INTERNATIONAL DEVELOPMENTS

"Fairness in Music Licensing Act" costs European publishers and songwriters $1.1 million a year in U.S. public performance royalties, WTO arbitrators determine

Music publishers and songwriters who are nationals of countries in the European Communities have lost $1.1 million a year in public performance royalties from the United States since 1998, as a result of amendments to the U.S. Copyright Act made by the "Fairness in Music Licensing Act." That is the conclusion reached by a panel of three arbitrators in a proceeding brought against the United States by the European Communities before the World Trade Organization. As a result, the E.C. eventually may retaliate against the U.S. by imposing tariffs or quotas on American made goods imported by E.C. countries in amounts equal to these lost royalties (for reasons explained in the Editor's Note and Opinion below).

The arbitrators' decision is the third in a proceeding that began in January 1999 when the E.C. complained that the "Fairness in Music Licensing Act" violates the Berne Convention and thus U.S. obligations under the WTO TRIPs Agreement (ELR 20:11:4). The Fairness in Music Licensing Act amended section 110(5) of the Copyright Act so that it now permits many restaurants, bars and retail stores to publicly perform musical compositions - by playing radio and television broadcasts of those compositions - without needing public performance licenses to do so (ELR 20:6:9).

Though the United States mounted a spirited defense to the E.C.'s claims, a WTO dispute resolution panel agreed with the E.C., and in July 2000, it issued a decision finding that the Fairness in Music Licensing Act does indeed violate Berne and TRIPs (ELR 22:2:7).

The United States chose not to appeal that decision and thus became obligated to repeal the Fairness in Music Licensing Act within a "reasonable period of time." The U.S. and the E.C. could not agree on how much time would be "reasonable," and thus that issue was submitted to arbitration. In January 2001, WTO arbitrators decided that the U.S. could have until July 27, 2001 (ELR 22:9:8). Just a few days before that deadline, it was extended by agreement between the E.C. and the U.S. until December 31, 2001 "or the date on which the current session of the US Congress adjourns, whichever is earlier."

In the meantime, however, the case proceeded to the next stage which required a determination of "the nature and level of the benefits [which otherwise would have been received by E.C. publishers and songwriters] which are being nullified or impaired" by the Fairness in Music Licensing Act. The E.C. and the U.S. could not agree on an amount. The E.C. contended that its music publishers and songwriters are losing almost $25.5 million a year in royalties, while the U.S. contended they are losing only $773,000 a year or less.

The arbitrators' decision that the amount is actually $1.1 million a year, while more than the U.S. estimate, is less than one-twentieth of the E.C. estimate. In this respect, then, it can be said that the United States "won" this round of the case.

There are several reasons the U.S. and the E.C. were so far apart on how much damage the Fairness in Music Licensing Act is doing to E.C. publishers and songwriters.

* The E.C. and U.S. had different views about whether the damage should be measured by the amount of royalties that all U.S. restaurants, bars and retail

stores should have been paying (the E.C.'s position), or only by those royalties that would have been paid by restaurants, bars and stores that ASCAP and BMI would have licensed (the U.S.'s position) if the Fairness in Music Licensing Act had not been passed.

* They also disagreed about whether the damage should be measured by the royalties that would have been collected by ASCAP and BMI on behalf of E.C. publishers and songwriters (the E.C.'s position), or only the amount that would have been distributed by ASCAP and BMI to E.C. publishers (or their U.S. subpublishers) and songwriters (the U.S.'s position).

* They could not agree on whether the amount should be calculated by taking, as a starting point, the number of restaurants, bars and stores that are improperly exempted (by the Fairness in Music Licensing Act) from paying public performance royalties (the E.C.'s position), or whether the starting

point should be the amount of royalties that were actually paid by ASCAP and BMI to E.C. publishers and songwriters before the Fairness in Music Licensing Act became law (the U.S.'s position).

* Finally, because the arbitrators could not obtain all of the exact data necessary for making their calculations, estimates had to be made in some areas; and the U.S. and E.C. were unable to agree on the proper figures for some of those estimates.

The arbitrators - Mr. Ian F. Sheppard, Mrs. Margaret Lian, and Mr. David Vivas-Eugui - agreed with the United States on most of these issues.

While the arbitrators agreed with the E.C. that all U.S. users of music should be licensed and should pay licensing fees, the arbitrators noted that in actual practice, E.C. publishers and songwriters rely on ASCAP and BMI to collect their public performance royalties; and ASCAP and BMI do not in fact attempt to license all restaurants, bars and stores, because the cost of licensing some would exceed the fees that could be collected from them. The arbitrators therefore decided that damages should be measured by reference to licenses that ASCAP and BMI actually would have issued if the Fairness in Music Licensing Act had not been passed.

The arbitrators determined that the E.C.'s damages should be determined with reference to the amount of distributions that ASCAP and BMI would have made to E.C. publishers and songwriters, rather than the license fees ASCAP and BMI would have collected from restaurants, bars and stores. This was so, the arbitrators explained, because the amounts actually lost by E.C. publishers and songwriters are those they would have received, after ASCAP and BMI deducted their own collection and administrative costs.

The arbitrators determined that they should start with the amounts paid to E.C. publishers and songwriters by ASCAP and BMI before the Fairness in Music Licensing Act became law, rather than with the number of restaurants, bars and stores that are improperly exempted by the Act. They reached this conclusion, because even before the Act was passed in 1998, some restaurants, bars and stores were exempt under the old "home style receiver" exemption; and the arbitrators decided that amounts lost by E.C. publishers and songwriters under that exemption were not at issue in this case.

To calculate the amount lost by E.C. publishers and songwriters as a result of the Fairness in Music Licensing Act, the arbitrators:

* took the amount ASCAP and BMI distributed to E.C. publishers and songwriters annually, before the

Act was passed (an amount the decision does not reveal, because it was considered to be confidential);

* determined how much of that amount was attributable to license fees paid by restaurants, bars and stores, by multiplying the total amount paid by 18.45% which is the percentage of total domestic receipts attributable to the "general licensing" category (by ASCAP), and then multiplying that by 50% which is the estimated percentage of "general licensing" fees attributable to restaurants, bars and stores; and

* determined how much of that amount was attributable to radio and television play (rather than, say, live performances or the use of CD players), by multiplying that amount by an undisclosed percentage (because the percentage was considered confidential).

These calculations led the arbitrators to conclude that before the Fairness in Music Licensing Act was passed, E.C. publishers and songwriters received $1.55

million a year on account of radio and television play of their compositions by restaurants, bars and stores in the U.S. The arbitrators then:

* determined that 58.5% of this $1.55 million - or $0.91 million - was paid by restaurants, bars and stores that became exempt because of the Act; and the arbitrators

* adjusted this $0.91 million to take into account "the evolution of the market" from 1998 until the arbitration began in July 2001; they did so

* by increasing the $0.91 million by the percentage of growth in the U.S. gross domestic product for 1998, 1999, 2000 and the first six months of 2001 (i.e., 5.6%, 5.5%, 6.5% and 1.7%).

These calculations yielded the $1.1 million figure the arbitrators decided was the amount per year E.C. publishers and songwriters have lost, as a result of the public performance fee exemptions that the Fairness in Music Licensing Act has improperly given to restaurants, bars and stores.

Editor's Note and Opinion: The arbitrators' decision that E.C. publishers and songwriters have suffered damage of $1.1 million a year since 1998 does not lead to a "judgment" that the E.C. can collect from the U.S. Instead, if the U.S. does not repeal the Fairness in Music Licensing Act by the December 31, 2001, deadline, the E.C. will be eligible to seek "compensation" from the U.S. or even to suspend "obligations" it owes the U.S. under the WTO agreement.

"Suspension of obligations" is a polite way of describing the initiation of a trade war. The WTO Dispute Settlement Understanding provides that "the general principle is that the complaining party"- in this case, the E.C. - "should first seek to suspend . . . obligations in the same sector(s) as that in which the panel . . . found a violation. . . ." This might mean, for example, that the E.C. would "suspend" payment of copyright royalties to the United States - royalties the E.C. otherwise would have paid, say, on account of public performances of American music in Europe. However, American songwriters and music publishers are as upset as their European counterparts by the Fairness in Music Licensing Act, and American songwriters and music publishers actively lobbied against its enactment in 1998. The E.C. presumably knows this, and thus may chose to skip "the general principle" in favor of an alternate principle permitted by the WTO Dispute Settlement Understanding. The alternate principle would authorize the E.C. "to suspend . . . obligations in other sectors." It would, for example, permit the E.C. to impose tariffs on goods manufactured in the United States that are exported to Europe.

The Fairness in Music Licensing Act was approved by a majority of the members of both the House and the Senate, and it was signed (rather than vetoed) by President Bill Clinton - even though all were told in advance that the Act probably would be found to violate TRIPs, just as it actually was.

While this means that blame for the Act can fairly be spread around, a bigger share should go to Representative James Sensenbrenner Jr. The Act's passage was spearheaded by Representative Sensenbrenner, and he now is Chairman of the House Judiciary Committee - the very committee that would have jurisdiction over legislation to repeal the Fairness in Music Licensing Act. In the wake of the WTO's original ruling that the Act violates TRIPs, an unidentified Sensenbrenner "spokeswoman" told the Hollywood Reporter that the Fairness in Music Licensing Act "is U.S. law, and allowing an international body to say, 'You will change the law,' is not a good precedent to set." (Hollywood Reporter, Nov. 10-12, 2001, pg. 8) Sensenbrenner also reportedly wrote to the United States Trade Representative, protesting the government's decision not to appeal the WTO ruling, arguing that despite the WTO ruling, the Act is consistent with U.S. obligations as a WTO member, in his opinion. Sensenbrenner then is unlikely to permit the Act to be repealed, so long as he heads the House Judiciary Committee.

This means that E.C. tariffs or quotas on American made goods are likely. The question is which goods will the E.C. choose to sanction. Sensenbrenner represents a district in Wisconsin. The state of Wisconsin is home to a huge number of manufacturers, including, for example, Harley-Davidson. What a perfect irony it would be if the E.C. chose to impose tariffs on Harley-Davidson motorcycles and other

Wisconsin-made goods. If the E.C. did that, perhaps Representative Sensenbrenner would come to understand that compliance with international law - as determined by an international body that the U.S. has used to good advantage in other disputes - is in fact an excellent precedent to set.

United States - Section 110(5) of the US Copyright Act - Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1 (Nov. 9, 2001), available at www.wto.org/english/tratop_e/dispu_e/160arb_25_1_e.pdf [ELR 23:6:4]

World Wildlife Fund wins ruling from British court that World Wrestling Federation breached 1994 contract by using "WWF" initials on its website and elsewhere

It looks as though the World Wrestling Federation will have to stop using its "WWF" initials, as a result of a lawsuit it has lost in Great Britain to the World Wildlife Fund, an organization also known by the initials "WWF." The Fund's lawsuit - filed in the Chancery Division of the High Court of Justice - did not assert claims for trademark infringement. Instead, the Fund alleged that the World Wrestling Federation breached a 1994 contract by which the Federation agreed not to use "WWF" except in very limited ways.

The 1994 contract between the Fund and the Federation was an agreement by which the two organizations settled several trademark infringement lawsuits the Fund had filed or threatened in a number of countries, one of which - in Switzerland - the Fund had already won. The World Wrestling Federation complied with the contract for a few years. But in 1997, it adopted the website address "www.wwf.com" and resumed using its initials "at will and on an increasing scale."

In response to the Fund's lawsuit, the World Wrestling Federation admitted that it had broken the 1994 contract; but it argued that the contract was an unlawful restraint of trade and thus void. The Fund of course thought otherwise, and made a motion for summary judgment, which has been granted by Justice Jacob.

Justice Jacob noted that intellectual property rights themselves impose certain restraints, and thus an agreement by which one party agrees not to infringe the intellectual property rights of another cannot automatically be considered an unenforceable restraint. Instead, the Justice ruled, the agreement between the Fund and the Federation would improperly restrain trade only if it (a) "actually imposes a real fetter on [the Federation's] trade," (b) "beyond any reasonably arguable scope of protection" for the Fund's WWF trademark, and (c) the restraint provides protection which the Fund does not reasonably need.

The World Wrestling Federation did convince Justice Jacob that a ban on its use of "WWF" would impose a "real fetter" on its trade. This was so, the Justice explained, because the Federation has been using those initials for some time, and they have acquired "some importance in its trade."

However, Justice Jacob concluded that while the Federation's use of "WWF" in some countries may not have violated the Fund's trademark rights, it did infringe the Fund's trademark in other countries, including Switzerland where the Fund had already won an infringement suit, and in the Benelux countries where infringements may be proved by merely showing that consumers "associate" one company's goods or services with another's mark.

Moreover, the Fund persuaded Justice Jacob that it did have a legitimate reason for wanting to prevent the Federation from using "WWF." This was so, the Justice agreed, because "At the time [the agreement was entered into] the Federation had a very insalubrious image. . . . Many would find the Federation's activities meretricious. Some would say its glorification of violence is somewhat unsavoury." For these reasons, Justice Jacobs concluded that "the Fund had a legitimate interest in any injurious association with the Federation, . . . in the initials remaining unsullied, [and] in putting as much clear water as possible between it and the Federation."

For these reasons, the 1994 agreement did not restrain trade improperly and is enforceable.

Justice Jacob rejected the World Wrestling Federation's argument that the Fund should be awarded damages rather than an injunction. He ruled instead that the Fund is entitled to an injunction, including one that bars the Federation from continuing to use the "www.wwf.com" website address. The World Wrestling Federation did score one victory however; Justice Jacobs denied the Fund's motion to amend its complaint to seek recovery of the Federation's profits.

The World Wildlife Fund was represented by Christopher Morcom QC and Mark Brealey, instructed by Edwin Coe. The World Wrestling Federation was represented by Christopher Carr QC, Siobhan Ward and Emma Himsworth, instructed by S J Berwin.

WWF - World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc., Case No. HC/000030 (Chancery Div. High Court of Justice 2001), available at http://wood.ccta.gov.uk/courtser/judgements.nsf [ELR 23:6:6]

Allegedly defamatory article about Melbourne businessman Joseph Gutnick in "Barrons Online" was published in Australia, even though Dow Jones' web servers are in New Jersey, Australian court rules in deciding it has jurisdiction to hear case

Dow Jones & Company will have to defend itself in a court in Australia in a defamation lawsuit that has been filed against it by Melbourne businessman Joseph Gutnick. The lawsuit is Gutnick's response to an article that appeared in Barrons Online, one of the periodicals available to subscribers to Dow Jones' website. The offending article, entitled "Unholy Gains," suggested that Gutnick was a tax-evader and money launderer.

Gutnick does business in the United States, as well as in Australia, but he has not filed suit in the U.S. Instead, he filed suit in the Supreme Court of Victoria at Melbourne, seeking to recover only for damages allegedly done to his reputation in the Australian state of Victoria on account of those portions of the article that suggested that he had financial dealings, while in Victoria, with a money-launderer.

Dow Jones sought dismissal or a stay of Gutnick's lawsuit, arguing that the Australian court does not have jurisdiction to hear the case, and that even if it does, it should not exercise jurisdiction because a court in New Jersey would be the more convenient forum. Both of these arguments were based on the fact that although the offending article was seen by Australian subscribers to Dow Jones' website, the article was written by an American, for an American audience, about the impact of Gutnick's actions on Americans, and was made available to subscribers only from Dow Jones' servers, all of which are located in New Jersey.

As compelling as Dow Jones' arguments seem, they did not persuade Justice John Hennigan. In a lengthy opinion that canvasses precedents from courts on three continents, Justice Hennigan denied Dow Jones' motion. He held that his court does have jurisdiction to hear the case, and that his court is more convenient than one in New Jersey.

Dow Jones argued that the jurisdictional issue should be decided on the basis of the country where the offending article was "published," and that it was published in New Jersey rather than in Victoria.

Apparently, the facts in support of this argument largely involved the technology used by Dow Jones to operate its web server. But Justice Hennigan determined that the issue would not be decided on the basis of technology. Instead, he decided that "publication" occurs "where and when the contents of the publication . . . are seen and heard. . . ." Using this standard, the Justice concluded that "the article 'Unholy Gains' was published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones's payment and performance conditions and by the use of their passwords."

The Justice rejected Dow Jones' arguments for New Jersey as the place of publication, saying those arguments were unduly pro-American. "To say that the country where the article is written, edited and uploaded and where the publisher does its business, must be the forum is an invitation to entrench the

United States, the primary home of much of Internet publishing, as the forum," Justice Hennigan said.

The Justice also was unmoved by Dow Jones' argument that it would be unfair for publishers to have to litigate in the many countries in which their statements are read on the Internet. That argument, he said, "must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo, frequently not of notable means, who would at enormous expense and inconvenience have to embark upon the formidable task of suing in the USA . . . where the libel laws are, in many respects, tilted in favour of defendants, or, if you will, in favour of the constitutional free speech concepts and rights developed in the USA which originated in the liberal construction by the courts of the First Amendment."

This simply means, Justice Hennigan advised Dow Jones, "that if you do publish a libel justiciable in another country with its own laws (not mere copies of the U.S. law as [Dow Jones' arguments] appear to favour, perhaps because they are tilted in favour of the defendant), then you may be liable to pay damages for indulging that freedom."

Australian law - like U.S. law - includes the doctrine of "forum non conveniens." But Justice Hennigan was not receptive to Dow Jones' argument that his court was an inconvenient forum. After balancing the relevant factors, he concluded that his court is the appropriate and convenient forum for the case. "Many of [Dow Jones'] claimed difficulties are more imagined than real," the justice said, "but, at the end of the day, the most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this

State, suing only upon publication in this State and disclaiming any form of damages in any other place."

Joseph Gutnick was represented by J. Sher, Q.C., and M. Wheelahan, and solicitors Clayton Utz. Dow Jones was represented by G. Robertson, Q.C., and T. Robertson, and solicitors Gilbert & Tobin.

Editor's note: Dow Jones has appealed Justice Hennigan's ruling. If it is affirmed, and the case proceeds to trial, Gutnick may win personal vindication in Justice Hennigan's courtroom in Australia. But unless Dow Jones owns assets in that country, it is unlikely Gutnick will win a money judgment that is enforceable in the United States. On at least three occasions, U.S. courts have refused to enforce British libel judgments against U.S. residents, because British libel law was deemed to be so "contrary to public policy" that it was not entitled to recognition under principles of "comity" (ELR 14:2:13, 17:1:24, 20:1:18).

Australian defamation law - as described by Justice Hennigan himself - has the very same characteristics that made American judges conclude that British libel law is "contrary" to American "public policy."

Gutnick v. Dow Jones & Company, [2001] VSC 305 (available at www.austlii.edu.au/au/cases/vic/VSC/2001/305.rtf) [ELR 23:6:7]

IN THE NEWS

UMG Recordings infringed copyrights to musical compositions by making copies on web servers so songs can be streamed to Farmclub.com users; server copies were not authorized by Harry Fox Agency or Copyright Act compulsory licenses, federal District Court decides

UMG Recordings has lost a newsworthy copyright case to The Rodgers and Hammerstein Organization and other music publishers - though the decision is less significant as a matter of legal doctrine than it seemed from first headlines.

At issue in the case is whether UMG and its Farmclub.com subsidiary obtained mechanical licenses authorizing them to copy Universal's recordings to Farmclub's web servers so they can be streamed to listeners over the Farmclub.com website. While UMG owns the copyrights to the recordings that have been copied to Farmclub's servers, Rogers and Hammerstein and other music publishers own the copyrights to the musical compositions on those recordings. In the process of copying the recordings, those musical compositions were necessarily copied as well.

UMG doesn't deny copying the publishers' compositions, nor even its need to have mechanical licenses to do so. Rather, UMG contends that it does have the necessary licenses, from either of two possible sources: in writing from the Harry Fox Agency, the publishers' agent; or as a result of the compulsory license granted by section 115 of the Copyright Act. The publishers disagree and sued UMG and the Farmclub for copyright infringement, in federal court in New York City.

In response to cross-motions for summary judgment, Judge John Martin has agreed with the publishers, completely. As a result, the judge has granted the publishers' motion and has denied UMG's.

UMG obtained written mechanical licenses from the Harry Fox Agency by submitting a standard Fox Agency form called a "Mechanical License Request" for each musical composition. The request included the catalog number and format (such as cassette or CD) for each license requested. In response, the Fox Agency sent UMG standard "License" documents, each of which was "limited to one particular recording" of the musical composition "as performed . . . on the phonorecord number identified [in the request]."

Since the copies made on Farmclub's web servers were not those identified by catalog number and format on the Fox Agency licenses, those licenses simply did not cover the server copies, Judge Martin concluded.

The Copyright Act's compulsory license did not help UMG either. Section 115 of the Act gives record companies a license to make records of musical compositions, but "only . . . to distribute them to the public for private use." Farmclub.com does not sell records to the public when it streams them to the listeners. Even UMG concedes that Farmclub's server copies are not for distribution to the public. As a result, the Copyright Act's compulsory license does not authorize Farmclub's server copies, Judge Martin ruled.

Finally, UMG argued that "in the evolving world of Internet music," it should be permitted "to distribute music without paying royalties to [music publishers] until the Copyright Office decides how to set royalty rates for Internet music services." In November 2000, the RIAA asked the Copyright Office to rule that the compulsory license created by section 115 of the Copyright Act applies to the online streaming of music, and to determine the royalty rates to be paid for that license. That proceeding is still pending.

Judge Martin however, refused to defer ruling on the publishers' infringement claims until the Copyright Office proceeding is completed. In fact, the judge found UMG's request to be "particularly disingenuous" because UMG itself had filed a successful lawsuit of its own against website operator MP3.com "to protect their sound recordings from infringement in cyberspace." The infringement alleged and proved by UMG in that case occurred as a result of MP3.com's copying of UMG's recordings onto MP3.com's web servers so MP3.com could stream those recordings to its own users (ELR 22:4:4) - behavior identical to UMG's own, and for which it has been sued by music publishers.

The Rodgers and Hammerstein Organization and other music publishers were represented by Carey R. Ramos of Paul Weiss Rifkind Wharton & Garrison in

New York City. UMG and Farmclub.com were represented by Hadrian R. Katz and Robert A. Goodman of Arnold & Porter in Washington D.C. and New York City.

Rodgers and Hammerstein Organization v. UMG Recordings, Inc., Case No. 00 Civ. 5444 (JSM) (S.D.N.Y. Sept. 25, 2001), available at www.nmpa.org/legal/Scanned_.pdf [ELR 23:6:9]

Court of Appeals issues opinion explaining why it vacated preliminary injunction that had barred publication of "The Wind Done Gone" in infringement action by owner of copyright to "Gone with the Wind"

The Eleventh Circuit Court of Appeals has issued the "comprehensive opinion" it promised last May when, in a brief order, it vacated a preliminary injunction that until then had barred Houghton Mifflin from publishing Alice Randall's novel The Wind Done Gone.

The preliminary injunction was issued at the request of Suntrust Bank, the current owner of the copyright to Margaret Mitchell's Gone with the Wind, in a lawsuit that alleges that The Wind Done Gone infringes the copyright to Gone with the Wind. District Judge Charles Panell had concluded that Randall's new novel is substantially similar to Mitchell's classic novel, and that the fair use doctrine did not protect Randall's novel from being an infringement (ELR 22:12:4).

On appeal, however, the Eleventh Circuit vacated the injunction. It did so immediately following oral argument, in a per curiam order that said that it was "manifest that the entry of a preliminary injunction in this copyright case was an abuse of discretion in that it represents an unlawful prior restraint in violation of the First Amendment." (ELR 23:1:4)

The appellate court's newly-issued "comprehensive opinion" places very little weight on the First Amendment. It begins by agreeing with District Judge Panell that The Wind Done Gone is substantially similar to Gone with the Wind. Writing for the appellate court, Judge Stanley Birch acknowledges that "Our own review of the two works reveals substantial use of GWTW [Gone with the

Wind]. TWDG [The Wind Done Gone] appropriates numerous characters, settings, and plot twists from GWTW."

This is so, Judge Birch explained, because "TWDG copies, often in wholesale fashion, the descriptions and histories of these fictional characters and places from GWTW, as well as their relationships and interactions with one another. TWDG appropriates or otherwise explicitly references many aspects of GWTW's plot as well, such as the scenes in which Scarlett kills a Union soldier and the scene in which Rhett stays in the room with his dead daughter Bonnie, burning candles. After carefully comparing the two works, we agree with the district court that, particularly in its first half, TWDG is largely 'an encapsulation of [GWTW] [that] exploit[s] its copyrighted characters, story lines, and settings as the palette for the new story.'"

On the other hand, the appellate court disagreed with District Judge Panell about whether The Wind Done Gone is protected from infringement liability by the fair use doctrine. "[T]he parodic character of TWDG is clear," Judge Birch said. "TWDG is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in GWTW. The fact that Randall chose to convey her criticisms of GWTW through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive TWDG of fair-use protection."

Although The Wind Done Gone was published for profit - a factor that ordinarily weighs against fair use - the appellate court concluded that "based upon our analysis of the fair use factors we find, at this juncture, TWDG is entitled to a fair-use defense."

The appellate court also concluded that Suntrust "has failed to show, at least at this early juncture in the case, how the publication of TWDG, a work that may have little to no appeal to the fans of GWTW who comprise the logical market for its authorized derivative works, will cause it irreparable injury. To the extent that [it] will suffer monetary harm from the infringement of its copyright, harms that may be remedied through the award of monetary damages are not considered 'irreparable.'" Since preliminary injunctions are granted only to prevent "irreparable harms," this was another reason that supported the appellate court's earlier order vacating the preliminary injunction.

Suntrust Bank was represented by Martin Garbus and Richard Kurnit in New York City, and by William

Smith of Jones Day Reavis & Pogue in Atlanta. Houghton Mifflin was represented by Joseph M. Beck of Kilpatrick Stockton in Atlanta.

Suntrust Bank v. Houghton Mifflin Co., Case No. 01-12200 (11th Cir., Oct. 10, 2001), available at http://laws.findlaw.com/11th/0112200opnv2.html [ELR 23:6:10]

WASHINGTON MONITOR

FCC permits public television stations to carry advertising on "ancillary and supplementary services" on their digital television channels, though not on broadcast programming

Public television stations will be able to sell advertising, as a result of a recent ruling of the Federal Communications Commission. The ruling was requested by the Public Broadcasting Service and by the Association of America's Television Stations. This does not mean, however, that viewers of "Masterpiece Theatre" or "The News Hour with Jim Lehrer" will suddenly be seeing commercials for cars, tires, beer or soap. Nor does it mean that public stations will be able to discontinue their periodic pledge drives and other appeals for financial support.

The FCC's recent ruling was triggered by the advent of digital television and by the prospect that, eventually, public television stations (like commercial stations) will be switching from analog to digital broadcast channels. When that day comes, digital technology will enable stations to transmit video television programming, like "Masterpiece Theater" and "The News Hour," plus additional "ancillary and supplementary services" like subscription television, computer software distribution, data transmissions, teletext, interactive material, and aural messages - all over a single digital channel.

The Federal Communications Act (in section 399B) prohibits public broadcasters from making their "facilities available to any person for the broadcasting of any advertisement." At first blush, this would appear to prohibit public television stations from using their digital channels to transmit advertising, not only when they broadcast programming, but even when they transmit other things like data or text. That in fact is what the Media Access Project and other public interest groups argued to the FCC, in opposition to the public broadcasters' request for authority to carry advertising on their "ancillary and supplementary services."

The FCC, however, has agreed with the public broadcasters, rather than their public interest opponents. The question of whether public stations should be able to carry advertising on their "ancillary and supplementary services" turned out to be one of statutory interpretation rather than one of pure public policy.

The FCC determined that the existing statutory ban on advertising by public broadcasters affects only their "broadcasting" activities. The word "broadcasting" has been defined, in other FCC proceedings, to mean "programming" made "available to all members of the public, without any special arrangements or equipment." Things that public broadcasters do not make available to all members of the public, because special arrangements or equipment are necessary to get them, are not "broadcasting" but are instead "ancillary and supplemental services." As a result, the Federal Communications Act does not prohibit public broadcasters from carrying advertising on their "ancillary and supplemental services," the FCC concluded.

Public television stations "will continue to be prohibited from providing advertising on their free over-the-air service," the FCC made clear. "Moreover," the FCC ruled that public broadcasters must continue to "use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service and to provide at least one free over-the-air video program signal." This means, the FCC explained, that public stations must use "a 'substantial majority' of their entire digital capacity for noncommercial, educational programs," for which advertising may not be sold.

Though a majority of the FCC's members treated the issue as one of statutory interpretation, Commissioner Michael Copps dissented because he was troubled by the policy implications of the ruling. He was concerned, he explained, that "once we start down the road of commercialization, the Law of Unintended Consequences will kick in," so that viewers, foundations and Congress may be less likely to provide public broadcasters the financial support they have been providing until now.

Report and Order In the Matter of Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees, FCC MM Docket No. 98-

203 (Oct. 2001), available at www.fcc.gov/Bureaus/Mass_Media/Orders/2001/fcc01306.pdf [ELR 23:6:11]

NLRB determines that IATSE members, rather than IBEW members, are entitled to operate moving lights during St. Louis Blues pregame shows at Savvis Center

Hockey games once were just hockey games, even in the National Hockey League. Today, however, they include pregame theatrical productions involving, among other things, exotic equipment. At the Savvis Center in St. Louis, for example, the pregame shows for the St. Louis Blues feature lights that can move up and down, arc in different directions, narrow or widen their focus, change hundreds of colors, and project ads, logos, flag symbols and other pictures.

These lights are technical and their technology changes often, so most of those who use them simply rent them. The Savvis Center rented them for the 1999-2000 NHL season, and had them operated by employees who are members of IATSE. The collective bargaining agreement between the Savvis Center and IATSE provides that IATSE members will operate the Center's houselights, spotlights and temporary lighting; so this seemed to make sense, and other Savvis Center employees who are members of IBEW did not complain.

For the 2000-2001 season, Savvis bought the moving lights and had them installed by Center employees who are members of IBEW. The collective bargaining agreement between the Savvis Center and IBEW provides that IBEW members will maintain and operate all lighting "fixtures," so having IBEW members install the lights made sense, and the Center's employees who are IATSE members did not complain.

Once the lights were installed, however, IBEW took the position that the lights are "fixtures," and thus its members have the right to operate them. IATSE on the other hand took the position that its members - not IBEW members - are entitled to operate the moving lights. And just to be certain that the Savvis Center knew how serious IATSE was, IATSE sent the Center a letter saying that unless its members continued to operate the moving lights, they would "strike in protest," despite a no-strike clause in their contract.

Caught in the middle, the Savvis Center filed a charge with the National Labor Relations Board, asking it to determine which union's members get to work the moving lights. The NLRB has statutory authority to award disputed work to one union or another; and it uses a multi-factor test to do so. In this case, the NLRB decided that IATSE members should operate the moving lights at the Savvis Center.

In an opinion by Chairman Peter Hurgen and members Wilma Liebman and John Truesdale, the NLRB explained that the moving lights "are quite different from the other nontheatrical lighting fixtures in the arena" that are operated by IBEW members. The Savvis Center itself assigned the disputed work to IATSE members and prefers that they continue to perform it. During the 1999-2000 season, the work was done by IATSE members. Most other arenas in St. Louis that use moving lights have IATSE members operate them, while IBEW members do not operate moving lights anywhere in the St. Louis area. IATSE members working for the Savvis Center have been trained to operate the moving lights, while IBEW members have not. And finally, it would be more efficient to have IATSE members operate the moving lights, because during the pregame show, those lights are used in close conjunction with houselights and spotlights operated by IATSE members.

Stage Employees IATSE Local 6 (Savvis Center), 334 NLRB No. 1 (2001), available at www.nlrb.gov/slip334.html [ELR 23:6:12]

RECENT CASES

Federal appeals court affirms dismissal of Astrud Gilberto's Lanham Act claims against Frito-Lay and its ad agency, complaining of their use of her recording of "The Girl from Ipanema" in TV commercial; but appellate court vacates dismissal of Gilberto's state law claims so she can refile them in New York state court

After several years of litigation in federal courts, performer Astrud Gilberto has won the right to pursue legal claims against Frito-Lay and its ad agency on account of their use of her 1964 recording of "The Girl from Ipanema" in a television commercial for Baked Lays. She will have to do so in New York state court however, because the Second Circuit Court of Appeals has affirmed the dismissal of Gilberto's federal Lanham Act claims.

Frito-Lay's advertising agency, BBDO Worldwide, obtained licenses from the music publishers of the "Ipanema" composition and from PolyGram Records, the owner of the song's master recording. BBDO did not, however, obtain a license from Gilberto herself, because it believed that she retained no rights in the recording.

The commercial featured Miss Piggy and several attractive models and was in fact quite funny. Gilberto however was not amused. She sued Frito-Lay and BBDO in federal court alleging an assortment of theories, most though not all of which were dismissed early in the case (ELR 20:2:10). Following Gilberto's filing of an amended complaint, her entire case was dismissed, in two stages (in unpublished opinions).

In an opinion by Judge Pierre Leval, the Second Circuit affirmed the dismissal of Gilberto's Lanham Act claims. Judge Leval reasoned that although a musical work may serve as a trademark - just as Gilberto asserted - the Lanham Act did not give her trademark rights in her recording of "Ipanema." She claimed such rights by arguing that "Ipanema" is her "signature song," and that audiences associate it with her. Judge Leval, however, noted that "Many famous artists have recorded such signature performances that their audiences identify with the performer. Yet in no instance was such a performer held to own a protected mark in that recording."

On the other hand, Judge Leval ruled that Gilberto's state law claims should not have been dismissed. One of those claims was for the alleged violation of Gilberto's right of publicity under section 51 of the New York Civil Rights Law. By its own terms, that section is not violated by the use of the voices of artists in "musical productions" they have "sold or disposed of. . . ." In this case, Gilberto's right of publicity claim was dismissed on the theory that she had sold or disposed of her rights in the "Ipanema" recording. But Judge Leval held that she had not admitted doing any such thing. Gilberto's claims under New York unfair competition and unjust enrichment law were erroneously dismissed for the same reason, the judge said.

As a result, Judge Leval vacated the dismissal of these state law claims and remanded them to the lower court with instructions that they be dismissed without prejudice so that Gilberto may refile them in the New York state court.

Gilberto was represented by Annemarie Franklin in New York City. Frito-Lay and BBDO were represented by David S. Versfelt of Kirkpatrick & Lockhart in New York City.

Oliveira v. Frito-Lay, Inc., 251 F.3d 56, 2001 U.S.App.LEXIS 10486 (2d Cir. 2001) [ELR 23:6:13]

California Labor Commissioner must decide whether Connie Stevens' personal manager acted as unlicensed talent agent, before manager's lawsuit for commissions may proceed in court, California Supreme Court decides

Performer Connie Stevens was represented by personal manager Norton Styne for many years. Eventually the two had a bitter falling out, and Styne sued Stevens for millions of dollars in commissions. Styne alleged that Stevens owed him these commissions on account of profits the performer earned selling her own line of beauty products on the Home Shopping Network.

The case went to trial before a jury, and Styne won a $4.3 million verdict against Stevens. In some ways, however, that was only the beginning of the case. The jury's verdict was followed by a complicated series of procedural moves, the correctness of which eventually reached the California Supreme Court; and the case isn't over yet. The Supreme Court has issued a ruling that doesn't fully satisfy either Stevens or Styne, and that requires yet further proceedings before the California Labor Commissioner and then a California trial court.

Following the jury's verdict in favor of Styne, a California trial court judge set aside the verdict and granted Stevens' motion for a new trial, saying that he had erred in refusing to give the jury an instruction that

Stevens had requested. The instruction would have asked the jury to decide whether Styne had acted as an unlicensed talent agent when he got Stevens the Home Shopping Network deal. That was an important issue in the case, because if Styne did act as an unlicensed agent, his commission agreement with Stevens would be void, under the California Talent Agencies Act, and he would have been entitled to nothing from her.

Styne appealed the trial court's new trial order, arguing that he had not acted as an unlicensed agent, and that in any event, the one-year statute of limitations on Stevens' right to make such an argument had long since passed. The California Court of Appeal agreed with Styne's statute of limitations argument and reinstated the jury's $4.3 million verdict.

The California Supreme Court then agreed to review the case; and it has reversed again.

In a decision by Justice Marvin Baxter, the Supreme Court has held that because Stevens asserted Styne's failure to comply with the licensing requirement of the Talent Agencies Act only as a defense to Styne's lawsuit for commissions, the Act's one-year statute of limitations does not bar her from arguing that the law required him to have such a license. In other words, since she did not seek any affirmative relief against Styne (such as refund of commissions she previously had paid him), the one-year statute of limitations did not apply, and she is entitled to assert the Act's licensing requirement as a defense.

Justice Baxter also ruled that Stevens' defense could not be asserted for the first time in the lawsuit itself, as she in fact had done. Instead, Justice Baxter held, the question of whether Styne had acted as an unlicensed agent has to be submitted first to the

California Labor Commissioner, for a ruling on that issue. This is so, because the Talent Agencies Act requires such disputes to be submitted first to the Labor Commissioner; and Justice Baxter ruled that this is true, even when the issue is raised by performers purely in defense to commission lawsuits filed against them by their personal managers.

As a result of these rulings, Justice Baxter has reinstated the trial judge's order for a new trial. But he has instructed the trial court not to conduct the new trial until after the Labor Commissioner has considered and ruled on Stevens' contention that Styne acted as an unlicensed talent agent.

Norton Styne was represented by Barry B. Langberg and Michael Niborski of Stroock & Stroock & Lavan and by Deborah Drooz of Bronson Bronson & McKinnon in Los Angeles. Connie Stevens was represented by Howard L. Rosoff of Rosoff Schiffres &

Barta and by Patricia Glaser of Christensen Miller Fink Jacobs Glaser Weil & Shapiro in Los Angeles. The DGA, SAG and AFTRA, as amicus curiae, were represented by Leo Geffner of Geffner & Bush in Burbank.

Styne v. Stevens, 109 Cal.Rptr.2d 14, 26 P.3d 343, 2001 Cal.LEXIS 4236 (Cal. 2001)[ELR 23:6:13]

Music publisher may sue record company for unpaid mechanical royalties even though license agreement was signed by publisher's predecessor and some royalties were due prior to predecessor's assignment of agreement to publisher

Sabroso Publishing, Inc., has standing to sue Caiman Records America, Inc., for unpaid mechanical royalties, federal District Judge Salvador Casellas has held. This is so, the judge ruled, even though Caiman Records had entered into a mechanical license with Sabroso's predecessor, and the license was then assigned by the predecessor to Sabroso. Moreover, Sabroso has standing to sue Caiman Records, even though some of the unpaid royalties were due before the assignment to Sabroso took effect.

Judge Casellas had little trouble reaching this result, because in addition to transferring the predecessor's copyrights to Sabroso, the assignment document also transferred to Sabroso "all past, present and future actions for copyright infringement that have accrued to this date . . . and all actions for collection of monies due and payable . . . ."

Judge Casellas also ruled that his court in Puerto Rico has personal jurisdiction over Caiman Records' president, even though he is a Florida resident, because the company's president had availed himself of the laws of Puerto Rico and allegedly committed torts there. The record company's president did so, Judge Casellas explained, by being an officer of a Puerto Rican corporation, by traveling to Puerto Rico on record company business, by signing a licensing agreement with Sabroso which is a Puerto Rican company, and by authorizing the manufacture of allegedly infringing recordings in Puerto Rico.

For these reasons, the judge denied Caiman Records' and its president's motion to dismiss Sabroso's lawsuit.

Sabroso was represented by Jose Hernandez-Mayoral in San Juan. Caiman Records and its president were represented by Jorge E. Perez-Diaz of Pietrantoni Mendez & Alvarez in Puerto Rico.

Sabroso Publishing, Inc. v. Caiman Records America, Inc., 141 F.Supp.2d 224, 2001 U.S.Dist.LEXIS 6668 (D.P.R. 2001) [ELR 23:6:14]

Claims by creator of "Sabrina the Teenage Witch" against publisher Archie Comics are dismissed

Cartoonist Daniel DeCarlo is locked in legal battle with his long time publisher Archie Comics as a result of disputes between them concerning who owns the rights to comic strips apparently created by DeCarlo as long as a half-century ago.

Archie Comics already has prevailed in a lawsuit filed by DeCarlo claiming ownership of the "She's Josy" strip and characters (ELR 23:1:15), in a ruling that has been affirmed by unpublished summary order

(DeCarlo v. Archie Comic Publications, 2001 U.S.App.LEXIS 11671 (2d Cir. 2001)).

Now, in a separate declaratory relief lawsuit initiated by Archie Comics involving claims about the ownership of "Sabrina the Teenage Witch," the publisher has won again, at least with respect to part of the case. Judge Lewis Kaplan has granted Archie Comics' motion to dismiss DeCarlo's counterclaims (so that the only claims that remain in the case are those of Archie Comics).

In his counterclaims, DeCarlo alleged that licenses granted by Archie Comics to ABC for a television series, and to others for computer games and a website, violated his rights. And he asserted those rights by alleging state law claims for breach of fiduciary duty, unfair competition, misappropriation, conversion and unjust enrichment. In addition, he alleged that the television series credit line indicating it was "Based on Characters Appearing in Archie Comics" violated his rights under the federal Lanham Act.

Judge Kaplan dismissed DeCarlo's state law claims for unfair competition, misappropriation, conversion and unjust enrichment on the grounds that all of them are preempted by federal copyright law.

The judge dismissed DeCarlo's fiduciary duty claim because "The express and implied obligations assumed by a publisher in an exclusive licensing contract are not, as a matter of law, fiduciary duties."

And Judge Kaplan dismissed DeCarlo's Lanham Act claim, because the objected-to credit line "does not speak to the origin of the characters." As the judge read the credit, "It simply (and truthfully) states that the characters, whoever created them, appear in Archie comics. There are no allegations suggestive of confusion as to the source of the Sabrina programs," he concluded.

Archie Comic Publications was represented by Leora Herrmann of Grimes & Battersby in Mamaroneck (New York). DeCarlo was represented by Whitney North Seymour Jr. of Landy & Seymour in New York City.

Archie Comic Publications, Inc. v. DeCarlo, 141 F.Supp.2d 428, 2001 U.S.Dist.LEXIS 5193 (S.D.N.Y. 2001) [ELR 23:6:15]

Owners of Speedvision cable channel win dismissal of idea submission lawsuit by developers who had earlier pitched their own proposal for a similar channel

Cox Communications and Comcast Corporation are investors in the Speedvision cable channel. Speedvision features programming devoted to motor vehicles and is, in many respects, quite similar to another proposed cable channel called The Auto Channel. The Auto Channel was conceived and developed by Robert Gordon and Marco Rauch who pitched it to Cox, apparently in some detail, before Cox and Comcast invested in Speedvision.

Naturally, Gordon and Rauch didn't respond in good cheer to the birth of Speedvision. In fact, they sued Cox and Comcast in federal court in Kentucky, alleging trade secret, breach of contract, and related state law claims. Their case, however, has not been successful. Judge John Heyburn has granted Cox and Comcast's motion for summary judgment and has dismissed the case with prejudice.

Judge Heyburn doubted that Gordon and Rauch's disclosures amounted to information that could be protected as trade secrets. But the judge didn't have to decide that issue, because he found that even if the information could have been protected, Gordon and Rauch themselves "made the information readily ascertainable" by sending it, "unsolicited, to nearly every major player in the cable industry." They made almost no effort to keep the information secret, the judge said. They didn't, for example, label it "confidential" or "proprietary." Nor did they ask anyone to sign a non-disclosure agreement. For these reasons, Judge Heyburn dismissed Gordon and Rauch's trade secret claims.

The judge also dismissed their contract claims. These claims failed, the judge explained, because Gordon and Rauch provided no evidence of an agreement on the essential terms of any contract. They did show that Cox had expressed "tremendous enthusiasm" for their Auto Channel ideas. "Optimism alone, however, cannot create binding obligations," Judge Heyburn explained.

Gordon and Rauch's other claims were similarly deficient, the judge concluded. While he "assume[d] that [Gordon and Rauch] were led-on by some of [Cox's] words and actions . . . the evidence of any actionable wrongdoing is too sparse to support the claimed causes of action," Judge Heyburn ruled.

Gordon and Rauch were represented by James E. Morreau, Jr., of Kruger Schwartz & Morreau in Louisville. Speedvision Network was represented by K. Gregory Haynes of Wyatt Tarrant & Combs in

Louisville. Cox Communications was represented by Janet P. Jakubowicz of Greenebaum Doll & McDonald in Louisville. Comcast Corporation was represented by John S. Reed II of Reed Weitkamp Schell Cox & Vice in Louisville.

Auto Channel, Inc. v. Speedvision Network, LLC, 144 F.Supp.2d 784, 2001 U.S.Dist.LEXIS 6263 (W.D.Ky. 2001) [ELR 23:6:15]

Artist Audrey Flack stated valid claims under Visual Artists Rights Act and Copyright Act against organization that commissioned her creation of sculpture of Queen Catherine, on account of allegedly defective repair work done on damaged clay model

Artist Audrey Flack has stated some valid claims against an organization that commissioned her to create a sculpture of Queen Catherine, a federal judge in New York City has held, in an opinion that denied part of the organization's motion to dismiss Flack's lawsuit against it. Though Judge Sidney Stein did dismiss some of the artist's claims, Friends of Queen Catherine, Inc., will have to continue to defend itself against allegations that it violated Flack's rights under the Visual Artists Rights Act (commonly known as "VARA") and the Copyright Act.

Queen Catherine is the namesake of the borough of Queens in New York City. Originally, Flack's sculpture of the queen was to have been placed on an East River site overlooking Manhattan. The project became controversial, even before a dispute erupted between Flack and Friends of Queen Catherine, because of opponents' assertions that Queen Catherine and her family had profited from the slave trade. As a result of that controversy, the East River site was lost, and work on the project was delayed.

During the delay, a clay model that had been created by Flack for the sculpture's face was damaged. Though Flack volunteered to do the necessary repairs (in return for an additional fee), Friends of Queen Catherine hired an artist named David Simon to do the repair work, rather than Flack herself. Simon was once Flack's assistant, but according to Flack, Simon did such a poor job that his repair work resulted in a "distorted, mutilated" model.

VARA grants artists the right to prevent destruction of works of "recognized stature." Judge Stein ruled that the damaged model could be a work of "recognized stature," even though it was but a step in the creation of what was intended to be a finished bronze sculpture. And the judge agreed that although VARA exempts modifications that are the result of conservation work, that exemption does not apply if "the modification is caused by gross negligence." Flack's complaint stated sufficient facts, the judge held, to state a VARA claim based on the repair work done by Simon - assuming those facts are proved at trial.

Judge Stein also ruled that Flack's complaint stated a valid claim for copyright infringement, based on Simon's alleged use of pictures of the original face to repair the damaged model.

The claims that Judge Stein did dismiss were VARA claims based on the actual damage to the clay model, and another based on the organization's authorization of the casting of the bronze sculpture without Flack's approval. The second of these claims was dismissed, because the offending bronze has not yet been created, and "VARA . . . does not cover works that do not yet exist," Judge Stein held.

Flack was represented by Barbara T. Hoffman in New York City. Friends of Queen Catherine was represented by Michael S. Oberman of Kramer Levin Naftalis & Frankel in New York City.

Flack v. Friends of Queen Catherine, Inc., 139 F.Supp.2d 526, 2001 U.S.Dist.LEXIS 4822 (S.D.N.Y. 2001) [ELR 23:6:16]

Federal court in Los Angeles has jurisdiction over Republic of Austria in suit to recover possession of Gustav Klimt paintings stolen by Nazis in early 1940s

Maria Altmann is the niece and heir of Adele Bloch-Bauer whose husband once owned six paintings by renowned artist Gustav Klimt. Adele Bloch-Bauer also was the model portrayed in those paintings, some of which have her name in their titles. All six of those paintings are now in the Republic of Austria, in the possession of the Republic or in the Austrian Gallery. Each painting has its own story of how it got to where it is today. All six, however, were stolen by the Nazis from Bloch-Bauer's husband in the early 1940s.

The reason that all of this matters is that the paintings are now worth $150 million, and Maria Altmann wants them back. To get them, she sued

Austria and the Austrian Gallery in federal court in Los Angeles. There are at least two reasons she filed suit in Los Angeles rather than Austria. First, Los Angeles is where Altmann lives. Second, in order to file suit in Austria, she would have to pay a filing fee of $130,000 to $200,000.

Not surprisingly, Austria and the Australian Gallery have argued that they cannot - or at least should not - be sued in Los Angeles. They made this argument in a multi-pronged motion to dismiss. Judge Florence-Marie Cooper has denied their motion, however, in a lengthy decision that rejects each of their contentions.

Judge Cooper has ruled that although Austria is generally immune from suit under the Foreign Sovereign Immunities Act, Altmann's claim arises under the "expropriation exception" to that immunity, and thus Austria is not immune in her case. The judge also held that Altmann's suit is not barred by international treaties. And she determined that Austria is not an adequate alternative forum, because its filing fees are so great.

Altmann was represented by E. Randol Schoenberg in Los Angeles. Austria and the Austrian Gallery were represented by Scott P. Cooper of Proskauer Rose in Los Angeles.

Altmann v. Republic of Austria, 142 F.Supp.2d 1187, 2001 U.S.Dist.LEXIS 6011 (C.D.Cal. 2001) [ELR 23:6:16]

Court refuses to dismiss World Wrestling Federation lawsuit against Parents Television Council alleging defamation and other claims arising out of Council's assertion that WWF's "Smackdown!" program was to blame for deaths of four children

The Parents Television Council will have to defend itself in a lawsuit filed in federal court in New York City by the World Wrestling Federation, as a result of very critical comments the Council has made about the WWF and its popular television program "Smackdown!"

Also named as a defendant in the WWF's lawsuit is Florida criminal defense lawyer James Lewis - the lawyer who defended 14-year-old Lionel Tate on charges that Tate murdered a 6-year-old girl. In his defense of Tate, Lewis argued that the boy had merely been mimicking wrestling moves he'd seen on television, and that the girl's death was an accident. That defense was rejected and Tate was eventually sentenced to life in prison.

Nevertheless, as an outgrowth of the Tate prosecution, both the Council and Lewis continued to blame the WWF for the deaths of Tate's victim and three other children they said had died as a result of other youths copying the televised violence they had seen on "Smackdown!" The Council allegedly coupled its criticisms with fund-raising appeals for the organization. The Council even produced a video that included clips from WWF broadcasts, without a license to do so.

The Council's activities and Lewis' statements provoked the WWF to file a complaint alleging thirteen causes of action, including claims for defamation, trademark infringement, copyright infringement, and interference with contractual and prospective business relations. The Council and Lewis responded with a motion to dismiss, arguing that they had a First Amendment privilege to make the statements they did, asserting that they had not infringed WWF's trademark, and claiming that their use of WWF video clips was a copyright "fair use." Lewis also argued that the New York court did not have personal jurisdiction over him, and that in any event, his statements were protected by the "judicial proceedings privilege."

Judge Denny Chin has disappointed the Council and Lewis by denying their motion to dismiss, in every respect. Judge Chin noted that the First Amendment protects "public discourse on the subject of sex and violence in the media." And he specifically acknowledged that the Council and Lewis were free to express the opinion that WWF shows "are excessively violent and not in society's best interests."

On the other hand, Judge Chin said, the WWF alleged that many of the specific comments made by the Council and Lewis were factually false and were made with knowledge of their falsity. For example, some of the deaths that had been blamed on "Smackdown!" occurred before that show ever went on the air. And other complained-of statements asserted that certain companies had stopped advertising on WWF programs, even though those companies had never done so in the first place. Judge Chin refused to dismiss these claims because "The First Amendment does not protect statements that are false and defamatory even if they are made in the context of a public debate about issues of general concern."

Moreover, the judge found that some of the Council's statements could be considered "commercial speech," because they were made to raise funds for the organization, and thus those statements would be entitled to lesser First Amendment protection.

Judge Chin also ruled that the statements made by the Council and Lewis "likely tarnished" the WWF's reputation, and thus the WWF had alleged a valid claim for trademark dilution. He rejected the Council's "fair use" defense to the WWF's copyright infringement claim, because the Council had used WWF television clips not just for the purpose of criticism, but also to raise funds. The judge also held that the WWF had properly alleged tortious interference claims.

Finally, Judge Chin held that Lewis was subject to personal jurisdiction in New York, because he had appeared and made statements in a video distributed to New York residents and had taken "advantage of 'New York's unique resources in the entertainment industry' on numerous occasions." The judge rejected Lewis' "judicial proceedings privilege" defense, on the grounds that his defamatory statements had been made on television and radio programs, rather than in court.

The WWF was represented by Eugene R. Licker of Kirkpatrick & Lockhart in New York City. Parents Television Council was represented by Thomas A. Leghorn of Wilson Elser Moskowitz Edelman & Dicker in New York City. Lewis was represented by Michael J. Quarequio in Fort Lauderdale.

World Wrestling Federation Entertainment v. Bozell, 142 F.Supp.2d 514, 2001 U.S.Dist.LEXIS 6719 (S.D.N.Y. 2001) [ELR 23:6:17]

Time Warner will have to defend invasion of privacy lawsuit filed by former Little League team members and coaches, complaining about team photo used by Sports Illustrated and HBO to illustrate stories about coaches who molested youths

Eight former Little League players and two coaches have demonstrated that they have a prima facie case for invasion of privacy against Time Warner, because their team photo was used by Sports Illustrated and the HBO program "Real Sports" to illustrate stories about coaches who molested youths. This was the conclusion reached by a California Court of Appeal in an opinion affirming a trial court's refusal to dismiss the case.

Time Warner had sought dismissal under a California "anti-SLAPP" statute - a statute designed to block "strategic lawsuits against public participation."

To defeat a motion to dismiss under that statute, plaintiffs must demonstrate they have a reasonable probability of success. In this case, the trial court and the Court of Appeal were persuaded that the Little League players and their coaches had demonstrated just that.

Writing for the appellate court, Justice Barton Gaut held that the players and coaches "have a viable invasion of privacy claim" for the public disclosure of private facts. This was so, Justice Gaut explained, because the "disclosure of information connecting a person with sexual molestation . . . may offend a reasonable person"; because the identities of the molested team members had not previously been disclosed and thus was a private fact; and because it could be found that the publication of photographs of their faces "was not a legitimate public concern and not newsworthy."

Judge Gaut also held that since only some of the depicted players had been molested, the others had valid "false light" invasion of privacy claim as well.

The players and coaches were presented by Thomas A. Cifarelli in Los Angeles and Michael J. Bidart of Shernoff Bidart & Darras in Claremont. Time Warner was represented by Robert C. Vanderet of O'Melveny & Myers, Paul G. Gardephe, and Lawrence H. Tribe.

M.G. v. Time Warner, Inc., 107 Cal.Rptr.2d 504, 2001 Cal.App.LEXIS 406 (Cal.App. 2001) [ELR 23:6:18]

Texas appellate court upholds KRGV-TV's victory in privacy and libel lawsuit filed by high school girls who complained of station's broadcast of videotape made without their knowledge while they changed clothes for band practice

Texas television station KRGV-TV has escaped without liability, despite broadcasting a videotape it must have known would raise the hackles of several high school girls and their parents. The tape in question was made by the band director of Port Isabel High School, using a clandestine video camera in an area where female students changed clothes for band practice.

Apparently, the band director made the tape to discover who was stealing from the girls' purses. Apparently too, the tapes were discarded once the band director determined that the thief was the assistant band director. In any event, the tapes were discovered in a garbage dumpster by someone who gave them to KRGV. The station then edited, altered and broadcast them, after promos that allegedly referred to them as the "Naked Tapes."

In response to the invasion of privacy and libel lawsuit filed by several of the band's female members, KRGV made a motion for summary judgment that was successful with respect to the claims of some of the girls. In an opinion by Justice Federico Hinojosa, the Texas Court of Appeals held that the summary judgment granted against those band members was proper, "because the evidence shows that KRGV did not broadcast their images in any state of undress or name them as persons taped by the band director." Thus the offending broadcast was not "about or directed at" them, as required by Texas privacy law.

The claims of two of the band members were tried to a jury, and the jury's verdict was that the KRGV broadcast had not invaded the privacy or libeled either of them. On appeal, these band members took issue with certain jury instructions and argued that the jury's verdict was against the great weight of the evidence and thus "manifestly unjust." Justice Hinojosa rejected both arguments however.

He ruled that the trial judge had properly rejected the band members' request for an instruction that would have allowed the jury to return a verdict in their favor, if the jury found that KRGV "negligently" invaded their privacy. There is a conflict in Texas law concerning whether invasion of privacy is only an intentional tort or whether it may be committed negligently as well. Judge Hinojosa agreed with those cases that hold that invasion of privacy is only an intentional tort. He therefore affirmed the trial judge's decision to reject a "negligent invasion of privacy" instruction.

Judge Hinojosa also ruled that the evidence submitted to the jury was sufficient for it to find that KRGV neither libeled nor invaded the privacy of the band members.

The band members were represented by Kevin W. Grillo of Hilliard Grillo & Munoz in Corpus Christi. KRGV was represented by Valorie C. Glass of Atlas & Hall in McAllen.

Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40, 2001 Tex.App.LEXIS 1079 (Tex.App. 2001) [ELR 23:6:18]

Michael Jordan and Nike win dismissal of trademark infringement lawsuit filed by maker of "Jordan" brand women's clothes; court rules that clothing maker waited too long before filing suit

Those who sleep on their rights are likely to lose them. That is the lesson learned by Chattanoga Manufacturing, Inc., a company that manufactures women's clothes under the "Jordan" trademark. Chattanoga sued Michael Jordan and Nike, Inc., for trademark infringement complaining that their use of the "Jordan" trademark on footwear, apparel and accessories infringes Chattanoga's registered trademark.

In a show of bravado that rarely if ever worked against Michael Jordan on the basketball court, Chattanoga made a motion for partial summary judgment, hoping that federal Judge Ruben Castillo would find Jordan and Nike liable for trademark infringement. Instead, the judge ruled that Chattanoga failed to show that its "Jordan" mark had acquired secondary meaning, and had failed to show there was a likelihood of consumer confusion between its products and those made by Nike. For that reason, Judge Castillo denied Chattanoga's motion.

Moreover, once Michael Jordan was roused, he stole the ball from Chattanoga by filing a motion for summary judgment of his own. He and Nike showed that they have been promoting and selling "Jordan" products since 1985 - some 14 years before Chattanoga got around to filing its lawsuit. Judge Castillo noted that "One would have to have lived a hermitic existence not to be aware of these Jordan products during this period of time." Its failure to file suit until 1999 "was unreasonable," the judge concluded. "[F]orcing Nike to abandon its name now, after fifteen years of unchallenged promotion and expansion, would result in extreme prejudice. . . ," Judge Castillo reasoned.

For these reasons, the judge dismissed Chattanoga's suit on the grounds that its claims for both injunctive relief and damages were barred by the doctrine of laches.

Chattanoga was represented by John L. Leonard of Defrees & Fiske in Chicago. Jordan and Nike were represented by Charles Robert McKirdy of Rudnick & Wolfe, and by Frederick J. Sperling of Hardin & Waite, in Chicago.

Chattanoga Manufacturing, Inc. v. Nike, Inc., 140 F.Supp.2d 917, 2001 U.S.Dist.LEXIS 8533 (N.D.Ill. 2001) [ELR 23:6:19]

Former Alabama State basketball coach, who was terminated after one year, wins fraud judgment against athletic director who promised coach two-year employment deal; former Baylor volleyball coach, who was terminated after one year, wins right to pursue fraud claim based on unenforceable oral promise of two-year contract

The difference between a one-year contract and a two-year contract means a lot to some college coaches. It did, for example, to John L. Williams who left his head coaching job at Savannah State University to take what he was promised would be at least a two-year position at Alabama State University. It also meant a lot to Tom Sonnichsen who was orally promised a two-year contract to coach the women's volleyball team at Baylor University.

Despite the promises that had been made to them, both Williams and Sonnichsen were terminated after just one year. As a result, both coaches filed lawsuits, alleging fraud as well as other claims. Williams sued Alabama State's athletic director, and has won a $200,000 judgment. Sonnichsen sued Baylor itself; and though his case was initially dismissed, a Texas appellate court has reversed, thus awarding him the right to pursue his fraud claim further.

The Alabama Supreme Court has upheld Williams' $200,000 compensatory damage judgment against Alabama State's athletic director, because the athletic director knew that he didn't have legal authority to make Williams a two-year offer. Only Alabama State's president had legal authority to hire Williams for more than one year; and the president specifically told the athletic director to advise Williams of that fact before Williams resigned from his Savannah State position to accept the athletic director's two-year offer. For unexplained reasons, the athletic director didn't tell Williams this until Williams was terminated after just one year.

In a per curiam decision, Alabama Supreme Court ruled that Williams had offered sufficient evidence to support a $200,000 compensatory damage award. The Court, however, reversed an additional $150,000 in punitive damages, because the athletic director showed that if he were required to pay that as well, his net worth would be a negative $140,000.

In Sonnichsen's separate case, the evidence showed that he had been orally promised a two-year written contract, but no such contract was ever actually prepared. When he was terminated after just one year, he sued Baylor for breach of contract and fraud. A Texas state trial court dismissed his case, on the grounds that his claims were barred by the Texas statute of frauds, which requires contracts that cannot be performed within one year to be in writing to be enforceable.

The Texas Court of Appeals has affirmed the dismissal of Sonnichsen's contract claim. In an opinion by Justice Tom Gray, the appellate court held that the "promissory estoppel" exception to the statute of frauds did not apply in Sonnichsen's case. Under Texas law, if a written contract exists, and one party promises to sign it but then doesn't, the "promissory estoppel" doctrine may prevent that party from asserting the statute of frauds defense. In this case, however, the two-year written contract was not in existence at the time it was orally promised to Sonnichsen; and thus the "promissory estoppel" doctrine did not help him.

On the other hand, Justice Gray did reverse the dismissal of Sonnichsen's fraud claim. In order to prevail on that claim, Sonnichsen will have to prove damages other than the damage he suffered from not being paid for a second year of employment. If he can, however, the statute of frauds will not bar his recovery of those damages.

In the Alabama State case, Williams was represented by Donald Maurice Jackson in Montgomery. The Alabama State athletic director was represented by Kenneth L. Thomas of Thomas Means Gillis Devlin Robison & Seay in Montgomery.

In the Baylor case, Sonnichsen was represented by LaNelle L. McNamara in Waco. Baylor was represented by Stuart Smith of Naman Howell Smith & Lee in Waco.

Williams v. Williams, 786 So.2d 477, 2000 Ala.LEXIS 417 (Ala. 2000); *Sonnichsen v. Baylor University*, 47 S.W.3d 122, 2001 Tex.App.LEXIS 2836 (Tex.App. 2001) [ELR 23:6:19]

Pac-10 rule that discouraged soccer player from transferring from USC to UCLA does not violate antitrust law, Court of Appeals affirms

Soccer player Rhiannon Tanaka has lost her antitrust case against the Pacific-10 Conference and the University of Southern California - a case that was prompted by a Pac-10 rule that discouraged her from transferring from USC to its cross-town rival, UCLA. In an opinion by Judge Diarmuid O'Scannlain, the Ninth Circuit Court of Appeals has held that the complained-of rule does not violate federal antitrust law. As a result, the appellate court affirmed a lower court order dismissing Tanaka's lawsuit.

Tanaka wanted to transfer to UCLA after her freshman year at USC, in part because she was dissatisfied with USC's soccer program and in part because she was dissatisfied with the education she was getting there. In an allegation that turned out to critical - in a way that unexpectedly hurt her case - Tanaka alleged that USC was arranging for athletes to receive fraudulent credits for sham classes, and that USC prevented her from transferring to UCLA in order to punish her for participating in an investigation into possible academic fraud at USC.

The vehicle by which USC prevented Tanaka from transferring to UCLA was a Pac-10 rule that permitted USC to insist - as a condition of her transfer - that she sit out a season, lose a year of eligibility, and be ineligible for an athletic scholarship during her first semester at UCLA.

To violate federal antitrust law, Tanaka had to show that the complained-of Pac-10 rule had "significant anticompetitive effects" within a "relevant market." This she failed to do, Judge O'Scannlain ruled, for two reasons.

First, she argued that the "relevant market" was women's collegiate soccer in Los Angeles, where USC and UCLA both are located. But Judge O'Scannlain said that was not the proper market. The proper market, he held, is national in scope, because Tanaka herself alleged that she had been recruited by colleges across the country, thus showing that Los Angeles was not the only place she could have played.

Second, even if Los Angeles were a proper market, her own allegations showed the Pac-10 rule was not having "significant anticompetitive effects." This was so, because she asserted that she was the only Pac-10 athlete against whom the rule had been applied to prevent a transfer. She made this allegation in support of her assertion that USC had retaliated against her for participating in a USC academic fraud investigation. But the fact that she alleged that she was the rule's sole victim was fatal to her antitrust case, Judge O'Scannlain held, because that meant it was not having "significant anticompetitive effects."

Tanaka was represented by Renee M. Smith in Hermosa Beach. The Pac-10 Conference was represented by Frank M. Hinman of McCutchen Doyle Brown & Enersen in San Francisco. USC was represented by Scott A. Edelman of Gibson Dunn & Crutcher in Los Angeles. The NCAA was represented by Robert J. Wierenga of Miller Canfield Paddock and Stone in Ann Arbor and Mark L. Eisenhut of Call Clayton & Jensen in Newport Beach.

Tanaka v. University of Southern California, 252 F.3d 1059, 2001 U.S.App.LEXIS 11837 (9th Cir. 2001) [ELR 23:6:20]

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

Eric Chalenor and at least three other men went to the University of North Dakota expecting to compete in intercollegiate wrestling. They were, after all, recruited to attend the university by its varsity wrestling coach. But in 1998, their expectations were dashed when the university cancelled its men's wrestling program.

In a lawsuit that Chalenor and the others filed in federal court in North Dakota, the disappointed wrestlers alleged that the university had cancelled the men's wrestling program "in order to attain proportionality between the gender composition of the student body" as a whole, and the gender composition of those participating in the university's sports programs.

The lawsuit asserted that the university's effort to attain proportionality by canceling men's wrestling violated Title IX of the Education Amendments - a federal statute that prohibits discrimination on the basis of sex by educational institutions that receive federal financial assistance. The university, of course, disagreed that it had violated Title IX. And Judge Rodney Webb agreed with the university.

In a decision granting the university's motion for summary judgment, Judge Webb noted that a "policy interpretation" issued by the Department of Health, Education and Welfare provided three means by which educational institutions could satisfy their Title IX obligations. The "least stringent" of these "provides a safe harbor for substantial proportionality," the judge said.

Judge Webb explained that this means that "the elimination of men's athletic programs is not a violation of Title IX as long as men's participation continues to be substantially proportionate to their enrollment." That was the case at the University of North Dakota, even after its men's wrestling program was eliminated. "Under these circumstances," the judge concluded, "there is no basis for a claim that [the University of North Dakota] violated Title IX by eliminating its wrestling program."

Chalenor v. University of North Dakota, 142 F.Supp.2d 1154, 2000 U.S.Dist.LEXIS 20994 (D.N.D. 2000) [ELR 23:6:21]

Athletic Association's denial of varsity eligibility to high school runner who transferred from private to public school after mother's divorce was "arbitrary and capricious," Indiana appellate court affirms

Divorce is never easy on kids. The divorce of B.J. Durham's mother and stepfather was especially hard on him. He had to transfer, for financial reasons, from Park Tudor High School, a private school where he was on the varsity cross-country and track teams during his freshman and sophomore years, to North Central High School, a public school (and a Park Tudor "rival"). Then, to make matters worse, the Indiana High School Athletic Association denied B.J.'s request that he be declared eligible to participate on varsity teams at North Central, and it denied his request for a Hardship Exemption from the Association's transfer rule.

B.J. sued the Association in Indiana state court, and won temporary and then permanent injunctions permitting him to compete on North Central's varsity teams. In an opinion by Judge Nancy Vaidik, the Indiana Court of Appeals has affirmed.

In an earlier unrelated case, the Indiana Supreme Court had held that the Association's decisions concerning student athlete eligibility could be overturned only if they were "arbitrary and capricious." (ELR 20:5:21) In B.J.'s case, the Court of Appeals agreed with the trial court the Association's decision to deny eligibility or a Hardship Exemption to B.J. was both.

Judge Vaidik explained that "in rendering its decision that the [Association] acted arbitrarily and capriciously, the trial court looked at the [Association's] particular decision with respect to B.J., applied the appropriate standard, and concluded that the

[Association's] conduct rose to the level of willful and unreasonable decisionmaking that was in disregard of the facts and circumstances before it. . . . No reasonable and honest person would have concluded that B.J. should be denied a hardship exemption in this case."

Durham was represented by Harry L. Gonso in Indianapolis. The Association was represented by Robert M. Baker III of Johnson Smith Pence & Heath in Indianapolis.

Indiana High School Athletic Association v. Durham, 748 N.E.2d 404, 2001 Ind.App.LEXIS 751 (Ind.App. 2001) [ELR 23:6:21]

Time Warner cable system violated Communications Act by transmitting Riddick Bowe-Andrew Golota boxing match to a commercial establishment, because it had right to transmit to residential customers only, appellate court affirms

Time Warner made an administrative mistake when one of its cable systems transmitted the 1996 fight between Riddick Bowe and Andrew Golota to the Melody Lane Lounge in Ohio. Time Warner was licensed to transmit that fight to residential customers, but not to commercial customers; and Melody Lane Lounge was definitely a commercial customer. The right to transmit the Bowe-Golota fight to commercial customers was held by National Satellite Sports, and when National Satellite learned that Melody Lane showed the fight to its customers, National Satellite sued Melody Lane and Time Warner, both.

Melody Lane settled; Time Warner didn't. Instead, Time Warner defended against National Satellite's claims, but without success. Federal District Judge David Dowd granted summary judgment to National Satellite on the issue of liability (ELR 21:10:23); and he then awarded National Satellite a judgment of $4,500 in statutory damages and $26,390 in attorneys' fees and costs.

Time Warner appealed, again without success. In an opinion by Judge Ronald Lee Gilman, the Sixth Circuit Court of Appeals has affirmed.

In a separate but similar case, Time Warner had earlier defeated National Satellite, in a lawsuit that arose out of the cable company's accidental transmission to a commercial customer of a 1996 fight between Evander Holyfield and Bobby Czyz. Time Warner argued that as a result of its victory in the Holyfield-Czyz case, National Satellite was "precluded" from relitigating the same issue again. Judge Gilman disagreed, however, because the earlier case involved an additional issue not present in the Bowe-Golota case; and since that other issue could itself have been the basis for Time Warner's victory in the earlier case, the court's ruling (in Time Warner's favor) on the reoccurring issue was not necessary to the outcome of that case.

Time Warner also argued that National Satellite didn't have standing to sue under the statute it had relied upon - section 605 of the Cable Communications Act. But Judge Gilman held that it did have standing.
Finally, Time Warner complained that the damages awarded against it were excessive. But Judge Gilman held that they were not.

National Satellite was represented by Michael J. Dell of Kramer Levin Naftalis & Frankel in New York

City. Time Warner was represented by Richard W. Clary of Cravath Swaine & Moore in New York City.

National Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 2001 U.S.App.LEXIS 12082 (6th Cir. 2001) [ELR 23:6:21]

New Jersey Nets must pay state sales tax even on portion of admission price collected on behalf of state agency that owns Meadowlands Arena, New Jersey appellate court affirms

The NBA's New Jersey Nets will have to pay more than a half million dollars in New Jersey sales tax on account of admission fees it collected from ticket buyers on behalf of the state agency from which the

Nets rents the Meadowlands Arena for the team's home games.

Meadowlands Arena is owned by New Jersey Sports and Expositions Authority. The rental agreement between the Authority and the Nets entitles the Authority to impose an "admission impost" of 10% of the price of each admission ticket, and the agreement requires the Nets to collect that impost on the Authority's behalf.

New Jersey law imposes a 6% sales tax on admissions to athletic events, and the Nets presumably paid that tax on the 90% of the admission price it collected from ticket buyers on its own behalf. Apparently, however, the Nets did not pay sales tax on the 10% it collected for, and then paid to, the Authority.

The New Jersey Division of Taxation determined that the Nets should have paid the tax, and thus sent the team a notice of deficiency that came to $516,337.53.

The team took the issue to the state Tax Court, without success. The Tax Court agreed with Division of Taxation. And now the Appellate Division of the Superior Court of New Jersey has as well.

Judge David Baime acknowledged that "Taxation is truly an arcane subject," and that "In construing a section, a missed word or comma can easily change the result reached." He nonetheless construed the New Jersey sales tax statute to require the Nets to pay the half million dollars in taxes, even though the statute exempts amounts charged by state agencies when they sell certain types of goods and services.

Under New Jersey law, admissions to athletic events are exempt from sales tax only if the proceeds are used exclusively for public schools. In the Nets case, the 10% admissions impost imposed by the Authority is not used for public schools; it is used by the Authority maintain and improve the Arena. Therefore Judge Baime concluded that the 10% impost is not exempt from the sales tax.

The Nets were represented by Robert J. Alter of Sills Cummis Radin Tischman Epstein & Gross in Newark. The Division of Taxation was represented by Patrick DeAlmeida of the Attorney General's office in Trenton.

Meadowlands Basketball Associates v. Director, Division of Taxation, 773 A.2d 1160, 2001 N.J.Super.LEXIS 180 (N.J.Super. 2001) [ELR 23:6:22]

Amphitheater owner was not liable to spectators injured by rowdy patrons during music concerts, because it satisfied its duty of care by having police present at concerts

Pine Knob Music Theater, an outdoor amphitheater in Michigan, was not liable for injuries suffered by spectators at two separate rock concerts caused by the rowdy behavior of other concert patrons. The Michigan Supreme Court has so held, in a five-to-two decision that turned on the fact that Pine Knob already had police present at the two concerts, even before the injuries occurred.

Pine Knob is an outdoor theater that offers seating on a grass-covered hill. For unexplained reasons, patrons at a 1994 concert featuring Suicidal Tendencies, Danzig and Metallica tore up and threw sod, injuring fellow concertgoer Stephen Lowry. A similar sod-throwing incident occurred at a 1995 concert featuring Bush and the Ramones, resulting in injuries to Molly MacDonald.

Lowry and MacDonald filed separate tort actions against Pine Knob, both of which were dismissed in response to Pine Knob's motions for summary judgment. Pine Knob's victory in Lowry's case was affirmed on appeal, but MacDonald won a reversal. The Supreme Court then agreed to hear the two cases, and has ruled in favor of Pine Knob in both.

The rowdy behavior that injured Lowry and MacDonald was not unique in Pine Knob's history. Similar sod-throwing incidents had occurred there during a 1991 Lollapalooza concert. Perhaps for that reason, Pine Knob had arranged to have police officers at the 1994 and 1995 concerts; and the police were present even before Lowry and MacDonald were injured. This turned out to be critical to Pine Knob's eventual victory.

In an opinion by Justice Robert Young, on behalf of the five-justice majority, the Michigan Supreme Court held that amphitheater owners (and other merchants) have a duty to use reasonable care to protect invitees from the foreseeable criminal acts of others. This duty, however, is triggered by "specific acts occurring on the premises" - that is by "an ongoing situation that is taking place on the premises." The Supreme Court held that "there is no obligation to otherwise anticipate the criminal acts of third parties."

Equally important, the Supreme Court held that all a merchant must do to satisfy this duty is to "reasonably expedite the involvement of the police." Merchants are not required to provide security guards or resort to self help in order to deter or quell disturbances.

Since Pine Knob had arranged for police to be present at the concerts where Lowry and MacDonald were injured, it had satisfied its duty to "expedite the involvement of the police." And for that reason, Pine Knob was not liable for their injuries.

Justice Michael Cavanagh dissented in an opinion joined by Justice Marilyn Kelly.

MacDonald was represented by Richard E. Shaw of Lopatin Miller Freedman Bluestone Herskovic & Domol in Southfield. Lowry was represented by Marc S. Morse in Farmington Hills. Pine Knob was represented by Kathleen McCree Lewis of Dykema Gossett in Detroit in the MacDonald case, and by Janet Callahan Barnes of Secrest Wardle Lynch Hampton Truex & Morley in Farmington Hills in the Lowry case.

MacDonald v. PKT, Inc., 628 N.W.2d 33, 2001 Mich.LEXIS 1187 (Mich. 2001) [ELR 23:6:22]

Wheelchair seat locations in Oregon stadium style movie theaters do not violate Americans with Disabilities Act, federal court decides

Regal Cinemas operates a half dozen movie theaters in Oregon featuring stadium style seating. Because stadium style theaters have steep grades and stairs, Regal's theaters provide seating areas for wheelchair-bound patrons among the first five rows of seats for the general public.

According to a non-profit organization known as Oregon Paralyzed Veterans of America, these seats "provide inferior and uncomfortable viewing angles." In a federal court lawsuit, the organization alleged that Regal violated the Americans with Disabilities Act by providing wheelchair-bound patrons with only these inferior seating areas.

Regulations adopted by the U.S. Department of Justice, known as the Americans with Disabilities Act Accessibility Guidelines, require theater owners to provide wheelchair-bound patrons with "lines of sight comparable to those for members of the general public." In cross-motions for summary judgment, Regal argued that these Guidelines mean that wheelchair-bound patrons must have "an unobstructed view of the movie screen," which they do, in Regal's theaters. Oregon Paralyzed Veterans, on the other hand, argued that Regal was obligated by law to provide wheelchair-bound patrons with seating areas in the stadium seating portion of the theaters, and not just in the front rows.

This exact issue has been litigated before, in Lara v. Cinemark USA. In that case, the Fifth Circuit Court of Appeals ruled in favor of the theater owner, holding that the Americans with Disabilities Act requires stadium-style movie theaters to offer unobstructed views to wheelchair-bound patrons, but does not require them to provide the same line-of-sight viewing angles enjoyed by most non-disabled patrons (ELR 22:4:22). The Supreme Court thereafter denied a petition for cert (ELR 22:8:26).

In deciding the Regal Cinemas case, Judge Garr King found "the reasoning of the Fifth Circuit in Lara to be persuasive. . . ." For that reason, Judge King granted Regal Cinemas' motion for summary judgment and denied Oregon Paralyzed Veterans' cross-motion.

Oregon Paralyzed Veterans was represented by Robert W. Pike, Kathleen L. Wilde and David B. Gray in Portland. Regal Cinemas was represented by Laura M. Franze of Akin Gump Strauss Hauer & Feld in Dallas, and by Karen O'Kasey of Williamson & Wyatt in Portland.

Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 142 F.Supp.2d 1293, 2001 U.S.Dist.LEXIS 7835 (D.Or. 2001) [ELR 23:6:23]

Federal judge refuses to vacate arbitration award in dispute between player agents Steve Weinberg and Howard Silber, but does order arbitrator to clarify ambiguities

About a year ago, player agent Steve Weinberg negotiated a contract for running back Stephen Davis with the Washington Redskins. The contract calls for Davis to be paid a whopping $135,450,000 over nine years, 3% of which Weinberg will eventually be paid as his fee. That 3% comes to more than $4 million, so this should have been a very happy moment for Weinberg, as well as for his client.

Alas, Weinberg negotiated the Davis deal just months after the breakup of a joint venture he once had with player agent Howard Silber. And according to Silber, Davis was a client of the joint venture rather than a client of Weinberg alone.

Weinberg and Silber agreed to submit their dispute to Dallas arbitrator Gary Berman. The arbitrator apparently found that Davis was a joint venture client, because Berman rendered an award ordering Weinberg to pay Silber more than $2 million as Silber's half of the Davis fee.

This was not the outcome Weinberg hoped for or expected, and he responded by filing a complaint in federal court seeking to vacate the award. Silber apparently was satisfied with the award, because he responded to Weinberg's complaint with a motion to confirm it.

Weinberg's attack on the arbitration award was multi-pronged. But to Judge Joe Kendall, virtually all of Weinberg's arguments "fail[ed]" because Weinberg "did not take steps to preserve his rights during the arbitration: the arbitration hearing was not transcribed, he never objected to any procedures employed by the arbitrator, and he has not submitted any evidence that the arbitration was governed by any particular set of rules."

Nonetheless, one of Weinberg's arguments did resonate with Judge Kendall - the argument that the arbitrator's award was "ambiguous" in certain critical respects. The most significant of these ambiguities concerned the more than $2 million awarded to Silber as his half of the Davis fee. Weinberg will be collecting that fee over time, because Davis' contract was for nine years, and the award did not indicate the "time frame for payment" of Silber's share. Moreover, it appeared that Weinberg may have entered into a fee sharing agreement with another agent concerning the Davis contract; and if so, the language of the arbitration award would mean that Weinberg would have to pay Silber more than half of what Weinberg would earn from it.

Thus, Judge Kendall remanded the case to arbitrator Berman for clarification of the ambiguities.

Weinberg was represented by J. Kent Davenport of Newman Davenport & Epstein in Dallas. Silber was represented by Michael S. Carnahan of Touchstone Bernays Johnston Beall & Smith in Dallas.

Weinberg v. Silber, 140 F.Supp.2d 712, 2001 U.S.Dist.LEXIS 5608 (N.D.Tex. 2001) [ELR 23:6:24]

Stockholders alleged valid securities fraud claim against book publisher that concealed increased returns from retailers

Stockholders in Scholastic Corporation alleged a valid securities fraud claim against the book publishing company and one of its officers, the Second Circuit Court of Appeals has held.

Scholastic, like other book publishers, sells books to retail stores with a full right of return. Scholastic, however, treats the wholesale price of those books as "income" when books are shipped to stores, even though they may later be returned.

In a class action lawsuit against Scholastic, shareholders alleged that Scholastic's vice president for finance and investor relations made misleading public statements about the company's financial condition by concealing the fact that returns from book stores had increased - thus reducing Scholastic's actual income.

A federal District Court had dismissed the stockholders' complaint for failing to state a valid claim under the Private Securities Litigation Reform Act. But in an opinion by Judge Richard Cardamone - which characterized Scholastic's alleged practices as "an unusual business model" - the Court of Appeals has reversed and has remanded the case for further proceedings.

The stockholders were represented by Jeffrey A. Klafter of Bernstein Litowitz Berger & Grossmann in New York City. Scholastic was represented by Michael J. Chepiga of Simpson Thacher & Bartlett in New York City.

In re Scholastic Corp., 252 F.3d 63, 2001 U.S.App.LEXIS 11368 (2nd Cir. 2001) [ELR 23:6:24]

Previously Reported:

WBC Championship. Judge Richard Owen has denied a motion by the World Boxing Council for reconsideration of a partial summary judgment by which the judge declared boxer Graciano Rocchigiani the WBC Lightheavyweight Champion (ELR 23:3:14). Judge Owen also denied the WBC's request for an interlocutory appeal of that judgment. The issue of Rocchigiani's remedies remains to be decided. Rocchigiani v. World Boxing Council, 139 F.Supp.2d 440, 2001 U.S.Dist.LEXIS 2460 (S.D.N.Y. 2001) [ELR 23:6:24]

"Sea of Love" authorship. A declaratory relief lawsuit filed by New York City-based Fort Knox Music against Louisiana-resident songwriter Philip Baptiste has been transferred by federal Judge John Sprizzo from the Southern District of New York to the Western District of Louisiana. Early in the lawsuit, Judge Sprizzo ruled that Baptiste is barred by the copyright statute of limitations from asserting that he is sole author of "Sea of Love," because Baptiste did not file suit within three years of learning that George Khoury has been credited as co-author since song was first published (ELR 21:6:24). Baptiste had disputed Judge Sprizzo's assertion of personal jurisdiction over him; and on appeal, the Second Circuit remanded the case to Judge Sprizzo for "supplementation of the record with respect to the basis for its ruling on the [personal] jurisdiction issue." (ELR 22:1:18) In response to that remand, Judge Sprizzo determined that he does not have personal jurisdiction over Baptiste. Fort Knox Music, Inc. v. Baptiste, 139 F.Supp.2d 505, 2001 U.S.Dist.LEXIS 4817 (S.D.N.Y. 2001) [ELR 23:6:25]

NCAA freshman eligibility standard. The Third Circuit Court of Appeals has affirmed a District Court's refusal to allow African-American student athletes to amend their complaint against the NCAA to add a claim for "intentional discrimination" in their case attacking the organization's freshman eligibility standard. The case originally asserted that the complained-of rule - known as "Proposition 16" - violated Title VI of the Civil Rights Act. But in an earlier ruling, the Third Circuit held that the NCAA is not subject to Title VI's antidiscrimination requirements (ELR 21:11:17). Apparently, an allegation of "intentional discrimination" would have given the case new life. It was not, however, an allegation the student athletes made in their original complaint, filed some four years before. As a result, the District Court denied their motion for permission to file an amended complaint. In an opinion by Judge Jane Roth, the Third

Circuit has affirmed that ruling. Judge Roth held that the students could have raised the "intentional discrimination" issue earlier in the case, and thus the District Court did not abuse its discretion by denying them the opportunity to raise it later. Cureton v. National Collegiate Athletic Association, 252 F.3d 267, 2001 U.S.App.LEXIS 9326 (3rd Cir. 2001) [ELR 23:6:25]

Michigan statute criminalizing Internet dissemination of sexually explicit material. A Michigan statute that criminalized the use of the Internet to disseminate sexually explicit material to minors violates the First Amendment and the Commerce Clause, a federal court in Michigan has held. The short ruling by Judge Arthur Tarnow was issued in response to a motion for summary judgment by the plaintiffs in the case - a group of Internet users, including internet service providers, website operators, bookstores and the ACLU. Earlier in the case, Judge Tarnow granted the plaintiffs' request for a preliminary injunction (ELR 21:8:23). The Sixth Circuit Court of Appeals affirmed the injunction in an unpublished per curiam ruling. The plaintiffs then made their summary judgment motion, asserting the same legal arguments that supported the injunction. Cyberspace Communications, Inc. v. Engler, 142 F.Supp.2d 827, 2001 U.S.Dist.LEXIS 8833 (E.D.Mich. 2001) [ELR 23:6:25]

"The Wind Done Gone" injunction. Opinions in "The Wind Done Gone" case that were reported in previous editions of the Entertainment Law Reporter have now been published. The District Court's decision granting Suntrust Bank's request for a preliminary injunction barring publication of the book (ELR

22:12:4) has been published at Suntrust Bank v. Houghton Mifflin Co., 136 F.Supp.2d 1357, 2001 U.S.Dist.LEXIS 5036 (N.D.Ga. 2001). The Eleventh Circuit's per curiam order vacating that injunction (ELR 23:1:4) has been published at Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 2001 U.S.App.LEXIS 10802 (11th Cir. 2001). The Eleventh Circuit has since issued a full opinion explaining its reasons for vacating the injunction; that opinion is reported in the "In the News" section of this issue of the Entertainment Law Reporter (ELR 23:6:10). [ELR 23:6:25]

PGA low-frequency radio broadcasts. The Fifth Circuit Court of Appeals has issued a slightly revised opinion in a case in which it reinstated a radio broadcaster's lawsuit against Anheuser-Busch alleging that beer company violated antitrust law by denying it the right to broadcast Anheuser-Busch-sponsored golf tournaments in response to enticements or coercion by the PGA. The revised decision supersedes the court's previously reported opinion (ELR 22:11:23), but it does not require alteration of the earlier article. Spectators' Communication Network v. Colonial Country Club, 253 F.3d 215, 2001 U.S.App.LEXIS 11379 (5th Cir. 2001) [ELR 23:6:25]

FCC Equal Employment Opportunity Rule. The D.C. Circuit Court of Appeals has denied petitions for a rehearing en banc in the case in which it held that the FCC's Equal Employment Opportunity Rule is still unconstitutional, even after its most recent revision (ELR 23:1:16). The order denying the petitions is accompanied by a decision by Judge Douglas Ginsburg, and by a dissenting opinion by Judge David Tatel. MD/DCDE Broadcasters Association v. Federal

Communications Commission, 253 F.3d 732, 2001 U.S.App.LEXIS 13709 (D.C.Cir. 2001) [ELR 23:6:25]

DEPARTMENTS

In the Law Reviews:

Entertainment Licensing: The Acquisitions and Disposition of Stage Rights by Elliot H. Brown, 21/9 The Licensing Journal 1 (2001) (edited by the Law Firm of Grimes and Battersby, published by Aspen Law and Business, 1185 Avenue of the Americas, 37th floor, New York, New York 10036)

Locating Copyright Within the First Amendment Skein by Neil Weinstock Netanel, October Stanford Law Review 1 (2001)

The UCLA Entertainment Law Review has published Volume 8, Issue 2 with the following articles:

Techno-neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada by Erik S. Knutsen, 8 UCLA Entertainment Law Review 87 (2001)

Judging Judy, Mablean and Mills: How Courtroom Programs Use Law to Parade Private Lives to Mass Audiences by Michael M. Epstein, 8 UCLA Entertainment Law Review 129 (2001)

Prudent Provenance-Looking Your Gift Horse in the Mouth by Shirley Foster, 8 UCLA Entertainment Law Review 143 (2001)

The Role of the Studio Lawyer in the New Media Age by Zane B. Melmed, 8 UCLA Entertainment Law Review 169 (2001)

Back From the Future: A Proleptic Review of the Digital Millennium Copyright Act by David Nimmer, 16 Berkeley Technology Law Journal 855 (2001)

Exorcising the Specter of a "Pay-Per-Use" Society: Toward Preserving Fair Use and the Public Domain in the Digital Age by John R. Therien, 16 Berkeley Technology Law Journal 979 (2001)

The Virginia Journal of Sports and the Law has published Volume 3, Issue 1 with the following articles:

Home Field Disadvantage: The Negative Impact of Allowing Home-Schoolers to Participate in Mainstream Sports by Darryl C. Wilson, 3 Virginia Journal of Sports and the Law 1 (2001)

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