

**WASHINGTON MONITOR**

**FCC to consider adoption of copy protection rules for digital television receivers and consumer electronics devices**

As the current session of Congress comes to a close, one piece of proposed legislation left hanging on the vine will be the "Hollings Bill." That bill - more formally known as the "Consumer Broadband and Digital Television Promotion Bill" - would have required hardware and software makers to include copy protection technologies in their products, in order to prevent the unauthorized use of copyrighted works.

The Hollings Bill was enormously controversial. It pitted "Hollywood" (which wanted the bill) against "Silicon Valley" (which didn't). And it sparked countless articles in the business and technology press

about this inter-industry conflict, including one in Fortune magazine titled "This Is War."

At about the same time the Hollings Bill was serving as a lightning rod for the debate over what to do about digital copyright piracy, the Federal Communications Commission was thinking about that issue too. The FCC has mandated the introduction of digital television broadcasting, nationwide, by 2006 (ELR 18:11:15). But movie and television producers aren't going to provide expensive content for digital TV broadcasts, if that content can easily be copied and forwarded over the Internet to recipients around the world.

As a result, the lack of effective copy protection methods may hinder the development of digital TV broadcasting by greatly reducing the amount of attractive programming that is made available for it.

With this in mind, the FCC has issued a "Notice

of Proposed Rulemaking" by which the Commission invites comments on whether it should adopt rules that would mandate the incorporation of copy protection technology into television receivers. The FCC also has requested comment on whether it should require makers of consumer electronics devices, such as digital TV recorders, to incorporate copy protection technologies into their products as well.

The FCC's notice urges comments on a wide range of issues. The Commission has asked, for example, about whether existing technologies would work, whether it has jurisdiction to adopt copy protection rules, whether such rules would be consistent with the First Amendment, and what effect such rules would have on the cost of affected equipment.

Since the FCC is still at the information-gathering stage, it has not proposed any specific

language for the rules it is contemplating. In that sense, the FCC proceeding is different from the Hollings Bill, which was controversial, in part, because of its specific proposals. In concept, however, the contemplated FCC rules and the Hollings Bill are the same. So although the FCC's "Notice of Proposed Rulemaking" did not trigger the same controversy the Hollings Bill did, the FCC proceeding itself is likely to become a forum for the heated exchange of conflicting views.

In the Matter of Digital Broadcast Copy Protection, MB Docket No. 02-230 (FCC Aug. 8, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-231A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-231A1.pdf) [ELR 24:5:4]

**Copyright Office invites comments on whether it should exempt certain types of works from DMCA's ban on circumventing technologies that control access to copyrighted works**

The Digital Millennium Copyright Act makes it illegal to circumvent technologies, like passwords, that control access to copyrighted works. The Act itself contains exemptions from this ban - exemptions that permit circumvention by law enforcement agencies as well as for encryption research, security testing and certain other specified purposes.

However, even with its statutory exemptions, the Act's ban on circumvention was controversial. It was, in fact, so controversial that Congress directed the Copyright Office to conduct proceedings every three years, to determine whether any additional exemptions should be granted, and if so, to grant them by

Copyright Office rule.

The Copyright Office concluded the first of those proceedings in 2000, and issued a rule that exempted two types of works: lists of websites blocked by filtering software; and literary works, software and databases with obsolete or defective access control mechanisms (ELR 22:6:9).

The time has now come to begin the second triennial proceeding. The Copyright Office has therefore issued a "Notice of Inquiry," inviting comments on whether it should continue to exempt the two types of works exempted in the first proceeding, and whether it should exempt any additional types of works for the three-year period beginning in October 2003.

The Copyright Office has emphasized that in order to persuade it to exempt a type of work - thus permitting the circumvention of access controls -

proponents of the exemption must do three things:

- \* identify the technological measure that is the source of the alleged problem of gaining access to the work,
- \* specifically explain what noninfringing activity the ban on circumvention is preventing, and
  
- \* establish that the prevented activity is, in fact, a noninfringing use under current law.

In addition, the Copyright Office has noted that permitting circumvention of access controls "could have a greater adverse effect on the public than . . . the adverse effects [of the ban on circumvention]." As a result, even if the ban on circumvention is shown to have caused adverse effects on the public, the Copyright Office has said that it will have to balance those effects against the adverse effects that may result from lifting the ban.

Written comments, in a format specified by the

Copyright Office, are due by December 18, 2002, and reply comments will be due by February 19, 2003. The Office will conduct hearings in the Spring of 2003.

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2002-4, 67 Federal Register 63578 (Oct. 15, 2002), available at [www.copyright.gov/fedreg/2002/67fr63578.pdf](http://www.copyright.gov/fedreg/2002/67fr63578.pdf) [ELR 24:5:4]



**Copyright Office denies request for stay of rule requiring radio stations to pay royalties to record companies and recording artists for Internet retransmissions of broadcasts**

Radio stations were required to make their first payment of performance royalties to record companies and recording artists on October 20, 2002, for Internet retransmissions of their music broadcasts. The Copyright Office so ruled in December 2000 (ELR 22:7:5).

Broadcasters, however, have never agreed with the Copyright Office's interpretation of the law. They instead claim that the Copyright Act exempts them from the obligation to pay performance royalties to record companies and artists - not only when they broadcast recordings over the air (where they clearly do have such an exemption), but also when their

broadcasts are retransmitted over the Internet.

So far, broadcasters haven't persuaded anyone that their interpretation of the Copyright Act is correct. Last year, federal District Judge Berle Schiller agreed with the Copyright Office, and held that radio stations do have to pay royalties for Internet retransmissions of their broadcasts (ELR 23:8:11). But the broadcasters have taken Judge Schiller's decision to the Court of Appeal, where the case is now pending.

The Court of Appeals is likely to rule sometime early in 2003. But in the meantime, the Librarian of Congress has determined the amount of the royalty that radio stations (and other webcasters) must pay: 0.07 cents per song per Internet listener (ELR 24:3:6). And payments are now due.

Radio stations still hope to prevail before the Court of Appeals and don't want to make any payments - or compile the performance reports that must

accompany them - unless and until they lose. For that reason, broadcasters asked the Copyright Office to stay enforcement of its rule, until the case is finished. The Copyright Office has denied that motion, however.

In an Order issued by Register of Copyrights Marybeth Peters, the Office has held that the broadcasters have not satisfied the legal requirements for a stay, for several reasons.

First, the Register concluded that broadcasters have not established a likelihood that they will succeed on the merits. Second, they have not shown there is a high probability they will suffer harm if they are required to begin making royalty payments now. Third, the broadcasters' own arguments showed that record companies and recording artists will suffer harm if payments are not begun now. And fourth, the public interest would not be served by delaying the payment of royalties until the case is concluded.

In the Matter of Public Performance of Sound Recordings, Docket No. RM 2000-3C (Oct. 10, 2002), available at <http://www.copyright.gov/carp/stay-amfm.pdf> [ELR 24:5:5]

### **INTERNATIONAL DEVELOPMENTS**

#### **Sale to Canadians of subscriptions and decoders for U.S. satellite TV services is prohibited by Canadian law, Supreme Court of Canada rules**

The Canadian Radiocommunication Act prohibits the sale to Canadians of subscriptions and decoders for United States satellite TV services. The Supreme Court of Canada has so held, in a lawsuit filed by Bell ExpressVu, one of the two Canadian companies

licensed by the Canadian government to provide direct-to-home satellite TV service in that country.

At first blush, it may look as though this ruling is the outgrowth of a desire to protect Canadian satellite TV companies from competition from U.S. satellite TV companies such as DirecTV. But it's not. In fact, Bell ExpressVu sued the owner of a company known as "Can-Am Satellites," a Canadian company that does business in that country, not in the U.S.

What's more, DirecTV intervened in the case on the side of Bell ExpressVu, and in opposition to Can-Am, even though Can-Am was selling DirecTV subscriptions and decoders to Canadian subscribers. Though DirecTV was paid for these subscriptions, DirecTV is not licensed to sell satellite TV service in Canada. (By Canadian law, no non-Canadian company is or can be.)

Moreover, DirecTV - for copyright and perhaps

other reasons - does not knowingly authorize its signals to be decoded by people outside the United States. Indeed, in order to sell subscriptions to its Canadian customers, Can-Am gave them phony U.S. addresses, in order to trick DirecTV into believing that they were in fact U.S. residents.

Bell ExpressVu sought an injunction against Can-Am's sale of decoders to Canadian customers, but it was not at first successful. Both the trial and appellate courts in British Columbia interpreted the Radiocommunication Act to prohibit the unauthorized decoding only of those signals that are transmitted by licensed Canadian satellite companies. Since DirecTV is not Canadian, those courts held that the Act did not prohibit Can-Am or its customers from doing what they were doing.

The Supreme Court of Canada has interpreted the Radiocommunication Act differently. In an opinion

by Justice Frank Iacobucci, the Supreme Court has held that the Act prohibits the decoding of all encrypted satellite signals except those that are decoded with the authorization of a satellite company that has the legal right to transmit those signals in Canada. Since DirecTV does not have the legal right to transmit satellite TV signals in Canada, the Radiocommunication Act prohibits the decoding of its signals, Justice Iacobucci concluded.

Can-Am argued that if the Act prohibits what it was doing, the Act violates the Canadian Charter of Rights and Freedoms (Canada's constitution). Justice Iacobucci declined to reach the Charter issue, however, saying that issue could be raised by Can-Am when the case went to trial.

Bell ExpressVu was represented by K. William McKenzie, Eugene Meehan Q.C. and Jessica Duncan, and solicitors Crawford McKenzie McLean & Wilford

in Orillia and Lang Michener in Ottawa. Can-Am was represented by Alan D. Gold and Maureen McGuire and solicitors Gold & Fuerst in Toronto. DirecTV was represented by Christopher D. Bredt, Jeffrey D. Vallis and Davit D. Akman and solicitors Borden Ladner Gervais in Toronto.

Bell ExpressVu Ltd. v. Rex, 2002 SCC 42 (2002), available at [www.lexum.umontreal.ca/csc-scc/en/index.html](http://www.lexum.umontreal.ca/csc-scc/en/index.html) [ELR 24:5:6]



**RECENT CASES**

**Beastie Boys' recording "Pass the Mic," which included licensed sample from James W. Newton's recording of his composition "Choir," did not infringe copyright to the composition itself, even though composition was not licensed**

Composer and flautist James W. Newton, Jr., has lost a copyright infringement lawsuit against the Beastie Boys and their record company, in a decision that seems - at first - counterintuitive.

The Beastie Boys' recording "Pass the Mic" contains a six-second sample from a recording of "Choir" which was both written and recorded by Newton. The Beastie Boys obtained a license for the sample from Newton's record company, but they didn't get a mechanical license for the composition itself from

Newton (who also is the composition's publisher).

Since the sample was licensed, Newton's case depended on whether "Pass the Mic" infringed the copyright to the composition alone. In response to a defense motion for summary judgment, federal District Judge Nora Manella held that it did not.

The sample used by the Beastie Boys included Newton's "unique technique" of performing "Choir," but those elements were licensed from Newton's record company. "After filtering out the performance elements," Judge Manella was "left with a six-second snippet of [Newton's] composition consisting of a fingered 'C' note and a sung three-note sequence C-D flat-C."

The Beastie Boys and their record company showed, however, that this same three-note sequence "has been used over and over again by major composers in 20th Century music, particularly [during]

the '60s and '70s, just prior to [when Newton composed 'Choir']." Relying on several earlier cases involving short snippets of music, the judge held that "such small and unoriginal portions of music cannot be protected by copyright."

Moreover, Judge Manella held that even if the three-note sequence were protected by copyright, the Beastie Boys' use of the sequence was "de minimis" rather than infringing.

Newton was represented by Jeffrey Alan Berchenko of Berchenko & Korn and Alan Michael Korn in San Francisco. The Beastie Boys and their record company were represented by Adam F. Streisand of Loeb & Loeb in Los Angeles. Sony Music and BMG Direct Marketing were represented by Barry E. Mallen of Manatt Phelps & Phillips in Los Angeles and Steven M. Hayes of Parcher Hayes & Snyder in New York City.

Newton v. Diamond, 204 F.Supp.2d 1244, 2002 U.S. Dist. LEXIS 10247 (C.D. Cal. 2002)[ELR 24:5:7]

**"Baywatch" actor Jose Solano is entitled to jury trial in suit against "Playgirl" complaining that magazine cover falsely suggested magazine contained nude photos of him**

Actor Jose Solano is best known for his role as "Manny Gutierrez" on the television series "Baywatch." Now though he'll be known - at least among entertainment lawyers and law students - as the thus far successful plaintiff in a rights of privacy and publicity lawsuit against Playgirl magazine.

Solano's lawsuit was triggered by two things: a photo on the cover of the magazine's January 1999 issue showing him shirtless (but with red lifeguard

trunks); and a headline on that cover that suggested, he alleges, that the inside of the January 1999 issue contains photos of him nude.

In fact, though the magazine did contain a short written profile of the actor and a photo showing him fully dressed, it did not contain nude photos of him. "Significantly," however, Playgirl is displayed on newsstands packaged in plastic wrap, so customers couldn't know the inside photo was not a nude, unless and until they bought the magazine and removed its wrapping.

Solano's lawsuit alleged claims for false light invasion of privacy and for violating his right of publicity under California Civil Code section 3344. The case did not go well for him, at first. Federal District Judge Dickran Tevzian granted Playgirl's motion for summary judgment and dismissed it. On appeal, however, Solano has done better.

In a decision by Judge Raymond Fisher, the Court of Appeals has held that there were sufficient disputed issues of fact to require a trial, in connection with both claims. As a result, the appellate court has reversed the judgment won by Playgirl and has remanded the case to the District Court, for further proceedings.

Judge Fisher held that "a jury reasonably could conclude that the Playgirl cover conveyed the message that Solano was not the wholesome person he claimed to be, [and] that he was willing to - or was 'washed up' and had to - sell himself naked to a women's sex magazine."

As a public figure, Solano also had to show that Playgirl published this false statement with "actual malice." Judge Fisher held there was sufficient evidence for a jury to conclude that Playgirl had. That is, Fisher introduced evidence showing that Playgirl's

own staff members had suggested that the cover would suggest Solano appeared nude inside, but despite being put on notice of this fact by the magazine's own staff, its editors decided to use the cover nevertheless.

Finally, to prevail on his false light privacy claim, Solano also will have to show he suffered damage. But Judge Fisher ruled that the actor's testimony that he was humiliated and embarrassed was sufficient to establish a genuine issue of fact concerning damages.

The judge held that Solano is entitled to a trial on his right of publicity claim as well. California law contains a "newsworthiness privilege" that permits the unlicensed publication of a celebrity's name and likeness in connection with newsworthy events. Judge Fisher ruled, however, that this exception for newsworthy publications does not apply when a celebrity's name and likeness are used "in a knowingly

false manner to increase sales of the publication."

Solano was represented by Jonathan H. Anshell of White O'Connor Curry Gatti & Avanzado in Los Angeles. Playgirl was represented by Kent R. Raygor of Sheppard Mullin Richter & Hampton in Los Angeles.

Solano v. Playgirl, Inc., 292 F.3d 1078, 2002 U.S.App.LEXIS 11437 (9th Cir. 2002)[ELR 24:5:7]

**Unauthorized depiction of real people in movie "The Perfect Storm" did not violate their rights, federal District Court holds in decision dismissing case**

The unauthorized depiction of the children and former spouses of deceased members of the crew of the



fishing vessel "Andrea Gail," in the movie "The Perfect Storm," did not violate any of their rights. Federal District Judge Anne Conway has so ruled, in response to a motion for summary judgment filed by Warner Bros. and others involved in the movie's production. Also dismissed were claims by a surviving member of the crew of the "Andrea Gail" who was depicted in the movie as well.

The plaintiffs had alleged claims for commercial misappropriation under a Florida statute and for common law invasion of privacy.

Judge Conway ruled that under Florida law, a motion picture is not a "commercial purpose," and thus use of the plaintiffs' names simply did not violate the statute. Moreover, the judge added, even if the statute purported to apply to movies, "The Perfect Storm" is protected by the First Amendment, and thus the statute could not be used to impose liability on Warner Bros.

or its co-defendants.

The plaintiffs argued that the result should be otherwise, because, they said, the movie was fictionalized. But Judge Conway held that no court has interpreted the statute as including an element of falsity, and thus it was "immaterial" whether "The Perfect Storm" was fiction or nonfiction.

Judge Conway dismissed the plaintiffs' false light invasion of privacy claims, because they did not have standing to assert such claims on behalf of their deceased family members, and to the extent the plaintiffs themselves were depicted in the movie, those depictions were not false.

Finally, the judge rejected the plaintiffs' disclosure of private facts claims, because such claims require the disclosed facts to be both private and true, while the plaintiffs contended that the disclosed facts were false.

The plaintiffs were represented by Stephen J. Calvacca in Orlando, and W. Edward McLeod Jr. in Winter Park. Warner Bros. and the other defendants were represented by Steven L. Brannock of Holland & Knight in Tampa and Robert C. Vanderet of O'Melveny & Myers in Los Angeles.

Tyne v. Time Warner, 204 F.Supp.2d 1338, 2002 U.S. Dist. LEXIS 9912 (M.D. Fla. 2002)[ELR 24:5:8]

**Anti-circumvention provisions of DMCA are constitutional, federal court rules in denying motion to dismiss criminal prosecution of ElcomSoft for selling software that strips Acrobat eBook protections**

Federal District Judge Ronald Whyte has upheld

the constitutionality of the anti-circumvention provisions of the Digital Millennium Copyright Act. He did so in a criminal case in which the federal government is prosecuting ElcomSoft Co., Ltd., a Russian company that sells software that strips protection technologies from Adobe Acrobat eBooks.

Judge Whyte's ruling was in response to ElcomSoft's motion to dismiss the indictment - a motion in which ElcomSoft argued that the DMCA's anti-circumvention provisions are unconstitutionally vague, violate First Amendment free speech rights, and were beyond Congress's power to enact.

In a nutshell, the DMCA's anti-circumvention provisions prohibit the distribution of tools designed to circumvent access and copy-protection controls (ELR 20:6:4). ElcomSoft's software clearly is such a tool, which is why ElcomSoft sought to have the anti-circumvention provisions declared unconstitutional.

In a lengthy and thoughtful decision, Judge Whyte rejected virtually all of ElcomSoft's arguments. The judge ruled that the anti-circumvention provisions are not vague, because they clearly ban the distribution of all circumvention tools, including those that may be used to circumvent controls for fair use or other non-infringing purposes.

Though this interpretation means that it is illegal to distribute circumvention tools even if they are used for non-infringing purposes, the provisions are not an unconstitutional restraint on free speech, the judge held. He agreed with ElcomSoft that its software is, in part, "speech" protected by the First Amendment. But this simply meant that in order to be constitutional, the anti-circumvention provisions have to serve substantial governmental interests in a manner that does not burden speech substantially more than is necessary. Judge Whyte found that the anti-circumvention

provisions satisfy these standards.

He also ruled that Congress had the power under the Commerce Clause of the Constitution to enact the anti-circumvention provisions.

For these reasons, Judge Whyte denied ElcomSoft's motion to dismiss the indictment. The trial itself has been postponed, however, because ElcomSoft's key witnesses also are Russian, and they have been denied visas to come to the United States to testify.

The government was represented by Scott Frewing, Assistant United States Attorney, in San Jose. ElcomSoft was represented by Joseph M. Burton of Duane Morris in San Francisco and John Keker of Keker & Van Nest in San Francisco.

U.S. v. Elcom Ltd., 203 F.Supp.2d 1111, 2002 U.S. Dist.LEXIS 9161 (N.D.Cal. 2002)[ELR 24:5:8]

**Offending statements in best-selling book "A Civil Action" were protected by First Amendment, appellate court holds, in decision affirming dismissal of tannery owner's defamation and related claims against author Jonathan Harr and book's publisher**

The book *A Civil Action* was a non-fiction but dramatic account of a toxic tort lawsuit brought by residents of Woburn, Massachusetts, against those who were allegedly responsible for contaminating two municipal water wells. Author Jonathan Harr spent years writing the book, and was rewarded, eventually, by its becoming a best-seller and the basis for a highly-regarded motion picture.

In due course, however, Harr and his publisher were themselves made the target of a lawsuit - one filed by John J. Riley, Jr., the owner of the tannery where the toxic chemicals were allegedly dumped. Riley

complained that A Civil Action wrongly described him as a liar, a perjurer, a "killer," a depressive, and a bully. Riley's complaint asserted several claims, including infliction of emotional distress, slander, defamation, and invasion of privacy.

Harr and his publisher escaped from the case more easily than the defendants in the toxic tort lawsuit, though it took two rounds of federal court hearings and rulings for them to prevail.

In the first round, District Judge Steven McAuliffe granted summary judgment to Harr and his publisher, on the grounds that the statements in the book about which Riley complained were protected by the First Amendment. Riley appealed, but in the second round, the Court of Appeals affirmed the dismissal, again on First Amendment grounds.

In an opinion by Judge Kermit Lipez, the appellate court considered the book's offending



statements individually, and concluded that each was a subjective view (rather than a statement of objective fact), or the book gave readers the information they needed to draw their own conclusions, or described evidence relied on in the toxic tort case while making it clear that it was never proved that Riley had dumped chemicals illegally, or was a fair report of what happened in the toxic tort case, or was rhetorical hyperbole (rather than a statement of fact).

Riley was represented by Peter A. Riley. Harr and his publisher were represented by Steven M. Gordon.

Riley v. Harr, 292 F.3d 282, 2002 U.S.App.LEXIS 11151 (1st Cir. 2002)[ELR 24:5:9]

**Appellate court orders dismissal of defamation suit filed against Geraldo Rivera by anti-abortion activist who Rivera described as "an accomplice to homicide" during CNBC interview, because statement was protected by First Amendment**

Geraldo Rivera has won the dismissal of a defamation lawsuit filed against him by Neal Horsley, an anti-abortion activist Rivera interviewed on his CNBC program "Upfront Tonight." The interview took place shortly after Dr. Bernard Slepian was shot to death through the window of his Buffalo, New York, home. Horsley was invited to participate in the program, because he operates an anti-abortion website on which he had posted Dr. Slepian's name with an X through it, immediately after the shooting.

During a heated exchange on "Upfront Tonight," Rivera said to Horsley, "You are an accomplice to

homicide, Mr. Horsley," to which Horsley responded, "You are too. . . ." Horsley also responded with a defamation lawsuit.

Rivera made a motion to dismiss the suit on the grounds that his statement was protected by the First Amendment. Federal District Judge Jack Camp denied the motion, but did certify the case for an immediate appeal.

In a decision by Judge Cynthia Holcomb Hall, the Court of Appeals ruled that Rivera's statement was "absolutely . . . protected by the First Amendment and by Georgia law as rhetorical hyperbole. . . ." Judge Hall explained that "A reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability for Dr. Slepian's death, not as a literal assertion that Horsley had, by his actions, committed a felony."

As a result, the Court of Appeals remanded the

case to the District Court with instructions to enter judgment in favor of Rivera.

Horsley represented himself. Rivera was represented by Daniel M. Kummer of NBC in New York City and by Joseph R. Bankoff of King & Spalding in Atlanta.

Horsley v. Rivera, 292 F.3d 695, 2002 U.S.App.LEXIS 9981 (11th Cir. 2002)[ELR 24:5:9]

**Discovery Channel documentary "If We Had No Moon" did not infringe copyright to book "What If The Moon Didn't Exist?," and documentary's "thank you" to book's author did not violate Lanham Act**

A Discovery Channel documentary entitled "If We Had No Moon" did not infringe the copyright to a book entitled "What If The Moon Didn't Exist?" by Neil F. Comins, a University of Maine Astronomy and Physics Professor, even though the documentary's producers acknowledged reading the book. Indeed, credits at the end of the documentary "thank" Professor Comins, as well as 39 others.

Federal District Judge Peter Messitte so ruled, in response to Discovery's motion for summary judgment - a motion the judge has granted.

After a careful review of Professor Comins' book

and Discovery's documentary, Judge Messitte concluded that "virtually all the similarities between [the two works] . . . involve non-protectable elements," such as ideas and facts. Moreover, Discovery demonstrated that it independently created the documentary, by presenting "extensive evidence of the literature it reviewed in the process of developing its program, as well as of the many interviews it conducted with scientists both off- and on-screen."

Judge Messitte also rejected Professor Comins' claim that his rights under the Lanham Act were violated by the documentary's "thank you" credit to him. The judge concluded that Discovery "in no way misrepresented or overrepresented Comins' contribution to the Film," nor did it attempt to "pass off" his work as its own.

Comins was represented by Jerry L. Squires of Washington D.C. Discovery was represented by Lee J.

Levine of Washington D.C.

Comins v. Discovery Communications, Inc., 200 F.Supp.2d 512, 2002 U.S.Dist.LEXIS 7645 (D.Md. 2002)[ELR 24:5:10]

**Fact issues preclude summary judgment in suit alleging that novel and movie "The Omega Code" infringe copyright to novel "The Omega Syndrome"**

The Omega Syndrome is a novel by Sylvia Fleener. It's an apocalypse story centered on the Biblical prophecy of the Anti-Christ. The Omega Code is a novel by Paul and Jan Crouch and Lance Charles, as well as a movie (based on that novel) produced by TBN Films and Gener8xion Entertainment. The Omega Code too is an apocalypse story centered on the

Biblical prophecy of the Anti-Christ.

Apocalyptic stories inspired by the Bible are of course an entire genre. But certain similarities between the plots, characters and settings of *The Omega Syndrome* and *The Omega Code* prompted Fleener to allege that the *The Omega Code* novel and movie infringe the copyright to her own novel.

As defendants in such cases often do, the defendants in this case responded with a motion for summary judgment. Federal District Judge Lourdes Baird denied their motion, however, finding - in an unpublished ruling - that a half-dozen elements common to both stories would be sufficient for a jury to find them substantially similar.

Focusing on those six elements, the defendants renewed their motion, arguing that they were not protected by copyright because they were not original, were merely ideas, or were scenes a faire. Once again,



however, the defendants were disappointed. In a belatedly published opinion, Judge Baird denied the defendants' motion.

The judge rejected the argument that the allegedly copied elements of Fleener's novel were unprotected because they were similar to elements in pre-existing books such as William Whiston's *Vindication of the New Theory of Earth* and Pat Robertson's *The End of the Age*. Judge Baird noted that similarities between Fleener's novel and those books would be relevant to its originality only if the defendants had shown that Fleener copied those earlier books. According to the judge, however, the defendants did not even attempt to trace the earlier books to Fleener's novel.

Judge Baird also rejected the defendants' argument that the half-dozen similar elements were unprotectible ideas. Instead, she said they were

"concrete" elements of plot, theme, sequence of events, theme and setting.

Finally, the judge ruled that the defendants had failed to show that the half-dozen elements were unprotectible scenes a faire. The defendants had not, she explained, established that any of the elements is standard to the genre, "much less indispensable."

Fleener was represented by Daniel Joseph Quisenberry of Nevers Palazzo Maddux & Packard in Westlake Village. TBN Films and Gener8xion Entertainment were represented by John C. Rawls of Jones Day Reavis & Pogue, Karen R. Thorland of Loeb & Loeb in Los Angeles, and Charles M. Coate of Barab Abrams & Coate in Beverly Hills. Paul and Jan Crouch were represented by John J. Murphy III of Jones Day Reavis & Pogue in Los Angeles and John Bethany Casoria in Newport Beach.

Fleener v. Trinity Broadcasting Network, 203

F.Supp.2d 1142, 2001 U.S.Dist.LEXIS 23847  
(C.D.Cal. 2001)[ELR 24:5:10]

**California Supreme Court to review suit filed by albino performers Johnny and Edgar Winter against creators and publisher of comic books that featured albino characters named Johnny and Edgar Autumn**

The California Supreme Court has agreed to review a case in which Johnny and Edgar Winter - well-known albino performing and recording musicians from Texas - have sued DC Comics on account of its publication of a series of comic books featuring albino characters named "Johnny and Edgar Autumn." The comic books' author Joe Landsale and their illustrators Timothy Truman and Sam Glanzman were named as

defendants as well.

As depicted in the comic book series, the Autumn brothers are quite unpleasant characters, so Johnny and Edgar Winter sued for defamation as well as misappropriation. Their case was not successful, at first. A California trial court dismissed it, in response to a defense motion for summary judgment. On appeal, the Winters did no better: the California Court of Appeal affirmed the dismissal, in an unpublished opinion.

Undaunted, the Winters petitioned the California Supreme Court, and there the case took a turn in their favor. The Supreme Court granted review until it could decide a separate but then-pending case it had under consideration - the Comedy III v. Saderup case involving unauthorized lithographs and T-shirts bearing images of the Three Stooges. Once the California Supreme Court decided that case - by holding that artist

Gary Saderup did not have a First Amendment right to use the Three Stooges images for those purposes (ELR 22:12:5) - the Supreme Court remanded Johnny and Edgar Winter's lawsuit to the Court of Appeal with instructions that it be reconsidered in light of the Supreme Court's decision in *Comedy III v. Saderup*.

The Court of Appeal did so, and issued a split ruling. It affirmed once again the trial court's dismissal of the Winters' defamation claims, on the grounds that no "reasonable reader" would believe that the comic book series made "factual" statements about the Winters.

On the other hand, the Court of Appeal reversed the dismissal of the Winters' misappropriation claim. In *Saderup*, the Supreme Court held that the unauthorized use of a celebrity's likeness would be protected by the First Amendment if "the work in question adds significant creative elements so as to be transformed

into something more than a mere celebrity likeness or imitation." In an opinion by Justice Gary Hastings, the Court of Appeal held that in the Winters' case, there are "triable issues of fact" concerning whether the comic books satisfy this test. Justice Hastings therefore held that Johnny and Edgar Winters are entitled to a trial on that issue.

The comic books' creators and publisher then asked the California Supreme Court to review the case for a second time, and it has agreed to do so.

The Winters were represented by Julia L. Ross, Corey J. Spivey and Vincent H. Chieffo of Gipson Hoffman & Pancione in Los Angeles. DC Comics and its co-defendants were represented by Anjani Mandavia, Julie B. Waldman and Michael Bergman of Weissmann Wolff Bergman Coleman & Silverman in Beverly Hills.

Winter v. DC Comics, 121 Cal.Rptr.2d 431, 2002 Cal.App.LEXIS 4300 (Cal.App. 2002), review granted, 125 Cal.Rptr.2d 442, 2002 Cal.LEXIS 6054 (Cal. 2002)[ELR 24:5:11]

**Art museums and collage artist Barbara Kruger defeat copyright and privacy claims of German photographer Thomas Hoepker and model Charlotte Dabney**

In a case that reads like a law school hypothetical, federal District Judge Alvin Hellerstein has dismissed a copyright and privacy case against the Whitney Museum, the Los Angeles Museum of Contemporary Art, and artist Barbara Kruger.

The case complained that Kruger created a collage that incorporated a cropped and enlarged photo

by German photographer Thomas Hoepker featuring an image of model Charlotte Dabney, without their consent. Kruger licensed the museums to reproduce her collage, and they sold the reproductions in a catalog of Kruger's work and as gift shop merchandise. The Whitney Museum also used reproductions of the collage to advertise its Kruger exhibit.

Judge Hellerstein dismissed Hoepker's copyright infringement claim, because his photograph was in the public domain in the United States when Kruger used it, and Hoepker never gave Kruger or the museums notice of his intent to enforce his copyright when it was restored in 1994.

The photograph was first published in Germany in 1960, and by virtue of the Universal Copyright Convention, it was protected in the U.S. until 1988, when the first term of its U.S. copyright expired. The photograph's copyright was not renewed in 1988,



though it could have been, and that is why it was in the public domain in 1990 when Kruger used it in her collage.

The U.S. copyrights to many foreign works, including Hoepker's photograph, were restored in 1994 (ELR 17:3:3). But in order to enforce those restored copyrights against those who had used the works in reliance on their public domain status, the owners of restored copyrights had to give notice of their intent to do so. Hoepker, however, never gave that notice. (Moreover, even if he had, because Kruger's collage is a derivative work, she and the museums could have continued to use the collage anyway, subject only to an obligation to pay a reasonable royalty.)

Judge Hellerstein dismissed Hoepker's copyright infringement claim, because the photographer failed to give Kruger or the museums notice of his intent to enforce his restored copyright.

The judge also dismissed Dabney's privacy claim, because he ruled that Kruger's collage is "shielded . . . by the First Amendment," and thus not in violation of New York's right of privacy statute. Judge Hellerstein concluded that even the museum shop gift items bearing reproductions of the collage were protected by the First Amendment. He reasoned that gift shop merchandise that replicates the art displayed in museums "makes the art popular, but does not change the essential nature of the artistic expression that is entitled to First Amendment protection."

Hoepker and Dabney were represented by Stephen A. Weingrad of Weingrad & Weingrad in New York City. Barbara Kruger was represented by Robert W. Clarida of Cowan Liebowitz & Latman in New York City. The Whitney Museum was represented by Peter Herbert of Lankler Siffert & Wohl in New York City. And the Museum of Contemporary Art was

represented by Michael H. Bierman of Luce Forward Hamilton & Scripps in New York City.

Hoepker v. Kruger, 200 F.Supp.2d 340, 2002 U.S. Dist. LEXIS 7966 (S.D.N.Y. 2002)[ELR 24:5:12]

**Dismissal of lawsuit by self-proclaimed former mistress of President Clinton, complaining that she was unable to find publisher for her "semi-autobiographical novel" because of actions by Clinton and others, is affirmed as to all defendants but Clinton; appellate court rules that complaint adequately alleged that Clinton interfered with author's business opportunities**

Dolly Kyle Browning wrote what she describes as a "semi-autobiographical novel" that depicts what

she claims was an actual affair she carried on for years with former President Bill Clinton. Browning has never been able to find a publisher for her novel, and she thinks she knows why. According to Browning, President Clinton, his lawyers Bruce Lindsay and Robert Bennett, journalist Jane Mayer and The New Yorker magazine all engaged in a variety of actions that prevented the novel's publication.

Browning made these remarkable allegations in a complaint filed in federal District Court in the District of Columbia. The District Court thought so little of Browning's complaint that it dismissed her case for failure to state a claim. But like many of President Clinton's enemies, Browning refused to give up. She appealed and, surprisingly, has won a partial - though only partial - victory.

In an opinion by Judge David Tatel (a Clinton appointee), the Court of Appeals affirmed the dismissal

of Browning's claims against all of the defendants except President Clinton. Browning's allegations against Lindsay, Bennett, Mayer and The New Yorker included tortious interference, disparagement, invasion of privacy, infliction of emotional distress, violation of the First Amendment, and even civil RICO. But Judge Tatel agreed with the lower court that Browning's complaint failed to allege facts that would support a recovery on any of these theories, against those defendants.

Judge Tatel also affirmed the dismissal of most of Browning's claims against President Clinton. However, the judge reversed the dismissal of Browning's claim for tortious interference with business opportunities. He ruled that Browning's complaint did adequately allege facts, which if proved, would support a recovery on tortious interference grounds.

This does not of course mean that Browning will win her case. Judge Tatel noted that ". . . whether Browning can . . . survive summary judgment or ultimately prevail depends on whether she is able to produce evidence to support her allegation that Mr. Clinton intentionally interfered with her 'commercially reasonable expectation' of publishing her book."

Browning was represented by Larry Klayman. President Clinton and Bruce Lindsay were represented by David E. Kendall. Robert Bennett was represented by John D. Aldock. Jane Mayer and The New Yorker were represented by Floyd Abrams and Landis C. Best.

Browning v. Clinton, 292 F.3d 235, 2002 U.S.App.LEXIS 11142 (D.C.Cir. 2002)[ELR 24:5:12]

**Investment book "The Market Gurus" did not violate right of publicity of securities analyst William O'Neil**

Securities analyst William O'Neil might have been pleased with the *The Market Gurus: Stock Investing Strategies You Can Use from Wall Street's Best*. O'Neil was one of only nine analysts profiled in the book, in a chapter devoted just to him.

O'Neil was not pleased, however. In fact, he was so displeased that he filed a right of publicity and false advertising lawsuit against the book's publisher, Dearborn Financial Publishing. But he has been less successful, so far, with his lawsuit than he was as a securities analyst.

O'Neil's right of publicity claim was based on California Civil Code section 3344 - a section that does indeed prohibit the unauthorized use of a person's name

for advertising or solicitation purposes. According to O'Neil, the use of his name on the book's cover and in ads for the book ran afoul of section 3344. However, that same section specifically provides that "news" is not advertising or solicitation.

Judge Howard Matz ruled that The Market Gurus fell within the "news" exception. He also ruled that the book's cover and advertising for the book were "an adjunct" of the book, and as such "protected to same extent as the book itself." Judge Matz therefore dismissed O'Neil's right of publicity claim (with leave to amend).

In order to prevail with his false advertising claim, O'Neil would have to show that advertising for the book was false and was published with knowledge of its falsity. His complaint, however, failed to specifically allege which aspects of the advertising were false, and failed to allege facts showing that



Dearborn knew its ads were false. Judge Matz therefore dismissed O'Neil's false advertising claim too (again with leave to amend).

O'Neil was represented by Carla J. Feldman of Loeb & Loeb in Los Angeles. Dearborn Financial Publishing was represented by Slade R. Metcalf of Squadron Ellenoff Plesent & Sheinfeld in New York City.

William O'Neil & Co. v. Validea.com Inc., 202 F.Supp.2d 1113, 2002 U.S.Dist.LEXIS 8392 (C.D.Cal. 2002)[ELR 24:5:13]

**Appellate court affirms dismissal of lawsuit by musical group "Champagne" against former members of group who continued to perform under that name**

Frank DiBlasi and other former members of the musical group "Champagne" have defeated unfair competition and related claims made against them by the group - claims that were triggered when the former members continued to perform for a time under the "Champagne" name. A federal appellate court has affirmed the dismissal of the case, in an opinion marked "May Not be Cited."

Earlier in the case, District Judge Leonard Wexler dismissed the lawsuit, on the grounds that "Champagne" is a mark owned by the Lawrence Welk Group, not by Champagne (ELR 23:5:12).

On appeal, the appellate court chose to affirm on

different grounds. It ruled that Champagne had failed to present evidence showing any actual confusion between Champagne and its former members (even when they performed using the "Champagne" name). Indeed, the evidence showed that those who booked the group's former members, as well as fans, knew the former members were no longer with the original Champagne group. In the absence of evidence of confusion, Champagne's lawsuit was properly dismissed, the appellate court held.

Champagne was represented by Victor M. Serby in New York City. DiBlasi and other former members of the group were represented by John V. Decolator in North Merrick.

Champagne v. DiBlasi, 36 Fed.Appx. 15, 2002 U.S.App.LEXIS 10900 (2nd Cir. 2002)[ELR 24:5:13]

**Auxiliary volunteer chorus members are "employees" of Seattle Opera, Court of Appeals holds, and therefore Opera's refusal to bargain with American Guild of Musical Artists was unfair labor practice**

As a general rule, volunteers are not "employees," and thus aren't eligible to join a union or compel collective bargaining. In Seattle, however, "volunteer" auxiliary chorus members are "employees" of the Seattle Opera, because each is paid \$214 per opera for transportation expenses and because the Opera has the right to control their performances.

The NLRB so ruled, in a dispute between the Seattle Opera and the American Guild of Musical Artists. And that ruling has been upheld by the Court of Appeals, in a 2-1 decision.

The Seattle Opera produces five or so operas per

season, and employs three dozen chorus members - known as "choristers" - for most productions. Sometimes, however, an opera will need more than three dozen choristers, or a regular chorister won't be able to perform. When that happens, the Seattle Opera draws on a pool of "auxiliary" choristers, who the Opera refers to as "volunteers."

Auxiliary choristers are considered "volunteers," because even though regular chorus members are paid \$160 per performance plus \$16 per hour for rehearsals, auxiliary choristers are given just \$214 per opera, to reimburse them - the Opera says - for their "transportation expenses."

Perhaps because they are compensated so little, the auxiliary choristers voted to be represented by the American Guild of Musical Artists - the same union that represents the regular choristers. But the Seattle Opera refused to bargain with the Guild on the grounds

that the auxiliary choristers are not "employees" and thus aren't eligible to join a union.

Though the NLRB ruled against the Opera, the Opera refused to bargain with the Guild, thus causing the NLRB to find the Opera had committed an unfair labor practice. The Opera petitioned the Court of Appeals for review, and the NLRB asked the court to enforce its order.

In an opinion by Judge Karen LeCraft Henderson, a 2-member majority of the Court of Appeals held that the auxiliary choristers are "employees" of the Opera, and it enforced the NLRB order requiring the Opera to bargain collectively with the Guild.

Judge Henderson reasoned that federal labor law defines "employee" broadly as anyone who works for compensation for an employer that has the right to control the material details of how such work is

performed. The auxiliary choristers were compensated \$214 per production, and the Opera had the right to control the way in which they performed. Judge Henderson therefore concluded that they are "employees."

Judge Raymond Randolph wrote an unusually biting dissent, characterizing the majority's opinion as "arbitrary and ridiculous." The key point for Judge Randolph was that the auxiliary choristers were "volunteers" - some of the "more than 109 million Americans [who] in 1998 freely gave their time and energy to help in the arts and humanities, in education, health, youth development, environment, and so forth." According to Judge Randolph, the majority's decision means that "if volunteers are paid a flat amount to reimburse them for expenses, the payment is 'wages' and the volunteers become 'employees.'"

Judge Randolph characterized the auxiliary

choristers as "volunteers" because their exact title, within the Opera, is "Auxiliary Chorister Volunteer," and - perhaps more importantly - the \$214 they were paid per opera works out to just \$2.78 per hour, on average, an amount that is less than the federal minimum wage.

The Seattle Opera was represented by Richard L. Cys. The NLRB was represented by Usha Dheenan of the NLRB. The American Guild of Musical Artists was represented by Melissa J. Auerbach.

Seattle Opera v. NLRB, 292 F.3d 757, 2002 U.S.App.LEXIS 11140 (D.C.Cir. 2002)[ELR 24:5:14]



**Federal District Court has subject matter jurisdiction to hear copyright infringement claim complaining of allegedly unauthorized telecasts of Pakistani programming in the United States, even though dispute revolves around validity of contract between non-U.S. companies, Court of Appeals holds**

A company named Prime TV Ltd. has plans to televise Pakistani programming in the United States, over the objections of a company named Scandinavian Satellite System which claims to own all non-Pakistani rights to that programming. As a result, Scandinavian Satellite sued Prime for copyright infringement, seeking a declaration of its exclusive copyright rights and an injunction.

The facts of the case are complicated, however, because Prime too claims to own the non-Pakistani

television rights to the programming at issue. Indeed, Prime claims to have acquired those rights directly from Scandinavian, in a transaction by which Prime - once a wholly-owned subsidiary of Scandinavian - was sold to a Pakistani company known as Sports Star International. Scandinavian, however, asserts that its agreement with Sports Star was signed under duress and thus is null and void.

All of this matters, because early in the case, federal District Judge Ellen Huvelle decided that the dispute between Scandinavian and Prime is really a contract dispute, not a copyright dispute. And for that reason, Judge Huvelle dismissed the case entirely (ELR 23:7:21).

Now, however, the case is back in Judge Huvelle's court. It is, because the Court of Appeals has reversed the dismissal and has remanded it for further proceedings.

In an opinion by Judge Harry Edwards, the Court of Appeals has held that Scandinavian's copyright infringement claims are sufficient to give Judge Huvelle subject matter jurisdiction to hear the case, and "[i]t does not matter" that Prime may assert a defense based on the contract between Scandinavian and Sports Star. Rather, Judge Edwards said, "the important point" is that Scandinavian's copyright claim is based on its assertion that it is the exclusive copyright licensee of U.S. television rights to the programming.

Scandinavian Satellite System was represented by Gary C. Tepper and Caroline Turner English. Prime TV was represented by Robert B. Rosen and Richard K. Coplton.

Scandinavian Satellite System v. Prime TV Ltd., 291 F.3d 839, 2002 U.S.App.LEXIS 10659 (D.C.Cir. 2002)[ELR 24:5:14]

**Chicago Blackhawks did not violate Illinois antitrust statute by refusing to grant press credentials to publisher of competing game programs**

The NHL's Chicago Blackhawks have prevailed, finally, in an antitrust lawsuit filed against the team by Blue Line Publishing, a company that publishes game programs that compete - for customers and advertising - with the Blackhawks' own programs. Blue Line filed its lawsuit, years ago, when the Blackhawks refused to give Blue Line press credentials.

Earlier in the case, the Illinois Appellate Court held that Blue Line had adequately alleged a violation of the Illinois Antitrust Act - a statute that is similar but not identical to federal antitrust law (ELR 17:12:7). Nevertheless, after the case was remanded for further proceedings, an Illinois trial court granted the

Blackhawks' motion for summary judgment. When the case returned to the Illinois Appellate Court for a second time, the appellate court affirmed the dismissal of Blue Line's case.

In an opinion by Justice Jill McNulty, the appellate court noted that the Illinois statute prohibits only those monopolies that affect a "substantial part of trade or commerce" in Illinois. (Federal law applies to monopolies affecting trade or commerce, even if it affects less than a substantial part.)

The evidence submitted in support of the Blackhawks' summary judgment motion showed that the market for game day hockey programs in Chicago "does not constitute a substantial part of trade or commerce of this state," Justice McNulty concluded. She therefore held that the Illinois Antitrust Act does not apply to the Blackhawks' refusal to grant press credentials to Blue Line Publishing.

Blue Line Publishing was represented by Mitchell B. Katten of O'Rourke McCloskey & Moody in Chicago. The Blackhawks were represented by Eugene E. Gozdecki of Gozdecki & Del Giudice in Chicago.

Blue Line Publishing, Inc. v. Chicago Blackhawk Hockey Team, Inc., 769 N.E.2d 97, 2002 Ill.App.LEXIS 289 (Ill.App. 2002)[ELR 24:5:15]

**PGA wins dismissal of antitrust lawsuit complaining that PGA rules prevented formation of competing senior pro golf tours**

Professional golfer Harry Toscano failed to make the cut in an antitrust lawsuit he filed against the PGA Tour. And because he was the only plaintiff, federal

District Judge David Levi has dismissed the case entirely, in response to the PGA's motion for summary judgment.

Though Toscano is still a relatively young man, he is more than 50 years old, and thus is a "senior" golfer, by PGA standards. The PGA runs a successful Senior Tour, but Toscano doesn't make the cut in that tour as often as he would like. According to Toscano, at least two other senior tours, in which he might have competed, failed, because of PGA rules. One was a tour proposed by Greg Norman; and the other was the Nitro Senior Series that went bankrupt in 1997.

Both of the failed tours would have competed with the PGA Senior Tour, Toscano asserted, and both were stymied by the PGA's "media rights" and "conflicting events" rules - rules that effectively prevent PGA players from participating in non-PGA events without the PGA's consent.

Toscano's antitrust lawsuit charged the PGA Tour and its Senior Tour sponsors with monopolizing the business of promoting senior golf tournaments. Earlier in the case, his claims against PGA Senior Tour sponsors were dismissed, and that ruling was affirmed on appeal (ELR 21:11:20, 23:8:20). Now, the rest of Toscano's case has suffered the same fate.

Judge Levi ruled that Toscano did not have standing to attack the PGA's media rights and conflicting events rules, because the injuries he claimed were too indirect, speculative and complex. Moreover, the judge ruled that even if Toscano did have standing, the rules in question were reasonable, under antitrust law's "rule of reason" analysis, because Toscano failed to show they had significant anticompetitive effects, and because the PGA did show they had procompetitive justifications. Finally, Judge Levi held that even if the rules were illegal, Toscano would not



be entitled to recover damages, because his alleged damages were too speculative.

Toscano was represented by Thomas August Casazza in Sacramento. The PGA Tour and other defendants were represented by Pamela J. Palmieri of Littler Mendelson in Sacramento, William J. Maledon of Osborn Maledon in Phoenix, and Cary M. Adams of Murphy Austin Adams Schoenfeld in Sacramento.

Toscano v. PGA Tour, Inc., 201 F.Supp.2d 1106, 2002 U.S. Dist. LEXIS 9223 (E.D. Cal. 2002)[ELR 24:5:15]

**Detroit Tigers alleged valid breach of contract and unjust enrichment claims against company that operated Tigers' website for a year, even though written agreement was never signed**

The Detroit Tigers claim they are owed \$600,000 by Ignite Sports Media, the company that operated the Tigers' website during the year 2000. That is in fact the amount that Ignite allegedly agreed to pay in a Letter of Intent signed by Ignite, and in a more formal document that Ignite sent to Major League Baseball for its approval.

Though the formal contract was never signed by either party, Ignite operated the Tigers' website, using the team's trademarks, as the Letter of Intent and unsigned contract contemplated. What Ignite did not do, however, was pay the Tigers the \$600,000 guaranteed fee called for in both documents. As a

result, the Tigers sued Ignite for breach of express and implied contract and for unjust enrichment.

Because the Letter of Intent specifically said that it was not a binding contract, and because the formal contract was never signed, Ignite responded to the Tigers' complaint with a motion to dismiss. That motion, however, has been denied by federal District Judge Paul Borman.

Judge Borman ruled that the alleged agreement did not have to be in writing under the statute of frauds, because it could have been - and indeed was - fully performed within a single year. The judge also held that although the Letter of Intent contemplated that the parties would eventually sign a formal written contract, the Letter of Intent did not require such a contract to be signed, in order for a binding agreement to arise.

Instead, the judge explained, the only thing that

was required was that the parties show their assent to an agreement. He held that the Tigers adequately alleged such assent by alleging that the team had allowed Ignite to operate a website using the team's trademarks, and Ignite in fact did so.

Moreover, Judge Borman held that even if no express contract were proved, the Tigers had adequately alleged the existence of an implied in fact contract. And even if no implied contract were proved, the Tigers adequately alleged a claim for unjust enrichment.

The Tigers were represented by Mark J. Zausmer of Fink Zausmer in Farmington Hills. Ignite was represented by Dennis J. Levasseur of Bodman Longley in Detroit.

Detroit Tigers, Inc. v. Ignite Sports Media, 203 F.Supp.2d 789, 2002 U.S. Dist. LEXIS 9037 (E.D. Mich.

2002)[ELR 24:5:16]

**University of North Dakota did not violate Title IX by eliminating men's wrestling program, federal appellate court affirms**

Eric Chalenor is, no doubt, a better - or at least more successful - wrestler than plaintiff. He was, after all, recruited to attend the University of North Dakota to compete on its intercollegiate wrestling team. But after he enrolled, the University cancelled its men's wrestling program, in order to comply with Title IX of the Education Amendments.

Chalenor, joined by at least three of his teammates, sued the University, alleging that its cancellation of men's wrestling actually violated Title IX, because it discriminated against men on the basis of their gender. Chalenor and his teammates lost the first round of their lawsuit when a federal District Court

granted the University's motion for summary judgment and dismissed the case (ELR 23:6:21).

Those who are successful in sports don't quit, and Chalenor didn't. He appealed the dismissal of his case. But he's lost the second round too. In an opinion by Judge Richard Arnold, the Court of Appeals has affirmed the judgment in favor of the University.

The appellate court held that the University was entitled to satisfy Title IX by seeking gender proportionality, and it was entitled to that by eliminating a men's team rather than by adding a women's team. Chalenor argued that the University couldn't do that in this case, because a private donor had offered to cover the costs of the men's wrestling team.

But Judge Arnold ruled that the University would not be exempt from Title IX's non-discrimination requirement simply because

disproportionate participation in sports by men was made possible by privately donated funds.

Chalenor and his teammates were represented by Kai H. Richter in Minneapolis. The University of North Dakota was represented by Douglas A. Bahr in Bismarck.

Chalenor v. University of North Dakota, 291 F.3d 1042, 2002 U.S.App.LEXIS 14404 (8th Cir. 2002)[ELR 24:5:16]

**Email from University of Illinois Chancellor directing faculty and students not to contact prospective student athletes violated First Amendment rights of those who wanted to advise prospective student athletes about controversy over University's use of Indian chief mascot**

The University of Illinois once was sanctioned by the NCAA for lack of "institutional control" that apparently resulted in the University's violation of NCAA recruiting rules. So in May 2001, Chancellor Michael Aiken sent an email to faculty and students, warning them not to contact prospective student athletes without the "express authorization" of the University's Athletic Director.

Chancellor Aiken's email was in response to faculty and students who expressed interest in contacting prospective student athletes to inform them



about an on-campus controversy over the University's use of a Native American Indian chief as its sports mascot.

The affected faculty members and students filed a lawsuit against the Chancellor, alleging that his directive violated their First Amendment free speech rights. Federal District Judge Michael Mihm has agreed.

In response to a motion for summary judgment, the judge has held that the Chancellor's directive was neither content-neutral nor narrowly-tailored to comply with NCAA recruiting rules, and that in any event, the University's interest in complying with NCAA rules did not outweigh the free speech interests of the University's faculty and students. As a result, Judge Mihm granted the faculty and students' motion.

The faculty and students were represented by Harvey Grossman of the Roger Baldwin Foundation of

the ACLU in Chicago. The University was represented by William J. Brinkmann of Thomas Mamer & Haughey in Champaign.

Crue v. Aiken, 204 F.Supp.2d 1130, 2002 U.S. Dist. LEXIS 9257 (C.D. Ill. 2004)[ELR 24:5:17]

**Pennsylvania appellate court reverses order that had enjoined state athletic association from prohibiting high school girls from participating in varsity basketball**

The Pennsylvania Interscholastic Athletic Association properly declared Ashley and Lauren Revesz ineligible to play high school basketball for a year, the Commonwealth Court of Pennsylvania has held. The appellate court therefore reversed a

preliminary injunction that had barred the Association from prohibiting the sisters from playing varsity basketball after transferring from one high school to another.

According to the Revesz sisters, they transferred high schools solely because their family was forced to move, for family financial and health reasons. The Association, however, concluded that the family's move was motivated, at least in part, by the sisters' dissatisfaction with the basketball program at their original high school.

According to Association rules, a move motivated in part by a student's dissatisfaction with the athletic program at his or her original high school is a move that makes the student ineligible to participate in sports at the student's new school for one year.

In an opinion by Judge Joseph Doyle, the appellate court noted that under Pennsylvania law, the

usual rule is that courts should not interfere with decisions of the state athletic association. In this case in particular, the judge found, there was adequate evidence to support the Association's conclusion that the Revesz family moved, in part, because of the sisters' dissatisfaction with their original school's program, and there was no evidence the Association had discriminated against the sisters. Moreover, Judge Doyle held, the Revesz sisters failed to show they would suffer irreparable harm by being barred from participating in basketball for a year.

The Revesz sisters were represented by Craig M. Lee in Pittsburgh. The Pennsylvania Interscholastic Athletic Association was represented by Helen M. Gemmell in Harrisburg.

Revesz v. Pennsylvania Interscholastic Athletic Association, 798 A.2d 830, 2002 Pa.CmwltH.LEXIS

419 (Pa.Cmwlth. 2002)[ELR 24:5:17]

**Disney system for allowing TV program viewers to view Disney websites at same time does not infringe HyperTV's patents for simultaneous viewing of TV programs and sites throughout the World Wide Web**

Federal District Judge Jed Rakoff has dismissed a patent infringement lawsuit filed by HyperTV Networks against Disney, ABC and ESPN. At issue in the case is a system used by Disney that allows subscribers to view Disney programming and Disney websites, simultaneously. Viewers may want to do so, for example, in order to watch a Disney quiz show and "play along" with it at the same time.

HyperTV Networks owns a patent on a system that permits users to view television programs and access sites anywhere on the World Wide Web,

simultaneously. In its lawsuit, HyperTV alleged that Disney's system was sufficiently similar to its own patented system that Disney's system infringed that patent.

In order to decide the case, Judge Rakoff had to interpret several terms in HyperTV's patent. Following a three-day "Markman" hearing, the judge issued an opinion construing those terms. Then, in a separate opinion, he granted Disney's motion for summary judgment.

The judge noted that when HyperTV first applied for its patent, it had distinguished its system from a pre-existing system patented by another company by persuading the Patent Office that the HyperTV system was "novel" because it permitted access to sites anywhere on the World Wide Web, unlike the pre-existing system which permitted access only to designated sites.

The very feature that made HyperTV's system "novel" - as it had to be, to qualify for patent protection - also was the very thing that made Disney's system different. This was so, the judge explained, because Disney's system only permits viewers to access Disney websites, not others on the Internet. And this meant that the Disney system did not infringe the patent to HyperTV's system.

HyperTV was represented by Robert Neuner of Baker Botts in New York City. Disney, ABC and ESPN were represented by James W. Quinn of Gotshal & Manges in New York City.

ACTV, Inc. v. Walt Disney Co., 204 F.Supp.2d 650, 2002 U.S.Dist.LEXIS 9981 (S.D.N.Y. 2002); ACTV, Inc. v. Walt Disney Co., 204 F.Supp.2d 691, 2002 U.S.Dist.LEXIS 9267 (S.D.N.Y. 2002)[ELR 24:5:18]

**Previously Reported:**

**Yoko Ono suit against Frederic Seaman is settled.** Yoko Ono has settled her lawsuit against Frederic Seaman, who once was a personal assistant to Lennon and Ono. After Lennon's death, Seaman authored the book *The Last Days of John Lennon: A Personal Memoir* and several articles, using photos he had taken of Lennon, Ono and their son. According to news accounts of the settlement, Seaman agreed to return the photos to Ono and to stop selling information about the Lennon family. The settlement was reached during the trial of the case, just before closing arguments were to begin. The case began as a multi-claim lawsuit. But earlier in the case, Seaman had success in paring it down somewhat: Judge Leonard Sands dismissed some of Ono's non-copyright claims (ELR 21:10:15), and also dismissed, without prejudice,



her copyright claims based on photos she was then unable to identify (ELR 22:2:17). According to news reports, the settlement including an apology from Seaman to Ono that was read in open court. [ELR 24:5:18]

**Previously reported cases are published.** The following cases, previously reported in the "In the News" department of the Entertainment Law Reporter, have been published: Cairns v. Franklin Mint Co., 292 F.3d 1139, 2002 U.S.App.LEXIS 12032 (9th Cir. 2002) (ELR 24:3:9), in which Cairns was represented by Barbara A. Solomon of Fross Zelnick Lehrman & Zissu in New York City, and Franklin Mint was represented by Robert A. Meyer, Douglas E. Mirell and Daniel J. Friedman of Loeb & Loeb in Los Angeles; Jacobs v. CBS Broadcasting Inc., 291 F.3d 1173, 2002 U.S.App.LEXIS 10610 (9th Cir. 2002)(ELR 24:2:4).

[ELR 24:5:18]

**DEPARTMENTS**

**In the Law Reviews:**

Entertainment, Publishing and the Arts Handbook: 2002-2003 Edition edited by John David Viera and Robert Thorne with Stephen F. Breimer as Consulting Editor, has been published by Thomson/West as the nineteenth volume in the series with the following articles:

Protection Racket: Are Copyright Lawyers and Their Clients Shaking Down the Public? by Bob Pimm, 2002-2003 Entertainment, Publishing and the Arts Handbook 3 (2002)

Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary by Joseph J. Beard, 2002-2003 Entertainment, Publishing and the Arts Handbook 9 (2002)

Copyright Co-ownership in Cyberspace: The Digital Merger of Content and Technology in Digital Rights Management and E-commerce by Corey Field, 2002-2003 Entertainment, Publishing and the Arts Handbook 113 (2002)

Disproving Originality in Copyright Law by David Gerber, 2002-2003 Entertainment, Publishing and the Arts Handbook 125 (2002)

Frankly, Gone With the Wind, The Wind Done Gone Doesn't Give a Damn: First Amendment Protection for

Parody Under the Fair Use Doctrine by Stephen F. Rohde, 2002-2003 Entertainment, Publishing and the Arts Handbook 129 (2002)

Notice of Termination of Copyright Transfers: Is Noncompliant Industry Custom "Adequate"?, 2002-2003 Entertainment, Publishing and the Arts Handbook 167 (2002)

Tasini and Archival Electronic Publication Rights of Newspapers and Magazines by Charles S. Sims and Matthew J. Morris, 2002-2003 Entertainment, Publishing and the Arts Handbook 173 (2002)

Who Are You?: Trademark Protection for Band Names by Ray Evans, 2002-2003 Entertainment, Publishing and the Arts Handbook 193 (2002)

Are the Cats Out of the Bag?: Lessons from the Makeup Designer's Case by Jeffrey M. Dine, 2002-2003 Entertainment, Publishing and the Arts Handbook 225 (2002)

Domain Name Initiatives by Zack S. Zeiler, 2002-2003 Entertainment, Publishing and the Arts Handbook 241 (2002)

Ninth Circuit Limits Right of Publicity Claims by Landis C. Best, 2002-2003 Entertainment, Publishing and the Arts Handbook 251 (2002)

Kidnapping the First Amendment: A Celebrity Kidnapping Almost Forty Years Ago Sets the Stage for a Successful Constitutional Challenge to California's "Son of Sam" Law by Stephen F. Rohde, 2002-2003 Entertainment, Publishing and the Arts Handbook 263

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