IN THE NEWS

Francis Ford Coppola's $20 million wrongful interference judgment against Warner Bros. is reversed; California Court of Appeal rules that letter sent by Warner Bros. to Columbia Pictures, asserting rights in Coppola's "Pinocchio" project, was legally privileged

No case better illustrates the highs, lows and uncertainty of litigation than the wrongful interference lawsuit filed by Francis Ford Coppola against Warner Bros. - the case in which the famed director complained that the studio had interfered with a deal Coppola had made with Columbia Pictures to produce and direct a live-action version of "Pinocchio."

In fact, the undisputed evidence showed that when word of the Coppola-Columbia deal surfaced,

Warner Bros. wrote a letter to Columbia asserting rights in Coppola's "Pinocchio" project, and that as a result of that letter, Columbia never finalized a contract with Coppola for that movie. A California Superior Court jury sided with Coppola and punished Warner Bros. by awarding the director a verdict of $80 million - $60 million of which was purely punitive damages.

The jury's verdict was the high point for the Coppola, and the low for Warner Bros. The trial court judge granted Warner Bros.' motion for judgment notwithstanding the verdict as to the punitive damages claim, thus reducing Coppola's recovery by $60 million. However, the trial judge refused to set aside the jury's $20 million actual damages verdict. A final judgment for $20 million was therefore entered in Coppola's favor - a far cry from $80 million, but still a very substantial recovery.

The $20 million judgment was a mid-point for both parties. Neither was content with it, and both sides appealed. Now, as a result of that appeal, the trial court has been ordered to enter a judgment entirely in Warner Bros.' favor (costs and all) - so that as things now stand, the case has reached a high point for the studio and a low for the director.

In an opinion by Judge Thomas Stoever, the California Court of Appeal has held that the letter Warner Bros. sent to Columbia Pictures, claiming rights in Coppola's "Pinocchio" project, was legally privileged as a matter of California statute, and this privilege was "an absolute defense to any Coppola claim arising solely from that written communication. . . ."

The reason that Warner Bros.' letter was privileged was that before Coppola asked Columbia to

finance and distribute "Pinocchio," Coppola had made a deal with Warner Bros. for it to do so.

The facts showed that "Warner and Coppola had worked together for approximately two years in developing 'Pinocchio'. . . . Warner expended $350,000 on the 'Pinocchio' project. Although a Warner-Coppola long-form contract was never concluded, Coppola did sign a certificate of employment which, in comprehensive language, purports to vest in Warner all of Coppola's work product on any 'Pinocchio' project. Warner paid money to Coppola and others in connection with said Certificate of Employment."

"We conclude," Judge Stoever said, "that a reasonable attorney, considering the facts before the court, would believe that Warner had a legally tenable claim in any Coppola 'Pinocchio' project and that such claim was not totally and completely without merit." This conclusion was critical, because "Liability for

wrongful interference with contract or prospective economic advantage cannot be predicated upon the assertion of a colorable claim of right supported by probable cause."

This conclusion required the reversal of Coppola's $20 million judgment, and the Court of Appeal did just that.

In addition, Judge Stoever upheld the trial judge's decision to set aside the $60 million in punitive damages the jury had awarded Coppola. "There is no clear and convincing evidence that Warner acted with malice," Judge Stoever observed, explaining that "The record does not support an argument that Warner acted in a despicable manner vis-a-vis Coppola with ill will, hatred or with intent to injure, vex, annoy or harass him."

Though this case has been closely watched by the entire movie business, and the Court of Appeal's

decision anxiously anticipated, the appellate court decided that its decision should not be published in the official California reports. For that reason, the Court of Appeal's decision is printed below, in full text.

Coppola was represented by Robert S. Chapman, Greenberg Glusker Fields Claman & Machtinger, Los Angeles. Warner Bros. was represented by Frederic D. Cohen, Horvitz & Levy, Encino.

Coppola v. Warner Bros., Cal.Ct.App., Dist. 2, Div. 7, Case No. B126903 (March 23, 2001)

[Full Text]

Francis Coppola v. Warner Bros.
Court of Appeal for the State of California
Second Appellate District, Division Seven
B126903

March 23, 2001

Warner Bros., Inc. (Warner) appeals from a judgment awarding Coppola et al. $20 million compensatory damages.

Francis Coppola, Fred Fuchs and Francis Ford Coppola, Inc. (Coppola) appeal from an order granting judgment notwithstanding the verdict (JNOV) as to a jury verdict awarding $60 million punitive damages against Warner; and, from an order granting nonsuit as to Coppola's claim for slander of title.

SUMMARY OF FACTS

In the late 1980's, appellant Coppola began considering concepts for a motion picture based upon the 19th century novel "Pinocchio." The story itself is in the public domain. Previously, in the 1960's,

Coppola had had negative experiences at Warner and had not since worked with Warner for many years.

In 1991 Coppola and Warner began discussing the "Pinocchio" project and two others involving the life of J. Edgar Hoover and the children's novel "Secret Garden." These discussions led to negotiations for Coppola to both produce and direct the "Pinocchio" project for Warner, as well as "Secret Garden" and "Hoover."

In mid-1991 Coppola and Warner came to disagreement over the compensation to be paid Coppola for his directing services on "Pinocchio." The parties deferred this issue. Coppola was represented in these negotiations by attorney Barry L. Hirsch, who testified:

". . . I said that it was absolutely essential that he (Coppola) get to direct Pinocchio. That was at the beginning of the negotiations. . . . they (Warner)

requested that we defer the discussion about Mr. Coppola directing the movie until such time as the movie was ready to go, a real movie rather than just a development deal. . . . [¶] After some bargaining, we agreed that we would defer the (directing) discussion but that in the event that we could not come to an agreement later on, then he would have the right to go elsewhere to make his Pinocchio, and then they could do whatever they wanted."

Negotiations continued regarding a producer's agreement. Jim Henson Productions Inc. (Henson) entered the "Pinocchio" project as a co-producer.

During October and November 1991, Warner contracted with Frank Galati (Galati) and Mauro Borelli (Borelli) for screenwriting and artistic services, respectively, on the "Pinocchio" project. Warner hired Galati before it had a production agreement with Coppola. Coppola brought Borelli into the project.

Warner committed to the payment of substantial amounts for the services of Galati and Borelli.

During the latter part of 1991, Coppola, in conjunction with Warner, Galati and Henson, engaged in a variety of activities in the development of the "Pinocchio" project. Treatments or summaries of these creative efforts were produced and circulated.

A Warner executive, Daniel Furie (Furie), testified that by November 13, 1991, Coppola, Henson and Warner had agreed upon the material terms of the producer's agreement. Lisa Henson, a former senior creative executive at Warner assigned to the "Pinocchio" project, testified that a producer's agreement had not been accomplished by the time she left Warner at the end of 1992. (After leaving Warner, Lisa Henson became president of production at Columbia.) Furie testified that various terms of a producer's agreement were and would have been

discussed with Lisa Henson before the actual producer's agreement was closed. At this point, there was no written agreement signed by the parties.

An undercover letter dated February 13, 1992, from Warner Deputy General Counsel Mary S. Ledding, sent ". . . a copy of the proposed agreement relating to the producing services of Francis Coppola and an individual designated by Jim Henson Productions, Inc. in connection with . . . the "Pinocchio" project. [¶] Also enclosed is a short agreement relating to Mr. Coppola's directing services on the picture. [¶] Since executives here at Warner have not had a chance to review these agreements, I must reserve the right to make changes, additions, etc. [¶] Please give me a call . . . so we can resolve any outstanding issues." (Emphasis added.)

The aforementioned proposed agreement is referred to by Warner as a "long-form producer

agreement." Similar proposed long form producer agreements relating to "Secret Garden" and "Hoover" were submitted. None of them were ever signed by any of the parties.

In May 1992, Coppola wrote a "Pinocchio" treatment, which was registered with the Writers' Guild. Coppola requested and Warner reimbursed him for the $10 registration fee. Coppola testified that "I wrote that treatment at their (Warner's) request. I certainly-yes, everything I was doing was on their behalf."

The only employment related document signed by Coppola and Warner was a Certificate of Employment signed in July 1992, but stating "executed as of November 13, 1991." Throughout this document Coppola is referred to as "Employee" and Warner as "Producer." The document specifically refers to the motion picture "Pinocchio," which Warner proposes to

produce, and to Coppola as producer or executive producer. This document states, in pertinent part:

"(Coppola) for good and valuable consideration (receipt of which is hereby acknowledged) (does) hereby acknowledge, certify and agree that (i) all of the results and proceeds of the services of every kind heretofore rendered by and hereafter to be rendered by Employee in connection with the Picture, and (ii) all ideas, suggestions, plots, themes, stories, characterizations and other material, whether in writing or not in writing at any time heretofore or hereafter created or contributed by Employee which in any way relate to the Picture or to the material on which the Picture will be based are and shall be deemed works 'made-for-hire' for Producer and/or works assigned to Producer, as applicable. Accordingly, Employer and Employee further acknowledge, certify and agree that Producer is and shall be deemed the author and/or

exclusive owner of all the foregoing for all purposes and the exclusive owner throughout the world of all of the rights comprised in the copyright thereof, and of any and all other rights thereto, and that Producer shall have the right to exploit any and all of the foregoing in any and all media, now known or hereafter devised, throughout the universe, in perpetuity, in all languages as Producer determines. Employer (sic) hereby grants to Producer all rights which it may have in and to all of said material as Employee's general employer. . . ."

Similar certificates of employment were signed for the "Secret Garden" and "Hoover" projects. All certificates of employment were reviewed by Coppola attorneys, Armstrong & Hirsch, with some revisions requested by them, before Coppola signed. Coppola testified he relied entirely on his attorneys in signing legal-type documents, including the Certificate of Employment for "Pinocchio."

After the Certificates of Employment were signed, Warner paid producer fees to Henson and paid a $3,125 advance on fees plus expenses to Coppola. Warner executive Daniel Furie testified that the signed Certificate of Employment was not sufficient for Warner to pay Coppola's usual producer's fee. The parties acknowledge that Coppola's usual fees for development, production and screenwriting would exceed $1 million.

In early 1993, Galati submitted his first draft screenplay for the "Pinocchio" film. This screenplay was unacceptable to Warner. Rather than authorizing a rewrite, Warner bought out Galati's contract for $50,000 and terminated his services. Warner decided not to proceed with the "Pinocchio" project on the basis of Galati's screenplay.

There is evidence that Warner expended approximately $350,000 of its own funds in furtherance of the "Pinocchio" project.

Coppola continued to work on the development of the "Pinocchio" film project. In mid-1993, Coppola, in collaboration with Borelli, produced a draft screenplay based upon a concept or "take" which was significantly different than the Galati screenplay. He also wrote 14 original songs for potential use in the revised "Pinocchio." The draft screenplay and songs were sent to his partner, Fred Fuchs, as the basis for a film budget but were never submitted to Warner. Warner was apparently unaware of this new "Pinocchio" treatment until the Coppola-Columbia Pictures relationship surfaced.

Coppola sought to negotiate a "split rights" or "negative pickup" agreement with Warner for the continued development of "Pinocchio," an arrangement

under which Coppola would own, in whole or in part, the project and control its development. Warner was unwilling to enter into such an arrangement. Warner submitted a counterproposal under which Warner would pay Coppola a minimum of an additional $7 million for his services as writer and director in addition to his services as producer. Coppola rejected Warner's counterproposal.

Warner and Coppola differ radically as to their status vis-a-vis each other and the "Pinocchio" project. Warner's position is that based upon the certificate of employment, the purported oral production agreement and the money paid to Coppola, Warner owns any and all of Coppola's work on any type or nature of "Pinocchio" film in perpetuity. Coppola contends that there was no agreement with Warner; that any agreement with Warner was contingent upon Coppola directing the film; and, that "Pinocchio" is a public

domain story which Coppola was free to develop anywhere, at anytime with anyone.

By letter dated June 30, 1993, addressed to Warner, counsel for Coppola ". . . advised that our clients . . . do not wish to continue negotiations with respect to the proposed engagement of their services in any capacity in connection with that project, including without limit, as producer, executive producer, or director. . . ." This letter returned checks for the fee advance and expenses paid by Warner and demanded return of all "Pinocchio" materials provided by Coppola to Warner.

By letter dated July 1, 1993, addressed to counsel for Coppola, Warner's General Counsel advised that "The Producer Loanout Agreement between this company and (Coppola) has been and remains in full force and effect. We expect all parties involved to live up to their obligations under that agreement . . . ." The

checks tendered by Coppola's counsel's letter of June 30, 1993, were returned.

Coppola's counsel responded in a letter dated July 7, 1993, that a producer loanout agreement had never been finalized; that a director agreement, which was integral to the overall arrangement, had never been concluded; and, that Coppola was not under any obligation to Warner in connection with "Pinocchio." This letter concluded with the statement that Coppola ". . . will indulge no interference by Warner Bros. in their development of any production based on that public work or with the pursuit of their livelihoods."

Negotiations continued, including a personal letter dated August 10, 1993, from Coppola to two top level Warner executives, wherein Coppola sought a "split rights" or "negative pickup" arrangement. The parties did not conclude an agreement other than that already extant, if any.

By cover letter dated September 29, 1993, Coppola's attorney (Armstrong & Hirsch) sent various "Pinocchio" materials, including the Galati screenplay, Coppola's revised screenplay and "our file relating to Mr. Coppola's earlier involvement with Warner Bros." to Jared Jussim (Jussim), Columbia Pictures' Vice-President, Legal Affairs. In early October 1993, Jussim requested and received from Coppola's attorney a copy of the Borelli "Pinocchio" treatment.

After reviewing the submitted documents and information, Jussim opined that some type of contract or arrangement existed between Warner and Coppola and that Warner had a potential claim of ownership to Coppola's "Pinocchio" work product. Jussim concluded the rights of and any claims by Warner should be resolved before Columbia could proceed with the Coppola "Pinocchio" project. The head of Columbia's legal affairs concurred regarding the necessity of

resolving any claims by Warner as a prerequisite to a Columbia deal with Coppola for a "Pinocchio" project. The Columbia-Coppola agreement contained the following clause:

". . . [I]t is a condition to the effectiveness of this entire agreement that all claims asserted by Warner Bros. be resolved to the mutual satisfaction of Columbia and Company (Coppola)."

A Warner executive, Steven Spira (Spira), heard through industry rumor that Coppola and Columbia were discussing a "Pinocchio" film project. Spira sent a letter dated February 17, 1994, to Coppola's agent with a copy to Spira's counterpart at Columbia, which read: "It has come to our attention that [Coppola] may be considering making a deal in connection with a PINOCCHIO project at Columbia. As you know [Warner] has previously notified [Coppola] that he has an agreement at [Warner] in connection with any such

project. Such agreement would preclude him from proceeding at Columbia. And [Warner] hereby reserves any and all rights arising out of such agreement."

At this point, a brief digression is appropriate. Francis Ford Coppola at all time pertinent herein was (and is) a world-renowned film director, screenwriter and producer. His film credits include the "Godfather" films, "Apocalypse Now," "The Rainmaker," "Patton," "Secret Garden," "Runaway Train," "Peggy Sue Got Married" and many many more. Coppola has received five Academy Awards, two Director's Guild Awards, first prize at the Cannes Film Festival and the Legion of Honor from the Nation of France. As of 1993, he had recently enjoyed a $200,000,000 worldwide success with "Dracula." Paraphrasing the testimony of international film financier, Paul Rassam, Francis Coppola is a filmmaking icon whose very name if "bankable." Obviously, there is substantial value in the

rights to any film making work product of Francis Coppola. (Perhaps this explains Warner's disparate approach to a Coppola "Pinocchio" vis-a-vis a Henson "Pinocchio.")

Coppola and Columbia entered into an agreement "as of June 15, 1994" for the production of Coppola's "Pinocchio." Coppola's signature(s) were notarized on September 1, 1994. This agreement specifically provides for resolution of the Warner claims either by negotiation or by declaratory relief litigation financed by Columbia.

Warner and Coppola entered into settlement negotiations resulting in drafts of settlement agreements. Spira sent a letter dated September 23, 1994, to Coppola's attorney Barry Hirsch confirming ". . . the basic terms of the agreement resolving the dispute between (Warner) and (Coppola) in connection with PINOCCHIO." Attorney Hirsch disagreed with

significantly material parts of this letter. Columbia would not accept the terms outlined in Spira's letter. Warner refused to relinquish any rights it might have in the Coppola "Pinocchio" project.

A mutually agreed upon settlement was not accomplished. The parties presented evidence of their respective theories as to what occurred and, of course, attributed full blame for this failure to the opposite side.

The Warner-Coppola claims were not resolved. The "Pinocchio" project was not financed. Columbia would not proceed. Coppola's "Pinocchio" was not produced. This litigation followed.

THE PRIVILEGE DEFENSE(S)

Coppola contends that the Spira letter dated February 17, 1994, constituted a wrongful interference with Coppola's prospective economic advantage in the

production of "Pinocchio" at Columbia; and, that Warner's refusal to relinquish whatever claims it may have had in a Coppola "Pinocchio" project constituted wrongful interference with the Coppola-Columbia contractual relationship.

Warner contends that Coppola's interference claims are barred in that Warner's correspondence and actions were in good faith justified and/or were privileged under the litigation privilege or common interest privilege or both. (Civ. Code, § 47, subds. (b) and (c).) Warner argues that its letters were privileged pre-litigation communications.

Coppola argues that Warner has waived its privilege defense(s) for failure to specifically label or name those defenses in Warner's amended answer or discovery responses. We do not agree.

The second affirmative defense in the amended answer of defendant Warner Bros. to first amended

complaint states, "3. The Fourth (Interference with Prospective Economic Advantage), Fifth (Interference with Contract) and Sixth (Slander of Title) Causes of Action are barred because Warner's actions were privileged and justified." (Parentheticals by this Court.) The litigation and common interest privileges were not specifically identified per se. Coppola did not demurrer to the answer.

Coppola submitted form interrogatories requesting that Warner "Identify each special or affirmative defense . . . and for each: (a) state all facts upon which you base the special or affirmative defense. . . ." Warner identified the "Privilege/Justification" defenses without further specification and thoroughly stated the complete factual basis for that (those) defense(s). In effect, Warner responded precisely to the letter of Coppola's form interrogatory. It is difficult to imagine that experience counsel could not glean the

scope of Warner's privilege defense(s) from this extensive factual recitation even though labels were not stated for the exact privilege(s) relied upon. We note also that no further discovery or motions to compel were pursued on this issue.

Coppola filed a motion in limine No. 7 to exclude certain evidence of affirmative defenses; etc. The affirmative defenses addressed were the litigation privilege, the common interest privilege and the competition privilege.

Warner filed a motion that the court determine Warner Bros.'s privilege defense (defendant's motion in limine No. 6).

The trial court deferred ruling on either of the motions relating to Warner's privilege defenses, and instructed counsel not to mention specific privilege issues during opening statements. Considering the nature of this case, the court's chosen procedure was

understandable and reasonable. However, the record does not reflect that the trial court ever specifically ruled on either of these motions.

The record does not support Coppola's assertion that the trial court ruled in limine to exclude all evidence and argument of the litigation and common interest privileges. Coppola correctly points out that the reporter's transcript indicates only that the trial court deferred a ruling. Warner argues that a subsequent minute order (not in the record on appeal) purports to nunc pro tunc minute order merely deferred a ruling. It is unnecessary to resolve this dispute. One point is clear: the trial court did not grant Coppola's in limine motion.

A full evidentiary trial proceeded, including all of the evidence necessary to a determination of Warner's privilege defenses.

At the conclusion of Coppola's evidence, Warner moved for nonsuit and argued, inter alia, its privilege defenses. The court denied Warner's motions with respect to the interference with prospective economic advantage and interference with contract causes of action; and, granted the motion with respect to the slander of title cause of action specifically relying on the common interest privilege.

After both sides rested their cases, Warner moved for directed verdicts, again arguing, inter alia, its privilege and justification defenses. The trial court denied Warner's motions.

We hold that the test of probable cause is applicable in the resolution of the privilege issues. In Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1130-1137 the California Supreme Court, by analogy to malicious prosecution actions, specifically extended the probable cause test to

the torts of interference with contract and prospective economic advantage. (Id. at p. 1132.)

For purposes of analyzing Warner's privilege defense(s), the existence or nonexistence of an enforceable Warner-Coppola contract is not relevant. The inquiry is whether or not Warner had probable cause to make the claim of right stated in the Spira letter dated February 17, 1994, regarding any Coppola developed "Pinocchio" project.[LSS1]

The issue of probable case is to be determined by the court, not the jury. (Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 873-877; Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d 1118,1131.) In the case at bench, although its orders denying Warner's nonsuit and directed verdict motions implicitly found against Warner, except for the slander of title cause of action, the trial court did not

specifically determine the privilege issues one way or the other.

The evidence pertinent to a determination of probable cause is not in dispute. Only the legal consequences of that evidence are in controversy. Thus, the matter may be determined on appeal by de novo review. (Sheldon Appel Co., v. Albert & Oliker, supra, 47 Cal.3d at pp.884-886; Hufstedler, Kaus & Ettinger v. Superior Court (1996) 42 Cal. App.4th 55,63.)

Motion picture development and production operates in a unique business universe. There was testimony defining the industry distinction between an "agreement" and a "deal." Film projects progress with substantial expenditures of money, talent, resources and time while formal contract negotiations are continuing. Multi-million dollar film projects are developed and completed (or cancelled) on the basis of loose, artistic understandings without written, signed contracts. The

Coppola-Warner relationship in developing "Hoover" and "Secret Garden" is a case in point. There is a distinction between "creative executives" and "decision makers," the latter having authority to bind, the former having no such binding authority notwithstanding their testimony and opinions regarding the existence or nonexistence of contractual obligations. Black letter certainty doesn't seem to be a priority until a relationship disintegrates into court proceedings. Then, of course, the absence of a written, signed contract becomes paramount in the minds of at least one side to the dispute.

Liability for wrongful interference with contract or prospective economic advantage cannot be predicated upon the assertion of a colorable claim of right supported by probable cause. (Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d at pp. 1131-1137.) in Sheldon Appel Co. v. Albert &

Oliker, supra, 47 Cal.3d 863, the California Supreme Court held that ". . . the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct. . . The resolution of that question of law calls for the application of an objective standard to the facts. . .(Citation)." (Id. at p. 878, emphasis added.)

The issue is not a subjective inquiry as to whether or not Warner, through its representatives, thought it had a legally enforceable claim of rights in the Coppola "Pinocchio" project. Rather, the inquiry is objective: Would any reasonable attorney have thought that there exists any colorable, tenable claim or is the claim totally and completely without merit. (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at pp. 884-886.) The Supreme Court specifically applied a "reasonable attorney" test, rejected a "prudent attorney" test and adopted, by analogy, the standard established

in In re Marriage of Flaherty (1982) 31 Cal.3d 637; Sheldon Appel Co. v. Albert & Oliker, supra, at pp.884-886; Hufstedler, Kaus & Ettinger v. Superior Court (1996) 42 Cal.App.4th 55, 66.

This objective standard is applied from the perspective existent as of the time the actions were taken, not at the time legal determinations of enforceability or viability are made by a trial court.

With respect to the tortious interference causes of action, the record does not disclose that the trial court specifically applied the aforementioned objective standard and specifically rule as a matter of law on Warner's privilege defenses. However, the privilege and justification issues were properly raised in the trial court and are not waived on appeal.

This court is in as good a position as the trial court to resolve the determinative legal question, namely, whether or not there was probable cause for

the Spira letter dated February 17, 1994 and Warner's refusal to relinquish its perceived rights in a Coppola "Pinocchio" project. (Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d at p. 884.)

The February 17, 1994 letter from Warner executive Spira to Coppola's agent, with a copy to a Columbia executive, was sent in response to an industry rumor that Coppola was moving the "Pinocchio" project from Warner to Columbia.

Warner and Coppola had worked together for approximately two years in developing "Pinocchio" as well as "Secret Garden" and "Hoover." Warner expended $350,000 on the "Pinocchio" project. Although a Warner-Coppola long-form contract was never concluded, Coppola did sign a certificate of employment which, in comprehensive language, purports to vest in Warner all of Coppola's work product on any "Pinocchio" project. Warner paid

money to Coppola and others in connection with said Certificate of Employment.

We conclude that a reasonable attorney, considering the facts before the court, would believe that Warner had a legally tenable claim in any Coppola "Pinocchio" project and that such claim was not totally and completely without merit.

The actual or imminent filing of a lawsuit following a prelitigation communication of a claim of right is not essential to perfecting the privilege defense. "In other words, if the statement is made with a good faith belief in a legally viable claim and in serious contemplation of litigation, then the statement is sufficiently connected to litigation and will be protected by the litigation privilege. The privilege then applied is absolute." (Aaronson v. Kinsella (1997) 58 Cal. App.4th 254, 266; Rubin v. Green (1993) 4 Cal. 4th 1187; Letrette v. Dean Witter Organization Inc. (1976)

60 Cal.App.3d 573, 576-578; Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (1993) 508 U.S. 49; Cardtoons, L.C. v. Major League Baseball Players Ass'n. (10th Cir. 1999) 182 F3d 1132.)

Coppola's argument that the litigation privilege is inapplicable because Warner did not file a lawsuit is not persuasive. There is substantial evidence supporting Warner's argument that, absent a settlement, litigation was inevitable. Coppola was simply the first party to the courthouse. A lawsuit emanating from these transactions was in fact filed by Coppola seeking, inter alia, a legal declaration of the parties' rights in and to the "Pinocchio" project. The identity of the party initiating the litigation is irrelevant.

This case was filed September 13, 1995; 19 months following Spira's February 17, 1994 letter. During this period, Warner, Coppola and Columbia

were attempting to resolve the competing claims of rights in and to the Coppola "Pinocchio" project. This was a reasonable and laudable course of conduct, i.e., avoiding litigation. The Spira letter is not so remote in time from the filing of litigation that doubt would be cast upon the good faith belief in the rights alleged or upon the "serious contemplation" of the litigation option. (Aaronson v. Kinsella supra, 58 Cal.App.4th at pp. 266-268.)

The Spira letter dated February 17, 1994 was supported by probable cause. It constitutes a privileged pre-litigation communication. (Civ. Code, § 47, subd. (b).) This privilege is an absolute defense to any Coppola claim arising solely from that written communication, to wit wrongful interference with prospective economic advantage and slander of title.

We further hold that the aforementioned correspondence falls within the common interest

privilege (Civ. Code, § 47, subd. (c)). Clearly, all parties (Coppola, Warner and Columbia) had common interests in and to the Coppola "Pinocchio" project.

There is no clear and convincing evidence that Warner acted with malice. At best, there is hearsay testimony (received without objection) that the witnesses had heard from third parties that two high level Warner executives did not like Coppola. Assuming, arguendo, that to be true, merely not liking a person does not rise to the level of legal malice. (Civ. Code, § 3294.) The record does not support an argument that Warner acted in a despicable manner vis-a-vis Coppola with ill will, hatred or with intent to injure, vex, annoy or harass him.

The trial court granted Warner's motion for nonsuit as to Coppola's slander of title cause of action. The record does not support Coppola's argument that the court granted nonsuit because Coppola had failed to

prove the absence of privilege. The court specifically ruled that the motion was granted on the ground that the common interest privilege applied (Civ. Code, § 47, subd. (c)). The court also found that there was no evidence of malice in the actions taken by Warner. We agree with both rulings.

For the reason stated herein, we find that it was error for the trial court to deny Warner's motion for nonsuit as to Coppola's cause of action for wrongful interference with prospective economic advantage. The timing of events dictates that this cause of action must be founded solely upon the Spira letter dated February 17, 1994, which is privileged as pre-litigation and common interest correspondence. The litigation and common interest privileges (Civ. Code, § 47, subds. (b) and (c)) are absolute defenses.

Although not entirely clear, it appears that Coppola's cause of action for interference with

contractual relations is based upon the Spira letter dated February 17, 1994, Warner's allegedly wrongful assertion of rights arising from settlement negotiations and Warner's allegedly wrongful refusal to relinquish its claim of right in and to Coppola's "Pinocchio" project.

We have concluded that the Spira letter dated February 17, 1994, is a privileged pre-litigation and common interest writing. The viability of Coppola's wrongful interference with contract claim must be analyzed absent that letter.

Coppola's attorneys advised Columbia that Warner was asserting a claim of right in and to any Coppola "Pinocchio" project and provided Columbia with all documents pertinent to the Coppola-Warner relationship and the Coppola "Pinocchio" project. Thereafter, Columbia insisted that its contract with Coppola contain a clause requiring that the Warner

claim be resolved as a condition precedent to Columbia's funding of and proceeding with a Coppola "Pinocchio" project. Columbia agreed in that contract to finance litigation brought by Coppola to determine his rights vis-à-vis Warner.

Coppola and Warner entered into negotiations in an attempt to settle their respective claims. The parties devoted appreciable time, talent and expense to these settlement efforts. Negotiations were carried out between Warner representatives and Coppola's attorneys, Armstrong & Hirsch. Columbia was not a party to the negotiations. Armstrong & Hirsch, as Coppola's attorneys, communicated with Columbia regarding the settlement negotiations. Warner did not contact Columbia regarding the negotiations.

By letter dated September 23, 1994, Warner purportedly confirmed ". . . the basic terms of the agreement resolving the dispute. . ." Attorney Hirsch

advised Warner that the "basic terms" in the September 23 letter were never agreed upon and were unacceptable to both Coppola and Columbia. Although further discussions occurred, the parties did not conclude a settlement.

We have concluded that the underlying claim of Warner in and to any Coppola "Pinocchio" project was legally tenable or colorable. We do not decide whether Warner's claim was legally viable or enforceable - only that it was legally tenable, not totally and completely without merit.

Therefore, Warner was at liberty to take whatever legal measures were available to protect and enforce that claim. The demands made and positions taken by the parties during negotiations and the exchange of settlement communications ultimately resulting in disagreement are all privileged from derivative tort liability. While Coppola may sincerely

believe that Warner's demands were unreasonable, Warner believed with equal sincerity that its demands were reasonable and the appropriate basis or price for relinquishing its colorable claim of rights in and to any Coppola "Pinocchio" film project.

Statements made in the course of litigating a colorable, objectively tenable claim are not actionable. The phrase "in the course of litigation," in addition to a filed lawsuit, also includes pre-litigation communications, settlement negotiations and communications emerging from settlement negotiations. Assuming that the underlying claim is objectively tenable, not totally and completely without merit, settlement negotiations regarding such a claim and communications emerging from such negotiations cannot be the basis for derivative tort liability. (Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d at pp. 1130-1137; Sheldon Appel Co. v. Albert

& Oliker, supra, 47 Cal. 3d 863; In re Marriage of Flaherty (1982) 31 Cal.3d 637).

The Pacific Gas & Electric Co. v. Bear Stearns & Co., supra, 50 Cal.3d 1118 and Sheldon Appel Co. v. Albert & Oliker, supra, 47 Cal.3d 863 cases discuss at length the fundamental public policy of assuring the utmost freedom of access to the courts and to avoid improperly deterring individuals from resorting to the courts for the resolution of disputes.

Furthermore, there is another fundamental policy favoring and encouraging the early resolution of disputes through settlement before resorting to the courts. This policy would be seriously impaired if a party to unsuccessful settlement negotiations were subjected to liability for refusing to relinquish the unsettled, objectively tenable claim. Coppola's argument asserting tort liability for Warner's refusal to relinquish an unsettled, objectively tenable claim of

right in and to a Coppola "Pinocchio" project are without merit.

We hold that Warner has absolute defenses under Civil Code sections 47, subdivisions (b) and (c) to Coppola's tort causes of action for wrongful interference with prospective economic advantage and wrongful interference with contract. This determination is dispositive of the entire litigation. All remaining issues are, therefore, moot.

DISPOSITION

The judgment in favor of Coppola and against Warner is reversed. The case is remanded for entry of judgment in favor of Warner and against Coppola.

The appeal of Coppola from judgment notwithstanding the verdict on the issue of punitive damages is dismissed.

Warner shall recover its costs on appeal.

STOEVER, J.

We concur:

LILLIE, P.J.
WOODS, J.

[ELR 22:11:4]

WASHINGTON MONITOR

Government Accounting Office reports that 1998 law requiring payment of residuals by those who acquire copyrights to movies produced under talent guild contracts is likely to have "small impact" on industry as a whole and an uncertain impact on guild members

When Congress passes a new law, those who supported its passage, as well as Congress itself, expect the law to have some impact. So it was with a law passed in 1998, as a small and "miscellaneous" provision of the Digital Millennium Copyright Act. The law was given the cumbersome title "Assumption of certain contractual obligations related to transfers of rights in motion pictures." As its title suggests, it provides that when the copyright to a motion picture

produced under a collective bargaining agreement is transferred, the transfer agreement "shall be deemed to incorporate" the obligation to pay any residuals called for in that collective bargaining agreement. (ELR 20:6:7)

The law was enacted at the behest of the Screen Actors Guild, Directors Guild and Writers Guild of America, because many movies are produced by companies that sell their copyrights and go out of business while residuals are still being earned. The Guilds' collective bargaining agreements provide that signatories must obtain "assumption agreements" from companies to whom they sell their copyrights; but if signatories fail to do so and then go out of business, there was little or nothing the Guilds could do to enforce their collective bargaining agreement right to residuals against non-assuming transferees.

The new law looked as though it would solve that problem. Indeed, it was described as a "powerful tool for protecting [Guild] members' residuals" in these very pages, shortly after its enactment. Congress, however, wanted a careful assessment of the law's impact, and thus, at the time of its enactment, Congress directed the Government Accounting Office to conduct a study and issue a report, after the law had been in effect two years. Those two years have now passed, and the GAO has issued its report.

If the GAO's conclusions had to be summed up in a single word, that word would be "inconclusive." The Guilds, however, point out (as noted in the GAO report itself) that two years is not enough time for the law's consequences to have been tested in court. That is so, because before the law can have any effect at all, a movie must be produced (under a Guild collective bargaining agreement) by a company that then assigns

the movie's copyright to another company and goes out of business before all residuals are paid. According to the Guilds, "it typically takes 18 months to 2 years from the start of film production to when residuals come due." And any contested failure to pay those residuals wouldn't be litigated to a conclusion for many months (or even years) thereafter.

The GAO assessed the law's impact on the movie industry as a whole, and on individual Guild members. Insofar as the industry as a whole is concerned, the GAO concluded that the law's impact would be "small." Indeed, the GAO subtitled its report "Legislation Affecting Payments for Reuse Likely to Have Small Impact on Industry."

To reach its conclusion, the GAO did an elaborate and statistically sophisticated study of movies released during the three years that preceded the law's enactment, and it found that "the amount of lost

residuals [was] relatively small." By "relatively small," the GAO meant "an estimated $35.2 million." That figure is entirely consistent with the Guilds' pre-enactment estimate to Congress - based on the Guilds' review of the bankruptcy records of signatory companies that sold their libraries without obtaining assumption agreements - that "tens of millions of dollars" in residuals had been lost.

The reason the GAO concluded the law would have only a "small" impact on the movie industry as a whole was that most movies for which residuals went unpaid were small-budget affairs: 57% had budgets of less than $2 million, and 29% had budgets of less than $500,000. Movies of this type, the GAO noted, "account for a very small percentage of total industry revenues gained from domestic box-office and secondary markets." Thus, even if the law makes low-budget movies less profitable than before, and thus less

likely to be produced at all, total industry revenues would not decline by much - "less than 2 percent," according to GAO estimates.

The law's impact on individual Guild members was completely inconclusive. On the one hand, the GAO noted that "If the legislation is effective in enabling the guilds to collect residuals that otherwise would not have been paid, union members who worked on those films will clearly benefit." Though "the amount of residuals that were unpaid prior to the legislation is small relative to total residuals collected," the GAO acknowledged that "for guild members working primarily on low-budget films, this amount may have a significant impact on their income."

On the other hand, AFMA argued to the GAO that "if some low-budget films become less profitable, some independent producers might find it more difficult to obtain financing. Thus, some films that

would otherwise have been made under union contract would either not be made or be made under different conditions, such as going overseas or using nonunion employees. In this case, residuals would not be paid to the unions, and guild workers typically employed in these films would lose these employment opportunities."

The GAO didn't attempt to weigh the benefit to Guild members of receiving residuals for movies on which they had worked against the possibility that they may not work at all on other movies to be made in the future. The GAO report merely concluded that the law's impact on "union actors, writers, and directors who work on [low-budget] films . . . could be significant."

Motion Pictures: Legislation Affecting Payments for Reuse Likely to Have Small Impact on Industry, United States General Accounting Office Report to

Congressional Committees, GAO-01-291 (January 31, 2001), available at www.gao.gov [ELR 22:11:12]

U.S. Department of Commerce issues report on impact of "runaway" film production, concluding that it has become a serious "problem"

The number of movies and television programs that are developed in the United States but produced abroad has jumped dramatically in the last decade.

Those in the entertainment industry know this, because two years ago, a significant study was conducted on behalf of the Directors Guild of America and the Screen Actors Guild concerning the "runaway film" phenomenon. The conclusions of that study generated a lot of news and some controversy. (The Canadians disputed the report's estimate of the amount

of money spent in their country by companies producing movies and programs developed in the U.S.)

Similar studies were done as well on behalf of film commissions and those who supply goods and services to American filmmakers. And their conclusions confirmed those of the DGA/SAG report.

Studies often beget additional studies, and so it was with these privately-commissioned "runaway film" studies. Last year, several members of Congress asked the United States Department of Commerce to conduct its own study of foreign production of American-developed movies and TV programs. And the Department of Commerce ("DoC") has now issued its own report.

The DoC's 85-page document is entitled "The Migration of U.S. Film and Television Production: Impact of 'Runaways' on Workers and Small Business in the U.S. Film Industry." It makes a substantial case

for the proposition that runaway film production was worthy of the DoC's time and attention. The report shows, with impressive charts, tables and graphs, that a lot of movies and programs that once would have been produced in the U.S. are now being produced elsewhere.

The DoC report - which largely synthesizes the facts and data compiled in earlier studies - spells out where American producers are going and what they're producing when they get there.

* The most popular destinations for American production companies are Canada, the United Kingdom, Australia and Ireland, in that order.

* A number of feature films have been made in those countries, including Mel Gibson's "Braveheart" and Steven Spielberg's "Saving Private Ryan" (both of which were made in Ireland). But the most dramatic increases in foreign production have occurred in

connection with made-for-television movies, many of which are now being made in Canada.

The reason this matters so much is that "By one industry estimate, 70 to 80 percent of [below-the-line] workers are hired at the location where the production is filmed." In other words, jobs that were once held by Americans no longer are. The DoC notes that "Some of these workers are highly skilled artisans, others are manual laborers. But they all have one thing in common: they cannot move to Canada or Australia at the drop of a hat to perform jobs that are as routine to film production as those of skilled workers are to the production of steel or automobiles. These businesses are stationary, and their work is local. In some cases, national immigration and labor laws would prevent these workers from crossing borders even if they were otherwise willing and able to do so. One industry source estimates that 90 percent of the production

budget for 'below-the-line' expenses are spent on location."

Films are developed in the U.S. but then produced abroad for two types of reasons: creative and economic.

Creative concerns, "such as the need or desire for a particular setting or 'feel,' . . . have long been part of the industry and present fewer concerns than . . . the 'economic' runaway." According to the DGA/SAG report, "the number of films shot abroad for creative reasons has remained fairly stable" from 1990 to 1998.

On the other hand, "Economic runaway films are produced abroad, not for artistic reasons, but because of reduced production costs from a variety of factors including reduced location costs, wage rate differentials and government incentives designed to attract foreign film production." These types of runaways do present concerns, because "the number of films shot abroad for

economic reasons increased dramatically - from 100 films in 1990 to 285 films in 1998, an increase of 185 percent in just eight years," according to estimates made in the DGA/SAG report and quoted in the new DoC report.

The DoC report notes that there are many reasons so many U.S.-developed films are now being produced abroad. Among these are technologies that make it easier to do, foreign production facilities and talent pools that once were available only in the U.S., and - of greatest interest to readers of these pages - "incentive" programs offered by other countries for the express purpose of attracting movie and television production.

A 15-page chapter of the DoC report is devoted to a description of the incentive programs offered by the leading destination countries, including a very detailed two-page chart outlining 30 such programs

offered by the federal and provincial governments of Canada alone. Some space is taken up with descriptions of programs that do not seem to be available to American producers, but the chapter helpfully points out which ones are. There are several.

Canadian incentives, available to Americans, include partial refunds of salaries paid to Canadian residents, and tax shelters for Canadians who invest even in American-developed films. According to the Canadians themselves, "U.S. film production surged after the introduction of provincial tax credits."

Though United Kingdom programs are "targeted at the British film industry," the DoC reports that "foreign production companies may be eligible for certain programs." Among these is the British sale-and-leaseback program.

"Australian state-based incentives . . . ranging from payroll tax rebates and exemptions to producers

are very attractive to foreign filmmakers," the DoC notes. Queensland, for example, "offers payroll tax rebates and cast and crew salary rebates for productions filming in Queensland . . . with no Australian content requirements or restrictions on foreign film companies."

The DoC found "the precise impact" of these incentive programs is "difficult to quantify." But the DoC concluded that "the data and anecdotes analyzed for this report present a compelling case that the runaway film problem could threaten to disrupt important segments of a vital American industry and the thousands of workers who depend on it."

The DoC assessed no blame for runaway productions, on anyone. "The players have for the most part reacted to global, economic, and technological forces largely, though not exclusively, beyond their control. Production companies have taken advantage of

lower costs in other countries, but they have done so often to seek operating efficiencies when the alternative may have been bankruptcies and even more layoffs. Unions and guilds have sought to maximize wages and benefits for their members in order to obtain a higher standard of living for their members families and local communities."

Even foreign governments escaped the DoC's criticism. Though they "creat[ed] wage and tax incentives that may have tipped the scales in their favor . . . nothing in our research indicates that foreign incentives were the primary factor [relied on by American production companies] in determining the location of film and television production." On the other hand, the DoC added, "when combined with all the other factors discussed, government incentives constituted an important consideration."

The overall tone of the DoC report makes it read like a brief for the proposition that significant actions should be taken by the U.S. to bring "runaways" to a halt. As a result, the report's "Conclusion" is surprisingly tepid.

It notes that the United States already is making efforts on behalf of its film industry in three ways.

First, the U.S. is taking the position that film distribution should be covered by the WTO's General Agreement on Trade in Services. Among the incentives that Americans have to produce in the U.K. and Ireland is this: EU countries impose local-content quotas on their own broadcasters; and movies or programs produced in the EU can satisfy those quotas, while film produced in the U.S. cannot. If the General Agreement on Trade in Services were to prohibit such quotas - as the U.S. would like - at least one incentive for runaways to the U.K. and Ireland would be eliminated.

(Indeed, because of co-production treaties between EU countries and Canada and Australia - but not the United States - that allow Canadian and Australian films to count towards EU quotas under certain circumstances, Americans would have one less incentive to produce in those two countries as well, if the WTO banned quotas.)

Second, the DoC report notes that the Export-Import Bank has adopted a Bank Loan Guarantee Program that should increase the number of bank loans made for independent films, if they are produced in the U.S.

And third, the Small Business Administration announced a program to provide government-guaranteed backing for commercial loans to small independent filmmakers, also for American made films.

Unfortunately, revision of the General Agreement on Trade in Services (so it bans film and

television program quotas) will be slow in coming - if it comes at all. France and Canada would like to exempt "cultural industries" from international trade agreements altogether; and there is a serious risk they will succeed. Unfortunately too, though the Export-Import Bank and Small Business Administration programs were announced last year, neither has been implemented yet; and both may be put in jeopardy by recently proposed budget cuts.

The DoC report also restates ideas proposed by members of the film industry itself. These include the adoption of U.S. government incentives to compete with those offered by other countries. But the report does no more than restate the idea; it does not advocate it, let alone propose specific legislation for Congress' consideration.

The report also restates the suggestion, made by some in the film industry, that the United States take

legal action against other countries that offer film incentives, on the grounds that those incentives violate existing international trade agreements. However, others in the film industry oppose this tack. So given the uncertain merits of such a claim, it is not surprising that the DoC report makes no recommendations at all along these lines.

The DoC reports that several state film commissions have urged the United States to create a national film commission. And it reports that others have urged Congress to hold hearings, and have argued for the creation of government-sponsored training programs.

The disappointing nature of the report's conclusion is highlighted by its final paragraph - a paragraph that states with confidence that these various proposals "need further study."

The Migration of U.S. Film and Television Production: Impact of "Runaways" on Workers and Small Business in the U.S. Film Industry, U.S. Department of Commerce (Jan. 2001), available at http://www.ita.doc.gov/media/ filmreport.htm [ELR 22:11:13]

INTERNATIONAL DEVELOPMENTS

British Court of Appeal sets aside jury verdict in favor of football player Bruce Grobbelaar in defamation case against News Group's Sun newspaper

Bruce Grobbelaar used to play professional "football" in Britain, first for Liverpool and then Southampton. In Britain, "football" is the game that

Americans call "soccer." But whatever it's called, the game is as important to the British as NFL football is to Americans.

As a result, when the Sun - a British newspaper published by News Group - ran a series of articles reporting that Grobbelaar had accepted bribes to fix games in which he played, it was a matter of great controversy. The evidence on which the Sun based its allegations came from one of Grobbelaar's former business partners, a man named Christopher Vincent, with whom Grobbelaar had a falling out because of the failure of one of their projects.

The evidence that Vincent gave the Sun was of two types: his own verbal assertions, and tape recordings of statements made by Grobbelaar admitting that he had taken bribes.

Naturally, the Sun's articles were extremely damaging to Grobbelaar. In fact, they were so

damaging that they resulted in his arrest and criminal prosecution. Ultimately, Grobbelaar was found not guilty, though it took two trials to reach that result. (The jury in his first criminal trial "disagreed," and he was tried again. At his second trial, the jury found him not guilty of one count and "disagreed" on a second, so the judge entered a not guilty verdict on it.)

Apparently angered by the prosecution the Sun articles had sparked, and emboldened by his acquittal, Grobbelaar then pursued a defamation suit against the Sun, seeking damages for the injuries it had caused to his reputation.

By the time the defamation case came to trial, Vincent was no longer a problem for Grobbelaar. Though Vincent was the source for the Sun's articles, the newspaper didn't even call him as a witness, because his credibility was so suspect. The tapes, however, spoke for themselves, and the Sun did put

them into evidence. Grobbelaar's response to his own recorded voice was stunningly simple: he lied on the tapes, he testified. And he did so, in order to get evidence that Vincent, his erstwhile business partner, was attempting to fix football games, so that he, Grobbelaar, could turn Vincent over to the authorities.

The Sun presented two defenses to Grobbelaar's defamation claim, one legal and the other factual.

The legal defense was that the newspaper had a "qualified privilege" to publish its articles, even if they turned out to be untrue. British law does not protect free speech as broadly as it is protected in the United States under the First Amendment. But recently, the House of Lords did recognize a "qualified privilege" of the kind claimed by the Sun.

The test for whether a newspaper can successfully claim the privilege in any particular case involves a ten-part evaluation of the facts. The trial

judge concluded that the Sun was not entitled to the privilege in Grobbelaar's case. And all three judges of the Court of Appeal - Lord Justice Simon Brown, Lord Justice Thorpe and Lord Justice Jonathan Parker - agreed.

Lord Justice Simon Brown emphasized the "tone" of the articles, saying that the privilege would have applied if the Sun had published "a restrained piece couched in the language of suspicion and allegation rather than, as here, an unqualified assertion of guilt." But, the Justice said, "If newspapers choose to publish exposes of this character, unambiguously asserting the criminal guilt of those they investigate, they must do so at their own financial risk."

The Sun's factual defense was "justification" - that is, the assertion that its articles were true. Under British law, the burden was on the Sun to prove the truth of its articles; and apparently the Sun failed. The

jury returned a verdict against it, and in favor of Grobbelaar, for 85,000 British pounds (about $130,000). The Sun appealed this issue too, arguing that "the jury's rejection of the defense of justification was perverse and should be set aside." It was on this issue that the Sun prevailed.

In order to reject its "justification" defense, the jurors had to believe Grobbelaar's testimony that the tapes of his conversations with Vincent, in which he admitted that he had accepted bribes, were nothing but lies. Each of the Justices of the Court of Appeal agreed that reasonable jurors simply would not have believed that testimony.

Lord Justice Simon Brown restated the evidence in detail, and concluded that "Mr. Grobbelaar's story is, quite simply, incredible." Lord Justice Thorpe agreed, saying that Grobbelaar's "explanation for his admissions went well beyond the boundary of the

implausible deep into the territory of the incredible." And Lord Justice

Jonathan Parker concluded that "Mr. Grobbelaar's explanation of those admissions is so utterly implausible that no jury, acting reasonably, could have accepted it as true."

For this reason, the Court of Appeal set aside the jury's verdict. The Sun emerged victorious. And Grobbelaar's reputation was tarnished again, this time in a judicial ruling that all but calls him a game-fixing liar.

Grobbelaar was represented by Mr. R. Hartley QC and Miss S. Palin, instructed by Cuff Roberts, Liverpool. The Sun was represented by Mr. R. Spearman QC, instructed by Daniel Taylor.

Grobbelaar v. News Group Newspapers, Supreme Court of Judicature, Court of Appeal (Civil Division),

Case No. A2/1999/1117, available at www.courtservice.gov.uk/ judgments/judg_home.htm [ELR 22:11:16]

RECENT CASES

Director William Wyler's successor is entitled to a trial in suit to set aside clause in his contract with MGM that limited his percentage of gross receipts compensation from "Ben Hur" to $50,000 per year, federal Court of Appeals rules again

The successor of director William Wyler has won, for the second time, an appellate court order that entitles it to a trial in its lawsuit against Turner Entertainment as the successor to MGM, the studio for which Wyler directed "Ben Hur" back in 1958.

Wyler's contract with MGM entitled him to be paid a percentage of the movie's gross receipts. But the current lawsuit is not an accounting dispute over how much that percentage should amount to. It is instead the result of a dispute over how much Turner is required to pay each year, out of gross receipts whose amount is agreed upon.

The reason the parties are locked in such an unusual dispute is that Wyler's contract also contained a clause that provided that his percentage compensation is to be paid "in annual installments not to exceed the sum of $50,000 in any one year." Wyler had asked for this clause in order to reduce his federal income taxes. In 1958, the marginal tax rate was 89% on individual incomes over $100,000 and 91% on incomes over $200,000. Wyler never anticipated that the clause would work to deprive him or his successors of the

benefit of the percentage compensation clause. But that is exactly what it has done.

"Ben Hur" was so successful that Wyler's share of the movie's gross receipts exceeded $50,000 a year by so much that today even the annual interest on the excess exceeds $50,000 a year! Turner has dutifully paid Wyler's successor the $50,000 a year Wyler bargained for. But Turner has rejected the successor's effort to "waive" the $50,000 a year clause - something the successor wants to do, because Turner is holding some $1.5 million that it would have paid Wyler or his successor, were it not for the $50,000 a year cap.

Early in the case, federal District Judge Saundra Brown Armstrong granted Turner's motion to dismiss the case. But that ruling was reversed. The Court of Appeal held that if Wyler's successor could prove that the $50,000 a year clause was inserted in Wyler's contract solely for his benefit, and not for MGM's

benefit as well, then his successor could waive the clause, and Turner would have to pay (ELR 20:3:4).

On remand, Judge Armstrong granted a Turner motion for summary judgment. She ruled that Wyler's successor did not have a legal right to waive the clause, for four reasons. Wyler's successor appealed again, and again it has won a reversal. Writing for the Court of Appeals, Judge Stephen Trott has rejected each of the four reasons Turner had relied on in its temporarily successful effort to avoid trial.

Judge Trott held that it was irrelevant that the tax law's "constructive receipt" doctrine would have been triggered - and thus Wyler would have had to pay much more in income taxes - if he had the right to waive the $50,000 a year clause any time he wanted. "The only question," Judge Trott ruled, "is whether the contracting parties included the installment payment provision for the sole benefit of Mr. Wyler."

Judge Trott also held that Wyler's successor is not barred by "judicial estoppel" from waiving the clause. "Here, the fact that Mr. Wyler claimed to the I.R.S. $50,000 in percentage compensation annually on his taxes was not a misrepresentation," the judge explained, because "he actually received only $50,000 per year."

On the central question of whether the clause was included for Wyler's sole benefit, his successor introduced evidence that it was. That evidence was testimony by Leon Kaplan and Roger Davis that in the late 1950s, clauses like Wyler's were requested by talent, not by studios; and testimony by Burton Forester that the clause could have hurt MGM financially, rather than help it, because of the probability that (because of falling corporate tax rates) studios might have to pay higher income taxes on unpaid excess gross receipt obligations than it could later deduct, when those

payments finally were made. Judge Trott held that this evidence raised a triable issue of fact about whether the clause was included in Wyler's contract for his sole benefit.

Finally, Judge Trott rejected the argument that Wyler's successor was barred by laches from waiving the clause. Since the lawsuit is to collect unpaid money allegedly due under a contract, it makes a "claim at law" rather than a "claim at equity." And laches is a defense only to claims at equity, Judge Trott held.

Wyler's successor was represented by Jonathan R. Bass, Coblentz Patch Duffy & Bass, San Francisco. Turner was represented by M. Laurence Popofsky, Heller Ehrman White & McAuliffe, San Francisco.

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184, 2000 U.S.App.LEXIS 31139 (9th Cir. 2000)[ELR 22:11:18]

Dismissal of Latrell Sprewell's lawsuit against Golden State Warriors and NBA, arising out of Warriors' termination of his contract and suspension by NBA, is affirmed, as are sanctions against Sprewell's lawyers for filing "baseless" amended complaint

Latrell Sprewell now plays for the New York Knicks. But basketball fans, and many others, will remember that he once played for the Golden State Warriors. Sprewell's tenure with the Warriors came to an abrupt end in 1997 after he choked, punched and threatened to kill P.J. Carlesimo who was then the Warriors' head coach. As a result of that incident, the Warriors suspended him for ten days and then terminated his contract, while the NBA thereafter suspended him for a year.

The NBA collective bargaining agreement gave Sprewell the right to file a grievance challenging the termination of this contract and his suspensions. And that's exactly what Sprewell did. Following a nine-day hearing, the arbitrator issued a ruling that for the most part favored Sprewell.

The arbitrator apparently upheld Sprewell's ten-day suspension by the Warriors, but found that the team's termination of Sprewell's contract was not supported by "just cause" because the team's interests were protected by the NBA's investigation of the altercation. The arbitrator also ruled that the NBA's suspension of Sprewell should last only for the balance of the 1997-98 season, rather than for a full calendar year.

Despite his apparent victory, Sprewell sued the Warriors and the NBA in federal court in San Francisco. His complaint sought to vacate the

arbitrator's award, and it alleged at least ten legal theories in an effort to do so. District Judge Vaughn Walker was not impressed, however. When the Warriors and NBA made a motion to dismiss, Judge Walker granted it.

After giving Sprewell and his lawyers "a comprehensive explanation" for why he deemed the complaint to be without merit, Judge Walker urged them to "simply drop[] the matter." He did, however, rule that they could file an amended complaint if they wished, provided Sprewell's attorneys "signed any amended pleading in accordance with Rule 11" - the Rule that permits federal judges to impose sanctions.

Sprewell's lawyers did file an amended complaint that "mirror[ed] the original." Judge Walker dismissed that complaint as well. And, in accordance with Rule 11, the judge sanctioned Sprewell's lawyers

by ordering them to pay the Warriors' and NBA's attorneys' fees.

Sprewell and his lawyers appealed, but without success. In an opinion by Judge Stephen Trott, the Court of Appeals has affirmed both the dismissal of Sprewell's case and the sanctions imposed on his lawyers.

Sprewell sought to vacate the arbitrator's award, in part, because it upheld his suspension by both the Warriors and the NBA, even though, on its face, the collective bargaining agreement allows players to be disciplined by their teams "or" by the Commissioner. Nevertheless, the arbitrator's award "explained in detail" why despite the collective bargaining agreement's use of the word "or," it actually permits discipline to be imposed "for just cause" by both teams and the Commissioner. On behalf of the appellate court, Judge Trott wrote that "regardless of whether we

would reach the same conclusion," the arbitrator was "construing or applying" the collective bargaining agreement; and thus, as a matter of federal law, his conclusion on this issue could not be set aside.

Judge Trott also ruled that the arbitrator did not exceed the scope of his authority, that his decision did not violate public policy, and that the award had not been procured by fraud.

Sprewell also alleged that his punishment violated federal statutes prohibiting racial discrimination. However, the arbitrator's award found that Sprewell had not been punished because of his race, but rather because of the "singularity of his misconduct," and because he had attacked his head coach - an action the arbitrator found to strike "at the very core of a structure that provides stability for a team and an organized sport."

Sprewell's claims under California state law were preempted by federal labor law, Judge Trott ruled.

Finally, Judge Trott upheld the award of sanctions against Sprewell's lawyers. Though courts usually exercise restraint in awarding sanctions in civil rights cases, Judge Trott ruled that Judge Walker had not abused his discretion in awarding them in this case, because Sprewell's lawyers had ignored Judge Walker's warnings and had "filed another baseless complaint mirroring the original."

On appeal, Sprewell was represented by Paul F. Utrecht, San Francisco. Sprewell's lawyers were represented by Richard R. Dale, Mill Valley. The Warriors and NBA were represented by Jeffrey A. Mishkin and Frank Rothman, Skadden Arps Slate Meagher & Flom, New York City and Los Angeles.

Sprewell v. Golden State Warriors, 231 F.3d 520, 2000 U.S.App.LEXIS 27824 (9th Cir. 2000)[ELR 22:11:19]

Idea submission case against Coca-Cola was properly dismissed, Georgia appellate court affirms, because idea to use anthropomorphic polar bears in television commercials was not novel, and because idea to use polar bears in Coca-Cola commercials was independently conceived

Coca-Cola's "Bears in the Theater" television commercials began airing in 1993, and right from the start, they were a hit. So popular were they, in fact, that Coca-Cola has even licensed other companies to make plush and plastic Coca-Cola polar bear figurines.

Coca-Cola's polar bears were conceived by Ken Stewart. He's the husband of an executive at Creative

Artists Agency - an agency that Coca-Cola had hired "to generate fresh advertising ideas." Stewart had been inspired by his own Labrador retriever puppy, because it looked like a polar bear. And the evidence showed that Stewart "came up with the idea on his own, free from any input from Coca-Cola personnel."

The reason that Stewart's creative processes became the subject of "evidence" is that Robert L. Burgess claims the polar bear idea was his, and that he had pitched it to Coca-Cola between 1989 and 1992, in meetings with Coca-Cola executives. Indeed, the evidence confirmed that Burgess did have pitch meetings with Coca-Cola executives, and that for a time, they were interested in his polar bear ideas, at least for toys if not for commercials.

Nothing ever came of Burgess' meetings with Coca-Cola executives. But when Burgess saw the company's polar bear commercials, he was sure the

bears were those he began pitching to the company four years earlier. He expressed his beliefs in a Georgia state court complaint that alleged an assortment of legal theories, including misappropriation, breach of implied contract, and breach of confidential relationship.

Burgess' case didn't get far. A Superior Court judge granted Coca-Cola's motion for summary judgment. And that ruling has been affirmed by the Georgia Court of Appeals.

In an opinion by Judge John Ellington, the appellate court has ruled that under Georgia law, an idea must be "novel" to be protected in the way that Burgess wanted. His idea was not, Judge Ellington ruled, because the Icee Company had used an animated bear to advertise its drinks since the 1960s, and because Coca-Cola itself had used anthropomorphic bears, including polar bears, in its own advertising since 1923.

The judge held that even if Burgess' bears "were presented in a fresh or different setting," that would "not constitute novelty because 'creating a new or better way of doing something' already existent is not sufficient."

Moreover, even if Burgess' ideas were novel, his case was properly dismissed, the appellate court ruled, because he had no evidence to rebut Coca-Cola's evidence that its polar bear commercials were independently created by Stewart. "Independent creation" is a complete defense, Judge Ellington explained.

Burgess was represented by Robert E. Shields, Doffermyre Shields Canfield Knowles & Devine, Atlanta. Coca-Cola was represented by Louis N. Jameson, King & Spaulding, Atlanta.

Burgess v. Coca-Cola Co., 536 S.E.2d 764, 2000 Ga.App.LEXIS 856 (Ga.App. 2000)[ELR 22:11:20]

Court of Appeals reinstates $655,000 copyright infringement judgment in favor of author Wade Cook against seminar producer Anthony Robbins, based on Robbins' use of two short phrases from Cook's book "Wall Street Money Machine"

It is common knowledge that short phrases are not eligible for copyright protection. The Copyright Office's own Circular 1, entitled "Copyright Basics," says exactly that.

Apparently, however, common knowledge is not always right - at least not in the Ninth Circuit. Book author Wade Cook has won a $655,000 infringement judgment in the Ninth Circuit Court of Appeals,

because seminar producer Anthony Robbins' used just two short phrases - "meter drop" and "rolling stock" - from Cook's best-selling book Wall Street Money Machine.

In an astonishing opinion by Judge Wallace Tashima, the appellate court has held that those two phrases are sufficiently original to be eligible for copyright protection. And it has held that Cook was entitled to a judgment of $655,000 - 65% to 94% of all of Robbins' profits from his seminar, according to the calculations of Cook's own expert - on account of Robbins' unauthorized use of those two phrases, because Robbins had failed to satisfy his burden to show what portion of his profits were attributable to other things. Finally, the appellate court held that Robbins' use of those four words was not a fair use.

In fairness to Judge Tashima and his colleagues, the procedural posture of the case must be emphasized.

Cook won a $655,000 jury verdict, and technically, the Court of Appeals merely held that the jury had been provided with sufficient evidence to properly reach that verdict. Following the verdict, the trial court judge - District Judge Jack Tanner - granted Robbins' motion for judgment as a matter of law, on the grounds that Cook failed to proved that any of Robbins' profits were attributable to his use of the two phrases.

In response to Cook's appeal, Judge Tashima ruled that Judge Tanner had erred in requiring Cook to prove that Robbins' profits were attributable to the infringement. Instead, Judge Tashima held that under section 504(b) of the Copyright Act, Cook merely had to show what Robbins' gross revenue had been, and the burden was then on Robbins' to show what portion of those receipts were attributable to things other than the infringement. Robbins did testify that no portion of his revenues was attributable to his use of the two phrases.

But Judge Tashima ruled that the jury was not required to accept that testimony (and apparently it didn't).

Robbins cross-appealed, on the grounds that the two phrases at issue were not copyrightable, and that in any event, his use of them was a fair use. But Judge Tashima rejected both arguments.

He held that "'meter drop' and 'rolling stock' are creative, even if only minimally so, and are protected by his copyright in Wall Street Money Machine." He also held that the evidence did not compel a finding, contrary to the jury's finding that Robbins' use of those phrases was a not fair use.

Cook was represented by H. Troy Romero, Bellevue, Washington. Robbins was represented by Peter S. Selvin, Los Angeles.

Editor's note: This is the second time in just months that the Ninth Circuit has rendered decisions that are remarkably deferential to jury verdicts in

copyright cases. It did so as well in the Isley Brothers' infringement case against Michael Bolton (ELR 22:5:11).

Cook v. Robbins, 232 F.3d 736, 2000 U.S.App.LEXIS 29168 (9th Cir. 2000)[ELR 22:11:20]

Windswept Pacific wins dismissal of suit by successors of songwriter Bo Gentry claiming that they, rather than Windswept, own renewal copyright to "Mony, Mony"; successors' assignee previously settled same claim, and release signed by assignee was binding on successors

The question of who owns a one-quarter interest in the renewal copyright to the song "Mony, Mony" has been the subject of a surprising number of lawsuits in

federal and state courts in New York. As a result of a decision by federal District Judge Shira Scheindlin, the answer now is: Windswept Pacific. But getting there has required Windswept to traverse a long and winding road.

A description of the dispute has to be reduced to its bare essence, because the full story only confuses. Here then is the essence.

"Mony, Mony" was co-authored by four songwriters, one of whom was Robert Ackoff - professional known as Bo Gentry. The song was registered for copyright back in 1968; and its copyright was duly renewed in 1997. Ackoff, however, died in 1983, without a wife, children or a will. As a result, his interest in the copyright passed to his mother, as did his one-quarter interest in the song's renewal copyright.

In 1989 - after Ackoff died but before the copyright was due to be renewed - Ackoff's mother

assigned her renewal expectancy to another of the song's co-writers, Richard Rosenblatt. Shortly after the song's copyright was renewed in 1997, Windswept filed a supplementary renewal registration with the Copyright Office which stated that Ackoff had co-written "Mony, Mony" as a "work made for hire" pursuant to an exclusive songwriter agreement with Windswept's predecessor. As a result, Windswept claimed to be the owner of the one-quarter interest in the renewal copyright attributable to Ackoff's contribution to the song.

By the time Windswept filed its supplementary registration in 1997, it was already locked in lawsuits with Rosenblatt over ownership of the copyrights to several songs, including "Mony, Mony." Earlier that year, Windswept settled one of those suits, and obtained from Rosenblatt a release of "all" of his claims. That wasn't the end of the matter however,

because Rosenblatt thereafter canceled Ackoff's mother's 1989 assignment to him, and transferred back to her the one-quarter interest in the renewal copyright to "Mony, Mony" he had obtained by that 1989 assignment.

In 1999, Ackoff's mother (joined by her daughter and son, to whom she had transferred interests in the copyright) sued Windswept themselves, claiming that they, rather than Windswept, owned the one-quarter interest in the renewal copyright to "Mony, Mony" attributable to Ackoff's co-writing of the song.

In response to Windswept's motion for summary judgment, Judge Scheindlin has held that Rosenblatt's 1997 release barred whatever claims the Ackoffs may otherwise have had, because at the time Rosenblatt signed the release, he was the owner of whatever renewal term rights Ackoff's mother may have had, as a result of her 1989 assignment of those rights to him.

The Ackoffs tried to avoid this result by arguing that the 1989 assignment was unconscionable, and thus did not convey renewal rights to Rosenblatt. Of course, if Rosenblatt didn't own those renewal rights, his 1997 release wouldn't have released the Ackoffs' claims. But Judge Scheindlin held that under New York state law, there is a six-year statute of limitations on claims of unconscionability. This meant that the period of limitations began in 1989 and expired in 1995 - four years before the Ackoffs filed their suit against Windswept Pacific.

The Ackoffs were presented by Frederick F. Greenman Jr., Deutsch Klagsbrun & Blasband, New York City. Windswept Pacific was represented by Scott L. Baker, New York City.

Ackoff-Ortega v. Windswept Pacific Entertainment, 120 F.Supp.2d 273, 2000 U.S.Dist.LEXIS 14811 (S.D.N.Y. 2000)[ELR 22:11:21]

Viacom wins dismissal of trademark case filed by software company that complained that its "M2" mark was infringed and diluted by name of Viacom's "M2: Music Television" channel

Back in 1996, Viacom created a sibling for its popular MTV music video channel. That sibling is now known, appropriately enough, as "MTV 2." But in the beginning, Viacom called it "M2: Music Television." As a result, Viacom got sued for trademark infringement and dilution by a company known as M2 Software, Inc.

As its name suggests, M2 Software's primary product is a computer program called "M2." The program enables record companies to track royalties. And M2 Software has sold just over a dozen installations of the program to record companies owned by BMG, Warner Brothers and others.

M2 Software also registered its "M2" mark with the U.S. Patent and Trademark Office in 1995. So when "M2: Music Television" went live (via cable and satellite) in 1996, M2 Software sued.

The case began as a close one. In an unpublished ruling, federal Judge Richard Paez found that M2 Software "had shown a likelihood of success on the merits." But the judge denied the software company's motion for a preliminary injunction on the grounds that it had not shown a possibility of irreparable harm.

Undaunted, Viacom later made a motion for summary judgment - and has been rewarded for its self-

confidence and legal preparation. Judge Paez has granted Viacom's motion.

Following a careful multi-factor analysis in connection with M2 Software's infringement claims, the judge concluded that there is no likelihood of confusion between the software company's "M2" mark and Viacom's "M2: Music Television" channel title, for several reasons. Among other things, the two products are "extremely different" and there has been no actual confusion between the two, the judge found.

Judge Paez also dismissed the software company's dilution claims. He did so, because he found that its "M2" mark simply is not "famous," as required for anti-dilution protection. Though the evidence showed that 12% of those polled were aware of the "M2" mark, the evidence showed that 11% of those polled also were aware of "completely fictitious marks."

As a result, Judge Paez ordered that judgment be entered in Viacom's favor.

M2 Software was represented by Robert B. Owens, Owens & Gach Ray, Los Angeles. Viacom was represented by Anthony M. Keats, Keats McFarland & Wilson, Beverly Hills.

M2 Software, Inc. v. Viacom, Inc., 119 F.Supp.2d 1061, 2000 U.S.Dist.LEXIS 11753 (C.D.Cal. 2000)[ELR 22:11:22]

City resolution allowing library patrons to censor children's books is unconstitutional, federal District Court rules in case prompted by award-winning books "Heather Has Two Mommies" and "Daddy's Roommate"

A resolution adopted by the city council of Wichita Falls, permitting library patrons to censor children's books, has been declared unconstitutional by federal District Judge Jerry Buchmeyer. The resolution was prompted by a Baptist Reverend's objections to two award-winning books that were shelved in the children's section of the Wichita Falls Public Library: Heather Has Two Mommies by Leslea Newman, and Daddy's Roommate by Michael Wilhoite. They are about children who have gay and lesbian parents.

The resolution required the library to remove books from its children's section and reshelve them in

its adult section, if a petition were submitted by 300 library cardholders. A petition was submitted requesting the removal of Heather and Daddy's Roommate, both of which were removed until a temporary restraining order was issued in a case filed by the mother of two children, as well as several other Wichita residents.

Judge Buchmeyer now has issued a permanent injunction barring enforcement of the resolution, on the grounds that it is unconstitutional. In a lengthy set of findings of fact and conclusions of law, the judge reasoned that the resolution permits content and viewpoint based discrimination against books, and thus violates the First and Fourteenth Amendments.

The Wichita residents who filed the suit were represented by John K. Horany, Dallas. The City of Wichita was represented by Mark T. Price, Wichita Falls.

Sund v. City of Wichita Falls, Texas, 121 F.Supp.2d 530, 2000 U.S.Dist.LEXIS 18931 (N.D.Tex. 2000)[ELR 22:11:22]

Appellate court affirms ruling that Hasbro's murder mystery game trademark "Clue" is not infringed or diluted by computer consulting company's use of "clue.com" domain name

Sometimes a good brief is just not enough. That is one of the lessons taught by a decision of a federal appellate court, in a case in which Hasbro unsuccessfully alleged that its murder mystery game trademark "Clue" has been infringed and diluted by a computer consulting company's use of "clue.com" as a domain name.

District Judge Douglas Woodlock dismissed Hasbro's trademark case against Clue Computing, Inc., in response to Clue Computing's motion for summary judgment (ELR 21:10:13). Hasbro appealed, attacking Judge Woodlock's reasoning and findings. It apparently did a good job too, because in a Per Curiam decision, the Court of Appeals noted that "Hasbro has written an able brief."

Unfortunately for Hasbro, the appellate court went on to say that "nothing in the [brief's] discussion persuades us that the district court used incorrect legal standards, erred in determining that there were no material issues requiring trial on the infringement claim, or made clearly erroneous findings of fact on the dilution claim."

As a result, the appellate court "generally adopt[ed] the district court's analysis without needlessly repeating it."

The appellate court did add a qualification to its "general endorsement." Judge Woodlock's ruling had devoted "some length" to the question of whether the Federal Trademark Dilution Act is retroactive, as Hasbro had argued; and he concluded that it is. That did not help Hasbro, however, because Judge Woodlock also concluded that its Clue mark is not famous and had not been diluted. Other courts have concluded that the Act is not retroactive. Thus, since the Act's retroactivity did not affect the outcome of the case, the appellate court concluded its short opinion by saying that it "prefer[s] to take no position on the matter."

Hasbro was represented by Kenneth B. Wilson, Wilson Sonsini Goodrich & Rosati. Clue Computing was represented by Thomas A. Mullen.

Hasbro, Inc. v. Clue Computing, Inc., 232 F.3d 1, 2000 U.S.App.LEXIS 27856 (1st Cir. 2000)[ELR 22:11:23]

Appellate court reinstates radio broadcaster's lawsuit against Anheuser-Busch alleging that beer company violated antitrust law by denying it the right to broadcast Anheuser-Busch-sponsored golf tournaments in response to enticements or coercion by PGA

For a while, Spectators' Communication Network was in an interesting if niche business. It did on-site low-frequency radio broadcasts of professional golf tournaments that could be heard only by those who were actually on the golf course. Spectators' made money by selling commercials and by putting company logos on the special radios that were used to listen to the broadcasts.

Among the tournaments that Spectators' acquired the right to broadcast were PGA tournaments sponsored by Anheuser-Busch. In 1993, however, the beer

company cancelled its contract with Spectators', shortly before a PGA tournament at Colonial Country Club.

Spectators' had reason to believe that its contract was cancelled because the PGA itself wanted to handle the on-site low-power radio broadcast of the tournament. And Spectator had further reason to believe that the PGA had enticed or coerced Anheuser-Busch into canceling Spectators' contract so the PGA could do so.

Spectators' responded by filing a federal antitrust lawsuit against PGA, Anheuser-Busch and others. It appears that the case may have produced some recompense for Spectators', because it has been publicly reported that some defendants were dismissed from the case "pursuant to agreements." One of those dismissed was the PGA itself; but even after others were dismissed, claims remained against Anheuser-Busch.

The beer company got out of the case - temporarily - with a motion for summary judgment. District Judge Jorge Solis ruled that Spectators' had not shown "concerted action" involving Anheuser-Busch, because as an advertiser, allegations that it had conspired to reduce competition among broadcasters were "not economically plausible." That ruling, however, has been reversed on appeal.

In an opinion by Judge John Gibson, the Court of Appeals has held that an illegal "combination or conspiracy" can occur, even when one conspirator has no interest in preventing competition, if that conspirator "is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive." In this case, Judge Gibson explained, "even though it was not directly in Anheuser-Busch's interest to eliminate competition in the market for on-site advertising at tournaments, other

facts in this record made it economically plausible for Anheuser-Busch to participate in a combination fomented by the PGA."

The "other facts" to which Judge Gibson referred were (1) allegations that the PGA had enticed Anheuser-Busch into participating in the conspiracy against Spectators' by giving the beer-company sponsorship opportunities it otherwise would not have had, and (2) allegations that the PGA had coerced Anheuser-Busch by suggesting that it would not be able to sponsor future PGA tournaments, if Spectators' were granted the right to broadcast them.

Spectators' argued that the conspiracy it had alleged resulted in a boycott that was illegal "per se." Judge Gibson, however, held that the rule of reason should be used to determine whether the alleged conspiracy was illegal. Therefore, the case has been remanded to the District Court for it to evaluate

whether Spectators' evidence shows that it was boycotted because of an unreasonable restraint of trade.

Spectators' was represented by Theodore Carl Anderson, Kilgore & Kilgore, Dallas. Anheuser-Busch was represented by Stephen Stingley Goodman IV, Goodman Odom Lacy Floyd & Midlgey, Fort Worth.

Spectators' Communication Network v. Colonial Country Club, 231 F.3d 1005, 2000 U.S.App.LEXIS 29034 (5th Cir. 2000)[ELR 22:11:23]

Tennessee high school athletic association is a "state actor," and thus its enforcement actions against Brentwood Academy for alleged recruiting violations are subject to Fourteenth Amendment, United States Supreme Court rules

Tennessee newspapers frequently have had the occasion to run headlines trumpeting the victories of Brentwood Academy. Brentwood is a private Christian school and a football "powerhouse." It has won seven Tennessee state championships and has even been nationally ranked by USA Today.

Recently, Brentwood won again - not on the football field, but in a court of law, indeed, in the United States Supreme Court. Brentwood won in a case in which it sued the Tennessee Secondary School Athletic Association, as a result of disciplinary action the Association took against the school because of its

alleged violation of an Association rule that prohibits its members from using "undue influence" in recruiting athletes.

Brentwood ran afoul of the Recruiting Rule in 1997 when its football coach sent a letter to all new incoming male students inviting them to participate in spring football practice. The Association retaliated by banning the school from tournaments for two years, putting it on probation for four years, and fining it $3000. Brentwood in turn responded by suing the Association, alleging that applying the Recruiting Rule to the coach's letter violated the school's First and Fourteenth Amendment rights.

Federal District Judge Todd Campbell agreed. In order to do so, Judge Campbell first had to conclude that the Association's actions were "state action." This was so, because only state actions - not purely private actions - must comport with the Constitution. In the

lengthiest part of his decision, Judge Campbell did conclude that the Association's actions were state action (ELR 20:9:16). And from that conclusion, the Association appealed.

On appeal, Brentwood suffered a setback that seemed to end its case. A three-judge panel of the Court of Appeals held that the Association's actions were not state action (ELR 21:7:22); and the full appellate court denied Brentwood's petition for en banc review (ELR 21:9:26).

However, Brentwood didn't get to be a sports powerhouse by giving up. It didn't give up after losing in the Court of Appeals either. Instead, it petitioned the Supreme Court to hear its case. And in doing so, it successfully completed a "hail Mary." The Supreme Court granted the school's petition (ELR 21:12:26). The Supreme Court then answered Brentwood's prayers, holding by a slim 5-to-4 margin, that the Association's

disciplinary actions were indeed state action, just as Judge Campbell had originally ruled.

The majority's opinion was written by Justice David Souter. He held that the Association's actions against Brentwood were state action because of "the pervasive entwinement of state school officials in the structure of the association." There was, Justice Souter said, "no offsetting reason to see the association's acts any other way."

Justices Clarence Thomas, Antonin Scalia, Anthony Kennedy and Chief Justice William Rehnquist all dissented.

Brentwood Academy was represented by Joel D. Bertocchi, Chicago. The Association was represented by Deanne F. Jones, Decator Illinois. The United States, as amicus curiae in support of Brentwood, was represented by Matthew D. Roberts, Washington D.C.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 121 S.Ct. 924, 2001 U.S.LEXIS 964 (2001)[ELR 22:11:24]

Dismissal of complaint filed by card-counting blackjack players against Atlantic City casinos is affirmed

Blackjack is a casino game in which a player's skill may increase his chance of winning. Skillful players do in fact increase their chances of winning by card-counting; and it works well enough that casinos have long used a variety of countermeasures to keep the game profitable for them. Those countermeasures work too, well enough to stymie the efforts of card-counting players.

Several card-counting blackjack players, as well a school that teaches players how to count cards, sued the casinos in Atlantic City, alleging that the casinos' countermeasures violate the federal RICO act and deprive the players of the constitutional rights.

The case did not get far. It was dismissed by federal District Judge Joseph Irenas, in response to a defense motion (ELR 20:6:24). The players and blackjack school appealed. But the ruling against them has been upheld.

In an opinion that begins with an exquisitely detailed description of the rules of blackjack and the strategy of card-counting, Court of Appeals Judge Morton Greenberg reached the conclusion that allegations that casinos violate RICO "are completely insubstantial and border on the frivolous." Among other things, the judge observed that unlike most RICO victims, players can avoid any injury to themselves

simply by not playing blackjack in casinos that take countermeasures against card-counters.

Judge Greenberg also rejected the players' argument that their constitutional rights had been violated by the casinos. In addition to the fact that casino actions are not state action, the judge held that players do not have a constitutionally protected right to gamble.

The players and blackjack school were represented by Howard A. Altschuler, East Haven Connecticut. The casinos were represented by Frederick H. Kraus, Atlantic City; Adam N. Saravay, Tompkins McGuire Wachenfeld & Barry, Newark; and John M. Donnelly, Levine Staller Sklar Chan Brodsky & Donnelly, Atlantic City.

Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 2000 U.S.App.LEXIS 27465 (3rd Cir. 2000)[ELR 22:11:25]

Previously Reported:

The United States Supreme Court has granted certiorari: in Holder v. Free Speech Coalition, 121 S.Ct. 876, 2001 U.S.LEXIS 944 (2001), the case that held that the Child Pornography Prevention Act of 1996, which makes computerized virtual child pornography a crime, is partially unconstitutional (ELR 21:11:9); and in City of Los Angeles v. Alameda Books, 121 S.Ct. 1223, 2001 U.S.LEXIS 1965 (2001), in which a Los Angeles ordinance prohibiting the operation of adult bookstores and adult video arcades in the same building was ruled unconstitutional (ELR 22:8:26).

The United States Supreme Court has denied petitions for certiorari: in Bolton v. Three Boys Music Corp., 121 S.Ct. 881, 2001 U.S.LEXIS 800 (2001), the case in which the Court of Appeals refused to set aside a jury's verdict that Michael Bolton's song "Love is a Wonderful Thing" was copied from the Isley Brothers' identically-titled song, despite slight evidence of access, resulting in the appellate court's affirming a $5.4 million judgment, even though the court acknowledged that the case "may" have been "weak" and "circumstantial" (ELR 22:5:11); in Mindgames, Inc. v. Western Publishing Co., 121 S.Ct. 882, 2001 U.S.LEXIS 807 (2001), where it was held that the manufacturer of the board game "Clever Endeavor" was not entitled to recover anticipated lost profits from the game's distributor, despite the distributor's alleged breach of their licensing agreement, because the manufacturer's damages were too speculative (ELR

22:6:21); and in Time Warner Entertainment L.P. v. Federal Communications Commission, 121 S.Ct. 1167, 2001 U.S.LEXIS 1687 (2001), which upheld the constitutionality of provisions of 1992 Cable TV Act dealing with subscriber limits and channel occupancy (ELR 22:5:21).
[ELR 22:11:25]

DEPARTMENTS

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Finding a Winning Strategy Against the MP3 Invasion: Supplemental Measures the Recording Industry Must

Take to Curb Online Piracy by Robert T. Baker, 8 UCLA Entertainment Law Review 1 (2000)

Claim Jumping on the Newest Frontier: Trademarks, Cybersquatting, and the Judicial Interpretation of Bad Faith by John M. Carson, Amy C. Christensen, and John N. Kandara, 8 UCLA Entertainment Law Review 27 (2000)

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Copyright Preemption: Is This the End of Desny v. Wilder? by Glen L. Kulik, 21 Loyola of Los Angeles Entertainment Law Review 1 (2000)

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Loki Surfs for Porn: An Analysis of the Discord the Internet May Cause in Obscenity Law by Alison E. Howell, 22 Comm/Ent, Hastings Communications and Entertainment Law Journal 509 (2000)

IPOs on the Internet: The Need for the Next Step by Daniel M. Weisenfeld, 22 Comm/Ent, Hastings Communications and Entertainment Law Journal 529 (2000)

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Perspectives and Divergent Analyses which arose from the 2000 American Association of Law Schools Intellectual Property Section Meeting:

Trademarks, Cybersquatters and Domain Names by J. Thomas McCarthy, 10 DePaul-LCA Journal of Art and Entertainment Law 231 (2000)

Right of Publicity From the Performer's Point of View by Richard Masur,10 DePaul-LCA Journal of Art and Entertainment Law 253 (2000)

California Expands the Statutory Right of Publicity for Deceased Celebrities While Its Courts Are Examining the First Amendment Limitations of That Statute by Bela G. Lugosi, 10 DePaul-LCA Journal of Art and Entertainment Law 259 (2000)

Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long! by Diane Zimmerman, 10 DePaul-LCA Journal of Art and Entertainment Law 283 (2000)

McClain Untarnished: The NSPA Shines Through the Phiale Controversy by Ann Brickley, 10 DePaul-LCA Journal of Art and Entertainment Law 315 (2000)

Sticks and Stones and Chips of Bone: Shock Humor and Emotional Distress in Roach and Driscol v. Stern, Infinity Broadcasting, Inc., and Hayden by Robert Sabetto, 10 DePaul-LCA Journal of Art and Entertainment Law 361 (2000)

The Supreme Court Appeal of the Casey Martin Case: The Court's Two Options-Martin's Hole-in-One or Olinger's Slice into the Bunker by Brian Pollock, 10

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Time to Give Boxers a Fighting Chance: The Muhammad Ali Boxing Reform Act by Melissa Bell, 10 DePaul-LCA Journal of Art and Entertainment Law 473 (2000)

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