick's "Take A Picture" was copied from plaintiff's unpublished song "Sell Your Soul"

Singer-songwriter Richard Patrick and his band Filter have won the dismissal of a copyright infringement lawsuit filed against them by aspiring artist Michael Tisi.

In response to cross-motions for summary judgment, federal District Judge Robert Sweet has ruled that Patrick did not have access to Tisi's unpublished song "Sell Your Soul" while Patrick was writing his own song "Take A Picture" which is on Filter's 1999 album "Title of Record." Judge Sweet also ruled that the two songs are not strikingly similar to one another, and that in any event, Patrick showed that he had independently created "Take A Picture."

The 78-year-old judge acknowledged "unfamiliarity" with the rock genre, and added that "[f]or the uninitiated, much of rock music sounds the same." As a result, the judge said, "a hasty comparison of ["Sell Your Soul" and "Take A Picture"] could result in a finding of superficial similarity." However, "Thanks to the skill of counsel and the clarity of [Patrick's] expert witness [Dr. Lawrence Ferrara, Chair of the Department of Music and Performing Arts at New York University], the unfamiliarity of the court with the genre has been overcome," Judge Sweet added.

Everyone agreed that the melodies and lyrics of the two songs are dissimilar. They disagreed, however, about the similarities of the songs' structures, harmonies and rhythms. Demonstrating his newly acquired familiarity with rock music, Judge Sweet reached three critical conclusions concerning these elements.

He concluded that "to the extent that the two songs share any structural similarities, those similarities are not significant because they are uniformly shared with most modern popular music."

He found that the two songs were closest in their harmonies, but even here, "there are notable differences in the harmonies." Moreover, the chord progression which makes them sound similar "is so common to rock and pop genres . . . that it alone does not make the songs sound any more similar than countless other songs."

Finally, Judge Sweet concluded that although "[a] lay listener may hear a basic similarity between the guitar rhythm of both songs because in both songs it is primarily based on four basic accents per measure . . .

this rhythmic similarity is not significant because this guitar rhythm is extremely common in the pop rock genre. . ." and was not original to either song.

These findings were critical to the outcome of the case, because Tisi was able to show that a demo tape of his song had been sent to several record companies, including Filter's own company, Warner Bros. Records. But Tisi was not able to show that any of those companies had ever given that demo tape to Patrick or to anyone else with creative input into "Take A Picture."

Without proof of access, Tisi had to show that his song and "Take A Picture" were "strikingly similar" to one another. And the judge's musical analysis showed they were not.

Finally, and for good measure, Judge Sweet also concluded that Patrick had established that "Take A Picture" was independently created.

For these reasons, the Judge denied Tisi's motion for summary judgment, and granted Patrick and Filter's motion, thus bringing the case to end.

Tisi v. Patrick, 97 F.Supp.2d 539, 2000 U.S.Dist.LEXIS 7249 (S.D.N.Y. 2000)[ELR 22:5:12]

Recording artist entitled to terminate management agreement because manager materially breached agreement by deducting commissions on royalties artist earned from recordings made before agreement was entered into, New York Appellate Division holds

Legend Artists Management materially breached its agreement with recording artist Richard Blackmore, by deducting unauthorized commissions from

Blackmore's earnings, the New York Appellate Department has held. As a result, Blackmore was entitled to terminate his management agreement and "avoid payment of any future commissions."

Legend Artists took commissions on Blackmore's "back catalog royalties." These were royalties earned by Blackmore from recordings he made before he entered into a management agreement with Legend Artists. That agreement entitled the management company to a 15% commission on Blackmore's earnings from services he performed during, and in some cases after, the term of the agreement.

But according to the Appellate Department, it was "unambiguously clear" that Legend Artists was not entitled to commissions on Blackmore's earnings from services he had fully performed before the term of the agreement. This was so, the appellate court explained in a short Memorandum Decision, because the agreement's provision that the management company would earn commissions on earnings from services performed by Blackmore at certain times "implicitly excludes" from commissionable earnings "royalties derived from services performed [by Blackmore] entirely during periods not expressed."

Legend Artists Management v. Blackmore, 709 N.Y.S.2d 85, 2000 N.Y.App.Div.LEXIS 6607 (App.Div. 2000)[ELR 22:5:12]

Photographer wins right to trial on claim that Warner Brothers' still shots of "Bird Girl" sculpture for movie "Midnight in the Garden of Good and Evil" are substantially similar to photographer's photograph for cover of book on which movie was based

Federal District Judge John Nangle was two-thirds right when he dismissed photographer Jack Leigh's lawsuit against Warner Bros., in what can be referred to as the "Midnight in the Garden of Good and Evil" case. But, he was only two-thirds right. One of his three rulings was wrong, the Court of Appeals has held. So Warner Brothers will have to defend itself in front of a jury, with respect to one of Leigh's claims.

Fans of the best-selling book by John Berendt, or of Warner Brothers' movie version of it, will recall that both featured images of the "Bird Girl," a sculpture by the late Sylvia Shaw Judson that once stood on a burial plot in the Bonaventure Cemetery in Savannah, Georgia. The cover of Berendt's book featured Leigh's photograph of the sculpture. Warner Brothers' movie featured sequences in which the sculpture was shown; and promotional materials for the movie featured still shots of it as well.

Though Leigh's photograph and Warner Brothers' versions of the "Bird Girl" are similar, that's because they both depict an actual sculpture. Warner Brothers' versions were not reproductions of Leigh's photograph. Instead, because the original "Bird Girl" statue was removed from Bonaventure Cemetery after the book was published, Warner Brothers got permission from Sylvia Shaw Judson's heirs to create a replica. And it was the replica that appears in the movie as well as in the studio's still shots.

Nonetheless, Leigh alleged that Warner Brothers' depictions of the statue - in both the movie and the stills - were so similar to his photograph that they infringed his copyright and trademark rights in his photograph. In response to Warner Brothers' motion for summary judgment, District Judge Nangle ruled that none of Warner Brothers' versions of the "Bird Girl" was substantially similar to Leigh's photograph, and that Leigh's trademark rights were not infringed either.

On appeal, Judge Phyllis Kravitch has agreed that Warner Brothers' depiction of the "Bird Girl" in the movie itself was not substantially similar to Leigh's photograph. And Judge Kravitch agreed that Leigh's trademark claim was properly dismissed because he had not shown that he acquired any trademark rights in his photograph.

On the other hand, Judge Kravitch reversed the dismissal of Leigh's claim that Warner Brothers' still shots infringe the copyright in his photograph. The judge acknowledged that "Leigh's copyright does not cover the appearance of the statue itself or of Bonaventure Cemetery, for Leigh has no rights in the statue or its setting." She also acknowledged that Leigh's copyright "does not protect the association of the statue with the Midnight story," even if he was the first to think of it, because "copyright law protects only original expression, not ideas."

However, Leigh's copyright does protect "elements of artistic craft" such as "the selection of lighting, shading, timing, angle, and film." And Judge Kravitch held that Judge Nangle had erred in concluding that Warner Brothers' still shots were not substantially similar to Leigh's photograph in these respects. Indeed, Judge Kravitch was of the opinion that Warner Brothers' stills "have much in common with the elements protected by Leigh's copyright."

She said that a "jury ultimately may conclude that the similarities between the protected elements of the Leigh photograph and the Warner Brothers still shots are not 'substantial.'" However, she added, the "similarities are significant enough . . . to preclude summary judgment."

Leigh v. Warner Bros., Inc., 212 F.3d 1210, 2000 U.S.App.LEXIS 11736 (11th Cir. 2000)[ELR 22:5:13]

Artist Elya Peker's copyrights were infringed by Masters Collection when it purchased posters of Peker's paintings and added oil paint to them in order to create "virtually indistinguishable" replicas of the originals, federal District Court rules

Elya Peker is a successful artist and a successful copyright litigator as well. In a lawsuit filed by Peker himself, the artist has won a summary judgment against Masters Collection in a federal District Court in Brooklyn. Judge Eugene Nickerson rejected Masters Collection's defenses to Peker's infringement claim, and then turned the case over to a Magistrate Judge to determine the amount of damages the artist is entitled to receive.

Peker has created a number of floral design oil paintings, which he licensed to Galaxy of Graphics to reproduce and sell as posters. Masters Collection bought several of these posters which it then transformed into framed oil paintings that were, according to its own sales brochures, "virtually indistinguishable" replicas of Peker's original artworks. Masters Collection did this by having its artisans apply oil paint to the posters using brush strokes that were intended to match the style and color of the originals.

Masters Collection argued that since it bought a licensed poster for each replica it created, the first sale doctrine authorized its activities. Judge Nickerson disagreed, however. "The 'first sale' of the poster gives Masters the right to sell the poster in whatever fancy frame or other setting Masters chooses," the judge acknowledged. "What the 'first sale' of the poster does not sanctify," he added, "is Masters' transmogrification of that poster by adding paint into what Masters describes as a 'virtually indistinguishable' copy of the 'original oil painting."

By doing that, Judge Nickerson ruled, Masters Collection violated Peker's exclusive right to reproduce his paintings.

Though not necessary to his decision, the judge pointed out that Peker's licensing arrangement with Galaxy of Graphics resulted in his receiving about fifty cents in royalties for each poster sold. Masters

Collection, however, sold its replicas for as much as $300 each. "[F]ifty cents strikes this Court as hardly a figure that captures a fair compensation for Elya [Peker]," the judge said.

Peker v. Masters Collection, 96 F.Supp.2d 216, 2000 U.S.Dist.LEXIS 7225 (E.D.N.Y. 2000)[ELR 22:5:13]

Court dismisses antitrust claim that Major League Soccer eliminates competition for players by having League hire them centrally; court rules that League is a "single entity" and thus cannot conspire or combine in violation of Sherman Act

Major League Soccer (MLS) has made sports law history, and in doing so, may have changed the manner in which new professional sports leagues are organized in the future. In a word, MLS has won a federal court ruling that the League is a "single entity," and thus cannot conspire or combine in violation of the antitrust laws when it comes to hiring players.

Long-time National Football League and National Basketball Association fans will appreciate what a significant ruling this is, because years ago, those leagues were subjected to antitrust lawsuits by their players who complained that player allocation methods - like the draft and reserve clause - violated federal antitrust law.

Major League Baseball was sued by its players too, but the Supreme Court repeatedly held that baseball is exempt from the antitrust laws, as a matter of legal history. The NFL and NBA did not share baseball's unique legal history, but they too sought antitrust exemption on another theory.

The NFL and the NBA each claimed that it was a "single entity," and that as such, their teams could not conspire or combine with one another, as a matter of law. The law to which they referred was the Supreme Court's 1984 decision in the Copperweld case, a decision which held that although a corporation and its subsidiaries were legally distinct companies as a matter of corporate law, they were a "single entity" for antitrust purposes, and thus could not conspire with one another as a matter of antitrust law.

The NFL never succeeded with that argument. And the NBA didn't either, in the context of player relations, though it eventually did in connection with its television broadcasting rules (ELR 19:1:5). The PGA also was declared a single entity in an antitrust lawsuit brought by a golf show promoter - not one that involved the PGA's relations with its player members (ELR 17:3:18).

Thus, the Major League Soccer case is significant, because it's the first in which the "single entity" defense successfully blocked a claim by players that competition among potential employers in a league was restrained in violation of the antitrust laws.

This ruling was issued by Judge George O'Toole in response to an MLS motion for partial summary judgment seeking dismissal of player claims that the League violated federal antitrust law by hiring players centrally, through the League office, rather than having individual teams hire them (and presumably compete with one another to do so). MLS not only hires players centrally, it has been organized as a single limited liability company. In this respect, it is different from the NFL and NBA, both of which are associations of separately and individually organized teams.

The players urged Judge O'Toole to disregard the organizational unity of MLS, arguing that "the structure of MLS is a sham designed to allow what is actually an illegal combination of plural actors to masquerade as the business conduct of a single entity."

Judge O'Toole declined to do so, however. He acknowledged that the Copperweld case had found that two separate corporations - a parent and its subsidiary - could be one company for antitrust purposes. "But," he added, "that does not mean that form is irrelevant. Copperweld does not support the proposition that a business organized as a single legal entity should have its form ignored, or its 'veil' pierced, so that courts could examine whether participants in the firm have conducted concerted activities that would violate" the Sherman Act.

The judge also dismissed the players' claim the creation of the MLS violated the Clayton Act because the League's creation tended to lesson competition or create a monopoly. Judge O'Toole explained that the creation of MLS "did not involve the acquisition or merger of existing business enterprises, but rather the formation of an entirely new entity which itself represented the creation of an entirely new market." Moreover, said the judge, the "creation of MLS did not reduce competition in an existing market because when the company was formed there was no active market for . . . professional soccer in the United States."

Fraser v. Major League Soccer, 97 F.Supp.2d 130, 2000 U.S.Dist.LEXIS 5434 (D.Mass. 2000)[ELR 22:5:14]

Court rules that Copyright Act preempts claim that New Line Cinema breached implied contract by producing movie "Frequency" without paying screenwriter William Selby, but Selby adequately alleged "reverse palming off" claim based on New Line's giving sole screenplay credit to Toby Emmerich

According to New Line Cinema, its time-travel thriller "Frequency" was written by music industry executive Toby Emmerich. The movie was in fact billed as Emmerich's "debut screenplay." But screenwriter William Selby has another view. According to Selby, "Frequency" was copied from a screenplay entitled "Doubletime" that he had submitted to New Line back in 1994.

Selby made this assertion in a lawsuit against New Line and Emmerich, alleging claims for breach of implied contract and "reverse palming off." New Line responded with a motion to dismiss, and has been partially - but only partially - successful. Federal District Judge Howard Matz has dismissed Selby's breach of implied contract claim, but not his reverse palming off claim.

The judge dismissed Selby's implied contract claim, because he held that it was preempted by federal copyright law. Selby argued that New Line had impliedly agreed that if it used the ideas in his screenplay, it would pay him and give him screen credit. Ideas are not protected by copyright, so for this reason, Selby also argued that his implied contract was not preempted.

In this case, however, Judge Matz ruled that Selby's "ideas fall within the subject matter of copyright." This was so, the judge reasoned, because "Here . . . the Ideas which are the subject of Selby's breach of contract claim are embodied in a copyrighted work - the 'Doubletime' script."

The judge also found that Selby's implied contract claim asserted rights that were equivalent to those protected by copyright. This was so, because the implied contract alleged by Selby did not seek to regulate any aspect of New Line or Emmerich's conduct beyond their use of the ideas in Selby's script. Thus, "the rights protected by that contract were equivalent to the exclusive rights protected by the [Copyright] Act."

On the other hand, Judge Matz declined to dismiss Selby's reverse palming off claim. This claim arose out of New Line's failure to give Selby any credit for the movie's screenplay, and was based on the Lanham Act. In support of its motion to dismiss this claim, New Line asked the judge to read and compare the two screenplays, so that he could see - New Line argued - that "Emmerich's 'Frequency' script does not bodily appropriate Selby's 'Doubletime' script."

However, Judge Matz decided that it was too early in the case to make a factual comparison between the scripts. Instead he ruled that Selby's complaint adequately alleged that New Line and Emmerich had violated the Lanham Act by "bodily appropriating" Selby's work. And on that basis, the judge declined to dismiss that claim, at that stage of the case.

Selby v. New Line Cinema Corp., 96 F.Supp.2d 1053, 2000 U.S.Dist.LEXIS 6045 (C.D.Cal. 2000)[ELR 22:5:15]

Appellate court affirms dismissal of claim by members of "The Tokens" that they co-authored "The Lion Sleeps Tonight" along with actual lyricists, because claim was made more than three years after members knew of grounds for their co-authorship claim; appellate court also affirms Rule 11 sanctions against "Tokens" members and their lawyers for filing false affidavits and other papers that contradicted their earlier depositions and interrogatory answers in unsuccessful effort to defeat lyricists' summary judgment motion

Sometimes a weak case is not just a loser, it results in actual harm to those who file it and even to their lawyers. Such a case was filed by the members of the 1960s-era recording group "The Tokens" in which they sought to be declared the co-authors of a song they popularized with their recording of "The Lion Sleeps Tonight."

When The Tokens' recording of "The Lion Sleeps Tonight" was first released, the song's lyrics were credited solely to Luigi Creatore, Hugo Peretti and George David Weiss - not to Tokens' members Philip Margo, Mitchell Margo, Jay Siegel and Henry Medress. The Tokens had to have known this, because they owned the music publishing company to which Creatore, Peretti and Weiss had assigned their copyright.

What The Tokens apparently didn't know, at least at first, was that as the song's lyricists, Creatore, Peretti and Weiss received songwriters' royalties from uses of the song - royalties in which The Tokens might have shared, if they had been credited as the songs' co-authors, along with the lyricists. In deposition testimony and interrogatory answers, The Tokens said they didn't learn this until 1992 or 1993. They then filed a lawsuit seeking co-authorship credit, but didn't do so until 1996 - more than three years after they first realized they were co-authors.

Shortly after The Tokens filed their lawsuit, the Second Circuit Court of Appeals held - in the unrelated case of Merchant v. Levy (ELR 19:1:6) - that the statute of limitations on copyright claims of co-authorship is three years. Relying on this case, the lyricists filed a motion for summary judgment. In response, The Tokens filed affidavits and revised deposition and interrogatory answers saying that they hadn't learned of the grounds for their co-authorship claim until 1994 - fewer than three years before they sued. They did so to no avail.

Federal District Judge Michael Mukasey granted the lyricists' motion for summary judgment, on the grounds that the claim was barred by the three-year statute of limitations. And Judge Mukasey sanctioned The Tokens and their lawyers for filing false affidavits. The judge did so, under Rule 11, by awarding the lyricists $22,680 towards their attorneys' fees: $7,680 against The Tokens, and $15,000 against their lawyers.

The Tokens and their lawyers appealed, but only hurt themselves more. In an opinion by Judge Robert Sack, the Court of Appeals has affirmed both the dismissal of The Tokens' lawsuit and the sanctions imposed on them and their lawyers.

On the merits of the dismissal, Judge Sack rejected The Tokens' argument that the three-year statute of limitations should not have been applied to their case, because the rule wasn't announced in Merchant v. Levy until after they had filed their lawsuit. "When [a court] applies a rule of federal law . . . ," Judge Sack said (quoting an earlier Supreme Court decision), "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open . . . and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule."

With respect to the sanctions, Judge Sack found that it was "objectively unreasonable" for The Tokens and their lawyers to file affidavits, deposition "errata sheets" and supplemental interrogatory answers in which they "contradicted their earlier deposition testimony and interrogatory answers." Therefore, Judge Sack concluded, Judge Mukasey had "acted well within [his] discretion in granting the defendants reimbursement for a portion of their attorneys' fees to compensate them for the waste of the court's and counsel's time."

Finally, Judge Sack awarded the lyricists "double costs on the appeal," because The Tokens' appeal on the merits was governed by "well-settled law" and had been correctly applied by Judge Mukasey.

Margo v. Weiss, 213 F.3d 55, 2000 U.S.App.LEXIS 11382 (2nd Cir. 2000)[ELR 22:5:15]

Trial required to determine whether sportswriter for Houston Chronicle is entitled to overtime pay, or whether he is an "artistic professional" and thus exempt from overtime pay requirement

Alan Truex is a sportswriter for the Houston Chronicle. Since November 1997, he's been covering the horse racing beat, though for years before that, he was a baseball writer, covering the Houston Astros and other Major League Baseball stories.

According to Truex, the Chronicle reassigned him from baseball to the "far less prestigious" horse racing beat, because he complained to his editors about not being paid overtime for the more than 40 hours a week he worked during baseball season.

Truex made these assertions in a federal court lawsuit under the Fair Labor Standards Act. That statute requires employers to pay time-and-a-half to most types of employees; and it prohibits employers from discriminating against employees who have "filed any complaint" under its provisions.

The Chronicle took the position that Truex is the not the type of employee who is entitled to overtime pay. The overtime pay provisions of the Act do not apply to "artistic professionals"; and according to the Chronicle, that's exactly what Truex is. Though most people would consider it a compliment to be considered an "artistic professional," Truex does not, because in order to be entitled to overtime pay, he cannot be one.

This is not the first case in which employers and their employees have taken counterintuitive positions concerning whether the employees were "artistic professionals." It's happened before in cases involving newspaper journalists (ELR 17:1:22) and television news writers and producers (ELR 13:1:13, 18:6:10). The results in those cases were split - the employers winning some because their employees were artistic professionals, and the employees winning others because they were not.

In a motion for summary judgment, the Chronicle drew analogies to those earlier cases where employees had been found to be artistic professionals and thus exempt from the overtime pay law. In response, Truex drew analogies to cases in which they were not.

In the end - after a lengthy opinion analyzing the law in some detail - federal District Judge Lee Rosenthal decided that he couldn't decide. That is, he determined that the outcome of Truex's case turns on disputed issues of fact. And so he denied the Chronicle's motion for summary judgment.

The judge also rejected the Chronicle's argument that it hadn't violated the law by reassigning Truex from baseball to horse racing - even if doing so was discriminatory - because Truex had not "filed" a "complaint" under the Act before he was reassigned. All he had done, the Chronicle said, was talk informally with the Department of Labor and complain to his editors. Judge Rosenthal held that these actions were sufficient to constitute a "filed . . . complaint" under the Act; so Truex's discrimination complaint will go to trial, along with his overtime pay claim.

Truex v. Hearst Communications, Inc., 96 F.Supp.2d 652, 2000 U.S.Dist.LEXIS 9633 (S.D.Tex. 2000)[ELR 22:5:18]

Appellate court reverses antitrust judgment against amateur soccer association won by for-profit indoor soccer facility; though Amateur Sports Act does not exempt association's "sanctioned facilities" rule, indoor facility failed to prove it suffered damages from association's rule

The North Texas State Soccer Association is a volunteer-run, non-profit association that sponsors amateur soccer competition in the West Texas towns of Midland and Odessa. Though it is a member of the United States Soccer Federation, it is far removed, economically, from Major League Soccer and other professional sports leagues whose rules have subjected them to antitrust lawsuits.

Nonetheless, the North Texas State Soccer Association has been sued for antitrust violations too. Moreover, at the trial court level, it lost. In a suit brought by a for-profit indoor soccer facility known as the Permian Basin Sports Center, a jury returned a $100,000 verdict against the Association, which the trial judge apparently trebled when he entered judgment.

The Sports Center's lawsuit was prompted by an Association rule that required its players, coaches and referees to play soccer only at "sanctioned" facilities. The Sports Center wasn't sanctioned; indeed, it never sought sanctioning, because its owner disagreed with some of the Association's rules and thought that sanctioning would raise his costs and interfere with his management prerogatives. Because it wasn't sanctioned, few teams played at the Sports Center, and after five years of money-losing operations, the Center closed its doors.

The Association asserted several defenses to the Sports Center's antitrust claims. The first of these was that the federal Amateur Sports Act protected it from antitrust liability, because the Act gave it an antitrust exemption for the adoption and enforcement of its sanctioned-facilities rule. This argument was not successful with the trial court judge, nor was it successful on appeal.

In her opinion for the Court of Appeals, Judge Edith Jones acknowledged that the rule might have been exempt if it had been promulgated by the United States Soccer Federation, or by national state associations all over the country, because this would have suggested that the rule was necessary for amateur soccer. In this case, however, the North Texas State

Soccer Association was the only one to have such a rule - thus suggesting it was not necessary. Judge Jones therefore concluded that the Amateur Sports Act does not exempt the rule from antitrust scrutiny.

Though not exempt, the rule was not automatically a violation of antitrust law. Judge Jones thought the Sports Center had made a "novel claim" by arguing that "a volunteer sports league can conspire with its volunteer players and coaches." In fact, she thought the case "poses ponderous and unusual antitrust questions." They were not, however, questions that needed to be answered, because she concluded that the judgment against the Association had to be reversed for another reason: the Sports Center failed to prove it had suffered recoverable damages.

The jury had been instructed to find whether the Sports Center had suffered "lost profits." The Center never had profits, so it presented evidence of "lost net revenue"-meaning revenue in excess of current operating expenses, without deductions for depreciation. Yet when the jury was instructed on the meaning of "lost profits," it was told to consider depreciation (as well as operating costs). And for that reason, Judge Jones concluded the judgment had to be reversed.

Moreover, even if lost net revenues were an acceptable measure of damages, the Sports Center's evidence was faulty for another reason. Its economist had projected anticipated revenues by taking an average of the revenues earned by other arenas operated by the Sports Center's owner. But no evidence was introduced to show that those arenas were in any way comparable to the Sports Center in location, size, attractiveness, operating costs, charges, or seasons of operation. Judge Jones explained that the economist's analysis could not support a judgment against the Association, because "an average of unknowns is also an unknown."

Eleven Line, Inc. v. North Texas State Soccer Association, 213 F.3d 198, 2000 U.S.App.LEXIS 11878 (5th Cir. 2000)[ELR 22:5:19]

Ticket brokers who sold Cincinnati Reds tickets on sidewalks near stadium are entitled to trial in suit against city complaining about arrests and confiscation of unsold tickets by police "scalping detail," Ohio appellate court rules

The city of Cincinnati will have to stand trial, as a result of the activities of its police department's "scalping detail." The Court of Appeals of Ohio has so ruled, in a civil lawsuit filed by ticket brokers Linda

Norwell and V'Ann Ryther, both of whom were arrested four times while selling tickets for Cincinnati Reds games on sidewalks near the stadium.

According to the police, Norwell and Ryther were arrested because what they were doing is illegal in Cincinnati. Yet there is no law in that city that prohibits ticket scalping. (An old one was declared unconstitutional.) So instead, the city tried to convict the two women of violating an ordinance that requires those who sell sports or entertainment tickets on the street at more than face value to have a peddler's license. Norwell and Ryther didn't have such a license, but they were acquitted nonetheless, three times; the fourth case was dismissed at the prosecutor's own request.

In response to their arrests, and in response to having thousands of dollars worth of tickets seized from them by the police, Norwell and Ryther sued the city. Their complaint alleges claims for violations of their federal civil rights, malicious prosecution, interference with business relations, and conversion. At first, they had less success in civil court than they previously had in criminal court. An Ohio trial judge granted Cincinnati's motion for summary judgment and dismissed their case. On appeal, however, the women resumed their winning streak.

The Court of Appeals has reversed the dismissal of their case and has remanded it for trial. According to Ryther, a Cincinnati police officer once acknowledged that the work of the city's "scalping detail" was the result of pressure put on the city by Marge Schott, then a majority owner of the Reds. Judge Robert Gorman ruled that this created triable issues of fact concerning whether Norwell and Ryther had been arrested unlawfully and their tickets improperly seized. This in turn meant that the two women were entitled to a trial in connection with their federal civil rights claim.

Judge Gorman also held there were material issues of fact concerning Norwell and Ryther's malicious prosecution, interference with business relations, and conversion claims, so they were entitled to a trial with respect to those as well.

Norwell v. City of Cincinnati, 729 N.E.2d 1223, 1999 OhioApp.LEXIS 2401 (Ohio App. 1999)[ELR 22:5:20]

In workers compensation case brought by NFL player Paul Green, New Orleans Saints are not entitled to credit for full amount team paid Green on account of his injuries, even though Louisiana law provides that workers comp benefits paid to professional athletes are subject to dollar-for-dollar offset

Paul Green used to play for the New Orleans Saints. He doesn't anymore, because he suffered an injury to his right knee in 1997. In the wake of that injury, the Saints paid Green $38,210.88 - the amount he would have earned under his Saints contract for a period of six weeks.

As was his right, Green then sought workers compensation benefits. In that proceeding, he was awarded benefits of $341 per week, commencing after the six week time period for which the Saints had already paid him. That, however, was not the end of the case.

Louisiana workers compensation law provides that benefits paid to professional athletes by their teams are subject to a dollar-for-dollar offset against workers compensation benefits thereafter awarded under that law. This enabled the Saints to argue that the $38,210.88 it paid Green should have been offset against his future benefits at the rate of $341 per week. If that had been done, instead of those benefits beginning after six weeks, they would have begun after 112 weeks.

A trial judge in the Louisiana Office of Workers' Compensation disagreed with the Saints. And the Court of Appeals of Louisiana has too. Writing for the appellate court, Judge Sol Gothard has affirmed the trial judge's conclusion that the Saints were entitled only to the week-for-week credit they received, not the dollar-for-dollar credit they wanted.

The issue presented by this case may seem arcane, but it's not unusual. Some years ago, Tom Ricketts' career with the Saints was cut short by an injury. (He was seriously injured the very month the Saints signed him.) Ricketts won a ruling that the $26,470 he received for three weeks pay entitled the Saints to just a three-week offset against workers compensation benefits, not a dollar-for-dollar offset (ELR 19:6:14).

In Green's case against the Saints, Judge Gothard said he agreed with the reasoning of the Ricketts case "and we adopt it as our own for the purposes of this matter." The reason Ricketts won was that his Saints contract contained a clause that provided that any payment made to him "for a period for which he is entitled to workers' compensation benefits . . . will be deemed an advance payment of [those] benefits." The Ricketts case decided that the payments he had received were "for" the three-week "period" for which he had been paid $26,470; and thus that amount was an advance for just those three weeks.

Green's contract with the Saints contained the same clause, and it was given the same effect by Judge Gothard. The $38,210.88 Green was paid for six weeks was for that six-week period; and thus, that payment was an advance for those six weeks, only.

Editor's note: The Saints are not the only team that has lost cases like this one. The Tampa Bay Buccaneers did as well, to injured player Curtis Jarvis. The reason that NFL teams keep litigating this issue is that they have won it at least once. A Pennsylvania court held that the Pittsburgh Steelers were entitled to a dollar-for-dollar offset against workers compensation benefits payable to player Ray Wallace for the entire

$65,000 the team had paid him on account of his injuries (ELR 21:2:13).

Green v. New Orleans Saints, 757 So.2d 36, 2000 La.App.LEXIS 203 (La.App. 2000)[ELR 22:5:20]

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

The Twentieth Century Fox lot is not open to the public. The only people allowed onto it are company employees and their guests; and every guest needs a pass.

Though sometimes inconvenient for visitors, the closed nature of the Fox lot was critical to its success in an Americans with Disabilities Act (ADA) lawsuit filed against the studio by Les Jankey, a wheelchair-bound non-employee who sometimes visits the lot in connection with fund raising events or to make deliveries.

The reason that Jankey sued Fox is that the studio's Commissary, Studio Store and Automatic Teller Machine were not always wheelchair accessible. (They now are.) According to Jankey, the ADA requires "place[s] of public accommodation," including restaurants, stores and banks, to be accessible to the disabled. But Jankey's lawsuit was dismissed, in response to Fox's motion for summary judgment, because District Judge Lourdes Baird found that the studio was not a "place of public accommodation." (ELR 20:10:11)

On appeal, Jankey did not dispute that the Fox lot is not in fact open to the public. Instead, he made a bolder argument. He contended that under the ADA, restaurants, stores and banks are places of "public accommodation," whether or not they are actually open to the public.

In a short and to the point opinion, the Court of Appeals has held otherwise. Judge William Schwarzer explained that Jankey's argument ignored a provision of the ADA that specifically states that an "establishment not in fact open to the public" is exempt from the law's requirements.

As a result, the appellate court has affirmed the dismissal of Jankey's lawsuit.

Jankey v. Twentieth Century Fox Film Corp., 212 F.3d 1159, 2000 U.S.App.LEXIS 10392 (9th Cir. 2000)[ELR 22:5:21]

Constitutionality of subscriber limits and channel occupancy provisions of 1992 Cable TV Act are upheld on appeal

The Cable Television Consumer Protection and Competition Act of 1992 was a massive bill - worthy of its lengthy title. Each of its many provisions was controversial in its own right, so each became the subject of litigation. In early rounds, at the federal District Court level, cable TV companies were partially successful. (See, e.g., ELR 16:2:28). On appeal, however, they have not been. (See, e.g., ELR 19:1:14)

The latest provisions of the 1992 Cable TV Act to emerge intact on appeal are those that directed the Federal Communications Commission to adopt regulations that limit: (1) the number of subscribers a cable operator may reach, and (2) the number of channels on a cable system that may be devoted to programming in which the cable operator has a financial interest.

At the District Court level, Judge Penfield Jackson held that the subscriber limit provision was unconstitutional, though he upheld the constitutionality of the channel occupancy provision (ELR 16:2:28). Neither the cable industry nor the government was satisfied with that Solomon-like result, and both appealed. In an opinion by Judge Douglas Ginsburg, the Court of Appeals has awarded a complete victory to the government.

Judge Ginsburg concluded that the subscriber limit provision of the 1992 Act is content-neutral, even though the legislative history of that provision showed that it was enacted in part because Congress was concerned that "media gatekeepers . . . slant information according to their own biases . . . or . . . provide no outlet for unorthodox or unpopular speech."

Because the provision is content-neutral, Judge Ginsburg assessed its constitutionality using "intermediate, rather than strict scrutiny."

That standard would have required Time Warner Entertainment - the cable company that challenged the Act on appeal - to show that the subscriber limit provision was "either unnecessary or unnecessarily overburdensome." Judge Ginsburg concluded that Time Warner showed neither, and thus he held that the subscriber limit provision is constitutional.

The judge concluded that the channel occupancy provision is content-neutral as well. This meant that Time Warner would have to show that the provision was not a reasonable method to "increase the diversity of voices available to the public via cable." Judge Ginsburg, however, found that it was reasonable and was "well grounded in the evidence and a bit of economic common sense." Thus that provision too is constitutional, he held.

Time Warner Entertainment Co. v. United States, 211 F.3d 1313, 2000 U.S.App.LEXIS 11032 (D.C.Cir. 2000)[ELR 22:5:21]

Preliminary injunction that was granted under Federal Trademark Dilution Act to publisher of "The Sporting News" against publisher of the "Las Vegas Sporting News" is affirmed on appeal

The Sporting News is famous to fans of baseball, basketball, football and hockey. It's the weekly newsmagazine for their sports, and they have given it a circulation of some 540,000 in the United States and Canada. "The Sporting News" has been a federally registered trademark since 1886, and the mark is now owned by Times Mirror Magazines, the publisher of The Sporting News.

The Las Vegas Sporting News is not as famous. It's a "sports gaming" periodical for those interested in sports gambling, and it has a circulation of about 42,000. This periodical used to be known as the "Las Vegas Sports News," but its publisher changed its name to "Las Vegas Sporting News" in 1997, even though the publisher was familiar with Times Mirror's The Sporting News.

When Times Mirror learned of the Las Vegas periodical's name-change, it sent a cease-and-desist letter. And when that had no effect, it sued the Las Vegas Sporting News for trademark infringement and trademark dilution. Times Mirror also sought a preliminary injunction, and its request was granted, "solely on trademark dilution by blurring grounds."

On appeal, that preliminary injunction has been affirmed, over the dissent of one judge. Writing for the majority, Judge Ruggero Aldisert held that the District Court had not erred in concluding that "The Sporting News" is a famous mark, and that its distinctiveness had been diluted by blurring.

Though Judge Aldisert's analysis was systematic and thorough, Judge Maryanne Barry dissented. In a scholarly opinion of her own, she challenged the majority's conclusion (and that of the District Court) that "The Sporting News" is a famous mark.

Judge Aldisert had been satisfied that "The Sporting News" is famous, even if it is only famous in the "niche market" consisting of baseball, basketball, football and hockey fans, because that is the same niche that Las Vegas Sporting News readers fall into. Judge Barry, on the other hand, argued that the Federal Trademark Dilution Act provides protection only to "truly famous" marks, and that "The Sporting News" was not one of those. "Buick,' "Dupont" and "Kodak" are "truly famous" marks, Judge Barry argued. In the sports world, the "New York Yankees" would qualify too, because it "is so famous that even non-sports fans are well aware of it." She argued that "it is simply beyond the pale" to find that "The Sporting News" is "truly famous" in the way those marks are.

The question of what types of trademarks are famous enough for dilution protection is important, Judge Barry explained, because she said, quoting McCarthy on Trademarks and Unfair Competition, "Without [a 'truly famous and well-recognized' requirement] an anti-dilution statute becomes a rogue law that turns every trademark, no matter how weak, into an anti-competitive weapon."

Editor's note: It is somewhat ironic that this case has produced an important decision on the "famous" mark requirement for federal anti-dilution law. Times Mirror was easily able to gather and present seemingly persuasive evidence that the Las Vegas Sporting News has resulted in actual - not merely likely - confusion with The Sporting News among periodical retailers. Thus, it seems that a preliminary injunction could have been granted, in Times Mirror's favor and without controversy, on pure trademark infringement grounds, where the extent of the fame of Times Mirror's registered mark would not have been an issue.

Times Mirror Magazines v. Las Vegas Sports News, 212 F.3d 157, 2000 U.S.App.LEXIS 8553 (3rd Cir. 2000)[ELR 22:5:22]

Court refuses to set aside judgment against Sugarhill Music, on account of its infringement of Tuff City Records' copyright to Spoonie Gee's "Spoonin' Rap"; but court does reopen case "for a more accurate determination" of Tuff City's damages which court had earlier set at $2 million

After two and half years of seemingly bitter litigation (ELR 21:7:14, 21:11:13), Tuff City Records defeated Sugarhill Music in a case that contested which of them owns the copyright to "Spoonin' Rap," a song written by singer-songwriter Spoonie Gee. Federal District Judge Robert Sweet granted Tuff City's motion for summary judgment - a motion that Sugarhill didn't oppose for reasons even the judge couldn't fathom.

Then, based solely on Tuff City's submissions - because Sugarhill never produced requested documents concerning its earnings from "Spoonin' Rap" - Judge

Sweet awarded Tuff City more than $2 million in damages. The size of the judgment finally got Sugarhill's attention. It retained new counsel and immediately made a motion for "relief" from the judgment, under Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b) authorizes federal courts to "relieve a party . . . from a final judgment" based on fraud or in cases where the judgment is "void." These are very tough standards to satisfy, but they did enable Sugarhill to make several arguments, though none was fully successful.

Sugarhill claimed that Tuff City's copyright registration for "Spoonin' Rap" had been fraudulently obtained and was thus invalid, because the registration application contained three errors. According to Sugarhill, this meant that the court never had subject matter jurisdiction to hear the case, because a "valid" copyright registration is a prerequisite to filing an infringement action.

Judge Sweet rejected the argument that a "valid" registration is necessary. The Copyright Act merely requires registration, not a valid registration. The validity of the registration is of course essential to a copyright claimant's right to recover; but the validity of a registration is not essential to give federal courts subject matter jurisdiction over copyright cases, the judge ruled.

Moreover, the judge rejected Sugarhill's argument that errors in the application were the result of a fraud on the Copyright Office. The errors concerned whether "Spoonin' Rap" was co-authored (or authored by Spoonie Gee alone), and the dates on which the song was created and first published. Though errors were admitted, Tuff City's witnesses said the errors were inadvertent. Moreover, Sugarhill failed to show that the Copyright Office would have refused to register the song's copyright if the application had contained the true facts on these three points.

Sugarhill also sought relief from the judgment on the grounds that Tuff City had not established a proper chain of title showing that it owned the song's copyright. "This assertion," the judge said, "is an attempt to relitigate the merits of the case. . . ." Even if chain of title were not proved - an argument Sugarhill never made before - that would not have affected the court's subject matter jurisdiction, and thus was not a basis for giving Sugarhill relief from the judgment.

Sugarhill did score one potentially valuable point, however. Judge Sweet acknowledged that "there is a potential inequity in the damages calculations. . . ." The $2 million judgment "may be higher than would actually be warranted had such calculations been based on actual revenues from [Sugarhill's] licensings of the song, in addition to the damages claimed from [Sugarhill's] interferences with Tuff's attempts to license the song, rather than exclusively based on the representations of Tuff," the judge said. As a result, Judge Sweet reopened the case "for a more accurate determination of damages."

Tuff-N-Rumble Management, Inc. v. Sugarhill Music Publishing, 99 F.Supp.2d 450, 2000 U.S.Dist.LEXIS 8239 (S.D.N.Y. 2000)[ELR 22:5:22]

Statute of limitations in federal suit by Kingvision Pay Per View against Illinois saloon owner for unauthorized interception of 1997 Holyfield-Moorer fight is three years under federal Copyright Act or five years under Illinois conversion law, so federal judge denies saloon owner's motion to dismiss suit filed in 1999

When the law is against you, argue the facts. When the facts are against you, argue the law. And when both are against you, assert the statute of limitations. That seems to be the philosophy of a number of bar, restaurant and saloon owners who have shown pay-per-view boxing matches to their patrons, without paying to do so.

Sometimes, the statute of limitations ploy has been successful. It was, for example, in a Louisiana case where a federal judge used that state's one-year statute of limitations for torts to dismiss a suit filed by Joe Hand Productions a year and a half after the unauthorized interception of the 1995 Whitaker-Vasquez fight (ELR 19:10:13).

On the other hand, Kingvision Pay Per View defeated a statute of limitations defense in a 1999 Tennessee lawsuit against a Memphis bar and grill that showed the 1997 Holyfield-Tyson fight without paying to do so. In that case, a federal judge applied Tennessee's three-year statute of limitations for conversion, in order to permit the lawsuit to proceed (ELR 22:2:23).

The reason the statute of limitations issue continues to arise in cases of this kind is that they are brought pursuant to a federal statute - sections 553 and 605 of the Cable Act - that inexplicably fails to contain a statute of limitations of its own.

As a general rule, when federal statutes do not contain their own limitations periods, the law requires judges to apply analogous state law statutes of limitations. In pay-per-view cases, there often are analogous state law limitation periods as short as one or two years. But the most analogous statute of all - the federal Copyright Act - has a three-year statute of limitations. And sometimes there also are other state statute of limitations periods as long as three, four or even five years.

Naturally, pay per view companies like Kingvision and Joe Hand Productions argue for the longer periods, while unlicensed bars, restaurants and saloons argue for the shorter periods.

So it was in a recent case filed by Kingvision against the owner of a saloon in Illinois that allegedly showed its patrons the pay-per-view telecast of the 1997 Holyfield-Moorer fight, without paying to do so.

Kingvision filed its lawsuit, under Cable Act sections 553 and 605, more than two but less than three years after that fight.

Predictably, the Illinois saloon owner argued that Kingvision's claim was barred by the Illinois two-year statute of limitations for "statutory penalties." Kingvision, on the other hand, argued that the Copyright Act's three-year statute of limitations should apply, or even Illinois' five-year limitation period for conversion.

In a carefully reasoned decision, federal Magistrate Judge Sidney Schenkier has sided with Kingvision. Judge Schenkier concluded that the Copyright Act's three-year statute of limitations is the one that should be applied in cases of this kind, even though other courts have applied state law limitation periods. In any event, the judge added, even if state law should be used, the analogous Illinois law is that state's conversion statute, which has a five-year period of limitations.

Since Kingvision's lawsuit against the saloon owner was filed within three years, and well within five years, Judge Schenkier denied the saloon owner's motion to dismiss.

Kingvision Pay Per View v. Boon Town Saloon, 98 F.Supp.2d 958, 2000 N.D.Ill.LEXIS 6001 (N.D.Ill. 2000)[ELR 22:5:23]

Previously Reported:

Judge Jed Rakoff's "fair use" ruling in the MP3.com case has been published. This was the May 4, 2000 decision in which the judge rejected MP3.com's fair use defense to the record industry's copyright infringement suit against the online music provider (ELR 21:12:4). UMG Recordings, Inc. v. MP3.com, Inc., 92 F.Supp.2d 349, 2000 U.S.Dist.LEXIS 5761 (S.D.N.Y. 2000)

The dismissal of a violinist's disability and age discrimination lawsuit against the St. Louis Symphony, in response to the Symphony's motion for summary judgment, has been affirmed on appeal "on the basis of the district court's ruling." (ELR 21:7:16) Judge Mark Bennett dissented, even though the District Court's "decision undoubtedly states the conclusion [he] would have reached on the record presented, had [he] been the trier of fact," because Judge Bennett concluded that there were disputed issues of fact that should have been resolved by a jury trial. Kampouris v. St. Louis Symphony Society, 210 F.3d 845, 2000 U.S.App.LEXIS 8460 (8th Cir. 2000)

The Fifth Circuit Court of Appeals has denied a petition for a panel rehearing and a rehearing en banc in Pederson v. Louisiana State University (ELR 21:12:21), a Title IX gender discrimination lawsuit filed against LSU on behalf of its women students. While denying the rehearing petition, the court vacated its earlier opinion and replaced it with a new one. The new opinion does not change any of the reasoning previously reported in these pages. Pederson v. Louisiana State University, 213 F.3d 858, 2000 U.S.App.LEXIS 12019 (5th Cir. 2000).
[ELR 22:5:24]

DEPARTMENTS

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Arthur R. Harding and Paul W. Jamieson, 12 Harvard Journal of Law & Technology 533 (1999)

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[ELR 22:5:25]