STATE OF MICHIGAN

COURT OF APPEALS

NEWARK MORNING LEDGER CO., Plaintiff-Appellant,	UNPUBLISHED December 8, 2009
v DEPARTMENT OF TREASURY, Defendant-Appellee.	No. 283723 Court of Claims LC No. 00-017603-CM

Before: Fort Hood, P.J., and Cavanagh and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff, Newark Morning Ledger Company, appeals as of right the Court of Claims order denying its motion for summary disposition and granting summary disposition in favor of defendant, Department of Treasury. We reverse.

To resolve the case, the parties presented a stipulation of facts as well as additional documentary evidence. Plaintiff is a New Jersey Corporation with its principal place of business in Newark, New Jersey. Defendant, the entity statutorily responsible for the collection of taxes under the former Single Business Tax Act (SBTA), MCL 208.1 *et seq*.,[1] assessed plaintiff for failing to include royalties for calendar years 1991 and 1992. During the years at issue, plaintiff owned and operated ten daily newspapers in the United States, with eight in Michigan. Plaintiff's newspapers consisted of compilations of news stories, photographs, cartoons, columns, features and other information. The newspaper prepared some content locally, but the rest was collected by various news assembling organizations or feature syndicates.

For the tax period in dispute, plaintiff was a member of the Associated Press (AP). The AP operates as a not-for-profit corporation and is owned by its 1500 US daily newspaper members. The AP is a corporation and an entity separate from its members. The AP is the largest and oldest newsgathering organization in the world, and it serves as a source of news photos, graphics, audio, and video for its members. The AP supplies a steady stream of news

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[1] The SBTA was repealed on business activity in Michigan after December 31, 2007. MCL 208.151. The SBTA was replaced by the Michigan Business Tax Act, MCL 208.1101 *et seq*., effective January 1, 2008.

around the clock to its members. All of plaintiff's newspapers entered into agreements with various entities or feature syndicates to obtain news stories, photographs, cartoons, columns and other features in its newspapers.

Defendant conducted a field audit of plaintiff covering the years in issue and concluded that plaintiff's payments to various feature syndicates and the AP were royalties for purposes of the SBT. As a result of the audit, defendant issued a bill for taxes due by concluding that additional tax in the amount of $417,995 was owing, and interest of $256,347.09, for a total amount due of $674,342.09. Plaintiff paid the assessment in full under protest.

Following cross-motions for summary disposition, the Court of Claims granted defendant's motion and denied plaintiff's motion. The Court of Claims determined that a royalty was a payment for the use of property. It concluded that the news items and syndicated features were products, not services, and that the payments for them were therefore royalties within the meaning of the SBTA. Further, it held that plaintiff had failed to establish an equal protection violation based on dissimilar taxing of print and broadcast media. It concluded that the press was not being singled out so as to give rise to a First Amendment violation, and that there was a rational basis for the classifications in the statute.

Plaintiff first alleges that the Court of Claims erred in concluding that payments plaintiff made for newsgathering and feature syndicate services are royalties under MCL 208.9(4)(g). We agree. Summary disposition decisions are reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The parties to a civil action may submit stipulated facts to the court, and if the stipulated facts are sufficient to allow the court to render judgment in the action, the court shall do so. MCR 2.116(A)(1), (2). Generally, when a case is submitted on the basis of stipulated facts, those facts are viewed as conclusive. *Columbia Associates, LP v Dep't of Treasury*, 250 Mich App 656, 665; 649 NW2d 760 (2002). When the parties submit stipulated facts, we do not deal with factual findings, but with the application of the law, and our review of the decision is solely for errors of law. *In re Butterfield Estate*, 405 Mich 702, 715; 275 NW2d 262 (1979); *Federal Land Bank of St Paul v Bay Park Place, Inc*, 162 Mich App 1, 6; 412 NW2d 222 (1987).

The SBTA, MCL 208.1, *et seq*, is not a tax on income, but rather, a tax placed on the value-added portion of a product, which allows for certain exclusions, exemptions, and industry-specific adjustments. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005) (citations removed). "Value added" is considered to be the increase in the value of goods and services created by whatever a business does to them between the time of purchase and the time of sale. *Id*., quoting *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989). "In short, a value-added tax is a tax upon business or economic activity." *Id*., citing *Trinova, supra*.

SBT liability is calculated starting with the taxpayer's business income, which is also that taxpayer's federal taxable income. MCL 208.9; MCL 208.3(3). From that base, adjustments are made to increase this base for items paid by the taxpayer, which do not reduce the value added to the product, including dividends, interest, depreciation, and royalties, but only to the extent deducted from the federal taxable base. MCL 208.9(4); *ANR Pipeline Co, supra* at 199, citing *Perry Drug Stores, Inc v Dep't of Treasury*, 229 Mich App 453, 454-455; 582 NW2d 533 (1998). Next, adjustments are made to decrease this base for dividends, interest, and royalty income received by the taxpayer. MCL 208.9(7); *Id*., citing *Perry*, *supra* at 455. "These items are removed from the SBT base 'because, although those items represent income for federal tax purposes, they do not represent value added to the product. That is, they do not result from the use of capital by the recipient.'" *Id*., quoting *Perry*, *supra*. Under the SBTA, once these adjustments have been made, the taxpayer will be liable for tax in accordance with the adjusted tax base multiplied by the existing SBT percentage. MCL 208.31.

The SBTA section in effect during the period in dispute provided in relevant part:

> (1) "Tax base" means business income, before apportionment or allocation as provided in chapter 3, even if zero or negative, subject to the adjustments in this section.
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> * * *
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> (4) Add the following, to the extent deducted in arriving at federal taxable income:
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> (g) All royalties except the following:
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> (*i*) On or after July 1, 1985, oil and gas royalties that are excluded in the depletion deduction calculation under the internal revenue code.
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> (*ii*) Cable television franchise fees described in section 622 or part III of title VI of the communications act of 1934, 47 U.S.C. 542.
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> * * *
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> (*v*) Film rental or royalty payments paid by a theater owner to a film distributor, a film producer, or a file distributor and producer.
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> (*vi*) Royalties, fees, charges, or other payments or consideration paid or incurred by radio or television broadcasters for program matter or signals.
>
> (*vii*) Royalties, fees, charges, or other payments or consideration paid by a file distributor for copyrighted motion picture films, program matter, or signals to a file producer.
>
> (*viii*) For tax years that begin after December 31, 1993, royalties paid by a licensee of application computer software, operating system software, or system software pursuant to a license agreement. [MCL 208.9.]

The goal in statutory construction is to discern and give effect to the Legislature's intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The intent of the Legislature is most reliably evidenced through the words used in the statute. *Id*. If the language in the statue is unambiguous, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). However, if a statute is ambiguous then judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees*

Retirement Sys, 458 Mich 326, 332; 582 NW2d 767 (1998). A statute is ambiguous "only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177 n 3; 730 NW2d 722 (2007) (emphasis in original).

Moreover, a statute should be construed "as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002) (citations removed). "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), citing *Franges v Gen Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979); see also *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 675; 760 NW2d 565 (2008) ("a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result"). Tax laws are construed against the government, but tax exemptions are strictly construed in favor of the taxing unit. *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 534; 708 NW2d 461 (2005).

When a statute defines a specific term, that definition applies. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007), citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). However, if the statute does not include a definition, a court may consult dictionary definitions. The pertinent statute does not provide a clear definition of the word "royalty."

Both parties cite *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473; 373 NW2d 730 (1985) for the Court's interpretation of "royalty" under the SBTA. In *Mobil Oil*, petitioner was an oil and gas operator-lessee. *Id*. at 475. Under the lease, the petitioner was obligated to give the landowner-lessor either money or one-eighth of the gross production from the property. *Id*. The petitioner gave the lessor the one-eighth of the gross production from its leased property, and did not include this income in its Michigan tax base. *Id*. Respondent assessed a deficiency against petitioner.

In considering the term royalties, the Court consulted the dictionary, which defines "royalty" as:

> a compensation or portion of the proceeds *paid* to the owner of a right, as a patent or oil or mineral right, for the use of it . . . an agreed portion of the income from a work paid to its author, composer, etc., usually a percentage of the retail price of each copy sold . . . a royal right, as over minerals, granted by a sovereign to a person or corporation . . . the *payment* made for such a right. [*Id*. at 484, quoting *The Random House College Dictionary* (rev ed), p 1150.]

The Court then looked to Black's Law Dictionary for "royalty," which states:

> Compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

> Royalty is share of product or profit reserved by owner for permitting another to use the property . . . . In mining and oil operations, a share of the product or profit *paid* to the owner of the property. *Id*., quoting Black's Law Dictionary (5th ed), p 1195.]

Because *Mobile Oil Corp* dealt with an oil lease, and the definition of "royalty" includes oil rights specifically, this Court concluded that petitioner had, in fact, paid royalties to the lessor, and that these royalties had to be added to petitioner's SBTA tax base. *Id*. at 485, 499.

This Court has had the opportunity to apply the definition of royalty from *Mobil Oil* in other cases with mixed findings. For example, in *Detroit Lions v Dep't of Treasury*, 157 Mich App 207; 403 NW2d 812 (1987), National Football League (NFL) games were telecast by major television networks who paid the NFL for the privilege of showing its games. *Id*. at 211. The plaintiff, Detroit Lions, received a share of the NFL television proceeds, and thereafter deducted this amount from its SBT income base as excludable "royalties." *Id*. at 211-212. The defendant rejected this position.

This Court recognized that the contracts in *Detroit Lions* had characteristics of both a "sale" and a licensing transaction producing royalties, but finally held that the NFL television revenues were royalties. *Id*. at 216-217; 219. Although the Court noted that the NFL has held a copyright in the live broadcast of these games since 1978, it also concluded that "the existence of a copyright or patent is not crucial" to find a royalty. *Id*. at 218. The Court reasoned that the contracts granted the networks a license to use and exploit the product assembled by the NFL, with the NFL retaining numerous rights and privileges with respect to the game broadcasts, and therefore could not be characterized as a "sale." *Id*. at 218-219.

Another example is *Zenith Data Systems v Dep't of Treasury*, 218 Mich App 742; 555 NW2d 264 (1996), where the plaintiff distributed personal computers and computer software to governmental agencies, businesses, and individuals for their own use and for distribution to others. *Id*. at 743. The plaintiff purchased computer software from copyright owners and then modified the software to meet the end-user customer needs. Plaintiff included those payments it made to the copyright owners for the right to use their computer software in its SBT income base, but deducted from the SBT base incoming monies received from end users pursuant to licensing agreements as excludable "royalties." *Id*. at 744-745. The defendant claimed that the end-user payments were not royalty payments because the plaintiff does not have a proprietary interest in the software. *Id*. at 745-746.

The Court disagreed and held that the payments received by plaintiff for the license of its computer software were royalties. *Id*. at 749. In reaching this conclusion, the Court considered *Mobil Oil*, and also referred to federal income tax law to define "royalties." *Id*. at 748-749. The Internal Revenue Code, 26 USC 543, states:

> A personal holding company may deduct from its income monies that were received in connection with the licensing of computer software by a corporation engaged in the active conduct of the trade or business of developing, manufacturing, or producing computer software that developed, manufactured, or produced the computer software. [*Id*. at 748-749, citing 26 USC 543.]

The Court considered these definitions. It reasoned that the plaintiff retained rights in connection with the software and noted that the end users were making payments to plaintiff for the benefit of the modified software to a qualified company. *Id*. at 748.

In *Michigan United Conservation Clubs v Dep't of Treasury*, 239 Mich App 70, 79; 608 NW2d 141 (1999), aff'd by equal division 463 Mich 995; 625 NW2d 783 (2001), this Court considered the definitions of "royalty" in *Mobil Oil* and simplified the content contained therein. It stated the key characteristics of a royalty as: "(1) it is a payment, (2) in the form of either the product itself or proceeds from the sale of the product, and (3) made in consideration for the use of the property." Because the facts and circumstances of that case led the Court to conclude that these three key characteristics were not met, the simplification was proper. However, it is improper for these key characteristics to be divorced from the original intent as stated in *Mobil Oil*.

This Court used the key characteristics as stated in *Michigan United Conservation Clubs, supra*, in the consolidated case of *Columbia, supra*, 250 Mich App at 660, to determine whether there was a royalty payment. In that case, plaintiffs were both cable television system operators with cable systems in Michigan. Plaintiffs paid affiliation fees to satellite programming networks in exchange for programming packages that it distributed through their cable television systems. *Id*. at 661. Plaintiffs would pass along these fees to subscribers. *Id*. The dispute arose over whether plaintiffs' network affiliation fees should be considered "royalties" under the SBTA. *Id*. at 660-661.

The *Columbia* Court stated: "The *Mobil Oil* definition makes clear that royalties have three key characteristics: '(1) it is a payment, (2) in the form of either the product itself or proceeds from the sale of the product, and (3) made in consideration for the use of the property.'" *Id*. at 673, quoting *Michigan United Conservation Clubs, supra,* 239 Mich App at 79. The Court held that plaintiffs' network affiliation fees met this definition of royalties. It also noted that the payments were for the use of copyrighted material, as stated in the Black's Law Dictionary definition, and the fees were paid depending on the number of subscribers to plaintiffs' cable service, which is akin to payments made to authors, composers, or inventors. *Id*. at 673-674.

In *Field Enterprises v Dep't of Treasury*, 184 Mich App 151; 457 NW2d 113 (1990), this Court considered a situation where Twentieth Century-Fox Television Corporation (Fox) granted the plaintiff a limited license to show 197 M*A*S*H videotapes on a Detroit television station, WKBD-TV. *Id*. at 152. Through the agreement, plaintiff was entitled to show each videotape up to six times over a six-year period, telecasting Fox's copyright notice, and plaintiff was required to pay the license fee of $797,600 or $4,048 per episode, regardless of whether or not the episodes were telecast. *Id*. at 152-153. Fox agreed to not license the episodes to any other television station in plaintiff's market, although Fox retained all rights, title, and interest in the episodes. *Id*. at 153. The issue in *Field Enterprises* was whether the monies paid by plaintiff were royalties to Fox or rent. *Id*.

The Court first referred to the definition of "royalties" provided in *Mobil Oil* and *Detroit Lions, Inc*. However, the Court seems to abandon that line of reasoning and relied on a Second Circuit opinion:

> In *Rohmer v Comm'r of Internal Revenue*, 153 F 2d 61, 62-63 (CA 2, 1946), cert den 328 US 862; 66 S Ct 1367; 90 L Ed 1632 (1946), the court held that, where a copyright owner transfers substantially less than the entire bundle of rights conferred by the copyright, payment therefore, whether in one sum or in several payments, constitutes a royalty. [*Id*. at 157-157.]

The Court thereafter concluded that plaintiff had an exclusive license to publicly show its copyrighted work, which granted plaintiff ownership of the rights conveyed by the license, but less rights than the copyright owner, and therefore the monthly installment payments were royalty payments. *Id*. at 158-159. Importantly, as *Field Enterprises* was released for publication on July 16, 1990, it carries only persuasive authority for this Court. See MCR 7.215(J).

This Court is bound to follow the decisions of our Supreme Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). However, although each of the above mentioned cases cites *Mobil Oil* for its definition of "royalty," this Court seems to have broadened the application by seeking clarification through federal law. See *Detroit Lions, Inc, supra* (removing the preference that a royalty exist of a copyright or patent by citing *Comm'r of Internal Revenue v Affiliated Enterprises, Inc*, 123 F 2d 665, 668 [CA 10, 1941]); *Zenith Data Systems, supra* (defining "royalty" in the context of a computer software corporation through federal income tax law according to 26 USC 543); *Field Enterprises, supra* (eliminating the need for a royalty to be paid as a percentage or share for each copy sold, and finding that a party can pay a lump sum payment under an exclusive license and it is considered a divisible royalty payment according to *Rohmer, supra* 153 F 2d 61, 62-63.[2]

Using the three main key characteristics of a royalty, as stated in *Columbia* and *Michigan United Conservation Clubs,* the basic exchange of payment for goods may be deemed a royalty. However, "[t]ax laws generally will not be extended in scope by implication or forced construction. When there is doubt, tax laws are to be construed in favor of the taxpayer." *Michigan Bell Tel Co v Dep't of Treasury,* 445 Mich 470, 477; 518 NW2d 808 (1994). In construing these transactions under the definitions from *Mobil Oil*, the payments to newsgathering services and feature syndicates are not royalty payments, but instead are flat-rate payments for newspaper inputs. As argued by plaintiff, the *Mobil Oil* definition of royalties also requires the payment to be (1) a percentage of receipts or a payment per unit produced, and (2) sharing of product or profit, neither of which is met in this case because plaintiff pays a flat monthly amount for services, pursuant to written agreements. We agree. In *Mobil Oil*, the Supreme Court referred to two definitions of "royalty." Both definitions include a provision that a royalty payment is usually made in accordance with each copy sold, or paid for each copy of a specific work. *Mobil Oil, supra* at 484. Moreover, the payment must be made to the owner of a right, typically referring to a copyright or natural resource right. *Id*.

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[2] We do not conclude that the cited cases were wrongly decided, but merely express an opinion that they could have been decided within the context of *Mobil Oil* to reach an appropriate result.

In the case of the newsgathering organizations, such as AP, the analysis is more straightforward. Here, plaintiff is a member of AP and pays a flat fee for its newsgathering services. Under the Charter and Bylaws of AP, all members are required to submit local news (within a thirty-mile radius) to AP and must also publish a news service report of the AP. In exchange, each member is given the option to retrieve news articles from AP. AP's Restated Certificate of Incorporation states:

> The objects and purposes for which the Corporation is formed are to gather, obtain and procure, by its own instrumentalities, by exchange with its members and others, and by any other appropriate means, any and all kinds of news, information and intelligence; literary property of all kinds including that which is information, educational or otherwise of public interest; news pictures, pictorial news and art of any and all kinds and to furnish and supply the same to its members and others entitled to the use thereof under and subject to such regulations and conditions as may be prescribed by the bylaws and the mutual cooperation, benefit and protection of its members.

The AP is a not-for-profit organization and does not make or declare dividends. The cost of collecting, exchanging, and transmitting news is apportioned among the members. Further, the agreements between plaintiff and the AP also consisted of DataStream IB service, with a high-speed delivery of news reports, and an online service consisting of news reports.

As a member of the AP, plaintiff pays a monthly fee for the benefit of sharing in copyrighted news articles, for data services, and for the convenience of having a supplier to compile relevant and time sensitive world news articles for publication. The AP is not structured in a way to accept royalty payments, but instead is a not-for-profit corporation with its monthly expenses shared among the members. Importantly, plaintiff is also required to provide local news articles to the AP, and is required to publish a newspaper on a weekly basis. Plaintiff does not receive payment, royalty or otherwise, from the AP in exchange for providing these articles; it is simply a condition of membership. This is an exchange of information and copyright benefits.

As seen in the *Mobil Oil* definitions and in the above cited cases, royalty payments are made for copyrighted material based on each unit sold, such as with satellite service payments for each subscriber (see *Columbia*, *supra*, 250 Mich App at 673-674), or for each television broadcast of an NFL football game (see *Detroit Lions, Inc.*, *supra*, 157 Mich App at 217). Defendant points to *Field Enterprises* for the proposition that a royalty payment is not required to be a percentage of receipts or payment for an amount per unit, but can be a fixed monthly amount. First, *Field Enterprises* is only persuasive authority for this Court based on the publication date. See MCR 7.215(J). Second, the facts in *Field Enterprises* are distinguishable, because in that case the plaintiff was given an exclusive right to show M*A*S*H programs in its area over a six-month period. Even if the plaintiff in *Field Enterprises* did not pay on a pay-per-use basis, it still held exclusive license to broadcast at its will and could have broadcast daily if it so chose. There was no sharing of the copyright material, but merely a short-term exclusive license.

Unlike in *Field Enterprises*, plaintiff did not hold an exclusive license, but instead received news articles, along with many other subscribers, for one-time use in its publication. Plaintiff paid a flat membership fee that was in no manner related to the number of newspapers sold, or dependent upon which articles were selected for publication. On the contrary, the payments made by plaintiff were more akin to a payment for membership services, which would allow plaintiff to share in the copyright benefits with all other AP members, and was not consistent with royalty payments.

Plaintiff's payments for feature syndicates are also flat weekly fees, paid for the right of one-time publication of pertinent columns, cartoons, crosswords, and weather information. Although these payments, in some cases, are for the use of copyrighted materials[3], the payments are not on a pay-per-use basis. Each contract is for one-time use in a newspaper, and there is no correlation between the payment required and the number of newspapers sold. The payments are in no way made from the proceeds of the newspaper sales.

The definitions in *Mobil Oil* state that a royalty is "an agreed portion of the income from a work paid to its author, composer, etc., usually a percentage of the retail price of each copy sold" and "payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent." *Mobil Oil, supra* at 484. These definitions seem to presume that the right that is being sold will have a continuing value to the holder of the right, or the purchaser of that right. This is certainly the case with most royalties, such as the use of television programming, artwork, written publications, digital media including sound recordings of music or instrumental works, satellite service, or land producing natural resources. Where there is a continuing interest in the product or service being sold, it is understood that a payment for each copy sold or for a share in the profit of natural resources is appropriate.

However, the definitions of royalty are not consistent with a situation where there is no continuing right. The definitions do not provide for this type of a scenario because this situation does not pertain to a royalty. The entertainment benefit of a movie, for example, is enjoyed whenever an individual watches it immediately upon release or whether they wait for one year to see it. However, the benefit of a news article or weather forecast does not maintain its beneficial value over time; yesterday's news is no longer news. Because of this anomaly, most news inputs are only relevant once.

Arguably, plaintiff does purchase some items that could have a reoccurring value, such as cartoons and crossword puzzles. Although this could change the analysis for those pieces, it does not change the situation here because plaintiff's contracts specifically state that each item used is limited to a one-time publication. For the reasons stated above, we conclude that

[3] The contracts between plaintiff and the feature syndicate service providers do not clearly state whether the provider holds a copyright on each of the items sold for publication.

plaintiff's payments to newsgathering organizations and feature syndicates do not constitute royalty payments under the SBTA.[4]

Reversed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

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[4] Appellate courts do not unnecessarily resolve constitutional questions, and judicial review of a constitutional question should not occur if the case can be disposed of on other grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003).