INTERNATIONAL DEVELOPMENTS

European Commission approves European soccer association's new broadcasting regulations that permit blackouts of soccer game TV broadcasts to protect stadium attendance and amateur participation

The European Commission has decided that UEFA's new rules on the broadcasting of football games "fall outside the scope of European competition rules." UEFA's Broadcast Regulations allow national football associations to block television broadcasts of football for 2 1/2 hours on Saturday or Sunday, in order to protect stadium attendance and amateur participation in the sport. The rules are, the Commission said, "a good example of how to reconcile competition rules and the special characteristics of sport."

UEFA - the "Union des Associations Europeennes de Football" - was founded in Switzerland in 1954, and is an association of 51 national football associations in Europe (where "football" is the game Americans call "soccer"). There is a single association in each country except for the United Kingdom, where for historical reasons England, Wales, Scotland and Northern Ireland each has its own association.

UEFA first introduced broadcasting rules in 1988. They were very complicated, extensive in scope, and had several different broadcast authorization requirements. The rules were amended on several occasions as a result of complaints from broadcasters who argued that UEFA's Broadcasting Regulations restricted competition. The Commission agreed and issued a "statement of objections" in 1998, finding that the regulations violated Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement and that they were not eligible for an exemption unless modified.

UEFA adopted its new Broadcasting Regulations in July 2000, in time for the start of the 2000/2001 season that began in August 2000. The new Broadcasting Regulations abandoned the authorization system, so that football associations can no longer arbitrarily veto broadcasts into their territories. "The new Broadcasting Regulations represent a significant improvement compared to the Broadcasting Regulations that were originally presented to the Commission in terms of scope and procedure," the Commission determined. And that has permitted the Commission to declare the rules to be "outside of the scope of the competition rules."

The price of broadcasting rights to European sporting events has increased dramatically in recent years; and TV rights for football tend to be the most expensive of all. While football clubs welcome TV revenues, they also want to protect stadium attendance. The Commission's examination of the UEFA broadcasting rules took into account those two conflicting interests.

UEFA's new Broadcasting Regulations allow national football associations to prevent the broadcasting of football within their territories for 2 1/2 hours either on Saturday or Sunday at hours that correspond to their scheduled games. A football match is played in two halves of 45 minutes each with a 15 minute break in between, so the 2 1/2 hour broadcast ban will be enough to protect stadium attendance.

Ten out of 21 national football associations chose to block broadcasts during the 2000/2001 season. No television channel in England, for example, showed football between 2:45 and 5:15 on Saturday afternoons, and the Belgian football association blocked football broadcasts from 7:30 to 10:00 on Saturday evenings. This meant that at times, broadcasters were unable to broadcast football games live. But the Commission concluded that this did not amount to an "appreciable restriction of competition" within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

The Commission also concluded that the Broadcasting Rules would not affect cross-border broadcasts significantly, because the rules only apply to broadcasts specifically produced for a given territory in terms of language or content, and because most broadcasters only intend to broadcast into the territory of a single national football association.

In reaching its decision, the Commission said that it took into consideration the fact that games are increasingly spread throughout the week in the leagues of the big football nations that have foreign markets outside their domestic markets. In most of those leagues, games are played on different days of the week and at different hours. Therefore the rules will rarely prevent broadcasters from broadcasting any football.

The Commission also examined the emerging market for Internet streaming of football, but concluded that the Broadcasting Regulations would not "at present appreciably restrict the technological and economic developments" in Internet streaming. However, the Commission "reserved the right to intervene in the future if developments were brought to its attention which would indicate that the Broadcasting Regulations would have become a barrier to the development of new Internet services."

EU Commission release IP/01/583 (20 April 2001), available at http://europa.eu.int/ [ELR 23:3:4]

European Commission does not object to subsidies for French professional sports clubs

The European Commission has decided not to object to a public subsidy program for French professional sports clubs, because the subsidies do not constitute "state aid" under the EC Treaty. "It was clear," the Commission concluded, that the French subsidies are designed to "assist education and initial training." As such, they amount to a permissible "educational" or comparable program.

The program permits local French authorities to grant professional football, basketball, rugby and volleyball clubs with public subsidies of as much as 2.3 million Euros a year per club (about $2 million) to operate state-approved youth training centers.

French authorities intend to provide young people with educations "allowing them reach the best sporting level," and with educations that enable them to find a ordinary jobs, or - for those who take up sport professionally - to find jobs at the ends of their careers. The provision of community facilities and the prevention of violence also are program goals.

French authorities have agreed to monitor the allocation of the subsidies closely, by requiring separate accounts to be kept for training measures and for the economic activities of the professional sports clubs, in order to prevent "overcompensation" for the cost of the approved training.

EU Commission release IP/01/599 (25 April 2001), available at http://europa.eu.int/ [ELR 23:3:6]

IN THE NEWS

SAG and AFTRA approve new collective bargaining agreement for theatrical and television production

Members of the Screen Actors Guild and the American Federation of Television and Radio Artists have voted to approve a new three-year collective bargaining agreement - one that, according to the boards of the two unions, is "designed to meet the unique needs of middle-income, on-camera principal performers . . . whose names audiences may not know, yet whose work is the backbone of the American film and television industry."

The new agreement provides for increases in: compensation for performers and stunt coordinators;

network, foreign and basic cable residuals; and contributions to SAG pension and health plans.

Principal performer salary rates will increase 3% as of July 2001, will increase another 3% in July 2002, and a further 3.5% in July 2003. Guest stars on network programs (including Fox, WB and UPN shows) also will receive pay increases. And the salaries of "background actors" - those who are paid by the day or week - will be increased as well.

As residuals, performers receive 100% of their actual salary - but only up to certain amounts called the "ceiling" - for reruns of programs in which they appear on network prime time. If their actual salaries exceed the ceiling, their residuals are capped at the ceiling. As a result of the new agreement, the amount of the ceilings have been increased, for example, from $3,100 (for one-hour programs produced before July 2001) to $3,225 (for one-hour programs produced during July

2003 through June 2004). Moreover, residuals for Fox programs - which previously were less than those for ABC, CBS and NBC programs - will gradually increase until July 2003 when Fox programs will be treated like "full network" programs.

Foreign residuals for television programs produced from July 2001 will be increased. For those programs, after performers have received foreign residuals equal to 35% of scale, they will receive, in addition, a share in a pool of 3.6% of distributors' gross receipts, including those from foreign free television and foreign basic cable, after those gross receipts reach certain thresholds.

Under the old collective bargaining agreement, performers were entitled to residuals when one-hour programs and television movies went into syndication.

Under the new agreement, those residuals continue. A new syndication formula was negotiated, however, for half-hour series that are sold to broadcasters reaching less than 50% of U.S. Television Households - a level that would not have permitted syndication, previously. Under the new agreement, performers appearing in those syndicated half-hour episodes will receive residuals of 20% of "total applicable minimum" for each run.

Basic cable residuals will be increased as much as 13%, because producers' pension and health contributions now will be made on top of the cable residuals pool, rather than from that pool.

Performers also will earn residuals from the Internet exhibition of theatrical motion pictures (produced since July 1971) or television movies (produced since July 1952) in a pay-per-view or subscription format. Performers will share in 3.6% of the distributor's gross receipts. SAG, AFTRA and the producers have "reserved their legal positions" on

Internet exhibitions in other formats. Producers also have agreed to advise the unions when they plan to produce programs especially for the Internet, thus giving the unions the opportunity to organize those productions.
[ELR 23:3:7]

RECENT CASES

Copyright Act does not give "New York Times" or "National Geographic" a privilege to republish freelance articles and photos in back-issue digital databases, Supreme Court and Court of Appeals hold, in separate but similar cases; appropriate remedies still to be determined

Freelance journalist Jonathan Tasini along with five other freelance authors, and freelance photographer Jerry Greenberg, have won significant victories in their separate but similar copyright infringement lawsuits against newspapers and magazines that originally published their works in traditional print media and then republished those works in back-issue digital databases.

Tasini and his fellow journalists had authorized the original print publication of their articles by the New York Times, Newsday and Sports Illustrated. And Greenberg had authorized the print publication of his photographs by the National Geographic. But none of them authorized those periodicals to republish their works in back-issue digital databases. As a result, the United States Supreme Court held that the Times, Newsday and Sports Illustrated infringed copyrights owned by Tasini and his colleagues. And the Eleventh Circuit Court of Appeals has held that the National Geographic infringed copyrights owned by Greenberg.

Though Tasini, Greenberg and the others had not specifically authorized the republication of their works in digital format, all of the periodicals claimed a legal privilege to do so - a privilege given them, they argued, by section 201(c) of the Copyright Act.

Section 201(c) contains two clauses. The first provides that a contribution to a "collective work" - and this would include an article or photograph contributed by a freelance author or photographer to a newspaper or magazine - "vests initially in the author of the contribution." This clause clearly favors freelance journalists and photographers - like Tasini, Greenberg and the others - rather than periodical publishers.

The other clause, however, gives the owner of the collective work a privilege to publish the contribution in three ways: (1) "as part of that particular collective work," (2) "as part of . . . any revision of that collective work," and (3) "as part of . . . any later collective work in the same series." The Times, Newsday, Sports Illustrated and National Geographic argued that the republication of their back issues in digital formats constituted "revisions" of their original print editions, and thus they had a privilege to digitally republish articles and photos that appeared in those print editions.

The question of whether freelance authors and photographers ought to be entitled to additional compensation when their works are digitally republished is, of course, a question with significant policy implications. However, the outcomes in both cases appear to have turned on the specific digital technologies used by the Times, Newsday, Sports Illustrated and National Geographic, rather than on the larger policy question.

In the case filed by Tasini and his fellow journalists, the digital databases in which their articles were republished were the online NEXIS database and two CD-ROMs published by University Microfilms (one containing New York Times articles only, and the other containing articles from some 200 periodicals). The particular search-and-retrieval technology used by all three of those digital databases allows users to retrieve and view articles individually, rather than the complete periodical issue in which they originally appeared. This technological feature appears to have dictated the outcome of the case.

In an opinion by Justice Ruth Bader Ginsburg, the Supreme Court held that since all three digital databases retrieved individual articles, but not the rest of the issue in which they originally appeared, and often retrieved those articles along with articles from other issues of the same or even different periodicals, "we cannot see how [any of the databases] perceptibly reproduces and distributes the article 'as part of' either the original edition or a 'revision' of that edition." Hence, the privilege afforded by section 201(c) did not apply to any of these three databases.

Justice Ginsburg seemed to acknowledge that the republication of newspapers and magazines on microfilm is privileged by section 201(c). But she distinguished microfilm from NEXIS and the CD-ROMs at issue in the case. "[U]nlike the conversion of newsprint to microfilm," the Justice reasoned, "the transfer of articles to the Databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another. The Databases offer users individual articles, not intact periodicals."

National Geographic digitally republished its back-issues on CD-ROM. Unlike the CD-ROMs at issue in Tasini's case, however, the National Geographic's CD-ROMs retrieve photographs and articles in the context of the original print issue in which they originally appeared. When retrieved, "Every cover, article, advertisement, and photograph appears as it did in the original paper copy of the Magazine." Nevertheless, the Eleventh Circuit Court of Appeals -

in an opinion issued before the Supreme Court decided the Tasini case - held that section 201(c) did not give National Geographic a privilege to digitally republish Greenberg's photographs in its CD-ROM.

Writing for the Circuit Court, Judge Stanley Birch held that National Geographic's CD-ROM "is in no sense a 'revision'" of the magazine's original print issues. Instead, the judge concluded that the CD-ROM was a new collective work, because in addition to digital reproductions of back issues, it contains two other features: a search-and-retrieval program, and an animated clip that plays whenever the CD-ROM is started.

The animated clip begins with an image of a cover of a National Geographic back issue, and after a second or so, that image morphs into another cover, and then another, until 10 different covers have been displayed. Unfortunately for National Geographic, one of the covers in the sequence contains a photo shot by Greenberg. This feature of the CD-ROM infringed Greenberg's exclusive right to make or authorize derivative works based on his photos, Judge Birch also held.

Both the Supreme Court and the Court of Appeals have made the question of appropriate remedy a very significant issue. Ordinarily, copyright owners are entitled to damages and injunctive relief, when their copyrights are infringed. In these cases, however, injunctive relief could drastically reduce the utility and value of the infringing databases.

Perhaps for that reason, the Supreme Court, in the Tasini case, concluded by saying "it hardly follows from today's decision that an injunction against the inclusion of these Articles in the Databases (much less all freelance articles in any databases) must issue. . . . The parties (Authors and Publishers) may enter into an agreement allowing continued electronic republication of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyright works and remunerating authors for their distribution. . . . [W]e leave remedial issues open for initial airing and decision in the District Court."

Likewise, the Court of Appeals, in the National Geographic case, concluded by saying, "In assessing the appropriateness of any injunctive relief, we urge the [trial] court to consider alternatives, such as mandatory licensing fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

Editor's note: In the aftermath of the Supreme Court's ruling, the New York Times decided to delete freelance articles from its digital databases, unless they consent to their inclusion without additional compensation. That triggered two new lawsuits against the Times, one by Tasini and another by the Authors Guild. (See, www.NYTimes.com/freelancer; and www.AuthorsGuild.org.) National Geographic has announced that it will petition the United States Supreme Court for review, believing that its CD-ROM qualifies for the section 201(c), privilege under the rationale relied on by Justice Ginsburg, because its CD-ROM retrieves articles and photos in the context of the entire issue in which they first appeared.

In the Tasini case, Tasini and his fellow journalists were represented by Laurence Gold; the New York Times and the other periodicals were represented by Laurence H. Tribe. In the National Geographic case, Greenberg was represented by Norman Davis, Steel Hector & Davis, Miami; National Geographic was represented by Naomi Jane Gray and Robert G. Sugarman, Weil Gotshal & Manges, New

York City, and by Terrence B. Adamson, National Geographic Society, Washington D.C.; and the American Society of Media Photographers, as amicus curiae, was represented by Patricia A. Felch, Chicago.

New York Times v. Tasini, 121 S.Ct. 2381, 2001 U.S.LEXIS 4667 (2001); *Greenberg v. National Geographic Society*, 244 F.3d 1267, 2001 U.S.App.LEXIS 4270 (11th Cir. 2001) [ELR 23:3:9]

Supreme Court rules that Americans with Disabilities Act requires PGA to allow Casey Martin to ride golf cart during tournament play; in separate case, Supreme Court orders lower court to reconsider whether USGA must permit Ford Olinger to ride cart as well

Casey Martin has made golfing history - though not in the way he undoubtedly wanted, when he first began winning tournaments before he was 15 years old. Martin hasn't defeated Tiger Woods on the links. Instead, he has defeated the PGA in the courts.

The United States Supreme Court has held that the PGA must allow Martin to use a golf cart during tournament play - even when PGA rules prohibit other golfers from doing so - because Martin suffers from a congenital, degenerative circulatory disorder that causes him severe pain in his lower right leg that makes it impossible for him to walk for long periods of time. In an opinion by Justice John Paul Stevens, the Supreme Court has affirmed a Ninth Circuit Court of Appeals ruling (ELR 22:2:10) that the Americans with Disabilities Act requires the PGA to accommodate Martin's disability by allowing him to use a cart, because doing so will not alter the fundamental nature of PGA tournaments.

Less than a week after its decision in Martin's case, the Supreme Court issued a three-sentence order requiring the Seventh Circuit Court of Appeals to reconsider, in light of the Supreme Court's decision in the Martin case, the Seventh Circuit's earlier ruling, in a separate though similar case, that the ADA does not entitle Ford Olinger to use a cart in tournaments sponsored by the USGA.

The ADA requires those who operate "places of public accommodation" to make "reasonable modifications" to their policies when "necessary" to permit those places to be used by the disabled, unless making modifications would "fundamentally alter the nature" of the accommodation.

Justice Stevens held that the PGA does operate "places of public accommodation," as that phrase is defined under the ADA.

The PGA did not deny that Martin's use of a golf cart would be a "reasonable modification" of PGA rules that would be "necessary" for him to play in its tournaments. The PGA argued, however, that allowing even disabled golfers to use carts would "fundamentally alter the nature" of its tournaments. The Supreme Court disagreed.

Justice Stevens noted that "the essence" of golf is "shot-making" rather than walking. The official "Rules of Golf" do not prohibit the use of carts; they merely permit - in a provision "buried in an appendix" -

tournament sponsors to require players to walk, if sponsors choose to do so. Most tournaments sponsors do not require players to walk. Even the PGA permits players to use carts in many of its tournaments.

Furthermore, Justice Stevens reasoned that the purpose of the PGA's no-cart rule is to make fatigue a factor, in those tournaments where its rules require players to walk. In Martin's case, though, the evidence showed that because of his medical condition, Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking."

For these reasons, the Supreme Court concluded that permitting Martin to use a cart would not fundamentally alter the nature of those PGA tournaments where carts are not generally permitted. The Court therefore concluded that "Martin's request for a waiver of the walking rule should have been granted."

Justice Antonin Scalia dissented, joined by Justice Clarence Thomas. In a colorful opinion, similar in tone to an "op-ed" piece, Justice Scalia argued that where golf is concerned, "the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone - not the even the Supreme Court of the United States - can pronounce one or another of them to be 'nonessential' if the rulemaker (here the PGA Tour) deems it to be essential. . . . Many, indeed, consider walking to the central feature of the game of golf - hence Mark Twain's classic criticism of the sport: 'a good walk spoiled.'"

More seriously, Justice Scalia made two observations about the possible consequences of the majority's ruling.

First, he predicted that the majority's decision "guarantees that future cases of this sort . . . will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)"

Second, he wrote that "The lesson the PGA Tour and other sports organizations should take from this case is to make sure that the same written rules are set forth for all levels of play, and never voluntarily to grant any modifications."

The PGA Tour was represented by H. Bartow Farr, III, Washington, D.C. Martin was represented by Roy L. Reardon, New York City. The United States as amicus curiae supporting Martin was represented by Barbara D. Underwood, Washington, D.C.

PGA Tour, Inc. v. Martin, 121 S.Ct. 1879, 2001 U.S.LEXIS 4115 (2001); *Olinger v. United States Golf Ass'n*, 121 S.Ct. 2212, 2001 U.S.LEXIS 4150 (2001) [ELR 23:3:10]

Federal appeals court erred when it ordered arbitrator to award Steve Garvey compensation from settlement fund for damages resulting from collusion by owners of Major League Baseball teams, Supreme Court rules

Former San Diego Padres pitcher Steve Garvey has suffered a setback in his legal efforts to get compensation for damages he claims he suffered as a result of collusion by owners of Major League Baseball teams in the 1980s. The United States Supreme Court has ruled that the Ninth Circuit Court of Appeals erred when it ordered an arbitrator to award Garvey the $3 million he sought. And thus, the Supreme Court has reversed that order and has remanded the case for further proceedings, apparently before the arbitrator who originally rejected Garvey's claim.

The origins of Garvey's claim date back to the late 1980s when the Major League Baseball Players Association accused club owners of colluding to depress the salaries of free agent players, in violation of their collective bargaining agreement. In a series of arbitrations, the Players Association proved its allegations and began to recover damages for specific players (ELR 9:5:19, 10:5:19, 10:8:9, 11:5:20, 12:3:19, 12:5:20). Eventually, the club owners settled with the Players Association for $280 million (ELR 12:8:21, 12:12:21). That money was placed in a fund to compensate injured players, pursuant to a process administered by the Players Association.

In a nutshell, players who believed they were injured by the owners' collusion were permitted to submit claims that were then evaluated by the Players Association. Players who objected to the Association's decisions could have their claims heard by an arbitrator. Garvey sought $3 million in damages, claiming that he would have earned that much more than he actually did, if the Padres had not colluded against him.

The Players Association rejected his claim, so Garvey took it to arbitration. To prevail, he had to prove that he had received a contract-extension offer. The arbitrator rejected evidence that Garvey had in fact received such an offer - even though some of that evidence came from the owner of the Padres himself. The arbitrator therefore denied Garvey's claim.

Garvey filed suit in federal court to set aside the arbitrator's decision, and eventually, the Ninth Circuit did just that, in an opinion that characterized the arbitrator's decision "completely inexplicable," "border[ing] on the irrational," and "bizarre." (ELR 22:1:17) The Ninth Circuit remanded the case to the District Court, which then remanded it further to the arbitrator for further hearings. Garvey immediately appealed that order to the Ninth Circuit, which then ruled, in an unpublished decision, that the record already established that the Padres had colluded against Garvey, and therefore ordered the arbitrator to award Garvey the amount he claimed, without any further hearings.

The Players Association appealed that ruling, by filing a petition for certiorari with the Supreme Court. (The Players Association did so, because any money awarded to Garvey would come out of the $280 million fund that is to be distributed among all players who suffered from collusion. An award to Garvey would not require the Padres to pay anything more.)

The Supreme Court granted certiorari, and without briefing or oral argument, ruled that the Ninth Circuit had gone out of bounds when it overturned the arbitrator's decision and ordered him to award Garvey the damages he sought.

In a Per Curiam decision, the Supreme Court explained that "When an arbitrator resolves disputes . . . , and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." What's more, the Supreme Court added (in a footnote), "no serious error on the arbitrator's part is apparent in this case. . . . The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error."

Then, in an apparent swipe at the Ninth Circuit itself, the Supreme Court described the Ninth Circuit's own decision as "nothing short of baffling."

The Supreme Court therefore reversed the Ninth Circuit and remanded the case for still further proceedings.

Major League Baseball Players Association v. Garvey, 121 S.Ct. 1724, 2001 U.S.LEXIS 3811 (2001) [ELR 23:3:11]

Artist's royalties from copyright licenses of artwork are partially exempt from sales tax, California Supreme Court holds; decision "disapproves" earlier appellate court rulings requiring record companies to pay sales and use taxes in connection with master tapes

Artist Heather Preston has won the right to a refund of California sales taxes assessed against her by the California State Board of Equalization. The taxes she was required to pay were based on royalties she received from two book publishers and a rubber stamp manufacturer in return for licenses to use her artworks. Though relatively little money was involved - just over $2,000 including interest - a significant legal point was at stake; and Preston had to take her case to the California Supreme Court to finally make that point.

Moreover, Preston has won a victory not only for herself and other California-based artists, it is an important victory for California record companies as well. Years ago, in 1984 and 1988, Capitol Records and A & M Records lost cases quite similar to Preston's, and thus they had to pay some $860,000 each in California sales and uses taxes. In its decision in favor of Preston, the California Supreme Court expressly "disapprove[d]" the appellate court decisions in the Capitol and A & M Records cases, thereby relieving record companies of the sales and use tax obligations those cases had imposed.

California's Revenue and Taxation Code imposes a sales tax on the sale or lease of tangible personal property (and a use tax on the use of such property, if no sales tax was paid), measured as a percentage of the property's price.

In connection with the licenses Preston granted to book publishers and a rubber stamp manufacturer, she delivered tangible copies of her works to her licensees for their use in creating reproductions. In return, Preston's licensees paid her royalties based on their sales, including advances against those royalties. Preston's licensees also returned her artwork to her, after making whatever reproductions they required to publish and manufacturer their own works.

Preston did not pay sales tax on any of the payments she received from her licensees, and thereby triggered an audit by the Board of Equalization (the California agency that administers that state's sales and use tax law). The Board determined that she owed sales taxes. Preston paid them and then filed a claim for a refund. The Board denied her refund claim; and the California Court of Appeal affirmed. The California Supreme Court, however, finally ruled in her favor.

In a lengthy opinion by Justice Janice Rogers Brown, a majority of the Court has held that a portion of the amounts Preston received in return for her copyright licenses are exempt from sales tax, for two reasons: first, because Revenue and Taxation Code section 6010(c)(10)(A) provides that taxable sales do "not include . . . The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement"; and second, because "technology transfer agreement" is defined in the Code to include "any agreement under which a person who holds a . . . copyright . . . licenses to another person the right to make and sell a product . . . that is subject to the . . . copyright interest."

On the other hand, Justice Brown - joined by three other members of the seven-justice Court - also held that "the portion of Preston's income attributable to the Agreements' temporary transfer of tangible artwork is taxable." Since her licensing agreements did not specify what portion of her royalties were attributable to the temporary transfer of her artwork, Revenue and Taxation Code section 6012(c)(10)(C) imposes sales tax on "200 percent of the cost of materials and labor used to produce the tangible personal property subject to the tax." The cost of Preston's materials and labor was not part of the record before the Court, so the case has been remanded for a calculation of the sales tax she owes and the amount of the refund she is owed.

Three justices dissented from this result, but not because they would have ruled against Preston. Rather, in an opinion by Justice Joyce Kennard, they indicated that they would have ruled that all of the royalties Preston received were exempt from sales tax. They would have ruled in Preston's favor completely, because a Board regulation provides that "the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation." And Justice Kennard could see no meaningful distinction between a "manuscript" transferred for publication and "artwork" transferred for publication.

Editor's note: The motion picture industry has not been confronted with this issue - even when California-based distributors acquire completed negatives from independent production companies - because Revenue and Taxation Code section 6006(g)(1) exempts leases of motion pictures, including television films and tapes. Note that the result in Preston's case encourages parties to allocate, in their copyright licenses, the portion of the licensor's royalties attributable to the intangible copyright license and the portion attributable to the licensee's right to temporary possession of the licensor's artwork (or master tape) - and it encourages them to place a low value on the right to temporary possession. This possibility was anticipated by the California legislature, and legislative history (discussed in the Preston decision) shows that the legislature was urged to amend the then-pending bill to prevent what the Board contended would be over-allocations to non-taxable copyright rights. The legislature did not amend the bill, however - thus supporting the argument that any plausible allocation will be sufficient for sales tax purposes.

Preston was represented by Nicholas Blonder, Mill Valley. The Board of Equalization was represented by Bill Lockyer, Attorney General, and Paul D. Gifford, Assistant Attorney General. And the Graphic Artists Guild, as amicus curiae on behalf of Preston, was represented by Daniel E. Abraham, and by John E. Mueller and Eric J. Miethke, Nielsen Merksamer Parrinello Mueller & Naylor, Mill Valley.

Preston v. State Board of Equalization, 105 Cal.Rptr.2d 407, 2001 Cal.LEXIS 1813 (Cal. 2001) [ELR 23:3:12]

LeAnn Rimes' lawsuit to disaffirm contract she signed with Curb Records when she was a minor must be heard in Tennessee rather than Texas, federal court in Texas rules, because contract contains Tennessee choice of law and forum clause and was signed with approval of Tennessee court

When LeAnn Rimes was just 12 years old, she signed a contract with Curb Records that she would now like to disaffirm. As a general rule, Texas law would give her an absolute right to do just that, simply on the grounds that she was a minor when she signed the contract. So it's not surprising that when Rimes sought a judicial declaration of her right to disaffirm, she did so in a court in Texas.

Curb, however, knew full well that Rimes was only 12 when it signed her. Curb therefore did two things that so far have blocked Rimes' efforts to disaffirm. First, Curb included a Tennessee choice of law and forum clause in Rimes' contract. Second, Curb obtained a Tennessee state court order that "removed her disability as a minor" for the purpose of her signing the contract.

Thus, when Rimes filed suit in Texas seeking a judicial declaration of her right to disaffirm the contract, Curb responded with a motion to transfer the case the Tennessee. Rimes argued that because she was a minor when she signed the contract, even its choice of law and forum clause were void. But federal District Judge Jerry Buchmeyer has disagreed.

Judge Buchmeyer has granted Curb's motion to transfer the case to Tennessee, for reasons he explains in an opinion written as lyrics to two Rimes recordings, with footnotes of legal substance, credit for all of which the judge gives to his law clerk Elizabeth Falk.

The judge concluded that the order of the Tennessee state court removing Rimes' disability as a minor is entitled to "full faith and credit" for the purpose of Curb's motion to transfer the case. And, under federal standards for enforcing choice of venue clauses, the Tennessee venue clause in Rime's contract had to be enforced.

In the lyric portion of his decision, the judge (or perhaps his law clerk, whom the judge describes as a "devoted LeAnn Rimes fan") acknowledged that he (or she) "Would love to meet LeAnn Rimes," but added, "It's going to have to be another time."

Rimes was represented by George Thomas Rhodus, Looper Reed Mark & McGraw, Dallas. Curb Records was represented by Monroe David Bryant, Jr., Hughes & Luce, Dallas.

Rimes v. Curb Records, Inc., 129 F.Supp.2d 984, 2001 U.S.Dist.LEXIS 4052 (N.D.Tex. 2001) [ELR 23:3:13]

Boxer Graciano Rocchigiani is declared WBC Lightheavyweight Champion . . . by federal court order

Some championships are tougher to win than others. To win the Light Heavyweight Championship of the World Boxing Council, German boxer Graciano Rocchigiani had to defeat Michael Nunn in a fight in Berlin, which Rocchigiani did; and then Rocchigiani had to defeat the WBC itself in a federal court lawsuit in New York City, which Rocchigiani also has done. As a result, Rocchigiani has been declared the Light Heavyweight Champion of the WBC by order of Judge Richard Owen.

Though declaring champions seems an odd thing for a federal judge to do, the case in which Judge Owen did so was a very simple breach of contract suit.

In 1997, boxer Roy Jones, Jr., was the WBC's Lightheavyweight Champion. He was supposed to defend his title, by November 1997, in a fight against challenger Michael Nunn. For some reason, Jones notified the WBC that he wouldn't fight Nunn. So the WBC scheduled a fight between Nunn and Rocchigiani.

The written contract for the Nunn-Rocchigiani fight stated that it was for the "WBC World Championship," and that is how the fight was promoted to the public. Moreover, when Rocchigiani defeated Nunn, a WBC official announced Rocchigiani to the viewing public as "world champion" and presented him with the Title belt. Indeed, for three months thereafter, WBC listed Rocchigiani as "champion" in its official rankings.

As the new champion, Rocchigiani had the right to defend his title against the former champion, Jones. However, apparently in anticipation of that fight, the WBC declared Rocchigiani "Interim" champion and it designated Jones as "Champion in Recess." Then, to add injury to insult, the WBC set terms for the Rocchigiani-Jones fight that included a purse split "substantially less favorable" than Rocchigiani would have been entitled to under WBC rules if he were the undisputed "Champion."

In the lawsuit that Rocchigiani thereafter filed, the boxer alleged that the WBC's actions caused him $1.225 million in damages.

The extent of Rocchigiani's damages has not been determined yet. But in response to Rocchigiani's motion for summary judgment, Judge Owen has ruled that the WBC did breach its contract. "The language in the written agreement admits of only one possible interpretation: the Rocchigiani-Nunn bout was for the WBC Light Heavyweight Championship. The word 'interim' is nowhere to be found within the four corners of the document. . . . The contract . . . cannot reasonably be mistaken [as one for the] WBC Interim World Championship. . . ."

Judge Owen therefore granted Rocchigiani's motion for summary judgment with respect to WBC's liability, and the question of remedies will be considered next.

Rocchigiani was represented by Carol A. Dunning, Ross & Hardies, New York City. The WBC was represented by Gabriel I. Penagaricano, World Boxing Council, San Juan, Puerto Rico.

Rocchigiani v. World Boxing Council, 131 F.Supp.2d 527, 2001 U.S.Dist.LEXIS 1502 (S.D.N.Y. 2001) [ELR 23:3:14]

Boxing promoter Don King will have to defend himself against RICO claims made by Cedric Kushner Promotions, Supreme Court rules, because for RICO purposes, King is distinct from his own company Don King Productions

Boxing promoter Don King will have to defend himself, after all, against RICO allegations filed against him in federal court in New York City by competing promoter Cedric Kushner Promotions.

For a while, it looked as though Kushner's RICO claims would never make it to trial. This was so because the Second Circuit Court of Appeals held that Don King was not distinct from his own company, Don King Productions, and thus, the RICO Act's ban on a "person" engaging in racketeering activities with an "enterprise" simply was not violated, when King did things as an officer of Don King Productions, as Kushner had alleged (ELR 22:9:12).

Other Circuits, however, have held that RICO can be violated by activities engaged in by officers of the corporations that employ them. The Supreme Court therefore agreed to hear Kushner's case, in order to resolve the conflict between the Second Circuit and the others.

In an opinion by Justice Stephen Breyer, the Supreme Court has sided with Kushner. Justice Breyer ruled that Don King the "person" was distinct from Don King Productions "the enterprise," even when King acted within the scope of his authority in conducting his company's affairs. The RICO statute "requires no more than the formal legal distinction between 'person' and 'enterprise' (namely, incorporation) that is present here," the Justice explained.

The Supreme Court thus has remanded the case for further proceedings, where it will be up to Kushner to prove its RICO allegations against King and his company.

Cedric Kushner Promotions was represented by Richard A. Edlin, Solovay Edlin & Eiseman, New York City. King was represented by Peter E. Fleming, Jr., Curtis Mallet-Prevost, Colt & Mosle, New York City.

And the United States, as amicus curiae supporting Kushner, was represented by Austin C. Schlick.

Cedric Kushner Promotions, Ltd. v. King, 121 S.Ct. 2087, 2001 U.S.LEXIS 4311 (2001) [ELR 23:3:14]

First Amendment protects radio commentator's right to broadcast tape of illegally intercepted cell phone conversation about matter of public concern, Supreme Court decides

Federal law has prohibited the disclosure of illegally intercepted communications since 1934. But it has taken until now for the Supreme Court to consider whether such laws validly bar the media (and others) from disclosing the contents of such communications, when they involve a matter of public concern.

The issue was finally presented to the Supreme Court in a case that arose when radio commentator Fred Williams broadcast a tape recording of an illegally intercepted cell phone conversation between officials of a teachers' union. The conversation occurred during the union's contentious collective-bargaining negotiations with a Pennsylvania school board; and Williams broadcast the tape in connection with news reports about a settlement.

Fred Williams - the on-air name used by Frederick Vopper - was given the tape by Jack Yocum, the head of a local taxpayers' organization who found it in his mailbox. Neither Williams nor Yocum personally intercepted the cell phone conversation; but they knew, or should have, that whoever intercepted it did so illegally, in violation of federal and state wiretap statutes.

The broadcast resulted in a lawsuit by the two union officials against Williams and Yocum. The case didn't get far, however, because the Third Circuit Court of Appeals ordered it dismissed in response to Williams' and Yocum's motion for summary judgment. The broadcast clearly violated the wiretap statutes' prohibition on disclosing the contents of the illegally intercepted cell phone conversation. But the Third Circuit held that the application of those statutes to Williams' broadcast violated the First Amendment.

The Supreme Court agreed to hear the case, and has affirmed its dismissal. In an opinion by Justice John Paul Stevens, the Supreme Court has held that the union officials' conversation involved a matter of public concern, and thus their privacy interests had to "give way" when balanced against the First Amendment interest in publishing matters of public importance.

The union officials (and the United States government, which intervened on their behalf) were represented by Jeremiah A. Collins and Seth P. Waxman, Washington, D.C. Williams was represented by Lee Levine, Washington, D.C. And Yocum was represented by Thomas C. Goldstein, Washington, D.C.

Bartnicki v. Vopper, 121 S.Ct. 1753, 2001 U.S.LEXIS 3815 (2001) [ELR 23:3:15]

Radio station's unlicensed broadcast of comedy recordings did not infringe comedian's copyrights in those recordings, federal District Court rules

Comedian Guillermo Alvarez Guedes has lost his lawsuit against a Puerto Rican radio station that broadcast his recordings without a license to do so.

Federal District Judge Jaime Pieras has dismissed all three claims alleged by Alvarez Guedes - for copyright infringement, right of publicity violations, and unjust enrichment. The judge did so in response to a motion for summary judgment filed by the station and by Hector Luis Marcano Martinez, the on-air personality who produced the broadcast and who selected Alvarez Guedes' recordings because Marcano considered Alvarez Guedes to be "one of the best humorists in the Hispanic world."

Judge Pieras dismissed Alvarez Guedes' copyright claim, because the station's broadcasts were made directly from his recordings. No tapes or other copies were made, and the judge noted that the Copyright Act does not give the owner of sound recording copyrights an exclusive right to publicly perform them.

Alvarez Guedes argued that the Copyright Act does give sound recording copyright owners the exclusive right to "distribute" their recordings, and he argued that the station's broadcasts amounted to an unauthorized "distribution" of his recordings. But the judge held that "merely transmitting a sound recording to the public on the airwaves does not constitute a 'distribution'. . . ."

The judge also rejected Alvarez Guedes' right of publicity claim, on two grounds. First, the judge held that Puerto Rican law has not yet recognized a right of publicity. Second, the station's broadcasts did not infringe the comedian's rights under the Lanham Act, because he failed to present evidence showing that the station attempted to deceive listeners about the source of the recordings it broadcast, nor did he show that the public was confused about the comedian's sponsorship of the broadcasts.

Finally, Judge Pieras dismissed Alvarez Guedes' unjust enrichment claim - a claim asserted under Puerto Rican law - on the grounds that it was preempted by federal copyright law.

Editor's note: The opinion in this case correctly states the legal principle that there is no public performance right in sound recordings, and the principle that broadcasts do not violate the distribution right. However, it appears that the judge - or perhaps Alvarez Guedes himself - misunderstood the true nature of the comedian's copyright infringement claim. The opinion notes that when Alvarez Guedes registered his copyrights, he registered and obtained certificates for his works under the Copyright Office's "TX" classification (not its "SR" classification). Though he may have deposited sound recordings, the "TX" certificates he was issued indicate that he actually registered his copyrights in his comedy routines themselves - not in his sound recordings of those routines. The opinion also indicates that it was uncontested that "Some of the jokes and stories recited by Alvarez Guedes in his . . . recordings are of his own creation; others are jokes and stories he has heard and adapted for his performances." The comedian therefore clearly has valid copyrights in the jokes and stories that were "his own creation," and he may well have valid copyrights in those that he "adapted" as well. While the station has ASCAP, BMI and SESAC licenses for the musical compositions it broadcasts, those licenses do not cover Alvarez Guedes' jokes and stories. It therefore appears that the station's broadcasts may well have infringed the comedian's copyrights - not in his sound recordings, but in the underlying jokes and stories, whose copyrights the comedian appears to have registered.

Alvarez Guedes was represented by Jorge A. Pierluisi, Jr., and Santiago Cordero-Osorio. The station and Marcano Martinez were represented by Jose A. Pagan Nieves, Dario Rivera Carrasquillo, and Roberto Sueiro Del Valle.

Alvarez Guedes v. Marcano Martinez, 131 F.Supp.2d 272, 2001 U.S.Dist.LEXIS 1697 (D.P.R. 2001) [ELR 23:3:15]

City violated artists' First Amendment rights by excluding their "controversial" artworks from city hall gallery, federal appeals court rules

In a case described as a "study in the politics and law of public art," a federal appeals court has held that the City of Pasco, Washington, violated the First

Amendment rights of artists Janette Hopper and Sharon Rupp. The city did so, the court explained, by inviting the artists to display their works in a gallery in the Pasco City Hall, and then excluding their artworks from the gallery because they were "controversial."

Hopper's artwork was a series of prints that depicted a naked couple (in silhouette and outline form) in a variety of landscapes and scenes from post-World War II Germany; none depict explicitly sexual activity, but in two the couple is kissing and in several they are embracing. Rupp's artwork was a sculpture that depicts a large, nude, headless woman whose naked backside faces the viewer.

Hopper and Rupp responded to Pasco's decision to exclude their works from the gallery by suing the city. At first, they were not successful. Federal District Judge Fred Van Sickle granted the city's motion for summary judgment on the grounds that Pasco's city hall is not a public forum and the city's decision to exclude the artworks was reasonable.

On appeal, however, the artists have done better. In an opinion by Judge Margaret McKeown, the Ninth Circuit Court of Appeals has held that the city hall gallery is a designated public forum, from which Hopper and Rupp's work had been excluded without a compelling governmental interest.

In so ruling, Judge McKeown acknowledged that the "result is, in certain ways, an unfortunate one" because "city administrators set out to display art, not to censor it," and because Pasco's administrators "walked a fine line as they tried to please the City Council, city workers, the local arts community, and the public at large, all of whom likely had different views as to what constituted art 'appropriate' for City Hall." Nonetheless, Judge McKeown explained that Pasco "could have avoided this problem by establishing and enforcing a clearly articulated policy that could pass First Amendment muster" - something it had not done. And "the fact that the city was well intentioned and acted in good faith does not excuse its violation of the artists' First Amendment rights."

Hopper and Rupp were represented by Paul J. Lawrence, Preston Gates & Ellis, Seattle. Pasco was represented by John G. Schulz and George Fearing, Leavy Schulz Davis & Fearing, Kennewick.

Hopper v. City of Pasco, 241 F.3d 1067, 2001 U.S.App.LEXIS 2232 (9th Cir. 2001) [ELR 23:3:16]

Newsweek and reporter Michael Isikoff win dismissal of lawsuit by Julie Hiatt Steele seeking damages for article about President Clinton that identified Steele as a source in alleged violation of Isikoff's agreement that his interviews with Steele would be confidential and "off the record"

Julie Hiatt Steele played a small role in the scandal surrounding the impeachment of President Clinton. She was identified as a source by reporter Michael Isikoff in articles he wrote for Newsweek about the President's alleged encounter with a White House volunteer named Kathleen Willey who was then Steele's "long-time friend." Readers who followed the scandal closely may recall that Willey told Isikoff the President had "groped" her; and Willey then asked Steele to lie to Isikoff by confirming that Willey had told Steele about the incident the day it occurred, when in fact Willey had not.

Steele was at first reluctant to do this favor for her friend Willey. However, Steele agreed to do so, because Isikoff assured her that their conversations would be "off the record" and confidential.

In her first conversation with Isikoff, Steele told the lie her friend Willey wanted her to. But in a second conversation with Isikoff, Steele recanted. Isikoff then wrote an article in which he reported what Steele had said on both occasions.

Steele responded by filing a lawsuit in federal court in Washington, D.C., against Isikoff and Newsweek. Steele's complaint alleged that the article had thrust her into the public spotlight against her will, and had caused her damage. Isikoff and Newsweek countered with a motion to dismiss, arguing that

Steele's claims were barred by the First Amendment and failed to state valid claims under state law.

Judge Colleen Kollar-Kotelly has granted the motion and has dismissed the case, though she declined to do so on First Amendment grounds.

If all of Steele's damages were alleged to have been caused by injury to her reputation, then the judge agreed that Steele's claims would be barred by the First Amendment. However, Steele's complaint could be read to allege that some of her damages were separate from harm to her reputation; and those damages, the judge held, would not be barred by the First Amendment as a result of the Supreme Court's decision in Cohen v. Cowles Media (ELR 13:3:11).

However, Judge Kollar-Kotelly did agree with Isikoff and Newsweek that Steele's complaint failed to allege valid claims under state law.

The judge rejected Steele's breach of contract claim, because "journalistic ethics effectively bar reporters and sources from entering traditional contracts relating to the provision of information or the publication of stories. . . . Accordingly, because a reporter's promise of confidentiality is a moral obligation, not a contractual requirement, and because a moral obligation does not give rise to express or implied contractual duties, there is no contractual relationship between Steele and Isikoff."

Moreover, the judge added, even a contract did exist between Steele and Isikoff, Steele breached it first by providing "deceptive information" during her first interview with Isikoff, and thus "Isikoff was relieved of his duty to live up to his side of the bargain."

The judge also dismissed Steele's fraud claim, because any harm she suffered from Newsweek's publication of Isikoff's article were the result of her "fabrication" and "subsequent retraction." Thus she, rather than they, was the proximate cause of that harm.

Steele's infliction of emotional distress claim was dismissed, because the facts she alleged did not support the conclusion that Isikoff's actions were "extreme and outrageous."

And the judge dismissed Steele's breach of fiduciary duty and confidence claims, because there is no fiduciary or confidential relationship between reporters and their sources, and because her relationship with Isikoff was "too fleeting and too superficial to give rise to a fiduciary duty."

Steele was represented by John Purcell Coale, Coale Cooley Lietz McInerny & Broadus, Washington, D.C. Isikoff and Newsweek were represented by Roger Campbell Spaeder, Zuckerman Spaeder Goldstein Taylor & Kolker, Washington, D.C.

Steele v. Isikoff, 130 F.Supp.2d 23, 2000 U.S.Dist.LEXIS 20501 (D.D.C. 2000) [ELR 23:3:17]

Dismissal of attorney's libel lawsuit against publisher of "Den of Thieves" is affirmed by New York Appellate Division, because attorney failed to show that offending statement was published with actual malice

After first establishing that a passage in the book Den of Thieves could be understood by readers to say defamatory things about him (ELR 15:6:24, 16:3:21, 16:12:9), attorney Michael Armstrong has lost his libel lawsuit against the book's publisher, Simon & Schuster, its author James B. Stewart, and its researcher/reporter Laurie P. Cohen. Armstrong lost because he failed to show that the offending passage was published with actual malice.

New York Supreme Court Judge Barry Cozier so ruled, in response to the publisher's motion for summary judgment.

Den of Thieves is an account of "the demise and criminal prosecution of the investment banking firm of Drexel Burnham Lambert, Inc., and Michael Milken." The offending passage described an affidavit prepared by Armstrong, who was the attorney for Lowell Milken, in a manner that suggested that the affidavit was false.

The New York Appellate Division has now affirmed the dismissal of the case. In a brief decision, the Appellate Division has held that since Armstrong "failed to raise any triable issue as to whether the allegedly libelous passage was, in fact, published with actual malice, defendants' motion for summary judgment dismissing the complaint was properly granted."

Armstrong was represented by David Simon. Simon & Schuster and its co-defendants were represented by Robert F. Cusumano.

Armstrong v. Simon & Schuster, Inc., 721 N.Y.S.2d 340, 2001 N.Y.App.Div.LEXIS 1898 (App.Div. 2001) [ELR 23:3:17]

Wrestler Nicole Bass's lawsuit alleging sex discrimination claims against World Wrestling Federation survives WWF motion to dismiss

The World Wrestling Federation will have to defend itself against sex discrimination and related claims made by wrestler Nicole Bass in a federal lawsuit she has filed in the Eastern District of New York. In response to a WWF motion to dismiss Bass's lawsuit for failure to state a claim, Judge Nicholas Garaufis has tossed out three claims made by Bass. But the judge has denied the WWF's motion with respect to four other claims asserted by the former Ms. Olympia contender.

Judge Garaufis dismissed Bass's Equal Pay Act and negligence claims against the WWF, and her battery claim against WWF employee Steven Lombardi. Her Equal Pay Act claim failed because she didn't identify any male wrestler who the WWF paid more than she or other women wrestlers were paid. Her negligence claim was dismissed because it was preempted by New York's Worker's Compensation Law. And her battery claim against Lombardi was tossed because it was barred by the statute of limitations.

On the other hand, Judge Garaufis ruled that Bass's complaint does allege adequate facts to state claims for sexual harassment and retaliation under Title VII, and for sex discrimination under New York's State Executive Law and City Administrative Code.

Bass was represented by A. Kathleen Tomlinson, Farrell Fritz, Uniondale. The WWF was represented by Ivy L. Jacobson and Jerry S. McDevitt, Kirkpatrick & Lockhart, New York City and Pittsburgh. And Lombardi was represented by Laura A. Brevetti, New York City.

Bass v. World Wrestling Federation Entertainment, Inc., 129 F.Supp.2d 491, 2001 U.S.Dist.LEXIS 4678 (E.D.N.Y. 2001) [ELR 23:3:18]

Massachusetts regulations concerning outdoor advertising of tobacco products violate First Amendment, Supreme Court holds

Regulations issued by the Attorney General of Massachusetts that prohibit outdoor advertising for certain tobacco products near schools or playgrounds violate the First Amendment, the United States Supreme Court has held. The Court has so ruled in a long a badly fractured decision that includes four concurring and dissenting opinions, in addition to the "opinion of the Court."

Lorillard and other tobacco companies filed the case, because the offending regulations directly affected their advertising activities. The outdoor advertising issue is the one that is of interest to the entertainment industry, because it too makes significant use of outdoor advertising.

The tobacco companies' suit challenged other regulations too, in addition to those affecting outdoor advertising. Those issues are of little or no concern to the entertainment industry. Among them was the question of whether the Attorney General's outdoor advertising regulations were preempted by the Federal Cigarette Labeling and Advertising Act, whether indoor and point-of-sale advertising regulations were preempted or violate the First Amendment, and whether regulations that required retailers to put tobacco products behind counters so that customers would have to request them from salespeople violated the First Amendment. The Court held that the outdoor and indoor and point-of-sale regulations were preempted, and the indoor and point-of-sale regulations do violate the First Amendment, but the behind-the-counter regulations do not violate the First Amendment.

The tobacco companies were represented by Jeffrey S. Sutton, Columbus. The Massachusetts Attorney General was represented by William W. Porter, Boston. And the United States as amicus curiae in support of the Attorney General was represented by Barbara D. Underwood, Brooklyn.

Lorillard Tobacco Co. v. Reilly, 121 S.Ct. 2404, 2001 U.S.LEXIS 4911 (2001) [ELR 23:3:18]

Court dismisses another, but still not all, claims made against NCAA and others by learning disabled student who was ineligible to participate in intercollegiate football during freshman year

The NCAA has won the dismissal of yet another claim made by learning-disabled student Michael

Bowers in his lawsuit against the Association, Temple University and others. Federal District Judge Stephen Orlofsky has dismissed Bowers' claims for injunctive relief against the NCAA, though other claims asserted by Bowers still remain in the case.

Bowers wanted to play football for Temple University. However, because of his learning disability, he did not complete the high school "core curriculum" required by NCAA rules to be eligible for an athletic scholarship or to play during his freshman year.

Bowers responded by suing the NCAA, Temple and others for violating the Americans with Disabilities Act, the Rehabilitation Act and the New Jersey Law Against Discrimination. Judge Orlofsky's latest ruling - dismissing Bowers' claims for injunctive relief - is the fourth written decision in the case already, and it hasn't even gone to trial. In three earlier rulings, the judge denied Bowers' motion for a preliminary injunction

(ELR 20:1:16); dismissed some, but not all, of Bowers' claims, in response to a defense motion for summary judgment (ELR 20:8:17); and then dismissed a few more - but still not all - of Bowers' claims in response to a further motion for summary judgment (ELR 22:10:23).

Bowers' claim for injunctive relief was among the claims the judge refused to dismiss in his third published ruling. Under NCAA rules as they once existed, students who were ineligible to play during their freshman years had no more than three years of eligibility - rather than the usual four - during which they could play. Judge Bowers' originally concluded that this gave Bowers standing to seek injunctive relief for a fourth year of eligibility.

However, in a motion for reconsideration, the NCAA pointed out that its rules have since been changed. Now, NCAA rules give those disqualified for freshman competition the chance to regain a fourth year of eligibility. The judge agreed that the new rule has this effect, and that he overlooked the new rule in his earlier decision. Since NCAA rules now would permit Bowers to seek a fourth year of eligibility, Bowers no longer suffers damage from the old rule, and thus he lacks standing to seek injunctive relief, Judge Orlofsky has concluded.

Bowers was represented by Barbara E. Ransom, Public Interest Law Center of Philadelphia. The NCAA was represented by Charles J. Vinicombe, Princeton.

Bowers v. National Collegiate Athletic Association, 130 F.Supp.2d 610, 2001 U.S.Dist.LEXIS 1071 (D.N.J. 2001) [ELR 23:3:19]

Barnes Foundation must pay attorneys' fees of some individual defendants in Foundation's unsuccessful civil rights suit over application of city regulations to Barnes Gallery, federal appellate court rules

In the aftermath of an unsuccessful civil rights lawsuit the Barnes Foundation filed against the Township of Lower Merion, the Foundation now finds itself liable for the attorneys' fees incurred by several individuals the Foundation sued along with the Township.

The Foundation owns an art collection that it has displayed for decades in a building in Lower Merion. Several years ago, the Township began applying its zoning, parking, police and fire code regulations to the gallery in a way that the Foundation alleged was discriminatory. The Foundation made these allegations in a federal lawsuit against the Township and against several of the gallery's neighbors.

Federal District Judge Anita Brody eventually dismissed the Foundation's case, in response to a defense motion for summary judgment (ELR 20:3:12). But Judge Brody denied a request for attorneys' fees made by a half-dozen of the gallery's neighbors.

The neighbors appealed, and in an opinion by Judge Morton Greenberg, the Third Circuit Court of Appeals has ruled that five of the neighbors are entitled to recover their attorneys' fees and a sixth neighbor may be as well. Judge Greenberg ruled that although the Foundation's lawsuit was not frivolous, its claims against five of its neighbors had no factual support and thus justified an award of attorneys' fees to them. Though there was some factual support for the Foundation's suit against the sixth neighbor, the judge ruled that if the Foundation's suit against him was brought in bad faith, attorneys' fees also could be awarded to him.

The appellate court therefore remanded the case to the District Court for it to determine how much in attorneys' fees the five neighbors should be awarded, and whether the Foundation's suit against the sixth neighbor was brought in bad faith.

The Barnes Foundation was represented by Sheryl L. Auerbach and Maura E. Fay, Dilworth Paxson Kalish & Kaufman, Philadelphia. The gallery's neighbors were represented by David H. Weinstein and Kellie A. Allen, Weinstein Kitchenoff Scarlato & Goldman, Philadelphia.

Barnes Foundation v. Township of Lower Merion, 242 F.3d 151, 2001 U.S.App.LEXIS 3347 (3rd Cir. 2001) [ELR 23:3:19]

DEPARTMENTS

Letters to the Editor:

New WGA agreement

I wanted to draw your attention to some inaccuracies that appeared in the "In the News" section of your June issue, under the heading, "Writers Guild of America ratifies Minimum Basic Agreement with Alliance of Motion Picture and Television Producers and television networks." [ELR 23:1:4]

The penultimate paragraph of this section reads, ". . . writers will have the right to be present at cast readings and will have the right to visit the sets of motion pictures they have written. Also, directors will meet with writers to discuss creative issues shortly after directors are hired and before any decision is made to hire a new writer."

The actual language of the agreement struck between the WGA and AMPTP is quite different. The agreement does not confer any new "rights" on writers. Instead, the WGA agreement establishes non-contractual, non-binding guidelines. These guidelines are not mandates, are not contractually enforceable and are not subject to arbitration; they are intended solely to serve as "preferred practices" for writer-director relationships.

Under the new, non-binding, preferred practices code for feature films:

* A director assigned to a film based upon an existing screenplay should meet with the currently employed writer before deciding to hire a new writer;

* It is preferred that the writer be invited to the first cast meeting. However, it is understood that this

reading is a delicate moment for both the director and the actors, and the director must be able to exercise discretion whether to invite a writer;

* It is preferred that the Company, in response to a request from the writer, arrange for the writer to visit the set at an appropriate time. However, it is understood that because of the nature of the material being shot, confidentiality considerations, personal dynamics of the case or other key personnel, or variety of other reasons, writer visits may not be appropriate. Therefore, the director retains the discretion to approve any such visit.

The DGA wholly support these preferred practices, and hopes that along with the preferred practices agreed upon for television they will lead to greater respect for the incredibly difficult jobs done - often brilliantly - by both writers and directors.

Sincerely,

Andrew Levy
Special Assignments Executive
Directors Guild of America
Los Angeles, CA

"Running Scared" defamation case lawyer

As always, I enjoy continued reading of the Entertainment Law Reporter, particularly your editorial notes. There is however one oversight I should like to bring to your attention, which appears on Page 15 of Vol. 23, No. 2, July 2001 [ELR 23:2:14]. My partner, David Blasband (then of the firm Deutsch Klagsbrun & Blasband which, as of April 1, 2001 merged with McLaughlin & Stern, LLP) was the attorney for Lyle Stuart. Naturally local counsel had been designated but it was David who did all the work, prepared the briefs and argued the case before the [Nevada] Supreme Court. . . .

Very truly yours,
Alvin Deutsch
McLaughlin & Stern
New York, N.Y.
[ELR 23:3:20]

In the Law Reviews:

Loyola of Los Angeles Entertainment Law Review has published Volume 21, Number 1 with the following articles:

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

UMG Recordings, Inc. v. MP3.com, Inc.: Signaling the Need for a Deeper Analysis of Copyright Infringement of Digital Recordings by Sara Steetle, 21 Loyola of Los Angeles Entertainment Law Review 31 (2000)

Tasini v. New York Times: Ownership of Electronic Copyrights Rightfully Returned to Authors by Yuri Hur, 21 Loyola of Los Angeles Entertainment Law Review 65 (2000)

Going Once, Going Twice, Sold! Are Sales of Copyrighted Items Exposing Internet Auction Sites to Liability? by Kelley E. Moohr, 21 Loyola of Los Angeles Entertainment Law Review 97 (2000)

Internet Business Model Patents: An Obvious Incentive to Reform the United States Patent and Trademark Office by Nicole-Marie Slayton, 21 Loyola of Los Angeles Entertainment Law Review 123 (2000)

The Entertainment and Sports Lawyer, published by the American Bar Association Forum on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, IL 60611-4497, has published Volume 19, Number 1 with the following articles:

Napster Through the Scope of Property and Personhood by Zachary M. Garsek, 19 Entertainment and Sorts Lawyer 1 (2001) (for address, see above)

Navigating Difficult Waters: Immigration Laws as Applied to Foreign Artists, Entertainers and Athletes by

Laura J. Danielson, 19 Entertainment and Sports Lawyer 3 (2001) (for address, see above)

Slam Dunk: Negotiating Coaching Contracts for Women's College Basketball Programs by Robert W. Ferguson, 19 Entertainment and Sports Lawyer 8 (2001) (for address, see above)

Reprinting Vintage Trading Cards: It's Better Than Counterfeiting Currency by Phillip W. Gillet, Jr., 19 Entertainment and Sports Lawyer 10 (2001) (for address, see above)

Book Review: Entertainment Law by Robert Fremlin, Cumulative Supplement, Updated by Michael Landau, reviewed by Richard J. Greenstone, 19 Entertainment Law Review 22 (2001) (for address, see above)

Book Review: Leveling the Playing Field: How the Law Can Make Sports Better for the Fans by Paul C. Weiler reviewed by Ryan M. Rodenberg, 19 Entertainment and Sports Lawyer 23 (2001) (for address, see above)

Copyright's First Amendment by Lawrence Lessig, 48 UCLA Law Review 1057 (2001)

Ex-Parte Seizure of Intellectual Property Goods by William P. Glenn, Jr., 9 Texas Intellectual Property Law Journal 307 (2001)
[ELR 23:3:20]