IN THE NEWS

"Carry one, carry all" provision of Satellite Home Viewer Improvement Act is constitutional, so satellite TV companies must now deliver local stations as well as network affiliates

DirectTV subscribers in Los Angeles received a very nice Christmas present last month. They now get the signals of all of the stations in their area, over their satellite TV receivers - not simply the network signals they used to receive. DirectTV and EchoStar subscribers throughout the country should have received this same gift as well, as of January 1st.

Ultimately, the signals of local TV stations are delivered by satellite TV companies like DirecTV and EchoStar; and DirecTV's recent letter to subscribers implies this gift is from the company itself. In reality though, the gift came from Congress, in the form of one provision of the Satellite Home Viewer Improvement Act of 1999. Before the gift was delivered, however, it had to pass Constitutional muster, and it did.

The Satellite Home Viewer Improvement Act of 1999 gave satellite television companies a statutory copyright license that authorizes them to retransmit the signals of local television stations (in addition to the distant signals they were permitted to retransmit under a 1988 act) (ELR 21:8:8). As a result, satellite TV companies do not have to negotiate copyright licenses with the owners of the copyrights to each of the locally broadcast programs the satellite companies retransmit.

On the other hand, if a satellite TV company takes advantage of this statutory license by retransmitting the signal of any local station in a geographic area, the 1999 Act requires satellite TV companies to retransmit the signals of all local stations in that same area that ask to have their signals retransmitted. This requirement is known as the "carry one, carry all" provision.

Although satellite TV companies were delighted with the statutory license provision of the Satellite Home Viewer Improvement Act, they were not as pleased with its "carry one, carry all" requirement. Indeed, in a lawsuit filed in federal court in Virginia, satellite TV companies and their trade association alleged that the "carry one, carry all" provision of the Act is unconstitutional on three grounds: because it violates their First Amendment free speech rights; because it deprives them of their property without due process or just compensation in violation of the Fifth Amendment; and because Congress did not have the power to make retransmission of local broadcasts a condition of a statutory copyright license.

Federal District Judge Gerald Lee found these arguments to be "substantial" but "not well taken." And in an opinion by Judge Blane Michael, the Fourth Circuit Court of Appeals has affirmed. Judge Michael has rejected each of the satellite TV companies' constitutional attacks on the "carry one, carry all" provision. The appellate court has held that the provision does not violate the First or the Fifth Amendment; and that Congress does have the power to require retransmission of the broadcasts of all local stations that request it if they taking advantage of the statutory license authorizing the retransmission of those local stations the satellite TV companies want to retransmit.

While this much of the appellate court's opinion pleases TV broadcasters - especially local stations - broadcasters did not get everything they wanted. In a separate proceeding initiated by broadcasters, they objected to an FCC rule that permits satellite broadcasters to sell broadcast signals to subscribers on a station by station basis. The rule, known as the "a la carte" rule, was challenged by local broadcasters as being contrary to the Act and "arbitrary and capricious," because local broadcasters would like satellite companies to sell all broadcast signals as a single package.

That proceeding was consolidated before the Fourth Circuit with the satellite companies' appeal from Judge Lee's ruling. And the Court of Appeal disappointed local broadcasters by ruling that the "a la carte" rule is consistent with the Act and is not arbitrary or capricious.

This means that the "carry one, carry all" requirement went into effect January 1, 2002, as originally scheduled by the Satellite Home Viewer Improvement Act itself, as did the "a la carte" rule.

The satellite TV companies were represented by Charles Justin Cooper of Cooper Carvin & Rosenthal in Washington D.C. The FCC was represented by Mark Bernard Stern of the Department of Justice in Washington D.C., and by Louis Emmanuel Peraertz of the F.C.C. in Washington D.C. The NAB was represented by Donald Beaton Verilli Jr. of Jenner & Block in Washington, D.C.

Satellite Broadcasting & Communications Association v. Federal Communications Commission, Case No. 01-1151 (4th Cir., Dec. 7, 2001), available at http://pacer.ca4.uscourts.gov/opinion.pdf/011151.P.pdf, aff'g, 146 F.Supp.2d 803, 2001 U.S.Dist.LEXIS 9636 (E.D.Va. 2001)[ELR 23:8:4]

Arbitrator concludes that Universal Music Group breached joint venture agreement with RA Hop by terminating Salt-N-Pepa's recording agreement without RA Hop's consent; RA Hop is awarded $1 million in damages

An arbitrator has ordered Universal Music Group to pay RA Hop $1 million in damages as a result of UMG's termination of a recording agreement with Salt-N-Pepa.

Salt-N-Pepa had a four-album contract with a joint venture between UMG and RA Hop. That contract required the joint venture to pay Salt-N-Pepa a $1 million advance on delivery of its second album, a $1.5 million advance on delivery of its third album, and another $1.5 million advance on delivery of its fourth album. Moreover, by virtue of a "pay or play" provision in that agreement, the joint venture was required to pay

Salt-N-Pepa these advances even if it decided to terminate the agreement before those albums were delivered, unless the joint venture terminated Salt-N-Pepa's contract for good cause.

Salt-N-Pepa's first album for the joint venture was not a success, and UMG decided to terminate the recording agreement. Salt-N-Pepa demanded the $4 million in advances due for the remaining three albums. Eventually, UMG settled for $3 million.

By virtue of the terms of the joint venture between UMG and RA Hop, half of all artist advances were to be paid by RA Hop; and it posted a letter of credit as security for its obligation to make those payments.

UMG settled with Salt-N-Pepa without consulting with RA Hop and certainly without its consent, the arbitrator, retired federal Judge John Davies, found. The joint venture agreement between

UMG and RA Hop provided that neither would amend it without the consent of the other. And since the primary if not exclusive purpose of the joint venture was to produce and distribute Salt-N-Pepa recordings, the arbitrator found that UMG's termination of Salt-N-Pepa's recording agreement also amounted to a unilateral modification - indeed a termination - of the joint venture agreement.

Perhaps for that reason, RA Hop did not pay its half of the settlement; so UMG called on the letter of credit, effectively extracting $1.5 million from RA Hop. The arbitrator awarded RA Hop just $1 million, rather than the $1.5 million he might have, because UMG and RA Hop stipulated that RA Hop's damages would be limited to $1 million, if the arbitrator ruled in its favor.

UMG argued that it had exercised sound business judgment in settling Salt-N-Pepa's $4 million demand for $3 million, and that in any event, RA Hop didn't suffer any damages from UMG's failure to get RA Hop's consent, because if Salt-N-Pepa's demand had not been settled, RA Hop would have owed $2 million.

The arbitrator rejected UMG's argument. He appears to have been influenced by these unusual facts.

RA Hop is the corporate successor to Red Ant Records - a company that was acquired in bankruptcy by the investment firm of Wasserstein & Co. RA Hop was formed by Wasserstein to enter into a joint venture agreement with London Records (not UMG).

London was Salt-N-Pepa's first record company; MCA Records was its second. Shortly after Salt-N-Pepa signed its "pay or play" contract with MCA, Al Teller, the company's chairman, left MCA and went to Red Ant and then to RA Hop. The joint venture between London and RA Hop was formed with the expectation that it could acquire Salt-N-Pepa's contract from MCA; and it did ("pay or play" clause and all), because after Teller left the company, MCA had as little interest in keeping Salt-N-Pepa on its roster as the duo had in staying with MCA.

Shortly after MCA assigned Salt-N-Pepa's contract to the London/RA Hop joint venture, MCA's parent company, Seagram Co., acquired London Records. Thus, MCA - or Universal Music Group as it is now known - stepped into London's shoes in the joint venture, and thus became Salt-N-Pepa's record company again! This is why, the arbitrator concluded, UMG made a unilateral decision to terminate Salt-N-Pepa's contract, without consulting RA Hop. UMG was merely re-implementing a decision it had previously made (as MCA Records), when it decided to assign Salt-N-Pepa's contract to the London-RA Hop joint venture in the first place.

UMG's argument about settling a $4 million claim for $3 million might have been persuasive, but wasn't. RA Hop contended that Salt-N-Pepa was late with its second album, and thus the joint venture could have terminated the contract for cause and not owed Salt-N-Pepa anything. UMG wasn't willing to take that position in its dealings with Salt-N-Pepa, however.

Moreover, the arbitrator said he hadn't been given enough facts to evaluate how good a deal the $3 million settlement actually was. "Universal's remedy," the arbitrator said, "when confronted with RA Hop's serious objections was to negotiate the best settlement it could, pay the funds from its own account, and then commence an action for contribution against RA Hop and Wasserstein. Such an action would have been the vehicle for testing the reasonableness of the settlement," he concluded.

RA Hop was represented by Michael T. Williams and Ann I. Park of Heller Ehrman & McAuliffe in Los Angeles. Universal Music Group was represented by Russell J. Frackman, Jeffery D. Goldman and Nicole L. Harris of Mitchell Silberberg & Knupp in Los Angeles.

RA Hop v. Universal Music Group, Inc., Calif. Superior Court, L.A. County, Case No. BC 235676, Arbitrator's Award (Oct. 18, 2001), available from Mike Williams at mwilliams@hewm.com or (213) 689-7593 [ELR 23:8:5]

INTERNATIONAL DEVELOPMENTS

European Union and United States reportedly reach settlement of WTO Fairness in Music Licensing case

The European Union has announced that it and the United States have agreed on a "temporary solution" of their dispute over the Fairness in Music Licensing Act. According to an EU press release, "the agreement came during a meeting between EU Trade Commissioner Pascal Lamy and . . . US Trade Representative Robert Zoellick."

The dispute is the one in which the World Trade Organization has found that the Fairness in Music Licensing Act violates U.S. copyright and international trade treaty obligations (ELR 22:2:7), and that the violation has cost European songwriters and music publishers $1.1 million a year in public performance royalties (ELR 23:6:4).

The EU release reports that "We have agreed on a process that will result in a US financial contribution to support projects and activities for the benefit of European music creators." The United States remains obliged to bring its copyright legislation into line with its WTO obligations.

The USTR reportedly will propose that the Bush Administration seek authorization and funding from Congress to enable it to contribute to the financing of projects and activities for the benefit of EU music creators. "Once the authorization is granted," the release said, "the EU and the US will be in a position to finalise an arrangement, which will be in place for three years." The USTR has not published the terms of the settlement.

The only publicity concerning the settlement has come from the European Union. The USTR has not yet publicly released details of the settlement.

EU and US agree on temporary solution in music copyright dispute, Press Release (dated Dec. 19, 2001), available at http://europa.eu.int/comm/trade/bilateral/usa/pr20011218.htm [ELR 23:8:6]

RECENT CASES

Manager's attempt to option spec screenplays to movie producers required California talent agent's license, because screenwriters always negotiate for employment to do rewrites and polishes, California Labor Commissioner rules

A former agent with the William Morris Agency should have stayed an agent, rather than become a manager. That's not a value judgment about the quality of the man's skills. It's a ruling by the California Labor Commissioner in a proceeding that resulted from a commissions dispute between the agent-turned-manager and his former management client, screenwriter Victoria Strouse.

The manager, whose company was known as Corner of the Sky Entertainment, attempted to sell two of Strouse's screenplays, without being licensed as a talent agent by the California Department of Labor. Under California law, such a license is needed by all of those who attempt to procure employment for artists. Screenwriters clearly are "artists" under the law. But the manager thought that attempting to sell screenplays was not an attempt to procure employment.

The manager recognized that screenwriters who sell options to their spec screenplays always seek employment to do rewrites and polishes of those screenplays. But he testified that he intended to get Strouse a licensed talent agent for those negotiations, if and when one of her screenplays was optioned.

Eventually - after the manager left the management business - Strouse did option the screenplays the manager had previously shopped. She didn't, however, pay him a commission as was required by their management agreement, so he sued. The lawsuit was stayed while the Labor Commissioner first determined whether the manager needed a license. And the Commissioner has decided that he did.

Hearing officer David Gurley concluded that "the shopping [of] . . . completed screenplays and scripts to producers and studios in the television and motion picture industries, absent compelling evidence that no future services of the artist are contemplated, establishes an attempt to procure employment within the meaning of [Labor Code section] 1700.4(a). . ." and therefore requires a talent agent's license. Since the manager didn't have one, his management agreement with Strouse was void, and he is not entitled to commissions from her.

Because decisions of the Labor Commissioner are not published, the full decision is reproduced below.

Strouse v. Corner of the Sky, Inc., California Labor Commissioner, Case No. TAC 13-00 (2001)

[Full Text]

Victoria Strouse v. Corner of the Sky, Inc.

Labor Commissioner of the State of California

Case No. TAC 13-00

Determination of Controversy

Introduction

The above-captioned petition was filed on May 15, 2000, by Victoria Strouse, (hereinafter "Petitioner" or Strouse), alleging that Corner of the Sky, Inc., dba Corner of the Sky Entertainment, Inc., (hereinafter "Respondent") acted as an unlicensed talent agent in violation of Labor Code §1700.5. The petitioner seeks a determination voiding ab initio the 1996 oral and subsequent written management agreement between the parties.

Respondent filed his answer on June 19, 2000. A hearing was scheduled and commenced in the Los Angeles office of the Labor Commissioner on October 6, 2000. Petitioner was represented by Matthew H. Schwartz of Green & Schwartz, LLP; respondent appeared through his attorney Jay M. Spillane of Fox & Spillane LLP. Due consideration having been given to the testimony, documentary evidence, briefs and arguments presented, the Labor Commissioner adopts the following determination of controversy.

Findings of Fact

1. Respondent, once a literary talent agent for the William Morris Agency, opted for a career change and in 1996 became a literary manager. In October of 1996, the parties entered into an oral contract whereby respondent would manage petitioner's career as a

motion picture screenwriter. According to the respondent, managing petitioner's career included, inter alia, reviewing her work, advising her as to which works were marketable, utilizing his "connections" to obtain a licensed talent agent and "shopping" her screenplays for the ultimate goal of selling petitioner's product.

2. During 1997, respondent focused on selling two completed screenplays, titled "Chick Flick" eventually renamed "Just Like a Woman," and "Mary Jane's Last Dance." In an effort to sell the screenplays, respondent admittedly "sent the transcript ['Chick Flick'] to everyone [he] knew." Included in those submissions were various producers from Disney, Touchstone Pictures, New Line Cinema, and Fox Studios. Respondent conducted these activities ostensibly in the same manner as he did while working as a literary agent for the William Morris Agency.

3. Respondent testified in great length about the motion picture industry's two-tiered screenplay purchasing process. He stated that in his experience, if a producer showed interest in a shopped screenplay, the producer would then ask a studio to option or purchase the script. Accordingly, it was the studio who made the final purchasing decision. Occasionally, respondent would send petitioner's screenplays directly to a studio if requested to do so by a producer. The focus of respondent's argument was that if a producer had shown interest and a studio optioned the screenplay, it was his intent to bring in a licensed talent agent to negotiate the terms of the deal. Neither of these prerequisites occurred with petitioner's work throughout 1997.

4. On March 4, 1998, the parties memorialized the prior verbal agreement in writing, purporting to backdate the written agreement from

October 15, 1996, through October 14, 1998. In early 1998, respondent secured a literary talent agent from the William Morris Agency to represent and assist the petitioner in selling her screenplays. In April of 1998, respondent went back to his former occupation as a literary talent agent for Innovative Artists.

5. In May of 1998, petitioner's new talent agent sold "Mary Jane's Last Dance" and in early 1999 "Just Like a Woman" was similarly optioned. Respondent was not involved in the negotiation of either project, and consequently the petitioner failed to pay respondent's commissions allegedly owed for both projects. Respondent then filed a breach of contract lawsuit, case no. BC217761 in Los Angeles Superior Court. The superior court action was stayed pending the results of this petition.

Conclusions of Law

1. The primary issue is whether the respondent operated as a "talent agency" within the meaning of §1700.4(a). Labor Code §1700.4(a) defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists."

2. Labor Code §1700.4(b) includes "writers" of motion pictures in the definition of "artist" and petitioner is therefore an "artist" within the meaning of §1700.4(b).

3. Respondent's argument is twofold. First, respondent argues sending screenplays to producers or sending screenplays directly to studios, does not constitute "attempting to procure employment." Respondent reasons that "the term 'attempt' should be construed as action taken with the intent to negotiate, or resulting in actual negotiation." Respondent maintains

that he always intended to bring in a licensed talent agent to negotiate the terms if negotiations ensued, and that sending screenplays to potential producers and/or buyers (studios) was a "courtesy to and [only] at the request of producers." Respondent's analysis is flawed. To accept Respondent's interpretation of "attempt to procure" would require the Labor Commissioner to be a mind reader or own a crystal ball. As here, if there was no actual deal, nor evidence of past conduct, it is impossible for the Labor Commissioner to determine whether the respondent would bring in a licensed talent agent to negotiate the terms of the deal. Even assuming that he did, this would not exempt the respondent from requiring a license. To hold that a manager may solicit for the purchase of a screenplay and then subsequently hire a licensed talent agent to negotiate the terms of the deal would essentially amend 1700.44(d). That is solely for the legislature.

4. Second, and far more interesting, is respondent's argument that attempting to sell a completed screenplay would not constitute an "attempt to procure employment" within the meaning of 1700.4(a). Respondent reasons that selling a completed screenplay is essentially selling services that have already been rendered and therefore "does not involve employment," as any reasonable interpretation of employment manifests an intent of the employer to seek future services.

5. In support of respondent's proposition, he cites Davenport V. AFH Talent Agency, TAC 43-94. In Davenport, the petitioner was a writer of a novel which the respondent sold to a book publisher. Our case is markedly different. Here, petitioner is distinguished in that she is a writer of motion picture screenplays. Labor Code §1700.4(b) defines "artists" as: "actors and actresses rendering services on the legitimate stage and

in the production of motion pictures, ..., . writers, cinematographers, ..., and other artists rendering professional services in the motion picture, theatrical, radio, television and other entertainment enterprises."

6. The petitioner in Davenport was not rendering services in the production of motion pictures or television and consequently the respondent was not representing an "artist" within the meaning of 1700.4(b). Here, Strouse writes screenplays to be adapted for motion pictures and clearly is an "artist" within the meaning of the Talent Agencies Act. In Davenport, the hearing officer simply did not address the issue of whether the attempt to sell a completed screenplay qualified as an attempt to procure employment in the entertainment industry. The analysis in Davenport is fact specific and its holding is limited to the sale of a completed novel. The Labor Commissioner has historically held that the sale of a

novel, not intended for television or motion pictures, does not fall within the purview of the Labor Commissioner's jurisdiction because the author of a novel is not an artist within the meaning of 1700.4(b) and consequently, the holding in Davenport is neither affected, nor particularly instructive here.

7. Assuming, arguendo, the attempted sale of a completed work without contemplation of future services is not an attempt to procure employment; the narrower issue becomes whether the attempted sale of petitioner's completed screenplay would have included discussions about or negotiations for petitioner's future services. If so, the attempted sale of petitioner's screenplay would be construed an "attempt to procure employment." Petitioner introduced a declaration stating "key points . . . that [are] raised in every negotiation for the purchase of a motion picture screenplay is whether the screen writer who wrote the

material to be purchased by the acquiring party will be employed in the future to perform either a 'rewrite' or a 'polish' on this material." The declaration was timely objected to on hearsay grounds. However, this declaration buttressed by the parties' testimony established that the purchase of a motion picture screenplay invariably includes discussions and/or negotiations regarding "rewrites" or "polishes."

8. Additionally, petitioner sold her screenplays and in both proposals she was contracted to and did render future services in the form of "rewrites" and/or "polishes." A holding exempting unsuccessful solicitations for the sale of a screenplay from the protective mechanisms of the Act, simply because we are unable to determine whether future services were contemplated would create an unprotected avenue through the heart of the Talent Agencies Act. The likelihood of future services from the artist after the

sale of a screenplay is so overwhelming, that an unsuccessful attempt to sell a completed screenplay shall be considered an attempt to procure employment. "The Act is a remedial statute . . . [and is] designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. . . . Such statutes are enacted for the protection of those seeking employment [i.e., the artists]. Consequently, the Act should be liberally construed to promote the general object sought to be accomplished. To ensure the personal, professional, and financial welfare of artists." Waisbren v. Peppercorn, 41 Cal.App.4th 246 at 254. Clearly, the Labor Commissioner cannot allow literary managers to solicit for sale artists' scripts and screenplays and allow that activity to be devoid of regulation, unless the product is sold and future services rendered. This would create a standard that would be both arbitrary and unenforceable.

9. In short, the shopping, or unsuccessful efforts to sell, completed screenplays and scripts to producers and studios in he television and motion picture industries, absent compelling evidence that no future services of the artist are contemplated, establishes an attempt to procure employment within the meaning of 1700.4(a) and consequently is protected activity.

10. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner."

11. In Waisbren v. Peppercorn Production, Inc. (1995) 41 Cal.App.4th 246, the court held that any single act of procurement efforts subjects the agent to the Talent Agencies Act's licensing requirements,

thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities re to the agent's business as a whole. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of §1700.4(a).

12. Waisbren adds, "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." Waisbren, supra, 41 Ca1.App.4th 246 at p. 261; Buchwald v. Superior Court, 254 Cal.App.2d 347 at p. 351.

Order

For the above-stated reasons, it is hereby ordered that the 1996 oral contract and 1998 subsequent written extension between petitioner Victoria Strouse, and respondent Corner of the Sky, Inc., dba Corner of the Sky Entertainment, Inc., is unlawful and void ab initio. Respondent has no enforceable rights under that contract.

Having made no showing that the respondent collected commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), petitioner is not entitled to a monetary recovery.

Dated: Feb. 28, 2001

David L. Gurley, Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Thomas Grogan, Chief Deputy Labor Commissioner

[ELR 23:8:7]

Fox fails in bid to enjoin Marvel-licensed "Mutant X" television series despite Fox's complaint that series violates Marvel's license to Fox for its "X-Men" theatrical movie

In 1993, Fox paid Marvel Enterprises $1.6 million for the "theatrical motion picture" rights to Marvel's "X-Men" comic books. The movie that resulted from that deal has been enormously successful - so successful that Marvel is likely to receive another $6 million or so in "back end contingent compensation."

Relations between Fox and Marvel are not as cordial as they should be, given how profitable their 1993 deal has been for both of them. The bone of contention between the two companies is Fox's complaint that in 2000 - after Fox had promoted and released its "X-Men" movie - Marvel licensed Tribune

Entertainment to produce and syndicate the "Mutant X" television series, in violation of Fox's 1993 license. Adding insult to injury, Tribune promoted its television series to station owners and advertisers using videotape that included unlicensed clips from Fox's movie, as well as an "X" logo that is similar to Fox's.

Though Fox's complaint includes copyright infringement allegations, the case is more complicated. The 1993 license from Marvel to Fox only gave Fox "theatrical motion picture" rights. Marvel specifically reserved "all television rights" to "X-Men," subject to a "freeze." That is, Marvel agreed that it would not authorize "any live-action motion picture for . . . television" without first getting Fox's consent.

Fox contends that the "Mutant X" television series is a "motion picture for . . . television" based on the "X-Men," and that Marvel never asked for, let alone obtained, Fox's consent for the series' production and syndication. Marvel, on the other hand, contends that the "Mutant X" television series is not a "motion picture for . . . television," and that in any event, it does not use any elements from "X-Men" that were licensed to Fox.

These positions have been staked out in a lawsuit in federal court in New York City, in which each side is aggressively asserting its position. In cross-motions argued before Judge Allen Schwartz, Fox sought a preliminary injunction while Marvel sought dismissal of Fox's case. Each side got only some of what it wanted, though on the whole, it looks as though Marvel did better.

Judge Schwartz rejected Marvel's argument that a television series clearly is not a "motion picture for . . . television." Instead, the judge found that the phrase is ambiguous, and thus he refused to dismiss Fox's breach of contract claim.

In fact, in connection with Fox's request for a preliminary injunction, the judge found that the evidence submitted - including the depositions of experts and the lawyers who negotiated the 1993 license - suggested that the "Mutant X" series probably is a "motion picture for . . . television." Moreover, the judge found that the series' "Mutant X" title is one of the elements that Marvel did license to Fox, and thus should not have been used without Fox's consent. On the other hand, Judge Schwartz concluded that the characters and storylines in the "Mutant X" series are not taken from the "X-Men" comics that were licensed to Fox, despite some similarities.

This brief statement of Judge Schwartz's conclusions does not do justice to his opinion - a carefully analyzed decision that runs 50 printed pages. Ultimately, the judge denied Fox's bid for a preliminary injunction, because he concluded that the studio is likely to succeed only with respect to the series' title, and the improper use of that title is unlikely to cause Fox "irreparable harm."

Fox didn't come away completely empty-handed. The judge did enjoin the promotional use of clips from Fox's "X-Men" movie; and he enjoined the series' use of a logo that is substantially similar to Fox's "X-Men" series.

Marvel didn't come away completely empty-handed either - not even in connection with its motion to dismiss. Judge Schwartz did dismiss Fox's trademark claims, on the grounds that as a mere licensee, Fox's use of trademarks belonging to Marvel could not infringe trademark rights belonging to Fox.

The judge also dismissed Fox's interference with contract claims against Tribune Entertainment. He did so on the grounds that there was no evidence Tribune intended to induce a breach by Marvel by assisting in the production of the series.

According to news reports, Fox has appealed to the Second Circuit Court of Appeals, which declined to issue a stay, but has agreed to an expedited proceeding.

Fox was represented by Dale M. Cendali of O'Melveny & Myers in New York City. Marvel was represented by Jonathan D. Reichman of Kenyon & Kenyon in New York City. Tribune was represented by Gerald Singleton of Frankfurt Garbus Kurnit Klein & Selz in New York City. Fireworks Television (a co-defendant) was represented by Steven Rosenfeld of Ohrenstein & Brown in New York City.

Twentieth Century Fox Film v. Marvel Enterprises, 155 F.Supp.2d 1, 2001 U.S.Dist.LEXIS 11568 (S.D.N.Y. 2001) [ELR 23:8:9]

Fox TV specials about magic tricks did not infringe copyright or trademark in "Mystery Magician" video, but Fox promotional statements about series may have been false advertising, federal judge rules

Magic fans will recall that in the fall of 1997, Fox TV aired a series of four television specials that revealed how several magic tricks and illusions are performed. The specials were entitled "Breaking the Magician's Code: Magic's Biggest Secrets Finally Revealed." And, in the magic business at least, they generated a certain amount of controversy, because the specials actually revealed - as their titles said they would - how magicians turn human assistants into tigers or saw them in half, how they levitate objects and pull rabbits out of hats, and how they perform other old and popular tricks.

Fox's TV specials were not the first time magic tricks had been publicly explained. Eleven years earlier, in 1986, Robert E. Rice produced a homevideo that did the same thing. It was entitled "The Mystery Magician - He Dares To Expose the Secrets Behind Magic's Most Mystifying Illusion." And for ten years, it was distributed to retailers by CBS/Fox Video. Over the years, more than 17,000 copies have been sold.

Fox's TV specials covered some of the same tricks as had Rice's video, and in Rice's opinion, did so using a substantially similar magician character. Offended that Fox had not asked him to produce the TV specials, had not given him credit as the specials' creator, and had not paid him for the specials, Rice sued Fox for copyright infringement, trademark infringement, and false advertising, in federal court in Los Angeles.

On their face, Rice's claims seem legally far-fetched. Rice did not, after all, accuse Fox of broadcasting his video without consent. He acknowledged that the network had produced its own shows, and even that most of the tricks revealed by Fox had not been revealed in his video. Indeed, when a challenge to the sufficiency of Rice's claims was presented to Judge Audrey Collins - in the form of a Fox motion for summary judgment - she too seemed to doubt their legitimacy. The first sentence of Judge Collins very long and detailed decision reads: "Trying to protect what he claims is his exclusive right to make or present videos or television specials in which the secrets behind well-known magic tricks or illusions are revealed, Plaintiff has sued everyone associated with making and presenting a series of allegedly infringing television specials."

Judge Collins then went on to painstakingly analyze and dismiss Rice's copyright and trademark infringement claims. But Rice's false advertising claim survived, because the judge determined that it raises issues that could not be decided in response to a summary judgment motion.

Judge Collins dismissed Rice's copyright infringement claim, because she found that his video and Fox's TV specials were not substantially similar in any way. Though she acknowledged that "in the abstract there is some level of similarity between the two videos involving masked magicians revealing tricks/illusions," that was not enough to allow Rice to proceed to trial. It was not, because the judge's analysis led her to conclude that the two works do not have similar main character magicians, dialogue, mood, pace, settings, or sequences of events.

She also dismissed Rice's trademark claims for failing to give him credit and for false designation of origin. He wasn't entitled to credit, the judge ruled, because Fox's TV specials were not substantially similar to his video. And he could not pursue a false designation of origin claim, because he failed to show that his mark had acquired secondary meaning or that his magician character had acquired sufficient "celebrity" to make out a false endorsement claim.

Judge Collins did, however, refuse to dismiss Rice's false advertising claim. This claim was based on Fox's assertions - during a broadcast, and on the packaging for homevideo versions - that the specials would reveal "never before" revealed magic secrets for the "first time," "at last" and "finally." These statements were "literally false," the judge said, and they were not mere "puffery."

Whether Rice is able to recover any money with his false advertising claim remains to be seen. Judge Collins acknowledged that he "may have a difficult time establishing the materiality of these false statements (in terms of their likelihood to influence a consumer's purchasing decision). . . ." Nonetheless, she said, this is something that "is best left to the ultimate trier of fact."

Rice was represented by Herbert Hafif in Claremont. Fox was represented by Jeffrey S. Kravitz of Lord Bissell & Brook in Los Angeles.

Rice v. Fox Broadcasting Co., 148 F.Supp.2d 1029, 2001 U.S.Dist.LEXIS 9654 (C.D.Cal. 2001) [ELR 23:8:10]

Federal court upholds Copyright Office ruling that Internet transmissions of AM/FM radio broadcasts are not exempt from record companies' digital performance right

The RIAA and the United States Copyright Office have won a significant victory in a federal court in Philadelphia - a victory that means that AM/FM radio stations that transmit their broadcasts over the Internet will have to pay royalties to record companies and recording artists (as well as to music publishers).

The lawsuit was filed by the owners of hundreds of AM and FM radio stations against the Register of Copyrights in an ultimately unsuccessful effort to overturn a Copyright Office ruling that Internet transmissions of AM and FM radio broadcasts are not exempt from the record companies' "digital performance right." (ELR 22:7:5)

Copyright law has long required radio stations to obtain public performance licenses from music publishers who are the owners of the copyrights to musical compositions stations broadcast. Radio stations obtain those licenses from the publishers' agents: ASCAP, BMI and SESAC. However, until 1995, United States copyright law did not give record companies (or recording artists) any copyright in their recordings; and thus radio stations did not need licenses from them.

Things changed slightly in 1995 with the enactment of the Digital Performance Right in Sound Recordings Act (ELR 17:6:3). That Act - often referred to by its acronym "DPRA" - amended the Copyright Act by adding a narrow "digital performance right" for sound recordings. By doing so, DPRA required those engaged in certain types of digital performances of sound recordings to obtain licenses to do so. However, at the behest of radio stations, DPRA made clear that radio stations were exempt from this new digital performance right - not only when they broadcast by analog AM or FM signals, but even if they eventually begin to broadcast digitally.

Though 1995 was not very long ago, it was before Internet transmissions of music and radio broadcasts became common. As a result, DPRA did not adequately deal with music on the Internet. In an effort to cure DPRA's inadequacies in the Internet area, Congress amended the Copyright Act once again in 1998, in Title IV of the Digital Millennium Copyright Act (ELR 20:6:6). That Act - commonly referred to by its acronym "DCMA" - continued to exempt radio stations from the digital performance right, even if they broadcast digitally.

Unfortunately, even as amended by the DCMA, the law was not perfectly clear about whether the radio station exemption applies only to over-the-air digital broadcasts, or applies as well to Internet transmissions done by licensed radio stations. The RIAA argued that the exemption applies only to over-the-air digital broadcasts. Radio stations took the position that the exemption applies to all of their digital transmissions, including Internet transmissions.

The Copyright Office concluded that the exemption relied on by radio stations applies only to over-the-air digital broadcasts, not Internet transmissions by radio stations. In their lawsuit in Philadelphia, the radio broadcasters argued that in reaching such a conclusion, the Copyright Office had exceeded its statutory authority and had reached the wrong result.

Judge Berle Schiller has sided with the Copyright Office, however. He concluded that "Congress, implicitly, if not explicitly, entrusted the

Copyright Office with the task of determining which entities would be exempted . . . from the public performance rights. . . ."

Moreover, after carefully reanalyzing the arguments made by the radio stations and the RIAA before the Copyright Office, Judge Schiller concluded that "were I approaching this question without the benefit of a Copyright Office Rulemaking . . . , I would come to the same conclusion" the Copyright Office did.

Judge Schiller's ruling means that radio stations must have digital performance licenses to transmit their broadcasts over the Internet. But it does not mean they will have to negotiate such licenses with record companies directly. Instead, it is likely that radio stations will be eligible for statutory licenses from record companies, at rates that will be set by a Copyright Arbitration Royalty Tribunal proceeding which is now in its final stages.

The radio stations were represented by R. Bruce Rich of Weil Gotschal & Manges in New York City and Marquerit S. Walsh of Littler Mendelson in Philadelphia. The Register of Copyrights was represented by Theodore C. Hirt of the Civil Division of the Department of Justice in Washington D.C. The RIAA was represented by Vincent V. Carissimi of Pepper & Hamilton in Philadelphia and Robert Alan Garrett of Arnold & Porter in Washington D.C.

Bonneville International Corp. v. Peters, 153 F.Supp.2d 763, 2001 U.S.Dist.LEXIS 10919 (E.D.Pa. 2001)[ELR 23:8:11]

Copyright infringement claim asserted by music video show creator complaining about Viacom's "MTV: Making the Video" program is barred by six-month limitations provision in Submission Release, and implied contract claim is preempted

Viacom has won the dismissal of a copyright infringement and implied contract lawsuit filed against it by Robert Entous, the creator of a proposed TV program called "Music Videos: Uncut." Entous complained that the Viacom program "MTV: Making the Video" was copied from his program treatment and video commercial.

Entous had submitted his materials to Viacom, three times. Each time, he was asked to sign a Submission Release; and he did. All three of the Releases provided that if any controversy later arose concerning his submissions, he would assert his claims not more than six months after he "first learned (or reasonably should have been aware) of [Viacom's] use or intended use of [his submitted] material."

Ultimately, Entous' copyright claim was dismissed, because he failed to assert it within six months of becoming aware of Viacom's intended use of what he said was his material.

Entous didn't dispute that he was bound by the "six-month" clause in the Releases he had signed. Instead, he argued that the six-month period began only when Viacom actually used of his material. The Copyright Act's three-year statute of limitations begins to run with actual use. Since Entous did file suit within six months of Viacom's first broadcast of its program, he would have filed on time, if that rule applied.

The Releases however started the six-month limitation period began when Entous learned of Viacom's "intended use." Entous learned about

Viacom's program while it was still being developed, more than six months before he filed his lawsuit. So, the only thing Viacom had to establish to defeat Entous' infringement claim was that the Releases' "intended use" language was valid and enforceable. District Judge Lourdes Baird agreed that it was.

Entous also alleged a claim for breach of implied contract. It asserted that Viacom had broken its implied agreement not to use his material without compensating him for it. Judge Baird held that this claim was preempted by the Copyright Act.

Entous was represented by Todd A. Norton and Jeffrey T. Walsh of Norton & Norton in Encino. Viacom was represented by Stephen A. Kroft and Bryan A. Castorina of McDermott Will & Emery in Los Angeles.

Entous v. Viacom International, 151 F.Supp.2d 1150, 2001 U.S.Dist.LEXIS 7948 (C.D.Cal. 2001)[ELR 23:8:12]

New York law governs enforceability of contract between Radioactive Records and Shirley Manson, so California's seven-year rule does not apply, but balance of dispute should be resolved in lawsuit filed by Manson and Garbage in California state court, federal court in New York rules

Though Shirley Manson signed a recording contract with Radioactive Records more than seven years ago, she will not be able to get out of that contract under California's seven-year rule. A federal court in New York has so held, in a case that is significant to the entire recording industry, as well as to Manson and Radioactive.

California's seven-year rule - found in section 2855 of the state's Labor Code - provides that personal service contracts may not be enforced against employees for more than seven years. However, Manson's contract with Radioactive stipulated that disputes would be litigated in New York under New York law. The question of which state's law applies to the enforceability of Manson's contract is significant, because New York law does not limit the duration of personal service contracts.

The dispute between Manson and Radioactive arose, because after Manson signed her contract with that company in 1993, she began recording and performing with the band Garbage which had a contract with Almo Records. Radioactive consented to Manson making those recordings for Almo on an album-by-album basis. But when Almo was acquired by Universal Music Group, Garbage sought to get out of its Almo contract on the grounds that its contract with Almo contained a "key man" clause allowing it to do so if Jerry Moss stepped down as Almo's chairman, which Garbage assumed would occur after UMG's acquisition of Almo was complete.

By coincidence, UMG also is a co-owner of Radioactive. Since UMG didn't want to lose Garbage, it told the band that it didn't matter whether the "key man" clause in its contract gave it the right to leave Almo, because UMG - through its ownership of Radioactive - owned the right to all recordings of Garbage's lead singer, Shirley Manson. It was at that point that Manson and Garbage filed suit in state court in California, seeking a declaration that neither of their recording contracts was enforceable.

Radioactive countered with a cross-complaint in the California action, and with a separate lawsuit in federal court in New York. In response to cross-motions in the New York case, Judge Shira Scheindlin has held that the California seven-year-statute does not apply to Manson's contract with Radioactive, because the contract provides that New York law would apply, and there was a reasonable basis for the parties to choose New York law at the time it was signed.

Judge Scheindlin rejected Manson's argument that New York law should be ignored, because California's seven-year-statute "reflects a powerful interest in controlling California employers." (Radioactive does business in California as well as in New York.) The judge said that the California legislature enacted the seven-year rule "to protect California employees," and "Manson does not contend that she is a California employee."

Judge Scheindlin did agree with Manson and Garbage on one point however. She agreed that the rest of the case should be litigated in California where Manson and Garbage first filed it, and where Radioactive filed a cross-complaint. The judge did so in order to avoid "duplicate efforts" and "piecemeal litigation." But the judge pointedly observed that she "expects the California court to respect" her decision that New York law should be applied, not California's seven-year rule.

Radioactive was represented by Steven A. Marenberg of Irell & Manella in Los Angeles, and Andrew H. Bart of Pryor Cashman Sherman & Flynn in New York City. Manson was represented by Marc Marmaro of Jeffer Mangels Butler & Marmaro in Los Angeles, and Robert Jossen of Swidler Berlin Shereff Friedman in New York City.

Radioactive, J.V. v. Manson, 153 F.Supp.2d 462, 2001 U.S.Dist.LEXIS 10700 (S.D.N.Y. 2001)[ELR 23:8:13]

Lyrics to "Independent Women," recorded by Destiny's Child for "Charlie's Angels" soundtrack, do not infringe copyright to lyrics to "Independent Lady"

Sony Music has won the dismissal of a copyright infringement suit filed against it by songwriter Paula Kandace Toliver. Sony released the soundtrack album for the movie "Charlie's Angels" which includes a recording of "Independent Women (Part I)" by Destiny's Child. According to Toliver, the lyrics to that song infringe the copyright to the lyrics of her own song, "Independent Lady."

For purposes of its summary judgment motion, Sony did not dispute its access to Toliver's lyrics. Indeed, according to federal District Judge James Singleton, Sony "agreed" that it had access to her lyrics. Nevertheless, apart from some similarity between the titles of the two songs, the lyrics to "Independent Women (Part I)" are nothing like those of Toliver's "Independent Lady."

Perhaps because Judge Singleton's court is in Alaska, and rarely gets cases like this one, the judge's decision is remarkably deferential to Toliver's similarity arguments. The opinion reproduces all of the lyrics of both songs, so its readers are able to form their own opinions. But the judge's methodical evaluation of Toliver's contentions led him to conclude that the lyrics to the two songs are not substantially similar, and no reasonable jury could conclude otherwise.

Toliver may have been prompted to file suit, because, in addition to the similarity of their titles, the lyrics of both songs consist of a woman's rejection of domination by a man. Judge Singleton explained, however, that "Were [Toliver] to own the copyright to all other songs depicting the tale of a woman rejecting a man's dominance, she would most certainly be among the wealthiest of troubadours in the land."

The judge might have added (but didn't) that if a copyright could be claimed to all songs about a woman rejecting a man's dominance, Toliver herself would have been an infringer, because she didn't register the copyright to her song until 1999, and thus it was hardly the first to tell that tale.

Toliver was represented by Jody P. Brion in Anchorage. Sony Music was represented by James N. Reeves of Dorsey & Whitney in Anchorage.

Toliver v. Sony Music Entertainment, Inc., 149 F.Supp.2d 909, 2001 U.S.Dist.LEXIS 7910 (D.Alaska 2001)[ELR 23:8:13]

Exclusive licensee of Russian animated films wins copyright infringement case against unauthorized American distributor; applying Russian law, court rejects distributor's argument that Russian licensor is not true owner of copyrights

Films by Jove has won a copyright infringement lawsuit in federal court in New York City against the Saint Petersburg Publishing House, on account of Saint Petersburg's unauthorized sale of copies of animated films produced in the former Soviet Union between 1946 and 1991. Films by Jove is a film distributor.

Saint Petersburg operates retail stores in Brooklyn. Both are American companies.

Saint Petersburg admitted that it infringed the films' copyrights, if Films by Jove were their exclusive licensee. Saint Petersburg argued, however, that Films by Jove is not the exclusive licensee of the films' copyrights, because those copyrights were never owned by its licensor, a Russian company named Soyuzmultfilm Studios. In fact, another Russian company named Federal State Unitarian Enterprise Soyuzmultfilm Studio intervened in the case claiming that it is the true owner of those copyrights.

In response to cross-motions for summary judgment, Judge David Trager has ruled in favor of Films by Jove, finding that its licensor, Soyuzmultfilm Studios, is the true owner of the films' copyrights, and that the intervening Russian company is not.

Though the ultimate dispute between the parties was simple and straightforward, the work necessary to reach Judge Trager's equally simple and straightforward conclusion was not. It required the application of Russian law, about which the parties' respective experts vigorously disagreed. Judge Trager did a painstaking analysis of the experts' opinions, great portions of which he quoted verbatim. In the process, the judge produced a decision that runs 48 printed pages and is a goldmine of information about Soviet/Russian history and copyright law.

In the end, Judge Trager concluded that the copyrights to the films passed by operation of Russian law from their original producer - a Soviet state enterprise - to the Russian company that had granted Films by Jove an exclusive worldwide license to distribute them.

There were two reasons the judge applied Russian law in deciding who owns the films' copyrights. First, in an earlier copyright infringement case - coincidently involving Russian works also - the Second Circuit Court of Appeals held that the law of the country where a work was created determines who the initial copyright owner is (ELR 20:8:10).

Second, many of the animated films in question were once in the public domain in the United States. Their U.S. copyrights were restored by the Uruguay Round Agreements Act of 1995, which provides (in what is now section 104A of the Copyright Act) that the owner of a restored copyright is "the author . . . as determined by the law of the source country of the work."

Since Films by Jove didn't get its license directly from the initial copyright owner or "the author" of the animated films, Saint Petersburg also challenged the validity of the transfers constituting Film by Jove's chain of title. Judge Trager noted that in some cases, this issue would itself present an as-yet unanswered choice-of-law question. In this case it didn't, he ruled, because he held that Saint Petersburg simply didn't have standing to raise that issue.

Counsel in the case were Julian H. Lowenfeld in New York City, Kenneth A. Feinswog in Los Angeles, Paul R. Levenson of Kaplan Gottbetter & Levenson in New York City, and Robert W. Clarida of Cowan Liebowitz & Latman in New York City.

Films by Jove, Inc. v. Berov, 154 F.Supp.2d 432, 2001 U.S.Dist.LEXIS 12815 (E.D.N.Y. 2001)[ELR 23:8:14]

New York right of publicity statute does not apply to sales in Germany, but U.S. court has personal jurisdiction over German company that produced musical play "Jekyll & Hyde" in Germany with respect to merchandise sales in New York bearing likeness of star of Broadway production

Robert Cuccioli, the star of the Broadway musical play "Jekyll & Hyde," will be able to litigate his right of publicity claims in a federal court in New York City against the German company that produced the musical in Germany. On the other hand, Cuccioli's case now involves less than he hoped it would when he first filed his lawsuit. These are the conclusions that were reached by Judge Lewis Kaplan in response to cross-motions for summary judgment filed by Cuccioli and by the company he has sued, Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH & Co.

The German production company is licensed to produce "Jekyll & Hyde" in Germany, Austria and Switzerland. Moreover, it believes that its license agreement authorizes it to use Cuccioli's likeness in connection with the promotion and merchandising of its German language productions. If the case is litigated all the way to judgment, the proper interpretation of that license agreement is likely to be the central issue (along with the question of whether the American licensors had the right to authorize the use of Cuccioli's likeness, if that is what they've done).

In the meantime, however, the German company has used Cuccioli's likeness on CDs of the German performance and on other merchandise. At first, the German company thought Cuccioli would be pleased it had done so, and it sent him samples of the merchandise. Instead of being pleased, however, Cuccioli sued the German company in federal court in

New York City, alleging that the merchandise violated his rights under New York Civil Rights Law Sections 50 and 51 (New York's right of publicity statute).

The German company responded with a motion to dismiss, arguing that the court did not have personal jurisdiction over it, and that the New York statute does not have extraterritorial effect over merchandise sales in Germany. Cuccioli sought summary judgment too, on those same issues.

Judge Kaplan held that his court does have personal jurisdiction over the German company, because it transacted business in New York by negotiating the licensing agreement in New York, paying royalties to licensors in New York, and by agreeing (in the license agreement) to submit to the jurisdiction of New York courts.

Some of the offending German language CDs were sold to New York residents - one by the German company's website in Germany, and others by retail stores in New York. Those sales to New York residents are subject to the New York statute. But Judge Kaplan held that sales in Germany (or elsewhere outside of New York) are not. This is so, the judge explained, because by its own terms, the statute applies only to prohibited activities "within this state." This means that only a small part of Cuccioli's case survived dismissal (the part involving the small number of sales in New York).

On the other hand, if Judge Kaplan had interpreted the New York statute to cover sales in Germany too, Cuccioli's whole case may have been lost. There is a one-year statute of limitations for claims brought under the New York statute. The German company began selling offending merchandise from its website in Germany two years before Cuccioli filed suit. Thus, if the New York statute reached sales in

Germany, Cuccioli's suit would have been barred by the statute of limitations. Since the statute doesn't reach out-of-state sales, however, it began to run only when the first in-state sale took place - something that occurred less than one year before Cuccioli sued.

Cuccioli was represented by Lisa M. Fantino in White Plains. The German company was represented by Ronald P. Mysliwiec in New York City.

Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion GmbH, 150 F.Supp.2d 566, 2001 U.S.Dist.LEXIS 8699 (S.D.N.Y. 2001)[ELR 23:8:15]

Federal appeals court refuses to stay performance of Terrence McNally's play "Corpus Christi" at state university, rejecting claims that First Amendment prohibits state-sponsored performances because of play's anti-Christian views

Terrence McNally's play "Corpus Christie" was performed last summer in a theater on the Fort Wayne campus of Indiana University Purdue University, after three Indiana residents failed to get an injunction that would have banned the performance.

The play - described as "notorious" and "blasphemous" by one of the federal judges who refused to ban it - "depicts Jesus Christ as a homosexual who has sexual relations with his disciples." For that and other reasons, the objecting Indiana residents argued that "by presenting the play, the university" - which is a state institution - "will be violating the First Amendment by publicly endorsing anti-Christian beliefs."

The play was being performed by a theater major as part of his course requirements, and the university itself took "pains to disclaim" any endorsement of the viewpoints it conveys. District Judge William Lee denied the residents' request for a preliminary injunction. With time too short to pursue an ordinary appeal, the residents unsuccessfully sought a "stay" from the Seventh Circuit Court of Appeals.

Appeals Court Judge Richard Posner asserted that "The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd." Quoting the Supreme Court, Judge Posner explained that "the controlling principle is that the amendment 'forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. . . . "[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them.'""

However "absurd" the contention may have seemed to Judge Posner, it apparently struck Judge John Coffey as plausible. He issued a dissenting opinion much greater in length than Judge Posner's majority decision.

The Indiana residents were represented by John R. Price in Indianapolis. The University was represented by Anthony S. Benton of Stuart & Branigin in Lafayette.

Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 2001 U.S.App.LEXIS 17922 (7th Cir. 2001)[ELR 23:8:15]

Destruction of mural may have violated Visual Artists Rights Act, even though mural was installed on public property without a permit and even though it was destroyed before it was seen by art critics or the public

Artist Joanne Pollara is entitled to a trial in her lawsuit against the manager of the Empire State Plaza, on account of the destruction of a mural she had painted and installed at the Plaza. A federal District Court in Albany, New York, has so held in a Visual Artists Rights Act lawsuit filed by Pollara against the Plaza's manager.

Pollara's lawsuit alleges that the manager of the Plaza violated her right "to prevent any [intentional or grossly negligent] destruction of a work of recognized stature." The Plaza manager responded to the lawsuit with a motion for summary judgment, seeking dismissal of the case on two seemingly plausible grounds.

First, Pollara's painting was installed on Plaza property, without a permit, in connection with a protest of funding cuts for legal aid. The Plaza manager argued that the Visual Artists Rights Act does not protect art works that are illegally placed on the property of others without consent.

Federal District Judge David Hurd has ruled otherwise, however. Indeed, he thought so little of this argument that the judge dispensed with it in a footnote. He noted that the mural could have been removed without destroying it. "Moreover, there is no basis in the statute to find a general right to destroy works of art that are on property without the permission of the owner," he held.

Second, the Plaza manager argued that since Pollara's mural was newly created and had never been exhibited to art critics or the public, it could not a "work of recognized stature" as a matter of law, and thus wouldn't be protected by the Act.

Again Judge Hurd disagreed. He held that the mural "is not excluded from the statutory definition of 'work of recognized stature' merely because it has not previously been exhibited. . . ." It could be a "work of recognized stature," the judge said, because Pollara "has an established reputation in the relevant community."

Pollara was represented by Paul C. Rapp of Cohen Dax & Koenig in Albany. The Plaza manager was represented by Charles J. Quackenbush of the New York Attorney General's office in Albany.

Pollara v. Seymour, 150 F.Supp.2d 393, 2001 U.S.Dist.LEXIS 10223 (N.D.N.Y. 2001)[ELR 23:8:16]

Penguin Putnam's failure to adequately disclose co-author's completion of novel begun by best-selling writer William J. Caunitz before his death allows purchaser of novel to sue for misrepresentation

Apparently, Adam Z. Rice is a fan of best-selling novelist William J. Caunitz. Apparently too, Rice didn't care for Caunitz's last book Chains of Command. This seems to be the case, because after Rice bought the posthumously published volume, he filed a misrepresentation lawsuit - on behalf of himself and "All Others Similarly Situated" - against its publisher, Penguin Putnam.

Though Chains of Command was begun by Caunitz, he died before completing it. Christopher Newman, "a lesser-known author" and a friend of Caunitz, finished the novel. When it was published, the cover of Chains of Command identified only Caunitz as its author. Newman wrote about half the book, but his contribution was revealed only in "very small type" on its copyright page.

Penguin Putnam responded to Rice's lawsuit with a motion to dismiss, arguing that Rice had not suffered any damage, because he got exactly the book he paid for. New York state Judge Martin Schneier has denied the publisher's motion, however.

In a very brief decision, the judge reasoned that "Books . . . are works of art that have enduring value, the amount of which is based, to some extent, on who the creator is. A buyer of a work of art who has been misled as to who the artist is, has surely suffered damages." As a result, the judge ruled, Rice's argument that Penguin Putnam "was able to command a higher price because of the alleged deception, is expressly permitted. . . ."

Rice was represented by Eduard Korsinsky of Beatie & Osborn in New York City. Penguin Putnam was represented by Mark B. Holton of Gibson Dunn & Crutcher in New York City.

Rice v. Penguin Putnam, Inc., 729 N.Y.S.2d 377, 2001 N.Y.Misc.LEXIS 255 (Sup. 2001)[ELR 23:8:16]

Music publishers and record companies may assert claims under Tennessee Consumer Protection Act against those who allegedly "sampled" their music, but negligence claims are preempted by Copyright Act, federal court rules

Bridgeport Music, Inc., and other publishers and record companies, have filed what appears to be a massive lawsuit in federal court in Tennessee against many other companies for allegedly unlicensed "sampling." The complaint asserts claims of copyright infringement, of course. But it also asserts claims under the Tennessee Consumer Protection Act and under Tennessee state negligence law.

In an effort to trim down the case against them, BMG and Bad Boy Records made motions to dismiss the Consumer Protection Act and negligence claims. They argued that the plaintiffs did not have standing to assert claims under the Consumer Protection Act, because they are not "consumers." BMG and Bad Boy also argued that the negligence claim was preempted by federal copyright law.

Judge Campbell has agreed that the negligence claim is preempted, and he has dismissed it. The "duties" that BMG and Bad Boy allegedly breached by their negligence "are essentially the components of a properly functioning licensing regime," the judge explained. The steps that BMG and Bad Boy allegedly failed to take "are taken to avoid copyright infringement, not forestall common law negligence."

However, Judge Campbell refused to dismiss the plaintiff's Consumer Protection Act claims. Despite the word "Consumer" in its title, the judge held that the Tennessee statute was amended in 1989 to make it applicable to others as well as consumers. And thus the Act applies even in the absence of a "consumer transaction."

Bridgeport Music was represented by Richard Busch of King & Ballow in Nashville. BMG and Bad Boy were represented by Jay Bowen of Bowen Riley Warnock & Jacobson in Nashville and Philip Kirkpatrick of Stewart Estes & Donnell in Nashville.

Bridgeport Music, Inc. v. 11C Music, 154 F.Supp.2d 1330, 2001 U.S.Dist.LEXIS 12592 (M.D.Tenn. 2001)[ELR 23:8:17]

Martha Graham Center and School own "Martha Graham" name, rather than dancer's heir Ronald Protas, even though Protas registered "Martha Graham" trademark and licensed Center and School to use it, federal court rules in infringement suit filed by Protas after he terminated license

Ronald Protas was the heir of famed dancer and choreographer Martha Graham. In fact, following her death in 1991, he succeeded Graham as the Artistic Director of the Martha Graham Center and School. Protas also was a Director of the Center and School, but by 2000, his relationship with other directors had deteriorated so much that they voted to remove him from the board. Though their disagreements must have been triggered by other things, one consequence was a fight over who owns the right to use the "Martha Graham" name.

Protas claimed that he inherited the right to the name, and certain language in Graham's will could be read to support that claim. Moreover, in 1995, Protas registered "Martha Graham" as a trademark; and in 1999, he granted the Center and School a license to use the mark in a written agreement by which the Center and School promised not to claim ownership of it or to contest Protas' ownership.

Nevertheless, after Protas terminated the license in 2000, the Center and School continued to use the "Martha Graham" name - thus triggering a trademark infringement lawsuit by Protas. Following a trial before federal District Judge Miriam Cedarbaum, the Center and School have emerged victorious. Judge Cedarbaum "found Protas not to be a credible witness." And she ruled that the Center and School are the true owners of the "Martha Graham" name, rather than Protas.

To reach that result, the judge had to reject the doctrine of "licensee estoppel" - a rule that holds that a trademark licensee is ordinarily estopped from asserting ownership of the mark against its licensor. Judge Cedarbaum found that it would be inequitable to apply that doctrine in this case, because Protas "provided erroneous and misleading information" to the Patent and Trademark Office when he applied for trademark registration.

In his trademark application, Protas claimed that Martha Graham owned the rights to her name and had orally licensed the Center and School to use it, while she was alive. As Graham's heir, Protas claimed to have inherited the rights in her name when she died. Judge

Cedarbaum, however, found that Graham had assigned - not licensed - her rights in her name to the Center and School when they were created. Thus, they - and not Protas - are the name's true owners.

Judge Cedarbaum also rejected Protas' argument that the "no-contest" provision in the 1999 license agreement barred the Center and School from contending that he didn't own the name. That clause had no continuing effect once Protas terminated the license, the judge ruled. She also rejected Protas' argument that, in another clause, the Center and School had assigned to him whatever rights they might acquire in the name. That clause, the judge said, only applied to rights they might acquire after the license was entered into in 1999; but it did not assign to Protas rights they had acquired from Graham herself before the license was granted.

For these reasons, Judge Cedarbaum denied Protas' request for an injunction.

Protas was represented by James J. McGuire of White & Case in New York City. The Martha Graham Center and School were represented by Dale M. Cendali of O'Melveny & Myers in New York City.

Martha Graham School v. Martha Graham Center, 153 F.Supp.2d 512, 2001 U.S.Dist.LEXIS 11260 (S.D.N.Y. 2001)[ELR 23:8:17]

Freelance photographer is awarded $20,142 in copyright infringement suit against Weekly World News on account of repeated unlicensed uses of "Alien Backs Clinton" photo

The Weekly World News has been ordered to pay freelance photographer Douglas Bruce $20,142.45 in damages, because the entertainment tabloid repeatedly republished, without permission, Bruce's 1992 photo of Bill Clinton shaking hands with a Secret Service agent. Actually, in the version of the photo published by the News, the Secret Service agent has been cropped out and replaced with an image of the News' own "Space Alien" character, creating an image titled "Alien Backs Clinton."

It wasn't the retouching of the photo that triggered Bruce's copyright infringement lawsuit. In 1992 and '93, the News published the retouched version of the photo several times, with Bruce's consent, in return for which Bruce received a total of $1,775 (after agency commissions).

The thing that triggered Bruce's lawsuit was the News' continued use of the retouched photo in and after 1995 - in the tabloid, on t-shirts, in advertisements for t-shirts and subscriptions, and on its website - without any permission at all. In response to Bruce's lawsuit, the News didn't contest that it had infringed his copyright. It merely disputed the amount Bruce claimed as damages - perhaps because he sought more than $400,000.

Following a three-day trial, federal District Judge Richard Stearns made careful and detailed findings of fact concerning the News' profits and Bruce's actual damages, the total of which came to $20,142.45.

Among the findings made by Judge Stearns were two of special interest.

First, the judge ruled that the popularity of the photo was attributable in part to the fact that it portrayed President Clinton with the News' own "Space Alien." In calculating the News' profits, the judge attributed half to Bruce's photo and half to the "Alien," and thus awarded Bruce only the half of those profits attributable to his photo.

Second, in calculating Bruce's damages, Judge Stearns noted that both parties' experts agreed that when a photo is used without a license, and a license fee then is negotiated, the fee is much greater than if the license had been obtained in advance. One expert said the multiplier is three while the other said ten would be appropriate. Judge Stearns decided to enhance Bruce's actual damages by a factor of five.

In addition to profits and damages, Bruce was directed to file a petition for his costs and attorney's fees.

While not a financial catastrophe for the News', the outcome of the case was far more expensive for it than use of Bruce's photo had to be. Before the News' had published the photo for the first time, it was offered a "buyout" for $3,000 - a figure at which it "balked."

Bruce was represented by Andrew D. Epstein of Barker Epstein & Loscocco in Boston. Weekly World News was represented by Andrew Baum of Darby & Darby in New York, and David S. Rosenthal of Hutchins Wheeler & Dittmar in Boston.

Bruce v. Weekly World News, Inc., 150 F.Supp.2d 313, 2001 U.S.Dist.LEXIS 17481 (D.Mass. 2001)[ELR 23:8:18]

NFL punter Kyle Richardson was not entitled to become free agent after 1997 season, federal court affirms

Punter Kyle Richardson was hoping to become a free agent after the NFL's 1997 season, and he almost did. Close, however, only counts in horseshoes, so as things turned out, he didn't.

The NFL Collective Bargaining Agreement allows a player to become a free agent after he has been on full pay status with an NFL team for "six or more regular season games" for each of four seasons. Richardson fell one game short. That is, by the end of the 1996 season, he had been on full pay status for six or more regular season games for three seasons. That much was not in dispute.

Then, during the 1997 season, he was on full pay status with the Seattle Seahawks for one game and with the Miami Dolphins for three games. He also was on full pay status with the Dolphins for one additional week during which the Dolphins didn't play a game because it had a "bye."

Thus, if the Dolphins' bye week counted as a "game" for free agency purposes, Richardson would have become a free agent. That is what Richardson argued, but the NFL thought otherwise. Their disagreement was submitted to Special Master Jack Friedenthal, who decided that Richardson was a game short and thus was not eligible to become a free agent.

The NFL Players Association objected to the Special Master's decision and took the matter to federal District Court in Minnesota where Judge David Doty has continuing jurisdiction to review Special Master decisions that interpret the NFL Collective Bargaining Agreement.

In a short opinion, Judge Doty has affirmed the Special Master. The Collective Bargaining Agreement, the judge explained, requires players to be on full pay status for six or more "games" - not "weeks" - in order to get credit for a season. He was not persuaded by the Players Association's argument that "games" should be interpreted to mean "weeks" because players are required to practice during weeks when their teams have byes, and because they are paid in full for those weeks.

The judge reasoned that if the NFL and the Players Association had intended bye weeks to count towards credit for a season, they would have said that players get such credit when they are on full pay status "for six or more weeks" or when they receive "six or more payments." That was not the language they used, however, Judge Doty observed.

He therefore concluded that "Since Richardson was on full pay status for only five regular season games during the 1997 season, he cannot receive credit for . . . that season." Thus, the Special Master was correct in deciding that Richardson had not become a free agent.

The NFL Players Association was represented by Edward M. Glennon of Lindquist & Vennum in Minneapolis, James W. Quinn of Weil Gotshal & Manges in New York City, and Richard Berthelsen of the NFLPA in Washington D.C. The National Football League was represented by Daniel J. Connolly of Faegre & Benson in Minneapolis, Gregg H. Levy of Covington & Burling in Washington D.C., and Frank Rothman of Skadden Arps Slate Meagher & Flom in New York City.

White v. National Football League, 149 F.Supp.2d 858, 2001 U.S.Dist.LEXIS 8311 (D.Minn. 2001)[ELR 23:8:19]

Payments made in 1994 by the Philadelphia Phillies to former players in settlement of Player Association collusion claims were "wages" for which payroll taxes were payable at 1994 rates, even though payments were backpay awards for 1986 and 1987 when collusion occurred and taxes were lower, though interest portion of payments was not taxable, federal District Court rules

The IRS properly collected federal payroll taxes from the Philadelphia Phillies in connection with payments it made to former players in 1994, to settle collusion claims made by the Major League Baseball

Players Association. (See ELR 12:8:21, 12:12:19, 22:1:17.) Federal District Judge William Yohn has so held, in a lawsuit filed by the Phillies seeking a refund of those taxes.

The Phillies didn't come away from the case completely empty-handed, however, because the judge also ruled that the interest portion of those payments was not "wages" and thus was not taxable at all. In response to the Phillies' motion for summary judgment, the Government conceded this much of the case. So the Phillies were awarded a refund of $9,108.25, representing the Social Security and Federal Unemployment Taxes they had paid on the interest portion of their payments to players.

The principal portion of the Phillies' payments to their former players was taxable "wages," Judge Yohn held, not "damages" as the Phillies had argued. Judge Yohn's conclusion on this issue was identical to that reached in an earlier case in which the San Francisco Giants had unsuccessfully argued that payments it had made to players were not wages (ELR 22:3:16).

Judge Yohn also ruled that those "wages" were taxable at the rates imposed in 1994 when the payments were actually made, rather than at the lower rates imposed during 1986 and 1987 when the collusion allegedly occurred. This ruling was dictated by a United States Supreme Court decision in an identical case involving payments made to players by the Cleveland Indians (ELR 23:1:11).

The Phillies were represented by Charles B. Blakinger of Hoyle Morris & Kerr in Philadelphia. The Government was represented by Christopher R. Zaetta of the Tax Division of the U.S. Department of Justice in Washington D.C.

The Phillies v. United States, 153 F.Supp.2d 612, 2001 U.S.Dist.LEXIS 6843 (E.D.Pa. 2001)[ELR 23:8:19]

Antitrust claims against sponsors of PGA Senior Tour were properly dismissed, appellate court affirms, because evidence did not show that sponsors conspired with PGA concerning eligibility rules objected to by senior golfer Harry Toscano

Harry Toscano is a 58-year-old professional golfer. Though many readers of the Entertainment Law Reporter would not consider Toscano to be old, he is a "senior" golfer by PGA standards. That's OK with Toscano, because the PGA sponsors a "Senior Tour," and he would happily compete in events on that tour. Unfortunately, PGA eligibility rules limit the field to 78 players on Senior Tour events. And Toscano hasn't been able to qualify as often as he'd like.

Toscano's inability to qualify has frustrated him so much that he filed an antitrust lawsuit against the local and title sponsors of the PGA Senior Tour as well as against the PGA itself. (Local sponsors actually organize and run the tournaments, pursuant to contracts with the PGA itself; title sponsors pay local sponsors for the right to have their names attached to tournaments and the right to display signs and obtain television and print advertising.)

Toscano's suit against the PGA is still pending. But his claims against the sponsors went into the rough, from which he has been unable to retrieve them. They were dismissed by a federal District Court (ELR 21:11:20), and that ruling has been affirmed on appeal.

Writing for the Ninth Circuit Court of Appeals, Judge David Thompson has held that the evidence showed that the local sponsors of Senior Tour events "had no involvement in the establishment or enforcement of the allegedly anti-competitive provisions of the contracts" between the PGA and those sponsors (the provisions concerning golfer eligibility) because "the PGA Tour independently set the terms of the contracts, and the local sponsors merely accepted them."

The evidence also showed, Judge Thompson ruled, that the contracts signed by title sponsors "demonstrate even less involvement with the PGA Tour and its rules than do the local sponsors' contracts. . . ."

As a result, there was no evidence that Senior Tour sponsors entered into any agreements to restrain trade. Judge Thompson affirmed the dismissal of Toscano's suit against the sponsors for that reason.

Toscano was represented by Paul Smith in Dallas. The local sponsors were represented by Andrew

D. Hurwitz in Phoenix. And the title sponsors were represented by J. Thomas Rosch in San Francisco.

Toscano v. Professional Golfers' Association, 258 F.3d 978, 2001 U.S.App.LEXIS 17164 (9th Cir. 2001)[ELR 23:8:20]

Appellate court affirms dismissal of lawsuit against University of Colorado assistant athletic director filed by website operator who was denied access and information given to members of the press

Theodore M. Smith is a Colorado lawyer and a fan of the athletic teams of University of Colorado at Boulder. Indeed, Smith is so big a fan that he even runs a website - www.Netfuff.com - devoted to the University's teams.

For a while, the University gave Smith the same access and privileges it gave other members of the press. But something must have happened in 1998, because in August of that year, David Plati, the University's Assistant Athletic Director for Media Relations, cut Smith off.

Smith responded as a lawyer would: by suing the University and Plati. His case, however, didn't get far. It was dismissed by federal District Judge John Kane (ELR 21:9:21). And that ruling has been affirmed on appeal.

In an opinion by Judge David Ebel, the Tenth Circuit Court of Appeals has held that "Plati's actions did not cause Smith to suffer an injury that would chill a person of ordinary firmness from continuing to publish an internet site. Plati's actions may have made it more difficult to obtain some information regarding the

University's varsity athletic programs, but alternative avenues to information remain open."

Judge Ebel flatly rejected Smith's argument that he has a First Amendment right to gather news about the University's athletic programs, which Plati violated by refusing to provide information about those programs. "It is well-settled that there is no general First Amendment right of access to all sources of information within government control," the judge said.

Nor was Smith entitled to a mandamus order under Colorado state law requiring Plati to give Smith equal access to information given other members of the press. "Mandamus is not appropriate in this case," Judge Ebel ruled, "because it would require a court constantly to be looking over Plati's shoulder and assessing whether, for instance, after consulting with the football coach and the athletic director, Plati's decision to permit five media photographers to set up their cameras on the sidelines during a home football game meant Plati had to grant sidelines access to Smith as well."

Smith abandoned his claims against the University, so the appellate court's affirmance of the dismissal of his claims against Plati brought the case entirely to an end.

Smith was represented by David A. Lane of Miller Lane Kilmer & Griesen in Denver. David Plati was represented by Patrick T. O'Rourke of Montgomery Little & McGrew in Englewood, and David P. Temple of the Office of University Counsel in Denver.

Smith v. Plati, 258 F.3d 1167, 2001 U.S.App.LEXIS 17040 (10th Cir. 2001)[ELR 23:8:20]

Federal court dismisses race and disability discrimination claims against the NCAA in lawsuit by San Jose State soccer player and University of Connecticut football player challenging legality of Prop 16

The National Collegiate Athletic Association has defeated a legal challenge to its freshman eligibility rule, commonly referred to as "Proposition 16." The rule requires student athletes to have achieved a minimum score on the Standardized Achievement Test and a minimum high school grade point average in order to participate in intercollegiate sports as a freshman.

Prop 16 was alleged to violate statutes banning race and disability discrimination in a lawsuit in federal court in Philadelphia. The suit was filed by Kelly N. Pryor, an African American woman who was recruited to play soccer at San Jose State University, and by Warren E. Spivey, Jr., an African American man who was recruited to play football at the University of Connecticut.

In response to the NCAA's motion for summary judgment, Judge Ronald Buckwalter dismissed Pryor's claims under the federal Rehabilitation Act and Americans with Disabilities Act. Although Pryor is learning disabled and alleged that she was denied freshman eligibility because Prop 16 discriminated against her, Judge Buckwalter found that she did not suffer injury from that denial. The reason she didn't suffer injury is that before she entered San Jose State, the NCAA adopted a Bylaw that gives learning disabled students five years to use their four years of eligibility. Thus, even though she couldn't play soccer as a freshman, she remained eligible to play for as many years as non-learning disabled students.

Judge Buckwalter also dismissed the race discrimination claims made by Pryor and Spivey. Both athletes alleged that discrimination was a "motivating factor" in the NCAA's adoption of Prop 16, and that the NCAA was deliberately indifferent to Prop 16's "disparate impact" on minorities. However, only "intentional discrimination" violates the two federal statutes on which the athletes based their claims - Title VI of the Civil Rights Act, and section 1981 of Title 42. And the judge ruled that Pryor and Spivey's allegations did not establish "intentional discrimination."

Pryor and Spivey were represented by Andrew L. Tennis of Straddle Ronyon Stevens & Young in Philadelphia. The NCAA was represented by David P. Burton of Drinker Middle & Breath in Philadelphia.

Pryor v. National Collegiate Athletic Association, 153 F.Supp.2d 710, 2001 U.S.Dist.LEXIS 10183 (E.D.Pa. 2001)[ELR 23:8:21]

University of Cincinnati wins dismissal of lawsuit by basketball player who was declared academically ineligible to play

The University of Cincinnati has defeated a lawsuit filed against it by basketball player Charles Williams.

Williams was a transfer student from Chaffey Junior College. His lawsuit was triggered by his being declared academically ineligible to play by the NCAA. When that happened, the University withdrew an athletic scholarship it had previously offered him and refused to permit him to play in any of the remaining games of the season.

In a factually detailed opinion, Judge Fred Shoemaker of the Ohio Court of Claims has held that the University did not breach its contract with Williams, because the University's obligation to provide him with a scholarship was conditioned on his being academically eligible to play basketball. "Quite frankly," the judge found, "it was [Williams] who breached the terms of the NLI [National Letter of Intent, the contract in question] by his poor academic performance."

The judge also rejected Williams' claims for defamation and intentional infliction of emotional distress, on the grounds that Williams had failed to prove those claims.

Williams was represented by Anne M. Frayne of Dayton. The University of Cincinnati was represented by Betty D. Montgomery, the Ohio Attorney General, in Columbus.

Williams v. University of Cincinnati, 752 N.E.2d 367, 2001 OhioMisc.LEXIS 10 (OhioCt.Cl. 2001)[ELR 23:8:21]

It is not unconstitutional to apply New Jersey Law Against Discrimination to NCAA eligibility decisions, court rules in suit filed by learning disabled student who was declared ineligible to participate in intercollegiate football during freshman year

Learning disabled student Michael Bowers will be able to proceed with the claims he has asserted against the NCAA under the New Jersey Law Against

Discrimination, in addition to other claims under federal law, federal District Judge Stephen Orlofsky has ruled.

In an unsuccessful motion for summary judgment, the NCAA sought dismissal of Bowers' state law claims on the grounds that applying New Jersey state law to the NCAA would violate the Due Process and Dormant Commerce Clauses of the Constitution. The NCAA argued that the Constitution does not permit the New Jersey Law Against Discrimination to be applied to places outside of New Jersey, even if the alleged victim is a New Jersey resident (as Bowers is).

Judge Orlofsky denied the NCAA's motion, because he ruled that "under the circumstances of this case," applying the New Jersey statute to the NCAA would not violate either the Due Process or Dormant Commerce Clauses of the Constitution.

This is Judge Bowers' fifth published opinion in this one case, all in response to pre-trial motions. (See, ELR 20:1:16, 20:8:17, 22:10:23, 23:3:19)

Bowers was represented by Barbara E. Ransom of the Public Interest Law Center in Philadelphia. The NCAA is represented by Charles J. Vinicombe of Drinker Biddle & Shanley in Princeton.

Bowers v. National Collegiate Athletic Association, 151 F.Supp.2d 526, 2001 U.S.Dist.LEXIS 11211 (D.N.J. 2001)[ELR 23:8:22]

West Virginia Supreme Court vacates injunction against NCAA and Southern Conference that allowed student-athlete to wrestle during his fifth year at Appalachian State

Jeremy M. Hart made intercollegiate wrestling history, though not in the way he had hoped. He wanted to become an All-American wrestler during the 2000-2001 season. That season, however, would have been his fifth as a student-athlete at Appalachian State University, and thus, without a waiver, he wouldn't even be able to compete. When the NCAA denied him the waiver he needed, Hart sued the NCAA and the Southern Conference in West Virginia state court.

Hart's suit alleged that by denying him a waiver, the NCAA and the Southern Conference had violated his legal rights and had breached a contract with him. The trial court apparently agreed, or at least agreed that he probably would prevail, because the trial court granted Hart's request for a preliminary injunction that permitted him to compete in 2000-2001.

The judicial record doesn't reflect whether he made All-American or not, though even if he did, it wouldn't have mattered. That's because the NCAA and the Southern Conference appealed; and the West Virginia Supreme Court of Appeals has reversed.

In an unsigned Per Curiam decision, the Supreme Court expressed sympathy with Hart. He missed much, perhaps most, of the 1997-98 season because of a then-new change in NCAA rules concerning weight classes - a rule that effectively disqualified Hart from competing because of decisions made by his coaches, not by him. Hart had unsuccessfully sought a waiver of that rule, so he could compete that season in the weight class his coaches had chosen for him. And that is why he thought - and apparently the trial court thought - he should have been granted an additional season of eligibility.

Despite the Supreme Court's sympathy with Hart, it ruled against him for two reasons. First, "a student's ability to participate in athletic contests is not a right recognized by the law of this State," it explained. Second, Hart had no contractual relationship with either the NCAA or the Southern Conference. For these reasons, the trial court abused its discretion in awarding Hart a preliminary injunction, and thus the Supreme Court vacated the injunction.

Thus the "history" that Hart made took the form of a published judicial decision holding the collegiate wrestlers in West Virginia have no right to wrestle, and have no contract claims against the NCAA or the Southern Conference either.

Hart was represented by David S. Hart of Abrams & Byron in Beckley. The NCAA and the

Southern Conference were represented by Nancy C. Hill of Winter Johnson & Hill in Charleston, Ancil G. Ramey of Steptoe & Johnson in Charleston, and Linda J. Salfrank of Blackwell Sanders Peper Martin in Kansas City.

Hart v. National Collegiate Athletic Association, 550 S.E.2d 79, 2001 W.Va.LEXIS 68 (W.Va. 2001)[ELR 23:8:22]

Former women's basketball coach at Delaware State University loses Title VII employment discrimination suit, because she asserted discrimination against women's athletic program as a whole rather than against her individually

Mary Lamb-Bowman was the head coach of the women's basketball team at Delaware State University for ten years. So it's understandable that as far as she was concerned, gender discrimination against her and against women's athletics at the University were one and the same thing.

That in fact is what she testified in her Title VII employment discrimination lawsuit against the University. But in the eyes of the law, there is big difference between the two. That is why federal District Judge Sue Robinson has granted the University's motion for summary judgment, and has dismissed Lamb-Bowman's lawsuit.

The judge ruled that Lamb-Bowman failed to show that she had suffered discrimination because of her sex. Instead, Lamb-Bowman claimed that there were funding and resource disparities between the women's and men's athletic programs at Delaware State. While these disparities may have violated federal law, the law they may have violated would have been Title IX, rather than Title VII. Thus, Lamb-Bowman failed to show that her rights under Title VII had been violated by the University, the judge held.

Judge Robinson also dismissed Lamb-Bowman's "retaliation" claim against the University. Lamb-Bowman asserted that the University had terminated her employment, because she had complained about disparities between the men's and women's athletic programs. But retaliation for those complaints also would have violated Title IX rather than Title VII.

When Lamb-Bowman first filed her lawsuit against the Delaware State, her complaint did allege claims under Title IX. But in an earlier unpublished ruling, Judge Murray Schwartz dismissed them as time barred. Thus, by the time the Judge Robinson was asked to dismiss the rest of Lamb-Bowman's case, all that remained of it were her Title VII claims.

Lamb-Bowman was represented by Leonard L. Williams in Wilmington. Delaware State was represented by Noel E. Primos of Schmittinger & Rodriquez in Dover.

Lamb-Bowman v. Delaware State University, 152 F.Supp.2d 553, 2001 U.S.Dist.LEXIS 9040 (D.Del. 2001)[ELR 23:8:23]

Contribution to Wichita State scholarship fund OK condition for renewal of basketball season tickets

If Wichita State basketball fans want to renew their season tickets, they'll have to make contributions the university's scholarship fund. The Kansas Court of Appeals has so held, in a case that pitted Wichita State against one of its long-time season ticket holders.

Fred Marrs has been a Wichita State basketball season ticket holder since 1962. Though obviously a committed fan, he objected for some reason to the scholarship fund contribution requirement when the university first imposed it, a couple of years ago.

According to Marrs, his ticket had a renewal-option clause. And though Marrs conceded that the university could increase the price of the tickets from year to year, and even impose other conditions - like "no smoking" in the arena - he asserted that his ticket was a "lease," and that scholarship donations could not be demanded as a condition for renewing it.

Rather than bicker endlessly with Marrs, Wichita State filed a declaratory relief lawsuit against him in Kansas state court, hoping that judges would agree with it. And they have. A trial court ruled that Wichita State could require season ticket holders to make scholarship contributions to renew their tickets. And the Kansas Court of Appeals has affirmed.

The appellate court held that Marrs' season ticket was a "license," rather than a lease, and that the renewal clause simply gave Marrs an option to reserve the use of his seat for another basketball season. However, nothing prevented Wichita State from imposing different conditions on the license or even revoking the renewal option for future seasons, the court held.

The appellate court concluded that since nothing prevented the university from raising the season ticket prices, nothing prevented it from requiring that a portion of the price increase be paid into a special scholarship fund.

Wichita State was represented by Ted Ayres, its General Counsel, and Jeff C. Spahn Jr. of Martin Pringle Oliver Wallace & Swartz in Wichita. Marrs represented himself.

Wichita State University v. Marrs, 28 P.3d 401, 2001 Kan.App.LEXIS 625 (Kan.App. 2001)[ELR 23:8:23]

High school juniors lose lawsuit against "Penthouse" complaining about magazine's publication of photo showing them participating in condom contest

Angie Stanley and Penny Carney were photographed while participating in a contest on a beach in Florida during spring break of their junior year in high school. The contest was to be won by the contestant who could unwrap a condom and place it on a plastic phallus the fastest, while blindfolded. Stanley was the eventual winner.

The photo was later published in Penthouse magazine, in a regular column called "Hard Times."

The two young women responded by filing a lawsuit in federal court in Arkansas against Penthouse's publisher and the condom maker that sponsored the contest. Their lawsuit alleged claims for invasion of privacy by appropriation and false light, libel and infliction of emotional distress.

The case didn't get very far, however. Judge Harry Barnes has dismissed it, in response to defense motions for summary judgment.

Judge Barnes rejected Stanley and Carney's appropriation/privacy claim, because the offending photo showed both of them either fully dressed or wearing a swimsuit, and thus "no reasonable jury could conclude that Penthouse magazine intended or expected that patrons would buy the magazine on the basis of the photo at issue." For that reason, Penthouse did not appropriate the women's names or likenesses for commercial use, the judge held.

The judge also rejected their false light/privacy claim because the photo simply was not false.

The women's libel claim failed, the judge ruled, because the photo was not false, and because all of the evidence showed that the photo's publication simply had not injured their reputations in any way.

Finally, their emotional distress claim was rejected, because "no jury could find that the minor distress, or embarrassment, described by [them] was the kind that no reasonable person could be expected to endure."

Judge Barnes also dismissed the claims against the condom maker, because it played no part in Penthouse's decision to publish the photo.

Stanley and Carney were represented by Bill Wells in Warren, and David O. Bowden in Little Rock. Penthouse's publisher and the condom maker were represented by Phillip E. Kaplan of Kaplan Brewer & Maxey, and John E. Tull of Quattlebaum Grooms Tull & Burrow, in Little Rock.

Stanley v. General Media Communications, Inc., 149 F.Supp.2d 701, 2001 U.S.Dist.LEXIS 17548 (W.D.Ark. 2001)[ELR 23:8:24]

Offer to sell videotapes and transcripts of television programming may not be "commercial," federal appeals court rules in case brought by producer of "America's Defense Monitor"; if not, programming would qualify for showing on public access channels

Robert M. Goldberg has won the right to a trial - or at least further proceedings - in his lawsuit against Cablevision Systems, the cable system in Oyster Bay, New York. Goldberg is a television producer, and his lawsuit seeks a court order requiring Cablevision to resume carrying his program "America's Defense Monitor" - including its 25-second closing segment offering to sell videotapes and transcripts of the program - on the system's public access channel.

Cablevision refused to carry the program unless the closing segment was deleted, because public access channels are only for noncommercial programming. According to Cablevision, the offer to sell videotapes and transcripts was a "commercial." Federal District Judge Leonard Wexler agreed, and granted Cablevision's motion for summary judgment (ELR 21:11:23).

The Second Circuit Court of Appeals has reversed, however. In a decision by Judge Robert Sack, the appellate court has held that "whether an advertisement for tapes and transcripts of a public access program is 'commercial' depends on the advertisement's function." If the advertisement's function is to "produce financial gain," then it is commercial. On the other hand, if its function is to "disseminate more broadly or more permanently the message contained in the program," then it is not commercial.

In Goldberg's case, further proceedings were necessary because the function of the segment offering tapes and transcripts of "America's Defense Monitor" was "inconclusive."

Goldberg was represented by Thomas J. Hillgardner in Jamaica, New York. Cablevision was represented by William M. Savino of Rivkin Radler & Kremer in Uniondale.

Goldberg v. Cablevision Systems Corp., 261 F.3d 318, 2001 U.S.App.LEXIS 18329 (2nd Cir. 2001)[ELR 23:8:24]

Court of Appeals reverses multi-million dollar summary judgment awarded to Robert Harris in contract case against Scholastic Productions; interpretation of ambiguous terms requires jury trial, appellate court rules

When Robert Harris last appeared in these pages, he had just been awarded a $4.5 million judgment against Scholastic Productions, and its parent company Scholastic, Inc. Now that judgment is gone - the victim of a reversal by a federal appeals court.

Harris is the former president of Universal Television and Imagine Films. Back in 1990, he and Scholastic formed a joint venture to produce movies and television programs. Harris contended that their written agreement - a document that was amended 21 times - gave him "Stock Appreciation Rights" in Scholastic stock. (Stock Appreciation Rights are like phantom stock options.) Federal District Judge Alvin Hellerstein agreed with Harris, and granted his motion for summary judgment (ELR 21:12:18).

With interest, the judgment grew to more than $6.1 million. So its reversal must have caused considerable pain to Harris, and considerable pleasure to Scholastic.

Harris' written agreement with Scholastic did give him Stock Appreciation Rights; Scholastic didn't deny that. It merely argued that certain things had to happen before those rights vested. The heart of the dispute between Harris and Scholastic was whether those things had happened. Judge Hellerstein agreed with Harris that they had. But the Second Circuit Court of Appeals was less certain.

In an opinion by Judge Richard Cardamone, the Court of Appeals held that whether or not the essential conditions had occurred depended on the proper meaning of certain terms. One of those terms was the abbreviation "HEI" which in some contexts seemed to refer to Harris' own company, Harris Entertainment, Inc., but in other contexts seemed to refer to the Harris-Scholastic joint venture. Another term was "operations" which may have meant only active movie and TV development and production activities, or may have included post-dissolution winding up activities as well. What's more, if "operations" did not include post-dissolution winding up activities, there was a dispute about whether the joint venture had actually been dissolved.

For these reasons, the disputed terms are "susceptible to different and distinct meanings in considerable tension with one another," Judge Cardamone said; and therefore, "the resolution of this litigation must be made by a jury, which considering the disputed language in the light of extrinsic evidence, can get at the parties' intended meaning."

Scholastic was represented by Michael J. Chepiga of Simpson Thacher & Bartlett in New York City. Harris was represented by Alfred R. Fabricant of Ostrolenk Faber Gerb & Soffen in New York City.

Scholastic, Inc. v. Harris, 259 F.3d 73, 2001 U.S.App.LEXIS 16961 (2nd Cir. 2001)[ELR 23:8:25]

Some securities fraud claims brought by noteholders against Livent and others are dismissed, though other claims are not

When Livent went bankrupt in 1998, a slew of securities fraud lawsuits were filed against the company and others related to it. Some of those lawsuits were filed by shareholders and others by noteholders. As usually happens in cases of this type, many of the defendants filed motions to dismiss.

The noteholders' lawsuits have been consolidated before Judge Victor Marrero in federal District Court in New York City. In a 75-page opinion, Judge Marrero has granted the dismissal motions filed by several defendants, though he has denied the motions of some.

The shareholders' lawsuits were consolidated before Judge Robert Sweet, also in federal court in New York City. Earlier, Judge Sweet granted dismissal motions filed by some of the defendants in those cases and also denied the motions of others (ELR 21:12:17).

Judge Marrero's rulings in the noteholder case involve complicated issues of federal securities law - issues that will be of far greater interest to securities lawyers than to those whose clients are in the entertainment business. Entertainment lawyers may find interesting, however, Judge Marrero's 10-page explanation of the noteholders' allegations. Though the case is still in pre-trial stages, and thus those allegations have not been proved, they do illustrate the ways in which it may be possible to misrepresent the financial condition of companies that produce plays and musicals. And that insight may be useful to those who do business with such companies.

In re Livent, Inc. Noteholders Securities Litigation, 151 F.Supp.2d 371, 2001 U.S.Dist.LEXIS 8933 (S.D.N.Y. 2001)[ELR 23:8:25]

Kingvision is awarded $15,000 for unlicensed exhibition of Chavez-Gonzalez boxing match

Kingvision Pay-Per-View has been awarded $15,000 in damages in its lawsuit against a grocery store that exhibited to its customers, without a license, the 1998 fight between Julio Cesar Chavez and Miguel Angel Gonzalez.

Federal Magistrate Judge James Francis assessed the Jasper Grocery, a market in the Bronx, with $5,000 in damages - an amount that the judge himself said was "well in excess of the probable licensing fee and . . . more than the store would have made in profits on a per-customer basis." Moreover, judge Francis added an additional $10,000 in "enhanced damages," because he concluded that Jasper Grocery had "used the fight to draw potential customers who would then spend money inside the store."

Kingvision Pay-Per-View was represented by Wayne Lonstein in Ellenville. Jasper Grocery was represented by James E. Young in Hackensack.

Kingvision Pay-Per-View, Ltd. v. Jasper Grocery, 152 F.Supp.2d 438, 2001 U.S.Dist.LEXIS 9677 (S.D.N.Y. 2001)[ELR 23:8:25]

Previously Reported:

The Federal Communications Commission has adopted a Notice of Proposed Rule Making seeking comments on new equal employment opportunity (EEO) rules for broadcasters. The proposed rules respond to the Court of Appeals decision in MD/DC/DE Broadcasters Association v. FCC, which held that a portion of the outreach requirements of the broadcast EEO rule adopted in 2000 was unconstitutional (ELR 23:1:16).

The decision in which the Ninth Circuit Court of Appeals affirmed a $31.7 million jury verdict in favor of Columbia Pictures in its copyright infringement case against the owner of TV stations that continued to broadcast programs after Columbia terminated the stations' licenses for non-payment of fees (ELR 23:4:11) has been published. Columbia Pictures TV v. Krypton Broadcasting, 259 F.3d 1186, 2001 U.S.App.LEXIS 15391 (9th Cir. 2001).

The High Court of Australia has agreed to hear Dow Jones' appeal from a lower court ruling that held that an allegedly defamatory article about Melbourne businessman Joseph Gutnick that appeared in "Barrons Online" was published in Australia, even though Dow Jones' web servers are in New Jersey, and thus courts in

Australia have jurisdiction to hear Gutnick's defamation action (ELR 23:6:7).
[ELR 23:8:26]

DEPARTMENTS

In the Law Reviews:

Cardozo Arts & Entertainment Law Journal has published Volume 19, Number 2 including the papers from the Recording Academy Entertainment Law Initiative 2001 Legal Writing Contest with the following articles:

White House Anti-Drug Policy: Statutory and Constitutional Implications by Ariel Berchadsky, 19 Cardozo Arts & Entertainment Law Journal (2001)

Napster Through the Scope of Property and Personhood: Leaving Artists Incomplete People by Zachary Garsek, 19 Cardozo Arts & Entertainment Law Journal (2001) (Recording Academy Winner)

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