INTERNATIONAL DEVELOPMENTS

Tennis pro Andre Agassi must pay United Kingdom income tax on payments received from Nike and Head for tournaments he played in UK, even though neither company resides in UK, and even though payments were made to corporation owned by Agassi which does not reside in UK either

Tennis pro Andre Agassi resides in the United States, and plays in tournaments all around the world. Because he's a U.S. resident, he has to pay income tax in the U.S., of course. Other countries too would like him to pay income tax there, whenever he earns income on account of tournaments he plays there.

Take, for example, the United Kingdom, where Agassi played tournaments in 1998 and 1999. According to the UK department of Inland Revenue (the British IRS), Agassi owed £27,500 in taxes on account of income that included payments totaling £125,000 he received from Nike and Head Sports in connection with tournaments Agassi played in the UK during those years. Agassi thought otherwise. He filed a British tax return for those years, but reported a loss of £63,700 on total UK income of £54,600, including income from Nike and Head of just £43,000 rather than the £125,000 figured by Inland Revenue.

The difference between Agassi's calculations and those of Inland Revenue was not the result of an arithmetic error on the part of either. Instead, the difference of more than £80,000 was explained by the fact that Nike and Head had paid that much *not* to Agassi personally, but instead to Agassi Enterprises Inc., a corporation owned and controlled by Agassi.

Agassi Enterprises had absolutely no presence in the UK at all, and neither did Nike or Head. As a result, even though the £80,000 was related in some fashion to tournaments that Agassi played in the UK – he didn't dispute that – the money was paid by Nike and Head directly to Agassi Enterprises entirely outside the UK. So Agassi simply didn't include that money in the income he reported to Inland Revenue.

Agassi didn't, and Inland Revenue did, as a result of a difference between them over the proper interpretation of a provision of UK tax law that pertains to the income of "Entertainers and Sportsmen." Their differing interpretations were eventually presented to the Chancery Division of the High Court of Justice. There, Mr. Justice Lightman began by noting that UK law imposes tax on the income of "any person . . . from any trade, profession or vocation exercised within the United Kingdom," regardless of the person's residence or nationality, regardless of where the payment is made, and regardless of whether the payment is made by a someone connected to the UK. Of course, Justice Lightman observed, it was always possible for people – especially "sportsmen and entertainers" – to "come [to the UK], earn, get paid and leave before and without ever paying the tax." As a result, UK law contains two sections dealing with "Entertainers and Sportsmen" in particular. One of them – section 555 –requires those who pay non-resident entertainers and sportsmen for performances in the UK to deduct and pay to Inland Revenue the taxes owed on those payments. The other – section 556 – provides that where a payment is made to someone other than the performer, the performer "shall be treated for [tax] purposes . . . as the person to whom the payment is made. . . ."

Inland Revenue argued that these provisions covered Nike and Head's payments to Agassi's corporation, and meant that Agassi himself was treated for tax purposes as the person to whom those payments were made. However, section 556 (the section that would treat him as the recipient of payments to his corporation) itself specifies that it applies only if section 555 (the section that would require Nike and Head to withhold taxes) applies. This enabled Agassi to argue that section 555 did *not* apply to Nike and Head because neither they nor Agassi Enterprises had any connection with the UK, and UK tax law applies only on British territory.

Agassi's argument was supported by at least a couple of earlier decisions of the House of Lords (the British Supreme Court). Those cases stated that "English legislation is primarily territorial," and that the "Income Tax Acts . . . themselves impose a territorial limit. . . ."

Justice Lightman was not persuaded, however. He acknowledged that it is "broadly correct that English legislation (and in particular English tax legislation) is to be construed as territorial. . . ." Nevertheless, he added, "on many occasions statutes have been held . . . to have extra territorial effect. . . ."

In this case, the Justice noted that the general rule is that tax is imposed on income earned in the UK by entertainers and sportsmen "irrespective of the connection of person making the payment with the UK," and that sections 555 and 556 were intended to prevent entertainers and sportsmen from avoiding the tax. This means that a connection with the UK of the person making the payment "must be irrelevant." Justice

Lightman reasoned that "it would be absurd to attribute to the legislature the intention that liability could in any and all cases be avoided by the simple expedient of channelling the payment through a foreign company with no tax presence here. It this were the case, the tax would effectively become voluntary."

For this reason, Justice Lightman dismissed Agassi's appeal from an Inland Revenue notice charging Agassi £27,500 in additional tax.

Agassi v. Robinson, [2004] EWHC 487 (Ch), available at http://www.courtservice.gov.uk/judgmentsfiles/j2381/agassi-v-robinson.htm

Canadian Federal Court rules that peer-to-peer file-sharing does not infringe Canadian copyright, so Internet service providers do not have to disclose to record companies identities of subscribers suspected of downloading and uploading unlicensed music recordings

Those who exchange unlicensed music recordings over peer-to-peer networks like Morpheus, Grokster, KaZaA and iMesh, do not infringe the Canadian copyrights owned by record companies, Justice Konrad von Finckenstein of the Federal Court of Canada has ruled. Justice von Finckenstein concluded that "file-sharing" does not infringe copyright, even though the Canadian Copyright Act makes it an infringement to reproduce, authorize others to reproduce, or distribute sound recordings without copyright-owner authorization, and even makes it an infringement to possess unauthorized sound recordings.

Justice von Finckenstein's remarkable decision – which decided a significant copyright law issue on its substantive merits – was reached in response to the most preliminary of procedural matters: a request by Canadian record companies for a court order that would have required five Canadian Internet service providers to identify subscribers whom the record companies suspect of downloading and uploading unlicensed music recordings. If such an order had been issued, the disclosed names would have been substituted for "John" and "Jane Doe" in a complaint the record companies have filed, alleging that the ISPs' subscribers are infringing sound recording copyrights by exchanging files over P2P networks. After the true names of those subscribers had been substituted, the complaint would have been served on the alleged infringers, and the case then would have begun, on its merits. Instead, by ruling as he did, Justice von Finckenstein brought the case to an end before it even began.

The record companies did not sue the ISPs themselves (not even for contributory infringement). Instead, the record companies simply sought "discovery" from the ISPs. Justice von Finckenstein determined that under Canadian law, the record companies would be entitled to the information they sought from the ISPs if, but only if, certain conditions were satisfied first. The record companies had to show that: they had a *prima facie* case of infringement; the ISPs were the only practical source of the identities of P2P users; and the public interest in the disclosure of subscriber names outweighed concerns for the subscribers' privacy.

In order to decide whether the record companies had a *prima facie* case, the Justice concluded that he had to decide whether P2P is an infringement; and that's why he reached the substantive merits of the record companies' claims, in response to their request for discovery.

Justice von Finckenstein held that downloading songs for personal use is not an infringement, because the Canadian Copyright Act provides that reproducing a musical sound recording for private use is not an infringement. He then reasoned that the evidence merely showed that P2P users placed copies of recordings into "shared directories which were accessible by other computer users via a P2P service," but that "[n]o evidence was presented" showing that ISP subscribers actually distributed or authorized the reproduction of those recordings. "The mere fact of placing a copy on a shared directory in a computer where that copy can be accessed via a P2P service does not amount to distribution," he said. And while the WIPO Performances and Phonograms Treaty does require nations to grant copyright owners the exclusive right to make recordings available, "that treaty has not yet been implemented in Canada and therefore does not form part of Canadian copyright law."

The Justice also found that the record companies had not shown that ISPs were the only practical source of their subscribers' names, because the record companies had not shown that those names could not be obtained from the P2P network operators themselves.

Finally, the Justice concluded that the public interest in the disclosure of the names of ISP subscribers was outweighed by their interest in privacy. The ISPs persuaded him that the information the record companies had provided about P2P users – namely, their IP addresses – would not necessarily indicate which subscribers had used P2P networks, because IP addresses are not permanently assigned to subscribers, and over time, different people use the same IP address. As a result, the names provided to the record companies may not have been those who were using P2P networks at the time the record companies determined the users' IP addresses.

The record companies immediately appealed Justice von Finckenstein's ruling to the Federal Court of Appeal of Canada, where it is now pending.

The record companies were represented by Ronald E. Dimock of Dimock Stratton in Toronto. The ISPs were represented by Charles F. Scott of Lax O'Sullivan Scott in Toronto, Joel Watson of Bennett Jones in Toronto, Kathryn Podrebarac of Hodgson Tough Shields DesBrisay O'Donnell in Toronto, Laura Malloni of Torys in Toronto, and Serge Sasseville in Montreal.

BMG Canada Inc. v. Doe, 2004 FCD 488 (2004), available at http://www.fct-cf.gc.ca/bulletins/whatsnew/T-292-04.pdf

Australia's Channel Ten may not have infringed Channel Nine's copyrights by rebroadcasting clips from Nine's programs as part of Ten's roundtable discussion program "The Panel," High Court of Australia rules

A case that began with one network's broadcasts of short clips copied from another network's programs has turned into a long-running legal debate over what, exactly, Australian copyright law protects when it protects "a television broadcast." That debate has wound its way from a federal trial court, to an appellate court, to the High Court of Australia. But the debate isn't over yet, because the High Court decided only a narrow, even if significant, point and has sent the case back to the appellate court for further consideration.

The case was provoked by Channel Ten's broadcasts of a late night program called "The Panel." The program's title reflects its format: a panel of well-known celebrities sits around an oval desk and discusses current affairs, sport, the arts and other topics, in a humorous and irreverent way. The show is "punctuated" by clips recorded from other television programs, including several broadcast by Channel Nine, a competing network. Nine responded by filing a copyright infringement lawsuit in the Federal Court of Australia in Sydney.

The clips used by "The Panel" were short, ranging from eight to forty-two seconds each. Perhaps for that reason, the trial court judge ruled in Channel Ten's favor, holding that "The Panel" had not used a "substantial" portion of Channel Nine's "broadcast[s]." The proper definition of "a television broadcast" is a very important part of this case, because the Australian Copyright Act provides specific protection to "a television broadcast." The trial judge defined "television broadcast" as a "program or discrete segments of a program." Since Nine's programs were 30 to 60 minutes long, the judge concluded that eight to forty-two second clips were not a "substantial" portion of them, nor of the programs' discrete segments.

On appeal, Channel Nine did better. The appellate court held that every image seen on a television screen qualifies for copyright protection as "a television broadcast," and thus Ten had infringed Nine's copyrights (subject to "fair dealing" defenses).

The question of what constitutes "a television broadcast" is a difficult one under Australian copyright law, as proved by what happened next. Channel Ten appealed to the High Court (Australia's Supreme Court), which reversed and ruled in Ten's favor – by a 3-2 majority. This means that of the nine judges to rule on the case so far, five have sided with Channel Nine (the copyright owner) and four have sided with Channel Ten (the alleged infringer); but because the High Court ruled 3-2 in favor of Channel Ten, the alleged infringer is the prevailing party – at this point in the case.

The High Court's majority held that the Copyright Act does not protect each and every image that viewers see when they watch a television broadcast. But the High Court did *not* decide what is now a key issue the case: whether a segment of a news or current affairs program constitutes a protected "television broadcast." The majority concluded by saying, "There can be no absolute precision as to what in any of an infinite possibility of circumstances will constitute 'a television broadcast.'"

The High Court agreed with Channel Nine, that an entire program qualifies as a protected "broadcast." However, the High Court "reserve[d] consideration . . . for a particular case" of the argument that "where a given program divides into segments, it may be legitimate . . . to use a segment of a program for measurement of the television broadcast, rather than the whole of the program." That, of course, is the precise issue presented by Channel Nine. But the High Court's majority declined to endorse Nine's position. Instead, the majority revealed how difficult it found the issue to be by adding, "However, the circumstance that a prime time news broadcast includes various segments, items or 'stories' does not necessarily render each of these 'a television broadcast' in which copyright subsists under . . . the [Australian Copyright] Act."

Rather than decide that legal issue itself, the High Court sent the case back to the appellate court, for it to decide the issues presented by Channel Nine's appeal from its original loss in the trial court.

Channel Nine was represented by A. J. L. Bannon SC with D. T. Kell, instructed by Gilbert & Tobin. Channel Ten was represented by J. M. Ireland QC with R. Cobden and C. Dimitriadis, instructed by Blake Dawson Waldron.

Network Ten Pty Limited v TCN Channel Nine Pty Limited, [2004] HCA 14, available at http://www.austlii.edu.au/au/cases/cth/high_ct/2004/14.html

WASHINGTON MONITOR

Clear Channel agrees to settle all pending FCC indecency matters – including two involving the "Howard Stern Show" – by making "voluntary contribution" of $1.75 million to U.S. Treasury, and by implementing Compliance Plan that includes training and possible suspension and termination of employees

Clear Channel Communications has agreed to make a "voluntary contribution" of $1.75 million to the United States Treasury. The payment, however, isn't an act of charity. In fact, only the Federal Communications Commission described it as a "voluntary contribution," in a remarkable display of bureaucratic doubletalk. What Clear Channel agreed to pay was a $1.75 million fine, in order to settle "indecency" proceedings pending before the FCC.

The settlement covers FCC indecency proceedings that were triggered by broadcasts of "Eliot in the Morning" (*ELR* 25:11:6), another unidentified program (*ELR* 25:11:6), an episode of the "Howard Stern Show" that aired in 2001 (*ELR* 25:11:6), and another episode of the "Howard Stern Show" that aired in 2003. The 2003 Howard Stern Show featured a discussion of the sex practices of John – a Stern Show cast member – and John's wife, as well as a discussion of "a purported personal hygiene product called 'Sphincterine.'" The FCC concluded that both discussions were "patently offensive."

These broadcasts resulted in FCC Notices of Apparent Liability that proposed forfeitures totaling $795,500. Clear Channel could have paid this amount and been done with these cases. But by paying almost $1 million more, it was able to settle not just these cases, but also many other indecency complaints that had been filed with the FCC about some 200 Clear Channel broadcasts – complaints that hadn't yet resulted in Liability Notices but might have.

What's more – and what may have been even more important – the FCC agreed that it would not use the Liability Notices or any of the other complaints "for any purpose relating to Clear Channel . . . and shall treat such matters as null and void for all purposes." The renewal of broadcasting licenses for Clear Channel's stations is one of the purposes for which the Liability Notices and complaints might have been considered, but now won't be.

To reach this settlement, Clear Channel had to do more than pay $1.75 million. It also had to agree to implement a Compliance Plan designed to prevent future violations of the FCC's indecency regulations. The Plan provides that Clear Channel will conduct training sessions on obscenity and indecency for all on-air talent and other employees who make programming decisions. If Clear Channel receives any more Notices of Apparent Liability, employees involved in airing the offending material will be suspended, will be required to undergo "remedial training" on the FCC's indecency regulations, and if allowed to return to the air following remedial training, will have their broadcasts delayed for as much as five minutes so a "program monitor" can interrupt them if their content "crosses the line." Finally, if Clear Channel is found to have aired an obscene or indecent program that results in future enforcement action against the company, "the offending employees will be terminated without delay."

Even before the settlement was reached, Clear Channel took a significant step in the direction of heading off future indecency proceedings. It cancelled its stations' airings of the "Howard Stern Show" completely.

Clear Channel was simply a licensee of the "Howard Stern Show," not its producer or syndicator. Howard Stern's show originates with and is syndicated by Infinity Broadcasting. In its Notice of Apparent Liability for Stern's 2003 show (the one that featured discussions of John's sex life and "Sphincterine"), the FCC pointedly noted that it was aware of Infinity's role, and the FCC "instruct[ed] the Enforcement Bureau to initiate an investigation into Infinity's broadcast of [that show]."

Though more than two-thirds of the indecency fines proposed by the FCC since 2000 have been against Clear Channel, it is not the only broadcaster to run afoul of the FCC's indecency regulations. On the same day the FCC released its Liability Notice against Clear Channel concerning Stern's 2003 show, the FCC also released an order upholding the decision of its Enforcement Bureau to fine Emmis Radio $14,000 on account of its broadcasts of two indecent shows. One broadcast featured a telephone conversation between a porn star and the on-air staff of the "Mancow's Morning Madness" show. The other featured interviews with three women about their sex lives on a show called "Bitch Radio."

Emmis did not deny airing the complained-of programs, nor did it argue that they weren't indecent.

Instead, Emmis argued that the complaints that had been filed against it were not as detailed as FCC rules and the First Amendment require. Emmis contended that by accepting vague complaints, the FCC had improperly shifted the burden of proof by requiring the company to prove that it had not broadcast the vaguely-described offending material – something Emmis could not do, because it had not maintained recordings of its broadcasts. The FCC rejected these arguments, however, because Emmis had not denied broadcasting the offending material.

Clear Channel Communications, Inc., FCC 04-128 (June 4, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-128A1.pdf; *Clear Channel Broadcasting Licenses, Inc.*, FCC 04-88 (April 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-88A1.pdf; *Emmis Radio License Corp.*, FCC 04-62 (April 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-62A1.pdf

Justice Department closes antitrust investigation into Movielink online movie download service; Department concludes that studio-owned joint venture does not harm competition or consumers

The Antitrust Division of the Department of Justice has closed its investigation of Movielink, a joint venture formed by five movie studios – Sony, Warner Bros., MGM, Paramount and Universal – to sell movies directly to consumers. The service is referred to by some as "video-on-demand" (or "VOD" in Justice Department vernacular). Movielink operates a website from which customers download movies at prices that currently range from $2 to $5 each.

Because Movielink is owned by five major studios which collectively account for about half of U.S. domestic box office revenues, its formation in 2001 was greeted in some quarters with concern about its impact on competition. (Indeed, a private antitrust lawsuit is now pending, filed by a Movielink competitor.) However, after what the Justice Department itself has characterized as "a thorough review," the Antitrust Division has determined that the evidence does not show that the formation of the Movielink venture has reduced competition or harmed consumers.

Each of the five studios entered into a content licensing agreement with Movielink, authorizing it to sell new films and older "library" titles over the Internet. Movielink also offers films from other studios that have entered into licensing agreements with the joint venture. The terms of these Movielink licensing agreements provide that each studio determines pricing and release dates for its own films.

The Antitrust Division explained that even though joint ventures can be procompetitive, any agreement among major horizontal competitors in a concentrated industry to collaborate and jointly market their products or services raises potential antitrust concerns. Because the Movielink joint venture involves vertical integration, the Antitrust Division said that it analyzed the joint venture's impact on competition at two levels: the studio licensing level, and the consumer retail level.

With respect to licensing, the Division examined whether Movielink diminished competition among its owners in connection with the license terms they demand for their movies from other online movie services that compete with Movielink. With respect to competition at the retail level, the Division considered not only the possibility that the studios would use Movielink to improperly exchange information with one another, but also the extent to which movie downloads compete with home video and pay-per-view cable and satellite services.

The Antitrust Division is legally obligated to keep confidential much of the information it obtains in its investigations. As a result, many of the specific facts it studied have not been made public. Based on those facts, however, the Division determined that the evidence does not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes.

Disney and Fox are not part of the Movielink joint venture. At about the same time Movielink was formed, those two studios created their own joint venure called Movies.com. In 2002, however, Disney and Fox abandoned their collaboration on Movies.com, and that service is now operated by Disney alone.

Department of Justice Press Release (June 3, 2004), available at www.usdoj.gov/opa/pr/2004/June/04_at_388.htm

Publishers and literary agents must report gross royalties paid to authors, Internal Revenue Service rules

Authors have to pay income tax on the royalties they receive, of course. In some cases, authors are "employees" of their publishers, and so receive W-2 Forms from their publishers at tax time, just like other kinds of workers. Usually, however, authors are not "employees"; they are instead "independent contractors," so publishers send them 1099-MISC Forms, rather than W-2's. Publishers also send copies of these forms directly to the Internal Revenue Service, so the IRS will know what amounts to look for on authors' income tax returns.

None of this is new law or procedure, yet the Internal Revenue Service has just issued a Revenue Ruling explaining this and more. The ruling is titled "Section 6050N. – Returns Regarding Payments of Royalties." And despite its dry and uninviting moniker, it is a Ruling that will interest both publishers and literary agents (or at least their lawyers and accountants).

The reason the IRS issued this new ruling is that publishers often pay royalties to *literary agents*, rather than directly to authors; and literary agents often deduct their *commissions and expenses*, before sending the rest to authors. Someone apparently asked whether – in cases like those – publishers still must send 1099 Forms to anyone, and whether literary agents should report the full (or in tax language, the "gross") amount paid by publishers, or only the net amount forwarded by agents to their author clients.

For publishers, the answer is "yes" – they must send (and file) 1099 Forms, even for authors whose royalties are sent to literary agents (rather than to the authors themselves). The new Revenue Ruling, however, advises publishers that if royalties are sent to literary agents, the 1099-MISC Forms should be sent to literary agents too, reporting the literary agent as the recipient – *unless* the literary agent is a corporation. A separate section of the tax law provides that 1099's do not have to be sent or filed for payments (of any kind) made to corporations.

For literary agents, the answers are "yes" and "gross." That is, literary agents who receive and then forward royalties for their author clients must send them (and file) 1099-MISC Forms, reporting the full amount of the royalties received from publishers, not simply the net amount forwarded to their clients.

Editor's note: This does not mean that literary agents have to pay taxes on royalties received from publishers, or that authors have to pay taxes on the portion retained by their agents as commissions and expenses. Though the new Revenue Ruling says nothing about these important points, literary agents are entitled to deduct from their own income the royalties they forward to clients. And authors are entitled to deduct from their own income the commissions and expenses their agents retain.

Section 6050N. – Returns Regarding Payments of Royalties, Revenue Ruling 2004-46, 2004-20 I.R.B. 915 (May 17, 2004), available at www.irs.gov/pub/irs-irbs/irb04-20.pdf

IN THE NEWS

Federal court in Los Angeles has jurisdiction over Republic of Austria in suit to recover possession of Gustav Klimt paintings stolen by Nazis during World War II, United States Supreme Court affirms

Maria Altmann is an 88-year-old resident of Los Angeles and the true owner, she alleges, of five paintings by artist Gustav Klimt that now hang in the Austrian Gallery. The paintings used to belong to Altmann's uncle, from whom they were stolen by Nazis during World War II. The Republic of Austria, which owns and operates the Gallery in which the paintings now hang, claims that the Gallery is their true owner, for a couple of different reasons.

These competing claims are being made in a federal court in Los Angeles, where Altmann has sued Austria and the Gallery seeking the paintings' return. Not surprisingly, Austria isn't pleased about having to defend itself in a United States court in Los Angeles, for many of the same reasons, quite likely, that Altmann would not want to have to pursue her claims in an Austrian court.

Though the case has generated three published opinions already, so far, nothing has been decided about the merits of the parties' conflicting ownership claims. Instead, the case has gone all the way to the United States Supreme Court on the narrow, procedural issue of whether a federal court in Los Angeles even has jurisdiction over Austria and its Gallery. Austria and the Gallery say it doesn't. But first a District Court (*ELR* 23:6:16), and then a Court of Appeals (*ELR* 24:12:17), and now the Supreme Court all have held otherwise.

Writing for a majority of the Supreme Court, Justice John Paul Stevens has held that federal courts in the United States do have jurisdiction to hear Altmann's claim against Austria by virtue of a federal statute known as the "Foreign Sovereign Immunities Act of 1976." Just the name of the Act makes at least two things quite notable about this holding.

First, the title of the Act makes the statute appear to be about the "immunities" of foreign sovereigns; and for the most part, it does grant immunities. However, the Act does contain some "exemptions," and those exemptions have the effect of granting jurisdiction to United States courts, when they apply. In this case, Altmann contends that one of those exemptions does apply: the one that exempts – and thus grants jurisdiction to U.S. courts – in "cases . . . in which rights in property taken in violation of international law are in issue."

Second, as the name of the Act indicates, it was passed in 1976 – decades after the Klimt paintings were stolen from Altmann's uncle and given to the Gallery. Austria argued that if Altmann's uncle himself had filed suit in the United States immediately after the paintings were given to the Austrian Gallery by a Nazi officer, Austria would have been immune. And Austria argued that the 1976 Act should not be read to give U.S. courts jurisdiction retroactively. This is the issue that the Supreme Court agreed to hear, and has decided in Altmann's favor.

The question of whether the Foreign Sovereign Immunities Act applies retroactively was a surprisingly difficult one (perhaps because the usual rule is that statutes do *not* apply retroactively). Justice Stevens' opinion that it does apply retroactively was accompanied by two separate concurring opinions written by Justices Antonin Scalia and Stephen Breyer, and a dissenting opinion by Justice Anthony Kennedy (in which Chief Justice William Rehnquist and Justice Clarence Thomas joined).

However, nothing in the Supreme Court's lengthy decision deals with "art law" or with the interesting issue at the heart of this case: whether – as a matter of international law – Altmann is entitled to recover the Klimt paintings from the Austrian Gallery. That issue awaits the proceedings that now will take place in the federal District Court in Los Angeles.

Republic of Austria v. Altmann, United States Supreme Court Case No. 03-13 (June 2004), available at http://a257.g.akamaitech.net/7/257/2422/07june20041115/www.supremecourtus.gov/opinions/03pdf/03-13.pdf

D.C. and Colorado federal courts express different views on constitutionality of statute that restored copyrights of foreign works that had fallen into public domain in United States

A decade ago, Congress did a remarkable thing, for a very good reason. It restored the copyrights of many foreign works that had fallen into the public domain in the United States, in order to comply with this country's obligations as a member of the World Trade Organization.

The statute which did this was called the "Uruguay Round Agreements Act," and it dealt with many topics totally unrelated to copyright. The copyright restoration part of the Act was long and complicated and left many important questions unanswered. (See, "Back from the Public Domain" by Lionel S. Sobel, *ELR* 17:3:3) But the constitutionality of the Act didn't seem, at first, to be one of those questions, because the Act was prompted by international trade objectives – something that the Commerce Clause of the Constitution gives Congress the power to regulate (even if copyright restoration isn't authorized by the Copyright Clause of the Constitution).

Nevertheless, the constitutionality of the Act did occur to people and companies in the U.S. whose businesses or hobbies involved dealing in public domain works, including public domain works of foreign origin. As a result, several of them filed two separate but similar lawsuits seeking judicial declarations that the copyright restoration provision of the Act is unconstitutional. One of these cases was filed in federal court in the District of Columbia; and the other was filed in federal court in Colorado.

The government responded to both lawsuits in identical ways: by filing motions to dismiss them on the grounds that they failed to state legally recognized claims. In the D.C. case, District Judge Ricardo Urbina has granted the government's motion and has dismissed the case. But in the Colorado case, Judge Lewis Babcock has denied the government's motion, so that case will continue into its next phase.

In both cases, the challengers argued that copyright restoration was unconstitutional, because the Constitution didn't give Congress the power to restore copyrights that had lapsed into the public domain, and because restoring copyright to public domain works violated the First Amendment. In the Colorado case, the challengers also argued that restoring copyrights to public domain works violated the Due Process clause of the Fifth Amendment.

The government argued to Judge Urbina (in the D.C. case) that the Copyright Clause of Article I of the Constitution, or another Article I clause (presumably the Commerce Clause), gave Congress the power to restore copyrights. Judge Urbina agreed that the Copyright Clause did, and so didn't consider whether the Commerce Clause may have as well. The judge came to this conclusion, because Congress has granted copyright to works in the public domain at least three times before: in 1790, when Congress enacted the first Copyright Act; in 1919, when Congress gave the President the power to grant copyright protection to foreign authors whose works fell into the public domain in the U.S. during World War I; and in 1941, when Congress gave the President the power to restore the copyrights of works that would fall into the public domain in the U.S. during World War II.

The challengers relied heavily on a Supreme Court decision that held that Congress could not restore patent protection to inventions that had fallen into the public domain. But Judge Urbina said that copyrights and patents are quite different, insofar as Congress' power to restore protection is concerned, because patent protection requires "novelty" while copyright protection does not. Moreover, Judge Urbina added that restoring copyright protection does not hinder the development of science or violate the requirement that copyrighted works be "original." Finally, Judge Urbina held that restoring copyright did not violate the First Amendment.

In the Colorado case, the government's motion to dismiss didn't require Judge Babcock to decide whether the copyright restoration provision is unconstitutional. He merely had to decide whether the claims were "cognizable," and he concluded that they are.

Judge Babcock determined that the Copyright Clause claim is "cognizable," because the Act removes works from the public domain – something the Copyright Clause may not permit. He decided that the First Amendment claim is "cognizable," because it adequately distinguishes the Supreme Court's decision in *Eldred v. Ashcroft* which had rejected a free speech attack on the separate Copyright Term Extension Act (*ELR* 24:8:4). And Judge Babcock held that the substantive due process claim was "cognizable," because the Supreme Court has held that if Congress enacts legislation in an "irrational and arbitrary way," it does violate due process, and Golan is entitled to an opportunity to prove that the copyright restoration provision is irrational and arbitrary.

The government didn't come away completely empty-handed, in the Colorado case. As filed, that case also challenged the constitutionality of the Copyright Term Extension Act – just as the *Eldred* case had earlier. At the government's request, Judge Babcock has dismissed that aspect of the case. In an unsuccessful effort to relitigate that issue, Golan made an argument that Eldred had not. But Judge Babcock noted that the argument had been raised by Justice Breyer in his dissenting opinion in *Eldred*, and had been rejected by the Court's majority. As a result, Judge Babcock concluded that Golan's attack on the Term Extension Act was "foreclosed" by the Supreme Court's decision in *Eldred*.

Editor's note: The current conflict between these two decisions could be reconciled by Judge Babcock himself, if he eventually decides that although the challengers *alleged* valid claims, the Act is nevertheless constitutional. On the other hand, it's certainly possible that this conflict at the District Court level will remain a conflict at the Court of Appeals level, and eventually, the issue will be decided by the Supreme Court. The outcome is very important – perhaps more important, as a practical matter, to American copyright owners abroad than it is to foreign copyright owners in the U.S. This is so because the WTO's TRIPs Agreement required all WTO members to provide retroactive copyright protection to works from other members. So if the Act is declared unconstitutional – and restored copyrights are not protected after all – the United States will be in violation of its WTO obligations. That would authorize other nations to retaliate against the U.S. in a variety of ways. One logical form of retaliation would be for other nations to deny copyright protection to works of U.S. origin, or at least to revoke the retroactive copyright protection those other nations have given to U.S. works. (See, e.g., "Retroactive Copyright Protections for Recordings, Japanese Style" by Lionel S. Sobel, *ELR* 18:9:4).

Luck's Music Library v. Ashcraft, U.S.D.C., D.D.C., Case No. 01-2220(RMU) (June 10, 2004), available at http://www.dcd.uscourts.gov/01-2220.pdf; *Golan v. Ashcroft*, U.S.D.C., D.Colo., Case No. 01-B-1854(BNB) (Mar. 15, 2004), available at http://cyberlaw.stanford.edu/archives/golan_dct.pdf

Ralph Nader defeats Mastercard's trademark and copyright case; Nader television commercial aired during 2000 Presidential campaign did not infringe trademarks or copyright to Mastercard's "priceless" advertisements, federal District Court rules

The 2004 Presidential campaign is now shifting into high gear, and once again, Ralph Nader is in the thick of it, just as he was four years ago. To start the 2004 campaign with a clean slate, Nader had a bit of old business to take care of from the 2000 campaign; and he has, by winning a trademark and copyright case filed against him by Mastercard International.

Readers will recall that during the 2000 presidential campaign, Nader ran a television commercial that featured phrases like "promises to special interest groups: over $100 billion," and ending with the phrase "finding out the truth: priceless. There are some things money can't buy." This commercial was patterned, of course, after a long-running series of Mastercard commercials, all of which feature the names, images and prices of goods and services, followed by a phrase describing a priceless intangible and a voice-over saying: "Priceless. There are some things money can't buy. For everything else, there's Mastercard."

Mastercard made fruitless attempts, by letter and phone, to persuade Nader to discontinue his commercial. And then Mastercard sued. It sued Nader and his campaign committees for trademark infringement and dilution, for copyright infringement, for unfair competition and misappropriation, and for unfair trade practices. None of the company's claims has been successful, however. Federal District Judge George Daniels has granted Nader's motion for summary judgment "in its entirety."

Judge Daniels dismissed Mastercard's trademark infringement claim, because he found that Nader's commercial did not create a likelihood of confusion.

The judge dismissed Mastercard's trademark dilution claim, because he found that Nader's commercial was political rather than commercial, and thus was protected from liability by a provision of the Federal Trademark Dilution Act that specifically exempts "noncommercial" uses of a mark, and by legislative history showing that Congress did specifically indicated that "political advertising" is not "commercial." Furthermore, Judge Daniels ruled that even if Nader's commercial were "commercial," there was no evidence that it diluted the distinctiveness of Mastercard's trademarks, and thus the company's dilution claim would have been dismissed on that ground, in any event.

The judge dismissed Mastercard's copyright infringement claim as well. He held that Nader's commercial was "sufficiently a parody for the purposes of . . . fair use. . . ." And for that and other reasons, the judge concluded that the commercial was a fair use of Mastercard's copyrighted ads.

Judge Daniels dismissed Mastercard's unfair competition and misappropriation claims, on the grounds they were preempted by federal copyright law.

And finally, he dismissed the company's deceptive trade practices claim, because there was no evidence Nader intended to deceive consumers nor any evidence that any consumers were deceived.

Mastercard was represented by Russell H. Falconer of Baker Botts in New York City. Nader was represented by Anthony L. Fletcher of Fish & Richardson in New York City.

Mastercard International Inc. v. Nader 2000 Primary Committee, Inc., 2004 WL 434404, 2004 U.S.Dist.LEXIS 3644 (S.D.N.Y. 2004)

RECENT CASES

ESPN defeats bid by PlayMakers sports agency for preliminary injunction that would have barred ESPN from using "Playmakers" as title for television series about professional football players

PlayMakers is a sports agency that represents professional athletes in contract negotiations and career counseling. "Playmakers" is the title of an ESPN television series. The series, however, is not about the sports agency; it's about professional football players. The sports agency has been using its "PlayMakers" name much longer than ESPN has been using the "Playmakers" name. Indeed, the sports agency registered its name as a federal service mark so long ago, the mark has already become "incontestable."

Under some circumstances, companies in PlayMakers' position might be pleased to have their names used as TV series titles. If nothing else, it could be significant (and free) promotion. PlayMakers, however, was not pleased. ESPN's series depicts football players using steroids and illegal drugs, womanizing, and being discriminatory. NFL players and coaches have criticized the series, in several published articles. For these reasons, the sports agency is concerned that the series will tarnish any positive association football players otherwise would have with the agency's name.

Not surprisingly, then, PlayMakers sued ESPN for trademark infringement. And, in an effort to protect its good name, the agency sought a preliminary injunction. It has not, however, been successful. Federal District Judge Marsha Pechman has denied the agency's request for a preliminary injunction, because the evidence did not show – "at least on the present record" – a substantial likelihood of reverse confusion.

Judge Pechman did a complete multi-factor likelihood-of-confusion analysis, and she concluded that confusion was not likely, because of: the visual dissimilarity of the marks, the differences in the services provided and marketing channels used, and the relatively weak strength of the mark.

The agency failed to persuade the judge that she also should consider the controversial nature of ESPN's series, and the likelihood that the series would "tarnish" the agency's name. Tarnishment is a factor in trademark *dilution* cases, the judge explained, but not in traditional trademark *infringement* cases like the one the agency had filed. The agency was unable to file a dilution case against ESPN, because dilution claims only may be brought by owners of "famous" marks. Though "PlayMakers" was a registered and incontestable mark, it "cannot be considered 'famous,'" the judge said.

PlayMakers was represented by Kari L. O'Neill and Katherine Hendricks of Hendricks & Lewis in Seattle. ESPN was represented by Jennifer Johnson Millones of White & Case in New York City, and Scott A.W. Johnson of Stokes Lawrence in Seattle.

PlayMakers, LLC v. ESPN, Inc., 297 F.Supp.2d 1277, 2003 U.S.Dist.LEXIS 24734 (W.D.Wash. 2003)

Expert testimony that "gross receipts" includes value of promotional benefits, in addition to cash, created disputed issue requiring trial in suit by author Gary Wolf against Disney over royalties from "Roger Rabbit" character merchandising, California appellate court rules

Author Gary Wolf is the creator of the "Roger Rabbit" characters that Disney made popular with its movie "Who Framed Roger Rabbit?" The movie rights licensing agreement between Wolf and Disney also contained a character merchandising provision that entitles Wolf to a royalty of 5% of Disney's merchandising "gross receipts." In a lawsuit filed in California state court, Wolf alleges that Disney hasn't properly accounted for or fully paid all of the merchandising royalties that he is entitled to receive, while Disney contends that it has.

Disputes over legal issues of significance have taken the case to the California Court of Appeal twice already, even before it has gone to trial.

When the appellate court considered this case the first time, it held that the licensing agreement between Wolf and Disney did not create a fiduciary relationship between them, but that Disney nevertheless has the burden of proving that its accountings were accurate (rather than Wolf having the burden of proving they were inaccurate) (*ELR* 24:10:4).

Next, the appellate court was called upon to decide whether the licensing agreement entitles Wolf to 5% of the value of promotional benefits Disney received from others that were authorized to use "Roger Rabbit" characters, as Wolf contends, or only 5% of the cash that Disney received from others, as Disney contends. This issue arose, because in addition to merchandising deals for which Disney received cash (5% of which Disney has paid to Wolf), Disney also made merchandising deals, with companies like McDonald's and Eckerd Drug, that authorized them to make and distribute "Roger Rabbit" merchandise, from which Disney received promotional benefits (for its "Roger Rabbit" movie and Disneyland) but *not* cash.

Disney did not account for the value of these promotional benefits, because, as it reads their agreement, it is required to pay Wolf only 5% of whatever cash it receives. The agreement provides that Disney's "obligation to pay . . . [royalties to Wolf] shall not accrue unless and until monies . . . shall have been received within the United States of America by, and placed at the unrestricted disposal of, [Disney]. . . ." The trial court agreed with Disney that this provision means that Wolf is entitled to a royalty only on "monies," not on the value of promotional benefits; and the trial court so ruled.

The trial court considered but rejected expert testimony offered by Wolf to show that in the entertainment industry, "gross receipts" means not just cash receipts but also other valuable consideration. This testimony was offered in a declaration by David Held, who for many years was a Business Affairs executive at United Artists, Paramount Pictures, and the Samuel Goldwyn Company. In his declaration, Held stated that unless "gross receipts" is specifically defined to limit its meaning, the term "means the total amount of money or the value of other consideration received by the studio." Held also stated that the clause that provides that Disney is not obligated to pay Wolf royalties "unless and until monies . . . shall have been received" was not part of the definition of "gross receipts." Instead, Held stated that the clause simply means that Disney isn't obligated to pay royalties "on failed or aborted projects."

Held's declaration didn't persuade the trial court. But in an opinion by Justice Earl Johnson, Jr., the Court of Appeal held that "At the very least, [Held's declaration] exposed an ambiguity in the term's meaning [because if] Held's definition is the industry norm, then [Wolf and Disney's] competing definitions were equally plausible."

Justice Johnson explained that Held's declaration was "relevant and admissible to expose the latent ambiguity in the contract language regarding the industry's customary usage of the term. Held's declaration did not violate the parol evidence rule, as Disney suggests. On the contrary, [it] was relevant to prove an interpretation to which the agreements were reasonably susceptible in the entertainment industry context."

Disney argued that it isn't "feasible" to put a value on the benefit of its participation in joint promotions with other companies. Justice Johnson, however, said that this "concern" would be considered in determining the "reasonableness" of Wolf's interpretation of the agreement.

Wolf was represented by J. Larson Jaenicke of Rintala Smoot Jaenicke & Rees in Los Angeles. Disney was represented by Martin D. Katz of Sheppard Mullin Richter & Hampton in Los Angeles.

Wolf v. Superior Court, 8 Cal.Rptr.3d 649, 2004 Cal.App.LEXIS 65 (Cal.App. 2004)

Fox and FremantleMedia win dismissal of idea submission lawsuit filed by producer who claims he developed "American Idol"

Harry T. Keane, Jr., is a sometime producer, though he'd like to do (or least be paid for) more. The show he produced was a 1997 stage musical called "Elvis, Then, Now & Forever." The show he'd like to produce (or be paid for) is "American Idol." Yes, that "American Idol" – the one broadcast by Fox and produced by FremantleMedia.

According to Keane, his relationship with "American Idol" is seminal: he says that the show was his idea, and that he submitted his idea to FremantleMedia, back when it was called Pearson and well before "American Idol" was first produced. Keane said all this in a complaint in federal court in Texas, in which he alleged several causes of action based on the Lanham Act, as well as state law claims for misappropriation of ideas and trade secrets, breach of implied contract, and common law quantum meruit.

Fox and FremantleMedia responded with a motion to dismiss. In an opinion of some length and detail, Judge Lake has ruled that none of Keane's allegations state facts that constitute a legally recognized claim. And thus, the judge has granted the motion "with prejudice."

Judge Lake dismissed Keane's Lanham Act claims, because the use which Keane claims to have made of the phrase "American Idol" was not a use of the kind that creates trademark or related rights. According to Keane, he used "American Idol" in an attempt to sell his idea to potential investors. That type of use "is not analogous to the sale of a trademark good or service to the public at large," the judge concluded, as is required for Lanham Act protection.

The judge also ruled that Keane's misappropriation claims failed, because Keane's own allegations showed that he submitted his idea to several production companies and even advertised it on the Internet. These facts "entirely eviscerate[d] his ability to characterize that concept as a trade secret or as an idea that was conveyed in confidence," the Judge Lake held.

Keane's breach of implied contract claim fared no better. The judge ruled that neither the act of mass-mailing ideas to strangers, nor advertising ideas on the

Internet, "is an act likely to create an implied contract between the idea man and those who read his idea as a result." None of the documents relied on by Keane in support of this claim showed that he had conveyed an idea on the condition that he would be paid for it if it were used. Instead, Keane "simply blurted out" his idea, the judge observed. And cases – in Texas as well as California – have said that "The 'idea man who blurts out his idea without having first made his bargain has no one to blame but himself for the loss of his bargaining power."

Judge Lake rejected Keane's quantum meruit claim as well. This claim was based on Keane's notion that by "generating the 'American Idol' idea and mailing out that idea," he had rendered services for which he ought to be paid. The facts alleged by Keane didn't support this theory however. Keane acknowledged that he gratuitously mailed his idea and posted it on the Internet before putting anyone on notice he expected to be paid for it. The judge explained that quantum meruit claims protect those who "offer to perform work in exchange for payment, and then are not paid," but deserve to be paid "despite the absence of an express agreement regarding the work performed."

Finally, the judge ruled that Keane's state law claims failed for one additional reason too: they are preempted by federal copyright law.

Keane was represented by Sean F. Greenwood of Heard Robins Cloud Lubel & Greenwood in Houston. Fox and FremantleMedia were represented by Marc A. Sheiness of Sheiness Scott Grossman & Cohn in Houston.

Keane v. Fox Television Stations, Inc., 297 F.Supp.2d 921, 2004 U.S.Dist.LEXIS 564 (S.D.Tex. 2004)

Right of publicity and related state law claims filed by recording artist Debra Laws against Sony Music, complaining that Jennifer Lopez's recording and video "All I Have" sampled Laws' recording "Very Special" without Laws' consent, are dismissed because they are preempted by federal copyright law

Jennifer Lopez's recording and video titled "All I Have" contains samples of a recording titled "Very Special" by Debra Laws. Neither Lopez nor Sony Music deny this fact. Indeed, Sony obtained a copyright license to use the sample from Elektra Records, the company that released Laws' recording and owns its copyright. Moreover, the jacket for Lopez's "All I Have" includes a credit reading "Featuring samples from the Debra Laws recording 'Very Special'" – as required by the Elektra-Sony agreement.

Nonetheless, Laws' sued Sony, alleging right of publicity and related state law claims. Indeed, Laws filed the suit in California state court, though Sony removed it to federal court, where it was then dismissed on the merits. District Judge Lourdes Baird ruled that Laws' claims are preempted by federal copyright law, because all of those claims were based on Sony's use of Laws' voice in a recording, whose copyright is owned by Elektra and was licensed to Sony.

Laws also objected to Sony's use of her name. But that was done only in an album credit that was required by the copyright license. What's more, Judge Baird found that the use of Laws' name in the "one, inconspicuous [credit] line does not constitute exploitation of [Laws'] image or identify."

Judge Baird acknowledged that some earlier cases had ruled that publicity rights and copyrights are distinct, and in those cases, publicity claims were not preempted by copyright. In those cases, though, celebrities' names or likenesses had been used in ways that were more than, or different from, the mere use of a copyrighted work. In this case, by contrast, Laws' objection was simply to the use of her copyrighted recording. If she could pursue a right of publicity action for that, the judge reasoned, "then any vocal sound recording would fall outside the parameters of the Copyright Act because of the use of a person's 'voice.'"

Laws was represented by Rickey Ivie and Kendall E. James of Ivie McNeill & Wyatt in Los Angeles. Sony was represented by Russell J. Frackman, David A. Steinberg, Matt J. Railo and Paul Guelpa of Mitchell Silberberg & Knupp in Los Angeles.

Editor's note: The ultimate result in this case is correct; the rationale is less so. Copyrights and publicity rights truly are separate and distinct, and are almost always owned by separate people as well. The result in this case was correct, because Sony's use of a sample from Laws' recording in Lopez's recording, and the accompanying credit to Laws' on the album jacket, simply were not violations of Laws' publicity (or other state law) rights. Laws' claims were not, however, preempted. Suppose, for example, that Laws' recording had been used in a radio or television commercial, without a license from anyone – not Elektra or Laws. If, in response, Elektra sued the advertiser for copyright infringement, and Laws' sued for violation of her right of publicity, would the court have dismissed Laws' publicity claim on the grounds that it was preempted by Elektra's copyright claim? The answer would be – or at least should be – "no." Both claims would have been allowed to proceed to conclusions on their respective merits. Laws' case was different from this hypothetical, because when she originally recorded "Very Special," she assigned her copyrights to Elektra (technically, she assigned them to her brother's company, which assigned them to Elektra). And the assignment to Elektra gave it the right to license others to use the recording – exactly as it did, when it issued a sampling license to Sony.

Laws v. Sony Music Entertainment, Inc., 294 F.Supp.2d 1160, 2003 U.S.Dist.LEXIS 22352 (C.D.Cal. 2003)

Record producer was not joint author of songs written and recorded by former partner Mike City, nor were songs written or recorded as partnership works-for-hire, federal District Court rules

Before Michael C. Flowers – the hip hop artist professionally known as "Mike City" – moved to Los Angeles in 2000, he was partners with a record producer and sound engineer named Eli Brown. According to Brown, the two of them owned a company named Hectic Records in Durham, North Carolina, for which Flowers made some 500 recordings.

In 1999, Flowers allegedly licensed one of these recordings, entitled "I Wish," to recording artist Carl Thomas who used it in a recording of his own on Thomas' platinum album "Emotional." Flowers also sold at least four more songs to Warner-Chappell Music, as their sole songwriter; and one of those was recorded by Sunshine Anderson on her platinum album "Your Woman."

All of this became a matter of public record, because of a lawsuit filed in federal court in North Carolina, in which Brown alleged that Flowers hasn't shared whatever income he received from licensing these two songs. Brown's lawsuit sought a declaration that he is the joint author of the songs in question, or alternatively, that the songs were created as works -for-hire on behalf of their partnership. Under either theory, Brown would be entitled to half of Flowers' income from the two songs – an amount that could have been quite significant, since they appeared on platinum-selling albums.

Flowers' version of the facts hasn't been made a matter of public record yet, and may never be. That's because Flowers won the case, based on Brown's version of the facts, simply by making a Motion to Dismiss for Failure to State a Claim. Federal District Judge Tilley has ruled that Brown was not a joint author, and the songs were not written as works-for-hire.

To support his claim that he is a joint author, Brown alleged merely that he "worked as a recording engineer and producer of the tracks. . . ." But this allegation was insufficient, as a matter of law, to support his claim, Judge Tilley ruled. The judge explained that to be a "joint author" for copyright ownership purposes, it is necessary that both parties intend to be joint authors, and both must make more than de minimus, original contributions. Brown didn't allege either of those factors.

Brown's claim that the songs were created as works-for-hire, whose copyrights belonged to their partnership, didn't succeed either. This could have been a successful claim, if Flowers had written and recorded the songs as an *employee* of the partnership. But Brown simply alleged that Flowers was his equal partner; Brown did not allege that Flowers was an employee. "Partners are not generally regarded as employees of partnerships," Judge Tilley explained. And therefore, Brown did not "sufficiently allege ownership [of the copyrights to the two songs] via the work-for-hire doctrine."

Finally, though Flowers could have assigned his copyrights to the partnership, he didn't. To be effective, assignments must be in writing. Brown, however, alleged that their partnership agreement was oral, so the partnership agreement didn't transfer any copyrights. The two men did have a written agreement to incorporate their partnership some day. But that document did not mention copyright ownership at all, let alone Flowers' agreement to transfer his copyrights.

Brown was represented by Thomas Haywood Stark of Stark Law Group in Chapel Hill. Flowers was represented by Stephen E. Robertson of Robertson & Medlin in Greensboro, and Reginald K. Brown in Los Angeles.

Brown v. Flowers, 297 F.Supp.2d 846, 2003 U.S.Dist.LEXIS 23235 (M.D.N.C. 2003)

National Geographic defeats copyright infringement claims made by freelance photographers and journalists, in cases complaining that their works were included in CD-ROMs and DVDs without their consent

National Geographic magazines have been digitized. More than a hundred years of back issues now can be stored on shelf space that used to hold just a year's worth. The digital versions also can be searched by computer, so readers can instantly find and retrieve information. These wonderful results were not cost free, however.

In addition to the cost of scanning and converting back issues into CD-ROMs and DVDs, there were litigation costs too, because of lawsuits filed against the National Geographic Society by two groups of freelance photographers and journalists. One group sued in Georgia; the other in New York. Both groups contended that National Geographic infringed their copyrights by including their articles and photos in the CD-ROM and DVD versions of the magazine without their consent. Though the legal issues in both cases were virtually identical, the Georgia group won but the New York group lost.

National Geographic acknowledged that as freelance contributors, the journalists and photographers retained ownership of the copyrights to their articles and photos. It also acknowledged that (in most cases), it had not acquired licenses from the freelancers authorizing the digital republication of their work. Instead, in creating the CD-ROM and DVD versions, National Geographic relied on section 201 of the Copyright Act that gives publishers of "collective works" – which National Geographic magazines certainly are – a privilege to republish contributions to those collective works – which articles and photographs certainly are – "as part of . . . any revision of that collective work."

Thus the issue in both the Georgia and New York cases was whether CD-ROMs and DVDs are a "revision" of original editions of the magazine, or whether instead they were new or different versions. In Georgia, the courts held that CD-ROMs and DVDs were not revisions, because they contain multimedia segments and search-and-retrieval software that the original paper versions did not (*ELR* 23:3:9, 23:4:15).

In the New York case, however, District Judge Lewis Kaplan has held that the CD-ROM and DVD versions of National Geographic are "revisions" of the original paper versions, and thus the Copyright Act gave National Geographic exactly the privilege it thought it had, when it first began to digitize the magazine's back issues. (Judge Kaplan dealt with other legal issues in the case in earlier decisions (*ELR* 24:6:12, 24:7:21, 24:9:19).)

New York and Georgia are in different judicial Circuits; but different outcomes in these cases would be more than a simple split in authority – or so the freelancers argued. Since National Geographic itself was a defendant in the Georgia case, they argued that the doctrine of "collateral estoppel" barred National Geographic from rearguing the same legal point it had lost in that already-decided case.

Judge Kaplan, however, concluded otherwise. He noted one subtle difference between the two cases. But more importantly, he observed that *after* the Georgia case was decided, the Supreme Court decided a separate but similar case called *Tasini v. New York Times* (*ELR* 23:3:9). Though the freelancers won that case too, language in the Supreme Court's opinion made it clear that the freelancers won because the *Times* and its co-defendants had not republished their back issues intact, as revised collective works; instead, they electronically republished individual articles from those back issues, separate from the collective works in which they originally had appeared. What's more, the Supreme Court's language all but said the result would have been otherwise, if only the back issues had been electronically republished as collective works.

In the New York case, Judge Kaplan emphasized that each National Geographic CD-ROM and DVD "is a package that contains substantially everything that made the Magazine copyrightable as a collective work – the same original collection of individual contributions, arranged the same way, with each presented in the same context. It is readily recognizable as a variation of the original." As a result, Judge Kaplan concluded that the CD-ROM and DVD versions of National Geographic are a "revision of the individual print issues of the Magazine." The judge added that he "disagrees with so much of the [Georgia decision] as held otherwise."

Two of the journalists and photographers filed a motion asking Judge Kaplan to reconsider his ruling against them. But the judge denied that motion, as well as their motion that he disqualify himself from the case.

The journalists and photographers were represented by Andrew Berger of Tannenbaum Helpern Syracuse & Hirschtritt, by Richard F. Schaden of Schaden Katzman Lampert & McClune, and by Stephen A. Weingrad of Weingrad & Weingrad. National Geographic was represented by Robert G. Sugarman of Weil Gotshal & Manges and by Terrence B. Adamson of the National Geographic Society.

Faulkner v. National Geographic Society, 294 F.Supp.2d 523, 2003 U.S.Dist.LEXIS 22202 (S.D.N.Y. 2003); *Faulkner v. National Geographic Society*, 296 F.Supp.2d 488, 2003 U.S.Dist.LEXIS 23009 (S.D.N.Y. 2003)

Representation of movie distributor by California lawyer in arbitration brought by producer in Chicago did not affect validity of award in favor of distributor; and distribution agreement did not create fiduciary relationship between producer and distributor

A decade ago or so, Colmar, Ltd., produced a movie titled "Captive" which it licensed for distribution to FremantleMedia North America. Colmar wasn't pleased with FremantleMedia's efforts, and accused the distributor of failing to "actively and aggressively" market the movie.

Colmar's accusation was first made in an arbitration proceeding in Chicago, because the distribution agreement between the two companies contained a clause that required them to arbitrate disputes before the American Arbitration Association. When Colmar lost the arbitration, it made the accusation again, in a lawsuit alleging that FremantleMedia had breached its fiduciary obligations to Colmar. Colmar's lawsuit also asked that the arbitration award be vacated, on the grounds that FremantleMedia was represented in the Chicago arbitration by a California lawyer who was not licensed to practice in Illinois.

Colmar wasn't prejudiced by the fact that FremantleMedia was represented by a California lawyer. But Illinois law provides that "judgments that result from legal proceedings brought in a court of record on a party's behalf by a person who is not licensed to practice law in [that] state are void." Arbitration proceedings are not "proceedings brought in a court of record," so that principle did not necessarily void FremantleMedia's arbitration victory. And, in an opinion by Justice Alan Greiman, the Appellate Court of Illinois held that FremantleMedia's representation by a California lawyer in a Chicago arbitration did *not* void the arbitrator's decision.

Justice Greiman noted that American Arbitration Rules permit parties to be represented by non-lawyers. The justice also observed that the dispute between Colmar and FremantleMedia did not involve issues that were unique to Illinois law. Moreover, the American Bar Association has proposed a Model Rule that would permit out-of-state lawyers to represent clients in alternative dispute resolution proceedings.

What's more, in New Jersey and New York, out-of-state lawyers are permitted to represent clients in arbitration proceedings. Justice Greiman acknowledged that the law in California is otherwise. In 1998, the California Supreme Court held that a New York law firm had engaged in the "unauthorized practice of law" in California when it represented a client in a California arbitration (though that decision was rendered in case to collect unpaid legal fees, not to enforce an arbitration award). But Justice Greiman observed that both the *Restatement of the Law Governing Lawyers* and the American Bar Association have criticized the California decision as "too harsh." And Justice Greiman "decline[d] to follow it."

For these reasons, Justice Greiman affirmed an Illinois trial court order that dismissed Colmar's complaint seeking to vacate the arbitrator's decision.

Colmar's complaint also alleged that FremantleMedia's failure to properly market "Captive" violated the distributor's fiduciary duties. Justice Greiman affirmed the trial court's dismissal of that claim too. "It is well-established that parties to a contract do not stand in a fiduciary relationship to one another," the Justice explained. "Thus, because Colmar's claim is based on nothing more than the parties' contractual relationship and [Colmar's] alleged trust in [FremantleMedia], no claim for breach of fiduciary duty has been established. . . ."

Colmar was represented by Charles R. Trieschmann in Evanston. FremantleMedia was represented by Jonathan S. Feld of Katten Muchin Zavis & Rosenman in Chicago.

Colmar, Ltd. v. FremantleMedia North America, 801 N.E.2d 1017, 2003 Ill.App.LEXIS 1410 (Ill.App. 2003)

Stipulation settling dispute about division of royalties between Igor Stravinsky's second wife and first wife's children included copyrights that reverted to composer's estate under British Copyright Act of 1911, and covered only writer's share of royalties (not publisher's), New York appellate court affirms

Composer Igor Stravinsky was married twice. He had four children with his first wife and none with his second. When Stravinsky died in 1971, his Last Will and Testament provided that his entire estate should be put in a trust, the income of which would go to his second wife for her life, and when she died, the assets should be divided among his children (who were to get two shares each) and his longtime friend and companion, Robert Craft (who was to get one share).

After Stravinsky's death, these arrangements resulted in a "bitter" dispute between his children and his second wife. The dispute was apparently triggered by the second wife's claim that in addition to her income interest in the trust, she had an "absolute" community property interest in 40% of Stravinsky's assets, because many of his works were composed while they resided in California, a community property state.

That issue probably would have been of interest to copyright lawyers generally. But it was settled by written Stipulation in 1979, and so never resulted in a published opinion.

However, after the second wife died, a second dispute arose – this one between the children and Robert Craft, to whom the second wife had left all of the royalties she received in the 1979 Stipulation. Actually, the second dispute was between Chester Music, Ltd., a British music publisher to which the children had assigned their interests, and Schott Musik International, a German music publisher, to which Craft had assigned the interests he received from Stravinsky's second wife and the share he had inherited directly from Stravinsky himself.

The second dispute involved nothing more (or less) than the way in which royalties from Stravinsky's compositions were to be divided between the two publishers. The outcome of this dispute does not seem to be of interest to copyright lawyers generally, because it turned on the proper interpretation of the 1979 Stipulation – a privately negotiated document that was agreed to only by Stravinsky's then-squabbling heirs.

Part of the second dispute concerned the question of whether the Stipulation was intended to cover the distribution of royalties earned by Stravinsky's estate, beginning 25 years after his death. This question arose, because the British Copyright Act of 1911 provided that assignments and grants made by an author (other than by will) would not be effective 25 years after the author's death. In an opinion by Justice Eugene Nardelli, the Appellate Division of the New York Supreme Court affirmed a lower court ruling that the 1979 Stipulation was not invalidated by the Act, because the Stipulation was not an assignment made by Stravinsky. This is the result that Schott wanted, because the Stipulation gave the second wife, and thus Schott, more than he would have received if the Act had invalidated the Stipulation.

Another part of the second dispute concerned the question of whether the Stipulation's division of "royalties" referred only to the writer's – that is, Stravinsky's – share of royalties, or whether instead, it referred to all royalties earned by Stravinsky's compositions, including those earned by his publishers. Schott contended that the Stipulation referred to all royalties, including the publisher's, because if the royalties were divided on that basis, the second wife, and thus Craft, and thus Schott itself would be entitled to more money than if the Stipulation divided only the writer's share of royalties. Justice Nardelli again affirmed the lower court order; but this time, the affirmed order favored Chester Music. In other words, Justice Nardelli agreed that the Stipulation referred only to Stravinsky's share of the royalties, not to the publisher's.

Chester Music was represented by Arthur S. Linker of Katten Muchin Zavis Rosenman. Schott Musik was represented by Carol A. Witschel of White & Case. Stravinsky's children were represented by James D. Dasso of Foley & Lardner.

Estate of Stravinsky, 770 NYS2d 40, 2003 N.Y.App.Div.LEXIS 14011 (App.Div. 2003)

Playboy wins right to trial in lawsuit complaining that Internet search engines Netscape and Excite infringed and diluted Playboy's trademarks by including banner ads for other companies on search results pages that list websites of other companies in response to searches for "playboy" and "playmate"

Playboy Enterprises is generally successful in lawsuits designed to protect its copyrights and trademarks. (See, e.g., *ELR* 16:4:10, 19:11:11, 20:2:19, 20:3:16, 20:4:3.) It did lose most of one trademark case to former Playmate of the Year named Terri Welles (*ELR* 24:1:7). And for a while, it looked like Playboy lost a trademark infringement and dilution lawsuit against Netscape and Excite as well.

Netscape and Excite are Internet search engines. They earned Playboy's ire by including banner ads for other, adult-oriented companies on the results pages that list websites in response to searches for the words "playboy" and "playmate," both of which (when spelled with capital P's) are Playboy's registered trademarks.

Early in the case, federal District Judge Alicemarie Stotler disappointed Playboy by denying its motion for a preliminary injunction (*ELR* 21:8:18) – a ruling that was affirmed the Court of Appeals (in an opinion it did not publish). Then, Judge Stotler granted Netscape and Excite's motion for summary judgment, dismissing the case entirely (in an unpublished opinion).

After two such setbacks in a single case, many companies would simply give up. But Playboy did not. It appealed again, this time with success.

In an opinion by Judge T.G. Nelson, the appellate court held that fact issues exist on two key issues in the case: whether Netscape and Excite created a likelihood of "initial interest confusion" or diluted Playboy's trademarks by listing other companies ads on "playboy" and "playmate" search result pages. As a result, the appellate court has reversed the dismissal of the case and has remanded it to Judge Stotler for a trial.

Playboy was represented by Barry G. Felder of Brown Raysman Millstein Felder & Steiner in Los Angeles. Netscape and Excite were represented by Jeffrey K. Riffer of Jeffer Mangels Butler & Marmaro in Los Angeles.

Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020, 2004 U.S.App.LEXIS 442 (9th Cir. 2004)

Former student in actor training program at University of Utah is entitled to trial in suit claiming her Free Speech and Free Exercise rights were violated, because she would not say certain words, for religious reasons, during acting exercise

Christina Axson-Flynn is an aspiring actress and a Mormon. At first blush, her aspirations and her religion seem to have little to do with one another, legally. But it turns out they do. They do, because Axson-Flynn once was a student in the actor training program at the University of Utah, but isn't any more. Midway through her freshman year, she withdrew from the University and enrolled in an acting program at Utah Valley State College – all because she refused to say words like "God," "goddamn," "Christ" and "fucking," even in acting exercises.

Axson-Flynn has sued the University of Utah for violating her Free Speech and Free Exercise rights. She wasn't asked to leave the University of Utah program, but she assumed that it was only a matter of time before she would be. That belief that hasn't been challenged yet, because so far the case has focused on different issues.

At the end of what dramatists would consider to be its first act, the case was dismissed entirely, in response to the University's motion for summary judgment. District Judge Tena Campbell agreed with the University that it had not violated Axson-Flynn's constitutional rights at all, and that in any event the University was entitled to qualified immunity on both claims.

The second act, however, featured a plot twist. In an opinion by Judge David Ebel, the Court of Appeals has reversed.

Judge Ebel acknowledged that the Constitution permits restrictions on student speech in classrooms, and he noted that in this case, the University justified its requirement that students, including Axson-Flynn, perform acting exercises as written as a method for preparing students for careers in professional acting. The University offered specific reasons for requiring students to perform offensive scripts – reasons which would satisfy Constitutional requirements, so long as they were not a pretext for religious discrimination.

Axson-Flynn argued that the University's reasons were a pretext for discrimination against her, on account of her Mormon religion. Judge Ebel concluded that Axson-Flynn had raised a genuine issue of material fact on this point. Axson-Flynn contended that program administrators were hostile to her religion, as shown by their insistence that she speak with other "good Mormon girls" about how she could say offensive words while acting and "still be a good Mormon."

Judge Ebel also acknowledged that neutral rules of general applicability do not violate the Free Exercise clause of the Constitution, even if they incidentally burden religious practices and beliefs. In this case, though, Judge Ebel concluded that Axson-Flynn had raised a genuine issue of fact concerning whether the University's requirement that scripts be acted as written was a neutral rule of general applicability, or whether instead it was applied in a discriminatory way to Axson-Flynn alone.

The evidence showed, for example, that a Jewish student in the program was permitted to skip an improvisational exercise on Yom Kippur, without adverse consequences. This suggested that the University was not enforcing a "neutral rule" against Axson-Flynn, but instead was making individual case-by-case determinations.

These factual issues also put in jeopardy the qualified immunity that the University might otherwise have had, Judge Ebel ruled. As a result, the case has been remanded the District Court for its third act – a trial on the disputed issues of fact that the appellate court ruled were significant

Axson-Flynn was represented by Michael S. Paulsen of the University of Minnesota Law School in Minneapolis. The University of Utah was represented by Peggy E. Stone, Assistant Utah Attorney General, in Salt Lake City.

Axson-Flynn v. Johnson, 356 F.3d 1277, 2004 U.S.App.LEXIS 1619 (10th Cir. 2004)

Appeals court reverses preliminary injunction that barred EchoStar from carrying Daystar and FamilyNet programming in alleged violation of contract clause giving Dominion Video exclusive right to transmit "Christian programming" from EchoStar satellite, because Dominion failed to show irreparable harm

Dominion Video has suffered a setback in its legal battle to be the only provider of Christian television programming available on the EchoStar satellite. Dominion scored an early victory in this battle, when it won a preliminary injunction that barred EchoStar from carrying Daystar or FamilyNet programming on its satellite (*ELR* 25:7:21). Daystar and FamilyNet provide what EchoStar calls "family values" programming. Dominion, however, says Daystar and FamilyNet are "Christian" program providers, like itself, and Dominion doesn't want the competition.

Of course, competition is generally protected by American law – not something the law protects against. But Dominion has a solid basis for its position. Dominion and EchoStar have a contract with one another that contains a "mutual exclusivity" clause. The clause itself gives Dominion the exclusive right to transmit Christian programming, and only Christian programming, on two of the satellite's channels; and it gives EchoStar the exclusive right to transmit other types of programming, but only other types, on the satellite's other channels.

The contract also contains a clause by which Dominion and EchoStar both acknowledge that a breach of the contract by either of them would cause the other "irreparable" harm, for which money damages would not be sufficient, and thus the non-breaching party would have the right to injunctive relief.

In response to Dominion's request for a preliminary injunction, federal District Judge John Kane agreed with Dominion that Daystar and FamilyNet's programming is "Christian." That finding, plus a finding of "irreparable harm," would be sufficient to support a preliminary injunction – thus making irreparable harm an important issue in the case.

Judge Kane ruled that Dominion had not shown facts proving it would suffer irreparable harm; and EchoStar had introduced evidence showing that any harm would not be irreparable. Judge Kane issued the preliminary anyway, for two reasons: because the breach of the contract's exclusivity provision was sufficient to show irreparable harm, as a matter of law; and because the parties' contract recited that a breach would cause irreparable harm.

On appeal, however, Court of Appeals Judge Stephanie Seymour held that Judge Kane had erred in finding irreparable harm on those two grounds. While Judge Seymour acknowledged that "irreparable harm is frequently found upon the breach of an exclusivity provision, that finding does not rest solely on the breach of the agreement and the resulting loss of exclusivity rights. Rather, the irreparable harm findings [in earlier cases] are based on such factors as the difficulty in calculating damages, the loss of a unique product, and existence of intangible harms such as loss of goodwill or competitive market position." Judge Kane himself found that Dominion had proved none of these critical factors. And Judge Seymour and her colleagues on the Court of Appeals were "not willing to go [so] far" as to say that preliminary injunctions are always available whenever an exclusivity clause has been breached.

Dominion didn't do any better before Judge Seymour with the contract clause that stated that breach would result in irreparable harm. Judge Seymour held that "that stipulation without more is insufficient to support an irreparable harm finding."

Yet another provision of the contract provided for arbitration of disputes, and the case has been referred to arbitration. "[S]hould Dominion win in arbitration on the merits," Judge Seymour said, "any damage caused by EchoStar's breach of the exclusivity agreement can be quantified in damages." For this reason, the Court of Appeals reversed the preliminary injunction that had been issued.

Dominion Video was represented by Mark D. Colley of Holland & Knight in Washington, D.C. EchoStar was represented by Ross W. Wooten of T. Wade Welch & Associates in Houston.

Dominion Video Satellite, Inc. v. EchoStar Satellite Corp., 356 F.3d 1256, 2004 U.S.App.LEXIS 1382 (10th Cir. 2004)

San Diego Padres are entitled to pursue malicious prosecution lawsuit against lawyer who filed unsuccessful cases seeking to block construction of San Diego Padres' new ballpark

The San Diego Padres opened the 2004 season in a brand new stadium called Petco Park. The facility has been called "attractive and striking," and it's in a great downtown location. But it wasn't built without a fight.

Much of the park's opposition was led by clients of California lawyer J. Bruce Henderson, who filed at least three separate cases challenging various aspects of the project. Henderson and his clients were not successful (*ELR* 22:12:12). And now, Henderson finds himself the target of a lawsuit brought against him by the Padres themselves.

The Padres have sued Henderson for malicious prosecution. The case alleges that the lawyer filed cases that the Padres won, and did so without probable cause and with malice. Henderson, it appears, is as tenacious on defense as he was on offense. He responded to the Padres' lawsuit with a motion to "strike" it, pursuant to California's anti-SLAPP statute – a law that protects the rights of petition and free speech concerning public issues. The statute does this by allowing trial courts to promptly dismiss lawsuits brought to "chill" these rights, unless those who file such cases show they will probably prevail.

In his motion, Henderson argued that the Padres would not probably prevail against him, for two reasons. First, he argued that he had an absolute privilege to file the cases that prompted the team to sue him. Second, he argued that even though he lost those cases, he had probable cause to file them and did not file them with malice.

The trial court agreed with Henderson about one of the cases he had filed, but not about the other two. As a result, the trial court granted Henderson's motion by striking just one of the Padres' claims, while allowing the team to proceed with the other two. On appeal, Henderson did somewhat better – but not well enough to defeat the Padres' case entirely.

In an opinion by Justice James McIntyre, a California Court of Appeal has held that Henderson did not have an absolute privilege to file cases against the Padres. Although Justice McIntyre agreed with Henderson that the lawyer had probable cause to file two of those cases, the Justice concluded that Henderson did not have probable cause to file the third case. What's more, the Justice also concluded that Henderson filed that third case "with malice."

Justice McIntyre's conclusions with respect to the third case meant that the Padres have shown they probably will prevail with their malicious prosecution claim as to that case. And thus, the appellate court affirmed the trial court's decision denying Henderson's motion to strike that one claim.

Henderson was represented by Roy B. Cannon and Stephen M. Hogan in San Diego. The Padres were represented by Kathryn E. Karcher and Mark C. Zebrowski of Gray Cary Ware & Freidenrich in San Diego.

Padres L.P. v. Henderson, 8 Cal.Rptr.3d 584, 2004 Cal.App.LEXIS 1865 (Cal.App. 2004)

Disney is not "common carrier" of all Disneyland customers, so discount admissions offered to Southern California residents does not violate California statute prohibiting common carriers from giving price preferences, California appellate court affirms

Disneyland offers discounts of to Southern California residents, during certain times of the year. The discount amounts to $8 to $10 per admission ticket, so those who live elsewhere pay what looks to them like a hefty premium. Indeed, the premium seemed hefty enough that some of them filed a class action lawsuit against Disney, alleging that the discount violates a California statute that prohibits "common carriers" from giving a "preference in . . . price . . . to one person over another."

"Common carriers" are transportation companies that offer to "carry" people. Buses, trains and airlines are prime examples. So at first glance, it looks like Disney isn't a common carrier at all, for any purpose. Nevertheless, at least three courts have held that Disney *is* a common carrier with respect to the operation of its theme park rides, in cases where customers were injured while on those rides (*ELR* 25:5:20).

In addition to prohibiting price preferences, California's common carrier statute also requires common carriers to use more care than those who aren't. Thus, classifying Disney a "common carrier" makes it easier for injured patrons to recover than it would be if they had to prove Disney negligently caused their injuries. The California Supreme Court has agreed to hear the most recent of these cases against Disney, so in due course, it may turn out that the company is not a common carrier at all, not even with respect to its theme park rides.

In the meantime, however, Disneyland customers who paid full price for admission to the park relied on these injury cases to argue that the discount offered to Southern California residents is illegal. The argument was not successful in the trial court; it granted Disney's motion for summary judgment. A California Court of Appeal has affirmed that ruling.

In an opinion by Justice Rebecca Wiseman, the appellate court has held that even if Disney is a "common carrier" when it operates rides, it is not when it admits customers to Disneyland. Justice Wiseman noted that there are "dozens of attractions and entertainment activities" within Disneyland that do not involve rides at all, and customers pay the same admission price whether they take the rides or simply do those other things. This is significant, because several earlier cases – involving trains, taxis and department store escalators – held that "the restrictions imposed on common carriers [apply] to carriage-related activities only" and not to "other activities of the carrier even if on the same property."

These cases mean that "A guest who chooses not to go on any of Disneyland's amusement rides may never enter into a carrier-passenger relationship. On the other hand, a patron who rides many rides would enter into many carrier-passenger relationships, each with a distinct beginning and end."

The plaintiffs were represented by Greg K. Hafif of the Law Offices of Herbert Hafif in Claremont. Disney was represented by Matthew M. Walsh of Dewey Ballantine in Los Angeles.

Simon v. Walt Disney World Co., 8 Cal.Rptr.3d 459, 2004 Cal.App.LEXIS 19 (Cal.App. 2004)

Dismissal of Larry Flynt's lawsuit against Secretary of Defense, seeking order that would have allowed Hustler Magazine correspondent to accompany American combat troops in Afghanistan, is affirmed on appeal

The war in Afghanistan isn't over yet, but Larry Flynt's lawsuit against Secretary of Defense Donald Rumsfeld is. Flynt sought a court order that would have allowed a *Hustler Magazine* correspondent to accompany American combat troops in the field in Afghanistan. But Flynt hasn't won even a single judicial battle.

At the outset of the case, federal District Judge Paul Friedman denied Flynt's motion for a preliminary injunction (*ELR* 24:1:9). Then, Judge Friedman dismissed the case entirely, in response to the Defense Department's motion for summary judgment (*ELR* 25:3:19). Now, the Court of Appeals has affirmed the dismissal of the case, on even broader and more sweeping grounds than those relied on by Judge Friedman.

Flynt argued that *Hustler*'s correspondent had a First Amendment right to travel with military units in combat, with accommodations and protections that are now known as "embedding." Judge Friedman did not deny the existence of such a right. Instead, he ruled against Flynt on the grounds that the Defense Department hadn't actually rejected the correspondent's request, and that eventually, the correspondent might reach the top of the list of journalists who were waiting to be embedded with U.S. troops. Indeed, it appears that *Hustler*'s correspondent, David Buchbinder, may have been embedded, because "at least one of [his stories] shows he has accompanied troops on a search for al Qaeda operatives."

On appeal, Flynt did even worse. Writing for the Court of Appeal, Judge David Sentelle ruled that the news media does not have a First Amendment right of access to U.S. troops in combat. In *Richmond Newspapers v. Virginia*, the Supreme Court did rule that reporters have a First Amendment right of access to *criminal trials*. But Judge Sentelle emphasized that the access-to-trials right was "based on a long history of such access in the United States and in England at the time our organic laws were created." By contrast, said Judge Sentelle, "No comparable history exits to support a right of media access to U.S. military units in combat."

Judge Sentelle added that Flynt's lawsuit was properly dismissed, even if the Supreme Court's decision in *Richmond Newspapers* applies to troops in combat. This is so, the judge said, because the Supreme Court recognized that judges may impose reasonable time, place and manner restrictions on access to trials. And Flynt had not shown that the Defense Department regulations concerning embedded reporters were unreasonable.

Flynt was represented by Paul J. Cambria. The Defense Department was represented by Michael S. Raab of the U.S. Department of Justice.

Flynt v. Rumsfeld, 355 F.3d 697, 2004 U.S.App.LEXIS 1561 (D.C.Cir. 2004)

DEPARTMENTS

Entertainment Lawyer News:

Christopher Ruhland rejoins Orrick Herrington & Sutcliffe from Disney. Orrick Herrington & Sutcliffe has announced that Christopher S. Ruhland has rejoined the firm as Of Counsel in its Los Angeles office. A former Orrick associate, Ruhland returns to the firm from The Walt Disney Company where he was Senior Counsel. Ruhland has extensive experience in a broad range of litigation and intellectual property matters involving motion pictures, consumer products, corporate trademarks, and music. While at Disney, he was responsible for worldwide enforcement of the company's intellectual property rights in its films and other audiovisual works. He supervised the company's intellectual property litigation in coordination with other studios, record labels, software companies, and their trade associations. At Orrick, Ruhland will focus his practice on the representation of clients in intellectual property, litigation, and entertainment matters. He received his Bachelor's degree cum laude from the University of California, Irvine, where he was elected to Phi Beta Kappa, and obtained a J.D. in 1994 from the UCLA School of Law where he was managing editor of the UCLA Law Review.

Miriam Beezy joins Foley & Lardner. Miriam Beezy has joined Foley & Lardner in its Los Angeles office as a partner in the firm's Intellectual Property Department and as leader of its national Trademark & Copyright Practice Group. Before joining Foley & Lardner, Beezy was chair of the Intellectual Property and Technology Department at Greenberg Glusker in Los Angeles. There she counseled entertainment, consumer products, technology and internet commerce companies and developed global trademark portfolios for clients in the United States and abroad. She cultivated a prominent entertainment industry client list that included a popular Australian children's musical entertainment group, a leading U.S. newspaper columnist and a producer of well-known television shows. Prior to that position, Beezy was Chief Trademark Counsel at Disney, where she managed Disney's worldwide trademark portfolio, including obtaining, licensing and enforcing Disney's trademark rights around the world. She supervised the wide variety of intellectual property issues relating to Disney's consumer products, motion pictures, television, musicals, video, theme parks, sports teams, restaurants, cruise lines, apparel, toys, collectibles and retail stores. She also handled the intellectual property issues associated with Disney's purchase of the baseball team now known as the Anaheim Angels. Beezy is a graduate of UCLA and received her J.D. degree from Southwestern University School of Law in Los Angeles.

In the Law Reviews:

The Berkeley Technology Law Journal has published Volume 19 as its Annual Review with the following Notes:

Foreword: The Rise of Internet Interest Group Politics by Aaron Burstein, Will Thomas DeVries & Peter S. Menell, 19 Berkeley Technology Law Journal 1 (2004)

In re Aimster & MGL, Inc. v. Grokster, Ltd: Peer-to-Peer and the Sony Doctrine by Elizabeth Miles, 19 Berkeley Technology Law Journal 21 (2004)

Lexmark International, Inc. v. Static Control Components, Inc. & Chamberlain Group, Inc. v. Skylink Technologies, Inc.: The DMCA and Durable Goods Aftermarkets by Daniel C. Higgs, 19 Berkeley Technology Law Journal 59 (2004)

Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act by Michael Jones, 19 Berkeley Technology Law Journal 85 (2004)

Additional Copyright Developments: United States v. Elcom Ltd, Kelly v. Arriba Soft Corp. and State Super-DMCA Laws, 19 Berkeley Technology Law Journal 107 (2004)

Moseley v. V. Secret Catalogue, Inc. by Brian Paul Gearing, 19 Berkeley Technology Law Journal (221 (2004)

Dastar Corp. v. Twentieth Century Fox Film Corp. by Richard Ronald, 19 Berkeley Technology Law Journal (2004)

DVD Copy Control Association v. Benner: Freedom of Speech and Trade Secrets by Alex Eaton-Salners, 19 Berkeley Technology Law Journal 269 (2004)

Cadence v. Avant! The UTSA and California Trade Secret Law by Jeff Danley, 19 Berkeley Technology Law Journal 289 (2004)

RIAA v. Verizon: Applying the Subpoena Provision of the DMCA by Alice Kao, 19 Berkeley Technology Law Journal 405 (2004)

United States v. American Library Ass'n: The Children's Internet Protection Act, Library Filtering, and Institutional Roles by Felix Wu, 19 Berkeley Technology Law Journal 555 (2004)
Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games by Nathan Phillips, 19 Berkeley Technology Law Journal (2004)

Comm/Ent, Hastings Communications and Entertainment Law Journal has published Volume 26, Number 1 with the following articles:

Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of "Universal Service" by Patricia M. Worthy, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel by Jessica Bulman, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling – A Clue Illuminated and Obscured by Susan J. Latham, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Building Rome in a Day: What Should We Expect from the RIAA? by Valerie Alter, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Vanderbilt Journal of Entertainment Law & Practice has published Volume 6, Number 2 with the following articles:

Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate by Clay Calvert and Robert D. Richards, 6 Vanderbilt Journal of Entertainment Law & Practice 147 (2004)

Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings by Matthew S. DelNero, 6 Vanderbilt Journal of Entertainment Law & Practice 181 (2004)

Business, The Arts and The Role of the Copyright Act: An Illustration by Keith C. Hauprich, 6 Vanderbilt Journal of Entertainment Law & Practice 213 (2004)

"Justice Isn't Deaf" – A Behind the Scenes Look at How Bijoux Records Executives Discuss the Potential Liability for Violence "Inspired" by Song Lyrics and How They Will Fare in the Face of the First Amendment by Renee Michelle Moore, 6 Vanderbilt Journal of Entertainment Law & Practice 222 (2004)

Fiduciary Duty: Can It Help Calm the Fears of Underpaid Artists? by Wendy V. Bartholomew, 6 Vanderbilt Journal of Entertainment Law & Practice 246 (2004)

A Wolf in Sheep's Clothing: Wolf v. Ashcroft and the Constitutionality of Using the MPAA Ratings to Censor Films in Prison by Colin Miller, 6 Vanderbilt Journal of Entertainment Law & Practice 265 (2004)

The E-rated Industry: Fair Use Sheep or Infringing Goat? by Christina Mitakis, 6 Vanderbilt Journal of Entertainment Law & Practice 291 (2004)

The New Software Jurisprudence and the Faltering First Amendment by Liam Seamus O'Melinn, 6 Vanderbilt Journal of Entertainment Law & Practice 310 (2004)

Is There Judicial Recourse to Attack Spammers? by Ashley L. Rogers, 6 Vanderbilt Journal of Entertainment Law & Practice 338 (2004)

The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance Against Participation in Fantasy Sports Leagues that Involve the Exchange of Money by Neville Firdaus Dastoor, 6 Vanderbilt Journal of Entertainment Law & Practice 355 (2006)

Loyola of Los Angeles Entertainment Law Review has published Volume 24, Number 2 with the following articles:

Let's Swap Copyright for Code: The Computer Software Disclosure Dichotomy by Christina M. Reger, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Missing the Right of Publicity Boat: How Tyne v. Time Warner Entertainment Co. Threatens to "Sink" the First Amendment by Jordan Tabach-Bank, 24 Loyola of Los Angeles Entertainment Law Review (2004)

4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule by Robert D. Koch, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws by Kathleen Howe, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Fordham's Intellectual Property, Media & Entertainment Law Journal has published Volume 14, Issue two and Issue three as a symposium on sports with the following articles:

The Impact of Pro-Football, Inc. v. Harjoon on Trademark Protection of Other Marks by Rachel Clark Hughey, 14 Fordham Intellelctual Property, Media & Entertainment Law Journal 327 (2004)

Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier? by Lateef Mtima, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 369 (2004)

Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law by Orit Fischman Afori, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 497 (2004)

Operation Blackbeard: Is Government Prioritization Enough to Deter Intellectual Property Criminals? by Lauren E. Abolsky, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 567 (2004)

Doing Their Jobs: An Argument for Greater Media Access to Settlement Agreements by Suzanna M. Meyers, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 603 (2004)

Symposium Panel I: *The Future of Sports Television* by Ronald A. Cass, Mark Abbott, Irwin Kishner, Brad Ruskin, and Alan Vickery, 14 Fordham Intellectual Property, Media & Entertainment Law Journal (2004)

Symposium Panel II: *Thirty Years after Title IX* by Linda Wharton, Lawrence Joseph, Donna Lopiano, Alison Marshall, and Mike Meyer, 14 Fordham Intellectual Property, Media & Entertainment Law Journal (2004)

Symposium Panel III: *Ethics and Sports: Agent Regulation* by Patrick Connors, John Genzale, Richard Hilliard, Brian Mackler, and Rachel Newman-Baker, 14 Fordham Intellectual Property, Media & Entertainment Law Journal (2004)

Title IX from the Red Rose Crew to Grutter: The Law and Literature of Sports by Joseph Z. Fleming, 14 Fordham Intellectual Property, Media & Entertainment Law Journal (2004)

The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Professional Athletes by Michael F. Taxin, 14 Fordham Intellectual Property, Media & Entertainment Law Journal (2004)

The Fallacy That Fair Use and Information Should Be Provided for Free: An Analysis of the Responses to the DMCA's Section 1201 by Mauricio España, 31 Fordham Urban Law Journal 135 (2003)

Villanova Sports & Entertainment Law Journal has published Volume 11 with the following articles:

As Seen on TV: The Normative Influence of Syndi-Court on Contemporary Litigiousness by Kimberlianne Podlas, 11 Villanova Sports & Entertainment Law Journal 1 (2004)

Corinthians Soccer Loses by Decision in Second Round Play-Off Over Corinthians.com in Sallen v. Corinthians Licenciamentos LTDA by Clark D. Robertson, 11 Villanova Sports & Entertainment Law Journal 49 (2004)

Increasing the Inherent Risks of Baseball: Liability for Injuries Associated with High-Performance Non-Wood Bats in Sanchez v. Hillerich & Bradsby Co. by Amanda W. Winfree, 11 Villanova Sports & Entertainment Law Journal 77 (2004)

An Unimproved Lie: Gender Discrimination Continues in Augusta National Golf Club by Charles P. Charpentier, 11 Villanova Sports & Entertainment Law Journal 111 (2004)

The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers by Krystina Lopez de Quintana, 11 Villanova Sports & Entertainment Law Journal 139 (2004)

Infringing the Fantasy: Future Obstacles Arise for the United States Patent Office and Software Manufacturers Utililzing Artificial Intelligence by Eric J. Schaal, 11 Villanova Sports & Entertainment Law Journal 173 (2004)

The Columbia Journal of Law & the Arts has published Volume 27, Number 3 with the following articles:

Stolen Art and Sovereign Immunity: The Case of Altmann v. Austria by Michael D. Murray, 27 The Columbia Journal of Law & the Arts 301 (2004)

Waltzing with the Muse or Dancing with the Devil: Enhancement Deals Between Nonprofit Theaters and Commerical Producers by Carolyn Casselman, 27 The Columbia Journal of Law & the Arts 323 (2004)

The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time by Alexandra Minkovich, 27 The Columbia Journal of Law & the Arts 349 (2004)

Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights by Rajan Desai, 10 University of Baltimore Intellectual Property Law Journal 1 (2001)

Beyond Napster: Online Music Distribution and the Future of Copyright by Damon Lussier, 10 University of Baltimore Intellectual Property Law Journal 25 (2001)

Bouchat v. Baltimore Ravens, Inc. et al: Strikingly Similar: The Fourth Circuit Court of Appeals Retains the Essential Element of Access by Michael Fecik, 10 University of Baltimore Intellectual Property Law Journal 49 (2001)

Amazon.com, Inc. v. barnesandnoble.com Inc: The Custody Battle Over "1-Click" Shopping: Web Customers Win Control by Elizabeth Jackson, 10 University of Baltimore Intellectual Property Law Journal 55 (2001)

Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has published Volume 15, Number 4 with the following articles:

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Reading Too Much into Nothing: The Metaphor of Place and the Internet by David Hricik, 55 Mercer Law Review 859 (2004)

The Internet: Place, Property, or Thing – All or None of the Above? by Robin Adams Anderson, Jennifer Stisa Granick, Richard E. Moberly, Paul F. Wellborn II, and Henry Timothy Willis with Adam Milani as Moderator, 55 Mercer Law Review 867 (2004)

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Educational Programs Calendar:

Understanding Basic Copyright Law 2004, July 19, PLI California Center, San Francisco and July 26, PLI New York Center, New York City plus Live Webcast July 19 at www.pli.edu. This Practising Law Institute program, coupled with Understanding Basic Trademark Law 2004 described below, provides an Overview of Basic Principles of Copyright Law and Copyright Office Practice; Enforcing Copyrights; Notable New Cases in Copyright Litigation; Ethics; and Web and Streaming. For additional information, call (800) 260-4PLI or register online at www.pli.edu.

Understanding Basic Trademark Law 2004, July 20, PLI California Center, San Francisco and July 27, PLI New York Center, New York City plus Live Webcast July 20 at www.pli.edu. This Practising Law Institute program may be combined with Understanding Basic Copyright Law 2004 described above. It will feature an Overview of Basic Principles of Trademark Law and Unfair Competition; Trademarks in Practice: Searching, Clearance, Application Process and Strategies in U.S. and Abroad; Creating a Trademark Protection Program in the U.S. and Abroad: Cost-Benefit Analysis; New Developments from the U.S. Patent and Trademark Office; Trademark Infringement Primer and Litigation Alternatives-Trademark Office and UDRP Proceedings. For additional information, call (800) 260-4PLI or register online at www.pli.edu.

Digial Media Technology: Rights and Transactions, September 9-10, Crowne Plaza Beverly Hills Hotel, Los Angeles. Presented by Law Seminars International, the program highlights Opportunities and Challenges in Digital Media: Who Needs to Care about Digital Media and Why?: I'm a (fill in the blank: software/hardware/business/e-commerce/entertainment etc.) Lawyer or Executive; Digital Media Technology for the Technically Challenged; Where the Technology is Heading; Digital Media Business Models; The New Music Marketplace; The FCC's Jurisdiction Over Digital Media; Content Protection and DRM; Policing and Protecting Valuable Content in Digital Media; Licensing in a Digital World; Perspectives from Licensors and Licensees; Digital Media and Rights of Publicity; Politics and Third Party Principles of Digital Rights Transactions; Online Transactions for Content with End Users; Five Things Not to Do When Protecting Your Digital Media Through Litigation; Napster, Aimster, Grokster: The Future of Digital Copyright Law and Litigation; and Ethical Issues in Digital Media, Conflicts of Interest. For additional information, call (800) 854-8009 or (206) 567-4490 or e-mail registrar@lawseminars.com.

Consolidation, Courage, and Creativity: Facing Today's Business Challenges, Saturday, September 18, 2004, University of Southern California. USC Law School and the Beverly Hills Bar Association's 2004 Institute on Entertainment Law and Business will examine Changing and Evolving Forms of Distribution-Studio/Network; Changing and Evolving Forms of Distribution-Talent; Courage: Ethics in the Face of Consolidation and Integration; Guilds; Integration of the Medium and the Message: Advertising in the 21st Century; Negotiating the Record Deal in a Consolidated Environment: Choices and Compromises in the New World; Negotiating Today's Contracts-Film; Negotiating TV Writer/Producer Deals: Protecting the Client in a Vertically Integrated World; Overview of Public Policy. For additional information, contact IELB Registration/Continuing Legal Education, The Law School-University of Southern California, Los Angeles, CA 90089-0071 or FAX 213-740-9442.