

# Federal Court Rules for APS and AIP in Dispute with Gordon & Breach over Survey of Journals

By most legal standards, the case was of little importance. It had no broad political, social or economic implications. Still, it was significant in the world of science publishing. The case was literally a long-running duel between the Gordon & Breach Publishing Group (G&B), a commercial, privately owned publisher of more than 300 specialized journals, and the American Physical Society (APS) and the American Institute of Physics (AIP), nonprofit professional societies that publish 35 peer-reviewed journals between them. After filing lawsuits against APS and AIP in Europe, G&B sued the two societies in the US in 1993. The dispute had its origins in 1986, when Henry H. Barschall, a prominent physics professor at the University of Wisconsin in Madison, published the first of two studies on the cost-effectiveness of physics journals. The case was decided on 26 August, when a US District Court judge in New York City rejected G&B's allegations that Barschall's methodology was inaccurate and unreliable and that APS and AIP had misrepresented the facts in promoting their journals to librarians and other subscribers.

In his first article in *PHYSICS TODAY* (December 1986, page 34), Barschall ranked 15 physics journals, four of them published by either APS or AIP and one by G&B. He listed each journal by its library subscription price and calculated the cost of each per 1000 characters. G&B's *Particle Accelerators* was the most costly, at 31 cents per 1000 characters, and the APS and AIP journals the least costly, ranging from 0.7 cents to 1.6 cents per 1000 characters. Barschall also compared his findings with earlier studies, using a similar methodology, carried out by the American Mathematical Society in 1982 and the Optical Society of America in 1984. In his article, Barschall stated: "While one would expect journals published by not-for-profit publishers to be less expensive than those published by commercial publishers, the cost-per-character ratio of over 40 between the most expensive commercial and the least expensive not-for-profit publication is larger than one might have expected."

During 1988, Barschall completed a more comprehensive survey of more than 200 physics journals, including 11 of the 24 physics journals then published by G&B. This time he not only measured the cost per 1000 characters but also the cost per character divided

by the "impact factor," a measure of the frequency of citations drawn from the 1986 Science Citation Index published by the Institute for Scientific Information in Philadelphia. For this survey, Barschall combined the two measures into a "cost/impact ratio," which he characterized as "perhaps the most significant measure of the cost-effectiveness" of any journal. Once again, G&B's physics journals fared



BARSCHALL: Target of a lawsuit.

poorly, while APS and AIP journals were among the most cost-effective. The second article was documented in the *Bulletin of the American Physical Society* and in summary form in *PHYSICS TODAY* (July 1988, page 56).

At the time of Barschall's first article, libraries throughout the US were confronted by rapidly rising costs for science journals. Most libraries were forced to cut back on their purchases, resulting in fierce competition among publishers and a cycle of price increases that thrust publishers into a struggle to recover their costs from fewer subscribers, who in turn simply reduced their purchases as journal prices increased. Nonetheless, according to one estimate, the top 500 science journals produced in the world now make up a \$2.3 billion annual business.

When APS and AIP distributed copies of Barschall's 1986 article to librarians to illustrate that their journals were a "great bargain compared to other physics journals," Martin Gordon, founder and chairman of G&B, was miffed. Gordon wrote to complain that the survey contained what he con-

sidered to be "fatal errors" and to request that the company's journals be excluded from any future surveys, but the letters apparently were misaddressed.

In the 1988 article, Barschall noted that the cost/impact ratio of the journals he surveyed differed by a factor of as much as 850. He concluded that "authors can help physics libraries by publishing their papers in journals that have a low cost per character. In general, articles in such journals also have a greater 'impact,' so that authors too will benefit by publishing in them."

This time, Barschall's survey and his commentary enraged Gordon. His letter to AIP demanded a prompt retraction in *PHYSICS TODAY*. AIP refused and instead ran a report of the dispute and informed readers that G&B had declined an offer to comment on the controversy in the magazine.

G&B subsequently sued APS, AIP and Barschall in France, Germany and Switzerland. On 23 September 1993, the company filed suit in the US District Court for the Southern District of New York. In November 1995, Federal Judge Leonard B. Sand dismissed the portion of the action concerning publication of the survey in the *Bulletin* and *PHYSICS TODAY* on the grounds of First Amendment protections, but allowed the case to proceed relating to the promotional use of the survey.

Meanwhile, the societies prevailed at every level of the German court system and repeatedly won in Switzerland, although the latest decision is again under appeal by G&B. Only in France, which has strict comparative advertising laws, did G&B prevail; that decision is on appeal by APS and AIP.

In the US case, after a period of "discovery" by lawyers from both sides, Judge Sand conducted a seven-day trial in June. At the trial, the societies stated that surveys by Barschall, who had died in February, were now "too stale" for further promotions of their journals, but that they intend to use his methodology in the future. While G&B gave up any claim to financial damages, because it refused to reveal its financial records, company attorneys asked the court for an injunction barring APS and AIP from ever using Barschall's survey techniques.

G&B contended in its suit that Barschall's studies constituted false or misleading advertising in violation of section 43(a) of the Lanham Act. Though Sand didn't need to decide on the APS and AIP defense that G&B was guilty of "unclean hands" in threat-



ening scholars and scientific societies, the judge found that the evidence “persuasively demonstrated that the present suit is but one battle in a ‘global campaign by G&B to suppress all adverse comment upon its journals.’”

In his carefully written 32-page opinion, Sand concluded that “Barschall’s methodology was sufficiently sound and reliably established his results.” G&B had claimed that Barschall was “fatally biased,” having served as a member of APS’s publications committee, and therefore was unable to conduct an impartial survey. To this argument, Sand stated that Barschall was a distinguished physicist, with some 80 scientific papers to his name. “His aptitude at collecting and analyzing quantitative data cannot seriously be contested, and the court thus finds that Barschall was sufficiently skilled to carry out the analyses that he performed.”

To the argument that Barschall’s methodology doesn’t establish journal cost-effectiveness and is therefore inappropriate for subscribers to rely upon when considering which journals to buy, Sand disagreed, stating that

Barschall’s 1988 article in *PHYSICS TODAY* begins with a careful qualification—specifically, that the survey did not imply it was “the only conceivable measure of cost-effectiveness.” Sand also wrote: “If G&B believes librarians will make more optimal decisions if they consider information other than that provided by defendants, its solution is to augment rather than censor the available truthful information.”

G&B intends to appeal Sand’s decision, Gordon declared during an interview by telephone. “We can do no less,” he stated, “because the court in France said Barschall’s studies were unfair and wrong, and because the usefulness of our journals never entered into Barschall’s calculations.”

Representing AIP and APS, Richard Meserve, a Washington attorney who also is a PhD physicist, said after Sand’s decision that Barschall and the societies only claimed to assess the cost-effectiveness as measured by the cost/impact ratio and that the societies stood up to G&B “because of their commitment to the open exchange of ideas and information.”

IRWIN GOODWIN

Gemini partnership, Van Citters says. Chile, meanwhile, was given first dibs on rejoining the project by 1 September.

The Chilean government had actually allocated funds for Gemini in each of the past two years, but it had withheld authorization to spend the money from Chile’s national science foundation, CONICYT, until the project’s legal and tax status could be resolved. The other international observatories in Chile—the European Southern Observatory, the Las Campanas Observatory of the Carnegie Institution and the Cerro Tololo Inter-American Observatory (CTIO)—operate tax-free. In addition, the observatories’ foreign employees are allowed to import cars and other personal goods duty- and tax-free, and they have diplomatic immunity, so they can’t be prosecuted under Chilean law. Some in the Chilean government are opposed to granting the observatories these privileges—an arrangement that has its roots in a 1953 agreement between the Chilean government and the United Nations Economic Commission for Latin America, and was introduced as an incentive to attract skilled people to Chile. But the Association of Universities for Research in Astronomy, or AURA, which manages Gemini for the NSF, wanted the same conditions to apply for Gemini as for CTIO, which it also runs, and the other international observatories in Chile, according to Van Citters.

About 10 days before the 1 September deadline, the Chilean parliament voted to satisfy the Gemini board’s terms of privileges and payment and rejoin the project—making Gemini the first international observatory in which Chile is a partner, rather than just the host country. But intense parliamentary debate continues regarding the status of future international observatories in Chile.

Chile gets 10% of the observation

## Chile Rejoins Gemini Telescope Project as a Full-Fledged Member

After being bumped last May from the Gemini telescope project for failure to pay its share of construction costs, Chile paid up \$3.52 million in time to rejoin the project before the 1 September deadline.

Gemini will consist of twin 8-meter optical-infrared telescopes, one in each hemisphere, which together will provide complete sky coverage. Gemini North is under construction on Mauna Kea in Hawaii, and Gemini South is being built on Cerro Pachon in Chile. The partners in the project are the US (50% share), the UK (25%), Canada (15%), Chile (5%) and Brazil and Argentina (2.5% each).

When the Gemini board tightened the screws on Chile, it was because, two years behind in its payments, Chile hadn’t yet contributed a cent. “Unfortunately, we had to say that we would seek an additional party to make up for the missing money,” says Wayne Van Citters of the National Science Foundation (NSF), the executive agency for the Gemini partnership. Chile’s share of the \$184 million project is \$9.2 million, and it owed \$2.2 million for 1995 and 1996, with another \$1.32 million due at the end of this year. In addition, Chile’s 5% share of operating costs is expected to come to about

▶ Gemini has won tax-free status for the project and diplomatic immunity for its foreign participants—perks that future international observatories in Chile may find hard to come by.

\$700 000 annually, once both telescopes are up and running. So, to keep construction on schedule, the board started talking to the Australian Research Council, which had made a strong bid to buy Chile’s share in the



GEMINI SOUTH, under construction on Cerro Pachon, Chile, is scheduled to see first light in 2000, and to be fully operational in 2001.

GEMINI 8M TELESCOPE PROJECT