INTERNATIONAL DEVELOPMENTS

Toronto Blue Jays' play-by-play radio announcer Tom Cheek does not have to pay income tax in Canada, because he is a U.S. resident and not a "radio artiste," Tax Court of Canada decides

Tom Cheek is a U.S. citizen who lives in Florida. As such, he pays income tax in the U.S., of course. Cheek also is the play-by-play radio announcer for the Toronto Blue Jays - a job that he performs from the press box in the SkyDome in Toronto. That means that at least some of Cheek's income is earned from services performed in Canada. And for that reason, Canada's Minister of National Revenue wanted him to pay income tax in Canada too.

As a result of a tax treaty between Canada and the U.S., residents of the United States generally do not

have to pay income tax in Canada. They do if they have a "regularly available" "fixed base" in Canada. But even the Minster of National Revenue acknowledged that the SkyDome was not a "fixed base regularly available" to Cheek. So although Cheek filed tax returns in Canada (for 1993 through 1996), he reported and then deducted his income from announcing Blue Jays games in Canada, which left him with no tax to pay there.

Tax law is never that simple, of course; and it wasn't in Cheek's case either. The Minister pointed to yet another provision of the Canada-U.S. tax treaty - a provision that allows Canada to tax the Canadian income of a U.S. resident who is an "entertainer, such as a . . . radio . . . artiste." (The treaty allows Canada to tax the income of U.S. resident musicians and athletes, too. And it allows the U.S. to tax the income of Canadian resident entertainers, musicians and athletes.)

According to the Minister, Cheek is a "radio artiste," and as such, has to pay tax in Canada.

Generally speaking, it's a compliment to be called an "artiste," but Cheek insisted that he isn't. According to Cheek, he's just "a sports broadcast journalist," and as such, he doesn't have to pay Canadian income tax.

Canadian Tax Court Judge M.A. Mogan has agreed with Cheek. The judge reasoned that "a radio artiste is a person who by some skillful and creative performance . . . can attract an audience to hear that person herself or himself. . . . Jack, Fred Allen, Bing Crosby and Ma Perkins were radio artistes. Radio audiences listened to people like Jack Benny [and] Bing Crosby . . . just to hear them perform; not to hear them describe how someone else was performing."

Cheek "may be able to hold the attention and interest of the fan with his . . . commentary but he is not

the reason why the fan turns on the radio," the judge observed. "He is a very skillful and experienced radio journalist," Judge Mogan, but Cheek "is not a radio artiste."

Cheek was represented by Clifford L. Rand and David Muha. The Minister of National Revenue was represented by David E. Spiro.

Editor's Note: The Cheek case seems to suggest that members of U.S.-based American League teams who play against the Blue Jays in Toronto may have to pay income tax in Canada on a portion of their baseball salaries, even though Cheek himself did not. This is so, because baseball players are "athletes," and they earn a portion of their salaries for playing services they render in Canada. However, The Canada-U.S. tax treaty also provides - in a paragraph that wasn't relevant to Cheek's case and thus was not quoted by the court - that "The provisions of this Article shall not apply to the income

of an athlete in respect of an employment with a team which participates in a league with regularly schedule games in both Contracting States." In other words, the treaty does not authorize Canada to tax the income of U.S. residents who play for American League teams that are based in the U.S., because the American League regularly schedules games in both Canada and the U.S.

Cheek and Her Majesty the Queen, Case No. 1999-1113(IT)G (Tax Court of Canada 2002), available at http://decision.tcc-cci.gc.ca/en/2002/html/2002tcc19991113.html [ELR 24:1:4]

European Union directive requires members to adopt (or improve) artist's resale royalty right by January 1, 2006

The copyright laws of most members of the European Union contain what is known as an "artist's resale royalty right." It gives the creators of works of visual art the right to receive a percentage of the resale price of their artworks, when those works are sold by their owners, under certain circumstances.

Though most EU member nations have such a right, not all do. And the exact details of the right vary from country to country, even among those EU members that have it. They differ, for example, with respect to the types of works covered, those who are entitled to receive royalties, the royalty rate, the transactions that require the payment of royalties, and the basis on which the royalties are calculated.

These variations will disappear by January 1, 2006, as a result of a new EU Directive with the descriptive if cumbersome title "Directive 2000 of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art."

The Directive requires EU members to enact a resale royalty right, or to modify their existing resale rights, so that royalties are paid:

* in connection with the resale of art works such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs (but not original manuscripts of writers and composers),

* if the seller, buyer or intermediary is an art market professional, such as a salesroom, art gallery or art dealer, and

* if the resale price is 3,000 Euros (about $2,800)

or more (unless the seller acquired the work directly from the artist less than three years before the resale and the resale price is less than 10,000 Euros).

The royalty will be payable:

* by the seller,

* at a rate based on the sales price, beginning at 4% of the first 50,000 Euros and decreasing, in stages, to 0.25% of the sales price in excess of 500,000 Euros, with a maximum royalty of 12,500 Euros ($11,750).

Artists who are not nationals of European Union members are entitled to receive these royalties too, if - but only if - the laws of their own countries provide for the payment of resale royalties to artists from the European Union. It therefore appears that artists from the United States will not qualify to receive royalties from the resale of their artworks in the European Union, because the United States does not have a federal resale royalties act. The state of California does

have such an act, but it benefits only those artists who citizens of the United States, or are residents of California (for at least two years), at the time their artworks are resold in California (Civil Code § 986).

If an artist is deceased, the artist's successors are entitled to royalties payable in connection with the resale of his or her works for a period of 70 years after the artist's death (the same duration as the duration of copyright in the European Union).

Directive 2000 of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art, EU PE-CONS 3628/01, available at http://europa.eu.int/comm/internal_market/en/intprop/news/resale_en.pdf [ELR 24:1:4]

IN THE NEWS

Movie studios win dismissal of lawsuit based on FTC violence report complaining that ads for R-rated movies are "deceptive and misleading"

In the immediate wake of the Federal Trade Commission's report that the entertainment industry markets violent movies to those younger than 17 years of age (ELR 22:4:7), an organization called Citizens for Fair Treatment sued eight studios for allegedly using "deceptive and misleading" advertisements to promote their R-rated movies.

California has a statute that prohibits "deceptive and misleading" ads. But it also has a statute that protects the exercise of free speech rights. The free speech statute is known as an "anti-SLAPP statute." ("SLAPP" is an acronym for Strategic Lawsuit Against

Public Participation.) It authorizes the striking - that is, the dismissal - of any claim based on "any act" a person may take "in furtherance of . . . free speech . . . in connection with a public issue. . . ."

The studios made a motion to strike Citizen's complaint under California's anti-SLAPP statute, but they were not at first successful. A trial court judge denied their motion, on the grounds that Citizens' claim was not based on the studios' exercise of their free speech rights in connection with a public issue. But the California Court of Appeal has reversed and has ordered the trial court to grant the studios' motion and to enter judgment in their favor, with costs.

In an opinion marked "Not to be Published in the Official Reports," Justice Fred Woods has held that the studios' marketing of their movies qualified as an "act," within the meaning of the anti-SLAPP statute. And he held that "movie marketing qualifies as being 'in

connection with a public issue. . . .'" It didn't matter that the studios make and advertise movies to entertain people, or even that they do it to make a profit. What matters, Justice Woods explained, is that "millions of people . . . attend films each year," and that is what makes them a public issue.

Moreover, movie advertising furthers the studios' exercise of their free speech rights, because movies are protected by the First Amendment, and "movie advertising facilitates the distribution and dissemination of the films." This meant that in order for Citizens to defeat the studios' motion, Citizens had to show it was likely to succeed at trial, on its "deceptive and misleading" advertisement claim. The studios argued that Citizens had not made such a showing; and Justice Woods agreed with them.

Citizens offered two types of evidence in an effort to show it would win: a copy of the Federal

Trade Commission's 104-page report; and a selection of newspaper articles. Neither did the job. The FTC report did not prove the truth of the hearsay matters it contained. And the newspaper articles were mere hearsay as well.

Citizens for Fair Treatment were represented by Norman B. Blumenthal of Blumenthal & Markham. The studios were represented by Robert M. Schwartz of O'Melveny & Myers and by William E. McDaniels of Williams & Connolly.

Citizens for Fair Treatment v. Time Warner Entertainment Co., Case No. B148565 (Cal.Ct.App. 2002), unpublished but available at www.EntertainmentLawReporter.com/decisions/240106.pdf [ELR 24:1:6]

RECENT CASES

Court of Appeals affirms dismissal of most, though not all, of Playboy's trademark and dilution claims against Terri Welles, ruling that her use of "Playmate of the Year" and other Playboy marks on her website are non-infringing nominative uses; court also affirms dismissal of Welles' defamation and emotional distress counterclaims

The lawsuit between Playboy Terri Welles isn't over yet, though it is a much narrower case now than it was when Playboy first sued her and she counterclaimed against it. As a result of recent rulings by the Court of Appeals, all that remains of the case is Playboy's contention that Welles' repeated use of "PMOY '81" in the wallpaper of the pages on her website infringes or dilutes its trademark.

Welles was the Playboy Playmate of the Year in 1981, and that is what "PMOY '81" stands for. Welles also used the terms "Playboy," "Playmate" and "Playmate of the Year" on pages of her website and as metatags.

Playboy sued her for doing so, but never had much success with the case. Federal District Judge Judith Keep denied Playboy's request for a preliminary injunction, and the Court of Appeals affirmed in an unpublished four-paragraph order (ELR 20:8:23). Then, Judge Keep granted Welles' motion for summary judgment, dismissing Playboy's case entirely (ELR 21:12:14). In a separate unpublished ruling, Welles' defamation and emotional distress counterclaims against Playboy were dismissed as well. Both sides appealed.

In an opinion by Judge T.G. Nelson, the Court of Appeals has affirmed most of both rulings. That is, the

appellate court affirmed the dismissal of Playboy's trademark infringement and dilution claims against Welles based on her use of Playboy trademarks in the headlines, mastheads and metatags of her website and in various banner ads. Judge Nelson concluded that these uses were non-infringing "nominative" uses, because they did not imply that Playboy sponsored or endorsed her site, they merely served to identify Welles as the past "Playboy of the Year" she was, and she only used trademarked words, not the font or symbols associated with Playboy's marks.

On the other hand, Judge Nelson concluded that Welles' repeated use of "PMOY" in the wallpaper of the pages of her website failed the "nominative use" test.

The appellate court therefore remanded the case to the District Court, so it could determine whether "PMOY" is a protected trademark.

In a separate opinion, marked "not appropriate for publication" and "not [to] be cited," the appellate court also affirmed the dismissal of Welles' counterclaims. It affirmed the dismissal of her defamation counterclaim, on the grounds that she is a public figure and had not shown that Playboy recklessly made false statements about her. It also affirmed the dismissal of her infliction of emotional distress counterclaim, because even though Hugh Hefner's conduct towards Welles was "reprehensible," it wasn't "outrageous" enough to justify such a claim.

Playboy was represented by Anthony Glassman of Glassman Browning & Saltsman in Beverly Hills. Welles was represented by David J. Noonan of Post Kirby Noonan & Sweat in San Diego.

Playboy Enterprises, Inc. v. Welles, 279 F.3d 796, 2002 U.S.App.LEXIS 1561 (9th Cir. 2002); Playboy

Enterprises, Inc. v. Welles, 30 Fed.Appx. 734, 2002 U.S.App.LEXIS 1931 (9th Cir. 2002) [ELR 24:1:7]

Producer of "Who Wants to be a Millionaire" did not breach contract with contestant by asking question that had two possible answers

A New York state court has dismissed a lawsuit against those involved in producing and broadcasting the television quiz show "Who Wants to be a Millionaire." The lawsuit was filed by a former contestant who was eliminated, with just $1,000 in prize money, after he answered the tenth of fifteen questions incorrectly.

Actually, the contestant, Robert Gelbman, filed suit because he contended that the question he missed - a question involving the Zodiac calendar - actually had two correct answers, and that his was one of them.

However, in a release and rules signed by Gelbman, the show's producers had reserved the right to decide all matters concerning the game, including those involving questions and answers.

Judge Charles Edward Ramos held that "Having a question with two possible answers is not a breach of any provision of the contract that [Gelbman] signed." The judge also rejected Gelbman's bad faith, adhesion contract and emotional distress claims.

Gelbman was represented by George J. Silver of Silver & Santo in New York City. Valleycrest Productions, Walt Disney, and ABC were represented by James W. Quinn of Weil Gotshal & Manges in New York City.

Gelbman v. Valleycrest Productions, Ltd., 732 N.Y.S.2d 528, 2001 N.Y.Misc.LEXIS 381 (N.Y.Sup. 2001)[ELR 24:1:7]

Nielsen Media not liable to producer of barter-syndicated TV programs for sampling error in measurement of African-American viewers

SI Communications has lost its lawsuit against Nielsen Media Research - a lawsuit in which SI complained that it suffered $10 million in lost profits as a result of sampling errors in Nielsen's measurement of African-American TV viewers. Federal District Judge Deborah Batts has dismissed SI's case in response to Nielsen's motion for summary judgment.

SI produces television programs for barter syndication, so its advertising income is closely tied to the number of viewers those programs attract. To get that information, SI entered into a contract with Nielsen pursuant to which Nielsen agreed to provide SI with television rating estimates of African-American

viewers, the audience to which SI aims its programs.

Nielsen places meters in some 5,000 households to make its ratings estimates - a process that Nielsen acknowledges is subject to sampling errors. Ratings for subsets of the national audience - such as ratings for the African-American audience - are subject to greater sampling errors than ratings for the national audience as a whole; and Nielsen makes this fact known to its clients. Indeed, this information is made part of Nielsen's contracts, including the one it had with SI.

Nielsen's contract with SI contained another clause as well - a "Limitation of Liability" clause by which Nielsen disclaimed any warranties concerning its analyses and by which SI expressly waived claims against Nielsen for damages caused by inaccuracies in Nielsen's data.

SI nevertheless argued that Nielsen breached their contract's implied covenant of good faith and fair

dealing. Judge Batts ruled otherwise. She held that notions of good faith could fill gaps in a contract, but could not block the use of terms - like Nielsen's "Limitation of Liability" clause - that actually appear in a contract.

In an effort to avoid that clause, SI argued it was unconscionable, but Judge Batts disagreed. "[I]t was not unreasonable," the judge said, "for Nielsen to attempt to protect itself from liability, as it clearly did not hold itself out as a guarantor of the accuracy of the ratings estimates."

SI was represented by John DeMaio in New York City. Nielsen was represented by John J. Kuster of Sidley & Austin in New York City.

SI Communications, Inc. v. Nielsen Media Research, 181 F.Supp.2d 404, 2002 U.S.Dist.LEXIS 1127 (S.D.N.Y. 2002)[ELR 24:1:8]

Duke University must pay Heather Sue Mercer almost $2.4 million in damages and fees, because jury found that it discriminated against her on the basis of sex when football coach cut her from team after allowing her to try out

Duke University let Heather Sue Mercer try out for its football team, and as a result of that, and other things, it has been ordered to pay her almost $2.4 million in damages and legal fees, in a Title IX discrimination case.

Duke allowed Mercer to try out for the team as a place kicker, and she made it. Later, however, the coach cut her from the team, for reasons more related to sex discrimination than lack of ability, according to Mercer. The jury agreed and awarded her $1 in actual damages and $2 million in punitive damages.

The irony behind Mercer's legal victory is that because football is a contact sport, Title IX didn't require Duke to allow her to try out for the team at all. Initially, a federal District Court dismissed the case, at Duke's request, for this very reason (ELR 23:3:19). But the Court of Appeals reversed, holding that once she made the team, after being allowed to try-out, Duke couldn't discriminate against her on the basis of sex in deciding whether to keep her on the team (ELR 21:9:22). The appellate court therefore remanded the case to the District Court, for the trial Mercer thereafter won.

After the jury's stunning verdict, Duke made a motion for judgment as a matter of law, or alternatively, for a new trial or a reduction in the amount of damages. Mercer countered with a motion of her own, for attorneys' fees and costs. Once again, Mercer came out on top.

Federal District Judge James Beatty denied all of Duke's motions. The judge ruled that it was up to the jury, rather than him, to decide whether the coach's decision was motivated by gender; and the jury decided that it was. It also was up to the jury to decide whether Duke had been deliberately indifferent to the coach's discrimination; and again, the jury decided that Duke was. Finally, Judge Beatty determined that the jury had heard sufficient evidence to support its verdict in Mercer's favor, and that $2 million in punitive damages was not excessive.

Mercer's lawyers asked for almost $341,000 in fees and $48,000 in costs - amounts that Duke didn't contest, if the court denied their motions for judgment or a new trial. Since Judge Beatty did deny Duke's motions, he also granted Mercer's lawyers' requests for fees and costs.

According to news accounts, Duke has appealed.

Mercer was represented by Martha Melinda Lawrence and Burton Craige of Patterson Harkavy & Lawrence in Raleigh. Duke was represented by John M. Simpson and Michelle C. Pardo of Fulbright & Jaworski in Washington D.C.

Mercer v. Duke University, 181 F.3d 525, 2001 U.S.App.LEXIS 23229 (M.D.N.C. 2001) [ELR 24:1:8]

Time, Inc., wins reversal of $10.7 million defamation judgment awarded to boxer/actor "Tex" Cobb based on statements in "Sports Illustrated"; appellate court finds insufficient evidence of actual malice

"Tex" Cobb is a professional boxer and character actor. In 1993, he also was one of the subjects of a

Sports Illustrated article - something that athletes usually like to be. Cobb, however, wasn't happy about his moment in that prominent sports magazine. Titled "The Fix is In," the article reported, among other things, that Cobb had participated in a "fixed" boxing match, and it suggested that after the fight, he used cocaine with his opponent and promoter.

As sometimes happens in response to articles like this, its publication was followed by a defamation lawsuit. Cobb denied the article's allegations about him were true, and a jury apparently agreed. It awarded him $8.5 million in compensatory damages and another $2.2 million in punitives. The trial judge denied Time's post-trial motions and entered a judgment for the full $10.7 million.

As always happens after defamation judgments like that, an immediate appeal followed. Since $10.7 million is a lot of money, even to Time, Inc., the

outcome of the appeal was very pleasing to Time, no doubt. In an opinion by Judge Cornelia Kennedy, the Court of Appeals reversed the judgment, and remanded the case to the trial court for entry of a judgment in favor of Time.

Because Cobb was a public figure, he had to prove that the article was wrong and that Sports Illustrated published it with "actual malice." After carefully reviewing the evidence - especially the investigation Sports Illustrated did before the article was published - Judge Kennedy concluded that there was insufficient evidence to support the jury's conclusion that the article was published with actual malice.

Judge Kennedy explained that this required the judgment to be reversed, because "[t]he jury's verdict cannot stand without significantly infringing on the 'breathing space' that the [Supreme] Court has carved

out for the freedom of speech."

Cobb was represented by George Bochetto of Bochetto & Lentz in Philadelphia. Time, Inc., was represented by R. Eddie Wayland of King & Ballow in Nashville and by Floyd Abrams of Cahill Gordon & Reindel in New York City.

Cobb v. Time, Inc., 278 F.3d 629, 2002 U.S.App.LEXIS 1231 (6th Cir. 2002)[ELR 24:1:9]

Court denies Larry Flynt's request for preliminary injunction against Secretary of Defense that would have allowed "Hustler Magazine" correspondents to accompany American combat troops in Afghanistan

Hustler Magazine isn't known, particularly, for its coverage of international or military affairs. But

publisher Larry Flynt apparently wants it to be. That is, Flynt wanted Hustler Magazine correspondents to accompany American troops on combat missions in Afghanistan, and even asked the Department of Defense for permission to have them do so.

An Assistant Secretary of Defense responded to Flynt's request by advising him that the only U.S. troops then in Afghanistan were involved in "special operations" that made it difficult for the media to be with them. But she assured Flynt that the Department of Defense would "attempt" to allow greater press access to troops "as conditions in Afghanistan evolved." And she closed by advising Flynt to contact Commander Jeffrey Alderson "to make arrangements" for access of some sort.

Not satisfied with that response, Flynt filed suit against Secretary of Defense Donald Rumsfeld and the Department of Defense, seeking an injunction that

would have restrained them from prohibiting Hustler Magazine correspondents from doing what Flynt wanted them to.

Federal District Judge Paul L. Friedman seemed receptive to Flynt's legal arguments, in theory. Judge Friedman was "persuaded," he said, "that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations to protect the safety and security of both the journalists and those involved in those operations, as well as the secrecy and confidentiality of information whose dissemination could endanger United States soldiers or our allies or compromise military operations."

The judge nevertheless denied Flynt's motion for a preliminary injunction. Judge Friedman did so, he

explained, because the record did not show that the Department of Defense had actually denied Flynt's request. Moreover, because circumstances in Afghanistan have changed, the judge could not say that if Flynt had contacted Commander Alderson, as advised, Flynt's request would not have been granted - "or would not now be granted" - at least in part.

As a result, the judge concluded that Flynt failed to show he would suffer irreparable harm if a preliminary injunction were denied. And deny it, the judge did.

Flynt was represented by John Perazich in Washington D.C. Secretary Rumsfeld and the Department of Defense were represented by John R. Griffiths of the U.S. Department of Justice, in Washington D.C.

Flynt v. Rumsfeld, 180 F.Supp.2d 174, 2002

U.S.Dist.LEXIS 145 (D.D.C. 2002)[ELR 24:1:9]

Graphic artist is at least joint author, and maybe sole author, of artworks created for album CD insert and promo postcard

Recording artist Philmore Fleming hired graphic artist Colleen Miles to create artworks for Fleming's self-released CD, "Philmore: Dreams of a Journeyman." Fleming agreed to pay Miles $50 an hour for her time, but they didn't put their deal in writing, let alone in a "work made for hire" agreement. Then Fleming failed to pay Miles, so Miles registered the copyrights to two pieces of artwork - the CD's insert and a promotional postcard - herself. And she persuaded the company that was supposed to print materials for Fleming, not to, on the grounds that she owned their copyrights.

These events triggered two lawsuits and an

arbitration, the procedural details of which are complicated. The part that may be of interest - to those other than Fleming and Miles - is the case in which Fleming sued Miles for copyright infringement, and lost.

Federal Magistrate District Judge John Jelderks has held that Miles is at least a co-author of the disputed artwork, and maybe its sole author. This is so, the judge concluded, even though Fleming contended that "he furnished the ideas and words, directed the work, and in some cases supplied art . . . which was incorporated into the final product."

The judge noted that Miles' artwork was "considerably more sophisticated" than what Fleming had supplied. However, the judge's ruling was in response to cross-motions for summary judgment; and on the evidence presented in those motions, the judge was unable to determine whether this meant that Miles

was the sole author of the artwork, or whether Fleming was a joint author too.

Fleming was represented by William E. Goshert of DuBoff Dorband Cushing & King in Portland. Miles was represented by Lake James Perriguey of Law Works in Portland.

Fleming v. Miles, 181 F.Supp.2d 1143, 2001 U.S.Dist.LEXIS 9482 (D.Or. 2001)[ELR 24:1:10]

Disc jockey company was not entitled to indemnity under "advertising injury" provision of insurance policy for $650,000 paid to RIAA to settle copyright infringement case resulting from company's distribution of unlicensed compilation discs, appellate court affirms

GRE Insurance has no obligation to indemnify its insured, Complete Music, Inc., for $650,000 Complete paid to the RIAA in settlement of a copyright infringement lawsuit, a federal appellate court has affirmed.

Complete Music operates a disc jockey service. It was sued by the RIAA for distributing unlicensed compilation discs to its disc jockey franchisees.

GRE issued an insurance policy to Complete Music that contained an "advertising injury" clause. The clause defines an "advertising injury" as one "arising out of . . . Infringement of copyright. . . ." Nevertheless, in a declaratory relief suit brought by GRE against Complete Music, a District Court held that the policy did not cover the copyright infringement claim made by the RIAA. And in an opinion by Judge Diana Murphy, the Court of Appeals has affirmed.

Judge Murphy reasoned that ". . . the insured

must do more than simply show that the infringing product was advertised or sold." The insured also must show a connection between the advertising and the infringement. Complete Music's advertisements were for franchisees, to which Complete then sold infringing discs. But that connection was not sufficient, Judge Murphy held, because it was Complete's distribution of the infringing discs - not the advertising for franchisees - that resulted in the infringement.

GRE Insurance was represented by Michael D. McClellan in Omaha. Complete Music was represented by John A. Kinney in Omaha.

GRE Insurance Group v. Complete Music, Inc., 271 F.3d 711, 2001 U.S.App.LEXIS 24341 (8th Cir. 2001)[ELR 24:1:10]

Federal court sends back to state court a TV production company's lawsuit alleging producer of "Queen of Swords" TV series breached contract for development of proposed series "Gitana"

Success, it is said, has many fathers - an aphorism well illustrated by the syndicated television series "Queen of Swords." When last that series appeared in the pages of the Entertainment Law Reporter, it was the subject of a copyright and trademark infringement lawsuit filed in federal court by Sony Pictures against the series' producer, Fireworks Entertainment, Inc. In that case, Sony alleges that "Queen of Swords" copied intellectual property owned by Sony by virtue of its production of the movie "Mark of Zorro." (ELR 23:5:8, 23:9:15)

Another company too claims to be the creator of "Queen of Swords" - Chesler/Perlmutter Productions. It

made this claim in a breach of contract and unjust enrichment lawsuit it filed against Fireworks Entertainment in California state court. In that case, Chesler/Perlmutter alleges that it developed a proposed series called "Gitana," that it entered into agreements with Fireworks to jointly develop and produce "Gitana" or anything based on it, and that "Queen of Swords" was based on "Gitana" but without Chesler/Perlmutter's involvement.

The Chesler/Perlmutter lawsuit said nothing about copyright infringement. But Fireworks contended that copyright is really what the case is about. As a result, Fireworks removed the case to federal court where it eventually was assigned to Judge Audrey Collins, because she is judging Sony's "Queen of Swords" case too.

Chesler/Perlmutter prefers state to federal court, so it asked Judge Collins to send the case back. And

she has.

Judge Collins ruled that Chesler/Perlmutter's state law claims for breach of contract are not completely preempted by federal copyright law, because those claims allege elements that are not protected by copyright law. That is, Chesler/Perlmutter alleged that Fireworks agreed to pay it at specific times for developing the "Gitana" concept, agreed to pay it a specific amount for an exclusive right to use that concept, agreed to employ one its employees as Executive Producer of any series based on "Gitana," and agreed to consult with it concerning all business and creative matters concerning the series.

Since Chesler/Perlmutter's state law claims are not preempted, and since the company did not allege the federal claim of copyright infringement, Judge Collins concluded that her court does not have jurisdiction to hear the case. She therefore granted the

company's motion to remand it to state court.

Chesler/Perlmutter was represented by Jonathan Levitan in Los Angeles. Fireworks Entertainment was represented by Jeffrey Kravitz of Lord Bissell & Brook in Los Angeles.

Chesler/Perlmutter Prods., Inc. v. Fireworks Entertainment, Inc., 177 F.Supp.2d 1050, 2001 U.S.Dist.LEXIS 21281 (C.D.Cal. 2001)[ELR 24:1:11]

Chamber orchestra clarinet player was independent contractor, rather than employee, so court dismisses musician's disability discrimination lawsuit

A federal District Court in Minnesota has dismissed clarinet player Shelley Hanson's disability discrimination lawsuit against the Minnesota Sinfonia

Chamber Orchestra, because the court found that she was an independent contractor rather than an employee of the Orchestra. The federal Americans with Disabilities Act and the Minnesota Human Rights Act only protect true "employees" against employment-related discrimination; neither law protects independent contractors.

Hanson was a member of the American Federation of Musicians, as were all Chamber Orchestra musicians. The musicians are governed by AF of M rules and a code of conduct, and the Orchestra pays them "union list prices on a 'per set' basis." No payroll taxes are deducted, however, nor does the Orchestra provide fringe benefits of any kind. In fact, the musicians provide their own instruments and even their own music stands.

In response to cross-motions for summary judgment, Federal Magistrate Judge Franklin Noel

determined - on the basis of these facts and others - that Hanson was not an Orchestra employee. He therefore recommended that summary judgment be granted in favor of the Orchestra. And District Judge James Rosenbaum has done so.

Hanson was represented by Jill Clark in Golden Valley. The Sinfonia Chamber Orchestra was represented by Louis Joseph Speltz of Bassford Lockhart Truesdell & Briggs in Minneapolis.

Hanson v. Friends of Minnesota Sinfonia, 181 F.Supp.2d 1003, 2002 U.S.Dist.LEXIS 1115 (D.Minn. 2002)[ELR 24:1:11]

Metropolitan Opera must arbitrate former dancer's age discrimination claim, New York appellate court affirms

The Metropolitan Opera has been accused of age discrimination by a former dancer. The claim was initiated on the dancer's behalf by the American Guild of Musical Artists. And the Guild's process of choice was arbitration.

The Opera objected to arbitration, even though its collective bargaining agreement with the Guild prohibits age discrimination and provides for arbitration of any disputes about the agreement's interpretation, application and alleged breach. However, the collective bargaining also provides that a decision not to "reengage" a dancer must be reviewed by a panel of dance experts after an audition.

Apparently, the Opera contended that the

audition procedure should be used in connection with the dancer's claim, rather than arbitration. The Opera made this contention in a lawsuit that sought a court order staying the arbitration the Guild had initiated. But a New York trial court denied the Opera's request for such an order.

On appeal, the Opera did no better. In a very short decision, the Appellate Division has held that the dancer's age discrimination claim is arbitrable under the collective bargaining agreement, and that even the question of whether the review-by-audition procedure should be used instead is itself a question for the arbitrator. The Appellate Division therefore affirmed the trial court's decision.

The Metropolitan Opera was represented by Deborah E. Lans. The American Guild of Musical Artists was represented by Manlio DiPreta.

Metropolitan Opera Association v. American Guild of Variety Artists, 736 N.Y.S.2d 323, 2002 N.Y.App.Div.LEXIS 122 (App.Div. 2002)[ELR 24:1:11]

Author of "Career Misconduct," a book that is critical of owner of Chicago Blackhawks, loses bid to invalidate city ordinance that prohibits sale of book on sidewalk outside Blackhawk's home arena

Mark Weinberg is not a fan of Chicago Blackhawks owner Bill Wirtz. We know this because Weinberg is the author of Career Misconduct, a book that criticizes Wirtz. What better place to sell such a book, Weinberg thought, than on the sidewalks outside the United Center, the Blackhawks' home arena, just prior to the start of Blackhawks' games? And that is

what Weinberg did, for several weeks.

After a while, however, Chicago police told Weinberg he couldn't sell his book within 1000 feet of United Center any more, because he didn't have a "peddler's permit" authorizing him to do so. Indeed, a City of Chicago ordinance requires anyone who sells anything except newspapers within that 1000-foot zone to have a permit.

This information made the Chicago ordinance an additional object of Weinberg's criticism. But instead of writing another book (or law review article), he filed a lawsuit against the city, alleging that the ordinance doesn't apply to the sale of his book, and if it does, it's unconstitutional.

At first, Weinberg was successful. A federal District Court granted his request for a temporary restraining order that permitted him to continue selling his book, without a peddler's permit, until the case was

finished. But the flow of the case turned against him; and before long he lost it, entirely.

In response to Weinberg's motion for summary judgment, Magistrate Judge Arlander Keys has ruled that the ordinance does apply to book sales (as well as the sales of other things). What's more, the ordinance is a content-neutral time, place and manner restriction that is narrowly-tailored to ensure pedestrian safety and reduce traffic congestion, the judge held. The ordinance leaves open other means for Weinberg to sell his book, and it is not unconstitutionally vague.

Weinberg did score one point: he convinced Judge Keys that the permit process gives Chicago officials "unfettered discretion." But that didn't win the case for Weinberg, because he never applied for a permit. The judge found that since the ordinance wasn't aimed at speech in particular, the permit process couldn't be declared unconstitutional on its face, as

Weinberg asked. Rather, its constitutionality only could be evaluated in the context of a rejected application.

As a result, Judge Keys granted summary judgment to the City of Chicago - leaving Weinberg to sell his book on the Internet and in local bookstores, where it's had "limited success."

Weinberg was represented by Neil S. Ament in Northbrook. The City of Chicago was represented by Andrew S. Mine, Assistant Corporation Counsel, in Chicago.

Weinberg v. City of Chicago, 179 F.Supp.2d 869, 2002 U.S.Dist.LEXIS 442 (N.D.Ill. 2002)[ELR 24:1:12]

Ordinance restricting street performances in city historic district is constitutional, appellate courts rules in decision vacating injunction won by one-man band

Larry Horton has suffered a setback in his effort to block enforcement of a St. Augustine, Florida, ordinance that restricts street performances in the city's four-block historic district. Horton performs for tourists as a "one-man band," so St. Augustine's historic district is a prime venue for him. As a result, when the city's ordinance excluded him from that area, he sought and was awarded a preliminary injunction barring its enforcement, on the grounds that it is unconstitutionally vague.

Now, however, that injunction has been vacated by the Court of Appeals. In an opinion by Judge Frank Hull, the appellate court has ruled that the ordinance is

not unconstitutionally vague or overbroad, nor is it an unreasonable time, place and manner restriction.

Horton was represented by David A. Wasserman in Winter Park. The City of St. Augustine was represented by Michael H. Kahn in Melbourne.

Horton v. City of St. Augustine, Florida, 272 F.3d 1318, 2001 U.S.App.LEXIS 24489 (11th Cir. 2001)[ELR 24:1:12]

Florida Attorney General is enjoined from investigating whether Major League Baseball's decision to eliminate two teams violates antitrust laws, because the "business of baseball" is exempt

Robert A. Butterworth, the Attorney General of the State of Florida, has a desire to investigate Major

League Baseball, and he's had this desire for years. His tool of choice is something called a "Civil Investigative Demand." Under Florida law, these Demands - called "CIDs" for short - are a cross between a subpoena and an interrogatory. Butterworth has sent CIDs to Major League Baseball (or its Leagues or officials) at least twice. Most recently, he sent them in connection with Major League Baseball's decision to eliminate two of its 30 teams. According to the "sweeping" CIDs, Butterworth wanted to investigate whether that decision violates Florida antitrust law.

Major League Baseball had no interest in participating in Butterworth's investigation, so it sued him in federal court, seeking declaratory and injunctive relief. According to the League, its decision to downsize was a business decision, and the law is clear that the "business of baseball" is exempt from the antitrust laws. That means, the League said, that

Butterworth has no legal basis for his investigation and thus no basis for his CIDs.

Judge Robert Hinkle has agreed and has issued the preliminary injunction requested by Major League Baseball. The exemption relied on by the League was created and reaffirmed by the United States Supreme Court in three separate rulings, most recently in its 1972 decision in the Kurt Flood case, Flood v. Kuhn. The exemption has been recognized and applied - to the League's advantage - more recently too, including a decision of the federal Court of Appeals for the 11th Circuit, which is where Florida is located (ELR 4:23:3).

However, the last time Butterworth issued CIDs to professional baseball, he won a ruling by the Florida Supreme Court that baseball's exemption only covered its reserve clause, not other aspects of its business; and thus Butterworth was permitted to continue an antitrust investigation into difficulties a Florida group was then

having in its efforts to buy and move the San Francisco Giants to Tampa Bay (ELR 16:9:8). Butterworth argued that the doctrine of collateral estoppel made the Florida Supreme Court's decision in that case binding on Major League Baseball in the new case. But Judge Hinkle disagreed. He held that the parties and the issues were different in the earlier case than in the current one.

Judge Hinkle also rejected Butterworth's argument that Major League Baseball's decision to eliminate two teams was not part of the "business of baseball," even if the "business of baseball" were exempt. "It is difficult to conceive of a decision more integral to the business of major league baseball than the number of teams that will be allowed to compete," the judge ruled.

Major League Baseball was represented by Michael Eugene Kinney of Cole Foley & Lardner in Jacksonville. The Tampa Bay Devil Rays and Florida

Marlins were represented by Lori S. Rowe of Gray Harris & Robinson in Tallahassee. Butterworth was represented by Patricia A. Conners, Attorney General, in Tallahassee.

Major League Baseball v. Butterworth, 181 F.Supp.2d 1316, 2001 U.S.Dist.LEXIS 22021 (N.F.Fla. 2001)[ELR 24:1:13]

Judo associations defeat claim that pre-match bowing requirements violate competitors' rights under laws banning religious discrimination

The rules of judo require competitors to bow to inanimate objects, like portraits and tatami mats, prior to their matches - an act that violates the religious beliefs of at least a few of those competitors. Back in

1997, three judo competitors filed suit against the International Judo Federation and three of its U.S. affiliates, seeking a court order that would have ended the requirement. And, in an unpublished ruling, a preliminary injunction actually was entered by a federal District Court in the state of Washington.

The court, however, stayed the lawsuit, and ordered the complaining competitors to pursue administrative remedies provided by the U.S. Amateur Sports Act. They did, but without success. The judo associations won four separate arbitrations conducted by three separate bodies: U.S. Judo, the American Arbitration Association, and the U.S. Olympic Committee.

Ordinarily, four arbitration victories would have brought the matter to an end. But before the judo associations could get their arbitration victories confirmed by court order, the United States Supreme

Court decided PGA v. Martin which held that the rules of professional golf are not immune to discrimination claims asserted by the disabled (ELR 23:3:10). The complaining judo competitors argued that the Martin decision meant that the arbitration decisions against them could not be affirmed, and that they were entitled to a court trial on their discrimination claims.

Federal District Judge Robert Lasnik agreed, but only in part. That is, he agreed that the Supreme Court's decision in "Martin compels the conclusion that the [judo] event organizers may not discriminate against competitors . . . [and that] 'rules of competition' . . . may be subjected to the appropriate tests for identifying 'discrimination.'"

On the other hand, Judge Lasnik did not agree that judo's bowing rule does amount to illegal religious discrimination. He held that in order to be illegal, a rule would have to be enforced with an intent to

discriminate. That was not the case here, the judge concluded, because one arbitration panel found that the bowing rule has seven non-discriminatory purposes, including the purpose of having a fair and safe start to matches between competitors who may not speak the same language.

Judge Lasnik therefore dissolved the preliminary injunction and dismissed the case.

The competitors who filed the lawsuit were represented by Mark L. Fleming in Seattle. The judo associations were represented by William Dirker Ehlert of Casey & Pruzan in Seattle.

Akiyama v. U.S. Judo Inc., 181 F.Supp.2d 1179, 2002 U.S.Dist.LEXIS 1282 (W.D.Wash. 2002)[ELR 24:1:13]

Michigan High School Athletic Association illegally discriminated against girls by scheduling girls' sports to be played during non-traditional or inferior seasons, federal District Court rules

Following an eight-day trial, during which he heard 25 witnesses and received 103 exhibits, federal District Judge Richard Enslen has ruled against the Michigan High School Athletic Association in a discrimination case filed by the civil rights organization Communities for Equity and by the mothers of two female student athletes.

Earlier in the case, Judge Enslen denied the Association's motion to dismiss the case as a matter of law (ELR 21:12:22).

Following trial, the judge ruled that the Association in fact discriminated against girls by scheduling their volleyball, basketball, soccer and

tennis games, and their swimming and diving meets, during non-traditional seasons for those sports - while the boys games and meets were scheduled during those sports' traditional seasons. The Association did schedule girls' golf during the spring, which is its traditional season. But in Michigan, the fall is a superior season for golf; and since the fall is when the boys play golf in Michigan, the Association discriminated against girls who play golf as well, the judge concluded.

The judge's ruling was explained in a lengthy decision (58 printed pages) in which he concluded that by scheduling girls' sports the way it did, the Association violated the Equal Protection Clause of the 14th Amendment, Title IX, and Michigan's own Civil Rights Act.

As a result, Judge Enslen has ordered the Association to reschedule high school sports by the

2003-2004 school year in a manner "that complies with the law." The Association is not required to combine the seasons of girls' and boys' teams in any particular sport, in order to comply with the law. But the judge admonished the Association that "any remaining single-sex seasons must as a group advantage and disadvantage girls and boys equally."

Communities for Equity and the girls' mothers were represented by H. Rhett Pinsky of Smith Fayette & Hulswit in Grand Rapids. The Association was represented by Carole D. Bos of Bos & Glazier in Grand Rapids.

Communities for Equity v. Michigan High School Athletic Association, 178 F.Supp.2d 805, 2001 U.S.Dist.LEXIS 21728 (W.D.Mich. 2001)[ELR 24:1:14]

Federal judge rules that enforcement of NCAA's "75/25 Rule" against learning disabled football player may have violated Americans with Disabilities Act; but ADA claim became moot because player participated in fourth season of football after transferring colleges

It's hard to say whether Anthony Matthews won his case or lost it.

Matthews is a learning-disabled college football player. When last he appeared in these pages, a federal court had denied Matthews' request for a preliminary injunction that would have allowed him to continue playing football for Washington State University, despite his failure to satisfy the NCAA's "75/25 Rule" - a rule that requires athletes to get at least 75% of the credits they need to graduate during the regular academic year, and no more than 25% in summer

sessions. Judge Wm. Fremming Nielsen determined that Matthews was unlikely to win his Americans with Disabilities Act claim, for a variety of reasons, and that is why the judge denied Matthews' request for a preliminary injunction (ELR 21:12:21). That of course was a loss.

However, after Judge Nielsen ruled against Matthews on the injunction, the Supreme Court decided another ADA case - Martin v. PGA Tour (ELR 23:3:10) - and other courts decided additional ADA cases involving athletes as well. As a result, when Matthews and the NCAA made cross-motions for summary judgment, Judge Nielsen revisited the question of whether the NCAA may have violated the ADA by refusing to grant Matthews a waiver of the "75/25 Rule."

This time, Matthews won, sort of. That is, Judge Nielsen held that the ADA does apply to the NCAA

after all, and that granting Matthews a waiver of the "75/25 Rule" would not fundamentally alter the NCAA's purposes. There was some question as to whether Matthews couldn't satisfy the rule because he is learning disabled, or instead because he didn't work hard enough on his studies. That dispute would have earned Matthews the right to a trial. But he didn't get one, for another reason.

When he could no longer play football for Washington State University, Matthews transferred to Eastern Washington University where he was able to satisfy the "75/25 Rule" and where he was permitted to play football. By the time Judge Nielsen ruled on the cross-motions for summary judgment, Matthews was playing his fourth and final season of collegiate football. Judge Nielsen therefore dismissed Matthews' ADA claim as "moot," because the ADA's only remedy is injunctive relief, not money damages.

The judge also dismissed Matthews' due process claim, on the grounds that the NCAA is not a state actor.

That left only Matthews' state law claims, under a Washington statute that is similar to the ADA but does allow for the recovery of damages. Given Judge Nielsen's decision that the NCAA may have violated the ADA, Matthews was hoping Judge Nielsen would conduct a trial on his state law claims. But once the ADA and due process claims were dismissed, there were no more federal issues in the case. So Judge Nielsen dismissed Matthews' state law claims too, without prejudice so Matthews may refile them in state court, if he wishes to do so.

Matthews was represented by Richard H. Wooster of Mann Johnson Wooster & McLaughlin in Tacoma. The NCAA was represented by Paul Renwick Taylor of Brynes & Keller and Paul R. Raskin of Corr

Cronin in Seattle.
Matthews v. NCAA, 179 F.Supp.2d 1209, 2001 U.S.Dist.LEXIS 23069 (E.D.Wash. 2001)[ELR 24:1:14]

Court refuses to dismiss student athlete's lawsuit complaining that his constitutional rights were violated when he was suspended for violating high school Athletic Code

Jamaal Butler is a "skilled three-sport athlete." Nevertheless, he was unable to participate in football, basketball or track during his senior year at Oak Creek High School (in Wisconsin), because Butler was suspended for a year, for violating the high school's Athletic Code. As often happens in cases like this, Butler filed a lawsuit alleging that his constitutional

rights were violated by his suspension.

At first, Butler had no success. Judge Lynn Adelman denied Butler's request for a preliminary injunction (ELR 22:10:24). As a practical matter, this meant that Butler was likely to graduate before he could play again, even if he later won his lawsuit. But he carried on with the case, nonetheless.

Oak Creek then went on the offensive. It filed a motion for summary judgment, which if granted would have brought the case to an end. Given Judge Adelman's ruling on the preliminary injunction, the school no doubt expected to prevail with its motion. But it hasn't, at least not entirely.

The judge did dismiss two of Butler's claims against the school and all of his claims against the school's athletic director (on the grounds he is immune from liability). Judge Adelman denied the rest of the school's motion, however - thus leaving open the

possibility that Butler may recover damages eventually, even if only $1, and attorneys' fees.

In a fairly lengthy and closely-analyzed decision, Judge Adelman ruled that the school may have violated Butler's due process rights: by not giving him adequate notice concerning which provisions of the Athletic Code he had violated; by not giving him a hearing; by allowing the athletic director to participate in the review of his own disciplinary decisions; and by suspending Butler on the basis of insufficient evidence.

Butler was represented by Robert E. Sutton in Milwaukee. The Oak-Creek-Franklin School District was represented by Charles H. Bohl and M. Elizabeth O'Neill of Whyte Hirschboeck Dudek in Milwaukee.

Butler v. Oak Creek-Franklin School District, 172 F.Supp.2d 1102, 2001 U.S.Dist.LEXIS 18911 (E.D.Wis. 2001)[ELR 24:1:15]

Decision by California Interscholastic Federation to deny athletic eligibility to Australian transfer student was constitutional, California appellate court rules

The California Court of Appeal has upheld the constitutionality of a decision by the California Interscholastic Federation to deny high school athletic eligibility to an Australian transfer student named John Ryan.

Ryan had actually graduated from high school in Australia before moving to California and enrolling in Rancho Buena Vista High School for a second senior year. The practice of re-enrolling for a second senior year apparently is not uncommon in Australia, where students do so in order to improve their grade point averages before applying to college. Ryan wanted to

attend college in the United States, so he enrolled in Rancho Buena Vista to satisfy entry requirements of U.S. colleges. While he was there, he wanted to play football too.

Because he had already finished eight semesters of high school, and because he moved to the U.S. without his parents, he wasn't eligible to play football at Rancho Buena Vista. The California Interscholastic Federation - like high school athletic associations elsewhere in the country - has rules that limit athletic eligibility to eight semesters, and deny eligibility to transfer students who move to new districts without their parents.

Ryan filed suit against the Federation, alleging that the Federation had denied him his constitutional right to due process; and he won. A California trial court held that he had been denied due process under the California constitution. What's more, the trial court

awarded Ryan's lawyers more than $92,000 in fees.

Alas, the glow of that exciting victory did not last long for Ryan, or for his lawyers either. The California Court of Appeal reversed. In a fairly lengthy opinion by Justice Terry O'Rourke, the appellate court held that the right to participate in high school sports is not a "property" right protected by either the California or United States Constitution, and that Ryan was given all the "process he was due." Since that meant that Ryan lost the case, rather than won, the attorneys' fees award was reversed as well.

Ryan was represented by Robert P. Ottilie in San Diego. The California Interscholastic Federation was represented by Andrew Patterson of Girard & Vinson in San Diego.

Ryan v. CIF-SDS, 114 Cal.Rptr.2d 798, 2001 Cal.App.LEXIS 3668 (Cal.App. 2001)[ELR 24:1:16]

Suit against National Amusements and Hoyts Cinemas, alleging designs of their stadium-style movie theaters violate Americans with Disabilities Act, is dismissed in part

The United States Government has sued National Amusements and Hoyts Cinemas, because - according to the Government - the designs of their stadium-style movie theaters violate the Americans with Disabilities Act.

Two things about the case seem beyond dispute: the ADA does require new movie theaters to be designed to conform to the requirements of federal regulations known as the "ADA Accessibility Guidelines"; and people in wheelchairs do not have access to the stadium-style seats, and therefore must sit in the traditional-style seating section of movie theaters

where the lines-of-sight to the screen are inferior to the stadium-style seats.

Other aspects of the case are disputed, however. National and Hoyts, for example, contend that their theaters do satisfy the ADA Accessibility Guidelines. The Government alleges that they do not. And that issue will be litigated.

The Government also contended that the designs of National and Hoyts' stadium-style theaters violated a more general provision of the ADA - one that prohibits theater owners (and others) from denying wheelchair-bound patrons "full and equal enjoyment of goods, services and facilities." That is, the Government contended that even if National and Hoyts' theaters were designed as required by the ADA Accessibility Guidelines, those designs could violate the ADA's "full and equal enjoyment" requirement.

Judge William Young disagreed. In response to a

motion to dismiss, the judge has ruled that insofar as the design of theaters is concerned, if the design satisfies the Accessibility Guidelines, the design does not violate the ADA at all. Judge William explained that the more general "full and equal enjoyment" provision of the ADA would apply to National and Hoyt if they denied all access to their theaters by wheelchair-bound patrons. But the general provision does not apply to their theater designs, the judge concluded. For that reason, Judge William granted National and Hoyts' motions to dismiss the Government's claim based on that general provision.

The Government was represented by Anne G. Depew, Assistant U.S. Attorney, in Boston. National and Hoyts were represented by Deborah S. Burstein of King & Spalding in New York City, John T. Haggerty in Charlestown, and James R. Carroll of Skadden Arps Slate Meagher & Flom in Boston.

United States v. National Amusements, Inc., 180 F.Supp.2d 251, 2001 U.S.Dist.LEXIS 23136 (D.Mass. 2001)[ELR 24:1:16]

CNN wins Anticybersquatting case in federal court in Virginia to recover ownership of "cnnews.com" domain name from Chinese company that registered and used it to operate website for residents of China

Cable News Network has won ownership of the domain name "cnnews.com" in an "in rem" lawsuit in federal court in Virginia. The domain name had been registered by a Chinese company that used it to operate a website for residents of China. But in a case brought by CNN under the Anticybersquatting Consumer

Protection Act, Judge T.S. Ellis found that the Chinese company's use of "cnnews.com" was likely to cause confusion, and that the company had registered the mark in bad faith.

Earlier in the case, Judge Ellis rejected the Chinese company's argument that, since it had no contacts with the United States, the lawsuit deprived it of due process (ELR 23:10:18). In response to CNN's motion for summary judgment, the Chinese company renewed its due process argument; and Judge Ellis rejected it once again.

The lawsuit is not against the Chinese company, but against the "cnnews.com" domain itself. Because the Chinese company registered that domain name with Verisign in Virginia, Judge Ellis emphasized that the domain name certificate is within Virginia. The judge explained that the requirements of due process would not be offended by his order, because even though ". . .

an order transferring the ownership of a domain name certificate within this jurisdiction may affect foreign contracts, it is accomplished by conduct wholly with this jurisdiction."

CNN was represented by Janis R. Orfe in Fairfax. The Chinese company was represented by Paul Edward Dietze of Pennie & Edmonds in Washington D.C.

Cable News Network v. Cnnews.com, 177 F.Supp.2d 506, 2001 U.S.Dist.LEXIS 21388 (E.D.Va. 2001)[ELR 24:1:17]

Even though registrant of corinthian.com domain name lost Uniform Dispute Resolution Policy proceeding to trademark licensee of Brazilian soccer team Corinthiao, federal court has jurisdiction to hear registrant's lawsuit seeking return of domain name

A Brazilian company named Corinthians Licenciamentos may be able to use the corinthian.com domain name some day. But before it can, it will have to defeat, again, a claim to that domain being made by a Massachusetts resident named Jay D. Sallen.

Sallen was actually the first to register the corinthian.com domain name. But the Brazilian company won the right to the name in a WIPO proceeding under the Uniform Dispute Resolution Policy. The company is the intellectual property licensee of the popular Brazilian soccer team

Corinthiao, whose name is the Portuguese language equivalent of "Corinthians." The WIPO panel found Sallen to be a cybersquatter, and ordered the corinthian.com domain name transferred to the Brazilian company.

Sallen, however, did not go quietly into the cyber night. Instead, he filed a lawsuit in federal court in Boston seeking an order retransferring the corinthian.com name to him. Sallen was not successful, at first. District Judge William Young dismissed Sallen's lawsuit for lack of jurisdiction. But the case isn't over yet, because the Court of Appeals has reversed.

In a decision by Judge Sandra Lynch, the appellate court noted that one sub-section of the Anticybersquatting Consumer Protection Act specifically grants domain name registrants who lose domain names in UDRP proceedings "an affirmative

cause of action" in federal courts for the return of "wrongfully transferred domain names." This was exactly the kind of case Sallen filed, and therefore Judge Lynch reversed the dismissal of his lawsuit and remanded it to the District Court.

Sallen was represented by Linda A. Harvey of Harvey & Kleger. Corinthians Licenciamentos was represented by Amy B. Goldsmith of Gottlieb Rackman & Reisman and Curtis Krechevsky of Hutchins Wheeler & Dittmar.

Sallen v. Corinthians Licenciamentos LTDA, 273 F.3d 14, 2001 U.S.App.LEXIS 25965 (1st Cir. 2001)[ELR 24:1:17]

Live Wire Productions wins preliminary injunction barring competitor Liberty Livewire from using "Livewire," but not "Liberty Livewire," in trademark infringement suit

Live Wire Productions is a movie and television production company, as well as a special effects house. It's made commercials for Disney, a theme park attraction for Paramount/MGM, and film and television projects for itself.

Liberty Livewire is the new name for the company that used to be called "Todd-AO." Its name was changed as a result of Todd-AO's acquisition by Liberty Media. Liberty Media is engaged in a variety of media-related businesses, some of which compete directly with Live Wire.

So, when Live Wire learned that Liberty Livewire was using the word "Livewire" as a

trademark, without the word "Liberty," Live Wire sued Liberty Livewire for trademark infringement. Live Wire then sought a broad preliminary injunction - one that would have prohibited Liberty Livewire from using "Livewire" or "Liberty Livewire" - and it got half of what it wanted.

Federal District Judge Florence-Marie Cooper did a careful eight-part "likelihood of confusion" analysis, and came to this conclusion. She concluded that Liberty Livewire's use of "Livewire" by itself, or with "generic" words like "Studios," "Media" or "Effects," was likely to cause confusion; and therefore Judge Cooper issued a preliminary injunction barring Liberty Livewire from doing so. On the other hand, Judge Cooper concluded that Liberty Livewire's use of its full name - "Liberty Livewire" - was unlikely to cause confusion; and therefore she refused to enjoin it from doing that.

Live Wire Productions was represented by Daniel M. Cislo of Cislo & Thomas in Santa Monica. Liberty Livewire was represented by Rod S. Berman of Jeffer Mangels Butler & Marmaro in Los Angeles.

Electropix v. Liberty Livewire Corp., 178 F.Supp.2d 1125, 2001 U.S.Dist.LEXIS 15228 (C.D.Cal. 2001)[ELR 24:1:17]

Philadelphia Phantoms and its home arena had no duty to protect spectator from hockey puck

Perry Petrongola was hit in the mouth by an "errant puck" while attending a Philadelphia Phantoms game in its home arena, the CoreStates Spectrum. Apparently, the puck flew through a five-foot gap in the plexiglass shield - a gap that exists to clear a path

from the players' bench to the tunnel that leads to their locker room. Petrongola's season seat is next to that tunnel.

Petrongola's injury was no doubt painful and may even have been expensive, for him. Nonetheless, he is not entitled to recover anything for his injuries from the Phantoms or from the Spectrum's owner. The Pennsylvania Superior Court has affirmed a trial court order granting the team and arena's motion for summary judgment.

In an opinion by Judge John Kelly, the appellate court has ruled that the Phantoms and the Spectrum owed "no duty" to Petrongola, because errant pucks "are a common, frequent, and expected occurrence at a hockey game; and the Spectrum hockey facility did not deviate from any established custom of safety. . . ."

Petrongola hoped to avoid Pennsylvania's usual "no duty" rule by arguing that because the Spectrum

provided a plexiglass shield in some parts of the arena, it assumed a duty to provide adequate shielding everywhere. Judge Kelly was not persuaded, however. Such an argument would mean, the judge reasoned, that "sports arenas that provide any form of protection between the playing field and the fans automatically assume a duty to provide sufficient protection so that no fan will ever come into contact with any element of the game." Judge Kelly concluded that the law of Pennsylvania imposes no such duty.

Petrongola was represented by Thomas A. Lynman in Philadelphia. The Phantoms and the Spectrum were represented by Jonathan Dryer in Philadelphia.

Petrongola v. Comcast-Spectacor, L.P., 789 A.2d 204, 2001 Pa.Super.LEXIS 3455 (Pa.Super. 2001)[ELR 24:1:18]

Federal law disqualifying past operators of pirate radio stations from getting low-power radio station licenses is unconstitutional, appellate court rules

Laws that require government licenses to operate broadcast stations are perfectly constitutional. And, as a general rule, laws that set the qualifications for broadcast licensees are too. One such law is not, however, according to a recent (and split) decision of the federal Court of Appeals in Washington D.C.

The law in question disqualifies those who ever operated unlicensed - or "pirate" - radio stations from getting low-power radio station licenses. It is part of the Radio Broadcasting Preservation Act of 2000. The reason that Congress gave thought to this issue as recently as the year 2000 is that from 1978 to 2000, the FCC declined to license low-power radio stations at all, as a matter of policy. Believing that the policy was

unconstitutional, many people engaged in "civil disobedience" by operating unlicensed microbroadcast stations.

When low-power licenses were introduced once again in 2000, Congress decided that those who had operated unlicensed stations shouldn't be issued low-power station licenses. Congress offered two reasons for this "character qualification": it would increase compliance with the law by deterring the operation of unlicensed stations in the future; and it would prevent former pirates, who Congress apparently thought would violate other broadcast rules if given the chance, from getting a chance to do so.

Greg Ruggiero once was the operator of pirate stations in New York City and elsewhere. He therefore was disqualified from getting a low-power license; so he challenged the "character qualification" provision of the Act (by petitioning the Court of Appeals for review

of an FCC regulation that implements it). His challenge has been successful.

Writing for a majority of the Court of Appeals, Judge David Tatel has held that the ban on licensing former pirates is unconstitutional, because, as written, it is both overinclusive and underinclusive. That is, the "character qualification" provision bans the licensing of those who may be able to show that, if licensed, they would comply with all broadcast regulations; but it does not ban the licensing of those who have committed other types of violations, so long as they haven't operated unlicensed stations.

For this reason, Judge Tatel found "the character qualification provision so poorly aimed at maximizing future compliance with broadcast laws and regulations as to 'raise[ ] a suspicion' that perhaps Congress's 'true' objective was not to increase regulatory compliance, but to penalize microbroadcasters' 'message."

Judge Karen Hendersen dissented.

Riggiero was represented by Robert T. Perry. The FCC was represented by Jacob M. Lewis of the Department of Justice.

Ruggiero v. Federal Communications Commission, 278 F.3d 1323, 2002 U.S.App.LEXIS 1994 (D.D.C. 2002)[ELR 24:1:18]

Appeals court affirms FCC decision ordering unlicensed radio "micro-broadcaster" to stop broadcasting and pay $11,000 forfeiture

Grid Radio and its owner Jerry Szoka operated a low-power radio station in Cleveland, without a license to do so. Indeed, Szoka never applied for a license, and when a letter from the FCC told him to stop, he ignored

it.

As a result, the FCC brought an administrative proceeding against him; and in due course, that proceeding resulted in a summary cease-and-desist order and an $11,000 forfeiture. The proceeding was "summary" in the sense that although the FCC administrative law judge considered Szoka's written arguments, it didn't hold an evidentiary hearing.

Grid and Szoka appealed, without success. In an opinion by Judge David Tatel, a federal Court of Appeals has held that the FCC was not required to reconsider Szoka's policy arguments - arguments the FCC had considered and rejected before - nor even his constitutional arguments.

Judge Tatel did consider, but rejected, Szoka's argument that the cease-and-desist order violated his First Amendment rights. And the judge rejected Szoka's contention that the $11,000 forfeiture violated the

Eighth Amendment's ban on excessive fines.

Grid Radio and Szoka were represented by Hans F. Bader. The FCC was represented by Rodger D. Citron of the FCC.

Grid Radio v. Federal Communications Commission, 278 F.3d 1314, 2002 U.S.App.LEXIS 1996 (D.D.C. 2002)[ELR 24:1:19]

Kingvision Pay-Per-View loses claim against New Hampshire bar that showed 1997 Holyfield/Moorer fight without a license

Kingvision Pay-Per-View makes frequent appearances in the pages of the Entertainment Law Reporter, because it aggressively protects its pay-TV rights to professional boxing matches by suing

businesses, like bars and restaurants, that exhibit those fights to customers without being licensed to do so.

Kingvision often wins its cases, but recently it lost one, to a bar and restaurant in Manchester, New Hampshire, named On the Rocks. The owners of On the Rocks admit that they showed the 1997 Holyfield/Moorer fight to "a few personal friends" without being licensed to do so. But, they argued, they did so by bringing a residential cable box to the bar and getting the telecast from their local cable company rather than by intercepting the telecast from satellite TV.

To many, it may seem that the distinction between intercepting a cable rather than a satellite transmission would be purely technical and irrelevant to whether Kingvision was entitled to win its case. It turns out, however, that the distinction was relevant in two ways.

First, Kingvision only controlled commercial establishment rights to the Holyfield/Moorer fight, not residential rights. Residential rights were controlled by Media One, which was not a party to Kingvision's lawsuit. Second, two separate sections of the Communications Act deal with unauthorized interceptions: section 605 prohibits unauthorized interceptions of "radio communications" including satellite TV transmissions; and section 553 prohibits unauthorized interceptions of cable communications.

Even though Kingvision's rights were protected by section 605 only, it argued that section 605 also prohibited On the Rocks' interception of the Holyfield/Moorer fight off of cable. In similar cases, some courts have agreed with that argument, but others have not. In this case, federal District Judge Joseph DiClerico did not. He held that the Communications Act makes a distinction between radio and cable, and

though On the Rocks may have violated section 553, it did not violate section 605 - the section on which Kingvision based its case.

Judge DiClerico also ruled that Kingvision did not have standing to sue On the Rocks for its possible violation of the rights of Media One.

Counsel in the case were Gregory W. Swope of Swope & Nicolosi in Concord, and Julie Cohen Lonstein in Ellenville N.Y.

Kingvision Pay-Per-View, Ltd. v. Rocca, 181 F.Supp.2d 29, 2002 U.S.Dist.LEXIS 4997 (D.N.H. 2002)[ELR 24:1:19]

Tennessee Adult-Oriented Establishment Act satisfies Equal Protection requirements, too, federal Court of Appeals rules

Tennessee's Adult-Oriented Establishment Act is perfectly constitutional, a federal Court of Appeals has held, in two separately issued decisions.

The Act was challenged by Richland Bookmart, Inc., an adult book and video store in Knoxville. The Act limits the hours and days during which adult entertainment establishments may be open and requires them to eliminate booths for watching sexually explicit videos or live entertainment.

At first and for a short time, Richland Bookmart was successful. A District Court held that the Act violated the First Amendment. But the Court of Appeals reversed that ruling (ELR 20:5:31), and remanded the case for consideration of Richland

Bookmart's Equal Protection challenge. On remand, the District Court held that the Act satisfies Equal Protection requirements, even though it treats live-entertainment establishments differently than book and video stores.

The Court of Appeals has affirmed that ruling. In an opinion by Judge Gilman, the appellate court held that the Act is rationally related to a legitimate governmental interest.

Judge Eric Clay dissented, because he concluded that the Act is underinclusive.

Richland Bookmart was represented by Frierson M. Graves, Jr., of Baker Donelson Bearman & Caldwell in Memphis. The District Attorney of Knox County was represented by Steven A. Hart, Assistant Attorney General, in Nashville.

Richland Bookmart, Inc. v. Nichols, 278 F.3d 570,

2002 U.S.App.LEXIS 879 (6th Cir. 2002)[ELR 24:1:20]

Previously Reported:

Supreme Court denies cert. The United States Supreme Court has denied a petition for certiorari in Brentwood Academy v. Tennessee Secondary School Athletic Association, 122 S.Ct. 1439, 2002 U.S.LEXIS 2183 (2002), in which the Sixth Circuit Court of Appeals held that a trial court must decide whether a Tennessee high school athletic association rule prohibiting the use of "undue influence" in recruiting is "narrowly tailored" to protect the association's legitimate interests (ELR 23:9:22).

Decisions reported "In the News" now published. A decision that was previously reported in the "In the

News" section of the Entertainment Law Reporter has been published: Gardner v. Nike, Inc., 279 F.3d 774, 2002 U.S.App.LEXIS 1431 (9th Cir. 2002) (ELR 23:9:11).
[ELR 24:1:20]

DEPARTMENTS

In the Law Reviews:

World Cup: How Football Banning Orders Can Be Used to Prevent Hooligans from Attending World Cup Matches by Peter Lownds, 146 Solicitors Journal 397 (2002) (www.smlawpub.co.uk/)

World Cup: Legal Points to be Considered When Drafting Sports Logo Licensing Agreements by Ian

Blackshaw, 146 Solicitors Journal 398 (2002) (for website, see above)

Obstacles for International Performing Artists by Dick Molenaar, 42 European Taxation 149 (2002) (http://join.ibfd.nl/Publications/pubdescr.asp?txtID=2)

The Entertainment Law Review has issued Volume 13, Issue 4 with the following articles: (published by Sweet & Maxwell (http://www.smlawpub.co.uk/products/at/sample.cfm)

Will Remakes or Television Adaptations of Motion Pictures Give Rise to Moral Rights Claims by the Original Screenwriter and/or the Director Under French Law? by Nicholas Dalton, 13 Entertainment Law Review 75 (2002) (for website, see above)

James Joyce' "Ulysses" - A Case of Preparatory Manuscripts and Revived Copyright by Victoria King, 13 Entertainment Law Review 86 (2002) (for website, see above)
[ELR 24:1:21]