INTERNATIONAL DEVELOPMENTS

French court orders Yahoo to block access by French users to sites that auction Nazi merchandise; Yahoo responds by filing suit in U.S. federal court seeking declaration that French judgment is not enforceable

In a case that dramatically tests the jurisdiction of the courts in one country over the operations of online service providers in another, a County Court in Paris, France, has order Yahoo! Inc. to block access by French users to any websites that auction Nazi merchandise, apologize for Nazism or contest the reality of Nazi crimes. Despite Yahoo's assertion that it is technologically impossible, or would be prohibitively expensive, to comply with the order, the Paris court has decreed that unless Yahoo complies by late February, it will be subject to fines of 100,000 Francs (about $14,000) per day.

Yahoo responded by filing a lawsuit of its own in United States District Court in San Jose, California. Yahoo's suit seeks a judicial declaration that the French judgment is not enforceable.

The Paris lawsuit was filed by two French associations, the League Against Racism & Antisemitism and the French Union of Jewish Students. Their case is based on a provision of French penal law that makes the mere display of Nazi merchandise a crime in that country.

Yahoo! Inc. is a California corporation whose only asset in France is its French subsidiary, Yahoo France, which operates a server in that country. Though Yahoo France also was named as a defendant in the case, it does not violate the French penal code, because it does not display links to Nazi websites.

Thus, what makes this case so significant is that the Paris court issued an order that requires Yahoo to block access by users in France to Yahoo servers located entirely in the United States, if those French users attempt to locate Nazi sites through Yahoo.com (in the U.S.) rather than Yahoo.fr (in France).

Yahoo argued that the Paris court was "territorially incompetent" to issue such an order. It was an argument Presiding Judge Jean-Jaques Gomez rejected summarily, without any of the discussion or analysis that would be expected if such an argument had been made in an American court.

The primary focus of the case became Yahoo's contention that it was technologically impossible, or would be prohibitively expensive, to block access by French users to its servers in the U.S. But the Paris court noted that when users in France access Yahoo.com, it responds with ads in the French language. Thus, to evaluate whether Yahoo could comply, the Paris court appointed a panel of experts.

According the court, the experts reported that Yahoo could determine if users were in France 70% of the time, on the basis of geographical indicators in the addresses of their Internet service providers.

The Internet service providers for the other 30% of French users - including those whose provider is AOL - do not have geographical indicators in their addresses. But the experts advised that Yahoo could determine their geographic location by requiring them to submit online declarations of their location when they access Yahoo or when they conduct a search for the word "Nazi." If this were done, the experts reported, Yahoo could determine if users were in France 90% of the time.

These findings were the basis for the Paris court's judgment against Yahoo.

Yahoo's lawsuit in U.S. District Court seeks to prevent the League Against Racism & Antisemitism and the French Union of Jewish Students from attempting to enforce the Paris court's order in the United States, where Yahoo's assets are located. Yahoo's complaint alleges that the Paris court's order is an unconstitutional prior restraint, violates several international treaties, and is inconsistent with provisions of U.S. law that give online service providers immunity from liability for Internet content posted by others. Yahoo also argues that the Paris court did not have jurisdiction to issue such an order. No rulings have been issued in that case as yet.

In the Paris court, the League Against Racism & Antisemitism was represented by Marc Levy, the French Union of Jewish Students was represented by Stephane Lilti, and Yahoo! Inc. was represented by Christophe Pecnard, all of Paris. In the lawsuit filed in

U.S. District Court, Yahoo! Inc. is represented by Michael Traynor, Cooley Godward, San Francisco.

League Against Racism and Antisemitism and Yahoo! Inc., County Court of Paris No. RG: 00/05308 (2000), available at www.cdt.org/speech/001120yahoofrance.pdf; *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemetisme*, U.S.D.C., N.D.Cal. S.J.Div. C00-21275 PVT ADR (filed Dec. 21, 2000); available at www.cdt.org/speech/international/001221yahoocomplaint.pdf [ELR 22:8:5]

WASHINGTON MONITOR

FCC terminates, without enforcement action, its investigation of NORML complaint that TV networks violated "sponsorship identification" rules by failing to disclose compensation received from National Drug Control Policy Office for airing programs with anti-drug themes

The Enforcement Bureau of the Federal Communications Commission has decided not to take any action against ABC, CBS, NBC, Fox or the WB in response to a complaint from the NORML Foundation that all five networks violated federal "sponsorship identification" rules, despite the Bureau's finding that those rules may in fact have been violated in some cases.

"NORML" is an acronym for the National Organization for the Reform of Marijuana Laws. In a complaint it lodged with the FCC in February 2000, NORML asserted that the networks violated a federal statute and FCC rule that require radio and television stations to reveal on-air the identity of anyone who compensates them for the broadcast of programming. According to NORML, the Office of National Drug Control Policy (ONDCP) had compensated the networks for their broadcasts of entertainment programming containing anti-drug and anti-alcohol messages.

Congress passed legislation in 1998 that required the ONDCP to conduct a media campaign to reduce drug abuse. That legislation authorized the ONDCP to spend federal money to buy media time. But it also required those funds to be matched by non-federal funds or in-kind contributions.

As part of the campaign conducted by the ONDCP, it purchased advertising spots from the networks. This required the networks to donate a matching amount of network time. The networks were required to satisfy 51% of their matching-time obligations by broadcasting public service announcements provided by the ONDCP. But, pursuant to an unwritten arrangement between the ONDCP and the networks, the rest of their matching-time obligations could be satisfied broadcasting programs whose story lines depicted the consequences of drug or alcohol abuse (and in other ways).

All of the networks satisfied part of their obligations by broadcasting such programs. But none of them revealed they had done so, as NORML contended they were required to do by law.

The FCC Enforcement Bureau agreed with NORML that the ONDCP had in fact compensated the networks for airing anti-drug and alcohol programming, by allowing them to use those programs to satisfy part of the matching-time obligations they incurred by selling spot advertising time to the ONDCP.

This, however, required the networks to identify the ONDCP as a sponsor of those programs only if - at the time those programs were broadcast - the networks had been promised that those particular programs would satisfy their matching-time obligations. The FCC found that the ONDCP never promised the networks that any particular program would satisfy their obligations before those programs were aired. Matching-time credit for each program was granted, if at all, only after the program aired. Moreover, in many cases the ONDCP rejected programs the networks had submitted for credit. "In such circumstances," the Enforcement Bureau concluded, "we cannot find that the Networks violated our sponsorship identification rule."

On the other hand, there were cases in which the networks repeated broadcasts of programs that had already been approved for credit, knowing they would receive matching-time credit for those rebroadcasts. "[I]n those cases," the Enforcement Bureau acknowledged, "sponsorship identification is required." However, rather than penalize the networks for failing to identify the ONDCP as a sponsor, the Bureau simply "caution[ed] the Networks to do so in the future." It decided that no sanctions were warranted, because "The need to include sponsorship identification in the repeat broadcasts was perhaps not clear to the Networks. . . ."

NORML was represented by Thomas W. Dean, Washington D.C. ABC was represented by Franco Garcia; CBS by Martin D. Franks; NBC by Diane

Zipursky; Fox by John C. Quale; and WB by Christopher G. Wood.

FCC Enforcement Bureau letter to NORML Foundation, FCC EB-00-IH-0078 (Dec. 22, 2000), available at www.fcc.gov/Bureaus/Enforcement/Orders/2000/da002873.doc [ELR 22:8:6]

RECENT CASES

Recording artist royalties computed "at the source" must be based on foreign licensee's revenues, rather than record company's receipts from licensee, federal court holds, in decision that awards B.J. Thomas, Gene Pitney, Hank Ballard and The Shirelles more than a million dollars in royalties owed by Gusto Records

B.J. Thomas, Gene Pitney, Hank Ballard and The Shirelles have been awarded more than a million dollars in artist royalties owed to them by Gusto Records on account of the exploitation abroad of masters of their recordings by Gusto's foreign licensees.

The award was entered by federal District Judge Aleta Trauger in a breach of contract suit in which (the judge found) there was "ample proof" that Gusto breached the artists' contracts by underpaying royalties. The primary issues discussed in Judge Trauger's lengthy and detailed decision concerned the calculation of the unpaid royalties, including the adequacy of the evidence and expert opinion offered on those issues.

The issue of greatest interest to others in the music business concerned the proper method for calculating Gusto's royalty obligations on foreign sales made by Gusto's foreign licensees, rather than by Gusto itself. The artists' contracts all provided that with respect to Gusto's licensing income, they were to be paid half of Gusto's licensing income "computed at [or from] the source."

Gusto contended that it was the "source," and thus its royalty obligations were to be computed on the basis of revenue it received from its foreign licensees. The artists, on the other hand, contended that the foreign licensees were the "source," and thus Gusto's royalty obligations were to be calculated on the basis of revenue received by those foreign licensees (as a result of their own sales or sub-licenses).

Since foreign licensees were entitled to retain a sizeable percentage of their own revenues before paying Gusto its share, the amount that Gusto was paid by foreign licensees was much less than the licensees' own revenues. Thus, the amount that Gusto would have to pay the artists would be much less if Gusto itself was the "source" than if its foreign licensees were the "source."

Judge Trauger had no trouble in concluding that the artists' interpretation of "at [or from] the source" was correct, and that Gusto's was not. The judge reasoned that if Gusto were correct, "there would be no need for the terms 'at the source' or 'from the source' to appear in the agreements at all." Instead, Judge Trauger explained that if royalties were to have been computed on the basis of Gusto's revenues, the agreements "would simply have been worded '50% of the licensing income received by Record Company.'"

Though the artists were awarded more than a million dollars, they weren't awarded all they had sought. They had requested $5.5 million in damages. But the evidence and expert opinion they offered were insufficient to support that large an award, Judge Trauger concluded.

The artists were represented by Scott Kendall Haynes, Boult Cummings Conners & Berry, Nashville. Gusto was represented by Nader Baydoun, Boydoun & Reese, Nashville.

Editor's note: Judge Trauger's interpretation of "at [or from] the source" is entirely consistent with the meaning attributed to that phrase by music lawyers, so this decision requires no changes in contract drafting. One interesting, but unexplored, aspect of this case involved the question of which foreign licensees' revenues were the "source." The judge ruled that Gusto's licensees were the source, because that is what she was asked to do by the artists in their post-trial Proposed Findings of Fact and Conclusions of Law. However, at least some of Gusto's licensees entered into sub-licenses with still other record companies. During closing arguments, the artists argued that their royalties should have been calculated on the basis of the revenues of those sub-licensees. That argument seems to be the one that most accurately reflects the meaning of "at the source," and is one that would have entitled the artists to even greater royalties, because sub-licensees too retain a percentage of their revenues before paying a share to their licensors (Gusto's licensees).

Thomas v. Lytle, 104 F.Supp.2d 906, 2000 U.S.Dist.LEXIS 10140 (M.D.Tenn. 2000)[ELR 22:8:7]

Agreements between Gridiron.com and 150 NFL players violate their exclusive group licensing agreements with NFL Players Association, federal court rules

Everyone in football agrees that NFL players enjoy a right of publicity that gives them the exclusive right to exploit their names and likenesses for commercial purposes. In its collective bargaining agreement with the NFL Players Association, the National Football League has been licensed to use player names and likenesses for certain purposes, while other purposes were retained by the players themselves.

As a result of a new high-tech use of those retained rights, a low-tech dispute has broken out between the NFL Players Association on the one hand and Gridiron.com on the other. The dispute is over the nature of the rights that some players granted to the Players Association. And the reason for the dispute is as old-fashioned as any in the entertainment industry: 150 NFL players granted Gridiron.com the right to use their names and likenesses in ways that the NFL Players Association contends those same players previously granted to it, exclusively.

Federal District Judge William Dimitrouleas has agreed with the Players Association's views concerning the rights it acquired from the players. As a result, the judge has granted the Players Association's motion for summary judgment and has issued an injunction that bars Gridiron.com from using the images of more than five players who previously granted rights to the Players Association.

The reason this dispute arose - and the reason the injunction permits Gridiron.com to use five images but not more - is this. In their collective bargaining agreement with the NFL, players reserved the right to enter into "group licensing programs" in which a licensee uses six or more NFL player images in connection with "products" that are sold at retail or used as promotional items. In a separate agreement called a "Group Licensing Assignment," 97% of NFL players assigned their group licensing rights to the Players Association.

Thereafter, 150 players granted Gridiron.com the right to use their names and likenesses on a website. Those players were among the 97% of all players who had assigned their group licensing rights to the Players Association. And the reason they felt free to do so -

according to declarations submitted by seven of the players - was that they didn't think their agreements with the Players Association - the Group Licensing Assignment - covered the Internet.

The Players Association, however, contended that the Group Licensing Assignment did cover the Internet. Judge Dimitrouleas agreed. Gridiron.com's website contains links to individual web pages for almost every player in the NFL. Though the Group Licensing Assignment only gave the Players Association the right to use players' images in connection with "products," Judge Dimitrouleas ruled that "The websites, in and of themselves, are products. . . ."

The judge concluded that websites are products, because in the NFL Collective Bargaining Agreement, the word "product" is defined to include Internet websites, and because the Players Association had repeatedly licensed - as "products" - other websites, video games and fantasy football games, before the dispute with Gridiron.com arose.

From this the judge concluded that since websites are products, and since Gridiron.com used images of 150 players, Gridiron violated the exclusive right of the Players Association to license six or more player images.

Judge Dimitrouleas rejected Gridiron.com's argument that an injunction would violate its First Amendment rights. He ruled that Gridiron.com's First Amendment argument was "flawed," because the website used players' "images and have them perform functions that go way beyond merely conveying the news."

The use of fewer than six player images would not violate the Players Association's rights. And that is why Gridiron.com has been permitted to do that.

Gridiron.com was represented by Alexander Theodore Sarafoglu, Morgan Lewis & Bockius, Miami. The NFL Players Association was represented by Jillian Elisabeth Marcus, Weil Gotshal & Manges, Miami.

Gridiron.com, Inc. v. National Football League Players Association, 106 F.Supp.2d 1309, 2000 U.S.Dist.LEXIS 9810 (S.D.Fla. 2000)[ELR 22:8:7]

Exclusive copyright licensee may not sublicense or assign its rights without copyright owners' consent, federal District Court holds; Nike's exclusive license to Sony of rights in Nike's copyrighted cartoon character "MC Teach" were not validly sub-licensed or assigned to third party, because Sony's consent was not obtained

An exclusive copyright licensee may not sub-license or assign its rights without the consent of the copyright owner, a federal District Court has held, in what appears to be a case of first impression.

The subject of this significant case is a cartoon character named "MC Teach," the copyright to which is owned by Nike. Nike granted Sony an exclusive license to use MC Teach in connection with records, movies and television programs using those records, educational materials, and even on clothing (so long as the Nike name and Swoosh mark did not appear on clothing).

The license agreement between Nike and Sony said nothing about Sony's right to sub-license or assign its rights, so Sony concluded that it could do so. Sony transferred all its rights in the MC Teach character to Michael Gardner who used, and sub-licensed others to use, MC Teach on educational materials. Sony's transfer to Gardner was done without Nike's consent, thus prompting Nike to threaten legal action against Gardner and its licensees. Gardner responded with a declaratory relief suit against Nike.

In response to cross-motions for summary judgment, Judge Lourdes Baird has ruled in favor of Nike and against Gardner.

Judge Baird reasoned that although section 201(d)(1) of the Copyright Act allows "ownership of a copyright" to be "transferred in whole or in part," that paragraph deals only with transfers of ownership of the copyright itself, including fractional interests in the copyright, but not with the transfer of "the exclusive rights comprised in a copyright."

Section 201(d)(2) of the Copyright Act - not section 210(d)(1) - is the paragraph that authorizes the transfer of "the exclusive rights comprised in a copyright," the judge explained. However, that paragraph gives the owner of a transferred exclusive right only the "protection and remedies" given to a copyright owner, rather than full ownership of the right. The right to transfer exclusive rights to a third party is not one of the "protections" and "remedies" of copyright, Judge Laird concluded.

This fine distinction between what may be transferred under section 201(d)(1) and what may be transferred under section 201(d)(2) was critical in the case between Gardner and Nike. It was, because Nike had not transferred ownership of its MC Teach copyright to Sony. Nike had merely transferred exclusive rights in that copyright to Sony. Thus, Sony could only transfer to Gardner the "protections" and "remedies" Sony enjoyed by virtue of the exclusive license it obtained from Nike. But Sony could not transfer the right to use MC Teach, without Nike's consent.

Gardner was represented by Herbert Hafif, Claremont, California. Nike was represented by Dennis Loomis, Troop Steuber Pasich Reddick & Tobey, Los Angeles.

Editor's note: Judge Baird acknowledged that her conclusion differs with that reached in Nimmer on Copyright. According to Nimmer - which the judge cites repeatedly for other propositions - exclusive licensees acquire ownership of the rights licensed to them and "may reconvey them absent contractual restrictions." As a practical matter, the significance of the difference between Judge Baird's conclusion and Nimmer's is this: under Judge Baird's ruling, a licensee who wants to be able to assign or sublicense its rights has the burden of negotiating a clause in the exclusive license agreement that permits it to do so; under Nimmer, a licensor who does not want a licensee to assign or sub-license its rights has the burden of negotiating a clause in the exclusive license agreement that prohibits the licensee from doing so.

Gardner v. Nike, Inc., 110 F.Supp.2d 1282, 2000 U.S.Dist.LEXIS 14096 (C.D.Cal. 2000)[ELR 22:8:8]

Supreme Court vacates dismissal of copyright infringement suit by Raquel against Geffen Records and Nirvana; orders reconsideration of lower court ruling that registration of "audiovisual work" was inadequate to register musical composition, in light of Copyright Office's position that registration was adequate

As a result of winning what is probably the shortest Supreme Court decision in the annals of copyright law, a singer-songwriter group known as "Raquel" is likely to get a chance to prove, if it can, that its song "Pop Goes the Music" was infringed by a song recorded by Nirvana and released by Geffen Records.

The merits of Raquel's claim have never been addressed by a court, because its lawsuit has been dismissed - twice - on the basis of what some may call a technicality. (ELR 19:6:10, 21:10:19) When Raquel registered "Pop Goes the Music" with the Copyright Office, Raquel indicated that the work was an "audiovisual work," and later, in a supplemental registration, it indicated that the work was a "performance."

As things turned out, however, Raquel did not own the copyright to an audiovisual recording of a performance of the work. One of the companies it sued owned that copyright. Moreover, Raquel didn't claim that an audiovisual work or performance had been infringed. It claimed that its musical composition had been infringed.

Raquel never submitted a registration form claiming copyright in a work whose nature was described as a musical composition. For that reason, a federal Court of Appeals affirmed the dismissal of Raquel's infringement claim. (ELR 21:10:19)

In an unusual response to that appellate court ruling, the Copyright Office issued a "Statement of Policy" in which it politely but clearly criticized that ruling. (ELR 22:5:8) The Copyright Office explained that although Raquel's registration form had incorrectly indicated that the nature of its work was an "audiovisual work," it had indicated - correctly - that the nature of its authorship was "All music and lyrics and arrangement." This was sufficient to register a claim to copyright in the musical composition itself, insofar as the Copyright Office was concerned.

Armed with that Statement of Policy, Raquel petitioned the Supreme Court for a writ of certiorari. The Solicitor General filed a brief (as a friend of the Court) supporting Raquel's petition, also citing the Copyright Office's policy statement.

That was enough for the Supreme Court. Without oral argument, and in an opinion just three sentences long, the Supreme Court vacated the judgment of the Court of Appeals (the judgment that had affirmed the dismissal of the case). And the Supreme Court ordered the Court of Appeals to give Raquel's case "further consideration in light of the position asserted by the Solicitor General . . . and the Copyright Office's . . . Statement of Policy."

Raquel v. Education Management Corp., 121 S.Ct. 376, 2000 U.S.LEXIS 7030 (2000)[ELR 22:8:9]

Staff photographers for Oprah Winfrey Show own copyrights to their photos, federal court rules in infringement suit complaining about their publication in Winfrey's book "Make the Connection"; but implied license may have authorized their publication

Paul Natkin and Stephen Green used to be "staff photographers" for The Oprah Winfrey Show. So it's hardly surprising - to outsiders - that Winfrey's 1996 book "Make the Connection" contained eleven of their photos. Apparently, however, it was surprising to Natkin and Green, because they've sued Winfrey (along with her production company, co-author and publisher) in federal court in Chicago, alleging copyright infringement and other claims.

Those familiar with the "work made for hire doctrine" may wonder how "staff photographers" could claim to be the owners of photographs they took while working in that very capacity. The "work made for hire" doctrine makes the employer or commissioning party the copyright owner, rather than the person who actually created the commissioned works. Thus, at first blush, it might be supposed that Harpo Productions, Inc. - the company that produces The Oprah Winfrey Show - would be the owner of the photos shot by Natkin and Green. And that in fact is exactly what Winfrey and her co-defendants argued, in response to the photographers' infringement claims.

On the other hand, facts flushed out in connection with the parties' cross-motions for summary judgment showed that in Natkin and Green's case, "staff photographer" was more an honorific title than a description of their true employment status. It turns out that Natkin and Green were independent contractors rather than employees. That is what Judge Ruben

Castillo has ruled in granting part of the summary judgment requested by the two photographers.

In reaching this conclusion, Judge Castillo applied the thirteen-factor test required by the Supreme Court's 1989 decision in Community for Creative Non-Violence v. Reid (ELR 11:3:12). All but two of those factors favored the photographers' position that they were not employees. One factor was particularly important, in Judge Castillo's opinion: Harpo reported to the IRS that the payments made to Natkin and Green were "nonemployee compensation," from which Harpo had not deducted payroll taxes.

Copyright law does permit independent contractors to create "works made for hire" under certain circumstances. But that didn't help Winfrey here, because in such cases, there must be a written agreement between the parties in which they acknowledge the "work made for hire" status of those works. Green did sign such an agreement with Harpo, but not until after he had taken the photos at issue in the case; and Natkin never signed one.

Winfrey and her co-defendants also sought dismissal of the photographers' infringement claims by arguing that they were "joint authors" of the photos, and thus co-owners of their copyrights. Indeed, when Natkin and Green were shooting on the set of the Show, many decisions concerning the subject matter of their photos were made by the producers of the Show, rather than by the photographers.

But Judge Castillo held that joint authorship requires each party to contribute copyrightable subject matter, and that the contributions of Winfrey and others - of such things as Winfrey's facial expressions, her attire, the choice of guests, and staging - were not independently copyrightable contributions. As a result, the judge held that the photos were not jointly authored.

The defense that may work for Winfrey and the others is that of "implied license." Some of Green's invoices acknowledged a "buy out by Harpo," but they didn't identify the particular photos bought out, so there was no express license, Judge Castillo held. On the other hand, he ruled that it could not be doubted that Harpo had an implied license to use Natkin and Green's photos.

What was in doubt was the scope of that implied license, and whether Natkin and Green had revoked it. The photographers asserted that Harpo's license only covered publicity for the Show, while Winfrey argued that it covered more and that in any event her book was publicity for the Show. Winfrey also disputed the validity of the photographers' revocation of any license they may have granted Harpo. "A trial will be necessary to answer these questions," the judge concluded.

Judge Castillo did grant part of Winfrey's motion for summary judgment. He ruled that the photographers' claims under the Lanham Act (and equivalent state law) were preempted by federal copyright law. On the other hand, he refused to dismiss, as preempted, the photographers' state law claims based on Harpo's refusal to return the photos.

Natkin and Green were represented by Mark H. Barinholz, Elliot Zinger & Associates, Chicago. Winfrey and her co-defendants were represented by David P. Sanders, Jenner & Block, Chicago.

Natkin v. Winfrey, 111 F.Supp.2d 1003, 2000 U.S.Dist.LEXIS 11463 (N.D.Ill. 2000)[ELR 22:8:10]

Photographer Joe Marvullo failed to state proper claims for copyright infringement and unfair competition based on magazine's use of White House photographs

Joe Marvullo is a professional photographer who has a "special relationship" with the White House Press and Photo Office. Mr. Marvullo entered into an agreement with the Stern Magazine Corporation, publisher of a German language magazine and subsidiary of the German corporation Gruner & Jahr AG & Co.

The agreement between Stern and Mr. Marvullo was a license agreement whereby Mr. Marvullo granted Stern the right to use Mr. Marvullo's photograph of White House photographer Bob McNeely photographing President Clinton as well as 50 to 60 photographs taken by the White House Photo Unit. The agreement also provided that Mr. Marvullo would write text and captions to accompany the photographs which were to be used in an article regarding the White House Photo Unit. Stern agreed to submit the article and photographs to Mr. Marvullo for his approval prior to publication.

Stern eventually used the photographs in an unflattering article on President Clinton, including graphic descriptions of the allegations made by Paula Jones. Stern did not submit this article to Mr. Marvullo prior to publication.

Mr. Marvullo filed a suit against Stern and Gruner in the U.S. District Court for the Southern District of New York alleging copyright infringement and unfair competition under section 43(a) of the Lanham Act. Gruner and Stern moved to dismiss Mr. Marvullo's complaint, and Mr. Marvullo filed a cross motion for leave to file an amended complaint.

With regard to the copyright infringement claim, Judge Carter found that Mr. Marvullo's allegations were merely bare legal conclusions with no factual support. Judge Carter recognized that a licensee which uses a licensed work beyond the scope of the license may be liable for copyright infringement. However, Judge Carter indicated that Mr. Marvullo's complaint failed to specify how Gruner and Stern used the licensed works outside of the scope of the license. Instead, Mr. Marvullo's complaint contained only bare, conclusory allegations.

Judge Carter also found Mr. Marvullo's claim for contributory copyright infringement to be legally insufficient. Mr. Marvullo claimed that Stern was liable for contributory infringement, and although Judge Carter stated that the proposed complaint was unclear on this issue, it appeared that Mr. Marvullo's claim was based on Gruner's alleged direct copyright infringement. Judge Carter found this claim to be lacking in two respects: first, Mr. Marvullo failed to properly plead direct copyright infringement; and second, Mr. Marvullo failed to provide any factual support to show that Stern had actual or constructive knowledge of the direct infringement.

Mr. Marvullo also attempted to plead copyright infringement based upon the fact that Stern altered his photograph by cropping it without permission. In rejecting this claim, Judge Carter reasoned that licensees are given a certain amount of leeway which allows them to alter the licensed copyrighted works, and Stern's cropping of the photograph was a minor alteration of the photograph. Judge Carter thus found, as a matter of law, that the same was not infringement. Additionally, Judge Carter noted that the agreement between Stern and Mr. Marvullo did not prohibit Stern from making alterations to the photographs.

Judge Carter dismissed Mr. Marvullo's copyright infringement claims but granted him leave to amend them.

Mr. Marvullo's Lanham Act claim was dismissed without leave to amend, however. Judge Carter found that Mr. Marvullo's Lanham Act claim was virtually identical to his copyright claim. In dismissing this claim, Judge Carter relied upon Lipton v. Nature Company, 71 F.3d 464, 473 (2nd Cir. 1995) where the Second Circuit held, "For the Lanham Act to apply to a copyright-based claim, an aggrieved author must show more than a violation of the author's copyright-protected right to credit and profit from a creation." Mr. Marvullo's complaint merely alleged that Gruner and Stern used his photographs in a manner in which he did not approve. Mr. Marvullo did not allege, for example, that Gruner and Stern attempted to pass off his photographs as their own. Thus, Judge Carter found that the Lanham Act claim was impermissibly duplicative of the copyright infringement claim.

Marvullo was represented by Stephen A. Weingrad, Weingrad & Weingrad, New York City. Stern Magazine was represented by Gregory F. Hauser, Walter Conston Alexander & Green, New York City.

Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 2000 U.S. Dist. LEXIS 8554 (S.D.N.Y. 2000)[ELR 22:8:11]

Defamation suit by Utah politician Craig Peterson against the Associated Press is dismissed, even though his photograph was mistakenly used in connection with an article about the Salt Lake City Olympic Bid Committee scandal

Craig Peterson is the former Majority leader of the Utah State Senate. A different Craig Peterson was allegedly involved in the Salt Lake City Olympic Bid Committee scandal. When Associated Press ("AP") wrote an article about the scandal, it included a photograph of "Craig Peterson" in connection therewith. Oops! The AP used a photograph of the wrong Craig Peterson, and this photograph was published in the New York Times together with excerpts of the ethics report regarding the scandal.

When the AP learned of the error, it immediately issued a "Photo Kill Advisory" which ordered that all copies of the photograph be removed from all archives and Internet sites. The New York Times also published a correction the day after Peterson's photograph appeared in the paper. Nonetheless, Peterson filed a lawsuit in the United States District Court for the District of Utah against the AP, alleging libel and negligence. The AP filed a Motion for Summary Judgment, and Judge Dale A. Kimball granted the motion.

Since Peterson conceded that the AP had not acted with malice, the central issue involved in the summary judgment motion was whether Peterson was a public figure. Peterson argued, unsuccessfully, that he was no longer a public figure since he had resigned from public office before the AP published its news story. Judge Kimball noted that Peterson was very active in the Utah political scene for many years and served in some high profile positions within the Utah

Legislature during that time. Recognizing that many cases have found individuals who had been out of office longer than Peterson to have retained their public figure status, Judge Kimball was not persuaded by Peterson's arguments to the contrary.

Satisfied that Peterson was still a public figure at the time of the publication of the disputed news story, Judge Kimball then analyzed whether or not the defamation related to Peterson's official conduct. The Judge noted that the malice standard requires not only that the plaintiff be a public official, but also the defamatory statements must relate to that person's official conduct. Peterson argued that since he was never involved in any effort to secure the Olympic bid for Salt Lake City, the news story did not relate to his official actions.

The AP argued that the mistaken photo and caption did relate to Peterson's official conduct, albeit erroneously. Namely, the caption identified Peterson as the State Senate Majority Leader, and the alleged wrongdoing occurred during the time that Peterson held office. If the story had been true, it would have certainly related to Peterson's official conduct.

Judge Kimball reasoned that if he adopted Peterson's argument, he would be setting a different standard for "mistaken identity" defamation than for "mistaken information" defamation. Since Judge Kimball found no support in law for this distinction or for the general proposition that certain types of defamation deserve greater protections than others.

Although acknowledging the unfortunate circumstances, Judge Kimball reflected upon the basic rationale for requiring public figures to prove actual malice. Public figures are in a position to correct and respond to false statements about them since they have access to the news media and to other channels of effective communications. Private citizens do not enjoy such access.

Peterson was represented by Roger H. Hoole, Hoole & King, Salt Lake City. AP was represented by Randy L. Dryer, Parsons Behle & Latimer, Salt Lake City.

Peterson v. New York Times Company, 106 F.Supp.2d 1227, 2000 U.S. Dist. LEXIS 11352 (D.Utah 2000)[ELR 22:8:11]

"Benumbed" and "bewildered" New York court answers the burning First Amendment question - what kind of forum is a cow - and rules that New York City's refusal to approve the People for the Ethical Treatment of Animals' CowParade entry was reasonable

In a long-winded, but informative, opinion (which should be entitled "More Than You Ever Wanted to Know About the First Amendment and Public Forums"), Judge Victor Marrero of the U.S. District Court for the Southern District of New York, refused to grant a mandatory injunction requested by People for the Ethical Treatment of Animals ("PETA") against the City of New York and the organizers of the CowParade art exhibit.

Anyone who has recently been in Chicago, New York, or several other cities throughout the world, has no doubt seen the CowParade - an art exhibit of hundreds of life-sized fiberglass cows which have been painted or decorated by individuals or organizations who "adopt" the cows for a fee in order to paint or decorate them. The cows are then placed on city sidewalks, in parks, building plazas, train stations, or in other public locations for several weeks. A portion of the proceeds from the CowParade, and from the auction of the cows which occurs at the conclusion of the exhibit, is distributed to the city in which the CowParade is held.

New York's CowParade was held between June 15, 2000 and September 3, 2000. The case centered on a dispute which arose between one of the CowParade sponsors, PETA, on the one hand, and New York City and the exhibit organizers, on the other hand. PETA, an organization well-known for its sometimes extreme and controversial views concerning animal rights, "adopted" two cows. PETA decorated one of its cows with imitation leather products such as boots, jackets, soccer balls, etc., and the words: "BUY FAKE FOR THE COW'S SAKE." This cow was approved by the Committee which had been set up to review the various entries to make sure the cows were in conformity with the CowParade's guidelines.

PETA's second cow design was not approved, however, as the Committee found portions of it to be "inappropriate," "too graphic" and "offensive" for the wide audience for which it was intended. The rejected cow design consisted of a cow which had been divided into sections to resemble a butcher-shop chart showing cuts of meat. Inside each of the sections were statements concerning "the health and ethical problems associated with the killing of cows for food." Some of these statements, such as "cattle are castrated and dehorned without anesthesia," were objected to by the Committee, and PETA was asked to change its design.

Instead of altering its design, PETA filed an action under 42 U.S.C. § 1983 claiming that its free speech rights under the First and Fourteenth Amendments had been violated. PETA sought an injunction, which Judge Marrero found to be "mandatory" in nature, wherein PETA requested that its second cow be approved and displayed. Judge Marrero denied PETA's request.

In finding that PETA had not demonstrated a likelihood of success on the merits, Judge Marrero conducted an extremely detailed analysis. The first issue addressed was the type of forum involved. PETA argued that the CowParade was a traditional public forum, and thus any restriction on speech had to be analyzed under the strict scrutiny standard. The City argued that the CowParade was not a public forum, and therefore the matter must be reviewed using the lesser, reasonableness standard.

Judge Marrero struggled through a multitude of confusing and ambiguous U.S. Supreme Court and Second Circuit cases on this issue and finally concluded that the CowParade was a type of non-public forum - a "designated" or "limited" public forum.

PETA argued that the City had no right, absent a compelling state interest, to transform traditional public property, like sidewalks, into a forum "for limited expressive activities without allowing unrestricted access to every organization that wishes to participate." Judge Marrero found PETA's argument to be without merit for a number of reasons.

Judge Marrero recognized a long line of cases wherein the right of the government to control its property is, with some limitation, akin to the right of a private landowner to control his or her property, and "[t]he right of the people to have general access to traditional public places for expressive activities sometimes competes with the interests of the state, in the course of internal governance, to exercise control over public property."

PETA's argument was rejected as well due to the fact that "not every corner of [public] property is presumed suitable for use by all persons at all times for expressive purposes." Judge Marrero noted, for example, that the government is well within its rights to close a portion of a public street or sidewalk for the construction of a new building.

Also important to Judge Marrero's forum analysis was the general public interest. If the courts were to preclude the government from reserving public forums for selective expressive activities, it would have an obviously damaging effect upon the right of free expression.

PETA argued in the alternative that the CowParade was a public forum by virtue of the access it sought. PETA contended that it sought access for its message in the city streets and parks - traditional public forums. Judge Marrero did not accept this argument, however.

First, Judge Marrero reasoned that the property to which PETA sought access was not traditional public property nor was PETA requesting "general access" to the same. Instead, PETA was seeking access to a "government program," and it was the cows - not the sidewalks and parks - which constituted the physical means of expression.

Judge Marrero also recognized that, by authorizing the placement of a limited number of cows, the City clearly did not intend to allow indiscriminate access for public discourse. The City required the CowParade organizers to obtain a permit, and the

CowParade's guidelines spelled out the City's intent to strictly limit the number of participants and the forms of expression allowed.

Third, Judge Marrero found that the nature of the property to which PETA requested access was not a city sidewalk, plaza, or park. The nature of the property was a cow which was owned not by the City but by the CowParade organizers. Judge Marrero reasoned, for example, that while members of the public are allowed to use a public forum to express their ideas generally, that does not equate to allowing someone to paint graffiti on a public wall or erect a sculpture on a sidewalk.

Judge Marrero concluded, based upon an examination of the public properties encompassed by the CowParade, that the City did not intend the event to be a public forum. In fact, Judge Marrero found that the City intended just the opposite - to temporarily restrict general access to certain areas of traditional public forums.

Finding that the forum in question was not a traditional public forum, Judge Marrero then analyzed the restriction on PETA's expression utilizing the less stringent reasonableness standard Under this standard, the government may restrict speech if it is reasonable to do so within the circumstances, such as when the speaker seeks to address a subject not within the purpose of the forum or if the speaker is not within the class of persons for whom the forum was created. The restriction need only be reasonable, it need not be the most reasonable.

In determining that the City's restriction on PETA's expression was reasonable, Judge Marrero evaluated several factors in great detail. The judge reviewed the CowParade guidelines since question of whether a limitation on expression is reasonable can often be answered by looking to the specific language of the limitation. The CowParade guidelines were found to be very broad. Judge Marrero engaged in an in-depth discussion of a long line of U.S. Supreme Court cases and found, based on the holdings of those cases, that "[t]he restriction on expressive activity was carried out pursuant to the Guidelines, which, albeit broadly and generally formulated, are sufficient to withstand First Amendment challenge."

Next, Judge Marrero found that the City's administration of the guidelines was also reasonable. He agreed with the City's position on this issue, namely, that the restriction was merely upon portions of PETA's cow design and not upon PETA as an organization. The City rejected PETA's cow because the City believed it did not comply with the CowParade's stated objectives of an exhibit which would be "festive, whimsical and appropriate for a broad-based audience of all ages."

Judge Marrero also held that the restriction was reasonable when evaluated in connection with the forum purpose and the public interest. If the City were forced to allow all forms of expression in connection with this exhibit, Judge Marrero recognized that it would open the floodgates. Rather than being a "festive" and "whimsical" exhibit, the CowParade could turn into a "massive public billboard" displaying all types of highly controversial political issues and obscenities. Such a display could easily bring about violence and heated protests which would certainly not be in the public interest.

The fact that PETA had ample alternate channels of communication to convey its message was also relevant to Judge Marrero's reasonableness determination. Indeed, one of PETA's cows had already been approved, and it was only a portion of PETA's second cow which was rejected. Additionally, PETA could, of course, carry its message to the same or larger audience at any public forum. Therefore, the fact that PETA was prohibited from expressing itself exactly as it wished in the context of the limited public forum was of no consequence.

Judge Marrero further found that the City's restriction was in keeping with First Amendment values. If a government is faced with an "all or nothing" decision when it comes to opening up public forums for expressive activities, the government may decide to do nothing and avoid a controversy rather than risk a "cacophony." Thus, free expression would be hindered rather than encouraged.

The last issue addressed by Judge Marrero in holding that the City's restriction was reasonable was the fact that the City was simply managing its public resources. It was not attempting, for example, to establish norms of conduct, promote values, or prevent general debate.

Even though the City's rejection of PETA's cow design was reasonable, Judge Marrero acknowledged that the restriction on PETA's expression had to be content neutral - the City could not restrict PETA's expression merely because it did not like or agree with the message. Judge Marrero found that PETA had not met its burden of demonstrating that the City was motivated by hostility toward PETA's views. In fact, the judge concluded that the opposite had been demonstrated. The City approved one of PETA's cow designs, and merely rejected a portion of PETA's second cow design. It was not PETA's message which was rejected.

PETA was represented by M. Christine Carty, Harrison Segal & Lewis, New York City. CowParade

Holdings Corp. was represented by Edward J. Nolan, Hackensack, New Jersey.

People for the Ethical Treatment of Animals v. Giuliani, 105 F.Supp.2d 294, 2000 U.S. Dist. LEXIS 10393 (S.D.N.Y. 2000)[ELR 22:8:12]

Appeals court vacates injunction that required owner of Skippy cartoon character to remove from its website critical comments about maker of Skippy peanut butter

Percy L. Crosby who in 1923 created a cartoon character named "Skippy" has several times, and rather predictably given the commercial stature of his opponent, found himself in trademark disputes with CPC International, the corporation which makes and markets Skippy peanut butter. The latest case is interesting because it presents not only an instance of possible trademark violation and ensuing likelihood of confusion amongst consumers, but because it raises important questions regarding the breadth and overbreadth of injunctive orders and the danger such orders can pose in terms of curtailing free speech.

The dispute has gone several rounds. In 1986, CPC, which has sold peanut butter in the United States under the trademark Skippy since 1933, brought a suit alleging that Crosby, in licensing his cartoon character's likeness to a caramel popcorn concern, had infringed upon CPC's trademark and caused a likelihood of consumer confusion. This seemed a valid enough claim. After all, Skippy the cartoon character and Skippy the peanut butter, albeit both trademarked, should necessarily remain in separate realms. While cartoon Skippy's province is one of the comic strip pages, Skippy peanut butter is understood to be the undisputed Skippy who reigns on supermarket shelves.

When cartoon Skippy crossed that not so diaphanous line into food advertisement, a federal District Court agreed with CPC. Joan Tibbets (Crosby's daughter and the current president of Skippy) and the comic Skippy were enjoined from using their mark either to market food products or to in any way aver that their mark rights included the right to use their trademark on peanut butter or any other food product.

All well and good and reasonable enough, and for the better part of a decade there were no reported problems between the two Skippys. Then in 1997, Joan Tibbets and her Skippy set up a website, aptly enough entitled "Skippy.com." The website was basically constituted by a long narrative which served as an homage to the life and times of Skippy's creator, Mr. Crosby. Apparently, however, the memoirs of Crosby were not deemed complete without a substantial portion of narrative being devoted to the cartoon magnate's long standing feelings of enmity for the Skippy peanut butter concern and all for which it stood.

CPC and Skippy peanut butter once again donned armor and rode into court to defend the honor of their sandwich spread. CPC alleged that the injunction of 1986 had been violated by the content of the Skippy.com website, and the District Court agreed. An order was served on Tibbets to remove permanently certain portions of text (not less than ten pages) from the website. Not surprisingly, these portions were mostly those that spoke ill of CPC and its alleged efforts to usurp the territory of Tibbets and the comic strip Skippy.

The District Court's order also required that no one else be provided with the deleted materials in question and that Tibbets pay a $500 a day fine for each day she continued to violate the injunction.

The Court of Appeals disagreed strenuously with these holdings. It is important at the outset to note that this is categorically not a case which raises a complaint of defamation (thus perhaps, and this is a big perhaps, lending some credence to CPC's complaints vis a vis the way in which it was portrayed on the website), but a case which asks whether the terms of the 1986 violation had been violated. The Court of Appeals concluded first that the District Court's holding violated Federal Rule of Civil Procedure 65(d). FRCP 65(d) demands that "every order for an injunction... shall set forth the reasons for its issuance; shall be specific in terms, shall describe in reasonable detail...the act or acts sought to be restrained."

The Appellate court noted that while there is specificity inherent in the injunctive order against

Tibbets as to what to delete, there is no explanation as to why it must be deleted, no explanation at all as to how commentary, albeit strident angry commentary, regarding the CPC peanut butter organization is in violation of the 1986 injunction. The Court of Appeals pointed out that the 1986 injunction covered instances in which Tibbets aligned her trademark with food items, but it said nothing about website commentaries that had nothing whatever to do with food.

A further repercussion of the failure to comply with Rule 65(d) is that the injunction, because of its lack of specificity, seemed to the Court of Appeals to be overbroad; and in its overbreadth it threatened to violate Tibbets right to First Amendment free speech. The First Amendment should burden "no more speech than necessary to serve a significant government interest," and an injunction must be specific enough so that while it curtails illegal acts, it does not impede legal ones.

In this case, the Court of Appeals found that a significant government interest is not at all being served. If the purpose of trademark protection is to encourage product differentiation, promote the production of quality goods, and provide accurate information to consumers, it is unclear how Tibbets is violating those protections and aims on her website. The Court of Appeals held that she is not engaging in a commercial transaction by implementing the website as a place to make the public familiar with the history of her father, and she is certainly not affiliating the name Skippy on this website with any food product.

Further, if a business concern such as CPC could use trademark protection as a means to curtail any inflammatory opinions offered against it (as CPC was attempting to do in this instance), a public policy concern would rise to the foreground. For instance, such a regulation would make virtually any type of consumer report casting doubt upon the quality of a product with trademark protection, illegal. Consumers would find they had no recourse when attempting to educate themselves before making a purchase. Trademark law is designed to avert such problems, not create them. Accordingly, the Court of Appeals vacated the injunction and remanded the case for further proceedings.

CPC was represented by William Mack Webner, Sughrue Mion Zinn MacPeak & Sheas, Washington D.C. Tibbets and Skippy Inc. were represented by Rodney Ray Sweetland III, Arlington Virginia.

CPC International, Inc. v. Skippy Inc., 214 F.3d 456, 2000 U.S.App.LEXIS 12104 (4th Cir. 2000)[ELR 22:8:14]

Though "Polo" magazine infringes designer Ralph Lauren's "Polo" trademark, injunction barring magazine's use of its mark is remanded by appellate court for consideration of more limited remedy accommodating publisher's First Amendment rights

A case between Polo Ralph Lauren (PRL), a conglomerate widely known in both the fashion and design business, and Westchester Media, which over the years has published several magazines with the word "Polo" in their title, addresses the issue of the power of trademark law to impinge on the right to free speech.

Westchester's initial publication, known as the "Old Polo" magazine, met with no disapproval from PRL. On the contrary, PRL seemed to embrace "Old Polo." Ralph Lauren himself went so far as to submit to an interview for one issue of the publication. However

"Old Polo" magazine dealt exclusively with the sport of polo itself, a self described "insider's view of the sport of polo . . . and the traditions that surround it."

Later in its history, "Old Polo" evolved into a publication entitled "Polo Life" which featured an "expanded lifestyle" section, depicting aspects more tangential and ancillary to the sport such as fashion and "upscale people having a good time." Still, PRL did not raise an eyebrow and even advertised in "Polo Life." The then owner of the publication, Ami Shinitzky, obtained federal registration for "Polo" for magazines "on the subject of equestrian sports and lifestyles." In 1998, Shinitzky's mark became incontestable, and still no objection was heard from the PRL camp.

Westchester purchased all the assets of the magazine in 1997 and then decided to re-launch the magazine under the name "Polo." This is where the trouble began. Westchester's magazine went too far for

PRL in its focus on "Adventure, Elegance, [and] Sport." Suddenly the magazine seemed a virtual high gloss fashion extravaganza reminiscent of a PRL advertisement. Supermodel Claudia Schiffer, the same model who had headlined a major PRL campaign just the year before, even graced the cover of the inaugural issue. If this were not enough, Westchester purchased the customer list from Neiman Marcus, one of PRL's largest retailers. What was an old school preppy fashion magnate such as Ralph Lauren to do but formally object to the title of New Polo?

Westchester sought relief at the trial court level in the form of declaratory relief asserting that its mark "Polo" did not infringe on PRL's, but it was disappointed in its efforts. PRL filed a counterclaim and eventually was granted a permanent injunction that required Westchester to cease and desist using "Polo" altogether. Westchester, naturally appealed.

On appeal, it was up to PRL to show that Westchester's mark created a likelihood of confusion with its own, in the mind of the public. However, things got a bit more complicated at this point because Westchester was not using the mark for a purely commercial purpose. Here is where the First Amendment clashed with the Lanham Act, because "unless the title [in this case of a magazine] has no artistic relevance to the underlying work . . . or if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work," it is protected by the First Amendment.

Westchester's "Polo" title does have artistic relevance to the underlying work; and the question thus arising was whether it explicitly misleads and confuses the consuming public. PRL prevailed here, because the appellate court found that Westchester's actual use of the "Polo" mark evidenced an intent to trade on PRL's reputation. This was adduced primarily by the fact that Westchester in its new publication was attempting to separate lifestyle (and thus fashion) from the technical aspects of the sport of polo per se.

Westchester argued that since PRL does not use its mark in the realm of publications, no confusion could ensue. However, the appellate court concluded that it was not enough that PRL was not in the business of using its mark on publications; it was enough if the public could fathom the possibility that PRL might advertise in a magazine, see the mark "Polo" upon a magazine and become confused in the process.

Westchester was awarded a partial victory by the appellate court, because it found the permanent injunction issued in PRL's favor was overreaching. The appellate court was concerned that Westchester's First Amendment rights might be denied if it is not allowed to issue the publication at all, that the remedy of a disclaimer might be adequate, and finally that PRL, having become famous itself by its association with the sport of polo, might now be attempting to arrogate the very name of that sport from a publication that on some level is about the players and the game. On this issue, the court remanded for more factual findings.

Westchester was represented by Thomas Charles Godbold, Fulbright & Jaworski, Houston. PRL was represented by Leslie G. Fagen, Paul Weiss Rifkind Wharton & Garrison, New York City.

Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 2000 U.S.App.LEXIS 14631 (5th Cir. 2000)[ELR 22:8:15]

Texas Supreme Court affirms summary judgment dismissing trial judge's defamation suit complaining about HBO documentary "Women on Trial"

In 1990, actress Lee Grant began production on a documentary for HBO entitled "Women on Trial." This documentary evolved into a series of vignettes that documented the alleged abuse of discretion exercised by family court judges in Texas. One vignette told the story of a little boy who was initially thought to have been sexually abused by his father. Subsequently, his mother moved to curtail the father's visitation rights, and was, in a surprising turn of events at the ruling of Judge Charles Dean Huckabee, deprived of any custody of the child. Judge Huckabee saw fit to instead award full custody to the father, the alleged perpetrator of the abuse. Naturally Grant, HBO, and various consultants pounced on this story, for it was sensational enough to capture the attention of their viewing audience.

Grant and HBO and their various employees quite scrupulously reviewed the facts and their sources, but while they tipped their hat to the fact that a doctor later confirmed that in his findings the abuse had occurred while the child was in the mother's custody rather than the father's, they did so only perfunctorily and in such a way that did not make it clear at all to the viewing public that Judge Huckabee was not a cavalier and uncaring administrator of justice.

Judge Huckabee later sued Grant and HBO and the production companies with which they were affiliated for defamation of himself as a public figure, a cause of action which required, if the judge were to prevail that he prove that that the statements published about him were false, defamatory, and implemented with actual malice.

This case, though it centers about a defamation action, is more precisely concerned with the correct standard to adopt in declaring summary judgment for the defendant on the basis of actual malice. Anderson v. Liberty Lobby (ELR 8:3:7) established the federal standard that demands that summary judgment in a defamation action will only be awarded if the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence. However, this case adopted a different standard.

The Texas Supreme Court determined that the plaintiff's heavy burden of proving actual malice at the trial stage itself was sufficient. The court reasoned that allowing a clear and convincing standard at the stage of summary judgment would conflict with Texas law. The law of Texas is that trial courts are not to weigh evidence at the summary judgment stage, and the clear and convincing test, of necessity, demands a weighing of the evidence. This exercise intrudes upon the province of the jury. Moreover, at the summary judgment stage, courts should only be deciding whether a material question of fact exists.

Furthermore, the court reasoned that it was uncomfortable with a clear and convincing standard at the time of summary judgment because such a standard is nebulously defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Because it is so vague, the court was reluctant to invoke it except in "extraordinary circumstances" when that type of heightened proof was required by constitutional or statutory requirements.

In a summary judgment hearing when not a single witness had yet graced the scene, it seemed to the court that it would be unrealistic to believe any issue might be honestly construed by anyone as clearly and convincingly established. Further, the court felt that, given both the paucity of evidence and witnesses at this stage as well as the vague definition of the term "clear and convincing," trial judges would be forced to make erratic and inconsistent decisions on this issue.

HBO, Grant, and the other production executives involved defended themselves against the charges of actual malice by presenting evidence of their research (transcripts of the hearings, interviews with the attorneys involved as well as Judge Huckabee himself) and the solid reputations for veracity and accuracy that those subordinates whose research they had relied upon had earned over countless years in their employ.

With the burden shifting to Judge Huckabee, he offered evidence that the defendants had purposefully portrayed him in an unflattering light and that their editorial choices similarly detracted from his image as a fair or caring judge. The court acknowledged that many of Grant's and HBO's choices over what to include and what not to include in their documentary may have portrayed the judge in an ill light. However, unfounded or not, in the absence of evidence that the defendants selected the material to portray the judge's record falsely, the First Amendment protected Grant and her cohorts' choices of which material to include and exclude in their broadcast, the court concluded.

The court held that Judge Huckabee did not offer evidence sufficient to indicate that Grant and HBO had acted with actual malice, and so summary judgment for Grant and HBO was affirmed.

Huckabee was represented by James Tynan Kelly, Houston. Time Warner was represented by Julie A. Ford, Austin.

Huckabee v. Time Warner Entertainment Co., 19 S.W.3d 413, 2000 Tex.LEXIS 43 (Tex. 2000)[ELR 22:8:16]

Painting seized from its rightful owner in Austria by Nazi official but later recovered by U.S. Forces was not "stolen" property for purposes of the National Stolen Property Act, even though U.S. Forces erroneously failed to give painting back to rightful owner

The U.S. Government filed an in rem action against the "Portrait of Wally," a painting by Egon Schiele, which was brought into the United States to be displayed at New York's Museum of Modern Art ("MOMA"). The painting was on loan from the Leopold Museum-Privatsiftung in Austria. The United

States claimed that the painting was stolen and sought its forfeiture under 19 U.S.C. § 1595a(c) and 22 U.S.C. § 401(a). The Leopold moved to dismiss the action on the basis that the painting was not "stolen," and Judge Michael Mukasey of the U.S. District Court for the Southern District of New York granted the Leopold's motion.

The painting's rightful owner was Lea Bondi Jaray, an Austrian Jew who owned an art gallery in Vienna. In 1938, Ms. Jaray's art gallery was seized by the Nazis and "aryanized" - given to an "aryan" named Friedrich Welz. The following year, Mr. Welz joined the Nazi party and visited Ms. Jaray at her home where he saw the painting at issue. After much pressure from Mr. Welz, Ms. Jaray and her husband turned the painting over to him and fled to London.

When World War II ended, Mr. Welz was held on suspicion of having committed war crimes, and his possessions, including the painting, were seized and placed under the authority of the U.S. Forces who were in charge of returning such possessions to the countries from where they were taken. Those countries were then supposed to return the possessions to their rightful owners.

The painting was erroneously given to a man named Heinrich Rieger. After changing hands several times, the painting was eventually sold to the Leopold, who then loaned it to MOMA where it was displayed from October, 1997 through January, 1998. Three days after MOMA's exhibit ended, a series of legal proceedings was instituted in regard to the painting. The United States ultimately filed this lawsuit in September of 1999, claiming that the painting was stolen and was therefore imported into the United States in violation of the National Stolen Property Act, 18 U.S.C. § 2314.

The Leopold relied upon common law doctrine and argued that even if the painting was stolen by Mr. Welz, it "ceased being stolen when it was recovered by the United States Forces." The United States argued that the doctrine was irrelevant for two reasons: first, Austrian law applied; and second, the doctrine only applies under U.S. law when the police use stolen goods as part of a sting operation. Judge Mukasey rejected both of the government's arguments.

Judge Mukasey analyzed relevant case law and concluded that "federal law controls the question of whether an item is stolen." Local law - whether it is foreign or state law - controls issues such as who owns the property or whether the receiver of the stolen property has any interest in it. Judge Mukasey noted that these issues are distinct from the "question of the conditions under which a once-stolen item ceases to be stolen." That question, the judge ruled, is a matter of federal law. Thus, U.S. law and not Austrian law applied.

No support was found for the government's second argument, i.e. that the doctrine relied upon by the Leopold only applied in situations where the police recover stolen goods and then deliver them to someone as part of a sting operation. Judge Mukasey noted that while some cases discussing the doctrine involve police sting operations, the cases which first articulated the doctrine did not do so in the context of entrapment or any similar concept.

Instead, ruled Judge Mukasey, the doctrine is based upon agency principles. When a stolen item is recovered by its owner or its owner's agents, the item ceases to be stolen. Since enforcement officials, such as the police, are deemed to be the agents of the true owners of stolen property, when such property is recovered by an enforcement agency, the property ceases to be stolen. Whether or not the true owners consent to have their property recovered by the police or similar agency is irrelevant. Judge Mukasey recognized that the law has charged such agencies to do so, and therefore, the agencies are deemed to be acting on behalf of the owners.

Because the U.S. Forces were charged with recovering the items which had been stolen by the Nazis, Judge Mukasey concluded that the U.S. Forces were acting as the agents of Ms. Jaray. Thus, once the U.S. Forces took possession of the painting, it was no longer stolen property.

The government was represented by Mary Jo White, United States Attorney, New York City. The Leopold Museum was represented by William M. Barron, Alexander & Green, New York City, and Stephen M. Harnik, New York City.

United States v. Portrait of Wally, 105 F.Supp.2d 288, 2000 U.S. Dist. LEXIS 10029 (S.D.N.Y. 2000)[ELR 22:8:17]

Production company was at fault in accident on set of "NYPD Blues," but accident didn't cause crewmember's injuries so judgment against crewmember was proper

A jury's verdict that Steven Bochco Productions was at fault for an auto accident on the set of "NYPD Blues," but the accident was not the cause of the crewmember's injuries, has been upheld by the Appellate Division of the New York Supreme Court.

Since the jury determined that the crewmember's injuries were not the result of the accident, a judgment was entered in favor of the production company.

The crewmember, Peter Senno, appealed. But in an unsigned Memorandum opinion, the Appellate Division noted that there was evidence that Senno's injuries were the result of a degenerative condition and prior accident, neither of which was caused or exacerbated by the accident on the TV production set. "Consequently," the court concluded, "the jury's verdict on the issue of damages" - that Senno should be awarded none - "was supported by a fair interpretation of the evidence."

Senno represented himself. Steven Bochco Productions was represented by Randy Faust, Faust Goetz Schenker & Blee, New York City.

Senno v. Picture Cars East, *Inc*., 712 N.Y.S.2d 52, 2000 N.Y.App.Div.LEXIS 8591 (App.Div. 2000)[ELR 22:8:18]

Owner of movie website Bigstar.com fails to enjoin talent site's use of NextBigStar.com

A federal court in New York has denied an application for a preliminary injunction sought by the owner of the website Bigstar.com against the operator of the website NextBigStar.com.

Bigstar.com offers information and chat about movies and movie stars and sells videos. NextBigStar.com gives aspiring performers an opportunity to post their resumes and self-produced performance videos online.

Despite some similarity between their names and an overlap in their fields of interest, federal District Judge Victor Marrero ruled Bigstar failed to show that NextBigStar's mark would create a likelihood of confusion among consumers. This was so, Judge Marrero explained, because Bigstar's mark is weak, NextBigStar's name is not sufficiently similar, actual competition between the two is insubstantial, Bigstar doesn't intend to expand into the talent business, there was no evidence of actual confusion, and the websites' visitors are sufficiently sophisticated to distinguish between the two.

Bigstar was represented by Jeffrey A. Conciatori, Orrick Herrington & Sutcliffe, New York City. Next Big Star was represented by Steven J. Stein, Kay Collier, New York City.

Bigstar Entertainment, Inc. v. Next Big Star, Inc., 105 F.Supp.2d 185, 2000 U.S.Dist.LEXIS 4924 (S.D.N.Y. 2000)[ELR 22:8:19]

Court approves allocation of settlement fund in coaches' suit against NCAA

A plan for the allocation of a settlement fund among college coaches, in a class action antitrust lawsuit filed on their behalf against the National Collegiate Athletic Association, has been approved by Federal District Judge Kathryn Vratil.

Earlier in the case, coaches won pre-trial rulings that an NCAA rule limiting the salaries that could be paid to certain coaches violated federal antitrust law (ELR 18:2:10, 20:3:14, 20:7:23). At trial, a jury returned a verdict in favor of the coaches for $22.3 million, which Judge Vratil trebled to $66.9 million. The judge awarded the coaches an additional $5 million "as a net present value adjustment," thus bringing the total judgment to almost $72 million. At that point, the

NCAA decided to settle the case, rather than appeal the judgment; and it did so for $54.4 million.

After paying the settlement, the NCAA was out of the case. But the case was not entirely over, because the $54.4 million settlement fund had to be allocated among the coaches who made up the class.

At that point, another round of litigation began, among the coaches who were entitled to receive portions of the fund. This round of litigation appears to have been triggered by the fact that the plan of allocation originally proposed by class counsel was deemed to be unfair, by class counsel, because it overcompensated some coaches at the expense of others. As a result, a revised plan was proposed which reduced the share of those who would have been overcompensated and increased the share of those who deserved more.

Coaches were able to see whether they were helped or hurt by the revised plan. And 26 of them objected to the revision. Judge Vratil considered, but rejected, each of their objections. She found that the revised plan of allocation "is fair, reasonable and adequate," because it "effectively matches each [coaches'] recovery to the strength of his or her claim." The judge noted that the value of each coach's claim was "not a reflection of his or her effort or contribution to his or her respective school." Instead, "it is a reasonable estimate of the extent of damages which each coach sustained because of the rule."

Law v. National Collegiate Athletic Association, 108 F.Supp.2d 1193, 2000 U.S.Dist.LEXIS 11831 (D.Kan. 2000)[ELR 22:8:19]

New Orleans Saints entitled to workers compensation credit for full $200,000 paid to injured player Jim Dombrowski

The New Orleans Saints were entitled to credit, against the workers compensation benefits owed injured player Jim Dombrowski, for the full $200,000 the team paid him during the season following his injury, a Louisiana appellate court has affirmed.

Dombrowski was injured during the 1996 season and did not play at all in 1997. The Saints did, however, pay him $200,000 in sixteen weekly installments during the '97 season, as required by an injury protection provision of the NFL Collective Bargaining Agreement. Dombrowski was entitled to receive workers compensation benefits, as well; and the Saints were entitled to some credit against those benefits for the $200,000 the team had already paid.

The only disagreement between Dombrowski and the Saints was whether that credit was for sixteen weeks or for the full $200,000.

A Louisiana workers compensation judge decided the Saints were entitled to credit for the full $200,000, because the state's workers compensation statute explicitly provides that benefits payable to professional athletes shall be offset or reduced by the amount paid by the employer "on a dollar-for-dollar basis and not just on a week-to-week basis."

Though the statute is clear, the Saints had earlier lost a similar case to player Tom Ricketts. There, a federal court of appeals held that the Saints were only entitled to a week-for-week credit, rather than a dollar-for-dollar credit, as a result of that court's interpretation of the Standard NFL Player Contract. (ELR 19:6:14)

Dombrowski, of course, relied heavily on the Ricketts decision. But in an opinion by Judge John

Pettigrew, the Court of Appeal of Louisiana "respectfully disagreed" with the conclusion reached in Ricketts. (ELR 22:5:20)

The law in Louisiana is now in total disarray, because in ruling against Dombrowski, Judge Pettigrew said nothing about another, even more recent, decision in a case involving the Saints and player Paul Green. In the Green case, another circuit of Judge Pettigrew's own Louisiana Court of Appeal sided with Green, saying that it agreed with and adopted as its own the decision in the Ricketts case.

Dombrowski was represented by Robert L. Hackett, New Orleans. The Saints were represented by Sammie M. Henry, Baton Rouge.

Dombrowski v. New Orleans Saints, 764 So.2d 980, 2000 La.App.LEXIS 1045 (La.App. 2000)[ELR 22:8:19]

LSU defeats suit by unsuccessful bidder for sports broadcasting rights

LSU has won a lawsuit filed against it by an unsuccessful bidder for the rights to televise LSU sporting events (outside Baton Rouge) - but to do so, the university had to take the case to the Court of Appeals of Louisiana.

In response to a request by LSU for bids for broadcasting rights to its sporting events, Talbot and Talbot, Inc., submitted the bid that had the highest guaranteed payments and percentages. Nevertheless, LSU awarded its broadcasting rights to a joint venture between Louisiana Network and Baton Rouge Broadcasting. Talbot and Talbot sued LSU, contending that by awarding the broadcast rights to the joint venture, LSU violated Louisiana's procurement code - a statute that requires contracts for "consulting services" to be awarded to the best bidder. A jury agreed with Talbot and Talbot and awarded it $376,319 in damages.

LSU appealed, and finally prevailed. The Court of Appeals ruled that broadcast rights are not "consulting services," and thus the trial court erred in entering a judgment in favor of Talbot and Talbot based on that statute. The appellate court rendered judgment in LSU's favor and dismissed Talbot and Talbot's suit.

Talbot and Talbot was represented by Lindsey Leavoy and Charles William Roberts, Baton Rouge. LSU was represented by Harry J. Phillips, Baton Rouge.

Talbot and Talbot, Inc. v. Louisiana State University, 764 So.2d 975, 2000 La.App.LEXIS 1041 (La.App. 2000)[ELR 22:8:20]

Suit against stadium by injured Miami Dolphins fan should not have been dismissed

A lawsuit filed by Miami Dolphins ticket holder Michael Covert against the owner of the Dolphins' stadium, as a result of injuries Covert suffered during a game, should not have been dismissed, a Florida appellate court has ruled, because the "exculpatory clause" in Covert's season ticket contract was ambiguous.

Covert was injured by drunken fans who beat him up (for reasons not reported in the court's opinion). His lawsuit against the stadium was dismissed by a trial court, in response to the stadium owner's motion for judgment on the pleadings.

In a Per Curiam opinion, the appellate court noted that the contract Covert signed when he bought his season tickets contained several ambiguities.

Among other things, it said that he would not have "any greater or lesser rights and privileges with respect to admission to the Stadium" than those given to other ticket holders. Nevertheless, Covert was able to show that the contracts of "regular" season ticket holders did not contain exculpatory clauses, as did his contract for "club-level" season tickets.

The appellate court said that this and other clauses were "so ambiguous that an ordinary and knowledgeable party would not know what he or she was contracting away." For this reason, the court held that Covert's lawsuit should not have been dismissed on the pleadings, because interpretation of the ambiguous clauses was necessary.

Covert was represented by Rhea P. Grossman, McGrane and Nosich. The stadium was represented by William G. Edwards, Marlow Connell Valerius Abrams Adler and Newman.

Covert v. South Florida Stadium Corp., 762 So.2d 938, 2000 Fla.App.LEXIS 5818 (Fla.App. 2000)[ELR 22:8:20]

Pro sports leagues win favorable rulings in RICO trading card cases

Federal courts in New York and California have sided with the merchandising arms of Major League Baseball, the NFL, the NBA, and the NHL in a series of RICO lawsuits filed against them on behalf of those who bought packs of licensed trading cards hoping they would contain "chase" cards redeemable for cash prizes.

In New York, District Judge Eugene Nickerson refused to dismiss or transfer a lawsuit filed by Major League Baseball Properties and others seeking a declaratory judgment that card purchasers had not been injured in their "business or property," and thus do not have standing to sue under the federal RICO statute. Judge Nickerson took particular exception to the fact that the card purchasers had filed thirteen separate RICO cases in four different federal districts "in an effort to coerce financial settlements." He ruled that declaratory relief was the appropriate way to resolve these cases, and that his courtroom was the right place to do it.

Some of those thirteen cases were filed in California. In earlier proceedings in the California cases, District Judge Rudi Brewster had refused to dismiss the card purchasers' RICO claims, though he did stay further action pending the outcome of the New York declaratory relief case (ELR 21:7:17).

Once Judge Nickerson ruled in New York, Judge Brewster reopened the California cases, and dismissed them. Judge Brewster finally agreed with Major League Baseball Properties and its co-defendants; he held that the card purchasers had not been injured in their "business or property" and thus didn't have standing to file RICO claims.

Major League Baseball Properties v. Price, 105 F.Supp.2d 46, 2000 U.S.Dist.LEXIS 12851 (E.D.N.Y. 2000); *Dumas v. Major League Baseball Properties*, 104 F.Supp.2d 1220, 2000 U.S.Dist.LEXIS 11864 (S.D.Cal. 2000); *Rodriquez v. Topps Co.*, 104 F.Supp.2d 1224, 2000 U.S.Dist.LEXIS 13268 (S.D.Cal. 2000); *Schwartz v. The Upper Deck Co.*, 104 F.Supp.2d 1228, 2000 U.S.Dist.LEXIS 11863 (S.D.Cal. 2000)[ELR 22:8:21]

Former friends state valid claims for constructive trust and breach of contract against holder of New York Jets seasons tickets

The Appellate Division of the New York Supreme Court has upheld the refusal of a trial court to dismiss claims for constructive trust and breach of contract brought against the holder of New York Jets season tickets, as a result of his sale of those tickets to others in 1999.

For more than 30 years, Saul Lipton bought season tickets - in his own name - for himself and for Norman Donnenfeld and I. Lawrence Brand. When Lipton got divorced and moved to Florida, he turned the tickets over to Donnenfeld, who later sold them to others. Brand and Lipton sued Donnenfeld seeking a constructive trust and for breach of contract.

In an unsigned Memorandum opinion, the Appellate Division has held that the constructive trust claim is valid, because it alleged a confidential relationship between Lipton and Donnenfeld, and alleged that Donnenfeld had agreed to administer the Jets tickets as Lipton had before or to return them to Lipton and Brand. The Appellate Court also held that the breach of contract claim is not barred by the Statute of Frauds, because even though the contract was not in writing, Donnenfeld's alleged promise to reconvey the tickets could have been performed within a year.

Lipton was represented by Jason L. Abelove, Garden City N.Y. Donnenfeld was represented by Gregg Reed, Proskauer Rose, New York City.

Brand v. Lipton, 711 N.Y.S.2d 486, 2000 N.Y.App.Div.LEXIS 8311 (App.Div. 2000)[ELR 22:8:21]

Disabled student who wasn't selected for high school basketball team loses suit under Individuals with Disabilities Education Act, because federal District Court finds that coach evaluated student in non-discriminatory manner

A high school student who wanted to play basketball, but wasn't selected for the team, has lost his lawsuit under the Individuals with Disabilities Education Act against the Eagle-Union school board. A federal District Court in Indianapolis has granted the school board's motion for summary judgment, bringing the case to an end.

The Individuals with Disabilities Education Act (IDEA) provides that parents and guardians are entitled to procedural safeguards to ensure that their disabled children's educational needs are being met by their school districts. The Act guarantees a "free, appropriate, [and] public" education.

IDEA delegates supervisory authority for the implementation of the Act to state educational agencies (SEAs) which are responsible for administering funds and setting up administrative checks over the local educational agencies (LEAs). In addition, SEAs, in the absence of an LEA to fulfill the need of a student, may step in and provide the accommodation to the student directly. However, generally, the task of direct administration of an individually tailored program of accommodation devolves upon the LEA. While a hierarchical chain of command in this ballet of accommodation undoubtedly exists, under IDEA, the ultimate responsibility for the sought after "free appropriate public education" lies with the SEA.

IDEA also provides to the parents of disabled children the right to question, with all the benefits afforded by due process, the measures being taken in regard to their children. To this end, parents may examine relevant records, seek an independent evaluation of their child's status; and, alas, for the SEAs and LEAs involved in this litigation, present complaints with respect to the provision of the accommodation.

IDEA requires that these complaints be heard by independent hearing officers (IHOs) who pledge no allegiance in their capacities either to the state or LEA in question. IDEA's goals are implemented with deference to those ideals expressed by the Americans with Disabilities Act that decrees that no qualified individual shall be excluded by any activity merely by reason of that disability.

The parents of a student attending Eagle-Union's high school sought a hearing under IDEA, because their child, afflicted by numerous disabilities which made his academic studies difficult to pursue, had been, they felt, cut unfairly from basketball tryouts. IHOs were convened and the edicts of due process, the court announced, were precisely followed.

The court found as well that the coach in question had afforded the student the same opportunity to make the team as he had everyone else and that the student had been "graded" in a non-discriminating manner during this process based on the subjective and objective criteria habitually used by this coach.

Doe v. Eagle Union Community School Corp., 101 F. Supp.2d 707, 2000 U.S.Dist.LEXIS 8278 (S.D.Ind. 2000)[ELR 22:8:21]

High school basketball player wins injunction against state athletic association, because she was likely to show she satisfied criteria for hardship exception to transfer rule

Jessah Martin, a high school student, recently prevailed against the Indiana High School Athletic Association (IHSAA) in a case which debated whether or not Martin should be permitted through a preliminary injunction full participation in high school sports at the new high school to which she transferred.

When Martin, a proficient and skilled varsity basketball player, first transferred from Bellmont High School to Bishop Luers High School, IHSAA granted her only junior varsity eligibility at the latter institution. IHSAA determined that under their Eligibility Rules for transfer students, Martin was only entitled to this limited eligibility, a curtailment to which she would be subject for a period of 365 days dating from her last participation in sports at Bellmont.

It was at this point that Martin sought and was granted a hearing with IHSAA but to no avail. They held fast to their belief that Martin should be granted only partial eligibility. Martin then sought both a preliminary injunction and declaratory relief at the trial court level. The trial court found that Martin should, in fact, be granted full participation in varsity sports at Bishop Luers. Strangely enough, Martin, after all this legal brouhaha chose not to play basketball at all, and the IHSAA chose to appeal.

One of the four factors that Martin had the burden of proving to obtain a preliminary injunction was that her case possessed a reasonable likelihood of succeeding on its merits. This factor for awarding a preliminary injunction was the one at the appeal level upon which IHSAA most saliently focused. Naturally, Martin's burden in proving a substantial likelihood did not require her to prove prior to a judgment being entered that she would indeed win. Rather, it was only necessary for Martin to demonstrate that she had a "better than negligible chance of succeeding on the merits."

For Martin to be eligible under the IHSAA's transfer rules which would permit her to full athletic participation at her new high school, she would have to prove either, quite logically, that she met the requirements for full eligibility as they were enunciated under the transfer rule, or, alternatively, if she did not meet these requirements, that her case was a hardship exception.

IHSAA centered its appeal argument around the contention that the trial court erred in determining that IHSAA's decision to curtail Martin's athletic activities was not supported by substantial evidence.

Martin apparently had first appealed to IHSAA as an emancipated minor. She based her status as "emancipated" upon the fact that having experienced a great deal of difficulty in her own home, she had moved into the home of a former basketball coach, Harry Miller. Though both her own family's home and Miller's were located in the Bellmont district, Martin opted to switch schools for a number of reasons to be discussed subsequently. Were Martin to be properly viewed by IHSAA or the trial court as "emancipated" she would be, under the transfer rules, entitled to immediate eligibility without a change of residence into a new school district by her own parents. IHSAA seems to press this point as a means of inferring that Martin knew she had no case under the transfer rules themselves and thus attempted to bypass them by portraying herself as an emancipated minor.

The trial court did agree that Martin by virtue of a move into a friendlier domestic atmosphere could not rightly dub herself emancipated, but it did take issue with IHSAA's further contention that Martin was not eligible under the hardship portion of the transfer rules.

The Supreme Court has held that when a student fails to meet an exception to the transfer rules, he or she is only entitled to limited eligibility unless the hardship rules applies. The hardship rule then becomes the root issue of whether or not Martin or the IHSAA will prevail.

Martin, under the hardship rule had the burden of proving that the transfer which spawned this whole controversy was beyond her control, that the purpose and spirit of the transfer rule would still be met were she to be granted eligibility, and that were she denied eligibility to play sports because of the limitations of the hardship rule she would suffer an undue burden.

The trial court found that Martin had met this burden. The IHSAA was of course not in accord with this finding.

IHSAA argued that the circumstances that spurred on Martin's transfer were not beyond her control. The trial court, to support its opposite conclusion, pointed to some very "uncontrollable" circumstances besetting Martin at the time of her decision to transfer. Among these was that fact that the hapless Martin suffered great angst because of the turbulence of her home life. Such turbulence somehow became the fodder of rumors at Bellmont High School, thus making matters even more insupportable for Martin. Martin also suffered the whispers of those at Bellmont High School who assured all that would listen that she was embroiled in an affair with a former coach. Based on all of these adverse factors, a school administrator suggested that both the changes in residence and school would be appropriate. Bishop Luers High School seemed an apt choice as it was on Martin's new custodian's way to and from work.

IHSAA, by its own by-laws, considers an illness that prevents a student from meeting its eligibility requirements a hardship and emotional disturbances such as those suffered by Martin were contained under the definition of what IHSAA considered an illness.

It seems as if IHSAA's contention that Martin had control over her transfer to Bishop Luers is prompted by the logic that she ultimately made the affirmative decision to transfer. But by this logic, any students who transferred, unless they were wheeled away from one school in restraints and presented at another, would have control of their decision. Rather, says the court, a student's control or lack thereof in the formulation of a decision to transfer, should be measured by the uncontrollable nature of the circumstances that spur on the ultimately voluntary and "controlled" decision of the student to transfer.

IHSAA then argued that the spirit of the rule would be violated were Martin to be given full eligibility without the 365-day waiting period. They contend that the spirit of the rule does not brook students transferring for the mere purpose of taking advantage of a superior athletic facility or team. Such underhandedness they contend could lead to students already participating in athletics at a school being displaced by new students who have transferred in violation of the rules. IHSAA contends that Martin may have presented good reasons for her transfer, but that possibly beneath these valid reasons, there existed the ulterior motive of matriculating at a high school with superior athletic facilities.

The Appeals court found this argument insupportable, because Martin did offer good, valid reasons for her transfer, and because were the IHSAA allowed to suspect each student applying for transfer of invisible and insidious underlying motives for the transfer, they would be in a position to deny every and any student with valid reasons or not. Martin's transfer would also not displace any athletes already playing varsity basketball at Bishop Luers because two free positions on the team were available.

Finally, IHSAA indicated that Martin would suffer no undue hardship from the limited eligibility they wished to grant her. But this, again, was erroneous. Martin, a skilled athlete, were she relegated to junior varsity, would not be allowed the occasion to try out for college coaches. Given her sad family life, it appears that her parents will not be helping her with college, and were she not allowed to attempt to help herself through athletic college recruitment opportunities she would indubitably be subject to undue hardship.

The Appeals court, in the end, affirmed the lower court's decision, and Martin prevailed.

The IHSAA was represented by Robert M. Baker III, Johnson Smith Pence & Heath, Indianapolis. Martin was represented by Edward L. Murphy Jr., Miller Carson Boxberger & Murphy, Fort Wayne.

Indiana High School Athletic Ass'n v. Martin, 731 N.E.2d 1, 2000 Ind.App.LEXIS 883 (Ind.App. 2000)[ELR 22:8:22]

High school swim coach not immune from unreasonable search and privacy claims of team member who coach asked to take pregnancy test

The swim team coach at a Pennsylvania high school is not immune from unreasonable search and privacy claims by a team member whoM the coach asked to take a pregnancy test, a federal Court of Appeals has held. As a result, it reversed the dismissal of a lawsuit filed on the team member's behalf against the coach, and has remanded the case to the District Court for further proceedings.

Writing for the appellate court, Judge Jane Roth ruled that "Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion." The judge ruled that swim coach Michael Seip was not entitled to immunity, because he should have known that by repeatedly urging team member Leah Gruenke to take such a test, his conduct violated this "clearly established right."

Moreover, the coach discussed with others at the high school his suspicions that Gruenke was pregnant. Doing so violated her "recognized right . . . to be free from disclosure of personal matters. . . ." For that reason, the coach was not immune from Gruenke's privacy claim; and its dismissal was reversed as well.

Gruenke was represented by Richard J. Orloski, Orloski Hinga & Pandaleon, Allentown. Seip was represented by Richard A. Polachek, Polachek Pecile & Smith, Wilkes-Barre.

Gruenke v. Seip, 225 F.3d 290, 2000 U.S.App.LEXIS 21082 (3rd Cir. 2000)[ELR 22:8:23]

Maine radio station owner loses right to compel arbitration of breach of employment contract and misappropriation of trade secret claims against former on-air radio announcer due to its extensive litigation of the dispute in Maine Superior Court prior to its demand for arbitration

Saga Communications of New England, Inc. is the owner of a radio station WMGX in Portland, Maine. Lori Voornas was a radio announcer and morning show co-host on WMGX during the term of her three-year employment contract with Saga from 1996 until 1999. When Voornas' employment contract expired, she chose not to continue her employment with Saga and instead took a job at one of Saga's competitors, Citadel Communications Corporation. At the beginning of her employment with Citadel, Voornas acted as a consultant and did not perform on-air services. Eventually, Voornas began appearing on-air for Citadel's radio station, WCLZ (now WPNT).

The terms of Saga's contract with Voornas prohibited her from performing services for any of Saga's competitors within a 75-mile radius for a period of six months. When Saga learned of Voornas' employment with Citadel two months after her employment with Saga ended, Saga filed an action against her in the Superior Court for the State of Maine, Cumberland County, alleging breach of the employment contract and misappropriation of trade secrets.

Two months after filing its suit, after losing two attempts to enjoin Voornas from her continued employment at Citadel and after cross motions for summary judgment were briefed, Saga attempted to invoke the binding arbitration clause of its employment agreement with Voornas. Maine Superior Court Judge

Mills held that Saga had waived its right to demand arbitration by its repeated and consistent attempts to pursue its remedies in court. Saga filed an appeal of the denial of its Motion to Compel Arbitration. Chief Justice Daniel Wathen of the Supreme Judicial Court of Maine affirmed the denial of Saga's motion and held that Saga had waived its rights to demand arbitration.

Saga's first argument, rejected by Justice Wathen, was that the plain language of the employment contract prevented a finding of a waiver no matter how extensively the matter had been litigated in court. Specifically, Saga relied upon Rule 37 of the National Rules for the Resolution of Employment Disputes (incorporated by reference into the employment agreement) which provides: "No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Justice Wathen reasoned, in keeping with the holdings of other courts that had interpreted this provision, that this clause is intended merely to allow a party to institute legal proceedings to maintain the status quo pending arbitration. Interpreting the clause as broadly as Saga urged would "undermine a court's ability to control the proceedings before it" because it would allow "the losing party to test the water before taking the swim."

The second argument espoused by Saga was also rejected. Saga contended that because the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq, created a strong policy in favor of arbitration, under the facts of this case, waiver should not have been found. Justice Wathen recognized that any doubts should be resolved in favor of arbitration and that "waiver is not to be lightly inferred," However, Justice Wathen also acknowledged that there is "universal agreement" among courts that have addressed the issue and found a waiver "that the party now seeking to compel arbitration must, at the least, have [sic] undertaken a course of action inconsistent with its present insistence upon its contractual right to arbitration." The relevant question, according to Justice Wathen, is whether the parties have litigated "substantial issues going to the merits."

Based upon Saga's two attempts to obtain injunctions against Voornas and the fully briefed cross motions for summary judgment, Justice Wathen found that the parties had indeed litigated "substantial issues going to the merits." Saga's motions for injunctive relief were not, as Saga had argued, merely attempts to maintain the status quo.

Saga's final argument was that before a waiver could be found, Voornas would have to demonstrate prejudice. Justice Wathen found a split among courts as to whether a showing of prejudice was required, but ultimately held that he did not need to resolve the issue since he believed that Voornas was prejudiced. First, during the two and a half months that the case had been pending, the parties had engaged in extensive litigation, filing numerous motions and requests for expedited relief that would not have been necessary had Saga timely requested arbitration.

Second, Justice Wathen found that by seeking to compel arbitration after losing its attempts to enjoin Voornas, Saga was attempting to force her to "relinquish her current favored position in this dispute." The federal policy favoring arbitration, Justice Wathen reasoned, "was not intended to provide litigants with successive opportunities to prevail through revisitation of the same issues in different forums."

Finally, Justice Wathen found support for prejudice against Voornas in Saga's own appellate brief. Therein, Saga expressed concern over the fact that its appeal may not be heard prior to the expiration of the six-month non-compete clause. Saga argued that an arbitration panel would have the ability to extend the six-month period if it found Voornas had breached her agreement. Justice Wathen faulted Saga for this problem, however, noting that Saga was aware of the six-month deadline when it chose to "test the judicial waters" before seeking arbitration. Under these circumstances, Justice Wathen found that Voornas should not be faced with a possible extension of the six-month period.

Saga Communications was represented by James G. Goggin, Verrill & Dana, Portland. Voornas was represented by Robert W. Kline, Portland.

Saga Communications of New England, Inc. d/b/a WMGX v. Voornas, 756 A.2d 954, 2000 Me. LEXIS 157 (Me. 2000)[ELR 22:8:24]

Foreign-made bubble bath bottles shaped like Sesame Street and Peanuts characters may be imported duty-free

Foreign-made bubble bath bottles shaped like Sesame Street and Peanuts characters are "toys" rather than "plastic bottles for the conveyance of goods," the United States Court of International Trade has held.

The U.S. Customs Service had imposed duties of 3% on the bottle bodies and 5.3% on the bottle caps, just as it does on conventionally shaped bottles, under the Harmonized Tariff Schedule. The Tariff Schedule does not impose any duties at all on "toys representing animals or non-human creatures." Thus, as a result of the ruling, bottles shaped like Sesame Street and Peanuts characters may be imported duty-free.

The bottles were manufactured pursuant to licensing agreements with Children's Television

Workshop and United Feature Syndicate. Neither agreement authorized the manufacture of "toys"; and Minnetonka Brands, the bottle-importer, understood it could not sell or advertise the bottles as toys. Nevertheless, Judge Evan Wallach was influenced, in part, by the fact that mothers generally purchased the bubble bath in those bottles "under pressure from their children," and most mothers bought it "mainly for the amusement value of the container, rather than the bubble bath inside."

Minnetonka Brands was represented by Joseph S. Kaplan, Ross & Hardies, New York City. The Government was represented by David W. Ogden, U.S. Department of Justice.

Minnetonka Brands, Inc. v. United States, 110 F.Supp.2d 1020, 2000 U.S.C.I.T.LEXIS 87 (CIT 2000)[ELR 22:8:25]

FCC defeats Constitutional and Religious Freedom Act claims of unlicensed radio microbroadcasters

In separate but similar cases, the Federal Communications Commission has defeated two low power radio stations, both of which claimed a legal right to broadcast even though neither ever sought, much less obtained, a license to do so, as required by federal law.

In Connecticut, District Judge Peter Dorsey granted the Government's request for a preliminary injunction barring further broadcasts by an unlicensed microbroadcaster that carried Spanish language religious programming. The judge held that since the station had never applied for a license or a waiver, it did not have standing to argue that the licensing requirement violates the First Amendment and the Religious Freedom Restoration Act.

In Michigan, a federal appellate court affirmed the dismissal of a lawsuit that sought to bar the FCC from taking any action to stop broadcasts by another unlicensed microbroadcaster. This case too alleged that the enforcement of federal licensing requirements would violate the broadcaster's rights under the First Amendment and the Religious Freedom Restoration Act. But Judge Ronald Gilman held that the District Court did not have jurisdiction to hear the broadcaster's lawsuit, because by statute, challenges to FCC licensing decisions may be heard only by the Court of Appeals for the District of Columbia.

In the Connecticut case, the broadcaster was represented by James W. Cummings, Moynahan Ruskin Mascolo & Minnella, Waterbury; the Government was represented by Alan M. Soloway, U.S. Attorney's Office, New Haven. In the Michigan case, the broadcaster was represented by Patrick M.

Edwards and Kevin S. Ernst, Law Offices of K.S. Ernst, Detroit; the Government was represented by Mark S. Davies, U.S. Department of Justice, Washington D.C.

U.S./F.C.C. v. Waterbury Hispanic Communications, 109 F.Supp.2d 80, 1999 U.S.Dist.LEXIS 22119 (D.Conn. 1999); *La Voz Radio de la Communidad v. F.C.C.*, 223 F.3d 313, 2000 U.S.App.LEXIS 18378 (6th Cir. 2000)[ELR 22:8:25]

Virginia statute prohibiting online display of material harmful to juveniles is unconstitutional

A Virginia statute that makes it a crime to display material that is harmful to juveniles, including "electronic files" and "messages containing images," is unconstitutional, federal District Judge James Michael has ruled.

The constitutionality of the statute was challenged by Internet service providers, organizations representing booksellers and publishers, individual authors and artists, and others. They argued that the statute violated their First Amendment free speech rights as well as their rights under the Commerce Clause. Judge Michael agreed.

The statute ran afoul of the First Amendment, the judge reasoned, because: it was not narrowly tailored to communications juveniles were likely to receive and thus criminalized communications to adults; it was not the most effective means of shielding juveniles from harmful materials online; less restrictive means are available to accomplish the state's goal of protecting children; and it was substantially overbroad.

Judge Michael held that the statute also violated the Commerce Clause of the Constitution. Website operators in other states could be subject to the Virginia statute, the judge explained, because there is no way to prevent Virginia residents from accessing websites outside that state. Thus, to comply with the Virginia statute, websites in other states would have to alter their materials to comply with the "rigors" of the Virginia statute.

Those challenging the statute were represented by Garrett M. Smith, Michie Hamlett Lowry Rasmussen & Tweel, Charlottesville. Virginia was represented by Mark L. Earley, Office of the Attorney General, Richmond.

PSINet, Inc. v. Chapman, 108 F.Supp.2d 611, 2000 U.S.Dist.LEXIS 11621 (W.D.Va. 2000)[ELR 22:8:26]

Los Angeles adult business ordinance is unconstitutional

A Los Angeles ordinance that prohibits the operation of an adult bookstore and an adult video arcade in the same building is unconstitutional, the Ninth Circuit Court of Appeals has affirmed.

The constitutionality of the ordinance was challenged by the owners of two adult bookstore/video arcade businesses. Federal District Judge Dean Pregerson agreed that the ordinance was unconstitutional and enjoined its enforcement.

On appeal, Judge Michael Daly Hawkins affirmed. He held that although the city has a "substantial government interest" in reducing crime, the challenged ordinance was not designed to serve this interest. In adopting the ordinance, the city had relied on a study showing the adverse effects of multiple adult businesses in a neighborhood. But Judge Hawkins concluded that the study said nothing about the effects of selling books and exhibiting videos within a single place of business.

The adult business owners were represented by G. Randall Garrou, Weston Garrou & DeWitt, Los Angeles. The city was represented by Michael L. Klekner.

Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 2000 U.S.App.LEXIS 18059 (9th Cir. 2000)[ELR 22:8:26]

Previously Reported:

The United States Supreme Court has granted petitions for certiorari in three cases of interest to readers of the Entertainment Law Reporter: PGA Tour v. Martin, 121 S.Ct. 30 (2000), 2000 U.S.LEXIS 4865, in which the 9th Circuit held that the Americans with Disabilities Act requires the PGA to allow Casey Martin to use a golf cart (ELR 22:2:10); New York Times v. Tasini, 121 S.Ct. 425 (2000), 2000 U.S.LEXIS 7321, in which the 2nd Circuit held that the electronic republication of the New York Times and other periodicals on Lexis and CD-ROM infringed the copyrights to articles authored by freelance journalists (ELR 21:9:10, 22:3:19); and United States v. Cleveland Indians Baseball Co., 121 S.Ct. 338 (2000), 2000 U.S.LEXIS 6857, an unpublished case from the 6th Circuit that raises the same issues as San Francisco Baseball v. United States which held that "loss of mobility" payments made to former baseball players were "wages" for which the team had to pay Social

Security and Federal Unemployment taxes (ELR 22:3:16).

The United States Supreme Court has denied petitions for certiorari in these previously reported cases: Paramount Pictures v. Wendt, 121 S.Ct. 33 (2000), 2000 U.S.LEXIS 4886, in which the 9th Circuit ruled that actors George Wendt and John Ratzenberger are entitled to a trial in their right of publicity lawsuit alleging that figures displayed in airport bars depict them in the roles as "Norm" and "Cliff" in the television series "Cheers" (ELR 20:1:7); Songbyrd, Inc. v. Estate of Grossman, 121 S.Ct. 68 (2000), 2000 U.S.LEXIS 5155, in which the 2nd Circuit affirmed the dismissal, as time-barred, of a lawsuit by the successor of musician Henry Roeland Byrd to recover possession of masters tapes from Bearsville Records (ELR 22:3:9); Horner v. Kentucky High School Athletic Ass'n, 121 S.Ct. 69 (2000), 2000 U.S.LEXIS 5160, in which the

6th Circuit ruled that Title IX was not violated by the refusal of the Athletic Association to sponsor fast-pitch softball for girls (ELR 22:3:18); Yerkovich v. MCA, Inc., 121 S.Ct. 171 (2000), 2000 U.S.LEXIS 5838, in which the 9th Circuit affirmed, without a published opinion, a District Court ruling that a "Miami Vice" writer's net profits claim against Universal could proceed to trial, but dismissing his unconscionability, separation of rights and copyright ownership claims (ELR 20:9:8); Sony Computer Entertainment v. Connectix Corp., 121 S.Ct. 172 (2000), 2000 U.S.LEXIS 5843, in which the 9th Circuit held that Connectix did not infringe Sony's PlayStation copyright in the process of creating Connectix's Virtual Play Station software, because copying for the purpose of reverse engineering is fair use (ELR 22:1:14); International Star Class Yacht Racing v. Tommy Hilfiger U.S.A., 121 S.Ct. 175 (2000), 2000

U.S.LEXIS 5860, in which the 2nd Circuit affirmed, in an unpublished opinion, a District Court ruling concerning whether Hilfiger's failure to do a full trademark search before using "Star Class" as a clothing insignia was evidence of "bad faith" (ELR 20:6:23); Major League Baseball Players Ass'n v. Cardtoons, 121 S.Ct. 175 (2000), 2000 U.S.LEXIS 5863, in which the 10th Circuit held that Cardtoons could pursue defamation and interference with contract claims against the Major League Baseball Players Association, as a result of a cease-and-desist letter the Association sent to a printer of parody trading cards, because private threats of litigation are not immune under the First Amendment (ELR 22:2:15); Collectibles, Inc. v. Brown, 121 S.Ct. 299 (2000), 2000 U.S.LEXIS 6614, in which the 5th Circuit held, in a case involving a record company's unauthorized sale of recordings bearing performers' names and likenesses, that claims under Texas right of publicity law are not preempted by federal copyright law (ELR 21:12:13); Fisher v. United Feature Syndicate, 121 S.Ct. 483 (2000), 2000 U.S.LEXIS 7510, in which the 10th Circuit affirmed, without a published opinion, a District Court ruling that the copyrights to an unpublished "Chipper" dog comic strip were not infringed by Peanuts' "Snoopy," RCA Victor's "Chipper," or Tyson Foods' "Chicken Chipper" (ELR 21:4:20); and Lara v. Cinemark USA, Inc., 121 S.Ct. 341 (2000), 2000 U.S.LEXIS 6924, in which the 5th Circuit held that the Americans with Disabilities Act requires stadium-style movie theaters to offer unobstructed views to wheelchair-bound patrons, but does not require them to provide the same line-of-sight viewing angles enjoyed by most non-disabled patrons (ELR 22:4:22).

The following previously reported cases have now been published: Cairns v. Franklin Mint Co., 107

F.Supp.2d 1212, 2000 U.S.Dist.LEXIS 9157 (C.D.Cal. 2000), 115 F.Supp.2d 1185, 2000 U.S.Dist.LEXIS 13360 (C.D.Cal. 2000) (ELR 22:5:5); A & M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 2000 U.S.Dist.LEXIS 11862 (N.D.Cal. 2000) (ELR 22:3:4); Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 346, 348, 2000 U.S.Dist.LEXIS 11696 (S.D.N.Y. 2000) (ELR 22:3:4); and UMG Recordings, Inc. v. MP3.com, Inc., 109 F.Supp.2d 223, 2000 U.S.Dist.LEXIS 12113 (S.D.N.Y. 2000) (ELR 22:4:4).
[ELR 22:8:26]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, published by Fred B. Rothman and Company, 10368 West Centennial Road, Littleton, CO 80127, has issued Volume 22, Number 3 with the following articles:

Reasonable Inferences and Substantial Evidence: How the U.S. Supreme Court Side-Stepped the First Amendment in Upholding Content-Based Must-Carry Rules in Its Turner Decisions by Mark R. Arbuckle, 22 Communications and the Law 1 (2000) (for address, see above)

The Future of Media Ride-Alongs by Brandon Fox, 22 Communications and the Law 31 (2000) (for address, see above)

Litigation Publicity: Courtroom Drama or Headline News? by Gail Ramsey and Kristen McGuire, 22 Communications and the Law 69 (2000) (for address, see above)

Book Review: Telecommunications Policy and the Public Interest: The Telecommunications Act of 1996 by Patricia Aufderheide, reviewed by Andrew J. Siegel, 22 Communications and the Law 85 (2000) (for address, see above)

Television Satellite Broadcasting in Russia After the Financial Crash of 1998: The Allure and Adversity for Western Companies by Daniel E. Rosen, 8 Cardozo

Journal of International and Comparative Law 347 (2000)

When Digital Contacts Equal Minimum Contacts: How Fourth Circuit Courts Should Assess Personal Jurisdiction in Trademark Disputes Over Internet Domain Names by Christopher M. Kindel, 78 North Carolina Law Review 2105 (2000)
[ELR 22:8:28]