WASHINGTON MONITOR

FCC rejects indecency complaints about ABC broadcast of "Saving Private Ryan," ABC broadcast of "Monday Night Football" intro featuring player and co-star of "Desperate Housewives," NBC broadcast of "Will and Grace," Fox broadcast of "Arrested Development," and WB broadcast of "Angel"

The Federal Communications Commission remains busy with "indecency" complaints. Over just a few weeks in February and March, it decided no fewer than five more cases – ruling in each instance that the complained-of broadcasts were not "indecent." These cases involved complaints about the award-winning film "Saving Private Ryan," and such network television staples as "Monday Night Football," "Will and Grace," "Arrested Development" and "Angel."

Saving Private Ryan

The dialogue in "Saving Private Ryan" includes expletives like "fuck," "shit," "bastard" and "Hell," as well words and phrases like "Jesus" and "God damn." The film was about World War II, and soldiers simply talk like that. Nevertheless, when the Golden Globe and Academy Award-winning film was broadcast on television in 2001 and 2002, viewers lodged indecency complaints with the FCC; and the FCC duly ruled that those broadcasts did *not* violate federal law prohibiting indecent broadcasts. The FCC's ruling in that case was consistent with its earlier decisions in other matters, and was a surprise to no one.

Then, in response to complaints involving other broadcasts, the FCC departed from precedent – admittedly so – when it overruled its own Enforcement Bureau Chief (*ELR* 25:6:10) by declaring that NBC's broadcast of the 2003 Golden Globe ceremonies was "indecent," simply because Bono expressed his joy at winning the award for Best Original Song by saying "This is really, really, fucking brilliant. Really, really great." (*ELR* 25:11:6) After that, the FCC departed from precedent – without admitting it – when it decided to fine CBS $550,000 as a result of the exposure of Janet Jackson's bare breast for a fleeting 19/32 of a second during the 2004 Super Bowl half-time show. (*ELR* 26:4:10)

As a direct result of these rulings, 66 of ABC's 225 affiliates decided not to carry the network's rebroadcast of "Saving Private Ryan" on Veterans Day 2004. Those 66 stations – almost 30% of ABC's affiliates – feared, not unreasonably, that the FCC's "Golden Globe/Bono" decision may have overruled its earlier "Saving Private Ryan" decision, and that its "Super Bowl/Janet Jackson" decision meant that airing "Saving Private Ryan" in 2004 could be a very expensive proposition.

Despite these fears, ABC and its remaining affiliates proceeded with their broadcast of the film, following an introduction by Senator John McCain who warned viewers about the film's "R-rated language and graphic content" and told them the film was "not appropriate for children." Despite these warnings, and despite viewer advisories aired after each of the broadcast's ten commercial breaks, and despite the FCC's ruling following earlier broadcasts of the film, members of the American Family Association and others complained to the FCC anyway about ABC's 2004 broadcast.

As if to confirm the fears of the 66 ABC affiliates that did not carry the broadcast, the FCC agreed with those who complained that the film's use of the word "fuck" meant that the broadcast fell within the "first prong" of the FCC's definition of "indecency" – namely, that the film "describe[s] . . . sexual . . . activities"!

Still, to be "indecent," the film would have to be "patently offensive" as well. In deciding whether material is patently offensive, the FCC considers three factors: whether it is explicit or graphic; dwells on or repeats descriptions of sex; and panders or is used to titillate. Again as if to confirm the fears of the 66 ABC affiliates, the FCC "assume[d]" that that "Saving Private Ryan" is "graphic and explicit" and repeatedly described sex, thereby satisfying the first two factors. The thing that saved "Saving Private Ryan" from being indecent was the FCC's conclusion that the complained of material did not pander and was not used to titillate.

The FCC explained that "in light of the overall context of the film, including the fact that it is designed to show the horrors of war, its presentation to honor American veterans on the national holiday specifically designated for that purpose, the introduction, which articulated the importance of presenting the film in its unedited form, and the clear and repeated warnings provided by ABC, not only in the introduction but also at each commercial break, we find that the complained-of material is not patently offensive . . . and, therefore, not indecent."

Monday Night Football

In a case that tested the difference between female breasts and backs, complaints were lodged with the FCC about the introduction to an ABC "Monday Night Football" broadcast. The offending segment featured wide receiver Terrell Owens, appearing as the Philadelphia Eagle that he is, and actress Nicollette Sheridan, appearing as her character in the ABC series "Desperate Housewives."

In the segment, Owens was in uniform for the game, though alone in the Eagles locker room. Sheridan, wearing only a towel, was trying to seduce Owens. He rebuffed her advances, because the game was about to start and his team needed him. Sheridan countered by dropping her towel. Viewers saw her from the back, waist up; they could not see her body below her waist. Owens responded "Aw, hell, the team's going to have to win without me," and Sheridan then leaped into his arms. The segment concluded with a shot of two other characters from "Desperate Housewives" who had watched the locker room encounter on their television, one of whom then commented to the other about how "desperate" Sheridan appeared. She then changed the channel to ABC and repeated the traditional "Monday Night Football" introduction, "Are you ready for some football?!"

The segment was very funny, and any indecency – or even nudity – connected to it was solely in the mind of the viewer. Nevertheless, an undisclosed number of viewers did complain, without success. The FCC determined that although the segment was "sexually suggestive," it was not graphic or explicit, because Owens remained fully dressed at all times, no sex organs were shown or described, no sexual activities were explicitly shown or described, and the shot of Sheridan dropping her towel and jumping into Owens' arms was brief.

Will and Grace

A "Will and Grace" broadcast by NBC in November 2003 attracted the ire of the Parents Television Council which complained to the FCC that the episode "contains a lot of references to drug use and some graphic sexual content." Though the FCC acknowledged that the episode "arguably describes sexual . . . activities," the FCC ruled that the episode was not "patently offensive" and thus not "indecent."

The segment wasn't patently offensive, the FCC explained, because the objected-to dialogue was not sufficiently graphic or explicit, nor did the three objected-to scenes show nudity or sexual activities.

Arrested Development

An "Arrested Development" broadcast by Fox Television in November 2003 also drew the ire of the Parents Television Council. According to the PTC's complaint to the FCC, the episode contained "multiple scripted bleeps" and "sexual innuendo dealing with homosexuality" apparently arising out of references to "making corn-holes" and "corn-holing" – which the PTC's complaint helpfully explained was "slang for anal sex" – in dialogue about using a device for making popcorn balls. Again, the FCC acknowledged that the episode "arguably describes sexual activities." But again the FCC ruled that the episode was not "patently offensive" and thus not "indecent."

The FCC explained that the episode wasn't patently offensive, because the complained-of dialogue was not sufficiently graphic or explicit, and its sexual innuendo was "ambiguous."

Angel

Finally, a third complaint was filed by the Parents Television Council concerning an episode of "Angel" broadcast by the WB Network, also in November 2003 (proving, if nothing else, that the PTC watched and was distressed by a lot of television that month).

The offending scenes apparently suggested sexual activities between the program's characters Angel and Spike. The FCC agreed that the episode "depicts sexual activities," but it determined that the complained-of scenes were not "patently offensive." They weren't, because they were not sufficiently graphic or explicit, were brief, and did not contain any nudity.

Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan", FCC 05-23 (Feb. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-23A1.pdf; *Complaints Against Various Television Licensees Regarding the ABC Television Network's November 15, 2004, Broadcast of "Monday Night Football"*, FCC 05-53 (Mar. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-53A1.pdf; *In the Matter of NBC Telemundo Licensing Co.*, FCC 05-38 (Feb. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-38A1.pdf; *In the Matter of Fox Television Stations, Inc.*, FCC 05-36 (Feb. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-36A1.pdf; *In the Matter of WBDC Broadcasting, Inc.*, FCC 05-37 (Feb. 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-37A1.pdf

INTERNATIONAL DEVELOPMENTS

Playboy TV fined £25,000 by UK Office of Communications for transmitting graphic sex film at midnight on encrypted satellite service

May of 2004 began badly for Playboy TV. Just eight minutes into that month, its UK subsidiary transmitted a film that "showed extremely graphic images of real sexual activity including close-ups of genital penetration." The transmission was encrypted, was available only to subscribers of its UK satellite service, and took place after midnight. Nevertheless, the transmission violated the Programme Code of the UK Office of Communications – known as "Ofcom" – which absolutely prohibits the transmission of films rated "R18" at any time.

To its credit, Playboy admitted that the film was an "R18" version and that the company's "breaches were serious." It explained that the transmission was the result of a "human error" that occurred while the channel was running two systems simultaneously – an old analog tape system and a new digital playout system – and that its new system includes a digital compliance system that will "avoid . . . any recurrence of such a breach."

Ofcom was impressed by Playboy's admissions and its installation of a digital compliance system. But Ofcom fined Playboy £25,000 anyway, in part because Playboy's transmission of the graphic sex film on Saturday, May 1st, was not the only breach of the Programme Code committed by Playboy that weekend! On Friday night, before 10 p.m., Playboy broadcast encrypted material of a kind that the Programme Code allows only after 10 p.m. And on Sunday, at 10:21 p.m., Playboy broadcast, on a "free to air" unencrypted basis, material that was more explicit than is acceptable under the Code.

Under the circumstances, Playboy wasn't penalized as badly as it might have been. Though the £25,000 fine is the equivalent of almost $50,000, Ofcom was authorized by the UK Communications Act to impose a fine of as much as £250,000 (almost $500,000) or 5% of Playboy UK's revenue for the "relevant period," if Ofcom had chosen to do so.

Consideration of Playboy TV UK/Benelux Limited, Ofcom Content Sanctions Committee (2005), available at www.ofcom.org.uk/bulletins/ocsc_adjud/adj-playboytv.pdf

Vancouver radio station violated Canadian Broadcasting Act by airing segment of American-produced program "Loveline" that referred to Holocaust during humorous interview with phone sex actress

Vancouver radio station CHMJ failed to satisfy policy objectives of the Canadian Broadcasting Act when it aired a segment of the American-produced program "Loveline," the Canadian Radio-television and Telecommunications Commission has ruled.

"Loveline" takes calls from listeners seeking advice about sex, relationships and drugs. In December 2002, the radio program featured a listener who worked as a phone sex actress who called for advice on how she could keep her customers on the phone longer, so she could earn more money. "My problem is my callers are coming way too fast," she explained. So in an effort to be helpful and funny at the same time, program co-host Adam Carolla suggested she use words like "cancer," "grandparents" and "Holocaust." Then, warming to his task, Carolla assumed the role of one of his caller's customers, and in a "mock aroused voice," he said, "Yeah, yeah, burn those Jews. Gas 'em in the shower, baby. Yeah, yeah."

An offended listener complained to the Commission that the segment had violated the Canadian Broadcasting Act because it ridiculed the Holocaust and was racist, and that it violated the Commission's 1986 Radio Regulations because it was abusive.

In accordance with its usual practice, the Commission referred the complaint to the Canadian Broadcast Standards Council (because CHMJ is a CBSC member); and the Council agreed with the offended listener, in part. The Council ruled that broadcast did violate the Canadian Association of Broadcasters' Code of Ethics because it failed to make a "full, fair and proper presentation of news, opinion, comment and editorial." However, the Council decided that the complained-of broadcast did not violate the Code's human rights provision, because it did not contain "a scintilla of racist commentary." (*ELR* 25:5:6)

Not satisfied with this result, the offended listener asked the Commission to review the Council's decision. The Commission did, and has agreed with the Council completely, though the Commission based its decision on Canadian law rather than the CAB Code.

The Commission ruled that the "Loveline" segment amounted to "a clear lack of respect for human dignity and is thus inconsistent with the set of values and objectives embodied in section 3 of the [Canadian Broadcasting] Act," which states that broadcasters "should" air programming of a "high standard."

On the other hand, the Commission concluded that the segment did not violate the provision of its Radio Regulations which prohibits "abusive comment that . . . is likely to expose an individual or a group . . . to hatred or contempt" on the basis of race, national origin, religion or the like. The Commission agreed that the offending statements were "offensive and could be interpreted as calling for violence towards Jews." But it did not believe that those statements were "likely to expose Jewish people to hatred or contempt. . . ."

The offended listener also "took exception" to the fact that the complaint had been referred first to the Canadian Broadcast Standards Council, and asked that the Commission to "review" its policy of doing so. The Commission, however, declined to change that policy, saying that it "strongly supports the self-regulatory process and . . . has found the CBSC's complaints resolution process to be a valuable and productive forum for maintaining an on-going dialogue between broadcasters and their audiences."

The Commission did not impose any penalty on CHMJ, beyond the Council's original order that the station announce its decision on-air.

Complaint regarding the broadcast of an episode of Loveline on CHMJ, Vancouver, Broadcasting Decision CRTC 2005-101 (2005), available at www.crtc.gc.ca/archive/ENG/Decisions/2005/db2005-101.pdf

Trials necessary in two separate idea submission cases against producer of "Who Wants to be a Millionaire?", British Chancery Court rules, though third case is dismissed without trial

In the beginning, "Who Wants to be a Millionaire?" was a song, written – apparently without dispute – by Cole Porter for the 1956 movie "High Society." More recently, "Who Wants to be a Millionaire?" is a television series that has enjoyed enormous success on both sides of the Atlantic. Unfortunately, the series' success has brought its pedigree into dispute.

The program was first produced by Celador Productions for broadcast on the UK network ITV; and Celador credits David Briggs and three its own employees – Michael Whitehill, Steven Knight and Paul Smith – as "Millionaire's" creators. However, in three separate lawsuits filed against Celador in the Chancery Division of the UK High Court of Justice, three other men – Timothy Leavey Boone, John William Baccini and Alan Melville – all claim to have created the program. And each claims that the program's format infringes his copyright and misuses his confidential information.

Celador responded to all three lawsuits with motions for summary judgment. Though the cases are unrelated to one another, Celador's motions were consolidated before Vice-Chancellor Sir Andrew Morritt, who has granted one of Celador's motions – but only one. The Vice-Chancellor has dismissed the case filed by Boone, but he has held that Melville and Baccini have "real prospects of success" – the British standard for deciding summary judgment applications – and thus he has denied Celador's applications as to them.

The Vice-Chancellor held that Boone did not have "real prospects for success," because his agent submitted a format for a program titled "Help!" to ITV *after* Celador had written three, pre-pilot versions of "Millionaire." Thus, elements of the program that appeared in the first three Celador versions were irrelevant to Boone's case, even if they did appear in his format. Seven elements were added to the program after those versions were written. Even Boone didn't claim that two of those elements could have been copied from his format. He did, though, claim a third element – the title – was copied, because both – "Who Wants to Be a Millionaire?" and "Help!" – are song titles. The Vice-Chancellor concluded that "this contention is manifestly absurd," because Boone has a copyright in what he wrote in this format, "not in any idea" (like using a song title as the program's title) it may contain. The Vice-Chancellor was little more impressed with the remaining four elements which Boone said were copied from his format: dressing the host in dark clothes; having the host and contestants sit on high chairs; elements of the set design; and putting a box of money on stage and having the host give the contestants checks, as they answered questions correctly. The Vice-Chancellor concluded that these similarities did not give Boone any real prospect of satisfying a court that they were taken from his format or that they constituted a substantial part of it. They were "no more than elements of style or technique," the Vice-Chancellor explained, and were not the basis for a judgment for copyright infringement or misuse of confidential information.

Melville's format contained 23 "relevant features," 22 of which were present in the program's first broadcast. These included the top prize of £1 million, progressively more difficult multiple-choice questions, Help-lines, the title "Who Wants to be a Millionaire?," the process for selecting initial contestants and whittling them down to one in the show's first stage, and set design and lighting. Celador said it never received a format from Melville containing all these features, and Celador disputed Melville's contention that such a format even existed before the program's first broadcast. But the Vice-Chancellor said that Melville is entitled to a trial to prove, if he can, that he did create the format before the broadcast. And if he does, "it would not be impossible to infer that its contents came to the notice of Celador."

There also are several similarities between Baccini's alleged submission and the program: "(a) both . . . have a real maximum prize of £1m, (b) both have an initial pool of 10 contestants selected on the basis of answering questions in a telephone call to a premium number, (c) both employ the concept of the fastest contestant in the first stage proceeding to the next . . . , (d) both take the form of a quiz show with multiple choice general knowledge questions, (e) in both correct answers give rise to a doubling up of prizes, [and] (f) in both there are safe havens in that the prize money won to that stage is protected from loss in the next stage." In the Vice-Chancellor's view, "the extent of the[se] similarities . . . are capable of giving rise to an inference of copying a substantial part. Similarly they are capable of being corroborative of Mr Baccini's assertion that he sent the documents to . . . ITV" before Celador created the program.

Celador Productions was represented by Richard Arnold QC and Brian Nicholson, instructed by Goodwin Derrick. Melville was represented by Richard Spearman QC and Andrew Norris, instructed by Orchard. Boone and Baccini represented themselves.

Cedar Productions Ltd. v. Melville, [2004] EWHC 2362 (CH), available at http://www.courtservice.gov.uk/judgmentsfiles/j2855/celador-v-melville.htm

RECENT CASES

Appeals court affirms summary judgment in favor of David Chase, creator of "The Sopranos," in idea submission case brought by New Jersey attorney, because alleged contract was too vague to be enforced, ideas were not novel, and quasi-contract claim was barred by statute of limitations

Robert V. Baer is an attorney who used to be a prosecutor in Elizabeth, New Jersey. Baer arranged meetings between Robert Chase and New Jersey detectives and with a fellow who told Chase personal stories about loan sharking. After Chase returned to Los Angeles, he sent Baer a copy of a draft of a "Sopranos" screenplay. Baer made various contributions to the script over a period of two years, but Chase did not pay Baer for his services. Chase's failure to pay Baer was significant, because in the lawsuit Baer later filed, Baer alleged that he had an agreement with Chase that "if the show becomes a success Baer would be remunerated in a manner commensurate to the true value of his services."

Chase responded to Baer's lawsuit with a motion for summary judgment, in which Chase stipulated to the terms of the agreement alleged by Baer. Applying New Jersey law, federal District Judge Joel Pisano ruled that the oral agreement was too vague to be enforced as an express contract. On appeal, Baer conceded that the agreement was too vague to be enforced as an express contract, but nevertheless argued that the agreement could be enforced as an implied-in-fact contract. The Court of Appeals disagreed.

Court of Appeals Judge Morton Greenberg ruled that the distinction between an express contract and an implied contract rests on the alternative methods by which parties demonstrate the terms of the agreement. Judge Greenberg ruled that even if the agreement were analyzed as an implied contract, it still could not be enforced because the contract was not definite about price or duration.

Baer argued that in an "idea submission" case, an implied contract does not need to be definite about price or duration. Judge Greenberg disagreed, holding that under New Jersey law, a contract involving an idea submission must be definite with respect to all essential terms to be enforceable. Judge Greenberg also affirmed the dismissal of Baer's quasi-contract claim for unjust enrichment, because it was barred by the New Jersey six year statute of limitations.

In response to Baer's misappropriation claim, the District Court held, and Judge Greenberg agreed, that ideas that exist in the public domain are not novel and cannot be the basis for a misappropriation claim. Judge Greenberg ruled that whether an idea is novel is a question of law for the court which may be decided on summary judgment. Judge Greenberg ruled that the locations Baer introduced to Chase – like the city of Elizabeth, the Pulaski Skyway, and Centanni's Meat Market – exist in the public domain. The stories and potential plots provided by Baer exist in the public record. Moreover, the stories and ideas that Baer claims were misappropriated were not his stories; associates of Baer actually told them to Chase.

For these reasons Judge Greenberg affirmed the grant of summary judgment in favor of Chase.

Chase was represented by Peter L. Skolnick and Michael A. Norwick of Lowenstein Sandler in Roseland, New Jersey. Baer represented himself with co-counsel Harley D. Breite in Wayne, New Jersey, and Michael S. Kasanoff in Red Bank, New Jersey. *(MAR)*

Baer v. Chase, 392 F.3d 609, 2004 U.S.App.LEXIS 26539 (3rd Cir. 2004)

BBC must defend idea submission lawsuit in federal court in New York City, even though New York resident producer pitched idea at meeting in London, and even though program was broadcast only in UK, appeals court decides

Television producer Pat Gross will get her day in court, after all. Better still – from her point of view – the court in which her case will be heard is located in New York City, where Gross lives and works. This is remarkable, or at least noteworthy, because Gross has sued the British Broadcasting Corporation – a network that is headquartered in London.

What's more, Gross has sued the BBC as a result of its production and broadcast, *in the UK only*, of the three-part documentary series "Beastly Business," following her pitch to the network of her idea for such a series at a meeting that took place in London.

Gross sued the BBC in New York City, because that is where she lives, and because she was concerned about being able to retain British counsel, if she filed suit in

London. Certain aspects of British law also influenced her decision to sue in New York rather than London. For example, under British law, the losing party must pay the winning party's legal fees – a prospect that caused Gross, a woman of "modest means," some understandable anxiety.

So far, the merits of her unjust enrichment and misappropriation of ideas claims haven't been evaluated. They haven't, because the BBC was as loathe to litigate in New York as Gross was to litigate in London. The BBC has "a presence in New York, and is unquestionably subject to personal jurisdiction" there. The BBC nevertheless objected to Gross' decision to sue in New York, and voiced its objection with a motion to dismiss on the ground of "forum non conveniens" – in other words, on the ground that New York wasn't a convenient forum.

The BBC was successful with its motion, at first. A federal District Court dismissed Gross' lawsuit on "forum non conveniens" grounds. But that ruling was reversed on appeal.

In an opinion by Judge Richard Cardamone, the Court of Appeals ruled that Gross is entitled to proceed in federal court in New York, because – in everyday language – that court is convenient enough. More specifically, Judge Cardamone noted that under the doctrine of "forum non conveniens," Gross' choice of forum was "presumptively entitled to substantial deference." In this case, the judge thought it was "significant" that Gross "sued in her *home* forum, and that forum is one in which the BBC is amenable to process."

Judge Cardamone acknowledged that London was "an adequate alternative forum" and that other relevant factors were "neutral." The judge even agreed with the BBC that London was entitled to "some preference," because British rather than American law will be used to decide the merits of the case. On the other hand, Judge Cardamone concluded that this factor did not "significantly" tip in favor of London.

So, the judge concluded that on balance, the presumption in favor of Gross' choice of New York as a forum was not overcome. He therefore vacated the dismissal of the case and remanded it to the District Court in New York City "for further proceedings."

Gross was represented by Eamonn Dornan of Smith Dornan & Shea in New York City. The BBC was represented by Laura R. Handman of Davis Wright Tremaine in New York City.

Gross v. British Broadcasting Corp., 386 F.3d 224, 2004 U.S.App.LEXIS 20986 (2nd Cir. 2004)

California Court of Appeal affirms that personal manager of Platter's Paul Robi is barred from recovering commissions due under personal management contract, because manager procured engagements for Robi without a talent agency license

As trustee in bankruptcy, Timothy J. Yoo brought an action to recover commissions due to Paul Wolf under a personal management contract Wolf had with the Platter's Paul Robi. The action was filed against Martha Robi, Paul Robi's widow and successor interest. The California Labor Code prohibits procuring performance engagements without a talent agency license, and Wolf didn't have one. So the issue in the case was whether Wolf had attempted or promised to procure performance engagements for Paul Robi.

Robi took the case to the California Labor Commissioner (as she had a right to do under California law); and the Commissioner determined that the contract between Wolf and Robi was unlawful because Wolf was not licensed as a talent agent. Wolf appealed to Los Angeles County Superior Court which found substantial evidence – and thus concluded – that Wolf procured or attempted to procure engagements for Robi without a talent agency license.

Wolf appealed again, to the California Court of Appeal, where he argued that sending out promotional packages and negotiating performance contracts do not constitute procuring or attempting to procure engagements. The California Court of Appeal disagreed, however. Justice Earle Johnson noted that there is a distinction between a personal manager and an agent. A personal manager promotes artists to the public and is the spokesperson for the client on a contract. An agent, however, promotes the artist to buyers in the entertainment industry and negotiates client contracts.

Justice Johnson concluded that substantial evidence supported the finding that Wolf acted as a talent agent without a license. For this reason, Judge Johnson affirmed the trial court judgment for Robi, barring Wolf from recovering any commission.

Robi was represented by Allen Hyman. Wolf was represented by Terran T. Steinhart. *(MAR)*

Yoo v. Robi, Cal.Ct.App., 2nd App. Dist., Div. 7, No. B165843 (Feb. 14, 2005), available at www. courtinfo.ca.gov/opinions/documents/B165843.PDF

First Amendment defeats invasion of privacy claim of man truthfully portrayed in television series "The Prosecutor" as having pled guilty to being an accessory to murder, 13 years before broadcast, California Supreme Court affirms

Time doesn't in fact heal all wounds. That's one way to view the significance of a California Supreme Court decision in an invasion of privacy case filed against Discovery Communications.

The Court itself described its ruling more narrowly. In an opinion by Justice Kathryn Werdegar, it held that the First Amendment protects the disclosure of truthful information contained in public official records of judicial proceedings, even if the disclosure is of "an historical nature" or involves "'reenactments,' rather than firsthand coverage, of the events reported." In so ruling, the California Supreme Court expressly overruled one of its own opinions – in the 1971 case of *Wolston v. Reader's Digest* – which had held that "actionable invasion of privacy may occur through the reckless, offensive, injurious publication of true, but not newsworthy, information concerning the criminal past of a rehabilitated convict."

The case that led to Justice Werdegar's ruling was filed by Steve Gates who was portrayed in a Discovery broadcast of an episode of the television series "The Prosecutor." The episode revealed that Gates had pled guilty to being an accessory to a murder. Though true, Gates had pled guilty 13 years before the broadcast. *Wolston v. Reader's Digest* seemed to support the validity of Gates' invasion of privacy claim against Discovery; and that is what the trial court held, when it denied Discovery's motion to dismiss the claim.

On appeal, however, the California Court of Appeal reversed. It held that after *Wolston* was decided in 1971, decisions of the United States Supreme Court had effectively overruled *Wolston*. Thus the Court of Appeal ordered the trial court to dismiss Gates' case (*ELR* 25:1:11). In so ruling, the Court of Appeal relied on such U.S. Supreme Court opinions as *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), which held that no valid claim could be brought for invasion of privacy where the defendant obtained the name of a victim from judicial records that were open to public inspection.

Gates, however, saw a difference between his case and the *Cox Broadcasting* case; and he asked the California Supreme Court to formally distinguish *Cox* and the other U.S. Supreme Court decisions on which Discovery and the Court of Appeal had relied. Gates argued that *Cox* and the others "all . . . involve[d] situations in which the events reported on occurred within a few days, weeks or months of the offending publications, not years after the fact as in *Brisco* . . ." and his own case.

If the California Supreme Court had made this distinction, it would have breathed new life into Gates' lawsuit. But the California Supreme Court declined to do so. Instead, Justice Werdegar decided that the First Amendment provides just as much protection to historians as it does to those reporting current events, and that the First Amendment protection enjoyed by Discovery was not diminished by the fact that it involved "'reenactments' rather than firsthand coverage."

For these reasons, the California Supreme Court affirmed the Court of Appeal's order that Gates' case be dismissed.

Gates was represented by Niles R. Sharif in La Mesa. Discovery Communications was represented by Louis P. Petrich and Robert S. Gutierrez of Leopold Petrich & Smith in Los Angeles.

Gates v. Discovery Communications, Inc., 21 Cal.Rptr.3d 663, 101 P.3d 552, 2004 Cal.LEXIS 11656 (Cal. 2004)

Age discrimination lawsuit filed by television writers over 40 against networks, production companies and talent agencies is revived by California Court of Appeal

A class-action age-discrimination lawsuit filed by members of the Writers Guild of America against television networks, production companies and talent agencies has finally been "green-lighted," four years after it was first filed. A California Court of Appeal has held that the writers – all of whom are older than 40 years of age – have adequately alleged that the networks and production companies violate the California Fair Employment and Housing Act and the California Unruh Act by discriminating in favor of youth, and against age and experience, in hiring writers for TV series and other projects. The Court of Appeal also held that talent agencies violate those two California statutes by "aiding and abetting" the networks' and production companies' violations by refusing to represent older writers who seek television writing opportunities.

The Court of Appeal's decision, authored by Justice Paul Boland, is the first judicial opinion to see things the writers' way. Originally, their lawsuit was filed in federal District Court, where it alleged claims under federal as well as California law. That case was dismissed, largely for procedural reasons. (*ELR* 24:12:8). Though much of that case was dismissed without prejudice, and with leave to amend, the writers decided to voluntarily dismiss it entirely, rather than amend their federal complaint. Instead, they re-filed their case in California state court, alleging claims under California state law only, where it was dismissed again (*ELR* 24:12:8).

Justice Boland's decision for the Court of Appeal reversed that dismissal, and sent the case back to the trial court where it resumes, after four years, at the procedural point that most cases reach in one month. The case was originally dismissed in response to "demurrers" (i.e., motions to dismiss for failure to state valid claims) filed by the networks, production companies and agencies. As a result, no facts have been proved yet. For the most part, Justice Boland's decision rejects legal arguments – some of them merely procedural – by the networks, production companies and agencies. Thus, although the writers scored some helpful points before Justice Boland, their case is far from won.

Among the most significant of Justice Boland's rulings were these:

The writers properly alleged "classwide claims" that the networks and production companies have engaged in a "pattern and practice" of discriminating against older writers, in violation of the California Fair Employment and Housing Act, even though the writers did not allege the details of any single writer's claim.

The writers sufficiently alleged that talent agencies aided and abetted the networks' and production companies' violations of the Fair Employment and Housing Act, because the agencies allegedly knew that the networks and companies discriminated on the basis of age and gave them "substantial assistance or encouragement" by screening out older writers in favor of younger ones when making referrals.

The writers' allegations that talent agencies refused to represent older writers stated a claim under the California Unruh Civil Rights Act, even though that Act does not apply to employment discrimination, because agencies provide "services" to writers and the Act prohibits businesses from discriminating in providing services.

The writers adequately alleged a claim against the networks, production companies and talent agencies under California's unfair competition law, even though they did not allege "potential competitive harm or likely consumer deception."

The networks, production companies and agencies didn't come away from the appeal completely empty-handed. Justice Boland agreed with them (and with the trial court) that a 2003 amendment to the Fair Employment and Housing Act, banning age discrimination by employment agencies, does *not* apply retroactively. And Justice Boland agreed with them (and the trial court) that the writers cannot recover classwide back pay under California's unfair competition law.

The writers were represented by Paul C. Sprenger of Sprenger & Lang in Minneapolis and by Dolly M. Gee of Schwartz Steinsapir Dohrmann & Sommers in Los Angeles. Universal Television was represented by Vilma S. Martinez of Munger Tolles & Olson in Los Angeles, while other production companies, networks and talent agencies were represented by other firms.

Alch v. Superior Court, 19 Cal.Rptr.3d 29, 2004 Cal.App.LEXIS 1531 (Cal.App. 2004), petition for hearing by the California Supreme Court denied (Dec. 22, 2004)

Illinois appeals court reinstates breach of contract suit against Michael Jordan by a former mistress who alleges Jordan promised to pay her $5 million in exchange for her silence and refraining from filing a paternity suit

Back to the court for Michael Jordan; however it isn't a basketball court. In spring of 1989 Karla Knafel performed in an Indianapolis hotel band. Jordan immediately requested an introduction. Knafel declined his invitation and continued to deny Jordan's subsequent invites. In September of 1989 Jordan married his current wife, Juanita Jordan. Two months later Knafel accepted Jordan's invitation and the two had unprotected sex. Once again the two engaged in sexual relations in November 1990. A few months later Knafel learned she was pregnant but refrained from contacting Jordan about the pregnancy until spring 1991. Knafel claims at that point Jordan requested an abortion but she declined.

Knafel alleges that Jordan offered "to pay her '$5 million when he retired from professional basketball in return for her agreement not to file a paternity suit against him in a court of law and for her agreement to keep their romantic involvement publicly confidential.'" Knafel accepted Jordan's offer. Once the child was born in July 1991, "Jordan paid certain hospital bills and medical costs and paid Knafel $250,000 for 'her mental pain and anguish arising from her relationship with him.'" In September 1998, after Jordan's second retirement, Knafel personally reminded Jordan of his obligation to make good on the rest of their agreement. Knafel alleges that Jordan "reaffirmed his agreement to pay her the $5 million."

In 2000 when Knafel's counsel contacted Jordan to resolve the dispute, Jordan denied the validity of his previous promise. Jordan filed suit for a declaratory judgment claiming the alleged agreement was unenforceable because it violated public policy, was induced by fraud, and involved a mistake of fact concerning the paternity of Knafel's child. Knafel counterclaimed for breach of contract. The trial court dismissed both the declaratory relief request and Knafel's counterclaim.

Illinois Appellate Court Justice Mary Jane Theis has reinstated both Jordan's and Knafel's suit. Justice Theis rejected Jordan's attempt to persuade the appeals court to rule that as a matter of "public policy in Illinois . . . all contracts involving the payment of money in exchange for silence are inherently extortionate." The Justice recognized that Knafel contracted away a "good-faith claim of right" – that is, the right to file a paternity suit against Jordan. Further, Jordan did not submit an affidavit or any proof that he wasn't the father of Knafel's child, so the contract was not based on a mistake of fact. Moreover, Justice Theis found sufficient facts in the record to establish an "actual controversy." Therefore the trial court's dismissal of Jordan's declaratory relief was reversed along with the trial court's dismissal of Knafel's breach of contract claim.

Knafel was represented by Michael T. Hannafan and Blake T. Hannafan of Michael T. Hannafan & Associates in Chicago. Jordan was represented by Frederick J. Sperling, Sondra A. Hemeryck and Paul E. Greenwalt III of Schiff Hardin in Chicago. *(ANC)*

Knafel v. Jordan, 2005 Ill.App.LEXIS 73, 2005 WL 265265 (Ill.App. 2005)

Pennsylvania appellate court affirms preliminary injunction barring basketball marketing company "AND 1" from interfering with contractual relations of its former endorser, NBA player Darko Milicic

NBA player Darko Milicic is free again to contract his endorsement to the highest bidder, as a result of a preliminary injunction he's won against the basketball marketing company "AND 1."

Serbian-born Milicic was the second overall pick in the 2003 NBA draft. Before he was drafted, Milicic signed an endorsement agreement with AND 1, a basketball sneaker and apparel company, to endorse its products. When Milicic signed the agreement he was just 16 years old and had no legal representation.

After it became public knowledge that Milicic would be a high NBA draft pick, his endorsement value rose. Once Milicic became 18 years old, he unsuccessfully attempted to renegotiate the agreement. Milicic then voided the agreement, as he was permitted to do because minors can void even an otherwise valid agreement once they reach the age of majority.

Unfortunately for Milicic, AND 1 refused to accept that the agreement had been invalidated, and the company sent letters to competitors indicating that Milicic was "involved in a contractual dispute [and their] agreement is valid and enforceable and will remain in force for several more years." Based on this letter, Adidas ceased negotiations on a "nearly finalized agreement."

Judge Seamus P. McCaffery of the Pennsylvania Superior Court (an appellate court) affirmed a preliminary injunction granted by the Court of Common Pleas. The injunction prevents AND 1 from sending out further letters, or in any way hindering Milicic's contractual relations with other basketball marketing companies.

On appeal, AND 1 contended that Milicic didn't meet the four essential requirements for a preliminary injunction. Judge McCaffery disagreed, however. He ruled that Pennsylvania law allows minors to disavow contracts once they reach majority age. Further, the judge noted that it would be against public policy to protect a corporation that drafted an agreement for a foreign minor to sign. Finally, Judge McCaffery recognized that AND 1's actions rose to the level of intentional interference with prospective contractual relations by "sending letters indicating that a valid contract *did* exist to entities already negotiating with [Milicic], with the express purpose of halting such negotiations . . . ."

AND 1 was represented by E. Graham Robb, Jr., in Philadelphia. Milicic was represented by G. Craig Lord in Philadelphia. *(ANC)*

Milicic v. Basketball Marketing Co., 857 A.2d 689, 2004 Pa.Super LEXIS 2787 (Pa.Super.Ct. 2004)

Nevada's "Son of Sam" law is unconstitutional, state supreme court decides

David Berkowitz is the infamous New York serial killer otherwise known as the "Son of Sam." In 1977, the state of New York enacted the first "Son of Sam" law so Berkowitz would have to pay his victims if he ever published memoirs of the killings. That New York law was later struck down as unconstitutional by the United States Supreme Court (ELR 13:8:3), but other states, including Nevada, enacted their own laws nonetheless.

Nevada's "Son of Sam" law allowed a felony victim to recover all profits a felon may have received from published materials about the offense. Basically, the law (similar to New York's previous law) didn't allow criminals to profit from their memoirs about the felony.

You Got Nothing Coming, Notes From a Prison Fish is a book by Jimmy Lerner. Lerner was convicted of killing Mark Slavin. He wrote his book while in prison, and it describes prison life as well as the killing of Slavin. Donna Seres is the slain Slavin's sister. Relying on Nevada's "Son of Sam" law, Seres sued Lerner for all profits – to be put in a trust for her mother – from Lerner's published book. Seres, however, was not successful. A Nevada trial court granted Lerner's motion to dismiss Seres' claim.

Under the First Amendment, legislatively created content-based restrictions on speech must satisfy strict scrutiny. To do so, they must address a compelling state interest and must be narrowly tailored to achieve that interest. The Nevada trial court decided that Nevada's

"Son of Sam" law was unconstitutional because it was not narrowly tailored. The law would allow victims to recover profits from a book that was not entirely based on the crime. That is, "the statute would allow recovery of proceeds from a book that is two-thirds about prison experience or religious conversion and one-third about the felony resulting in imprisonment."

Seres appealed, but didn't do any better. In an opinion by Justice William Maupin, the Supreme Court of Nevada agreed that the law violated the First Amendment and was indeed unconstitutional. Justice Maupin ruled that Nevada's "Son of Sam" law was content based, because it applies to income received from speech concerning crime and it "places a direct financial burden only on speech with a specified and particular content. . . the felony itself."

This meant the law had to satisfy strict scrutiny review. Justice Maupin agreed that Nevada did have a compelling state interest in "the compensation of crime victims and in the prevention of direct profiteering from criminal misconduct." But he held that it was not narrowly tailored, because the law allowed victims to recover profits from works only partially or tangentially related to the crime. Thus, it penalized all speech in published works related or unrelated to a crime.

Justice Maupin also reasoned that a victim can't recover even a portion of the money received from published works, because it would be "unworkable" to calculate the proper amount without leaving open the possibility of over-inclusiveness. Further, the law is too broad because it only refers to – and does not exactly define – a person who "committed" a felony. Therefore, Nevada's law also does not pass strict scrutiny analysis because it is not restricted to people convicted of an offense.

Seres was represented by Hardy & Associates in Reno. Lerner was represented by Freeman & Routsis in Reno. *(SG)*

Seres v. Lerner, 102 P.3d 91, 2004 Nev.LEXIS 12733 (Nev. 2004)

Fictitious satirical article in "Dallas Observer" – prompted by detention of juvenile who wrote and read Halloween story in class – did not defame judge or district attorney, Texas Supreme Court rules

After a Texas seventh-grader was arrested at school and held for five days in a juvenile detention hall for writing a Halloween story which officials believed contained "terrorist threats," *Dallas Observer* staff writer Rose Farley sprang into action. She wrote a fictitious tale about a six-year-old "jailed for writing a book report about 'cannibalism,' fanaticism, and disorderly conduct' in Maurice Sendak's classic children's book, 'Where the Wild Things Are.'" Problem was, the article, entitled "Stop the Madness," named the actual Juvenile Court Judge and District Attorney who oversaw the real case. Perturbed at the perceived slight, Judge Darlene Whitten and D.A. Bruce Isaacks sued the Observer and Farley.

Both the trial and appeals courts denied motions for summary judgment filed by the Observer and Farley. But the Texas Supreme Court reversed and ordered that "Isaacks and Whitten take nothing."

In a lengthy and detailed decision looking into the history of satire and alluding to such varied contributions as Jonathan Swift's "A Modest Proposal" and "Hustler" magazine's landmark joke on Jerry Falwell, Texas Supreme Court Judge Wallace Jefferson agreed with the Observer and Farley that the average reader would understand "Stop the Madness" as satire or parody – and not "actual statements of facts about the plaintiffs."

Referring to the U.S. Supreme Court's decision in *Hustler Magazine v. Falwell* (ELR 9:10:3) and other well-known decisions, the judge said "in such cases, the test is whether the publication could be reasonably understood as describing actual facts." This inquiry was to be filtered through the eyes of the reasonable reader.

Judge Jefferson looked at evidence presented in this case – including what he called the "unorthodox headline" of Farley's article; the fact that it was accompanied by a "photo of a smiling child holding a stuffed animal" along with a humorous caption; the fact that the little girl in the article was placed in ankle shackles; and that it referred to a "freedom opposing religious group that bears a ridiculous acronym": GOOF – and concluded: "[the] obvious clues in the article itself, the *Observer's* general and intentionally irreverent tone, its semi-regular publication of satire, as well as the satire's timing and commentary on a then-existing controversy, lead us to conclude that 'Stop the Madness' could not reasonably be understood as stating actual facts about Isaacks and Whitten."

As to actual malice, Judge Jefferson concluded that the proper inquiry was "did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?" The judge looked at affidavits submitted by Farley and other members of the Observer's staff, which tended to show they took steps to keep the article from being taken seriously. Said Judge Jefferson: "[the] affidavits do not merely deny actual malice, they provide detailed explanation of the affiants' state of mind and descriptions of steps taken to ensure that the article was understood to be fiction." While Whitten and Isaacks relied on evidence that their opponents meant to ridicule them, the judge said that "evidence of intent to ridicule is not evidence of actual malice." He added: "[indeed] the very purpose of satire is ridicule, but this does not make it a sort of second-class speech under the First Amendment."

The judge also noted that the editor-in-chief of the "Observer," Julie Lyons, apparently never considered labeling the article as satire. But Judge Jefferson said that the Observer's "prompt labeling and clarification in the next [edition of the paper], as well as its explanatory responses to readers, evidence a lack of actual malice." And while the appeals court had relied on Lyons' confession that even an intelligent reader might mistake the article for real, Judge Jefferson noted: "Her hindsight acknowledgement that some people could have been fooled is not evidence that the reasonable reader could have understand the satire to state actual facts, nor is it evidence of actual malice at the time of publication."

The Observer and Farley were represented by Steven P. Suskin in Phoenix and R. James George Jr. of George & Donaldson in Austin. Whitten and Isaacks were represented by James Scott Reib in Denton. *(AMF)*

New Times, Inc. v. Isaacks, 146 S.W.3d 144, 2004 Tex.LEXIS 787 (Tex. 2004)

Federal Court of Appeals affirms summary judgment in favor of Motion Picture Association of America in tort case filed against it by the operator of InternetMovies.com website that was shut down pursuant to MPAA request under the Digital Millennium Copyright Act

Michael J. Rossi operates "InternetMovies.com" – a website that offers information about movies, and perhaps more. When the MPAA saw that Rossi's website claimed to offer "Full Length Downloadable Movies," and that the site contained graphics of MPAA members' copyrighted motion pictures, the MPAA followed the "notice and take down provisions" of the DMCA. In response, Rossi's ISP shut down his site.

Although Rossi found a new ISP, he claimed that he lost money while his site was offline. Rossi made these claims in a lawsuit against the MPAA alleging tortuous interference with prospective economic advantage and contractual relations, libel and defamation, and intentional infliction of emotional distress.

A federal district court granted the MPAA's motion for summary judgment on all Rossi's claims (*ELR* 25:2:9). District Judge Barry Kurren dismissed Rossi's contractual and economic advantage interference claims, because the MPAA had a good faith belief that Rossi's site contained infringing material, and because the MPAA had complied with the take down provisions of the DMCA. The judge rejected Rossi's defamation and emotional distress claims because the statements made by the MPAA to Rossi's ISP were privileged, justified and reasonable.

Rossi appealed, but the Court of Appeals affirmed the dismissal of his case.

Court of Appeals Judge Johnnie Rawlinson held that Rossi did not raise a material issue of fact regarding the MPAA's good faith belief that he infringed its members' copyrights.

On appeal, Rossi argued that in order to have a good faith belief that infringement has occurred, copyright owners must conduct a reasonable investigation. Rossi argued that if the MPAA had conducted a reasonable investigation, it would have concluded that Rossi's site was not a source for downloading movies. The MPAA argued that the "good faith" belief standard is a subjective standard, not the objective standard proposed by Rossi.

Judge Rawlinson agreed with the MPAA because "good faith" traditionally encompasses a subjective standard, and if Congress had wanted to, it "could have easily incorporated an objective standard of reasonableness." The judge also said that the statement "Full Length Downloadable Movies" compels the conclusion that Rossi's site was infringing MPAA members' copyrights. The judge also agreed that the MPAA's communications with Rossi's ISP were privileged and reasonable.

For these reasons Judge Rawlinson affirmed the district court's summary judgment in favor of the MPAA.

The MPAA was represented by Russell J. Frackman and Elena Segal of Mitchell Silberberg & Knupp in Los Angeles and Paul Maki in Honolulu. Rossi was represented by James H. Fosbinder in Kahului. *(MAR)*

Rossi v. Motion Picture Association of America, 391 F.3d 1000, 2004 U.S.App.LEXIS 24743 (9th Cir. 2004)

Former Major League Baseball player Cecil Fielder must go to trial again in right of publicity lawsuit against interior decorator who used Fielder's name in several publications without his permission; but appellate court affirms that decorator was not entitled to summary judgment on any of Fielder's claims

When Cecil Fielder's wife, Stacey Fielder, employed Robert Weinstein of Weinstein Design Group to provide interior decorating services for her home, little did she know that Weinstein would be secretly employing her husband's services as well. From November of 1996 to some time in 1998, Weinstein provided interior decorating services for Fielder's home. During this period Weinstein used Cecil Fielder's name in four publications without his permission. This drew

Fielder's ire, and subsequently Fielder brought a right of publicity lawsuit against Weinstein.

The four publications forming the basis of Fielder's suit were a trade magazine, a company newsletter, a magazine article, and business brochures featuring the magazine article. Before trial, an interesting twist happened. Weinstein admitted to using Fielder's name in four publications without his permission. But Weinstein argued that at most, he could be held liable for using Fielder's name only in the trade magazine and newsletter. This was so, Weinstein contended, because the magazine article and business brochures do not violate Fielder's right of publicity since they don't fall within the prohibitory "advertising" language of the Florida right of publicity statute.

Hoping to escape liability, Weinstein moved for summary judgment as to the other two claims. Judge Catherine Brunson denied his motions, deeming the publicity issues solely for jury consideration. After the jury decided in Fielder's favor, Weinstein appealed. In an opinion by Florida District Court of Appeal Judge Mark Polen, the appellate court remanded the case for a new trial because the jury had been improperly selected. (Prospective jurors who admitted they were predisposed towards Fielder were not excluded.) Nonetheless, Judge Polen discussed the publicity issues "because the issues were likely to recur upon a new trial."

In round two, Weinstein's luck didn't change. Judge Polen affirmed the trial court's denial of his motions. As for the magazine article, Judge Polen reasoned that the case was not one where "no proper view of the evidence could sustain a verdict in favor of Fielder" because the evidence supported both sides. Evidence supporting Weinstein included the magazine editor's testimony stating that the magazine article was an editorial, and not an advertisement. Evidence in Fielder's favor included testimony by Weinstein's publicist stating that it was her "intention to get Weinstein profiled in as many articles as possible, to generate business for Weinstein."

Weinstein fared even worse on the business brochures issue. Judge Polen rejected Weinstein's argument that "undistributed" brochures can provide no legal basis for liability. Judge Polen reasoned that allowing the jury to consider the brochures in determining damages was necessary because "it is undisputed that Weinstein did print the brochures for advertising purposes," in clear violation of the publicity statute. Thus, whether the brochures were distributed or undistributed was irrelevant.

Fielder was represented by Daniel S. Rosenbaum of Becker & Poliakoff in West Palm Beach. Weinstein Design was represented by Gaunt Pratt Radford & Methe in West Palm Beach and Elizabeth K. Russo of Russo Appellate Firm in Miami. *(KH)*

Weinstein Design Group, Inc. v. Cecil Fielder, 884 So.2d 990, 2004 Fla.App.LEXIS 14306 (Fla. App. 2004)

Federal Court of Appeals upholds summary judgment in favor of United States Olympic Committee against former employee claiming constructive discharge based on race

Doctor Wade Exum resigned from his job as Director of Drug Control Administration at the United States Olympic Committee in June of 2000 with a letter that said he was doing so "under duress and protest." He cited as one reason what he called the organization's "hostile attitude towards racial minorities." Subsequently, Exum filed suit against the USOC, claiming under federal law that he was constructively discharged and denied various promotions and appointments because he is African-American. He also brought state law claims of breach of contract, wrongful termination in violation of public policy, and tortious interference with prospective financial advantage.

A federal District Court granted summary judgment in favor of the USOC on all of Exum's federal claims and declined to exercise supplemental jurisdiction over the state law ones, dismissing those without prejudice. Exum appealed, but the Court of Appeals sided with the USOC too – and affirmed.

Court of Appeals Judge David Ebel noted that Exum refused the USOC's offer to conduct an investigation in lieu of a resignation; and that, before he quit, Exum had refused to comply with his supervisor's order to turn over certain medical records to the United States Anti-Doping Agency (USADA). "Plaintiff's attempt to re-cast his voluntary decision to quit as a constructive discharge by the USOC thus falls well short of the mark. Because [Exum] has failed to show an adverse employment action, it follows that he has failed to establish a prima facie case as to [this claim]."

Exum also argued that he was promised that a new position would be created at the USOC and that he would be given the job. This argument didn't persuade the judge either. "[Exum] has not shown that he was treated less favorably than others with respect to not receiving the Chief Medical Officer position – the USOC did not hire or consider anyone for that job." Therefore, Judge Ebel concluded, Exum failed to establish a prima facie case for this claim too.

Exum also claimed that discrimination was the reason he was overlooked for the position of Senior Managing Director of Sports Resources, which went to a white person instead. The judge disagreed, because Exum hadn't "pointed to any evidence showing he was qualified for the position." Further, Judge Ebel rejected Exum's assertion that the only criteria for the position seemed to be the "perceptions of the individuals who had been discriminating against [him]." The USOC had presented a nondiscriminatory justification for its hiring choice – essentially that the person it hired was qualified for the job. Noting that the criteria weren't whether a fact finder could disagree with the employer's assessments, but that the employer "believed these reasons and acted in good faith upon those beliefs," Judge Ebel said: "[although Exum] obviously has his own opinion about his leadership and managerial skills, he has not demonstrated a genuine factual dispute about the genuineness of the USOC's assessment of his abilities."

Exum also believed that the USOC discriminated against him based on race when it did not submit "his name to the USADA for consideration for that organization's CEO position," which also went to a white person. The judged noted there was no evidence that the USOC submitted any names to the USADA concerning this position. "[Exum's] failure to show that he was treated any differently than any other USOC employee seeking the [position] is fatal to his claim that the USOC's failure to submit his name to the USADA was a product of intentional racial discrimination."

Exum was represented by John W. McKendree in Denver. The USOC was represented by William A. Wright of Sherman & Howard in Denver. *(AMF)*

Exum v. United States Olympic Committee, 389 F.3d 1130, 2004 U.S.App.LEXIS 23976 (10th Cir. 2004)

Jury awards JamSports $90 million in case alleging Clear Channel interfered with JamSports' contract to produce motorcycle Supercross series, after District Court denied Clear Channel's pre-trial motion for summary judgment

A federal court jury has returned a $90 million verdict in favor of JamSports in its lawsuit against Clear Channel Communications for interfering with JamSports' contract to produce AMA Pro Racing's motorcycle Supercross series. Though the jury ruled against JamSports by rejecting JamSports' *antitrust* claims against Clear Channel, the jury ruled in JamSports' favor on its *interference with contract* claim. The verdict compensates JamSports for $17 million in profits that JamSports lost as a result of Clear Channel's interference with JamSports' contract with AMA Pro, and it awards JamSports an additional $73 million in punitive damages.

Clear Channel had hoped to avoid having a jury decided the case, and it filed a pre-trial motion for summary judgment in an unsuccessful effort to do so.

After a letter of intent between promoter JamSports and AMA Pro ran its course, ending without a contract between the two, AMA Pro signed with Clear Channel Communications as the promoter of its Supercross motorcycle events. This revved up JamSports, which sued AMA Pro for breach of contract and Clear Channel for tortious interference with contract, as well as violations of federal antitrust law.

In a staggeringly detailed opinion in response to cross-motions for summary judgment, federal District Judge Matthew Kennelly recalled the particulars leading up to the suit, which included: the letter of intent between AMA Pro and JamSports containing an exclusivity clause; subsequent letters from Clear Channel expressing interest in producing AMA Pro's events; fears by AMA Pro that Clear Channel's contract with another motorcycle racing entity might threaten AMA Pro's survival; an extension of the deadline for the letter of intent; and, finally, the scrapping by AMA Pro of the contract with JamSports for a renewed contract with Clear Channel, which had produced AMA Pro events before.

In response to Clear Channel's summary judgment motion, Kennelly rejected Clear Channel's argument that since there could only be one owner of the contract of the kind in question, the number of possible promoters in the series remained unchanged, and therefore, there would be no decreased output of product or an increase in prices. The judge found that there might be decreased output or increased prices, because Clear Channel had made plans to possibly promote another series of racing events, and because JamSports looked at the opportunity with AMA Pro to enter a wider market for promoting Supercross.

The judge didn't agree with JamSports' "essential facilities doctrine" argument, however. JamSports contended that "Clear Channel denied it access to eleven venues," and that although no one of these facilities was essential, "a combination of [them was] essential to a profitable supercross series." After listing numerous other facilities that JamSports could have used, the judge concluded that JamSports had misstated the law. Its "contention assumes 'essential' means 'best,' 'most profitable' or 'preferable.' But that is not what essential means for purposes of antitrust law. Essential means essential," the judge explained.

JamSports also claimed Clear Channel "monopolized the market for supercross promotion . . . by pressuring venues not to book JamSports' races, offering incentives to OEMs and athletes to participate in Clear Channel's series, seeking sanctioning from [another motorcycle racing organization], and attempting to derail JamSports' deal with the Speed Channel, a cable television network." Judge Kennelly agreed with JamSports that an issue of fact existed as to Clear Channel's behavior, because JamSports offered evidence to show that Clear Channel "threatened stadiums that it would pull all of its events . . . if they booked JamSports' supercross race," and "that Clear Channel tried to use its other motor sports events and concerts to entice venues to exclude JamSports." While Clear Channel argued it had legitimate reasons for its behavior, Kennelly said that's for a jury to decide.

AMA Pro won summary judgment on its defense that the letter of intent itself was not a binding promotion agreement. "In this regard," said the judge, "the letter of intent could hardly be clearer," because it stated that – "except" for its exclusivity and confidentiality provisions – it "is not binding in any way."

JamSports also claimed AMA Pro breached the letter of intent's exclusivity and confidentiality provisions by "failing to advise JamSports of a proposal AMA Pro received from Clear Channel in early November 2001, and by failing to negotiate in good faith with JamSports." As to the former claim, the judge ruled that there was a breach of the exclusivity agreement; he noted that an AMA board member, in fact, reminded the members that "AMA Pro was obligated to share Clear Channel's proposal with JamSports" – but it never did. The judge remanded this issue for a trial jury, but added: "It remains to be seen, however, whether this breach entitles JamSports to recover any damages."

Judge Kennelly denied Clear Channel's motion for summary judgment as to JamSports' three tortious interference claims, since there were genuine issues of fact for a jury to resolve.

The case was tried to a jury over a six-week period in February and March 2005; and the jury returned its verdict just before this issue of the *Entertainment Law Reporter* went to press. Clear Channel has announced that it will appeal.

JamSports was represented by Bruce S. Sperling of Sperling & Slater in Chicago. Paradama AMA Pro Racing was represented by Steven F. Pflaum of McDermott Will & Emery in Chicago. *(AMF)*

JamSports v. Paradama Productions, 336 F.Supp.2d 824, 2004 U.S.Dist.LEXIS 16508 (N.D.Ill. 2004)

Federal court denies summary judgment motions by both parties in Metropolitan Intercollegiate Basketball Association's antitrust suit challenging NCAA's postseason competition rules

The National Collegiate Athletic Association and the Metropolitan Intercollegiate Basketball Association have had "a long and somewhat tortured relationship," explained federal District Judge Miriam Goldman Cedarbaum. MIBA has sued the NCAA, claiming that five of its rules affecting Division I college basketball "reduce competition from preseason and postseason non-NCAA sponsored tournaments and are unreasonable restraints of trade in violation of Section 1 of the Sherman Act." MIBA claims that the NCAA "uses the rules affecting postseason competition to achieve or attempt to gain monopoly power in the market for Division I men's college basketball tournaments, in violation of Section 2 of the Sherman Act."

The rules challenged by MIBA are the "Commitment to Participate Rule," which requires a team invited to play in a NCAA championship tournament to play in the tournament or in no postseason competition whatsoever; the "One Postseason Rule" prohibiting NCAA members from participating in more than one postseason tournament; the "End of Playing Season Rule," which requires MIBA's Postseason National Invitational Tournament (NIT) to conclude prior to the end of the NCAA tournament; and the NCAA's automatic qualification procedure and bracket expansions.

MIBA asked for summary judgment on its Sherman Act challenge of the Commitment to Participate Rule. But Judge Cedarbaum denied the motion. MIBA claimed that the Rule "effectively requires any NCAA institution invited to the NCAA Tournament to boycott the Postseason NIT." Judge Cedarbaum did agree with MIBA that the Commitment to Participate Rule "constitutes an agreement among the NCAA and its member institutions." However, the judge didn't agree with MIBA that the Rule is illegal per se as an unreasonable restraint of trade.

Thus the judge had to filter the Commitment to Participate Rule through a "rule of reason" analysis. MIBA pushed, without success, for a "quick look" analysis of the test. Judge Cedarbaum noted that under the rule the MIBA "may choose from any of the 260 teams which are not invited to the NCAA Tournament" and invite them to *its* tournament; and that the MIBA had not presented any evidence that it had been unable to fill its Postseason NIT bracket each year. So she concluded that "the MIBA is required to meet its burden under the full rule of reason analysis to show the anticompetitive effects of the rule."

In the NCAA's motion, it unsuccessfully sought summary judgment on all five of the postseason rules. The judge disagreed with the NCAA that the rules were not subject to scrutiny under the Sherman act because they do not restrain "trade or commerce" and are non-commercial in nature. She noted that the NCAA justified one rule by saying it ensures the best teams will participate, which makes it attractive to broadcasters and others. "Thus the rule cannot be said to be noncommercial." Because MIBA was challenging rules as they worked in combination with each other, Judge Cedarbaum also didn't agree that they fall into the "category of rules sanctioned by the Supreme Court" – such as those that determine the size of the field. She ultimately concluded that there existed the possibility of a violation of the Sherman Act.

Judge Cedarbaum went on to look at the Rules under the rule of reason test, which requires the showing of "an actual adverse effect on competition as a whole in the relevant market." MIBA offered an expert's declaration that the relevant market was Division I mens' college basketball, and the judge agreed that it made a "sufficient showing" that it would be able to prove this at trial.

The NCAA also argued that MIBA's evidence only showed a harm to the Postseason NIT, not harm to competition in general. The judge noted the difficulty in separating the two ideas, pointing out that the parties "agree that the only postseason tournament other than the NCAA Tournament is the Postseason NIT." While the judge noted an increase in output, which has naturally occurred over time in the arena of college basketball, she said that it "is also clear . . . that the rules require an invitee to the NCAA Tournament to attend to the exclusion of the Postseason NIT." Agreeing with MIBA's expert, she concluded the "facts tend to show that the Postseason Rules adversely affect competition by depriving colleges and fans of a potentially attractive postseason tournament choice and possible participation in an additional tournament." Ultimately, Judge Cedarbaum ruled that there are questions of fact "about whether the Postseason Rules are the least restrictive means of accomplishing NCAA's goals" and about whether the NCAA possesses monopoly power in its market and maintains it through exclusionary means.

The Metropolitan Intercollegiate Basketball Association was represented by Jeffrey L. Kessler of Dewey Ballantine in New York. The National Collegiate Athletic Association was represented by Gregory L. Curtner of Miller Canfield Paddock & Stone in New York. *(AMF)*

Metropolitan Intercollegiate Basketball Association v. National Collegiate Athletic Association, 337 F.Supp.2d 563, 2004 U.S.Dist.LEXIS 19502 (S.D.N.Y. 2004); *Metropolitan Intercollegiate Basketball Association v. National Collegiate Athletic Association*, 339 F.Supp.2d 545, 2004 U.S.Dist.LEXIS 20418 (S.D.N.Y. 2004)

In copyright infringement suit against R.J. Reynolds Tobacco, alleging unauthorized use of artwork in advertising, illustrator Michiko Stehrenberger could not use multiplier in calculating her actual damages, even though graphic arts industry has standard fee for granting "retroactive license" that is two to ten times normal fee

Illustrator Michiko Stehrenberger has sued R.J. Reynolds Tobacco Company for copyright infringement, alleging that it used her graphic art in newspaper advertising, without authorization. Stehrenberger sought a "reasonable license fee" as actual damages, and asserted that a multiplier of ten should be used to calculate that fee, because R.J. Reynolds had used her work without first getting a license.

Stehrenberger offered expert testimony that the graphics arts community has a schedule of fees for granting a "retroactive license." According to the expert, this industry standard schedule allows an infringer to correct a mistake of unauthorized use of copyrighted material by paying a reasonable license fee of two or three times the normal rate, but if the copyright owner has to sue the infringer, then the licensing fee is ten times what the pre-infringement fee would have been.

Federal District Judge Louis Stanton rejected Stehrenberger's plea for enhanced damages. In response to R.J. Reynolds' motion for partial summary judgment, the judge held that "[i]n litigated cases, infringement does not make a copyright more valuable." He reiterated the concept that in ascertaining a reasonable license fee, one must determine the fair market value of the copyrighted work at the time of the infringement. A multiplier only acts as a form of punishment, and the "'value of what was illegally taken' is not determined by multiplying it." Rather, statutory enhanced damages and disgorgement of profits are the two remedies by which copyright law punishes and deters willful infringement.

Judge Stanton acknowledged that another court had allowed the use of a multiplier in *Bruce v. Weekly World News, Inc.* (*ELR* 23:8:18, 24:10:13). But Judge Stanton refused to follow that holding, because both parties involved in that case had adopted the multiplier. Therefore, Judge Stanton precluded Stehrenberger from using the multiplier, industry standard though it may be.

Michiko Stehrenberger was represented by Stephen A. Weingrad of Weingrad & Weingrad in New York. R.J. Reynolds was represented by Marc J. Rachman of Davis & Gilbert in New York. *(MLS)*

Stehrenberger v. R.J. Reynolds Tobacco Holdings, Inc., 335 F.Supp.2d 466, 2004 U.S.Dist. LEXIS 18566 (S.D.N.Y. 2004)

Photographers win injunction against Brooklyn Music's unlicensed use of their photograph on "Digital Empire" CD, but recover only $27,000 in damages rather than $1.5 million they requested

In a copyright infringement lawsuit, Javier Barrera and Lynn Burgos claimed that they were entitled to $1,512,000 in actual damages, profits and costs attributable to Brooklyn Music's unauthorized use of their photograph on its "Digital Empire" CD. Because Brooklyn Music failed to respond to their complaint, the matter was referred to Magistrate Judge Kevin Nathaniel Fox to conduct an inquest, at which he recommended the photographers be granted an injunction against Brooklyn Music and $27,000 in damages.

Barrera and Burgos are visual artists who jointly created an abstract photograph of an aged agricultural silo. In 1997, they left this photograph with a designer for review but did not authorize its reproduction. However, in late 1998, Barrera and Burgos discovered that the CD "Digital Empire" featured their photograph on its cover, on the CD divider, and on Brooklyn Music's website.

Barrera and Burgos registered their photograph's copyright with the Copyright Office and then sued Brooklyn Music for infringement. They sought actual damages of $72,000 as a reasonable license fee for the use of the photograph plus Brooklyn Music's profits of more than $1.4 million. They also sought a permanent injunction and an order requiring Brooklyn Music to destroy the infringing articles.

In determining a reasonable license fee for a photograph, certain factors such as the type of use, size of use, and circulation are helpful. Considering these factors, Barrera and Burgos computed a base license fee at $9,000. However, because Brooklyn Music failed to give credit to the photographers, they argued that the license fee should be tripled, as is the custom in the music industry (when photos are used without credit), which increased the total fee to $27,000. They also argued that the license fee be further augmented to a total of $45,000, five times the base license fee, as is the custom and practice in the photography industry.

Magistrate Judge Fox agreed that a photographer would charge a higher fee to a licensee who does not intend to credit the artist, and therefore increased the license fee to $27,000. However, he found that an additional $45,000 for Brooklyn Music's unauthorized use of the photograph did not logically represent the fair market value of the licensing fee. Because this augmented amount was not related to a "cognizable injury," Judge Fox determined that Barrera and Burgos had only established $27,000 as the reasonable license fee.

In addition to their request for actual damages, Barrera and Burgos sought $1,440,000 which Brooklyn Music received from K-tel International. The photographers argued that K-tel paid this amount as royalties related to the "Digital Empire" CD. But Judge Fox found that K-tel's monthly payments to Brooklyn Music were royalty payments for numerous CDs and not just "Digital Empire," in addition to licensing fees for distributing other recordings owned by Brooklyn Music. More importantly, the judge determined that the payment also granted K-tel rights to purchase a controlling interest in Brooklyn Music. Therefore, Judge Fox held that Brooklyn Music's gross revenues from K-tel were not reasonably related to the sale of the "Digital Empire" CD, and recommended that Barrera's and Burgos' request for an award of Brooklyn Music's profits be denied.

Barrera and Burgos also sought recovery of their attorney's fees. Section 505 of the Copyright Act provides for the recovery of attorneys' fees to the prevailing party, if the infringement commences after the effective date of the copyright registration. Because Barrera and Burgos didn't register their copyright until after Brooklyn Music's infringement commenced, Judge Fox determined that they could not recover their attorney's fees.

Finally, Judge Fox found that Brooklyn Music's failure to respond to the complaint suggested a threat of continuing infringement, and therefore he recommended that Brooklyn Music be enjoined and ordered to destroy any of its infringing articles.

In a brief order, District Judge Robert Carter accepted Magistrate Judge Fox's recommendations.

Javier Barrera and Lynn Burgos were represented by Nicholas Alexander Penkovsky in New York City. *(MLS)*

Barrera v. Brooklyn Music, Ltd., 346 F.Supp.2d 400, 2004 U.S.Dist.LEXIS 12450 (S.D.N.Y. 2004)

Though Timex willfully infringed Polar Bear Productions' copyright in kayaking film, by using it in trade shows and videos, $2.4 million in damages for lost and indirect profits were improperly awarded, Court of Appeals rules

To promote its "Expedition" brand watches, Timex agreed to sponsor Polar Bear Productions' extreme-kayaking film, "PaddleQuest," in return for a one-year license to use the film as promotional material. After the year was over, however, Timex continued to use the footage. Timex produced a ten-minute promotional loop of "PaddleQuest" and used it at twelve different trade shows, in a promotional campaign with Mountain Dew, and in videos used to train its salespeople.

Polar Bear responded with a copyright infringement lawsuit, which resulted in a jury award of $2.4 million against Timex, most of which was for Polar Bear's own lost profits and Timex's indirect profits.

Timex did not dispute that it used the copyrighted footage beyond the life of the license without permission. But on appeal, it argued that the award of $2.4 million was invalid because Polar Bear failed to establish a "causal nexus" between the infringement and the amount awarded. Timex also argued that the Copyright Act did not permit Polar Bear to recover damages for infringements that occurred more than three years before it filed the action.

Court of Appeals Judge Margaret McKeown explained that the Copyright Act provides two remedies for infringement – actual damages (damages suffered as a result of the infringement) and wrongful profits (either direct or indirect profits by the infringer that are attributable to the infringement). Both actual damages and wrongful profits require proof of a "causal link" between the infringement and the remedy sought.

The jury awarded Polar Bear $315,000 in actual damages consisting of $115,000 in lost license and renewal fees and $200,000 of its own lost profits. Judge McKeown affirmed the $115,000 award for the lost license and renewal fees because there was substantial evidence to show that Polar Bear had earlier quoted similar fees to Timex and these fees were within the range of the fair market value. Timex insisted that Polar Bear would not have charged this rate, but Judge McKeown stated, "Having taken the copyrighted material, Timex is in no better position to haggle over the license fee than an ordinary thief and must accept the jury's valuation unless it exceeds the range of the reasonable market value."

On the other hand, Judge McKeown did not agree with the jury's award of $200,000 for Polar Bear's lost profits, which were based on Polar Bear's assertion that if it had received a licensing fee for Timex's use of the footage, Polar Bear could have produced and sold thousands of "PaddleQuest" copies with that money. Judge McKeown found this theory of liability too "pie in the sky." Because these lost profits were too speculative, Judge McKeown held they could not be recovered.

The jury also awarded Polar Bear $2.1 million in indirect profits earned by Timex from direct sales at trade shows, a promotion with Mountain Dew, and the overall enhancement of Timex's brand prestige resulting from its association with the sport of extreme kayaking. Judge McKeown found that Polar Bear demonstrated a sufficient causal nexus with profits from the trade shows and the Mountain Dew promotion. However, Polar Bear failed to sufficiently demonstrate a causal nexus between the infringement and Timex's revenue from enhanced prestige. Therefore, she held that the jury should not have been permitted to consider the claim of profits associated with Timex's enhanced prestige. However, because the jury did not explain how it arrived at the $2.1 million amount, and because trade show sales and the Mountain Dew promotion could have totaled no more than $333,000, Judge McKeown vacated the entire indirect profits damage award because the entire award "exceeds the maximum amount sustainable by the probative evidence."

On the statute of limitations issue, Judge McKeown held that the Copyright Act allows for damages outside of the three-year limit, if the plaintiff was reasonably unaware of the infringement and filed within three years of discovering the infringement. Although Timex began infringing Polar Bear's copyrights as early as 1995, Judge McKeown determined that Polar Bear did not discover this infringement until two years later, and thus, Polar Bear filed within the statutory window.

Polar Bear Productions was represented by Robert C. Lukes and Terry J. MacDonald in Montana. Timex was represented by Roger L. Zissu and John P. Margiotta in New York, and Ronald A. Bender in Montana. *(MLS)*

Polar Bear Productions, Inc. v. Timex Corp., 384 F.3d 700, 2004 U.S.App.LEXIS 18737 (9th Cir. 2004)

After Bridgeport Music voluntarily dismissed copyright infringement claims against Universal Music, federal District Court denied Universal's motion for attorneys fees because it was not a "prevailing party" within the meaning of attorney fee section of the Copyright Act

Bridgeport Music sued Universal Music for copyright infringement, but eventually stipulated to a voluntary dismissal with prejudice of its case. Universal responded with a motion seeking to recover its attorneys fees, arguing that a dismissal with prejudice made it a "prevailing party" entitled to attorneys fees under the Copyright Act. A federal District Court in Nashville has disagreed, however.

Judge Thomas Higgins ruled "that a prevailing party is one who has been awarded some relief by the court, by judgment on the merits or court ordered consent decree, effecting a material alteration of the legal relationship of the parties." The judge held that voluntary conduct is insufficient to constitute a judicially sanctioned change of the legal relationship between the parties that is required for one party to prevail over another.

Judge Higgins also held that he would have declined to award attorney fees to Universal even if Universal were a prevailing party, because Universal did not respond to Bridgeport's discovery requests. Judge Higgins said that if a defendant has documents on hand that could spare it months of litigation, it bears some of the risk for refusing to produce them.

For these reasons Judge Higgins denied Universal's motion for costs and fees.

Bridgeport was represented by Richard S. Busch and Ramona P. DeSalvo of King & Ballow in Nashville. Universal was represented by Philip Michael Kirkpatrick of Stewart Estes & Donnell and Amy J. Everhart of Bowen Riley Warnock & Jacobson in Nashville. *(MAR)*

Bridgeport Music v. London Music, 345 F.Supp.2d 836, 2004 U.S. Dist. LEXIS 23759 (M.D.Tenn. 2004)

Museum may sue art dealer from which it purchased, almost 50 years ago, painting stolen from Italian embassy, because statute of limitations was tolled by doctrine of equitable estoppel

In 1955, the Springfield Library and Museum Association bought "Spring Sowing," a painting by Italian Renaissance artist Jacopo da Ponte. Springfield bought the painting from Knoedler Archivum, Inc., an experienced art dealer. In its bill of sale, Knoedler stated that it was the lawful owner; the painting was free of any encumbrances; it had the right to sell the painting; and that it would defend any lawful claims.

In 1966, the Italian government made a claim. It asserted that *Spring Sowing* lawfully belonged to the Uffizi Italian museum, and was stolen from its embassy in Poland during WWII. In 2001, Springfield gave the painting back to the Italian government and then demanded that Knoedler compensate it. When Knoedler refused to do so, Springfield sued.

Knoedler argued Springfield's case was time barred. Springfield responded that any limitation period should be suspended. Judge Kenneth Neiman found Springfield's claims were based on contractual breach of warranty and not on tort. Further, because the bill of sale was "signed and sealed," Springfield's claims were subject to a 20-year limitation period from the time of the sale. Thus, Springfield had to file its claim by 1975 or "must point to an event or event that tolled or estopped the statutory period at some juncture within the twenty year period."

Springfield pointed to fraudulent concealment and the doctrine of equitable estoppel. The judge found there was no fraudulent concealment because there is no evidence Knoedler acted fraudulently in concealing Springfield's cause of action at any time.

On the other hand, the judge ruled for Springfield on its theory that the doctrine of equitable estoppel suspended the statute of limitations. A limitations period may be estopped if the "defendant made representations it knew or should have known would induce the plaintiff to put off bringing suit and . . . the plaintiff did in fact delay in reliance on the representations."

The judge pointed to the fact that in 1966 Knoedler, as an experienced art dealer, encouraged Springfield to resist the Italian government's efforts to reclaim *Spring Sowing*. Knoedler told Springfield to continue to ask for more information from Italy. And Knoedler advised Springfield to challenge the Italian government's description of *Spring Sowing* and any actual evidence of theft. The judge concluded that Knoedler, being an experienced art dealer, knew or should have known that Springfield would rely on its advice and would delay making claims against Knoedler. Indeed, Springfield did everything Knoedler told it to do. In short, Knoedler gave Springfield a sense of false security and belief that it need not pursue any claims against it within the statutory period.

For these reasons, the theory of equitable estoppel allows Springfield's action to survive the statute of limitations period, Judge Neiman ruled.

Knoedler Archivum, Inc., was represented by Amy J. Berks of Palmer & Dodge in Boston. Springfield Library and Museum Association, Inc., was represented by Mark D. Mason of Cooley Shrair in Springfield. *(SG)*

Springfield Library & Museum Association v. Knoedler Archivum, Inc., 341 F. Supp. 2d 32, 2004 U.S.Dist.LEXIS 20437 (D.Mass. 2004)

City's policy to pre-approve artwork for sale on parks and streets is unconstitutional prior restraint on speech, federal District Court rules

Steven C. White is a man who sells his artwork on city parks, streets, and sidewalks. The City of Sparks wouldn't let him without first getting a "Roadway and Sidewalk Vendors License." This is their story.

Sparks wanted to regulate sales – not display – of art by having White first show city employees his artwork. Sparks wanted to determine if the art contains protected constitutional messages before it was sold. White claimed this violated his First and Fourth Amendment rights because the city's ordinances were broad content-based restrictions and prior restraints on speech.

Federal District Judge David Hagen ruled that the First Amendment does not protect all visual art. To be protected, White's work must express some political, religious, philosophical, or ideological idea, the judge said. The judge found it did.

That led to a second question: Does Sparks have the right to insist on reviewing and pre-approving White's work before allowing sales? Sparks' policy is that White can only sell items protected by the First Amendment – as determined by Sparks officials. Sparks claims that its officials' common sense and the plain meaning of the categories – political, religious, philosophical, or ideological – would guide decision makers.

The judge found this would be a prior restraint on speech because the enjoyment of protected expression is subject to the approval of governmental officials. Any restrictions must contain adequate standards to guide government discretion, the judge said. But Sparks even admitted, "There are no limiting criteria or standards, which could result in incorrect determinations." Officials can easily place personal judgments in favoring some artists and suppressing others.

The judge therefore granted White's motion for partial summary judgment on the issue that his art is protected and that Sparks' pre-approval policy is unconstitutional, but the judge denied White's request for a ruling that all visual art per se is constitutionally protected.

White was represented by Terri Keyser-Cooper in Reno. Sparks was represented by Chester Adams of the Sparks City Attorney's Office in Sparks. (*SG*)

White v. City of Sparks, 341 F.Supp.2d 1129, 2004 U.S.Dist.LEXIS 20699 (D.Nev. 2004)

Federal District Court denies motion to vacate earlier judgment that Brooklyn video store owner infringed Russian film copyrights licensed exclusively to American distributor by Russian company; court refuses to give effect to post-judgment Russian government "Directive" purporting to transfer copyrights, retroactively, to government-owned enterprise

Films by Jove is an American company that distributes Russian animated films in the United States. It does so pursuant to an exclusive copyright license it received from a Russian company named Soyuzmultfilm Studio. Films by Jove invested more than $3 million to restore, update and revoice those films. So it's not surprising that when a video store in Brooklyn began to sell unauthorized copies, Films by Jove sued the store's owner for copyright infringement.

What began as a seemingly simple piracy case turned out to be anything but. It has generated three published opinions already, all by federal District Judge David Trager, to whom the case was assigned when Films by Jove first filed it.

The video store doesn't dispute that it copied and sold the films. Instead, the store owner contends that the Russian company which granted an exclusive license to Films by Jove wasn't the owner of the films' copyrights in the first place, and thus Films by Jove is not in fact their licensee. The store owner claims that films' copyrights actually are owned by a Russian government-owned enterprise named named Federal State Unitarian Enterprise Soyuzmultfilm Studio ("FSUESMS" for short). And indeed, FSUESMS intervened in the case in support of the video store owner's claim.

The question of who owns the films' copyrights required Judge Trager to master a significant chunk of Soviet/Russian history and copyright law. And when he did, the judge granted summary judgment in favor of Films by Jove, because he found that its licensor was the true copyright owner, rather than FSUESMS (*ELR* 23:8:14).

The dispute over who owns the films' copyrights is not just international; it's also multinational. After Judge Trager granted summary judgment to Films by Jove, the very same issue also was litigated in France and in Russia; and courts in both of those countries ruled that the copyrights were not owned by the Russian company from which Films by Jove got its license. The French and Russian rulings prompted the video store owner and FSUESMS to file a motion for reconsideration with Judge Trager. But Judge Trager refused to give effect to the subsequent decisions in France and Russia; and he reaffirmed his original judgment (*ELR* 25:2:10).

That was not the end of the matter. After Judge Trager reaffirmed his original judgment, the Russian government issued a "Directive" that purported to retroactively transfer the films' copyrights to FSUESMS. Armed with this new Directive, the video store owner and FSUESMS filed yet another motion for reconsideration with Judge Trager – without success.

Judge Trager denied the second motion for reconsideration, and again reaffirmed his original judgment. The judge ruled that the Directive was not controlling law in the case, in part because evidence showed that the Directive was issued "by the Russian government . . . to influence the outcome of this United States litigation with the purpose of depriving . . . Films by Jove of its right to distribute the animated films in the United States and elsewhere outside of the former Soviet Union."

Ordinarily, as a result of a legal principle called the "Act of State Doctrine," courts in the United States would not inquire into the validity of the public acts of another sovereign nation committed within its own territory. But Judge Trager ruled that the "Act of State Doctrine" did not prevent him from questioning the validity of the Russian government's "Directive," because the Directive was intended to affect property located in the United States, namely, Film by Jove's right to distribute the films here.

Finally, the judge rejected the argument that the principle of "comity" required him to give effect to the Directive. It did not, Judge Trager explained, because it is well settled that comity – that is, respect for another nation's law – does not override U.S. public policy. In this case, he ruled, "expropriation of the property of an American company by an act of a foreign sovereign is unquestionably against the public policy of the United States."

Films by Jove was represented by Julian H. Lowenfeld in New York City, and by Kenneth A. Feinswog in Los Angeles. The video store owner was represented by Paul R. Levenson of Kaplan & Levenson in New York City.

Films by Jove, Inc. v. Berov, 341 F.Supp.2d 199, 2004 U.S.Dist.LEXIS 22375 (E.D.N.Y. 2004)

Oklahoma RedHawks had no duty to warn patron of danger of being hit by foul ball, Oklahoma Supreme Court affirms

As the old saying goes, "one, two, three strikes you're out." So it was with a lawsuit filed by R. Keith Tucker against the Oklahoma RedHawks. However, Tucker struck out not only once, but twice. His last swing was in front of the Oklahoma Supreme Court, which ruled in the RedHawks' favor and dismissed his lawsuit completely.

The seed of Tucker's lawsuit was planted on April 17, 1998, when Tucker and his wife attended a RedHawks baseball game in Oklahoma City. While sitting in an unscreened area of the luxury suites behind home plate, Tucker was struck in the head by a foul ball. Tucker sued the RedHawks to recover for injuries caused by the foul ball, primarily alleging that the team was negligent for failing to warn him of the danger of being hit by a baseball.

However, there was one huge obstacle in Tucker's way. A previous Oklahoma Supreme Court decision in *Hull v. Oklahoma City Baseball Co.* directly undermined his case. The rule enunciated in *Hull* stated that "a spectator seated in an unscreened portion of a grandstand at a baseball game assumes all normal or ordinary risks attendant upon the use of the premises." So if Tucker wanted to win, he had to find a way around the *Hull* decision.

Tucker used an unexpected strategy in an attempt to solve his predicament. Before trial, he asked Judge Vicki Robertson to "sustain the RedHawks' Motion for Summary Judgment" and dismiss his case in light of the *Hull* decision. Tucker believed that he could hit a home run on appeal at the Oklahoma Supreme Court by persuading the court to overturn *Hull*. If the high court overturned *Hull*, Tucker was confident he could win his case. As expected, the trial court granted Tucker's wish by sustaining the RedHawks' motion for summary judgment. Tucker's appeal to the high court subsequently followed.

On appeal, Tucker's vision of his home run trot was cut short by the Supreme Court, as he struck out again. In an opinion by Justice Robert Lavender, the court held that as a result of the *Hull* decision, the RedHawks had no duty to warn Tucker of the danger of being hit by a baseball. As a result, the high court affirmed the trial court's dismissal of Tucker's case. The court ruled against Tucker mainly because the facts in his case were "analogous to the facts in *Hull*." Additionally, the high court arrived at its decision due in part to Tucker's admission at the trial court that it should dismiss his case and the fact that the material facts of the case were not disputed.

As for Tucker's quest to overturn the *Hull* decision, it failed when Justice Lavender rejected each of his three arguments. Justice Lavender stated that *Hull* was good law and represented the general rule in spectator injury cases at baseball stadiums.

Tucker was represented by Rex K. Travis in Oklahoma City. The RedHawks were represented by Robert D. Looney of Hall Estill Hardwick Gable Golden & Nelson in Oklahoma City. *(KH)*

R. Keith Tucker v. ADG, Inc., 102 P.3d 660, 2004 Okla.LEXIS 82 (Okla. 2004)

California appellate court affirms grant of DirecTV's anti-SLAPP motion dismissing lawsuit complaining about demand letters DirecTV sent to those who purchased illegal cable decryption devices

After obtaining lists of people who purchased decryption devices in response to advertising aimed at its cable subscribers, DirecTV sent demand letters to thousands of them, "explaining that use of illegal signal-theft equipment to gain access to . . . programming violated federal law." When this didn't stop them, DirecTV filed federal lawsuits nationwide against more than 600 people who had bought the decryption devices.

In response to the demand letters sent to them, Kevin Blanchard and others sued DirecTV, claiming that by sending the letters, DirecTV: engaged in unfair business practices; interfered with their exercise of their civil right to be free from personal insult, defamation and injury to their personal relations; and engaged in extortion and duress.

The trial court granted DirecTV's special move to strike Blanchard's suit, agreeing with the cable company that the California anti-SLAPP statute applied. Blanchard appealed, but the California Court of Appeal affirmed.

In an opinion by Justice Richard Aldrich, the appellate court ruled that DirecTV's complaint arose from its demand letters, which were sent in anticipation of litigation, and thus the letters were an exercise of the company's "constitutional right to petition to seek redress of grievances protected by the anti-SLAPP statute." As a result, Blanchard and the others "could not carry their burden to show a reasonable probability of success on the merits of their lawsuit because [the] demand letter was immune from liability under the litigation privilege."

Blanchard argued that a newly enacted exception to the anti-SLAPP motion applied to the case. The exception makes the anti-SLAPP procedure inapplicable to "any action brought *solely in the public interest or on behalf of the general public*." However, Justice Aldrich rejected Blanchard's argument, because he had not satisfied two elements of the exception, namely: that "the action, if successful, would enforce an important right affecting the public interest and would confer a significant benefit… on the general public or a large class of persons"; and that "[private] enforcement is necessary and places a disproportionate financial burden on the plaintiff" in relation to his stake in the matter.

As to the first element, the justice noted: "[there] is no question but that [Blanchard's unfair business practice claim], if successful, would not 'enforce an important right affecting the public interest.'" He added that Blanchard was not "seeking to assert some general right not to receive demand letters or notices," nor did he "seek a declaration about demand letters in general." Therefore, the justice said, if Blanchard's claim were successful, "it would establish no ringing declaration of the rights of all pirating-device purchasers, nor would it lead to a wholesale change in the practice of sending demand letters."

As to the other element, Justice Aldrich said it was nonexistent. The issue was whether the "cost of [Blanchard's] legal victory transcends" his personal interest in the matter. "Plaintiff's personal stake in this lawsuit – namely, not receiving these letters from DirecTV about these devices – far exceeds the effect that this lawsuit could possibly have on the public at large." The justice also injected a bit of Biblical metaphor into his opinion: "[we] are unconvinced by plaintiff's portrayal of themselves as the public-interest David against the corporate Goliath."

Because the anti-SLAPP statute was applicable, Blanchard needed to establish a prima facie probability of success in his own lawsuit. DirecTV argued that its demand letters, which were the sole basis for the lawsuit, were absolutely privileged under the law – and Justice Aldrich agreed. The judge noted that, contrary to Blanchard's contentions, the letters were sent in good faith and thus protected under the privilege. "Our view is only bolstered by DirecTV's representation it has now filed approximately 23,400 additional lawsuits."

Blanchard was represented by Lakeshore Law Center and Jeffrey Wilens. DirecTV was represented by Dale H. Oliver of Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles. *(AMF)*

Blanchard v. DirecTV, 20 Cal.Rptr.3d 385, 2004 Cal.App.LEXIS 1830 (Cal.App. 2004)

Previously Reported:

Rehearing denied, and opinion amended, in Grosso v. Miramax/"Rounders" idea submission case. The Ninth Circuit Court of Appeals has denied a petition for rehearing and rehearing en banc in the copyright infringement/idea submission case filed by Jeff Grosso alleging that the Miramax movie "Rounders" was copied from his script "The Shell Game." A three-judge panel affirmed that "Rounders" did not infringe the copyright to Grosso's screenplay, but it also held that Grosso's implied contract claim is not preempted by Copyright Act, so the panel reversed the District Court's dismissal of that claim (*ELR* 26:9:7). In its order denying the rehearing petition, the Court of Appeals amended its original opinion by adding a brief statement indicating that it "express[ed] no opinion on the question whether the facts adduced during the summary judgment proceedings on Grosso's copyright claim can support the *Desny* [implied contract] claim set forth in Grosso's complaint. . . . we hold only that the First Amended Complaint states a *Desny* claim. We need not and do not decide whether the summary judgment record or any future record, yet to be developed, supports that claim." For reasons explained in the Editor's Note to the article that reported the appellate court's original opinion, it appears that the record does not support the implied contract claim. And thus Miramax may yet win this case on summary judgment, on the existing record or a "future record." *Grosso v. Miramax Film* Corp., No. 01-57255 (9th Cir., Mar. 15, 2005), available at http://www.ca9.uscourts.gov/ca9/newopinions.nsf/19A9AABED3C0447B88256FC4008183E7/$file/0157255.pdf?openelement

Rehearing denied, and opinion amended, in James Newton/Beastie Boys case. The Ninth Circuit Court of Appeals has denied a petition for rehearing and rehearing en banc filed by composer-performer James Newton in his copyright infringement suit against the Beastie Boys. In an earlier 2-to-1 decision, a Ninth Circuit Panel held that the Beastie Boys' recording "Pass the Mic," which included licensed sample from Newton's recording of his composition "Choir," did not infringe the copyright to the composition itself, even though composition was not licensed, because Beastie Boys used only a "de minimis" portion of the composition (*ELR* 25:7:12). In denying Newton's petition, the panel issued an amended opinion and dissent, though the amendments do not change anything previously reported about the case in these pages. *Newton v. Diamond*, 388 F.3d 1189, 2004 U.S.App.LEXIS 23398 (9th Cir. 2004)

Opinion published. The opinion of the court in "anti-bootlegging statute" case, *United States v. Martignon* (*ELR* 26:4:8), has now been published. *United States v. Martignon*, 346 F.Supp.2d 413, 2004 U.S.Dist.LEXIS 19134 (S.D.N.Y. 2004).

DEPARTMENTS

Entertainment Lawyer News:

Brenda Feigen joins Kenoff & Machtinger in Los Angeles. Brenda Feigen has become Of Counsel to the Los Angeles firm of Kenoff & Machtinger. Feigen represents producers, directors, actors, writers, authors and musicians. Her practice emphasizes transactions and talent negotiations with buyers such as studios, broadcast networks and premium cable outlets. She is also involved with raising financing for motion pictures. At the beginning of her career in entertainment law, Feigen was associated with Loeb & Loeb where she worked with large production company clients. She then went on to work in business affairs and as an agent in the Motion Picture Literary Department at the William Morris Agency where she represented writers for film and television projects and others. In 1990, Feigen produced a big-budget feature for Orion Pictures titled "Navy Seals"; and in 2000, her book, *Not One of the Boys: Living Life as a Feminist,* was published by Alfred A. Knopf. She co-founded *Ms. Magazine* with Gloria Steinem in 1971 and directed the Women's Rights Project of the ACLU with (now Justice) Ruth Bader Ginsburg in the '70s. In 1999, Feigen managed the project "Entertainment Goes Global," which was jointly sponsored by USC's Annenberg School and the Pacific Council on International Policy. Feigen serves on the Boards of Directors of Population Media Center and California Lawyers for the Arts and on the Advisory Board of the American Screenwriters Association. She lectures around the country on various aspects of the law, most recently at the ABA's annual Forum on Entertainment and Sports Industries, the Texas Entertainment Law Institute and the Austin Film Festival, at Vassar College, the University of Michigan, Occidental College, Harvard and Yale Law Schools and Boalt Hall. Feigen has written articles for the *Harvard Women's Law Journal, Ms.* and *Vogue Magazines*, *The Village Voice* and other publications. In 1987 and 1988, her articles on movie law were published in PLI's *Counseling Clients in the Entertainment Industry,* and her article *From Books to Film* appeared in the winter 2004 edition of "Entertainment and Sports Lawyer," a publication of the ABA Forum on the Entertainment and Sports Industries. Feigen earned her B.A. *cum laude* in mathematics from Vassar College and received her law degree from Harvard Law School. She is a member of the Bars of California, New York and Massachusetts.

Michael Hobel joins Katten Muchin Zavis Rosenman in Los Angeles. Michael Hobel has joined Katten Muchin Zavis Rosenman as a capital partner in its Entertainment and Media Practice in the firm's Los Angeles office located in Century City. Hobel comes to the firm from the Century City office of O'Melveny & Myers where he was a partner in its Entertainment and Media Department. Hobel has more than 20 years of experience representing motion picture studios, networks, production companies, financiers, industry executives and talent in developing, financing, producing and distributing motion pictures, television programs, interactive productions, sporting events, and other types of entertainment product. His clients have included: Home Box Office, FremantleMedia, Thames Television, the Discovery Channel, DreamWorks, Jaffe/Braunstein Films, the Hearst Corporation, Electronic Arts, Mattel, NBA Entertainment, Major League Soccer, and American Greetings. Admitted to practice in California, Hobel received his B.A. degree, with honors, from Harvard University in 1977. He received his J.D. degree from New York University in 1981 where he was the Note and Comment Editor of the *New York University Law Review*.

Gibson Dunn adds five media and entertainment litigators. Gibson, Dunn & Crutcher has announced the addition of a five-lawyer media and entertainment litigation team. **Orin Snyder** has joined the firm's New York office as a partner. Formerly the head of the Manatt Phelps & Phillips Litigation Unit in New York and the East Coast, Snyder will continue his intellectual property and commercial litigation practice with an emphasis on media and entertainment industries, as well as his white-collar practice. Snyder represents major corporations and prominent individuals in media and entertainment, intellectual property and other commercial litigation. He also represents clients in white-collar criminal matters and internal corporate investigations. Representative clients include Time Warner, Home Box Office, Sony BMG Music Entertainment, Warner Music Group, Atlantic Records, Time Inc., American Media, Inc., Cablevision, William Morris Agency, Bob Dylan, Marc Anthony, Julie Andrews and Ozzy and Sharon Osbourne. Snyder practiced with Parcher, Hayes & Snyder from 1994 to 2003 (which merged with Manatt in December 2003). Snyder also served as Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York from 1989 to 1994, serving in the Securities

Fraud and Organized Crime Units, and as Chief of the Narcotics Unit. Snyder has taught trial advocacy as an adjunct professor and lecturer at various law schools and also teaches courses on copyright law, entertainment law, criminal law and litigation for continuing legal education programs and clients. He graduated from the University of Pennsylvania Law School cum laude in 1986. **Cynthia Arato** joins Gibson Dunn's New York office as of counsel and focuses her practice on intellectual property, commercial and civil litigation, also with an emphasis on media and entertainment. Arato has represented major companies and individuals in litigation involving copyright, trademark, defamation, right of publicity, employment, contract, fraud, fiduciary duty and royalty issues. In 2004, she successfully represented the Select Committee of Inquiry of the Connecticut House of Representatives before the Connecticut Supreme Court in a landmark case which held that a sitting Governor could be compelled to testify before a legislative impeachment committee. Her clients include Warner Music Group, Atlantic Records, Sony BMG Music Entertainment, Elektra Entertainment, America Media Inc., Home Box Office, Warner Bros. Records, Scholastic and Frank McCourt. She has taught legal ethics at Columbia University School of Law and copyright law seminars for continuing legal education programs and clients. She received her law degree in 1991 from Columbia University, where she was a Harlan Fiske Stone Scholar and Managing Editor of *Columbia Journal of Transnational Law*. **Ashlie Beringer** joins the firm's Denver office as of counsel and will continue her entertainment and media law, intellectual property and general commercial litigation practice. Beringer practices in the areas of entertainment and media, general commercial litigation and intellectual property law. She has represented several entertainment and media clients in disputes concerning contracts, copyright, trademark, defamation and privacy issues. She has significant experience in the prosecution and defense of commercial contracts, securities fraud and business tort actions. She is a 1996 graduate of Yale University School of Law, where she was Editor of *Yale Law Journal* and the recipient of the John Gallagher Prize for Best Trial Performance in Yale's Mock Trial Competition. **Marc Isserles** joins the firm in New York as an associate. Isserles focuses his practice on civil litigation, with an emphasis on appellate and constitutional litigation. He served as a law clerk for U.S. Supreme Court Justice Stephen G. Breyer and for Judge Laurence H. Silberman, of the U.S Court of Appeals, District of Columbia Circuit. He received his law degree in 1998, magna cum laude from Harvard Law School, where he was Notes Editor of *Harvard Law Review* and recipient of the Joshua Montgomery Sears Prize. **Elise Zealand** also joins the firm in New York as an associate. Zealand's practice focuses on all aspects of entertainment litigation, and she has represented clients in the entertainment industry in various contract matters and other disputes, including copyright and licensing issues. Zealand served as a law clerk to the U.S. District Court Judge William C. Conner, Senior District Judge, Southern District of New York. She received her law degree in 1998 from Columbia University where she was a James Kent Scholar and Harlan Fiske Stone Scholar, as well as the Writing and Research Editor of the *Columbia Journal of Law and Social Problems*.

National Music Publishers' Association names lawyers as its new President/CEO and Vice President/Counsel. The National Music Publishers' Association (commonly known as the "NMPA") is a trade association that represents more than 800 American music publishers, in protecting their interests – and those of their songwriter partners – in matters relating to music copyrights. Indeed, The Harry Fox Agency – the leading U.S. mechanical rights organization – is a subsidiary of the NMPA. Perhaps because its mission is so closely intertwined with the law, the NMPA has named a lawyer – **David M. Israelite** – as its new President and CEO, and another lawyer – Berkley Etheridge – as Vice President and Counsel. Before joining the NMPA, Israelite served in the Bush Administration as the Deputy Chief of Staff and Counselor to the Attorney General of the United States, and as the Chairman of the Department's Task Force on Intellectual Property. Prior to his appointment to the Department of Justice in 2001, Israelite served as the Director of Political and Governmental Affairs for the Republican National Committee. From 1997 through 1998, Israelite was an Administrative Assistant to U.S. Senator Kit Bond of Missouri. From 1994 to 1997, Israelite practiced law at the firm of Bryan Cave in Kansas City, Missouri. Israelite earned his Juris Doctor from the University of Missouri in 1994 and received a B.A. with a double major of Political Science and Communications from William Jewell College in 1990. **Berkley Etheridge** – the NMPA's new Vice President and Counsel – was an Attorney Advisor in the Office of Legislative Affairs at the U.S. Department of Justice, where she acted as the liaison to the House and Senate on many issues including intellectual property, computer crime, and telecommunications. She was a contributor to the Department of Justice's Intellectual Property Task Force Report. Etheridge will be involved in all the legal and lobbying efforts for the NMPA. Before the Department of Justice, Etheridge served as Counsel to U.S. Congressman Steve Chabot, a House Judiciary Subcommittee Chairman, where she was responsible for all Judiciary Committee issues. Prior to that, she served as Legislative Assistant to U.S. Congressman Mac Collins. Before moving to Washington, Etheridge practiced law in Jackson, Mississippi, at Daniel Coker Horton & Bell. Etheridge earned her Juris Doctor from the University of Mississippi School of Law, where she also served as Associate Notes and Comments Editor of the *Mississippi Law Journal*.

In the Law Reviews:

COMM/ENT, HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL, has published Volume 27, Number 2 with the following articles:

An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation by Paul Cowling, 27/2 Comm/Ent, Hastings Communications and Entertainment Law Journal 257 (2005)

Why Protect Political Art as "Political Speech"? by David Greene, 27/2 Comm/Ent, Hastings Communications and Entertainment Law Journal 359 (2005)

The Failure of the Broadcast Flag: Copyright Protection to Make Hollywood Happy by Lisa M. Ezra, 27/2 Comm/Ent, Hastings Communications and Entertainment Law Journal 383 (2005)

"No Animals Were Harmed…": Protecting Chimpanzees from Cruelty Behind the Curtain by Lorraine L. Fischer, 27/2 Comm/Ent, Hastings Communications and Entertainment Law Journal 405 (2005)

Words Signifying Nothing? The Evolution of § 315(a) in an Age of Deregulation and Its Effects on Television News Coverage of Presidential Elections by Colin Vandell, 27/2 Comm/Ent, Hastings Communications and Entertainment Law Joural 443 (2005)

FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT LAW JOURNAL has published Volume 15, Number 1 with the following articles:

Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources:Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures? by Nancy Kremers, 15 Fordham Intellectual Property, Media & Entertainment Law Journal 1 (2004)

Voyeur War? The First Amendment, Privacy and Images from the War on Terrorism by Clay Calvert, 15 Fordham Intellectual Property, Media and Entertainment Law Journal 147 (2004)

Are DeCSS T-Shirts Dirty Laundry? Wearable, Non-Executable Computer Code as Protected Speech by Sara Crasson, 15 Fordham Intellectual Property, Media and Entertainment Law Journal 169 (2004)

How Do You Say "Big Media" in Spanish? Spanish-Language Media Regulation and the Implications of the Univision-Hispanic Broadcasting Merger on the Public Interest by Nicole Serratore, 15 Fordham Intellectual Property, Media & Entertainment Law Journal 203 (2004)

THE COLUMBIA JOURNAL OF LAW & THE ARTS has published Volume 28, Number 1 with the following articles:

Virtual Music Scores, Copyright and the Promotion of Marginalized Technology by Charles Cronin, 28/1 Columbia Journal of Law & the Arts (2004)

"Opting-Out": A Technical, Legal and Practical Look at the CAN-Spam Act of 2003 by Dominique-Chantale Alepin, 28/1 Columbia Journal of Law & the Arts (2004)

Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence by Samuel Butt, 28/1 Columbia Journal of Law & the Arts (2004)

Book Review: William W. Fisher III. Promises to Keep: Technology, Law, and the Future of Entertainment by Kristin Blemaster, 28/1 Columbia Journal of Law & the Arts (2004)

THE COMPUTER & INTERNET LAWYER, published by Aspen Publishers and edited by Arnold & Porter, has issued Volume 22, Number 3 with the following articles:

The Debate over Sony-Betamax and Peer-to-Peer File Sharing: Will the Supreme Court Settle It in MGM v. Grokster? by Jeffrey G. Knowles, 22/3 The Computer & Internet Lawyer 1 (2005) (for publisher, see above)

Protecting and Licensing Software: Copyright and Common Law Contract Considerations by Lateef Mtima, 22/3 The Computer & Internet Lawyer 13 (2005) (for publisher, see above)

DMCA Subpoenas Improper for ISP That Acted Merely as a Conduit, 22/3 The Computer & Internet Lawyer 27 (2005) (for publisher, see above)

Copyright Duration and the Progressive Degeneration of a Constitutional Doctrine by Kenneth D. Crews, 55 Syracuse Law Review 189 (2005)

Cyberspace in Three Dimensions by Renato Mariotti, 55 Syracuse Law Review 251 (2005)

Copyright Monopoly vs. Public Access-Why the Law Should Not Be in Private Hands by Jessica C. Tones, 55 Syracuse Law Review 371 (2005)

THE ENTERTAINMENT LAW REVIEW, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 16, Number 2 with the following articles:

Unpaid and Under-reported Royalties: Initiatives to Enhance the Rights of Royalty Recipients by Mark Fox and Tracey Anderson, 16/2 Entertainment Law Review 27 (2005) (for website, see above)

Format Rights: Not so Simple for Simon by Sean McTernan, 16/2 Entertainment Law Review 32 (2005) (for website, see above)

The New Film Tax Relief by Michael Gilbert, 16/2 Entertainment Law Review 35 (2005) (for website, see above)

Interim Restraint Orders: Clarification of a s.12(3) of the Human Rights Act 1998 by Mark Lewis and Charlotte Hinton, 16/2 Entertainment Law Review 37 (2005) (for website, see above)

How to Stay a Millionaire by Tom Amlot and Medwyn Jones, 16/2 Entertainment Law Review 39 (2005) (for website, see above)

Book Review: On the Origin of the Right to Copy by Ronan Deazley, 16/2 Entertainment Law Review 41 (2005) (for website, see above)

Software as Crime: Japan, the United States, and Contributory Copyright Infringement by Salil K. Mehra, 79 Tulane Law Review 265 (2004)

From Hit Man to a Military Takeover of New York City: The Evolving Effects of Rice v. Paladin Enterprises on Internet Censorship by Andrianna D. Kastanek, 99 Northwestern University Law Review (2004)

Virtual Spaces Formed by Literary Works: Should Copyright or Property Rights (or Neither) Protect the Functional Integrity and Display of a Web Site? by Jill E.C. Yung, 99 Northwestern University Law Review (2004)

Cabining Intellectual Property through a Property Paradigm by Michael A. Carrier, 54 Duke Law Journal 1 (2004)

Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright? by Peter Eckersley, 18 Harvard Journal of Law & Technology 85 (2004)

Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation by Anthony E. Varona, 6 Minnesota Journal of Law, Science & Technology (2004)

Reform in the "Brave Kingdom": Alternative Compensation Systems for Peer-to-Peer File Sharing by Joseph Gratz, 6 Minnesota Journal of Law, Science & Technology (2004)

THE EUROPEAN INTELLECTUAL PROPERTY REVIEW, published by Sweet and Maxwell, www.sweetandmaxwell..co.uk, has issued Volume 27, Issues 2 and 3 with the following articles:

Of Encryption and Devices: The Anti-Circumvention Provision of the Malaysian Copyright Act 1987 by L. T. Khaw, 27/2 European Intellectual Property Review 53 (2005) (for website, see above)

Book Review: Character Merchandising in Europe by Ellie Palmer, 27/2 European Intellectual Property Review 82 (2005) (for website, see above)

Book Review: Economics, Law and Intellectual Property by Dr. Ian Walden, 27/2 European Intellectual Property Review 82 (2005) (for website, see above)

Sponsorship of Sports Events and Ambush Marketing by Carolina Pina and Ana Gil-Robles, 27/3 European Intellectual Property Review 93 (2005) (for website, see above)

Copyright and the P2P Challenge by Patricia Akester, 27/3 European Intellectual Property Review 106 (2005) (for website, see above)

Football Fixtures, Horseraces and Spin-offs: The ECJ Domesticates the Database Right by Mark J. Davison and P. Bernt Hugenholtz, 27/3 European Intellectual Property Review 113 (2005) (for website, see above)

Joint Authorship in a Copyright Work Revisited by Thorsten Lauterbach, 27/3 European Intellectual Property Review 119 (2005) (for website, see above)

Copyright in Commissioned Works: A Cause for Uncertainty by Rebecca Baines, 27/3 European Intellectual Property Review 122 (2005) (for website, see above)

Double Standard: A Comparison of British and American Defamation Law by Michael Socha, 23 Penn State International Law Review 471 (2004)

Unauthorised: Some Thoughts upon the Doctrine of Authorisation of Copyright Infringement in the Peer-to-Peer Age by Michael Napthali, 16/1 Australian Intellectual Property Journal 5 (2005) (published by Lawbook Co. Ltd., 44-50 Waterloo Road, N. Ryde NSW 2113 Australia)

The Name of the Game-An Analysis of Naming Right Deals, 12/1 Sports Law Administration and Practice 1 (2005) (www.informalaw.com)

Digital Rights and Wrongs: Intellectual Property in the Information Age by Norman E. Bowie, Spring Business and Society Review: Journal of the Center for Business Ethics at Bentley College 77 (2005)

Educational Programs Calendar:

Representing Your Local Broadcaster: 24th Annual Legal Forum, Sunday, April 17, 2005, The Bellagio, Las Vegas, Nevada. The program is sponsored by the American Bar Association Forum on Communications Law, the National Association of Broadcasters, and the Federal Communications Bar Association. For additional information, contact the ABA Forum staff Teresa Ucok at 312-988-5658 or e-mail tucok@staff.abanet.org.

The Integration of Hollywood and Wall Street, Saturday, April 23, 10am-5pm in Rm. 175 Dodd Hall on the UCLA campus. Taught by attorney William L. Abrams, this new UCLA Extension Entertainment Studies and Performing Arts seminar uses hypothetical and real-world case studies of new production entities to illustrate essential issues of business planning, implementation, and management, and cover various methods of acquiring, merging, and financing production companies and strategically integrated entities. Fee: $115. For more information call (310) 825-9064 or visit uclaextension.edu/entertainmentstudies for complete course description and online enrollment.

International Trademark Association 127th Annual Meeting, May 14-18, San Diego Convention Center, San Diego. Among the many sessions, the keynote address by CMG Worldwide Chairman and CEO Mark A. Roesler will highlight Navigating Intellectual Property Rights for Celebrities. Other panels will examine That's Entertainment: Trademarks in Popular Culture; Product Placement and Misplacement-The Good, the Bad and the Ugly; Sports Marketing-The Real Dream Team; Toy, Entertainment and Sports Industries Breakout-Marketing to Children; Character Licensing and Co-Branding; Use (and Misuse) of Third-Party Trademarks and Trade Dress; Celebrity Endorsements-Pros and Cons; Merchandising and Co-Promotion and the Movies; and Negotiating Licensing and Sponsorship Agreements Workshop. For additional information, contact www.inta.org/sandiego.

Litigating Trademark, Domain Name, and Unfair Competition Cases, May 19-20, Washington, D.C. This Sixth Annual Advanced American Law Institute-American Bar Association program considers Developing the Litigation Strategy; Developing and Executing the Discovery Plan; Using the Internet in Trademark Litigation; Strategies to Develop and Detect Confusion Evidence; Trademark Dilution after Victoria's Secret; Use of Expert Witnesses; Strategies for Funding IP Litigation: Insurance and Other Avenues; Ethical Issues; Strategies for Dealing with Infringements and Related Issues Outside the United States; Temporary Restraining Orders, Injunctions, and Seizure Orders; Strategies for Mediation and Other Forms of Alternative Dispute Resolution; Trying the Intellectual Property Case to the Jury; Strategies for Securing and Obtaining Monetary Relief; and the View from the Bench. For additional information, phone 800-CLE-NEWS; FAX 215-243-1664; or online at www.ali-aba.org.

Advanced Seminar on Copyright Law 2005, May 23-24, New York City. Sponsored by the Practising Law Institute, the program will examine How to Deal with Copyright Ownership and Transfer Issues; How to Draft Licensing Agreements; the Important Issues in Copyright Litigation; Intersection of Entertainment Law and Copyright; Intersection of Trademark Law and Copyright; Intersection of Right of Publicity and Copyright; and Music and Movies on the Internet. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Advanced Seminar on Trademark Law 2005, June 30, New York City. This Practising Law Institute program will provide an Up-To-Date Look at Important Trademark Issues in the Face of Rapidly Occurring Economic and Technological Changes in the United States and the World. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Film & Television Law: Exploring the Fundamentals Facing the Entertainment Industry, June 23-24, Millennium Biltmore Hotel, Los Angeles. This second annual conference, sponsored by CLE International, considers Trademarks; Credits; Financing Feature Films; Hot Entertainment Industry Guild and Employment Issues; Recent Developments in Contract Litigation; Copyright and Infringement Claims; the Legalities of Reality TV; The First Amendment Implications of the FCC's Recent Indecency Rulings; Motion Picture Development and Production; the Right of Publicity; Elimination of Bias; Ethics; the Treatment of Lost Profits in Television and Film Litigation Matters; the Right of Privacy; and Intellectual Property Rights on the Internet: A Panel Presentation. For further information, contact CLE International, 1620 Gaylord Street, Denver, CO 80206, call (800) 873-7130, e-mail registrar@cle.com or online at www.cle.com.