INTERNATIONAL DEVELOPMENTS

Personal assistant to model Naomi Campbell has no valid defense to claim that assistant breached Confidentiality Agreement by revealing affair between Campbell and actor Joseph Fiennes to News of the World, British appellate court affirms

Model Naomi Campbell has won part of her privacy lawsuit against her former personal assistant, Vanessa Frisbee, as a result of an appellate ruling by Mr. Justice Lightman of the Chancery Division of the British High Court of Justice. Campbell's lawsuit was triggered by an article in News of the World, a London newspaper, reporting that the model had an affair with actor Joseph Fiennes and had, until then, kept it a secret from her partner Flavio Briatore.

The article was based, at least in part, on an interview with Frisbee who told the paper that she had accompanied Campbell to Berlin where Campbell's affair with Fiennes had begun.

Campbell's lawsuit against Frisbee was not based on general common law principles of privacy. It was, instead, based on a written Confidentiality Agreement signed by Frisbee shortly after she began working for Campbell. Justice Lightman agreed with Campbell that Frisbee's interview with the News of the World about the affair - for which she was paid £25,000 - "was in flagrant and deliberate breach of her . . . duties of confidentiality . . . under the Confidentiality Agreement." The only question was whether that breach was excused, for either of the two reasons asserted by Frisbee.

Frisbee argued, first: that Campbell had repudiated their employment and confidentiality

agreements by "violently" assaulting her; that she, Frisbee, had accepted Campbell's repudiation of those agreements; and that because she accepted their repudiation, she, Frisbee, was released from her obligation under the Confidentiality Agreement and was therefore free to talk with the News of the World.

A lower court had granted Campbell summary judgment, dismissing this defense as a matter of law. So when Justice Lightman reviewed the issue on appeal, he assumed - without deciding - that such an assault had taken place, and that it amounted to a repudiation by Campbell of Frisbee's Confidentiality Agreement. Nevertheless, Justice Lightman ruled that Frisbee's "duty . . . not to divulge or exploit confidential information acquired [while working for Campbell] . . . survived any acceptance by [Frisbee] of [Campbell's] repudiation of [the Contract]. . . ."

Frisbee also argued that she was justified in giving confidential information about Campbell to News of the World because there was a public interest in the information she had disclosed. Indeed, Frisbee asserted she had a legal right to do so, under the "free expression" guarantee of the European Convention on Human Rights - a Convention to which Great Britain has adhered, and which it implemented in 1998 in its own Human Rights Act.

Justice Lightman acknowledged freedom of expression in Britain is now broader than before Britain's adherence to the Human Rights Convention and its adoption of the Human Rights Act. But he pointed out that the same Convention and Act also require courts to give effect to "the rights to respect for private and family life." He explained that for the "public interest to override an express obligation of confidence, as a rule, the information must go beyond

being interesting to the public and private matters which are of no real concern to them; there must be a pressing public need to know."

In this case, Justice Lightman concluded that he could "not see how there was a public interest in the encounters or the privately expressed feelings of [Campbell] for Mr. Fiennes. The disclosures made were a good 'story,' no more and no less. It was interesting and no doubt sold newspapers. But I can see no reason why [Frisbee] should not pay damages or account to [Campbell] in respect of the profits earned from the disclosure."

Campbell was represented by Heather Rogers, instructed by Peter Carter-Ruck & Partners in London. Frisbee was represented by David Price and Korieh Duodu instructed by David Price Solicitors & Advocates in London.

Campbell v. Frisbee, [2002] EWHC 328 (Ch), available at www.courtservice.gov.uk/judgmentsfiles/j1080/Naomi_Campbell_v_Frisbee.htm)[ELR 24:4:4]

Supreme Court of Canada reverses lower court order that permitted artist Claude Théberge to seize art works created by transferring ink from authorized paper posters of his paintings to canvas, without his consent

Internationally known Canadian artist Claude Theberge has suffered at least a temporary setback in his legal battle to prevent the sale of canvas-backed versions of his paintings, without his consent. Theberge's adversaries in this battle are Canadian art galleries that purchased licensed paper posters of Theberge's paintings, and then used a chemical process

to lift and transfer the ink from those posters to canvas backings.

A lower Canadian court found that the canvas-backed versions of Theberge's posters were unauthorized "reproductions." Under the Canadian Copyright Act, this finding entitled Theberge to a pre-trial order that enabled him to seize the canvas-backed works from the galleries that created and had been selling them.

The galleries then appealed to the Supreme Court of Canada which, in a 4-to-3 ruling, reversed the lower court's decision, vacated the seizure order, and ordered the canvas-backed works returned to the galleries. In an opinion by Justice William Binnie, the majority held that the process used by the galleries had not resulted in any copies being made of Theberge's posters, and thus no infringement of the artist's economic rights had occurred.

Justice Binnie reasoned that Theberge was really complaining about the violation of his moral, rather than economic, rights. Canadian copyright law does recognize moral rights. But to establish a moral rights violation, an artist must show that his or her work was distorted, mutilated or modified in a manner that caused "prejudice" to his or her "honour or reputation" - something that Theberge had not yet done. Moreover, Canadian copyright law does not authorize pre-trial seizures for violation of moral rights.

The dissenters' views were expressed in an opinion by Justice Charles Gonthier. He wrote that Theberge had properly asserted his economic rights, not moral rights, in objecting to the canvas-backed works created by the galleries. Justice Gonthier reasoned that the galleries did reproduce the artist's posters by changing their material form.

Theberge was represented by Louis Linteau and by Laurin, Lamarre, Linteau & Montcalm, Solicitors, in Montreal. The galleries were represented by Marzia Frascadore and Vincent Chiara, and by Gowling Lafleur Henderson and Chiara & Associates, Solicitors, in Montreal.

Editor's note: The close division of opinion in this case mirrors a similar split of authority in the United States in cases involving analogous facts. In the U.S., the Seventh Circuit Court of Appeals has held that an artist's exclusive right to create derivative works was not violated by the unauthorized transfer of images from paper to other media (ELR 20:1:14), while the Ninth Circuit has held that it was (ELR 10:9:13, 16:4:25). On its face, this Canadian decision deals only with the practices of a narrow slice of the commercial art market. The decision is, however, of wider interest, because Justices Binnie and Gonthier engage in a quite

scholarly debate about the distinction between, and the purposes of, economic and moral rights in the law of copyright. That debate has practical significance to the motion picture industry too, now that computer technology is being used to create unauthorized "sanitized" versions of movie homevideos and DVDs.
Galerie d'Art du Petit Champlain v. Théberge, 2002 SCC 34, available at www.lexum.umontreal.ca/csc-scc/en/index.html [ELR 24:4:5]

WASHINGTON MONITOR

Joint venture between Polygram and Warner for distribution of 1998 "Three Tenors" album and video results in FTC administrative law judge order prohibiting Polygram from fixing prices of, or restricting advertising for, recordings and videos

Polygram has been ordered by an FTC administrative law judge not to fix the prices of, or restrict advertising for, recordings and videos. The judge's order also applies to Polygram's corporate siblings, Decca Music Group, UMG Recordings, and Universal Music & Video Distribution Corp.

According to findings made by Administrative Law Judge James Timony, Polygram did these things - in violation of the Federal Trade Commission Act (a federal antitrust statute) - in connection with a joint

venture it entered into with Warner Music for their shared distribution of recordings and videos of performances by the Three Tenors during the World Cup soccer finals in Paris in 1998.

The Three Tenors are opera singers Luciano Pavarotti, Placido Domingo and Jose Carreras. They had performed together during World Cup soccer finals in 1990 and 1994. Polygram distributes albums and videos of their 1990 performance, and Warner distributes albums and videos of their 1994 performance. In anticipation of their 1998 performance, Warner and Polygram formed a joint venture giving Warner the right to distribute albums and videos of it in the United States, while Polygram had the right to distribute them outside the U.S.

Warner and Polygram's agreement concerning The Three Tenors' 1998 performance triggered a proceeding by the FTC. The FTC did not complain

about the Warner-Polygram joint venture itself. Instead, the FTC complained about a separate "moratorium" agreement by which Polygram agreed not to discount or advertise the 1990 album and video, and Warner agreed not to discount or advertise the 1994 album and video, for two and a half months shortly before and after the release of the 1998 album and video.

According to the FTC, the "moratorium" agreement was prompted by concerns that the 1998 album and video would not be as "commercially appealing" as the earlier Three Tenors releases. Thus, the FTC alleged, the "moratorium" was agreed to in order to reduce competition from those 1990 and 1994 releases. The FTC asserted that the "moratorium" was not reasonably necessary for the efficient operation of the joint venture, and had the effect of increasing prices and injuring consumers.

Warner settled the case the FTC brought against it by signing a Consent Order that bars it from agreeing with competitors to fix the prices of, or restrict the advertising for, audio recordings and "Three Tenors" videos (ELR 23:5:6). Polygram, however, did not settle. It chose to go to trial instead. It was that trial that resulted in Judge Timony's recent ruling.

The judge ruled that Polygram and Warner's agreement not to discount, and to restrict advertising for, the 1990 and 1994 albums was presumptively anticompetitive. That meant that Polygram had the burden of proving there was some plausible and valid justification for the restraint. Polygram tried to do so, but Judge Timony concluded that the moratorium agreement was not a necessary element of the joint venture. Nor could the agreement be justified, the judge found, on any of the other grounds - such as free-riding or consumer confusion - offered by Polygram.

Judge Timony concluded that a cease and desist order was necessary in this case. He reasoned that "When . . . [a] music label . . . release[s] an artist from his exclusive recording contract in return for a royalty on the artist's first album on his new label . . . , the two competing labels may have a shared financial interest in the success of a particular album." This was significant, the judge said, because in those cases, "The marketing challenge that gave rise to the Three Tenors moratorium may recur: the fear that a new release by a given artist may lose sales to the artist's older albums." Polygram and Universal, he said, have "recording contracts with several artists that formerly released albums with one of [their] competitors. Universal is engaged in other joint ventures where a similar incentive and opportunity to restrain competition is presented. Universal and Sony have formed a joint venture known as 'Pressplay' to distribute music over

the Internet. Universal, Sony, and other music companies will provide their music to the venture on a non-exclusive basis. This means that music products marketed by the venture may also be marketed (e.g., by Sony) through traditional retail outlets. Absent an order, Universal and Sony may find it profitable to fix prices on products sold to retail stores in order to enhance the venture's internet sales and profits."

The Federal Trade Commission was represented by Geoffrey M. Green, John Roberti Cary Zuk and Melissa Westman-Cherry of the FTC in Washington, D.C. Polygram was represented by Bradley S. Phillips, Glenn D. Pomerantz and Stephen E. Morrissey of Munger Tolles & Olsen in Los Angles.

In the Matter of Polygram Holding, Inc., FTC Docket No. 9298 (FTC 2002), available at www.ftc.gov/os/caselist/d9298.htm [ELR 24:4:6]

FTC issues fourth report on marketing of violent entertainment; "real progress" has been made in some areas, but "little change" in others

The Federal Trade Commission has issued yet another report on the marketing of violent entertainment - its fourth in less than two years. This latest report, like its predecessors, analyzes whether violent R-rated movies, explicit-content labeled music, and M-rated games are advertised in media popular with teenagers, and whether rating information is included in movie, music and electronic game advertising.

On the plus side for the entertainment industry, the Commission's report concluded that "real progress [has been made] in the disclosure of rating information in most forms of advertising," and it found "nearly universal compliance by both the movie and electronic

games industries with industry standards that restrict certain ad placements." The industry is not entirely out of the woods with the FTC, however, because the Commission also reported that it found "little change in the practices of all three industries with regard to advertising violent R-rated movies, M-rated games, and explicit-content labeled recordings in media popular with teens."

As it did in its original report (ELR 22:4:7), and its two earlier follow-up reports (ELR 23:1:6, 23:7:10), the FTC separately evaluated the marketing practices of the movie industry, the music industry, and the electronic game industry.

Movies. The FTC reported that movie studios have made "further progress" in disclosing rating information in advertising. They now "routinely disclose" ratings and reasons for ratings in their television and print advertisements. The FTC

characterized this as "a major improvement" since its original report was issued in September 2000. The Commission's praise was not unqualified, however. Though it acknowledged that "a number of studios have done an excellent job in making their disclosures clear and conspicuous," it complained that "there were still many advertisements with rating reasons that were difficult to read."

Electronic games. The FTC found "widespread compliance" with the electronic game industry standards that limit ads for M-rated games in media where children under 17 constitute a certain percentage of the audience. Nonetheless, the FTC couldn't help but report that it also "found several examples of advertisements on popular teen television programs, and continued placement of advertising in youth-oriented game enthusiast magazines." It therefore concluded, as it had in its original report, that the

electronic game industry's "anti-targeting standards diminish - but do not eliminate - placements in media with large teen audiences."

On the whole, though, the electronic game industry fared the best in the FTC's most recent report. "Although some areas still could be improved (e.g., including content descriptors in television advertising)," the FTC said, "there is much in the game industry's rating disclosure requirements that merits duplication by others."

Music. The music industry did not fare as well as movies and games in the latest FTC report. The Commission reported that its "review of explicit-content music ad placements showed virtually no change in industry practices" since its original report. "Advertisements continue to be placed on television shows and in print magazines popular with teens," the FTC complained. On the other hand, the Commission

acknowledged that it had found "improvements in the music industry's disclosure of labeling information in its advertising," and it said "there has been progress in placing the Parental Advisory Label in industry advertising."

The FTC singled out BMG Entertainment for special praise, because BMG has to decided to place advisory stickers on newly released explicit-content labeled albums, specifying whether they have violent content, sexual content, or strong language. BMG also will include that information in its advertising.

The Commission noted again, as it had in its original report, that "the music industry rejects any suggestion that its Parental Advisory Label system be age-based." The FTC had previously acknowledged that implementing such a suggestion "would require fundamental changes in the music industry's labeling program." Nevertheless, the Commission expressed

once again its opinion that "even absent basic changes, the music industry could still adopt standards in this area that lessen children's exposure to ads for recordings that have a Parental Advisory Label."

FTC recommendations. Once again, as it had in the past reports, the Commission made "suggestions" for further "improvements" by each of the industries.

It recommended that the movie and music industries "focus on ensuring that both the rating or label and the reasons for the rating or label are effectively - and clearly - communicated to parents" because "[t]here are still many examples where such information is hard to find or see."

The FTC also "encourage[d] retailers and theater owners to adopt or enforce policies to discourage the sale of R- or M-rated or explicit content-labeled entertainment products to children," because doing so "would help limit the influence of industry ad

placements that promote violent entertainment products in media popular with youth." The FTC has again recommended that these things be done pursuant to "private sector initiatives by industry and individual companies," because of the First Amendment implications of doing them by government regulation.

The FTC is not out of the violent entertainment monitoring business yet. "To encourage continued voluntary compliance and to document any changes in self-regulatory efforts," it said in conclusion, "the Commission will monitor the entertainment industry's marketing practices through the next year, and will then issue a follow-up report."

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

(FTC June 2002), available at www.ftc.gov/os/2002/06/ [ELR 24:4:7]

RECENT CASES

Stephen King's "Riding the Bullet" does not infringe copyright to unpublished manuscript written by plaintiff's brother, nor did it invade privacy of plaintiff's mother, appellate court affirms

Stephen King's novel Riding the Bullet deals, apparently, with universal themes. For example, a woman named Anne Hiltner alleges that Riding the Bullet was copied from an unpublished manuscript written by her late brother and that the novel includes events that are based on the hospitalization of her mother. Hiltner made these allegations in a copyright

infringement and invasion of privacy lawsuit she filed against King and his publishers Simon & Schuster and Glassbook.

Federal District Judge George Singal ruled in favor of King and his publishers. And in a brief decision marked "Not for Publication - Not to be Cited as Precedent," the Court of Appeals has affirmed.

The appellate court held that Hiltner's brother's manuscript, titled Robert Adams, is not substantially similar to King's novel, because "neither the sequence of events nor the development of the characters in Robert Adams have been replicated in Riding the Bullet." Moreover, Hiltner failed to identify anything in Riding the Bullet that had been quoted from Robert Adams. As a result, the appellate court ruled that Hiltner "has no copyright claim."

Hiltner's privacy claim failed, because an action for invasion of privacy may be brought only on behalf

of a living individual, and Hiltner's mother is dead. What's more, neither Hiltner nor her mother could be identified by anything in Riding the Bullet so the novel could not have appropriated their names or likenesses, nor did the novel concern anything in Hiltner's private life or place her in a false light.

Hiltner represented herself. King and Simon & Schuster were represented by Peter Herbert of Lankler Siffert & Wohl and Warren M. Silver of The Silver Law Firm. Glassbook was represented by Robert H. Stier Jr.

Hiltner v. Simon & Schuster, Inc., 34 Fed.Appx. 394, 2002 U.S.App.LEXIS 8718 (1st Cir. 2002)[ELR 24:4:9]

Author of "Children of the Promise" novels may have infringed copyright to non-fiction memoir "Who Refused to Die," federal appellate court rules, because protected expression as well as unprotected facts may have been copied

Novelists often do research in non-fiction books, and on a few occasions, they have been sued for copyright infringement for doing so. Neither facts nor short phrases are protected by copyright, so cases like this rarely succeed. An infringement case now pending in Utah may fail eventually as well; but as of now, it's going to trial, because a federal Court of Appeals has ruled that this time, the non-fiction author may be entitled to succeed.

The plaintiff in the case is Gene S. Jacobsen, a World War II veteran who wrote a memoir entitled Who Refused to Die about his survival of the Bataan

Death March and his imprisonment and torture in work camps in the Philippines and Japan. The defendants in the case are Dean Hughes, the author of the Children of the Promise series of novels, and Hughes' publisher Deseret Book Company.

Hughes' novels were "written primarily" for Mormons. The novels portray the lives of the members a Mormon family during World War II, one of which "closely follows Dr. Jacobsen's experiences as related in Who Refused to Die."

Early in the case, a federal District Court granted Hughes' and Deseret Book's motion to dismiss, for two reasons. First, the District Judge ruled that since Who Refused to Die is non-fiction, it is entitled only to "thin" protection, and its copyright would be infringed only if Jacobsen could show "supersubstantial similarity" between his memoir and Hughes' novels. Second, the District Court held that Hughes had copied

only unprotected facts from Who Refused to Die. But in a decision by Judge Wade Brorby, the Court of Appeals has reversed.

The appellate court acknowledged that "supersubstantial similarity" must be proved in cases involving factual compilations like telephone books. But Judge Brorby ruled that "Who Refused to Die involves more creative effort and original expression than . . . telephone directories . . . . Therefore, Dr. Jacobsen could prove substantial similarity with less similarity than we would require if the allegedly infringed work were a telephone directory."

In addition, Judge Brorby concluded that the similarity between Jacobsen's memoir and Hughes' novels "goes beyond the bare facts that both describe a World War II Army Air Corps Supply Sergeant who was captured by the Japanese, forced to march across the Bataan Peninsula, and imprisoned in various work

camps." Instead, both works described identical specific scenes.

Moreover, Hughes' copied specific language used by Jacobsen, not merely by "close paraphrasing" but even by reproducing "Jacobsen's words exactly." In some of those cases, Hughes copied Jacobsen's quotations of actual people; and Hughes argued that Jacobsen could not claim copyright in things other people said. Judge Brorby, however, noted that Jacobsen had not "contemporaneously record[ed] the quotations or cop[ied] them from a written source." Thus, the judge concluded, the quoted material may have been Jacobsen's "original expression rather than the actual words used." That question should be determined at a trial, rather than in response to a motion, Judge Brorby concluded.

Jacobsen was represented by Brent O. Hatch and Mark R. Clements of Hatch James & Dodge in Salt

Lake City. Hughes and Deseret Book Co. were represented by Mary Anne Q. Wood of Wood Crapo, and Kent B. Linebaugh of Jones Waldo Hollbrook & McDonough, in Salt Lake City.

Jacobsen v. Deseret Book Co., 287 F.3d 936, 2002 U.S.App.LEXIS 7351 (10th Cir. 2002)[ELR 24:4:9]

Claims against publisher of violent video game "Mortal Kombat," asserted by mother of boy who was killed by game-obsessed friend, are dismissed

The publisher of the violent video game "Mortal Kombat" has escaped from a lawsuit filed by the mother of a boy who was killed by friend who was "obsessed" with the game. According to Andrea Wilson, her 13-year-old son Noah was stabbed to death

by a friend who believed that he actually was "Cyrax," a "Mortal Kombat" character who kills his opponents by grabbing them around the neck and stabbing them in the chest.

Noah's mother made this claim in a lawsuit against Midway Games, Inc., seeking recovery under Connecticut products liability and emotional distress law, and other theories.

Federal District Judge Janet Arterton has granted Midway's motion to dismiss the case for failure to state a claim.

Judge Arterton held that "Mortal Kombat" is not a "product" covered by Connecticut's products liability statute. She also ruled that Wilson's emotional distress claim was barred by the First Amendment.

Wilson was represented by Joseph A. Moniz of Moniz Cooper & McCann in Hartford. Midway Games was represented by David L. Belt of Jacobs Grudberg

Belt & Dow in New Haven, Gerald O. Sweeney Jr. of Lord Bissell & Brook in Chicago, and Stephen G. Murphy Jr. of Milano & West in Branford.

Wilson v. Midway Games, Inc., 198 F.Supp.2d 167, 2002 U.S.Dist.LEXIS 6070 (D.Conn. 2002)[ELR 24:4:10]

California Court of Appeal orders dismissal of slander lawsuit filed by "Who Wants to Marry a Millionaire" contestant against host and producer of "Sarah and Vinnie" talk show and radio station owner

Jennifer Seelig is, in one sense, a two-time loser. In February 2000, she was a contestant on the television reality show "Who Wants to Marry a

Millionaire," but she was eliminated almost immediately. She was on television less than one minute, but in that time, she revealed that she worked for San Francisco radio station KFRC. KFRC's sister station KLLC broadcasts a morning talk show called "Sarah and Vinnie," and when the program's hosts and producer learned that Seelig appeared on a reality show whose winner marries a total stranger, they naturally tried to persuade her to talk on their radio program about why she would do a thing like that.

Seelig refused, however, to participate on the "Sarah and Vinnie" show - thus provoking the show's hosts, Sarah Clark and Vincent Crackhorn, and its producer Uzette Salazar, to refer to Seelig as a "chicken butt," "local loser" and "big skank." Those comments provoked Seelig to sue "Sarah and Vinnie's" producer and co-host Vinnie (though not Sarah) as well as

Infinity Broadcasting Corp., the company that owns KLLC (as well as Seelig's own employer, KFRC).

Seelig's lawsuit alleged slander and other claims, some - but only some - of which were dismissed by the trial court judge in response to the defendants' demurrer (i.e., a motion to dismiss for failure to state a recognized legal claim). The trial judge denied the defendants' motion to strike the remaining slander claims. In response, they took an immediate appeal, and were successful.

The California Court of Appeal has ordered the trial court to dismiss Seelig's remaining claims. Under California's "SLAPP" statute - so called because it is designed to protect against "strategic lawsuits against public participation" - the defendants were entitled to dismissal of Seelig's case, without a trial, if they could show that she had sued them because of comments they

made "in connection with an issue of public interest" and it was unlikely she would prevail on her claim.

In an opinion by Justice Mark Simons, the California appellate court ruled that the defendants satisfied that standard. The broadcast concerned a matter of public interest, because "Who Wants to Marry . . ." had "generated significant debate" about what the show indicated "about the condition of American society" and about what sort of person would be willing to marry a complete stranger on national television for notoriety and money.

Justice Simons also ruled that Seelig was unlikely to prevail with her slander suit, because in order to win, she would have to prove that false statements of fact about her had been made. This, she couldn't do, the justice concluded, because the words "chicken butt," "local loser" and "big skank" are too

vague to be considered statements of "fact" that could be proven true or false.

Seelig was represented by Christopher B. Dolan in San Francisco. Infinity Broadcasting and its co-defendants were represented by Frederick F. Mumm of Davis Wright Tremaine in San Francisco.

Seelig v. Infinity Broadcasting Corp., 119 Cal.Rptr.2d 108, 2002 Cal.App.LEXIS 3974 (Cal.App. 2002)[ELR 24:4:10]

Settlement agreement authorized Internet Entertainment Group to continue Internet transmissions of video of Pamela Anderson and Tommy Lee engaged in intimate acts, but may not have authorized subsequent sales of VHS and DVD versions in retail stores, federal appellate court rules

Pamela Anderson is a favorite of the Internet Entertainment Group, but the admiration isn't mutual. She has sued IEG three times for distributing, without her consent, two separate videos of her engaged in intimate acts with then-boyfriend Brett Michaels and then-husband Tommy Lee. She and Michaels got a preliminary injunction in the first case (ELR 20:7:12). And she and Lee settled the second case.

Settlement of the second case didn't end their disputes, however. After exchanging mutual releases, IEG continued to transmit the Anderson-Lee video over

the Internet, and even began selling VHS and DVD versions of it in retail stores. That's what triggered Anderson's third suit against IEG. Naturally, IEG defended the case by asserting the release that settled the second case. But Anderson argued that the release did not authorize IEG's continued use of the video and certainly didn't authorize its sale in retail stores.

Federal District Judge Dean Pregerson agreed with IEG and granted its motion for summary judgment. That didn't end their disputes, however, because on appeal, only part of Judge Pregerson's ruling was affirmed. Part of it was reversed, so the case continues.

In an opinion marked "not appropriate for publication," the Ninth Circuit Court of Appeals has held that the settlement "plainly covers future conduct by IEG."

"However," the appellate court added, "there remains an issue of fact as to whether the Settlement covers only Internet distribution . . . or whether it extends to distribution of the tape on VHS and DVD via retail stores. . . ." The reason there is a factual dispute about this issue is that Anderson's lawyer stated that only Internet distribution was discussed during settlement negotiations, and after the settlement was reached, IEG's president was quoted in a newspaper article as saying that IEG would "Never" sell hard copies of the tape.

Since "a reasonable juror could conclude that the Settlement released only claims related to Internet distribution," the appellate court reversed the dismissal of the case and remanded it for further proceedings concerning IEG's distribution of VHS and DVD versions of the video.

Lee v. Internet Entertainment Group, Inc., 33 Fed.Appx. 886, 2002 U.S.App.LEXIS 7437 (9th Cir. 2002)[ELR 24:4:11]

Former personal manager of rock band "Groovelily" is not liable for notifying concert organizer that it no longer represented band

The rock band "Groovelily" wanted to perform in a November 1999 showcase sponsored by the National Association for Campus Activities (NACA). The band's personal manager and booking agent, DCA Productions Plus, submitted an application; and NACA apparently decided to invite Groovelily to appear. However, before a contract between NACA and the band was signed, Groovelily exercised its right to terminate its

management contract with DCA and thereafter signed a new contract with a former DCA employee.

When DCA learned that Groovelily was represented by a former employee, DCA notified NACA that it no longer represented the band - and NACA removed Groovelily from the showcase. A lawsuit was the consequence.

Groovelily alleged that DCA committed a prima facie tort, had interfered with the band's contractual relations, and had breached fiduciary duties. As serious as these allegations were, the Appellate Division of the New York Supreme Court has ordered them dismissed.

The Appellate Division noted that a claim for "prima facie tort" requires "special" damages. But Groovelily didn't allege any. It merely alleged that it lost future income, the nature of which was "conjectural" and the amount of which was "speculative."

The Appellate Division also held that DCA had merely notified NACA that it no longer represented the band, and done nothing to cause a breach of any contractual relationship between the band and NACA.

Finally, the Appellate Division ruled that "While a business relationship can give rise to a fiduciary duty, not every business relationship does," and there was "no reason to impose a fiduciary duty on . . . a discharged agent" like DCA.

Groovelily was represented by Al J. Daniel Jr. DCA was represented by Robert M. Trien.

Vigoda v. DCA Productions Plus Inc., 741 N.Y.S.2d 20, 2002 N.Y.App.Div.LEXIS 3454 (App.Div. 2002)[ELR 24:4:11]

Breach of contract judgment against Telemundo Network in favor of television series producer is affirmed on appeal, even though signed contract included termination clause

An $850,000 breach of contract judgment against the Telemundo Network in favor of Spanish Television Services (STS), the company that produces the Spanish language television series "Mas Alla Del Horizonte," has been affirmed on appeal. The judgment was affirmed even though their signed contract gave Telemundo the right to terminate the contract if it found the program was "not in its best interests." Shortly after the contract was signed, Telemundo did decide that the series would not appeal to its viewers.

A jury found in favor of STS, and awarded it a verdict of $2.6 million. Since the contract called for a license fee of $5,000 per episode for 170 episodes - for

a total of $850,000 - the trial judge reduced the award to $850,000. But the judge denied Telemundo's motion for a directed verdict or new trial.

In an opinion by Judge John Fletcher, the appellate court held that sufficient evidence had been introduced at trial to permit the jury to conclude that the parties had not in fact agreed on a termination clause or that Telemundo never properly invoked it.

Judge Fletcher also rejected STS's cross-appeal seeking reinstatement of the jury's $2.6 million verdict. He did so on the grounds that "Damages in a breach of contract action are intended to place the injured party in the same position he or she would have been in had the breach not occurred" - not in a better position.

Editor's note: The conclusion that the parties had not in fact agreed on a termination clause - even though it was in their signed contract - was more possible in this case than in most cases, because Telemundo itself

was immediately dissatisfied with the signed contract (because it omitted a provision it claimed had been agreed to), so it sent STS a new version which STS never signed.

Spanish Television Services was represented by Kendall Coffey. Telemundo was represented by Adorno & Zeder.

Telemundo v. Spanish Television Services, 812 So.2d 461, 2002 Fla.App.LEXIS 2402 (Fla.App. 2002)[ELR 24:4:12]

Sex education instructor stated valid claim for invasion of privacy when video producer assigned distribution rights to company that allegedly used her name and likeness to market adult videos as well videos in which she appeared

Sex educator Dr. Judith Seifer has stated a valid invasion of privacy claim, under Ohio law, against Adam & Eve Communications and related companies, because of their alleged use of her name and likeness in marketing sex education and adult videos. Federal District Judge Walter Rice has so held, in an opinion denying most of Adam & Eve's motion to dismiss Dr. Seifer's lawsuit.

Some of the videos marketed by Adam & Eve were sex education videos in which Dr. Seifer appeared, or did voice-over narration, pursuant to a contract with their producer, a company known as The

Learning Corporation. That contract gave The Learning Corporation the right to use Dr. Seifer's name and likeness in marketing the sex education videos produced pursuant to that agreement.

Eventually, The Learning Corporation assigned its rights to Adam & Eve, including the right to use Dr. Seifer's name and likeness. Believing it had acquired the right to do so, Adam & Eve used Dr. Seifer's name and likeness to market The Learning Corporation's sex education videos, and - according to Dr. Seifer - to market its own adult videos as well.

Judge Rice rejected Adam & Eve's argument that because the sex education videos are protected by copyright, Dr. Seifer's privacy claim is preempted by the Copyright Act. The judge also held that the contract by which Dr. Seifer gave The Learning Corporation the right to use her name and likeness did not authorize Adam & Eve to do so.

Moreover, the judge held that the law does not give distributors an implied right to use the names and likenesses of the performers who appear in the videos they distribute.

Dr. Seifer was represented by Henry Louis Sirkin of Sirkin Pinales Mezibov & Schwartz in Cincinnati. Adam & Eve and its co-defendants were represented by Hal Roger Arenstein in Cincinnati, Thomas K. Maher in Chapel Hill, and David S. Rudolf of Rudolf Maher Widenhouse & Fialko in Chapel Hill.

Seifer v. PHE, Inc., 196 F.Supp.2d 622, 2002 U.S.Dist.LEXIS 12624 (S.D.Ohio 2002)[ELR 24:4:12]

Court of Appeals agrees that copyright to once public domain Danish troll doll probably was restored by 1994 amendment to Copyright Act; but appellate court vacates preliminary injunction barring Russ Berrie's continued sales of its similar troll dolls, because District Court did not properly consider whether Russ Berrie's troll dolls were "derivative works," rather than mere copies

Russ Berrie & Company sells troll dolls quite similar, if not identical, to a troll that was designed by Danish woodcarver Thomas Dam back in the 1950s. Dam owns a Danish copyright in his troll. But for decades, his troll was in the public domain in the United States, because when it was first published, it was published without the sort of copyright notice then required by U.S. law.

In 1994, Congress amended the Copyright Act (by adding a new section 104A) to restore U.S. copyright to certain works of foreign origin (ELR 17:3:3). Dam took the position that his troll's copyright was one of those restored. Russ Berrie disagreed, so Dam sued it for infringement and successfully sought a preliminary injunction.

Federal District Judge Nicholas Politan ordered Russ Berrie to discontinue selling its troll dolls by February 13, 2002 - one year after it received Dam's "Notice of Intent to Enforce." One-year is the "sell-off" period given to those who exploited copies of public domain works before their copyrights were restored.

Russ Berrie disputed Dam's contention that his troll was eligible for copyright restoration. Berrie argued that Dam's troll was first published in the United States, rather than Denmark. If so, this would have been significant, because copyrights to works first

published in the U.S. were not restored (regardless of the nationalities of their authors). Berrie also argued that Dam abandoned his copyright. District Judge Politan ruled against Berrie on both points; and the Court of Appeals has agreed. In an opinion by Judge Marjorie Rendell, the appellate court has held that "it appears that Dam . . . will be able to establish that [his troll] satisfies all . . . requirements for restoration. . . ."

On the other hand, the appellate court also ruled that Judge Politan had not properly considered whether Russ Berrie's dolls were "derivative works" based on Dam's troll. The Copyright Act treats derivative works differently than mere copies. That is, mere copies of foreign works may be exploited for no more than a year (after receipt of a Notice of Intent to Enforce) by those who exploited those works before their copyrights were restored. But those who created derivative works may continue to exploit their derivative works forever -

subject only to an obligation to pay the copyright owner "reasonable compensation" for doing so. Thus, if Russ Berrie's trolls are derivative works based on Dam's troll, rather than mere copies, Berrie should not have been enjoined.

Judge Rendell held that if Russ Berrie's trolls "possess 'at least some minimal degree of creativity'" as compared to Dam's troll, and the difference is more than merely trivial, then Berrie's trolls are derivative works, and an injunction barring Berrie from selling its trolls should not have been issued. The appellate court therefore vacated the preliminary injunction and remanded the case to Judge Politan, so he could make that determination.

Dam was represented by Robert L. Sherman of Paul Hastings Janofsky & Walker in New York City. Russ Berrie was represented by Trent S. Dickey and

James M. Hirschhorn of Sills Cummis Radin Tischman Epstein & Gross in Newark.

Dam Things from Denmark v. Russ Berrie & Co., 290 F.3d 548, 2002 U.S.App.LEXIS 9448 (3rd Cir. 2002)[ELR 24:4:13]

Producer of "Fashion Television" program loses trademark and unfair competition lawsuit against owner of "Fashion TV" cable channel

The producer of the weekly television program "Fashion Television" has lost its trademark infringement and unfair competition lawsuit against the owner of the "Fashion TV" cable channel.

Federal District Judge Kimba Wood held that "Fashion Television" is generic, and therefore not

protected by trademark law. Judge Wood therefore granted the cable channel's motion for partial summary judgment, in an unpublished ruling.

Then Judge Constance Baker Motley held that "Fashion Television" has not acquired secondary meaning, and in any event the program's producer had not proved a likelihood that "Fashion Television" would be confused with the "Fashion TV" cable channel, so Judge Motley ruled against the producer on its unfair competition claim as well.

"Fashion Television" is a magazine-style program consisting of interviews and reporting. It is produced in Canada, and has been televised in the United States on the VH-1, E! and Style cable networks.

"Fashion TV" is owned by a French company, and has been carried in the United States by cable systems in New York and Miami. It features

programming that consists solely of short clips of models walking down runways during fashion shows. It does not show interview or news programming at all.

Though Judge Wood found "Fashion Television" to be generic, and thus unprotectible as a trademark, she also ruled that the program's producer might be able to prove an unfair competition claim, under the Lanham Act or common law. The case was then assigned to Judge Motley who conducted a weeklong bench trial on the unfair competition issue.

On the basis of the evidence introduced at trial, Judge Motley did a multi-factor analysis of whether "Fashion Television" had acquired secondary meaning, and concluded that it had not. As an independent basis for her ruling, the judge also did a separate multi-factor analysis of whether the program's producer had proved a likelihood of confusion, and concluded that it had not.

As a result, Judge Motley has entered judgment in favor of the owner of the "Fashion TV" cable channel, thus bringing the case to an end.

The producer of the "Fashion Television" program was represented by Kenneth A. Plevan of Skadden Arps Slate Meagher & Flom in New York City. The owner of the "Fashion TV" cable channel was represented by Raymond J. Dowd of Dowd & Marotta in New York City.

Chum Ltd. v. Lisowski, 198 F.Supp.2d 530, 2002 U.S.Dist.LEXIS 6926 (S.D.N.Y. 2002)[ELR 24:4:13]

Losing season and other factors entitled high school district to replace 53-year-old basketball coach with 43-year-old coach, without violating age discrimination laws

James Ranieri coached varsity basketball at James O'Neill High School in New York for four years. During that time, his teams won two section championships and he won Coach of Year honors once. However, his fourth season was a losing season. And when the school district hired a coach for the following year, it hired someone else. The new coach was 43 years old - 10 years younger than Ranieri who was 53.

Ranieri responded to this disappointment by filing an age discrimination lawsuit against the school district, under the federal Age Discrimination in Employment Act and the New York State Human

Rights Law. His lawsuit, like his final year of coaching, has not been successful.

Federal District Judge Colleen McMahon has held that even though Ranieri's replacement was himself older than 40 - and thus within the class of those protected by age discrimination law - Ranieri had stated a valid prima facie case of age discrimination.

On the other hand, in a motion for summary judgment, the school district asserted that it had hired a new coach because of Ranieri's losing season and because it preferred the new coach's goals and objectives for the program to Ranieri's goals and objectives. Both of these were legitimate, non-discriminatory reasons for hiring the new coach, Judge McMahon held. And she ruled that Ranieri had not satisfied his burden of showing that these reasons were merely a pretext for other discriminatory reasons.

Judge McMahon has therefore granted the school district's motion for summary judgment.

Ranieri was represented by Michael H. Sussman in Goshen. The school district was represented by Julianna Ryan of Kaufman Borgeest & Ryan in New York.

Ranieri v. Highland Falls-Fort Montgomery School District, 198 F.Supp.2d 542, 2002 U.S.Dist.LEXIS 7446 (S.D.N.Y. 2002)[ELR 24:4:14]

Federal appeals court reverses dismissal of race discrimination claims against NCAA in lawsuit by San Jose State soccer play and University of Connecticut football player challenging legality of freshman eligibility rule

The National Collegiate Athletic Association will have to defend itself, after all, against allegations that its freshman eligibility rule discriminates against racial minorities. The allegation has been made in a lawsuit filed by an African-American woman named Kelly N. Pryor who was recruited to play soccer at San Jose State University and by an African-American man named Warren E. Spivey, Jr., who was recruited to play football at the University of Connecticut.

Early in the case, federal District Judge Ronald Buckwalter dismissed it entirely (ELR 23:8:21). But

that ruling has been reversed, in part, by the Court of Appeals.

The rule in dispute is known as "Proposition 16," and it 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. Pryor and Spivey allege that the NCAA adopted Prop 16 "because of" its adverse impact on racial minorities. If that is so, the rule violates Title VI and other Civil Rights legislation.

In an opinion by Judge Paul Michel, the appellate court has held that Pryor and Spivey's complaint adequately alleges a claim for "purposeful discrimination" and thus should not have been dismissed. Judge Michel acknowledged "the NCAA's burden of having to tend to numerous lawsuits alleging purposeful discrimination in the adoption of

Proposition 16" - of which Pryor and Spivey's is one - but he added that the usual rules of civil procedure apply to these cases as much as to others.

The judge "express[ed] no opinion" about whether Pryor and Spivey would be able to substantiate their allegations. He merely ruled that they were entitled to try.

Pryor also had alleged a claim under the Americans with Disabilities Act - a claim that had been dismissed by District Judge Buckwalter as well. That ruling was upheld on appeal. Judge Michel agreed that Pryor had not yet suffered any damages based on her disability, because NCAA rules give learning-disabled students an additional year of eligibility, so that Pryor might yet be able to play soccer for four seasons.

Pryor and Spivey were represented by Andre J. Dennis of Stradley Ronon Stevens & Young in

Philadelphia. The NCAA was represented by David Bruton of Drinker Biddle & Reath in Philadelphia.

Pryor v. National Collegiate Athletic Ass'n, 288 F.3d 548, 2002 U.S.App.LEXIS 8745 (3rd Cir. 2002)[ELR 24:4:14]

Miami University wins dismissal of gender discrimination lawsuit filed by members of disbanded men's soccer, tennis and wrestling teams

Miami University eliminated its men's soccer, tennis and wrestling teams at the end of the 1998-99 school year in order to satisfy its obligations under Title IX - the federal statute that requires federally funded educational institutions to provide equal athletic opportunities for its men and women students. Not

surprisingly, this decision mightily upset the men who played those sports, many of whom had been recruited to attend the University for the specific purpose of becoming team members.

Even though the University had acted in order to comply with the law, several members of the disbanded men's teams sued the University, alleging that it had violated the law by eliminating their teams.

Federal District Judge Sandra Beckwith disagreed. In response to the University's motion for summary judgment, the judge dismissed the case. She ruled that the University had not violated the Equal Protection Clause by eliminating men's soccer, tennis and wrestling, nor had it violated Title IX itself.

The team members who filed the suit were represented by Robert Raymond Furnier of Furnier & Thomas in Cincinnati. Miami University was

represented by James Alan Dyer of Sebaly Shillito & Dyer in Dayton.
Miami University Wrestling Club v. Miami University, 195 F.Supp.2d 1010, 2001 U.S.Dist.LEXIS 24420 (S.D.Ohio 2001)[ELR 24:4:15]

Yahoo and ESPN fantasy football games do not infringe Fantasy Sports' patent, Court of Appeals affirms, but further proceedings are needed to determine whether SportsLine.com's "Commissioner.com" software infringes

Online fantasy football games offered by Yahoo! and ESPN do not infringe a patent owned by Fantasy Sports Properties, the Court of Appeals for the Federal Circuit has held. That ruling affirmed summary judgments won by Yahoo! and ESPN. On the other

hand, the appellate court reversed a summary judgment won by SportsLine.com, and remanded Fantasy Sports' suit against that company for further proceedings. (The lower court's Yahoo ruling was published (ELR 22:6:22), though its ESPN and SportsLine rulings were not.)

Writing for the appellate court, Judge Alan Lourie reasoned that the Fantasy Sports patent covered a game that awarded "bonus points" which the court interpreted to mean points beyond those given in an actual football game, such as bonus points awarded when a player scores in a manner not typically associated with his position.

Judge Lourie affirmed Yahoo's summary judgment, because its game awards no bonus points at all. Though ESPN's game does award different points for different types of scoring plays, the judge affirmed ESPN's summary judgment because in its version of

fantasy football, all types of players receive the same number of points, regardless of the positions they play; and thus ESPN's scoring system was not the same as Fantasy Sports' patented scoring system.

SportsLine didn't fare as well on appeal, though it too may eventually prevail. SportsLine's "Commissioner.com" software allows users to create their own custom fantasy football leagues. Among the things users may customize are the scoring systems used in their fantasy leagues. SportsLine claimed that although scoring could be customized, "Commissioner.com" software does not permit users to award bonus points of the kind that Fantasy Sports has patented. However, Fantasy Sports' expert claimed that he was able to use the Commissioner.com software to create a customized scoring system that was identical to Fantasy Sports' system. SportsLine's summary

judgment had to be reversed to resolve that factual dispute, Judge Lourie concluded.

Fantasy Sports was represented by Dean D. Niro of Niro Scavone Haller & Niro in Chicago. Yahoo! was represented by Michael A. Jacobs of Morrison & Foerster in San Francisco. ESPN was represented by Thomas H. Shunk of Baker & Hostetler in Cleveland. SportsLine was represented by Barry G. Magidoff of Greenberg Traurig in New York City.

Fantasy Sports Properties v. SportsLine.com, 287 F.3d 1108, 2002 U.S.App.LEXIS 7607 (Fed.Cir. 2002)[ELR 24:4:15]

Federal court in California dismisses royalty claims against Polygram Records asserted by "Vinnie" Vincent Cusano, former "KISS" songwriter, because dispute between Cusano and music publisher over ownership of claimed royalties is pending in different court in New York

Polygram Records has won at least the temporary dismissal of a lawsuit for allegedly unpaid songwriter royalties filed against it by "Vinnie" Vincent Cusano, a former guitarist and songwriter for the band "KISS." Cusano co-wrote three of the songs on the KISS album "Creatures of the Night." Polygram has been paying Cusano's share of the songwriter royalties for those songs to Horipro Entertainment Group, a music publishing company that appears to have acquired Cusano's share by written contract back in 1992.

Cusano, however, alleges that Horipro acquired only his publisher's share of the royalties, not his writer's share, or that the agreement became entirely void. The dispute between Cusano and Horipro is pending in federal court in New York, while Cusano's case against Polygram is pending before federal District Judge Howard Matz in Los Angeles.

In response to Polygram's motion, Judge Matz has dismissed Cusano's lawsuit, without prejudice, because any decision made in Los Angeles would either prejudice Horipro's right to continue receiving royalties from Polygram, or would subject Polygram to an obligation to pay duplicate royalties to Cusano as well as Horipro.

As a result, Judge Matz has ordered Cusano to take whatever action is necessary in the New York case to establish his rights "vis-à-vis Horipro," and to refile his suit against Polygram in Los Angeles if he succeeds

in establishing that he, rather than Horipro, owns the royalties he claims.

Cusano was represented by James J. Little and Stephen P. Collette of Little & Collette in Los Angeles. Polygram Records was represented by John H. Lavely Jr., Brian G. Wolf and Paul K. Lukacs of Lavely & Singer in Los Angeles.

Editor's note: This is the second, primarily procedural, opinion issued in this on-going case. Originally, Cusano's suit was dismissed, because he went bankrupt, and the District Court held that his claims belonged to his bankruptcy trustee rather than to him. The Ninth Circuit Court of Appeals partially reversed that ruling, however, saying that his claims for royalties earned after he filed his bankruptcy petition did not belong the bankruptcy trustee (ELR 23:9:18). Those, apparently, are the claims that were at issue in this second decision.

Cusano v. Klein, 196 F.Supp.2d 1007, 2002 U.S.Dist.LEXIS 13174 (C.D.Cal. 2002)[ELR 24:4:16]

Judge awards BMI $43,000 in statutory damages in suit against corporate owner and principal officer of Alabama establishment that performed live and recorded music without a license; infringer's right to jury trial waived by failure to make timely jury demand

Federal District Judge Dean Buttram has awarded BMI and several music publishers $43,000 in statutory damages in their copyright infringement lawsuit against the owner of "Dee Fords," an "establishment" in Anniston, Alabama, that performed live and recorded music without a BMI license. The judgment was entered, jointly and severally, against

Dee Fords' corporate owner and the corporation's sole shareholder and principal officer.

Judge Buttram rejected the principal officer's argument that he was entitled to a jury trial on the amount of statutory damages that could be awarded against him. That argument was based on the Supreme Court's 1998 decision in Feltner v. Columbia Pictures (ELR 19:12:6). But in this case, the officer failed to make his jury request within the time required by court rule, so he waived his right to a jury trial, the judge held.

The $43,000 award amounted to $3,909.09 for each of 11 copyrights that were infringed. The judge explained that the amount he awarded was comfortably within the $750 to $30,000 per infringement range permitted by the Copyright Act, and was approximately three times the licensing fee that should have been paid to BMI.

The judge also awarded BMI its attorneys fees and costs and enjoined any further infringements of copyrights licensed by BMI.

BMI and its publishers were represented by Gilbert E. Johnston Jr. of Johnston Barton Proctor & Powell in Birmingham. The owner of Dee Fords and its shareholder were represented by H. Merrill Vardaman of Vardaman & Vardaman in Anniston.

Broadcast Music, Inc. v. Entertainment Complex, Inc., 198 F.Supp.2d 1291, 2002 U.S.Dist.LEXIS 8027 (N.D.Ala. 2002)[ELR 24:4:16]

Previously Reported:

A "superseding" opinion has been published in Latin American Music v. Archdiocese of San Juan, 194

F.Supp.2d 30, 2001 U.S.Dist.LEXIS 24288 (D.P.R. 2001). This newly-published opinion reaches the same conconclusions, for the same reasons, as the original decision reported at ELR 23:5:14. [ELR 24:4:17]

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[ELR 24:4:18]