

**IN THE NEWS**

**Disney's agreement to pay merchandising royalties to creator of "Roger Rabbit" characters did not create fiduciary relationship, but Disney will have burden of proving its royalty payments were accurate, California appellate court rules**

In 1983, Gary Wolf and Walt Disney Pictures entered into an agreement with one another that, two decades later, triggered a legal question that is important to many in the entertainment industry. That question is whether a contract clause that requires one party to pay royalties to the other creates a fiduciary relationship between the parties.

A California Court of Appeal has held that it does not. On the other hand, the court also held that in the event a dispute arises concerning whether those

royalties were accurately paid, the party who agreed to pay royalties has the burden of proving they were paid accurately; the royalty recipient does not have the burden of proving they weren't properly paid.

Wolf is the author of the novel *Who Censored Roger Rabbit?* Wolf's 1983 contract with Disney gave it the right to produce a movie based on the novel, as well as the right to merchandise the novel's characters. In return, Disney was supposed to pay Wolf a fee, a percentage of the movie's "net profits," and a royalty of 5% of Disney's receipts from "Roger Rabbit" character merchandise.

Steven Spielberg's *Who Framed Roger Rabbit?* was the movie based on Wolf's book. Wolf does not complain (at least not in this case) that Disney short-changed him on his share of its profits. However, in a lawsuit filed in California state court, Wolf does complain that Disney underreported its revenues from

"Roger Rabbit" character merchandise, and thus underpaid his royalties. Moreover, Wolf alleged that in doing so, Disney not only breached their agreement but also violated their fiduciary relationship.

A trial court judge dismissed Wolf's fiduciary duty claim (though not his contract claim). This ruling was a sufficient set-back, in Wolf's eyes, that he sought a writ of mandate from the California Court of Appeal (a form of interlocutory appeal, under California state court procedure), which, if granted, would have required the trial court to reinstate the fiduciary relationship claim.

In a fiduciary relationship, "the fiduciary owes to its beneficiary . . . obligations far more stringent than that required of ordinary contractors." Wolf asserted that Disney was the fiduciary and that he was the beneficiary, and thus Disney owed him a "more stringent" duty than if he and Disney were "ordinary

contractors." In an opinion by Justice Dennis Perluss, the Court of Appeal rejected that argument.

A contractual right to contingent compensation does not, by itself, create a fiduciary relationship, Justice Perluss explained. Nor did Wolf's contractual right to receive an accounting from Disney, even though Disney has exclusive control over the financial records from which his royalties were calculated. For these reasons, Justice Perluss denied Wolf's petition for a writ of mandate.

But Wolf may not have come away from the appeal empty-handed. Justice Perluss did find it significant that Disney has control over the financial records from which Wolf's royalties were calculated. Because of this, the justice said, Wolf does not have the burden of proving that Disney's accountings were inaccurate. Instead, when the case resumes in the trial court, the burden will be on Disney to prove that its

accountings were accurate.

Wolf was represented by J. Larson Jaenicke of Rintala Smoot Jaenicke & Rees. Disney was represented by Martin D. Katz of Akin Gump Strauss Hauer & Feld.

Wolf v. Superior Court, Case No. B157178 (Cal.App., Feb. 25, 2003), available at [www.courtinfo.ca.gov/opinions/documents/B157178.PDF](http://www.courtinfo.ca.gov/opinions/documents/B157178.PDF) [ELR 24:10:4]

**In case involving ownership of "LeeStrasberg.com" domain name, appellate court rules that decisions in Uniform Domain Name Dispute Resolution Proceedings are not entitled to deferential court review because they are not "arbitrations"**

Anna Strasberg - the widow of famed acting

coach Lee Strasberg - has become locked in protracted litigation with a fellow named Eric Dluhos over which of them should be able to use the "LeeStrasberg.com" domain name.

Strasberg is the executrix of her late husband's estate and manages the estate's trademarks, including "The Lee Strasberg Institute" and "Actor by Lee Strasberg." Dluhos, however, registered the "LeeStrasberg.com" domain name before Strasberg did. In response, Strasberg's representatives sent Dluhos letters asserting that his use of the domain infringed the estate's trademarks.

When Dluhos failed to respond, Strasberg initiated a Uniform Domain Name Dispute Resolution Proceeding. In due course, Strasberg prevailed. Dluhos refused to participate in the proceeding, and a UDRP panel transferred the domain name to her.

That, however, was not the end of the matter.

Dluhos filed a lawsuit challenging the Constitutionality of the dispute resolution process. At first, he lost. A federal District Court dismissed Dluhos' constitutional claims and affirmed the UDRP panel's decision. On appeal, though, Dluhos has salvaged some of his case, though it is not yet apparent whether he or Strasberg ultimately will prevail.

In affirming the UDRP panel's decision in favor of Strasberg, the District Court determined that the proceeding was an "arbitration," and as such, its outcome was entitled to the Federal Arbitration Act's "extremely deferential standard of judicial review." In an opinion by Judge Ruggero Aldisert, the Court of Appeals has held that UDRP hearings are not arbitrations, and thus not covered by the Federal Arbitration Act at all.

Instead, Judge Aldisert held that Dluhos' claims were covered by the Anticybersquatting Consumer

Protection Act. Under that Act, Dluhos is entitled to have the District Court consider anew his right to use "LeeStrasberg.com," just as though no UDRP hearing had been held. As a result, Judge Aldisert reversed the dismissal of part of Dluhos' case and directed the District Court to do just that. Judge Aldisert noted, however, that his decision "in no way reflects an intimation that the [UDRP] panel erred in its judgment, but merely that UDRP resolutions do not fall under the limited judicial review of arbitrators of the [Federal Arbitration Act]."

Judge Aldisert reversed only part of the District Court's decision, because he affirmed its dismissal of Dluhos' constitutional claims against Strasberg.

Dluhos v. Strasberg, Case No. 01-3713 (3rd Cir., Feb. 20, 2003), available at [www.ca3.uscourts.gov/recentop/week/013713.pdf](http://www.ca3.uscourts.gov/recentop/week/013713.pdf) [ELR 24:10:4]



**INTERNATIONAL DEVELOPMENTS**

**Norwegian court acquits Jon Johansen in criminal case charging him with illegally developing DVD movie decryption software "DeCSS"; Norwegian appellate court agrees to review decision**

Norwegian teenager Jon Johansen is something of a hero in the world of computer hackers and even elsewhere. He's the one who is credited or blamed (depending on one's point of view) with developing the DVD movie decryption software known as "DeCSS."

In fact, Johansen had some important help. According to a Norwegian criminal court judge, Johansen combined two sets of computer codes created by others with a user interface of his own design, thus giving birth to DeCSS. Nonetheless, when the Motion

Picture Association and the DVD Copy Control Association persuaded Norwegian law enforcement authorities to take action, Johansen was the one who was prosecuted.

The Norwegian criminal code contains a provision that makes it illegal to break protection to get access to data or programs stored by electronic means. That is what Johansen did, the prosecutor argued. But Judge Irene Sogn disagreed.

Judge Sogn interpreted the Norwegian law to mean that it would have been illegal for Johansen to get access to the contents of movie DVDs, if he had no right to those contents at all - if, for example, they were pirated DVDs. Johansen, however, testified that he used DeCSS to get access to legitimate DVDs of "The Matrix" and "The Fifth Element" which he had legally purchased in shops in Olso and Larvik. As a result, Judge Sogn concluded that Johansen's activities did not

violate the criminal code, because, the judge said, the law's ban does "not . . . apply to the person who . . . gains access to data to which he otherwise is authorised to access . . . in a different way than presumed by the producer."

The judge also acquitted Johansen of charges that he "co-operated" in violations of the criminal code committed by others. This ruling was based in part on the fact that no proof had been offered that anyone had used DeCSS to get access to illegal DVDs. It also was based on the judge's conclusion that DeCSS can be used to get access to a user's own legitimate DVDs. "How useful this is for the society may be subject to different views," the judge said, "but it would appear that it is lawful."

A Norwegian appeals court has agreed to hear the prosecutor's appeal.

Editor's Note: In the United States, distribution

of DeCSS has been held to violate the anti-circumvention provisions of the United States' Digital Millenium Copyright Act (ELR 23:7:4).

Sunde v. Johansen, Oslo Norway Court of First Instance, Case No. 02-507 M/94 (2003), available at [www.eff.org/IP/Video/DeCSS\\_prosecutions/Johansen\\_DeCSS\\_case/20030109\\_johansen\\_decision.html](http://www.eff.org/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030109_johansen_decision.html) [ELR 24:10:6]

**French court acquits Yahoo! of criminal charges stemming from sale of Nazi memorabilia by Yahoo-hosted websites in U.S.**

A court in Paris has acquitted Yahoo! of charges that it violated French criminal law by allowing the sale of Nazi memorabilia from websites it hosted on servers

located in the United States.

French law prohibits "justifying a crime against humanity" and "exhibiting a uniform, insignia or emblem of a person guilty of crimes against humanity." The penalty for doing so can amount to as much as five years in jail and a fine of some \$45,000. According to news accounts, the Paris judge ruled that "justifying war crimes" means "glorifying, praising, or at least presenting the crimes in question favorably." And the judge decided that Yahoo's did not do these things, simply by allowing Nazi memorabilia to be sold from websites it hosted.

This criminal case is one of three cases dealing with the sale of Nazi memorabilia from Yahoo-hosted websites. The first was a civil lawsuit in France. It resulted in a French court order requiring Yahoo to block access by French users to any websites that auctioned Nazi merchandise, apologized for Nazism, or

contested the reality of Nazi crimes; the order decreed that if Yahoo failed to do so by February 2002, it would be subject to fines of 100,000 Francs (about \$14,000) a day. (ELR 22:8:5). Yahoo responded by filing a lawsuit in the United States, seeking a judicial declaration that the French court's order is not enforceable in this country. A federal District Court granted Yahoo the order it sought (ELR 23:7:6), though that ruling is now pending before the Court of Appeals.

Editor's Note: Yahoo no longer permits the sale of Nazi memorabilia from websites it hosts, as a result of a change in company policy adopted for ethical rather than legal reasons. Nonetheless, these cases are particularly important, because Yahoo's French web-hosting service never permitted websites to sell Nazi memorabilia or otherwise violate French law. The civil and criminal cases against Yahoo in France both complained about websites that were hosted by Yahoo

on its servers in the United States. As a result, these cases raise a critical issue about the extent to which the laws of one country may be enforced against websites and web-hosts located in other countries. [ELR 24:10:6]

### RECENT CASES

**ITC Entertainment held liable to investors in "Wrong Decision" movie project for fraud committed by executive producer, but California Court of Appeal reverses judgment for investors' lost profits and remands punitive damage award for new hearing**

L. Travis Clark used to develop projects for ITC Entertainment. One of the projects Clark developed

was to have been a movie titled "Wrong Decision." But the movie never got made, and that fact eventually led to a judgment against ITC for more than \$18.5 million. Part of that judgment has been reversed, and the rest has been remanded for a new hearing. But whatever the final judgment turns out to be, ITC will be liable for it, on the grounds that ITC was Clark's agent when he defrauded those who invested in "Wrong Decision."

The facts of this case were complicated and voluminous. The reporter's transcript of the five-week trial ran 18 volumes, and the clerk's transcript was 5,300 pages in 31 volumes. In a nutshell, though, it appears from the California Court of Appeal's decision that Clark held himself out to be an "executive producer" employed by ITC, and ITC did nothing (or not enough) to dispel that impression. Indeed, the record showed that Clark had an office in ITC's building on the same floor as its President, Vice



President and General Counsel. And the record showed that ITC provided Clark with ITC stationery, business cards, fax machines "and other resources."

Clark's relationship with ITC became important when an acquaintance named Ron Hunt wrote a screenplay about Hunt's experiences as a nightclub manager and owner, and submitted the screenplay to Clark, because Hunt knew Clark was "somehow involved in the movie business" and was then "at ITC." Clark liked the screenplay, and persuaded Hunt and two of Hunt's business partners to invest in the movie's production, saying that ITC would distribute it.

Clark presented Hunt and his partners with revenue projections showing the movie would be profitable. But after production commenced, "costs began to spiral out of control," vendors went unpaid, and "Clark deposited some of the money into his own personal banking account and even forged the name of

the [movie's] music director."

Eventually, Hunt and his partners determined the movie was "unsalvageable." But when they approached ITC with evidence of Clark's fraud, ITC insisted that Clark was an independent producer and that it was not responsible.

Hunt and his partners sued ITC and Clark in California state court, and eventually obtained the \$18.5 million judgment against Clark (who defaulted) and against ITC as his agent. The judgment consisted of \$9 million in actual damages, \$1.5 million in interest, and \$8 million in punitive damages.

At least some of the actual damage portion of the judgment was for lost profits. The California Court of Appeal has reversed that part of the judgment, for reasons that have not been published. (California Rules of Court permit appellate courts to publish only parts of their opinions; and in this case, the appellate court

omitted the part of its decision that explains why it reversed the lost profits part of the judgment.)

Because it eliminated lost profits from the judgment, the Court of Appeal remanded the punitive damage award to the trial court for reconsideration, so it may be reduced as well.

However, on the question of whether ITC was properly held liable for punitive damages based on Clark's actions, the appellate court held that it was. It affirmed ITC's liability on the grounds that it was Clark's agent and the jury could have found that their relationship was designed to allow "Clark to practice low level fraud while allowing ITC to claim high level ignorance." Moreover, the appellate court ruled, Clark's involvement with ITC on the "Wrong Decision" project was extensive enough that the jury could have found that "ITC had authorized and ratified Clark's actions during the entire production."

Hunt and his partners were represented by Gerard P. Fox of Fox & Spillane in Los Angeles. ITC was represented by Glenn D. Pomerantz of Munger Tolles & Olson in Los Angeles, and by Craig M. Fields of Glickfeld & Fields.

Streetscenes v. ITC Entertainment Group, 126 Cal.Rptr.2d 754, 2002 Cal.App.LEXIS 4880 (Cal.App. 2002) [ELR 24:10:8]

**Federal court grants TVT Records' pretrial request for injunction barring Def Jam from including tracks in Ja Rule album "The Last Temptation" that were recorded for TVT while Ja Rule was member of rap group Cash Murda Click**

Def Jam and TVT Records are competitors, not

just in the record business generally, but in that part of the business that involves releasing albums by rap artist Ja Rule.

At the beginning of his career, Ja Rule was a member of Cash Murda Click, a rap group also known by its initials CMC. That group was signed to TVT Records, and CMC recorded some tracks for TVT while that contract was in effect. Eventually, however, Ja Rule signed an exclusive recording agreement with Def Jam as a solo artist, as did record producer Irv Gotti.

Later still, TVT decided to release an album that would have included previously-recorded CMC tracks, as well as newly-recorded tracks performed by Ja Rule and produced by Gotti. TVT negotiated a deal with Ja Rule and Gotti for that new album, as well as what TVT said was a deal with Def Jam, authorizing Ja Rule and Gotti to record new tracks for the TVT album.

Then, things fell apart. Def Jam denied that it had struck a deal with TVT, and Def Jam allegedly discouraged Ja Rule and Gotti from recording for TVT, saying they would be violating their exclusive Def Jam agreements if they did so. TVT responded with a lawsuit against Def Jam, alleging fraud, breach of contract, interference with contract and copyright infringement.

In a pre-trial motion, TVT sought and was granted a preliminary injunction that barred Def Jam from including the CMC tracks in a then in-progress album by Ja Rule called "The Last Temptation." Federal District Judge Victor Marrero found that if Def Jam were able to acquire masters of the old CMC tracks and include them in Ja Rule's "The Last Temptation" album, TVT wouldn't be able to use those tracks in its planned album. Judge Marrero also found that this would cause TVT irreparable harm, and thus

was grounds for issuing a preliminary injunction barring Def Jam from doing so, until TVT's claims could be tried.

The judge also found it likely that TVT would be able to prove it had reached an agreement with Def Jam permitting Ja Rule and Gotti to record new tracks for a TVT hip-hop album. But the judge declined to issue a preliminary injunction that would have barred Def Jam from interfering with Ja Rule and Gotti's delivery to TVT of newly-recorded tracks for such an album. The judge declined to do so, solely on the grounds that TVT would not suffer irreparable harm, if its release of that album were delayed a bit, until its case against Def Jam went to trial.

The judge noted that as a result of his pretrial rulings, neither company could release "a noncomplying album" until the case was resolved by "trial or otherwise." Perhaps Judge Marrero thought the

parties would then settle their differences. But if that's what he thought, he was wrong. The case was not settled.

Instead, the case went to trial, and that trial has resulted in a jury verdict in TVT's favor. According to news accounts of the March 2003 verdict, the jury found that Def Jam had agreed to allow Ja Rule and Gotti to record new tracks for a TVT hip-hop album, but then interfered with TVT's contracts with them. The verdict dealt only with the issue of liability. The question of TVT's damages will be dealt with in a separate, later phase of the case.

TVT was represented by James E. d'Auguste of Akin Gump Strauss Hauer & Feld in New York City and by Peter L. Haviland in Los Angeles. Def Jam was represented by Michael T. Mervis of Proskauer Rose in New York City.



TVT Records v. Island Def Jam Music, 225 F.Supp.2d 398, 2002 U.S. Dist. LEXIS 18656 (S.D.N.Y. 2002)[ELR 24:10:9]

**Work-made-for-hire agreement between creator of "Captain America" and Marvel's predecessor, entered into after character was created and in settlement of earlier lawsuits, does not prevent creator from claiming he was character's "author" and thus is entitled to terminate transfer after 56 years, federal appellate court rules**

Marvel Characters, Inc., acquired the "Captain America" character from its first publisher, Timely Comics, Inc. Though the character is now 63 years old, it continues "to generate substantial revenue for Marvel," according to federal Court of Appeals Judge

Joseph McLaughlin. Now, however, Marvel's continued receipt of those revenues has been put in jeopardy by a decision written by Judge McLaughlin, in a declaratory relief lawsuit filed by Marvel against Captain America's creator, Joe Simon.

Simon claims that he is the "author" of Captain America, and as such, he is entitled to terminate his transfer of the character's copyright to Timely Comics, and thus recapture ownership of the copyright from Marvel. In fact, Simon did file Notices of Termination with the Copyright Office in 1999, more than 56 years after he gave Timely the right to publish Captain America comics. Section 304(c) of the Copyright Act gives authors the right to terminate transfers 56 years later; and that is the provision Simon relied on when he did just that.

However, in its lawsuit, Marvel disputes Simon's right to terminate, for a reason that is unique to this

case. Back in the 1960s, Simon filed lawsuits against Timely, asserting that he - rather than Timely - was the owner of the renewal term to Captain America's copyright. Those lawsuits were settled by a written agreement in which Simon acknowledged that he had created Captain America as a work-made-for-hire whose copyright was owned by Timely. This work-made-for-hire agreement was significant, because it meant that Timely was the owner of the renewal term copyright to Captain America.

Years later, when Simon attempted to terminate his transfer to Timely, Marvel argued that Simon's work-made-for-hire agreement was significant for a second reason too. Section 304(c)'s right to terminate transfers 56 years later does not apply to works made for hire. A federal District Court agreed with Marvel and granted its motion for summary judgment. On appeal, however, that judgment has been reversed.

Writing for the Court of Appeals, Judge McLaughlin made two rulings, both of which are important to others in the entertainment industry, as well as to Simon and Marvel.

The first ruling will affect the kinds of documents that are prepared in connection with settlements. Marvel argued that the doctrine of collateral estoppel prevented Simon from arguing that he was the "author" of Captain America, after he settled earlier lawsuits involving that exact issue by agreeing that the character was a work-made-for-hire.

Judge McLaughlin ruled that Simon was not estopped, because the stipulations of dismissal he filed in the earlier lawsuits were not accompanied by findings of fact, and "where a stipulation of settlement is 'unaccompanied by findings,' it does 'not bind the parties on any issue . . . which might arise in connection with another cause of action.'" In the earlier

cases, the settlement agreement contained detailed findings on the authorship issue, but the stipulations of dismissal did not, nor did the stipulations reference the settlement agreement in any way.

Though this conclusion seems to be based on an unusually arcane technicality, the judge thought not. "If parties intend to preclude any future litigation regarding authorship by settling their claims," Judge McLaughlin explained, "they need only comply with the requirements of collateral estoppel by filing a detailed stipulation of settlement, complete with sufficient factual findings on authorship, with the court."

Judge McLaughlin's second ruling dealt with whether the work-made-for-hire settlement agreement prevented Simon from exercising his right to terminate under section 304(c), even though he wasn't barred from doing so by the collateral estoppel doctrine. Section 304(c) gives authors the right to terminate

"notwithstanding any agreement to the contrary." The issue was whether the work-made-for-hire settlement agreement between Simon and Timely was an "agreement to the contrary," which section 304(c) made ineffective. Judge McLaughlin ruled that it was.

In a sentence that will concern many entertainment industry employers, the judge held that ". . . an agreement made subsequent to a work's creation which retroactively deems it a 'work for hire' constitutes an 'agreement to the contrary' under § 304(c)(5) of the 1976 Act."

The consequence of this ruling for Marvel is that Simon is not bound by his earlier settlement agreement - though that does not mean Simon has won or Marvel has lost the case yet. It simply means that Marvel's motion for summary judgment should not have been granted. A jury still will have to decide whether Simon was the "author" of Captain America, or whether the

character was created as a work-made-for-hire, after all.

Simon was represented by Ethan Horwitz of Goodwin Procter in New York City. Marvel was represented by David Fleischer of Paul Hastings Janofsky & Walker in New York City.

Marvel Characters, Inc. v. Simon, 310 F.3d 280, 2002 U.S.App.LEXIS 23146 (2nd Cir. 2002)[ELR 24:10:9]

**YES Network alleged valid federal antitrust claims against Cablevision, based on Cablevision's failure to carry Yankees games during 2002 baseball season**

The 2002 baseball season began badly for Yankees fans who lived in New York City. A dispute broke out between Yankees Entertainment and Sports Network - the channel commonly known as "YES" that

owns the cable TV rights to Yankees' games - and Cablevision Systems, the cable TV system that until that year had been showing all of the Yankees' games.

The dispute involved a number of related issues, including whether Cablevision would make the YES channel available to cable subscribers as part of Cablevision's basic package, or whether Cablevision would offer YES as a premium channel only to those subscribers who paid extra for it. Because the dispute was not immediately resolved, Cablevision didn't carry Yankees games at all for a while.

This state of affairs was so distressing to Yankees fans that a number of them filed a lawsuit of their own against Cablevision in federal court on Long Island. The fans' lawsuit didn't get far. Indeed, it was dismissed by Judge Thomas Platt, in response to a Cablevision motion (ELR 24:6:18).

The fans' lawsuit was not the only lawsuit filed



against Cablevision, however. YES itself filed one too, in federal court in Manhattan, alleging that Cablevision's refusal to carry Yankees games, except on certain objected-to terms and conditions, constituted a violation of federal antitrust law. Cablevision sought dismissal of that case too, but was not successful.

Federal District Judge Deborah Batts denied Cablevision's motion to dismiss YES's federal antitrust claims. In a lengthy decision, Judge Batts ruled that YES had adequately alleged that Cablevision intended to monopolize the market for sports broadcasting rights in New York, by refusing to carry YES's broadcasts of Yankees games. According to YES, Cablevision did so in order to prevent YES from competing with the Madison Square Garden network and Fox SportsNet New York, which are sports broadcasting networks that are owned by Cablevision itself.

Judge Batts also ruled that YES had standing to

challenge, on federal antitrust grounds, Cablevision's acquisition of the Madison Square Garden network which gave it control over broadcast rights to New York Knicks and Rangers games. And the judge held that YES had adequately alleged that Cablevision had denied it "access to an essential facility," by refusing to pay YES a "reasonable price" for carrying Yankees games.

YES was represented by Alan B. Vickery of Boies Schiller & Flexner in New York City. Cablevision was represented by Yvonne S. Quinn of Sullivan & Cromwell in New York City.

Yankees Entertainment and Sports Network v. Cablevision Systems Corp., 224 F.Supp.2d 657, 2002 U.S. Dist. LEXIS 16291 (S.D.N.Y. 2002)[ELR 24:10:10]

**ESPN defeats defamation lawsuit filed by Evel Knievel and his wife, despite website photo caption that called him a "pimp"**

Federal District Judge Donald Molloy has dismissed a defamation lawsuit filed against ESPN by Evel Knievel and his wife Krystal. The lawsuit was provoked by a photo of the motorcycle daredevil and his wife posted to ESPN's website along with a caption that read "Evel Knievel proves that you're never too old to be a pimp."

The Knievels alleged that the caption asserts that Evel actually is a pimp and Krystal is a prostitute. Since both occupations are illegal in Montana where the Knievels filed their lawsuit and apparently live, they alleged that the caption was libelous per se and actionable on its face.

Judge Molloy, however, disagreed. In response

to ESPN's motion to dismiss, the judge noted that the photo was one of several on ESPN's website, and that all of them had suggestive or risqué captions. Moreover, the judge emphasized that the Knievels' photo was positioned so that viewers had to see other photos before they could see the Knievels' photo. Finally, though the judge acknowledged that a "pimp" can be "a man who solicits customers for a prostitute . . . ," it also has been defined by The Online Slang Dictionary to mean "cool."

As a result, Judge Molloy concluded that "The website was obviously directed at a younger audience and contained loose, figurative, slang language such that a reasonable person would not believe ESPN was actually accusing [the Knievels] of being involved in criminal activity."

The Knievels were represented by Wade J. Dahood of Knight Dahood McLean & Everett in

Anaconda, Montana. ESPN was represented by Peter Michael Meloy in Helena and by Nathan Siegel of ABC, Inc., in Washington, D.C.

Knieval v. ESPN, Inc., 223 F.Supp.2d 1173, 2002 U.S. Dist. LEXIS 25665 (D.Mont. 2002)[ELR 24:10:11]

**Martha Graham Center owns copyrights to 45 dances created by Martha Graham, and dancer's heir Ronald Protas owns copyright to one, federal District Court decides; Protas also ordered to pay Center \$180,000 he received from licenses and sales of Center's property**

Martha Graham was "one of the most renowned dancers and choreographers of her era." But when she died in 1991, a bitter legal battle erupted between her

successors, each of whom claims ownership of the assets that make up her artistic legacy.

One side of that battle was fought by the Martha Graham Center, the successor to the dance school Graham founded in 1930. The other side was fought by Ronald Protas, who is Graham's heir, the executor of her will, and the Center's former Artistic Director.

The assets over which the Center and Protas have been fighting are of three types: the trademark in the "Martha Graham" name; the copyrights to some 70 dances she created over a 70-year span from the early 1920s until her death; and costumes and sets used in staging some of her dances. The fight has taken place in federal courts in New York. And so far at least, the Center has been victorious on almost all issues.

In the first stage of the case, District Judge Miriam Cedarbaum ruled that the Center owns the trademark rights in the "Martha Graham" name (ELR

23:8:17). That ruling was affirmed on appeal (ELR 24:7:28). Judge Cedarbaum then took up the remaining issues: the copyright ownership claims; and the parties' conflicting claims to ownership of the costumes and sets.

On the basis of extensive evidence taken during a week-long trial, Judge Cedarbaum ruled that the Center owns the copyrights to 45 of the dances created by Graham, Protas owns the copyright to one dance, and the Center owns the costumes and sets. Judge Cedarbaum also ruled that the Center is entitled to recover almost \$180,000 from Protas on account of money he received from licenses and sales of the Center's property while he was a member of its board.

Much of the case turned on the demeanor of the witnesses, and this worked to Protas' disadvantage. Judge Cedarbaum again found, as she had during the trademark phase of the case, that Protas' testimony was

"evasive and inconsistent" and that he was "not . . . a credible witness." Even apart from this aspect of the case, however, the preceding paragraph's short statement of Judge Cedarbaum's ultimate ruling fails to reveal the complexities of the copyright questions she had to answer in order to reach her conclusions.

The case was made unusually complex by the fact that it involved disputed claims of copyright ownership to 70 separate dances that were created over such a long time that two kinds of things happened, both significant.

First, in 1956, Graham stopped creating dances as the individual proprietor of what until then had been her unincorporated dance school, and became instead an employee of the Center, a non-profit corporation.

Second, the Copyright Act was amended three separate times: in 1976 when the Act was rewritten entirely, changing (among other things) the term of



copyright, the standards for determining whether works are works-made-for-hire, and the formalities necessary to assign copyrights to certain works; in 1989 when the copyright notice requirement was done away with; and in 1992 when copyright renewal was made automatic for works first published between 1964 and 1977.

In order to determine who owns the copyrights to Graham's 70 dances, Judge Cedarbaum had to determine what combination of factors applied to each dance, and to determine what effect each combination had on the status and ownership of each dance. The judge's analysis didn't favor one party or the other, in all cases. With respect to 24 of the disputed dances, Judge Cedarbaum found that neither the Center nor Protas proved ownership. Of those 24, the judge found that 10 are now in the public domain, 5 are owned by others who had commissioned Graham to create them, and 9 are of uncertain status because they were pre-

1978 works and the evidence didn't show whether they were published with adequate notice.

Each of these determinations would have made a challenging case in itself. It took 37 printed pages for Judge Cedarbaum to explain the reasons for 70 determinations, including a 2-page chart to display her conclusions (and another dozen pages to explain her reasons for concluding that the Center owns the costumes and sets, and why Protas must repay the Center the money he received from licenses and sales of its property).

Protas was represented by Judd Burstein in New York City. The Center was represented by Katherine Forrest of Cravath Swaine & Moore in New York City.

Martha Graham School v. Martha Graham Center, 224 F.Supp.2d 567, 2002 U.S.Dist.LEXIS 15761 (S.D.N.Y. 2002)[ELR 24:10:11]

**California courts do not have personal jurisdiction over out-of-state operator of website that posted DeCSS software, California Supreme Court holds in trade secrets case filed by DVD Copy Control Association**

Matthew Pavolich is the operator of a website that offers DeCSS software for download. DeCSS software enables users to decrypt movie DVDs that have been protected by the Content Scramble System. For his trouble, Pavolich got himself sued by the DVD Copy Control Association - the company that licenses the use of CSS. The Association sued Pavolich for violating its rights under California's trade secret law, and the Association filed its lawsuit in state court in California, where it is headquartered.

Pavolich, however, lives in Texas. What's more,

he never worked in California, doesn't own property there, doesn't have bank accounts there, doesn't have a phone listing there, and never solicited or transacted business there. His website doesn't have interactive features. And though his website can be accessed by California residents, there was no evidence that any ever had, let alone evidence that California residents had downloaded DeCSS from the site.

For all of these reasons, Pavolich argued that the California court did not have jurisdiction over him. The trial court, however, disagreed, as did the California Court of Appeal (ELR 23:7:4).

Pavolich finally made his point in the California Supreme Court, by a bare 4-to-3 majority. In an opinion by Justice Janice Brown, the majority ruled that Pavolich's knowledge that his conduct may harm industries centered in California, including the movie industry, was not enough, "by itself," to give California

courts personal jurisdiction over him.

Justice Brown did not bless Pavolich's activities. She described it as "tortious conduct," and noted that the Association has the ability and resources to sue Pavolich in Texas. "Pavolich may still face the music - " the Justice said, "just not in California."

Justice Marvin Baxter wrote a dissenting opinion for the minority. He emphasized that Pavolich "engaged in intentional conduct purposefully targeted at interests he knew were centered or substantially present in California, with knowledge they would suffer harm here, such that he must reasonably have anticipated being called to account in this state."

Pavolich was represented by Ornah Levy. DVD Copy Control Association was represented by Jared Ben Bobrow of Weil Gotshal & Manges.

Pavolich v. Superior Court, 29 Cal.4th 262, 127

Cal.Rptr.2d 329, 58 P.3d 2, 2002 Cal.LEXIS 7959 (Cal. 2002)[ELR 24:10:12]

**Court of Appeals awards freelance photographer an additional \$5,500 - for a total of \$25,642 - in copyright infringement suit against Weekly World News on account of unlicensed uses of "Alien Backs Clinton" photo**

A federal Court of Appeals has awarded freelance photographer Douglas Bruce an additional \$5,500 in damages in his copyright infringement suit against the Weekly World News. So, in a sense, Bruce was the victor on appeal, just as he was the victor, in a sense, before the District Court.

However, even with the additional award, the judgment Bruce obtained came to a total of just

\$25,642 - far less than the \$425,000 or so he had sought. What's more, to add injury to insult, the Court of Appeals ordered Bruce (as well as the News) to bear his own costs on appeal, so it's not clear that the photographer came out ahead, financially, as a result of his appeal, or even as a result of the case.

At issue in the lawsuit was an "Alien Backs Clinton" photo that the News used repeatedly in its newspaper and on promotional T-shirts. The photo was a composite created by the News from a photo taken by Bruce and an "Alien" character created by the News itself.

The News licensed Bruce's photo, but admittedly used the photo beyond the authorized term. Federal District Judge Richard Stearns awarded Bruce just \$20,145 in damages (ELR 23:8:18).

On appeal, Judge Conrad Cyr ruled that Judge Stearns had made one error - but just one - in

calculating Bruce's damages. At the time Bruce licensed his photograph to the News, Bruce was represented by a stock photo agency to which Bruce paid a 50% commission. As a result, District Judge Stearns awarded Bruce only 50% of the amount the evidence showed he had lost in licensing fees. However, by the time the judgment was entered, the stock photo agency had gone out of business; and Judge Cyr ruled that as between Bruce and the News, "Bruce is unquestionably . . . the more deserving recipient" of the share that would have gone to the stock photo agency, if it were still in existence.

On the other hand, Judge Cyr affirmed Judge Stearns' decision to apportion the News' profits from the "Alien Backs Clinton" photo 50/50 between Bruce and the News. Bruce sought more than half, but Judge Cyr held that Judge Stearns had properly exercised his discretion in determining that "Bruce's original



photograph (of Clinton and [a] Secret Service Agent) was so routine and generic that it had very little market appeal, whereas the bizarre nature of the retouched photograph gave it exponentially greater appeal."

In all other respects too, Judge Cyr affirmed the judgment.

Bruce was represented by Andrew D. Epstein of Barker Epstein & Loscocco in Boston. Weekly World News was represented by Andrew Baum of Darby & Darby in New York.

Bruce v. Weekly World News, Inc., 310 F.3d 25, 2002 U.S.App.LEXIS 22626 (1st Cir. 2002)[ELR 24:10:13]

**Gennifer Flowers may proceed with suit against George Stephanopoulos and James Carville, complaining about things they said and wrote about her, federal appellate court rules**

More than a decade after Bill Clinton first ran for President, statements made by Gennifer Flowers during that 1992 primary campaign are still kicking around in federal court.

Some readers may recall that in the middle of that long-ago primary, the Star published an article reporting that Flowers and Clinton had an affair while he was governor of Arkansas. At first, Flowers denied the allegation. But a few days later, Flowers sold her story to the Star and recanted her denial. Clinton and his wife Hillary responded on 60 Minutes by denying the story. And that prompted Flowers to hold a press conference in which she played recordings of old phone

calls with Clinton - recordings she had secretly made.

Readers who are politics buffs also may recall that James Carville and George Stephanopoulos came to Clinton's defense. They did so in television interviews and in books that each of them wrote. The statements made by Carville and Stephanopoulos in their defense of Clinton caused Flowers to sue them for defamation and false light invasion of privacy. Flowers sued Hillary Clinton too.

At first, Flowers' lawsuit went nowhere. Federal District Judge Philip Pro dismissed it. He ruled that most of her claims were barred by the statute of limitations, and in any event, the allegedly defamatory statements were merely rhetorical hyperbole or opinions (ELR 22:9:20).

On appeal, however, part of Flowers' lawsuit has been resurrected. Writing for the Court of Appeals, Judge Alex Kozinski held that Flowers is entitled to

proceed with her defamation and false light invasion of privacy claims against Carville and Stephanopoulos, based on statements they made on the Larry King Show, and against Stephanopoulos and his publisher based on statements he made in his book *All Too Human: A Political Education*.

Judge Kozinski ruled that some of the things Carville and Stephanopolos said about Flowers could be defamatory, even though they had repeated what others had already reported in the news media. The judge explained that if those other reports were untrue, Carville and Stephanopolos could be liable for repeating them; there is no general privilege to repeat what others have said.

Since Flowers is a public figure, she would have to prove that Carville and Stephanopolos knew the reports were untrue, or that they disregarded obvious warning signs that those reports might be untrue.

However, the judge said, since Carville and Stephanopolos were Clinton insiders, they may have known the reports were untrue. Flowers, at least, was entitled to an opportunity to try to prove that they did.

Judge Kozinski also held that Flowers' false light claim should not have been dismissed, because it did not just duplicate her defamation claim. Rather, under Nevada law, which the judge held was applicable to Flowers' case because she lived there when she filed it, false light and defamation are distinct. "A jury could award her damages for false light but not for defamation if it found that she suffered subjective distress but not reputational injury," he explained.

On the other hand, Judge Kozinski upheld the dismissal of some of Flowers' claims. Some of the statements she objected to were mere rhetorical hyperbole, he agreed. He also agreed that Flowers' claims based on statements made in Carville's book

All's Fair: Love, War, and Running for President, were barred by the statute of limitations, as were her privacy and other claims against Hillary Clinton.

Flowers was represented by Larry Klayman of Judicial Watch, Inc. Stephanopoulos and his publisher were represented by Laura R. Handman of Davis Wright Tremaine. James Carville was represented by William Alden McDaniel, Jr., of McDaniel Bennett & Griffin. And Hillary Clinton was represented by David E. Kendall of Williams & Connolly.

Flowers v. Carville, 310 F.3d 1118, 2002 U.S.App.LEXIS 23371 (9th Cir. 2002)[ELR 24:10:13]

**FCC did not have authority to require "video descriptions" of television programs' visual elements, Court of Appeals rules in response to MPAА petition**

In the Telecommunications Act of 1996, Congress mandated the improvement of television programming for the hearing and visually impaired. It did so by directing the Federal Communications Commission to adopt regulations that require broadcasters to transmit the audio portion of programs as on-screen displays of spoken words that can be activated by viewers, at their discretion. This by-now familiar technology is commonly referred to as "closed captioning," and the FCC's implementation of Congress's closed-captioning mandate does not appear to have generated any controversy.

At the same time Congress required closed

captioning, it also directed the FCC to study "video description" technologies and to issue a report concerning its findings. "Video descriptions" are "aural descriptions of a television program's key visual elements (such as the movement of a person in a scene) that are inserted during pauses in the program dialogue." The FCC conducted the required study, issued the required report, and then went a step further: it ordered broadcasters to transmit video descriptions.

The FCC's video description order - unlike its closed captioning regulations - did generate opposition, perhaps because the two technologies are quite different from one another. Closed captioning merely requires the transcription and transmission of words that are actually spoken on screen. Video description, on the other hand, requires the creation of a second script containing descriptions of on-screen images, as well as the use of narrators to give voice to those



descriptions.

The MPAA petitioned the Court of Appeals for review of the FCC video description order. And in an opinion by Judge Harry Edwards, the appellate court has granted that petition and has vacated the FCC's order.

Judge Edwards noted that Congress intentionally treated closed captioning and video description differently in the Telecommunications Act, by requiring regulations implementing closed captioning but only a study and report in connection with video description.

The FCC argued that it had the authority under section 1 of the Communications Act of 1934 to adopt its video description order. But Judge Edwards disagreed. He noted that the video description order "is a direct and significant regulation of program content." And he observed that section 1 of the Communications

Act "has not been construed to allow the FCC to regulate programming content because such regulations invariably raise First Amendment issues."

The MPAA was represented by Robert Corn-Revere. The FCC was represented by C. Grey Pash, Jr., of the FCC.

Motion Picture Ass'n of America v. Federal Communications Commission, 309 F.3d 796, 2002 U.S.App.LEXIS 23225 (D.C.Cir. 2002)[ELR 24:10:14]

**Agreement requiring arbitration of disputes between reporter and television station or its "agents" did not require reporter to arbitrate malpractice claim against law firm hired by station to advise reporter on legality of using recordings of intercepted cordless phone conversations**

Robert Riggs used to work as a news reporter for television station WFAA-TV in Dallas. In 1995, the station broadcast reports by Riggs concerning a Dallas school district official who was alleged to be involved in possible public corruption. Riggs' reports were based in part on tape recordings of the official's cordless phone conversations, made by the official's neighbor using a police scanner.

Before Riggs' reports were produced, WFAA retained the law firm of Jenkins & Gilchrist to advise it and Riggs on the legality of using the tapes. The firm

advised them that they could, because even though federal wiretap laws make it unlawful to intercept cordless phone calls, WFAA and Riggs had not made the tapes themselves and had lawfully obtained them.

As things turned out, the school district official was indicted. But he also was acquitted. The official filed a civil lawsuit against WFAA and Riggs, and the case was settled for \$5 million. Riggs then sued Jenkins & Gilchrist in Texas state court "asserting causes of action arising from Jenkins's erroneous advice regarding the tape recordings."

Riggs' employment contract with WFAA contained a clause that required Riggs to arbitrate "any claims and disputes" between Riggs and the station or its "agents." Since WFAA had retained the Jenkins & Gilchrist, the firm demanded arbitration - as WFAA's "agent" - of Riggs' claims. But Riggs' refused to do so.

Jenkins & Gilchrist made an unsuccessful

motion for an order compelling arbitration. In an opinion by Justice James Kinkeade, the Texas Court of Appeals has agreed that the agreement between Riggs and WFAA does not entitle Jenkins & Gilchrist to arbitration of Riggs' claims, for two reasons.

First, Justice Kinkeade interpreted the arbitration clause to apply only to claims between Riggs and agents of WFAA whose conduct could make WFAA vicariously liable, and even Jenkins & Gilchrist agreed that WFAA was not vicariously liable for the law firm's conduct.

Second, the Justice held that Jenkins & Gilchrist "was acting more as an independent contractor for WFAA than as an agent in giving legal advice to Riggs."

Jenkins & Gilchrist was represented by Fernando Rodriguez of Baker Botts in Dallas. Riggs was represented by Peter Malouf of Waggoner Malouf

& Aldous in Dallas.

Jenkins & Gilchrist, P.C. v. Riggs, 87 S.W.3d 198,  
2002 Tex.App.LEXIS 6715 (Tex.App. 2002)[ELR  
24:10:15]

**NHL's Los Angeles Kings did not owe spectator duty to eliminate risk of injury from flying hockey pucks, so California appellate court affirms dismissal of lawsuit filed by woman hit by puck during pre-game warm-ups**

Holly Ann Nemarnik was hit in the face by a hockey puck that flew off the ice during the warm-ups before a Los Angeles Kings game in 1999. All she has to show for her injuries, though, is a published judicial decision bearing her name, and a bill for \$12,870 in court costs she has been ordered to pay the Kings, as a result of her filing an unsuccessful lawsuit against the team.

A California trial court granted the Kings' motion for a nonsuit at the beginning of the trial of Nemarnik's case, and dismissed the case before testimony or evidence were introduced. On appeal, she did no better.

In an opinion by Justice Reuben Ortega, the California Court of Appeal has affirmed that ruling.

Justice Ortega concluded that under California's "primary assumption of the risk" doctrine, the Kings did not have a duty to protect Nemarnik from the risk she might be injured by flying hockey pucks.

Nemarnik attempted to avoid this result by arguing that she had been injured because other fans had blocked her view of the ice, thus preventing her from avoiding the puck; and she argued that the Kings had a duty to prevent other fans from doing that. In fact, the Kings' manual for ushers directs them to prevent fans from standing in places that block the views of others.

This argument did not succeed, however, for two reasons. First, Justice Ortega ruled that "Obstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of



attending a sporting event." Second, the justice noted that during her opening statement, she did not contend that if she had a clear line of sight, she would have been able to avoid the flying puck.

As a result, the issue in the case was not whether the Kings owed her a duty of better crowd control, but only whether they owed her a duty to eliminate the risk of injuries from flying pucks. That, they did not, Justice Ortega held.

Nemarnik was represented by Martina A. Silas in Encino. The Kings were represented by Patrick M. Kelly of Wilson Elser Moskowitz Edelman & Dicker in Los Angeles.

Nemarnik v. Los Angeles Kings Hockey Club, 127 Cal.Rptr.2d 10, 2002 Cal.App.LEXIS 4939 (Cal.App. 2002)[ELR 24:10:15]

**Title IX lawsuit filed by girl's high school basketball coach against school district was properly dismissed, appellate court affirms, because Title IX does not create a private right of action in favor of those who suffer retaliation for complaining about gender discrimination suffered by others**

Roderick Jackson used to coach the girl's basketball team at Ensley High School in Birmingham, Alabama. He doesn't any more.

The reason Jackson was "relieved of his coaching duties" became the subject of a Title IX discrimination lawsuit he filed against the Birmingham Board of Education. According to Jackson, he was fired as coach because he complained that the Board had denied his girl's team equal funding and access to sports facilities and equipment, in violation of Title IX.

However, Jackson never had the chance to prove why he was fired, because a federal District Court dismissed his complaint. In an opinion by Judge Stanley Marcus, the Court of Appeals has affirmed.

Title IX prohibits gender discrimination by institutions that receive federal financial assistance. On its face, the statute appears to provide only one enforcement option: a cut-off of further federal financial assistance to institutions that violate Title IX's requirements. However, the Supreme Court has held that Title IX also implies a private right of action in favor of those who suffer prohibited discrimination.

In his lawsuit, Jackson sought an extension of the private right of action principle to those, like himself, who allege that although they did not suffer gender discrimination themselves, they were retaliated against for complaining about gender discrimination suffered by others. Judge Marcus ruled that Title IX does not

imply such a cause of action.

Jackson represented himself. The Board of Education was represented by Valerie L. Acoff of Thomas Means & Gillis in Birmingham.

Jackson v. Birmingham Board of Education, 309 F.3d 1333, 2002 U.S.App.LEXIS 22001 (11th Cir. 2002)[ELR 24:10:16]

## **DEPARTMENTS**

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