IN THE NEWS

Movie industry gets split results in two lawsuits against websites that posted and linked to DeCSS software that circumvents DVD encryption: federal appellate court affirms permanent injunction against website in copyright case, rejecting First Amendment attacks on DMCA; but state appellate court reverses preliminary injunction against different website in trade secrets case, ruling that injunction violated First Amendment

The movie industry got split results in two appellate court decisions in separate but factually similar cases against the operators of websites that posted and linked to "DeCSS" software - a rogue program that enables users to circumvent DVD encryption, without authorization.

A state appeals court in California overturned a preliminary injunction that had been issued in a trade secrets case, on the grounds that the injunction violated the First Amendment free speech rights of the website operator. But just four weeks later, a federal appeals court in New York affirmed a permanent injunction that had been issued in a copyright case, in an opinion that rejected the website operator's First Amendment arguments.

The state case was filed by the DVD Copy Control Association, a movie industry trade group that controls the rights to the "content scramble system" used to encrypt movie DVDs. The case was brought under California state trade secret law against website operator Andrew Bunner. The trade secret at issue in the case was a piece of code known as a "master key" that is used by properly-licensed DVD players to decrypt movie DVDs. The DeCSS software posted on

Bunner's website, and those to which he linked, revealed the "master key." And that is what prompted the Association's trade secret lawsuit.

The trial court granted the Association's request for a preliminary injunction barring Bunner from continuing to distribute DeCSS. The injunction did not, however, bar him from linking to other sites that do. Discontent with his half-victory, Bunner appealed and won the other half. The California Court of Appeal assumed that Bunner had violated California's trade secrets law. But in an opinion by Justice Eugene Premo, the appellate court went on to hold that the injunction violated Bunner's First Amendment free speech rights.

Justice Premo reasoned that DeCSS is "speech," and that the preliminary injunction that barred Bunner from distributing DeCSS "can fairly be characterized as a prohibition of 'pure' speech." What's more, the injunction was a "prior restraint." As such, the Justice said, it was "highly disfavored and presumptively unconstitutional." The Association's "statutory right to protect its economically valuable trade secret is not an interest that is 'more fundamental' than the First Amendment right to freedom of speech," Justice Premo concluded. And though he expressed "respect for the Legislature and its enactment" of California's trade secret law, that respect, the Justice said, "cannot displace our duty to safeguard the rights guaranteed by the First Amendment."

Ironically, when Bunner's appeal was assigned to a three-judge panel that included Justice Premo, the Association probably was pleased, because he had ruled in the Association's favor on an important procedural issue earlier in the case. When the Association filed its lawsuit, it also sued other defendants as well as Bunner, including a website operator named Matthew Pavlovich who lived for a while in Indiana and then in Texas but never in California. Pavlovich argued that the California court did not have personal jurisdiction over him. The trial court rejected that argument, and in an opinion by Justice Premo, the Court of Appeal did too. In a decision that suggested he knew full well what a real threat DeCSS is to the movie industry, Justice Premo held that "California's long-arm statute reaches . . . operators of . . . Web sites when, in violation of California law, they make available for copying or distribution trade secrets or copyrighted material of California companies." The California Supreme Court has agreed to hear Pavlovich's appeal, so that issue isn't entirely settled yet.

The separate federal case was filed in New York City by Universal City Studios and the other major studios against website operator Eric Corley. That case alleged that Corley's distribution of DeCSS from his website, and its links to other sites that distribute it as well, violated the anti-circumvention provisions of the Digital Millennium Copyright Act (ELR 20:6:4). District Judge Lewis Kaplan agreed, and issued a preliminary injunction before trial (ELR 22:1:14) and permanent injunction after trial, barring Corley from posting or linking to DeCSS (ELR 22:3:4).

Corley appealed. But in an opinion by Judge Jon O. Newman, the Second Circuit Court of Appeals has affirmed. Judge Newman acknowledged that computer code and programs are "speech," and that as such, they "can merit First Amendment protection." On the other hand, Judge Newman reasoned, "The functionality of computer code properly affects the scope of its First Amendment protection."

The injunction against Corley's posting of DeCSS was based solely on its function as a decryption program - not on its speech features. Therefore, the injunction was content-neutral and was constitutional if it served a substantial governmental interest, Judge Newman explained. "The Government's interest in preventing unauthorized access to encrypted copyrighted material is unquestionably substantial," he concluded.

The injunction against Corley's linking to other sites that distribute DeCSS does impair some communication, Judge Newman acknowledged. And that required him "to choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication." In making that decision, Judge Newman said the public policy issues were for Congress to decide. His task was merely to determine whether the legislative solution, as applied by the injunction, was consistent with the First Amendment. "We are satisfied that it is," he concluded.

In the California state cases, the DVD Copy Control Association was represented by Jared Ben Bobrow of Weil Gotshal & Manges in Menlo Park; and Bunner and Pavlovich were represented by Allonn E. Levy of Huber & Samuelson and the HS Law Group in San Jose. In the federal case, Universal and the other studios were represented by Charles S. Sims of Proskauer Rose in New York City; and Corley was represented by Kathleen Sullivan of Stanford University in Palo Alto.

Editor's note: The ultimate results in the two cases are at odds with one another, as are their conclusions about whether DeCSS is "pure speech" or speech-plus-function. The DVD Copy Control Association has asked the California Supreme Court to review the case; and if it does, Judge Newman's analysis in the federal case is likely to be influential, though not dispositive. On the other hand, the two decisions may not be as different as they seem at first. In his decision for the California Court of Appeal in the Bunner case, Justice Premo emphasized that he was reversing a preliminary injunction; and he added, "We express no opinion as to whether permanent injunctive relief may be obtained after a full trial on the complaint, as that issue is not before us." Moreover, Justice Premo also emphasized that injunctions in copyright cases may be constitutional, even if they were not in trade secret cases, because copyright law has a Constitutional foundation (in Article I Section 8), while state trade secret law does not. Judge Newman's decision for the Second Circuit Court of Appeals dealt with a permanent (not preliminary) injunction issued pursuant to a provision of a federal copyright statute (not a state trade secret statute).

DVD Copy Control Association v. Bunner, No. H021153 (Cal.App., Nov. 1, 2001), available at www.courtinfo.ca.gov/opinions/documents/H021153.PDF; *Pavlovich v. Superior Court*, 109 Cal.Rptr.2d 909, 2001 Cal.App.LEXIS 623 (Cal.App. 2001), hearing by Cal.Sup.Ct. granted, order available at www.courtinfo.ca.gov/courts/supreme/actions/SL121201.PDF (Dec. 12, 2001); *Universal City Studios v. Corley*, Docket No. 00-9185 (2nd Cir., Nov. 28, 2001), available at www.mpaa.org/Press [ELR 23:7:4]

Minnesota Twins are ordered to play 2002 season in Minneapolis Metrodome, and Major League Baseball is ordered not to interfere with Twins doing so, despite Major League Baseball's plans to downsize by buying and eliminating Twins

Major League Baseball's plans to downsize have been put on hold, for the time being at least, by a temporary injunction issued at the request of the Metropolitan Sports Facilities Commission. The Commission operates the Minneapolis Metrodome - the home stadium of the Minnesota Twins.

As baseball fans are painfully aware, Major League Baseball intends to buy and then eliminate the Twins (as well as the Montreal Expos) before the 2002 season begins. But Minnesota state court Judge Harry Seymour Crump has ordered the Twins to play their entire 2002 major league home baseball schedule in the

Minneapolis Metrodome. And Judge Crump has ordered Major League Baseball not to interfere "in any way" with the Twins doing so.

The Metropolitan Sports Facilities Commission has alleged a breach of contract claim against the Twins and claims for interference with contract and prospective advantage against Major League Baseball. The contract at issue is a "Use Agreement" between the Commission and the Twins.

In a very short decision explaining his order, Judge Crump noted that the Twins have exercised an option, granted to the team by the Use Agreement, to play in the Metrodome during 2002. And he noted that "A breach of the Use Agreement entitles the Commission to '. . . specific performance requiring the Twins to play its home games at the [Metrodome]." Apparently, the Use Agreement explicitly gave the Commission the right to specific performance, because the agreement "does not require the Twins pay rent for the use of the Metrodome for regular season games. . . ." Instead, the Twins merely pay some utility costs and share concession rights with the Commission.

Because the Commission sought a temporary, pre-trial, injunction, Judge Crump had to balance the harms that would result from his decision. In doing so, he extolled the importance of baseball to the nation as a whole and to Minnesota in particular. "Baseball is as American as turkey and apple pie," he said. It is "a tradition that passes from generation to generation. Baseball crosses social barriers, creates community spirit, and is much more than a private enterprise. Baseball is a national pastime. Locally, the Twins have been part of Minnesota history and tradition for forty years."

For these reasons, the judge explained, "more than money is at stake" in the case. "The welfare, recreation, prestige, prosperity, trade and commerce of the people of the community are at stake. . . . The Twins are one of the few professional sports teams in town where a family can afford to take their children to enjoy a hot dog and peanuts at a stadium." This meant that "The vital public interest, or trust, of the Twins substantially outweighs any private interest," the judge concluded.

The Minnesota Supreme Court has denied Major League Baseball's request for an accellerated appeal. Instead, the case will be heard by the state Court of Appeals.

The Metropolitan Sports Facilities Commission was represented by Corey Ayling. Major League Baseball and the Twins were represented by Roger Magnuson.

Editor's note: The case being heard by Judge Crump is not the only legal proceeding that has been triggered by Major League Baseball's decision to eliminate the Twins and Expos. Congress has held hearings as well, and is considering (once again) the possibility of revoking Major League Baseball's antitrust exemption. Major League Baseball takes the position that the economics of its business require contraction; and it has posted information concerning those economics at http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story.jsp?article_id=mlb_20011206_hearingsarchive_news&team_id=mlb.

Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, Hennepin County [Minnesota] District Court (November 16, 2001), available at www.msfc.com/commissionnews_detail.cfm?releaseID=48 [ELR 23:7:5]

United States federal court declares that French court order requiring Yahoo to block access by French users to sites that auction Nazi merchandise, or pay $14,000 a day in penalties, is not enforceable in U.S.

Yahoo! Inc. and two French organizations are battling each other in two separate but related lawsuits that dramatically test the jurisdiction of the courts in one country over the operations of online service providers in another. Thusfar, the French organizations - the League Against Racism & Antisemitism, and the French Union of Jewish Students - have won the case they filed in Paris, while Yahoo has won the case it filed in California.

At issue in both cases is Nazi merchandise being auctioned by Yahoo users from websites hosted on Yahoo's servers in the United States. French law makes the mere display of Nazi merchandise a crime in that country. Because the Internet makes websites accessible worldwide, regardless of where those websites are hosted, French residents are easily able to access the Nazi auction websites on Yahoo's servers, even though those servers are in the United States rather than France.

The League Against Racism & Antisemitism, and the French Union of Jewish Students, sent a "cease and desist" letter to Yahoo at its main office in California, insisting that it remove Nazi merchandise from its users' websites, and threatening legal action if Yahoo failed to do so. Indeed, when Yahoo did not accede to the organizations' demands, they sued Yahoo in a County Court in Paris; and they won.

The French court ordered Yahoo to block access by French users to any websites that auction Nazi merchandise, apologize for Nazism, or contest the reality of Nazi crimes. Moreover, the French court decreed that if Yahoo failed to do so by February 2002, it would be subject to fines of 100,000 Francs (about $14,000) a day. (ELR 22:8:5)

The only asset Yahoo owns in France is a subsidiary that provides Internet and web hosting services to French residents. However, in compliance with French law, Yahoo France does not permit its users to auction or display Nazi merchandise. Perhaps for that reason, the French court did not threaten Yahoo's French subsidiary with fines, even if its parent company in California failed to comply with the court's order. That meant that Yahoo anticipated that the two organizations would attempt to collect those fines here in the United States.

Since nothing required the French organizations to be quick about attempting to collect those fines, and since they would accrue at a rate of more than $5 million a year, Yahoo decided to take the offensive in the United States. It did so by filing a declaratory relief lawsuit against the two organizations, in federal District Court in San Jose, California.

Though the French organizations thought nothing of hauling Yahoo into a French court by asserting personal jurisdiction over the company there, they were not pleased about having to defend their position in a California court. As a result, their initial response to Yahoo's lawsuit was to seek its dismissal on the grounds that the California court did not have personal jurisdiction over them.

Federal District Judge Jeremy Fogel gave their motion thoughtful consideration. But he determined that they had subjected themselves to the personal jurisdiction of his court - under the "purposeful availment" test - by doing three things: by sending Yahoo a "cease and desist" letter at its Santa Clara headquarters; by asking the French court to order Yahoo to re-engineer its web servers in California so they would detect French residents and block their access to displays of Nazi merchandise; and by using a U.S. Marshal to serve Yahoo with process in the French case.

Yahoo then moved for summary judgment, and Judge Fogel granted their motion. He ruled that the order of French court could not be enforced in a U.S. court, consistent with the First Amendment, for two reasons: because the French order required Yahoo to block access to certain websites on the basis of their viewpoint; and because the wording of the order was far too general and imprecise.

The judge made a point of emphasizing that he was not in any way criticizing the French or their law. "This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organizations in seeking relief under those statutes," he said. "[A]s a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here."

The only thing at issue in the case, Judge Fogel said, was whether the doctrine of comity - pursuant to which the courts of one nation ordinarily enforce the judgments of courts of other nations - would be followed in this case. And in this case, "the principle of comity is outweighed by the Court's obligation to uphold the First Amendment," he concluded.

The League Against Racism & Antisemitism and the French Union of Jewish Students have appealed to the Ninth Circuit Court of Appeals.

Yahoo was represented by Ronald S. Katz and Richard A. Jones of Coudert Brothers in San Francisco and San Jose. The League Against Racism & Antisemitism, and the French Union of Jewish Students, were represented by Robert C. Vanderet of O'Melveny & Myers in Los Angeles and Michael Traynor of Cooley Godward in San Francisco.

Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F.Supp.2d 1168, 2001 U.S.Dist.LEXIS 7565 (N.D.Cal. 2001) (personal jurisdiction decision); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, Case No. C-00-21275-JF, available at: www.cdt.org/jurisdiction/011107judgement.pdf (N.D.Cal., Nov. 7, 2001) (summary judgment decision) [ELR 23:7:6]

HBO wins dismissal of lawsuit alleging that its sports agent series "Arliss" infringed copyright to treatment for proposed talent agent series called "Schmoozers"

No one may claim a copyright to a "smarmy" or "sleazy" agent, at least not successfully. That is the lesson to be learned from an opinion by federal District Judge Martin in a case that alleged that HBO's popular series "Arliss" infringed the copyright to a treatment for a proposed series about talent agents called "Schmoozers."

The lawsuit was filed against HBO by Patricia Willis, the author of the "Schmoozers" series. When she filed it, she had one thing going for her: a copy of her treatment "somehow found its way into the files of an employee of . . . HBO," before "Arliss" went into production. For this reason, Judge Martin concluded that he could not dismiss the case on the grounds that HBO lacked access to Willis' treatment, even though the judge noted that HBO had offered "substantial evidence that the creators of Arliss never had access to [Willis'] work." The judge explained that the existence of Willis' treatment in HBO's files created an issue of fact concerning access that prevented him from granting summary judgment on that issue.

On the other hand, Judge Martin concluded he could grant HBO's motion for summary judgment on the ground that "Arliss" was not substantially similar to any protected element of "Schmoozers." There were certain similarities between the two works, the judge acknowledged. But "to the extent that there are similarities, they are found either in stock characters, or themes that are common to the talent agency business, or to situation comedies in general or in trivial details that are not essential to either series."

Judge Martin evaluated each of the similarities relied on by Willis and found all of them wanting. "The strongest similarity between the two works," he explained, "is that they both involve talent agents who operate in a 'bottom-dwelling ethical nether world, where lying is an art form; insincerity, a science; and personal convictions are as commonplace as nose rings." The problem for Willis was that "[t]his concept is not original or protectible under the copyright law." Judge Martin took judicial notice "that books, movies and television series are full of such unethical men and women in a variety of businesses and . . . this is not an uncommon perception of talent agents."

Willis also had complained that Arliss "misappropriated her use of a male side-kick, a female assistant and an African American character with a business background." Though the judge disclaimed being "au courant" with today's television programming, he was able to note that "an earlier generation was entertained by Perry Mason, his side-kick Paul Drake and his assistant Della Street. [And] Matt Dillon had Chester and Miss Kitty." While none of the main characters in those series was African American, Judge Martin added he "would have hoped that we were well past the day when someone would urge that it should be considered 'creative' to conceive of an African American male involved in finance."

Willis submitted the declaration of an expert in television studies who offered the opinion that a supporting character in "Arliss" was "substantially similar" to a supporting character in her treatment. The declaration did not have its intended impact, however. Instead, it led Judge Martin to observe that the only thing the expert's declaration demonstrated was "the sad fact that one can apparently get an 'expert' to swear to anything." The judge found the two characters to be quite different from one another and held that "[n]o reasonable fact finder could conclude that [they] are substantially similar."

The judge also rejected Willis' argument that two dramatic devices used in "Arliss" - a character who talks directly to the audience, and celebrities appearing as themselves - were copied from her treatment. The first of these devices dates back to ancient Greek tragedy, and the second has been used in many movies and television programs, Judge Martin found. "Thus, even if HBO copied these devices from [Willis'] treatment, there is not copyright violation," he held.

Willis was represented by Robert N. Fass of Friedman Krauss & Zlotolow in New York City. HBO was represented by Orin Snyder and Cynthia S. Arato of Parcher Hayes & Snyder in New York City.

Willis v. Home Box Office, Case No. 00 Civ. 2500 (JSM) (S.D.N.Y., Nov. 2, 2001), available at www.nysd.uscourts.gov/courtweb/Default.htm, and at 2001 WL 1352916 [ELR 23:7:7]

The Pullman Group loses trade secret case against Prudential, the Rascoff/Zysblat Organization and others; courts rule that David Pullman developed "Bowie Bond" securitization techniques while employed by securities firms Gruntal and Fahnestock, and thus any trade secrets in those techniques are owned by those firms rather than Pullman

David Pullman may be the father of music securitizations, but he doesn't own the technique. That in a nutshell is what New York state courts have ruled in a trade secret lawsuit filed by Pullman's company, The Pullman Group LLC, against Prudential Insurance, the Rascoff/Zysblat Organization and others.

"Securitization" is an asset-based financing technique that uses income streams as collateral. The technique has been used for years in many industries. But Pullman seems to be the first to suggest that it be used in the entertainment industry. He did so in connection with a multi-million loan by Prudential to singer-songwriter David Bowie, using the royalties earned by Bowie's songs as collateral. The documents for that and other similar deals are often referred to as "Bowie Bonds."

Pullman began work on the Bowie deal while working for Gruntal & Co. Before the Bowie deal was done, Pullman left Gruntal to go to work for Fahnestock & Co. After Prudential bought all of the

Bowie Bonds for $55 million, Pullman left Fahnestock to start his own company.

When Pullman left Gruntal to go to Fahnestock, Gruntal assigned to Fahnestock "all of [Gruntal's] rights and obligations" in the then-pending Bowie Bond deal. When Pullman later left Fahnestock to start his own company, Fahnestock assigned to Pullman all of its rights in a then-pending deal that would have created a joint venture -called the Royalty Finance Company of America - between Fahnestock, Prudential and Bowie's manager, the Rascoff/Zysblat Organization, to do more music royalty securitizations.

The Royalty Finance Company joint venture never came to fruition. In a complaint filed in New York state court, Pullman alleged that Prudential, Rascoff/Zysblat and others misappropriated trade secrets they had learned from him about music royalty securitizations in order to start a competing joint venture called Entertainment Finance International.

Prudential, Rascoff/Zysblat and their co-defendants responded to Pullman's lawsuit by filing a motion to dismiss, in which they argued that Pullman didn't have standing to assert his trade secret and related claims because he dosn't own the trade secrets that his lawsuit accused them of misappropriating. New York Supreme Court Judge Beatrice Shainswit agreed and therefore granted their motion.

Judge Shainswit explained that "any intellectual property that [The Pullman Group] seeks to protect was, at best, developed by Mr. Pullman while he was employed by Gruntal and Fahnestock. . . . Under the established intellectual property doctrine regarding 'work for hire,' any such intellectual property therefore belongs to either Gruntal or Fahnestock - not to Mr.

Pullman, and certainly not to [The Pullman Group, which] . . . thus has no injury, and no standing to sue."

Pullman argued that his company acquired the misappropriated trade secrets by assignment from Gruntal and Fahnestock. But Judge Shainswit ruled that the language of those assignments dealt only with Gruntal's and Fahnestock's rights in particular deals. "Although the law allows trade secrets to be assigned," the judge said, "it requires any such assignment to be express and specific." Neither the assignment from Gruntal to Fahnestock, nor the assignment from Fahnestock to Pullman, mentioned trade secrets or intellectual property, she held.

Pullman appealed the dismissal of his case. But in a very short decision, the Appellate Division has affirmed, on the same grounds relied on by Judge Shainswit.

Pullman Group v. Prudential Insurance Co., N.Y.Sup.Ct. Index No. 605210/99 (Aug. 18, 2000), available at www.courts.state.ny.us/www/nyscomdiv/august/605210-99.pdf, affirmed, 2001 NYSlipOp 09010 (App.Div., Nov. 1, 2001), available at www.courts.state.ny.us/reporter/slips/09010.htm [ELR 23:7:8]

WASHINGTON MONITOR

FTC issues second follow-up report on violent entertainment praising movie and electronic game industries for "commendable progress," but faulting record industry for failing to change its marketing practices though it has made "improvements in other areas"

The Federal Trade Commission has criticized the advertising practices of the recorded music industry for the third time in a little over a year. The FTC did so in its second follow-up to a report it issued in September 2000 entitled Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (ELR 22:4:7).

The newly-issued second follow-up report was prepared in response to a request by Senators John McCain (R-AZ), Ernest Hollings (D-SC), Max Cleland (D-GA), and Sam Brownback (R-KS) of the Senate Commerce Committee. It covers the same points already examined in its April 2001 follow-up (ELR 23:1:6), "but is based on more extensive information." Though the FTC criticized the recording industry yet again, it complimented the movie and electronic game industries for making "commendable progress in limiting their advertising to children of R-rated movies and M-rated games and in providing rating information in advertising." Warner Bros. in particular was singled out for praise "for going beyond the letter of its commitment [made in response to the FTC's initial report] and avoiding advertising in some media that its commitment technically would allow."

The FTC again found fault with the recording industry, because "it has continued to advertise explicit content recordings in most popular teen venues in all media." On the other hand, the FTC praised the recording industry for making "improvements in [its] disclosure of parental advisory label information in its advertising."

The FTC also criticized the retail industry for making "few changes" in its practices. Using "an undercover 'mystery' shopper survey," the Commission found that "nearly half (48 percent) of the theaters [surveyed] sold tickets to R-rated movies to the underage moviegoers, while 90 percent of the music retailers [surveyed] sold explicit-content recordings to the underage shoppers." These were about the same results the FTC got from its first survey for its September 2000 Report. The FTC noted that "Electronic game retailers showed modest improvement in restricting the purchase of M-rated games compared to last year, with 78 percent allowing shoppers to purchase M-rated games (compared to 85 percent earlier)."

Among the specific findings made by the Commission in its second follow-up report were these:

Movie industry. The Commission's review of studio marketing plans for six violent R-rated and three violent PG-13-rated films revealed no express targeting of either R-rated films to children under 17, or PG-13-rated films to children under 13. In reviewing marketing practices, the Commission found no ads for R-rated movies in popular teen magazines and little promotion of R-rated films in locations popular with teens. Its check of trailers for R-rated movies revealed none was shown before G- and PG-rated feature films. Studios, however, continued to advertise R-rated films on television. The MPAA has no specific limits on ad placements, and though some studios have announced they will not advertise R-rated movies on programs with a youth audience of 35 percent or more, this threshold permits continued advertising on programs with a large number of teen viewers. The Commission found that the movie industry has made real progress in disclosing rating information in its advertising. Studios now routinely disclose both ratings and reasons for ratings in their television, print, radio, outdoor, and online advertisements.

Recorded music industry. Marketing documents for 13 explicit-content labeled recordings included plans for extensive television, radio, print, and online advertising likely to be seen by teens. This is so, the FTC explained, because advertising targeted to all ages is consistent with the RIAA's parental advisory labeling program, which, unlike the rating programs for movies and electronic games, does not specifically designate an age for which labeled music may be inappropriate. The Commission found that record companies increasingly are complying with recently announced industry-wide guidelines requiring parental advisories be included in all advertising of explicit-content labeled recordings. The FTC characterized this as "a promising start and a clear improvement since the September 2000 Report," but it added that "continued efforts will be needed to achieve widespread compliance."

Electronic Games. The Commission found that the electronic game industry has continued to take "positive steps" to limit ad placements for M-rated games in popular teen media. It found little advertising on popular teen television programs. However, in its review of marketing documents for 14 violent M-rated games, the Commission found that all planned at least some ad placements in media popular with teens, and two expressly targeted an under-17 audience. The

Commission also found continued placements of advertising for M-rated games in youth-oriented magazines and popular teen websites. The Commission complimented the electronic game industry for making "substantial progress" in providing "accurate and prominent rating information" in advertising. Now that the game industry has a revised code in place that strengthens and clarifies disclosure requirements across all media, "there remain only a few key areas where the code and compliance need strengthening," the FTC said.

The FTC recommended that all three industries make further progress in limiting the use of popular teen media to advertise violent entertainment by adopting industry-wide standards to limit ad placements. The FTC suggested standards that would take into account factors that would identify those media most popular with teens, such as the percentage of the audience under 17, the total number of children reached, whether the content is youth-oriented, the media's popularity with children, the apparent ages of the characters or performers, and the time of day an ad airs on radio or television.

The Commission also recommended that all three industries further improve the disclosure of rating and labeling information in advertisements by ensuring that both the rating or label and the reasons for the rating or label are effectively and clearly communicated to parents in advertising. The FTC suggested that this could be done by adopting industry standards for disclosures of such information, and by stepped-up monitoring by industry associations.

The FTC suggested that improvements in these areas could be enhanced by programs to impose "meaningful sanctions" for non-compliance with code provisions, such as the one recently instituted by the electronic game industry.

The Commission acknowledged that some of these things already have been done by the movie and electronic game industries, or they involve practices already followed by some companies that could be standardized for the entire industry. "For the music industry, however," the FTC added, "taking these steps would require fundamental changes in its labeling program, to which it is not yet committed. These would include modifying the labeling program to require reasons for labels and the disclosure of those reasons in advertisements. It would also require the industry to adopt the underlying premise that some labeled recordings should not be advertised in popular teen venues."

Finally, the FTC suggested that all three industries "Encourage third-party retailers to check age or require parental permission before selling or renting R-rated/M-rated/advisory-labeled products."

The FTC recognizes that there are First Amendment limits to what the government can do in this area. "Because of First Amendment and other issues," it said, "the Commission continues to support private sector initiatives to implement these steps. It believes that in addition to the role that industry self-regulatory programs play in this area, individual companies also can play an important role in adopting best practices that go beyond those programs."

In anticipation of the FTC's second follow-up report, the RIAA and the Interactive Digital Software Association issued reports of their own.

Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game

Industries: A Report to Congress (FTC Dec. 2001), available at www.ftc.gov/os/2001/12/violencereport1.pdf; *Music Industry Meeting the Challenge: An RIAA Status Report on the Parental Advisory Program* (RIAA Dec. 2001), available at www.riaa.org/pdf/pal3.pdf; *Video Games & Youth Violence: Examining the Facts* (IDSA Dec. 2001), available at www.idsa.com/pressroom.html [ELR 23:7:10]

Compulsory mechanical rates for music recordings, and music performance royalties paid by certain public broadcasters, increase as of January 1, 2002

Songwriters and music publishers will be getting a slightly belated holiday gift this season. The royalties they earn from recordings and broadcasts by certain public stations will be increased a week after Christmas, on January 1, 2002.

The compulsory mechanical rate paid by record companies will increase to 8 cents per record (for each song on a record), or to 1.55 cents per minute (for each song), whichever is greater. The rate was 7.55 cents or 1.45 cents per minute for the years 2000 and 2001.

For record companies that carefully get their mechanical licenses before they release their recordings, the compulsory rate turns out to be the maximum they have to pay. Often, however, record companies negotiate a lower rate with music publishers - for example, a "three-quarters rate," which, as its name suggests, is three-quarters of the compulsory rate. Thus, come January 1, 2002, the "three-quarters rate" will be a nice round figure: 6 cents per song. The three-quarters rate has been a round number of pennies per song only once before in the 92-year history of the compulsory mechanical license; and even then, it was an even amount for just one and a half years, from July 1, 1981 through December 31, 1982, when the compulsory rate was 4 cents thus making the three-quarters rate 3 cents.

The increase in the compulsory mechanical rate is not the result of any new action taken by the Copyright Office. Instead, it is an increase that was announced by the Copyright Office in 1998 when it set the compulsory rates for each two-year period from 1998 through 2007 (ELR 19:10:7).

The music public performance royalties payable by colleges, universities and other nonprofit educational institutions that operate radio stations, and that are not affiliated with National Public Radio, will increase on January 1, 2002 as well. (NPR has privately negotiated public performance licenses with ASCAP, BMI and SESAC on behalf of its affiliates.)

The royalty increase just announced by the Copyright Office is simply a cost-of-living increase. The Consumer Price Index for the period from December 1, 2000 to December 1, 2001 increased 2.1%. Therefore, the license fees payable by noncommercial educational radio stations (not affiliated with NPR) have been increased by that percentage. Starting January 1, 2002, the new license fees payable by these stations will be: $244 each to ASCAP and BMI, and $66 to SESAC, annually.

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, amending 37 CFR section 255.3, Copyright Office, Library of Congress, 63 Federal Register 7288 (Feb. 13, 1998) (previously reported at ELR 19:10:7); *Cost of Living Adjustment for Performances of Musical Compositions by Colleges and Universities*, amending 37 CFR section 253.5, Copyright Office, Library of Congress, 66 Federal Register 59698 (November 30, 2001) [ELR 23:7:11]

INTERNATIONAL DEVELOPMENTS

WIPO Copyright Treaty to take effect March 6, 2002, with ratification by thirtieth nation

When the World Intellectual Property Organization adopted its Copyright Treaty in 1996, attention immediately turned to the changes countries would have to make to their own national copyright laws in order to be eligible to adhere to the new treaty. In the United States, the few changes that were necessary were accomplished in 1998 in the Digital Millennium Copyright Act (ELR 20:6:4).

The amendments to U.S. law that were made by the Digital Millennium Copyright Act have taken effect already; but the WIPO Copyright Treaty that required those changes has not. By its own terms, the Treaty would "enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO."
The nation of Gabon was the thirtieth to deposit that instrument with WIPO. It did so on December 6, 2001, thereby bringing the Treaty into force on March 6, 2002.

Other nations that have ratified the Treaty - in addition to the United States - are: Argentina, Belarus, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, Georgia, Hungary, Indonesia, Japan, Kyrgyzstan, Latvia, Lithuania, Mexico, Panama, Paraguay, Peru, Republic of Moldova, Romania, Saint Lucia, Slovakia, and Slovenia.

Noticeably absent from the list of adhering countries are those of the European Union. They should be depositing their instruments of ratification soon, however. The recently-adopted EU Copyright Directive requires EU members to amend their laws to satisfy WIPO Copyright Treaty requirements; and the Directive gives EU members only until the summer of 2002 to implement those changes (ELR 23:2:6).

WIPO Press Release PR/2001/300 (Dec. 6, 2001), available at www.wipo.int/pressroom/en/releases/2001/p300.htm [ELR 23:7:13]

British Independent Television Commission properly refused to consent to exclusive broadcasting by pay-TV company of World Cup qualifying matches in which Denmark was playing, because too few Danes would be able to watch, U.K. House of Lords decides

When qualifying matches for the 2002 World Cup are played, it looks as though Danes will be able to watch their team on free over-the-air TV, as a result of a decision of the U.K. House of Lords. That wasn't the original plan of the company that acquired the exclusive Danish TV rights to those games. Those rights were acquired by TV Danmark 1 Limited, a newly organized pay-TV broadcaster. It had planned to transmit the Danish team's matches to viewers in Denmark who subscribe to cable and satellite.

TV Danmark's pay-TV plans were upset by a decision of the British Independent Television Commission that denied the company the consent it needed to exercise its exclusive rights, and by the decision of the House of Lords upholding the Commission's decision.

There is in fact a good, three-part, reason that a British commission and court were assigned the task of deciding whether Danish football fans will get to watch their team's games on free over-the-air television in Denmark.

First, in 1997, the European Council adopted an amendment to its "Television Without Frontiers Directive." The amendment authorizes members designate events "of major importance" to their societies, and it requires EU members to "ensure that broadcasters under their jurisdiction do not exercise rights purchased by those broadcasters . . . in such a way that a substantial portion of the public in another member state is deprived of the possibility of following events which are designated by that other member state . . . via . . . coverage . . . on free television. . . ."

Second, despite its Danish-sounding name and its intended Danish audience, TV Danmark is in fact a U.K. company.

Third, Denmark has in fact designated World Cup football matches in which Denmark is playing as events "of major importance." (Only three other EU members have taken advantage of the Directive to designate events. Italy has designated the Formula One Italian Grand Prix, the San Remo music festival and some other events. Germany has designated various football matches. And the U.K. has designated the Olympic Games, the Grand National Horse Race, the Wimbledon Finals, and certain cricket and rugby matches.)

In the U.K., responsibility has been given to the Independent Television Commission for ensuring that British broadcasters do not exercise exclusive rights to deprive EU residents of their ability to watch events that have been designated by their countries. This meant that since TV Danmark is a British company, it had to get the Commission's consent to exercise its exclusive World Cup rights in Denmark.

The Commission, however, denied TV Danmark the consent it required. The Commission did so, because it determined that only 60% of Danes subscribe to cable or satellite, and thus a "substantial portion" of them would not be able to watch their team's matches. (Under Danish law, 90% of Danes must be able to view designated events; under British law, 95% must.)

The Commission's decision was only the first step of what turned into a four-step effort by TV

Danmark. The company sought to "quash" the Commission's decision by "applying for judicial review," first before a High Court judge, which upheld the Commission's decision. The company then took its case to the Court of Appeal, where it was successful, temporarily. The Court of Appeal held that the Directive is satisfied so long as free over-the-air broadcasters are given a fair chance to bid on broadcast rights.

The House of Lords disagreed with the Court of Appeal however. Lord Hoffmann held that the Directive "requires member states to . . . prevent the exercise by broadcasters of exclusive rights in such a way that a substantial portion of the public in another member state is deprived of the possibility of following a designated event." The Court of Appeal was "wrong," Lord Hoffmann explained, because "The Directive requires the public to have the possibility of following the event in the sense that a member of the public may watch it if he chooses to switch on his television set."

In Denmark, the public is given this right by requiring pay-TV companies to offer to share their rights, non-exclusively, with free over-the-air broadcasters. The Court of Appeal thought that such a system would be "unattractive to the pay-TV broadcaster and that the value of the rights will be depressed." Lord Hoffmann agreed that this might be so. "But that," he said, "is a consequence that inevitably follows from the protection which the Directive was intended to confer upon the public right of access to such events."

Lord Hoffmann was joined in his decision upholding the Commission by Lords Slynn, Nolan, Hutton, and Hobhouse of Woodborough.

Regina v. Independent Television Commission, [2001] UKHL 42, available at http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm [ELR 23:7:13]

RECENT CASES

Creators of "Psycho Chihuahua" cartoon character win reinstatement of idea-submission lawsuit against Taco Bell; appeals court holds that implied contract claim is not preempted by copyright and Michigan law does not require ideas to be novel

The pedigree of the talking Chihuahua once featured in Taco Bell's television commercials is in serious dispute. Taco Bell claims that he was created by employees of the Chiat/Day advertising agency, while Joseph Shields and Thomas Rinks - the creators of a cartoon character named "Psycho Chihuahua" - claim that they created Taco Bell's little dog too.

The dispute has been litigated in federal courts in Michigan where Shields and Rinks have filed an idea-submission lawsuit against Taco Bell. The lawsuit's central claim is that Taco Bell breached an implied-in-fact contract with Shields and Rinks by using ideas they had submitted to the company, at its request, without paying for them.

Earlier in the case, Shields and Rinks suffered a serious setback when District Judge Gordon Quist dismissed it, on two grounds. Judge Quist ruled that their claims were preempted by the Copyright Act, and that even if they weren't, their ideas were not novel and thus were not protected by Michigan law. (ELR 21:7:7)

On appeal, however, Shields and Rinks have won reinstatement of their case. Writing on behalf of the Sixth Circuit, Judge James Graham has held that Shields' and Rinks' implied contract claim is not preempted, and that Michigan law does not require ideas to be novel in order to be protected by contract.

Judge Graham acknowledged that some implied contract claims are preempted by copyright. However, Shields' and Rinks' was not, the judge reasoned, because they alleged that Taco Bell had promised to pay them for the use of their ideas. That promise was an "extra element" that would not be required in a copyright infringement case. Because they have to prove this extra element, their claim was not preempted, because the rights they sought to enforce were not equivalent to the rights protected by copyright, the judge held.

Judge Graham also acknowledged that some states do require ideas to be novel to be protected by contract. New York, for example, is one of those, under most circumstances. California, on the other hand, does not require novelty. Judge Graham concluded that Michigan law is among those that do not require novelty.

The judge also concluded that Shields' and Rinks' ideas were novel - in the sense required by contract law - because Taco Bell admitted that it didn't know what their ideas were until they were submitted to the company.

For these reasons, Judge Graham reversed the dismissal of Shields' and Rinks' lawsuit and has remanded it to the District Court for further proceedings.

Shields and Rinks, and their licensing company Wrench LLC, were represented by Jeffrey O. Birkhold of Warner Norcross & Judd in Grand Rapids. Taco Bell was represented by Randall G. Litton of Price Heneveld Cooper DeWitt & Litton of Grand Rapids.

Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 2001 U.S.App.LEXIS 15097 (6th Cir. 2001) [ELR 23:7:15]

Use of clips from old monster movies in newly-produced documentaries was fair use, two courts rule

In two separate but similar cases, federal judges have ruled that the use of short clips from old monster movies in newly-produced documentaries were fair uses rather than copyright infringements. Both lawsuits were filed by Susan Nicholson Hofheinz, the widow of James Nicholson. Sam Arkoff and Nicholson founded American International Pictures in the mid-1950s, and decades later, Hofheinz acquired the copyrights to many AIP-produced movies including "I Was a Teenage Werewolf" and "It Conquered the World."

In a case filed in Brooklyn, Hofheinz complained about the use of clips from several AIP movies in a documentary about AIP itself entitled "It Conquered the World! The Story of American International Pictures." The documentary was produced by American Movie Classics for airing on its cable channel. But the film turned out so well, AMC decided to exhibit it in a movie theater for a week, in order to qualify it for Academy Award consideration. Hofheinz sought a preliminary injunction in that case. But her request for an injunction was denied by Judge Charles Sifton.

What exactly triggered Hofheinz's suit against AMC is not fully apparent from Judge Sifton's opinion. It appears that AMC sought a license for the clips it wanted to use, and that a $36,000 license fee for cable exhibition was agreed upon. It even appears that when AMC decided to exhibit the documentary in a theater, an additional license fee of $2,500 was agreed to, as well as a $5,500 consulting fee and on-screen credit for Hofheinz. Apparently, however, something displeased Hofheinz, because she never signed the final licensing document, thus enabling her to argue that AMC's use of the clips was not authorized.

Judge Sifton denied Hofheinz's request for a preliminary injunction, because he found that AMC's use of the clips is "likely to be considered fair and because it is probable that [Hofheinz] gave [AMC] express and implied licenses that authorized the conduct [she] now characterizes as infringing."

In ruling that AMC's use of the clips is likely to be found to be a fair use, the judge reasoned that "Just as a parody 'needs to mimic an original to make its point' . . . and a biographer is permitted to quote his subject . . . , so too a documentary about two film makers should be permitted to sparingly show clips of the subjects' works . . . ." At issue were five clips that averaged 26 seconds each, one lasting as little as 10 seconds and none lasting longer than 54 seconds. "No more seems to have been taken than was necessary for [AMC] to produce the Documentary," Judge Sifton concluded.

In a separate case filed in Manhattan, Hofheinz complained about the use of clips from the AIP movie "It Conquered the World" in a documentary about the career of actor Peter Graves. The documentary, entitled "Peter Graves: Mission Accomplished," was produced for cable exhibition as part of the Arts & Entertainment series "Biography." It used 20 seconds of footage from a trailer that once had been used to promote the theatrical exhibition of "It Conquered the World."

No license from Hofheinz seems to have been sought by A&E, and if not, that explains why she sued the cable network. Judge Robert Sweet thought little of her case, though. He dismissed it in response to A&E's motion for summary judgment. Among other things, the judge noted that the documentary used only 20 seconds from the movie - an amount that was less than 1% of the movie's 70 minutes.

Moreover, those 20 seconds were made up of three distinct "snaps" that were "just snippets of Graves in an alien monster film, people fleeing and Graves hitting a policeman. . . . The 20 seconds of 'It Conquered the World' shown in the Graves' biography are enough to give a viewer an idea of the absurdity of the pictures Graves was appearing in, three clips out of sequence, telling us nothing else," the judge explained.

Hofheinz was represented by Gregory A. Sioris in New York City in both cases. AMC was represented by James W. Dabney of Pennie & Edmonds in New York City. A&E was represented by Douglas C. Fairhurst of Dorsey & Whitney in New York City.

Hofheinz v. AMC Productions, Inc., 147 F.Supp.2d 127, 2001 U.S.Dist.LEXIS 1591 (E.D.N.Y. 2001); *Hofheinz v. A&E Television Networks*, 146 F.Supp.2d 442, 2001 U.S.Dist.LEXIS 8616 (S.D.N.Y. 2001) [ELR 23:7:15]

Hasim Rahman was enjoined from fighting for 18 months unless and until he complied with contractual obligation to fight rematch with Lennox Lewis

Lennox Lewis is heavyweight champion of the world, again. He recaptured his WBC, IBF and IBO by knocking out Hasim Rahman in the fourth round of their fight at the Mandalay Bay in Las Vegas on November 17, 2001. As boxing fans well know, that fight was a rematch. Lennox was the heavyweight champ until April 21, 2001 when Rahman beat Lennox in a surprising upset, in a bout in Johannesburg, South Africa.

The contract between Lewis and Rahman for their April fight contained a clause that gave Lewis the right to a rematch, if Rahman won that fight. Nevertheless, to get the November rematch, Lewis had to sue Rahman in federal court in New York City. Apparently, the lawsuit became necessary because after his April victory, Rahman signed an agreement to be promoted by Don King and received a $5 million advance for doing so. King, however, wanted Rahman to defend his newly-won title against Brian Nielsen, rather than Lennox Lewis.

Federal District Judge Miriam Cedarbaum granted Lewis' request for a preliminary injunction that barred Rahman from fighting for 18 months, unless and until he complied with his contractual obligation to grant Lennox a rematch. In so ruling, Judge Cedarbaum found that although the Lennox-Rahman contract (for their April fight) did not contain a negative covenant, injunctive relief against Rahman was nevertheless available, because Rahman's services as heavyweight champion of the world were "unique and extraordinary." Moreover, the judge found that because of his advanced age for a boxer, Lennox would be irreparably harmed, if his right to a rematch were delayed. "The value of the opportunity to regain the heavyweight championship while he still has the ability to do so cannot be measured or compensated for in money damages," she explained.

Cedric Kushner Promotions also made a claim against Rahman, as well as against Rahman's new promoter Don King. Kushner was Rahman's promoter when Rahman beat Lennox in April. Kushner claimed a contractual right to continue to be Rahman's promoter for his rematch with Lennox. Judge Cederbaum, however, denied Kushner's motion for an injunction that would have barred King from promoting the rematch. The judge did so, because she found that since Kushner's claimed exclusive right to be Rahman's promoter covered just one additional fight, Kushner's damages from any breach of that right could be measured in money. "It is the percentage of Rahman's purse that [Kushner] would have received had it been Rahman's promoter," Judge Cederbaum explained.

Lewis was represented by Judd Burstein in New York City. Cedric Kushner Promotions was represented by Richard A. Edlin of Greenberg Traurig in New York

City. Rahman was represented by Michael F. Armstrong of Kirkpatrick & Lockhart in New York City. Don King was represented by Peter Fleming Jr. of Curtis Mallet-Prevost Colt & Mosle in New York City. And Rahman's managers were represented by Andrew M. Lawler in New York City.

Lewis v. Rahman, 147 F.Supp.2d 225, 2001 U.S.Dist.LEXIS 8614 (S.D.N.Y. 2001)[ELR 23:7:16]

Professional violinist who records movie scores for studios is entitled to "home office" income tax deduction for space in which she practices

Professional violinist Katia Popov has won the right to deduct 40% of her apartment rent, and 20% of her electricity costs, because she used the living room of her one-bedroom apartment solely for violin practice and demo recordings. The IRS is generally stingy about "home office" deductions, and it was in Popov's case too. In order to get the deduction, Popov had to take her case all the way to the Ninth Circuit Court of Appeals.

Popov shared her one-bedroom apartment with her husband Peter Popov, a lawyer, and their four-year-old daughter. But the evidence showed that the only furniture in the living room was a chair, a small table, a bureau on which Popov stored sheet music, and shelves with recording equipment. No one slept in the living room, and Popov's daughter was not allowed to play in it.

The IRS took the position that Popov's place of business was where she delivered the service of playing her violin: in movie recording studios when she played for movie studios, and in concert halls when she played with Los Angeles Chamber Orchestra and the Long

Beach Symphony. Thus, the IRS disallowed her deduction; and the Tax Court agreed with the IRS.

However, in an opinion by Judge Michael Hawkins, the Ninth Circuit rejected the IRS's position. "Taken to extremes," Judge Hawkins reasoned, the IRS's position "would seem to generate odd results. . . . We doubt, for example, that an appellate advocate's primary place of business is the podium from which he delivers his oral argument, or that a professor's primary place of business is the classroom, rather than the office in which he prepares his lectures."

Judge Hawkins found that the amount of time Popov spent practicing was the most significant factor. Popov spent significantly more time practicing at home than performing in studios or concert halls. Moreover, during the year in question, she played for 26 different employers and recorded in 38 different locations.

For these reasons, Judge Hawkins reversed the Tax Court and ruled that Popov was entitled to the home office deductions she had taken.

Popov was represented by Peter Popov in Beverly Hills. The Commissioner of Internal Revenue was represented by Janet A. Bradley of the Department of Justice Tax Division in Washington D.C.

Popov v. Commissioner of Internal Revenue, 246 F.3d 1190, 2001 U.S.App.LEXIS 6611 (9th Cir. 2001)[ELR 23:7:17]

Supreme Court denies request by activist C. Delores Tucker to review dismissal of her defamation claims against Newsweek and Time, complaining about reports that she had sued rapper Tupac Shakur's estate because his lyrics diminished her sex life; also denies request by lawyer for Shakur estate to review reinstatement of Tucker's defamation claim against him

C. Delores Tucker is an outspoken and well-known opponent of "gangtsa rap." She'd locked horns with Tupac Shakur before his death - so much so, she's said, that the lyrics of two of his recordings singled her out for attack using "sexually explicit messages, offensively coarse language and lewd and indecent works."

Not one to take such attacks sitting down, Tucker responded with a lawsuit against Shakur's estate and record companies. News coverage of that lawsuit spawned two more in which Tucker alleged defamation claims against newspapers and magazines that published articles about her first lawsuit, as well as against the lawyer for Shakur's estate.

At issue in the two defamation cases are statements reporting that Tucker's original lawsuit against Shakur's estate and record companies alleges that Shakur's lyrics ruined her sex life. The original lawsuit did seek compensation for "loss of consortium" - a phrase that sometimes means loss of sex, but not always. According to Tucker, it meant something else in her case. And in her defamation lawsuits, she asserts that her reputation has been injured as a result of news coverage reporting she had sued Shakur's estate for injuries to her sex life.

One of Tucker's defamation cases was filed against The Philadelphia Daily News and other news organizations in Pennsylvania state court. Her other defamation case was filed against Newsweek and Time, and against Richard Fischbein, the lawyer for Shakur's estate, in federal court in Pennsylvania. So far, she's gotten mixed results.

In her state court action, the trial court dismissed her complaint; but that ruling was reversed on appeal (ELR 22:7:10), so (unless it has since been settled) it is pending once more.

The trial court also dismissed her federal court action; but that ruling has been affirmed with respect to her claims against Newsweek and Time. On the other hand, the federal appeals court did reverse the dismissal of her claims against Fischbein.

In an opinion by Judge Samuel Alito, the Third Circuit Court of Appeals held that the trial court had erred in concluding that the statements published by Newsweek and Time were not capable of defamatory meaning. Those statements did have "the tendency to lower the Tuckers in the estimation of the community and to deter third persons from associating with them," Judge Alito held.

On the other hand, the judge ruled, there was no "clear and convincing" showing that Newsweek or Time published their offending articles with actual malice. Newsweek had interviewed Tucker's lawyer before publishing its article; and when later asked what he told the magazine's reporter, the lawyer was unable to say that he had specifically told the reporter that Tucker's suit against Shakur's estate "does not involve sex." Similarly, Time's article was based on earlier articles published elsewhere, and there was no evidence that Time knew that Tucker's case against Shakur's estate did not involve sex. Thus, Judge Alito affirmed the dismissal of Tucker's case against the two magazines.

Tucker did better on appeal with her claim against Fischbein. Tucker sued him first in an amended complaint in the case against Shakur's estate, because of remarks he had made to the press in response to the original complaint in that case. Tucker's amended complaint specifically alleged that she was not seeking damages for loss of her sex life. Yet, when Fischbein was later interviewed by Time - after he had been served with that amended complaint - he again said that Tucker was seeking to recover for the loss of her sex life. Thus, Judge Alito held, a jury could find that Fischbein had been "reckless" in making that statement to Time, because the amended complaint had advised him otherwise.

Neither Tucker nor Fischbein was pleased with Judge Alito's rulings. Tucker sought Supreme Court review of the affirmance of the dismissal of her claims against Newsweek and Time. And Fischbein sought

Supreme Court review of the reversal of the dismissal - in other words, the reinstatement - of her claims against him. The Supreme Court, however, was not interested in hearing either of their appeals. In separate orders issued the same day, the Supreme Court denied both of their petitions for certiorari.

Tucker was represented by Richard C. Angino of Angino & Rovner in Harrisburg. Newsweek was represented by Kevin T. Baine of Williams & Connolly in Washington D.C. Time was represented by Laura E. Krabill of Wolf Block Schorr & Solis-Cohen in Philadelphia and Paul G. Gardephe of the Time, Inc., Legal Department in New York City. Richard Fischbein was represented by Alan J. Davis of Ballard Spahr Andrews & Ingersoll in Philadelphia and Donald N. David of Fischbein Badillo Wagner & Harding in New York City.

Tucker v. Fischbein, 237 F.3d 275, 2001 U.S.App.LEXIS 265 (3rd Cir. 2001), cert. denied, *Tucker v. Fischbein*, 122 S.Ct. 42, 2001 U.S.LEXIS 5520 (2001), and *Fischbein v. Tucker*, 122 S.Ct. 43, 2001 U.S.LEXIS 5521 (2001)[ELR 23:7:17]

MP3.com settles TeeVee Toons' copyright infringement suit, after court rules that new trial was required by math error that resulted in verdict against MP3.com for $300,000 instead of $3 million

Mistakes happen sometimes, and one did at the very end of TeeVee Toons' copyright infringement trial against MP3.com. The jury returned a $300,000 verdict in favor of TeeVee Toons. While that is a lot of money, it was just a fraction of the millions of dollars TeeVee

Toons had sought. And perhaps for that reason, the jury's verdict was especially newsworthy.

When, however, two of the jurors saw the news of their own verdict, they immediately telephoned Judge Jed Rakoff to say that the news reports were wrong, because the jury actually intended to award TeeVee Toons almost $3 million.

A subsequent hearing revealed the reason for the mistake. The jurors had first decided how much to award in total, and then they had broken that amount down into specific amounts for each of 145 separate infringements. Though the calculations were done by one of the jurors on her Palm Pilot, they weren't done correctly. And the verdict form had not required the jury to add up the total of their individual awards. That was done (apparently by the lawyers or a court official) only after the jurors were polled and excused.

Though all of the jurors later agreed they intended to award almost $3 million, only one could remember the exact amount they had agreed to. Judge Rakoff "regret[fully]" concluded that the specific recollection of only one juror was "an insufficient basis on which to correct the verdict." As a result, he ordered a new trial.

Before a new trial could be held, however, MP3.com and TeeVee Toons settled the case, on terms that have not been publicly revealed.

Before the case ever got to trial, it did make some interesting law on three issues.

First, TeeVee Toons' case raised essentially the same issues as the earlier (and eventually settled) UMG lawsuit against MP3.com (ELR 21:12:4, 22:4:4, 22:6:5), in which Judge Rakoff had held that MP3.com had infringed UMG's copyrights "willfully." For that reason, Judge Rakoff ruled that by virtue of the doctrine of collateral estoppel, MP3.com's infringements of TeeVee Toons' copyrights were "willful" as well, and MP3.com was estopped from arguing otherwise. The judge rejected MP3.com's efforts to distinguish TeeVee Toons' case from UMG's on this issue.

Second, Judge Rakoff also held that the music publishers who own the copyrights to the songs recorded on TeeVee Toons' recordings could recover statutory damages of their own, in addition to whatever statutory damages TeeVee Toons itself might recover. This was so, the judge ruled, even though the Copyright Act provides that for purposes of calculating statutory damages, all parts of a compilation constitute just one work.

Finally, the judge rejected MP3.com's argument that TeeVee Toons' case should be dismissed, because it had registered its recordings for copyright as "works made for hire" when in fact (according to MP3.com) they were not. The judge noted that all of the TeeVee Toons contracts he had seen also contained (in addition to work made for hire clauses) backup clauses by which the copyrights to recordings were "assigned" to the company. "Someone who in fact lawfully owns a copyright but in seeking registration inaccurately denominates the basis for ownership (as here, allegedly, by checking the 'work made for hire' box on the application form) does not thereby become subject to having the registration invalidated by an infringing party unless, at a minimum, the infringing party can show that the inaccuracy was both material and made in bad faith."

TeeVee Toons was represented by Michael Elkin and Sharon P. Carlstedt of Thelen Reid & Priest in New York City. MP3.com was represented by Jeffrey A.

Conciatori and Michael Carlinsky of Orrick Herrington & Sutcliffe in New York City.

TeeVee Toons, Inc. v. MP3.com, Inc., 134 F.Supp.2d 546, 2001 U.S.Dist.LEXIS 3212 (S.D.N.Y. 2001); *TeeVee Toons, Inc. v. MP3.com, Inc.*, 148 F.Supp.2d 276, 2001 U.S.Dist.LEXIS 8119 (S.D.N.Y. 2001)

Appellate court affirms $90,000 Anticybersquatting Act judgment in favor of creator of "Joe Cartoon" animations against owner of domain names confusingly similar to www.joecartoon.com

In a case of "first impression," the Third Circuit Court of Appeals has held that the Anticybersquatting Consumer Protection Act prohibits the registration of domain names that are intentional misspellings of distinctive or famous names.

As a result, the appellate court has affirmed a $90,000 judgment awarded to Joe Shields, the creator of the popular animations "Frog Blender," "Micro-Gerbil" and "Live or Let Dive." The award was entered by District Judge Stewart Dalzell in response to Shields' motion for summary judgment, in a lawsuit against John Zuccarini, a domain name "wholesaler" who has registered thousands of domain names that are confusingly similar to famous trademarks and celebrity names.

Among the thousands of domains Zuccarini has registered, five were intentional misspellings of Shields' domain name, www.joecartoon.com. (Earlier in the case, Judge Dalzell issued a preliminary injunction against Zuccarini. (ELR 22:4:13))

The Anticybersquatting Act prohibits the use of domain names that are identical or "confusingly similar" to distinctive or famous marks. In an opinion by Judge Ruggero Aldisert, the appellate court concluded that Zuccarini's registration of such domain names as "joescartoon.com" and "joecarton.com" violated the Act, because "A reasonable interpretation of conduct covered by the phrase 'confusingly similar' is the intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight spelling or typing error to reach an unintended site."

The appellate court also affirmed Judge Dalzell's decision to award Shields $10,000 in statutory damages for each of Zuccarini's five infringing domain names, plus an additional $39,109 in attorneys' fees and costs.

Shields was represented by Michael P. Coughlin and William J. Levant of Kaplin Stewart Meloff Reiter

& Stein in Blue Bell, Pennsylvania. Zuccarini was represented by Howard M. Neu in Pines, Florida.

Shields v. Zuccarini, 254 F.3d 476, 2001 U.S.App.LEXIS 13288 (3rd Cir. 2001)[ELR 23:7:19]

Radio talk show host may have defamed children's TV show host Sally Starr by calling her "the lesbian cowgirl"

Sally Starr was the host of a children's television program in Philadelphia, from 1950 to 1972. Sixteen years later, she became the subject of a brief exchange on a call-in radio show broadcast by a New Jersey station.

One afternoon during the summer of 1998, the radio station's listeners were asked to name their favorite children's show, and one listener said it had been the "Sally Starr Show." The radio program's co-host Jeff Diminski responded by twice calling Starr "the lesbian cowgirl."

Sally Starr is now the plaintiff in a defamation lawsuit in New Jersey state court against Diminski and the owner of the radio station that employs him. At first, her case didn't get very far, because a trial court judge granted summary judgment in favor of Diminski and his station, and dismissed the case. On appeal, however, Starr got her lawsuit reinstated.

Writing for the Appellate Division of the New Jersey Superior Court, Judge Isaiah Steinberg ruled that Diminski's statement could have a defamatory meaning, and that a jury could find that Diminski had acted with reckless disregard for the truth when he called Starr a lesbian.

Judge Steinberg explained that "Although society has come a long way in recognizing a person's right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor." Moreover, when Diminski explained, in his deposition, why he thought Starr was a lesbian, "his sources were of dubious veracity" and his recollections were "so vague that a jury could find that they were contrived after the fact."

For these reasons, Judge Steinberg reversed the dismissal of Starr's lawsuit and remanded it to the trial court for further proceedings.

Starr was represented by B. Adam Sagan of Sagan & Greenberg. Diminski and his station were represented by Richard M. Eittreim of McCarter & English in Newark.

Gray v. Press Communications, Inc., 775 A.2d 678, 2001 N.J.Super.A.D.LEXIS 280 (N.J.Super.A.D. 2001)[ELR 23:7:20]

Models are awarded $12,000 in actual damages and $80,000 in punitives each, as a result of continued use of their photographs on marketing materials and packaging after expiration of one-year period specified in "Model Vouchers" despite signing "Consent and Release" forms authorizing use of their photos "forever hereafter"

Wyeth-Ayerst Laboratories paid models Alina Hernandez and Susee Kilbanks $1,100 each back in 1993, when their photographs were taken for use in marketing materials and packaging for the company's vitamins. Now Wyeth-Ayerst will have to pay

Hernandez and Kilbanks an additional $92,000 each, because the company continued to use their photos for more than three and a half years after the expiration of the one-year period specified in their "Model Vouchers," and for at least four months after it received a letter from the models' lawyer demanding that use of their photos be stopped.

A "Model Voucher" is a contract, and it looks as though Wyeth-Ayerst would not have had any defense to the models' claims, if their Model Vouchers were the only documents involved in the case. For some reason, however, the Model Vouchers were not the only documents. On the day their photographs were taken, Hernandez and Kilbanks also signed "Consent and Release" forms that authorized the use of their photos "forever hereafter."

Thus, when Hernandez and Kilbanks sued Wyeth-Ayerst in New York state court for violating their rights under sections 50 and 51 of the New York Civil Rights Law (New York's right of publicity statute), the company argued that its continued use of their photos was authorized by their Consent and Release forms. Judge Martin Schoenfeld disagreed.

Judge Schoenfeld reasoned that since the Model Vouchers and Consent and Release forms were signed within days of one another, they had to be read together as though they were one agreement. So read, the one-year use limitation prevailed over the "forever hereafter" authorization, for four reasons.

First, the one-year limitation was handwritten while the "forever hereafter" language was typewritten or word-processed; and handwritten clauses prevail. Second, the one-year term is more specific than "forever hereafter"; and specific provisions prevail over general provisions. Third, the Model Vouchers stated that they "take precedence" over releases signed at the time photos are taken. And fourth, Hernandez had specifically written on her Consent and Release that it was subject to the "Terms of [her] Model's Voucher." (Though Kilbanks had not, there was no evidence the two models were to be treated differently, the judge observed.)

Judge Schoenfeld found that the jury's $12,000 compensatory damage award to each model was consistent with expert testimony offered at trial. And he found that the jury had properly awarded punitive damages, since "exemplary damages" are specifically authorized by section 51 of the Civil Rights Law in cases where the defendant "knowingly used . . . [the plaintiff's] picture . . . in such manner as is forbidden. . . ."

However, the jury had awarded $100,000 in punitive damages to each model. And Judge Schoenfeld concluded that under the circumstances,

"$80,000, which is between six and seven times the compensatory awards in this case, is the highest reasonable award the jury could have granted." As a result, the judge granted Wyeth-Ayerst's post-trial motion for a new trial on the issue of punitive damages, unless Hernandez and Kilbanks agreed to accept $80,000 each in punitives.

Hernandez and Kilbanks were represented by Edward Greenberg of Greenberg & Reicher. Wyeth-Ayerst was represented by Steven E. Garry of Costello Shea & J.S.C. Gaffney.

Hernandez v. Wyeth-Ayerst Laboratories, 727 N.Y.S.2d 591, 2001 N.Y.Misc.LEXIS 162 (Sup. 2001)[ELR 23:7:20]

After defeating copyright infringement claim by Don Post Studios involving "Michael Myers" mast, Cinema Secrets is entitled to damages, not capped by injunction bond, for wrongful injunction, and attorneys' fees

Cinema Secrets ultimately was the successful party in a copyright case in which Don Post Studios accused it of infringing Post's copyright to a "Michael Myers" mask from John Carpenter's 1978 movie "Halloween" (ELR 22:12:11). Earlier in the case, however, the court issued a preliminary injunction against Cinema Secrets, because the facts then looked different to the judge than they did after trial. Post of course was required to post a bond at the time the injunction was issued. And that raised an interesting post-trial question.

Cinema Secrets was injured by the preliminary injunction, and Post may have been unjustly enriched by it, because while the injunction was in effect, Cinema Secrets couldn't sell "Michael Myers" masks while Post could. Now that Cinema Secrets has won the case, it wants damages for its injuries; and the amount that it wants apparently exceeds the amount of the bond Post had posted.

The question thus put to federal Judge Eduardo Robreno was whether the damages Cinema Secrets can now be awarded is capped by the amount of Post's bond, or whether Cinema Secrets can be awarded more. The judge has decided the answer is "more."

"In this case," Judge Robreno explained, Post "filed a frivolous, objectively unreasonable lawsuit and sought an injunction on the basis of a copyright that [Post] knew to be invalid in order to win a marketplace advantage over [its] competitor. Accordingly, the court finds that [Post] acted in bad faith, and . . . will not be permitted to cap its damages to the extent of the posted bond."

The exact amount of Cinema Secrets' damages was left for a later hearing. But the judge said that in determining the amount of those damages, "the court will also consider evidence that [Post has] been unjustly enriched as a result of [Cinema Secrets] being enjoined from selling its mask in competition with [Post's] mask."

Judge Robreno also ruled that, as the successful party in the case, Cinema Secrets is entitled to recover its attorneys' fees.

Post was represented by Steven L. Friedman of Dilworth Paxson in Philadelphia. Cinema Secrets was represented by Karol A. Kepchar of Panitch Schwarze Jacobs & Nadel in Philadelphia.

Don Post Studios, Inc. v. Cinema Secrets, Inc., 148 F.Supp.2d 572, 2001 U.S.Dist.LEXIS 8193 (E.D.Pa. 2001)[ELR 23:7:21]

Federal District Court dismisses copyright infringement case complaining of plans for allegedly unauthorized telecasts of Pakistani programming in the United States, because case was really a contract dispute between non-U.S. companies

On its face, the claim alleged by Scandinavian Satellite System against Prime TV Ltd. looked just like the copyright infringement claim Scandinavian Satellite said it was. At issue was Prime's plan to televise, in the United States, Pakistani programming to which Scandinavian claims the U.S. (and other non-Pakistani) rights.

Beneath the surface, however, the case was more complicated. Prime used to be a wholly owned subsidiary of Scandinavian Satellite. As a result of an agreement between Scandinavian and a Pakistani company known as Sports Star International, Sports Star acquired control over Prime. However, Scandinavian alleged that its agreement with Sports Star should be declared null and void, because Scandinavian signed the agreement under duress.

In response to Prime's motion to dismiss, federal District Judge Ellen Huvelle has held that she does not have subject matter jurisdiction to hear the case, because it is a contract rather than a copyright case.

Judge Huvelle explained that if the agreement were declared null and void, there would no longer be a dispute of any kind, because Scandinavian would once again be in control of Prime, and could stop it from broadcasting in the U.S., if that's what Scandinavian wanted to do. (Scandinavian filed its lawsuit before any programming actually was broadcast in the U.S.; and once the suit was filed, broadcasts of the programming were "indefinitely postponed.")

Alternatively, if the agreement were not declared null and void, Scandinavian would not be the owner of television rights to the programming, because in addition to giving Sports Star control over Prime, that agreement also transferred those rights to Prime.

As a result, Judge Huvelle concluded that the entire case turns on whether Scandinavian's agreement with Sports International is valid or void - an issue that is purely one of contract, not copyright, law. Since that contract was entered into between Norwegian and Pakistani companies, and contained a forum selection clause requiring disputes to be arbitrated in Pakistan, Judge Huvelle's court had no jurisdiction to hear the case; and she dismissed it.

Scandinavian Satellite was represented by Gary Clifford Tepper of Arent Fox Kintner Plotkin & Kahn in Washington D.C. Prime TV was represented by Michael J.E. Dixon of Dilworth Paxson in Washington D.C.

Scandinavian Satellite System v. Prime TV Ltd., 146 F.Supp.2d 6, 2001 U.S.Dist.LEXIS 6669 (D.C.Cir. 2001)[ELR 23:7:21]

Ambiguous language of photographer's assignment to National Geographic requires trial

Freelance photographer Shawn Henry has won the right to a trial in his breach of contract lawsuit against National Geographic.

Henry's lawsuit was triggered by National Geographic's reuse of 43 of his photos in its Trip Planner interactive software. National Geographic originally used those photos in its Driving Guides book series, pursuant to a written contract by which Henry "transferred" the copyrights to his photos to National Geographic and authorized it to use the photos in "digital" versions of those books. Despite this language, the contract also provided that "No secondary or other usage of the photographs unrelated to the [book series] is granted to National Geographic. . . ."

This clause made the contract ambiguous, federal Judge Joseph Tauro has ruled, because if National Geographic acquired the copyrights to the photos, it should have been able to use them for anything. Moreover, there was a dispute about whether the Trip Planner and the Driving Guides are related to one another. For these reasons, the judge denied National Geographic's motion for summary judgment.

Henry was represented by Jonathan M. Feigenbaum of Phillips & Angley in Boston; National Geographic was represented by Michael R. Reienmann of Cesari & McKenna in Boston.

Henry v. National Geographic Society, 147 F.Supp.2d 16, 2001 U.S.Dist.LEXIS 8382 (D.Mass. 2001)[ELR 23:7:22]

Oral agreement by owner of minor league baseball team to give team's general manager percentage of profit from team's sale was enforceable

William Davidson once was employed as general manager of the Chattanooga Lookouts, a minor league baseball team, pursuant to an oral agreement with the Lookouts' owner, Richard Holtzman.

At the time Davidson agreed to manage the Lookouts in 1989, Holtzman orally promised to pay Davidson 5% of any profit Holtzman might make from his eventual sale of the team. That at least is what Davidson claimed in a breach of contract lawsuit he filed against Holtzman in Tennessee state court, after Holtzman sold the team six years later in 1995 for $3.75 million. Holtzman denied the existence of any such promise. But a jury found in favor of Davidson, and awarded him $116,423.80.

Holtzman appealed, arguing that the alleged oral agreement was unenforceable under the Tennessee Statute of Frauds, and in any event, the agreement was too indefinite to be enforced.

Tennessee does indeed have a statute of frauds which provides that "any agreement . . . not to be performed within . . . one (1) year" is not enforceable, "unless the . . . agreement . . . shall be in writing. . . ." Since the Lookouts were not sold until six years after the alleged promise was made, Holtzman no doubt expected to prevail on appeal. But he didn't.

In an opinion by Judge Charles Susano, the Tennessee Court of Appeals held that even though Davidson and Holtzman "may not have contemplated a sale of the franchise within one year . . . we cannot say 'that in no reasonable probability can such agreement be performed within the year.'" Indeed, Holtzman had admitted that "the franchise could have been sold within the year." As a result, the oral agreement did "not run afoul of the Statute of Frauds."

Judge Susano also rejected Holtzman's argument that the agreement was too indefinite to be enforced. There was evidence to support a finding that Holtzman had agreed to pay Davidson "five percent of the difference between the purchase price and the sales price of the Chattanooga franchise," the judge found. And that agreement was "sufficiently definite to be enforceable," he held.

Davidson was represented by William H. Horton in Chattanooga. Holtzman was represented by Michael E. Richardson in Chattanooga.

Davidson v. Holtzman, 47 S.W.3d 445, 2000 Tenn.App.LEXIS 733 (Tenn.App. 2000), application for permission to appeal denied by Tenn.Sup.Ct. (2001)[ELR 23:7:22]

Public radio and TV stations not required to bid for licenses in commercial spectrum

NPR, the Corporation for Public Broadcasting and other noncommercial educational broadcasters have won their claim that public radio and TV stations are not required to participate in competitive bidding when they seek broadcast licenses - not even when they seek licenses for the part of the broadcast spectrum usually used by commercial broadcasters.

Public broadcasters have never had to bid for licenses to use the part of the spectrum reserved for noncommercial broadcasting. But in response to a 1997 statute that requires competitive bidding by commercial broadcasters, the FCC adopted a rule requiring public stations to bid as well, if they sought licenses to broadcast on a frequency in the commercial spectrum.

In an opinion by Judge David Tatel, the D.C. Circuit Court of Appeals has held that the FCC should not have done so, because the 1997 statute plainly exempts noncommercial educational broadcasters from the bidding requirement.

The public broadcasters were represented by Patrick F. Philbin; and the FCC was represented by C. Grey Pash Jr.

National Public Radio, Inc. v. Federal Communications Commission, 254 F.3d 226, 2001 U.S.App.LEXIS 14811 (D.C.Cir. 2001) [ELR 23:7:23]

Court upholds FCC rule banning restrictions on use of satellite receiver antennas

An FCC rule that prohibits landlords from restricting their tenants' use of direct-to-home satellite receiver antennas has been upheld by the D.C. Circuit Court of Appeals. The rule was adopted by the FCC in 1998, and is an extension of an earlier FCC ban on restrictions (by state and local governments, and homeowners associations) on the use of satellite TV antennas by property owners.

The 1998 rule was challenged by trade associations representing real estate owners and property managers, on three grounds. They claimed that the FCC did not have authority to adopt the rule, that the rule violates the Takings Clause of the Constitution, and that the FCC acted arbitrarily and capriciously in adopting the rule.

In an opinion by Judge Judith Rogers, the appellate court rejected all of these arguments.

The trade associations that challenged the rule were represented by Matthew C. Ames; the FCC was represented by Gregory M. Christopher; and DirectTV and other satellite TV companies were represented by Richard P. Bress.

Building Owners and Managers Association International v. Federal Communications Commission, 254 F.3d 89, 2001 U.S.App.LEXIS 15105 (D.C.Cir. 2001)[ELR 23:7:23]

Waiver signed by injured pit crew member was valid, so Arkansas Supreme Court affirms dismissal of his negligence suit against racetrack owners

Robert Plant suffered very serious injuries while working as a member of the pit crew for a driver racing at the Northwest Arkansas Speedway. According to Plant, his injuries were caused by the negligent failure of the Speedway's owners to provide and maintain adequate safety barriers. But whether that is so will never be known for sure, because the Arkansas Supreme Court has affirmed the dismissal of Plant's negligence suit.

Before Plant was permitted to enter the pit area, he was required to sign a "Release and Waiver of Liability" form. The form was prepared by North American Racing Insurance, Inc., and "is commonly used at racetracks across the country." Indeed, Plant had signed that exact form at least a dozen times before.

Nevertheless, Plant argued that the release violated the public policy of Arkansas and thus was void. Both the trial court and a majority of the Supreme Court disagreed, however. In a decision by Justice Donald Corbin, the Supreme Court held that under the circumstances that surrounded Plant's signing the release, it was valid.

This case is not the first in which the North American Racing Insurance release form has been at issue. Back in 1989, the federal Eighth Circuit Court of Appeals upheld the form's validity (ELR 11:8:18); and similar racetrack releases have been upheld in other cases too (ELR 7:6:19). Justice Plant noted these earlier rulings in deciding that the form was valid in Arkansas.

Justice Tom Glaze dissented, however. Among other things, Justice Glaze observed that the Eighth

Circuit case involved Missouri - not Arkansas - law. And in his view, Arkansas's public policy is different from Missouri's.

Plant was represented by Timothy L. Brooks of Mashburn & Taylor in Fayetteville. The Speedway's owners were represented by James M. Duckett of Kemp Duckett Spradley Curry & Arnold in Little Rock.

Plant v. Wilbur, 47 S.W.3d 889, 2001 Ark.LEXIS 434 (Ark. 2001)[ELR 23:7:23]

Injured pro hockey player entitled to workers comp even though he didn't wear facemask

Pro hockey player Wade Gibson is entitled to receive workers compensation benefits, on account of injuries he suffered while playing for the Lake Charles

Ice Pirates in 1998, even though Gibson was not wearing a facemask at the time of his injury.

Louisiana law denies workers comp benefits to an employee who is injured by the "deliberate failure to use an adequate guard or protection against accident provided for him." The Louisiana Court of Appeal has held that this provision did not disqualify Gibson for benefits.

Writing for the court, Judge Jimmie Peters ruled that the Ice Pirates had not proved that a facemask "was actually 'provided' to Gibson. . . ." Rather, to get a facemask, Gibson would have had to ask for one, and then the Ice Pirates would have had to get one because none was on hand for players who might request them. Moreover, the judge explained, the evidence showed that "Gibson's failure to use the face shield was due to the fact that it was an impediment to his job performance."

Gibson was represented by Robert L. Hackett in New Orleans; the Ice Pirates were represented by Edward F. Stauss III of Keogh Cox & Wilson in Baton Rouge.

Gibson v. Lake Charles Ice Pirates, 788 So.2d 720, 2001 La.App.LEXIS 1429 (La.App. 2001)[ELR 23:7:24]

Pay-per-view companies are awarded damages in suits against bar and club that showed Holyfield/Tyson and De LaHoya/Trinidad boxing matches without being licensed to do so

Kingvision Pay-Per-View and Joe Hand Promotions have won separate but similar lawsuits against a bar and a club that showed boxing matches to their customers, without being licensed to do so.

Kingvision won its case against the owner and manager of a bar in Wisconsin that exhibited the 1997 fight between Evander Holyfield and Mike Tyson. Federal Judge Lynn Adelman has awarded Kingvision $18,375 in statutory damages under section 553 of the Communications Act, plus an additional $200 in attorneys' fees.

Separately, Joe Hand Promotions has been awarded a default judgment of $17,785 against the Men's Club in Massachusetts and its owner Michael J. Salinetti, on account of their unlicensed showing of the pay-per-view telecast of the 1999 fight between Oscar De LaHoya and Felix Trinidad. The judgment was recommended by federal Magistrate Judge Kenneth Neiman, and was adopted by Judge Michael Ponsor. The total - while considerably less than the $110,000 plus fees and costs requested by Joe Hand Promotions - did include a $2,500 "add on," because the Men's Club's unlicensed showing was "committed willfully." The judgment also included a $10,000 statutory award for the Club's decryption of the satellite signal of the fight, as well as a $3,200 statutory award - which was five times what the license fee would have been - for its interception and divulgence of the telecast. Attorneys' fees of $1,500 and costs of $585 were awarded as well.

Kingvision was represented by John C. Scheller in Madison; the defendants in that case represented themselves pro se. Joe Hand Promotions was represented by Wayne D. Lonstein in Ellenville, New York; the defendants in that case defaulted and made no appearance in the case.

Kingvision Pay-Per-View Ltd. v. Scott E's Pub Inc., 146 F.Supp.2d 955, 2001 U.S.Dist.LEXIS 8295 (E.D.Wis.

2001); *Joe Hand Promotions, Inc. v. Salinetti*, 148 F.Supp.2d 119, 2001 U.S.Dist.LEXIS 9888, 10150 (D.Mass. 2001)[ELR 23:7:24]

Previously Reported:

United States Supreme Court denies requests to review entertainment decisions. The United States Supreme Court opened its 2001 term by denying petitions for certiorari in: Steppenwolf Productions, Inc. v. Kassbaum, 122 S.Ct. 41, 2001 U.S.LEXIS 5508 (2001), in which the Ninth Circuit Court of Appeals held that Steppenwolf's original bass player Nick St. Nicholas is not barred by contract or the Lanham Act from truthfully referring to himself as "formerly of Steppenwolf" in promotional materials for new band (ELR 23:1:13); Brown v. McCormick, 122 S.Ct. 41, 2001 U.S.LEXIS 5514 (2001), in which the Fourth Circuit Court of Appeals affirmed, without a published opinion, a $14,053 judgment in favor of a quilt designer in a copyright infringement case against those involved in producing and merchandising the movie "How to Make an American Quilt" (ELR 22:3:7); Louisiana Philharmonic Orchestra v. Immigration and Naturalization Service, 122 S.Ct. 51, 2001 U.S.LEXIS 5570 (2001), in which the Fifth Circuit Court of Appeals affirmed, without a published opinion, a District Court ruling that the Immigration and Naturalization Service had abused its discretion by not explaining why it denied the Louisiana Philharmonic Orchestra's application for an H-1B visa for an alien violinist, where the INS had previously granted H-1B visas to three other musicians employed by the Orchestra (ELR 21:6:27); Khreativity Unlimited, Inc. v. Mattel, Inc., 122 S.Ct. 57, 2001 U.S.LEXIS 5607

(2001), in which the Second Circuit Court of Appeals affirmed, without a published decision, a District Court ruling dismissing an idea submission lawsuit against Mattel filed by a company that had suggested a cross-marketing venture with the National Basketball Association, because the idea was not sufficiently novel to establish that Mattel had been unjustly enriched when it later became an NBA toy licensee (ELR 22:6:15); Slaney v. International Amateur Athletic Foundation, 122 S.Ct. 69, 2001 U.S.LEXIS 5684 (2001), in which the Seventh Circuit Court of Appeals upheld the suspension of runner Mary Decker Slaney for "blood doping" because some of her legal theories were barred by treaty, others were preempted by the Amateur Sports Act, and another failed to state a claim (ELR 23:4:13); and National Geographic Society v. Greenberg, 122 S.Ct. 347, 2001 U.S.LEXIS 9493 (2001), in which the Eleventh Circuit Court of Appeals held that National Geographic could not republish on CD-ROMs, without a negotiated license, freelance photos originally licensed for print publication (ELR 23:3:9). The Supreme Court also dismissed America Online, Inc. v. AT&T, 122 S.Ct. 388, 2001 U.S.LEXIS 9764 (2001), with the agreement and at the request of the parties; in that case, the Fourth Circuit Court of Appeals held that "You Have Mail" and "IM" are generic phrases, but AOL's trademark registration certificate for "Buddy List" created disputed issue of fact requiring a trial of AOL's infringement claim against AT&T (ELR 23:4:15).

Decisions in Dustin Hoffman and Rosetta Books cases are published. Decisions have been published in Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 2001 U.S.App.LEXIS 15085 (9th Cir. 2001), in which the Ninth Circuit Court of Appeals

reversed Dustin Hoffman's $3 million right of publicity judgment against Los Angeles Magazine on the grounds that an altered "Tootsie" photo was part of an article that was protected by the First Amendment (ELR 23:4:10); and Random House, Inc. v. Rosetta Books LLC, 150 F.Supp.2d 613, 2001 U.S.Dist.LEXIS 9456 (S.D.N.Y. 2001), in which Random House's motion for preliminary injunction that would have barred Rosetta Books from publishing digital editions of books by William Styron, Kurt Vonnegut and Robert B. Parker was denied (ELR 23:4:10).
[ELR 23:7:25]

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