RECENT CASES

California Court of Appeal upholds award of $1.8 million to actor William Smithers for breach of contract by MGM Television in screen credit dispute case

A jury award of $1.8 million to actor William Smithers in his action against Metro-Goldwyn-Mayer Studios, Inc., for breach of contract and tortious breach of contract has been upheld by a California appellate court.

In 1976, Smithers accepted a role in the MGM television series "Executive Suite." Smithers agreed to a smaller than usual fee in return for a "most-favored-nations" screen credit arrangement. This arrangement provided that only three performers would receive "up-front" billing and that no other performer would receive

more prominent billing or a better billing provision than Smithers (except when performers' names appeared alphabetically on the crawl). Furthermore, if any other performer received greater compensation than Smithers, Smithers was to have at least the same compensation as that performer.

Ultimately, when the show was aired, 10 or 11 actors were given "up-front" billing while Smithers' end-of-show, name-only billing remained the same. Smithers discovered that the most-favored-nations provision of his Outline Deal Memo had been changed in an unsigned long form contract to allow any number of performers to be billed more prominently. When Smithers declined a request that he waive the most-favored-nations provision of his contract, Harris Katleman, the President of MGM Television, allegedly told Smithers' agent that he would not use Smithers' services in future productions.

After hearing considerable testimony as to the importance of billing to an actor and the manner in which billing affects an actor's compensation, a jury awarded Smithers $500,000 in damages against MGM for breach of contract; $300,000 against MGM for tortious breach of contract; $200,000 for fraud against MGM, Katleman, and Bernard Weitzman (vice president of MGM in charge of Business Affairs); and $2 million in punitive damages against MGM. The jury found that Katleman had issued "what amounted to a threat to blacklist Smithers and to encourage others to blacklist him" unless Smithers waived his contractual rights. The trial judge reduced the fraud damages to $1 and the punitive damages to $1 million, but found that there was sufficient evidence to establish MGM's tortious breach of its contractual duty of good faith and fair dealing.

A California Court of Appeal has agreed, stating "it is clear that the threat was extraneous to the contract,

intending to bludgeon Smithers not only into foregoing his contractual rights but also threatening action directly affecting the practice of his art and damaging to his future earning power."

The award of damages for breach of contract also was affirmed. The evidence showed that Smithers suffered an economic loss due to MGM's failure to live up to its contract. Witnesses could not estimate precisely how much Smithers would earn in future years, but their testimony did provide a reasonable basis on which to calculate damages.

MGM also was unsuccessful in asserting that damages were improperly allowed for emotional distress based on Smithers' cause of action for fraud. The court concluded that the jury properly found, on substantial evidence, that Smithers had been damaged by MGM's deceit in failing to honor the most-favored-nations

provision of their contract - a provision on which Smithers had relied when he entered into the contract.

The trial judge's reduction of punitive damages also was upheld. The appellate court concluded that while MGM's conduct may have been "extreme and outrageous," Katleman's purported threat was neither carried out nor communicated to any other party and did not appear to result in economic loss to Smithers.

Smithers v. Metro-Goldwyn-Mayer Studios, Inc., Case No. 2d Civ. 65508 (Cal.App., Feb. 1, 1983) [ELR 4:21:1]

Arbitrator rules that Paramount's prepayment of residuals to director John Frankenheimer for pay-tv production of "The Rainmaker" violated Directors Guild of America 1981 Basic Agreement

When Paramount Pictures approached John Frankenheimer to direct a production of "The Rainmaker" for exhibition by HBO over pay television, Frankenheimer stated that his fee would be $70,000 - an amount equivalent to the salaries of the performers starring in the production. Director's Guild scale for the production was $34,237, and Paramount said it would pay no more than that. In order to resolve the disparity, Paramount proposed to prepay the first two years of the residuals due Frankenheimer. (HBO's license with Paramount was for a two year period.) The contract therefore called for three payments to Frankenheimer of $24,333.33 each. But Frankenheimer eventually was sent checks totaling $34,237; and a check for $35,763 as an "advance against residuals that will become due" was sent to the DGA. The DGA objected, however, claiming that the

1981 Basic Agreement does not permit a production company to prepay residuals to a director.

Arbitrator Hermione K. Brown has ruled that the $35,763 payment to the DGA may not be offset or credited against any residual or other contingent compensation due Frankenheimer for his services as director of "The Rainmaker."

Under section 4-109 of the 1978 Basic Agreement, it was provided that "Overscale cannot be used to credit or offset in any manner any payments required to be made to the Director. The only exception to the prohibition against crediting or offset monies in excess of scale is the right of employer to negotiate with the Director to credit or offset residuals against monies in excess of 200% of scale. . ." Section 10- 1 14 states that a separate check for guaranteed residual payments must be sent to the director in care of the Guild and not combined with other payments for his or her services.

Notwithstanding these provisions, it was "not uncustomary" for directors to be paid, upon request, a guaranteed amount against residuals by production companies. While the Guild was concerned about the "bona fides" of many of these arrangements, it did not attempt to challenge true guaranteed residual prepayment arrangements.

However, when conducting negotiations for the 1981 Basic Agreement, the Guild took the position that in order to protect the overscale director, no prepayment of residuals would be permitted except for the offset of monies in excess of 200% of scale, and in particular, there could be no prepayment of residuals in pay television. This position apparently was accepted by the producers, but the draft language in the 1981 Basic Agreement was so similar to the overscale prohibition in the 1978 Basic Agreement that, arguably, it could allow for the continuation of the guaranteed residual

prepayment arrangements which took place under the 1978 agreement.

Arbitrator Brown accepted the testimony of Michael Franklin that the draft language was intended to bar such arrangements except in the case of payments in excess of 200% of scale in free television, and thus, Brown ruled accordingly.

In awarding costs, Arbitrator Brown noted that while Paramount was responsible for breaching the 1981 Basic Agreement, Frankenheimer had concurred in the impermissible arrangement. Brown therefore ordered the DGA to pay 75% of the fees and costs in the matter (the remaining 25% to be paid by Paramount), with the "hope and intent" that the DGA recover the costs from John Frankenheimer Productions, Inc.

In the Matter of the Arbitration between Directors Guild of America, Inc., and Paramount Pictures Corporation Relating to "The Rainmaker" Before the Directors Guild

of America - Producers Arbitration Tribunal, Case No. 01263 (Jan. 10, 1983) [ELR 4:21:2]

Denial of third-ranked boxer's right to fight for championship was denial of a property right without due process, Federal District Court rules

Tony Ayala is a junior middleweight prizefighter. As of April 1982, Ayala was the third-ranked boxing contender in the world, according to the World Boxing Association (WBA). Reminiscent of the words of Marlon Brando, Tony Ayala "could have been a contender" and was willing to go to court to fight for his right to be a part of a championship bout. The last thing Ayala wanted was a "one-way ticket to Palukavilla."

In April of 1982, the WBA sanctioned a prize fight between the junior middleweight champion, Davey Moore,

and the fourth-ranked junior middleweight contender, Charlie Wier. Tony Ayala brought an action against the WBA claiming that it was unlawful for the WBA to sanction the Moore-Wier bout. According to Ayala, his ranking ahead of Charlie Wier was a protectable property right, a property right which the WBA was duty-bound to enforce, and that he had been denied this property right without due process of law. Judge Stern of the Federal District Court in New Jersey agreed.

According to Ayala, the WBA's sanctioning of the Moore-Wier fight was done in violation of the WBA's own charter. "Regulation 6" of the World Championships Regulations required the Champion Moore to defend his title against the "leading available contender."

The WBA responded to Ayala's contention by arguing that the "leading available contender rule" protected only the first ranked challenger (the prizefighter Ayub Kolule - ranked number 2). The WBA pointed out that

Ayub Kolule had relinquished his right to fight Moore and had transferred it to the promoters of the Moore-Wier fight in exchange for a guarantee that the winner of the bout would defend his title against Ayub Kolule. In addition, the WBA argued that "Regulation 19" of the World Championships Regulations empowered the WBA to ships Regulations empowered the WBA to suspend all other regulations as the WBA saw f-it, including "Regulation 6."

Thus, the WBA argued that the "leading available contender's" right to fight the Champion vested only with the number 2 contender who could, at his election, either exercise that right or transfer it away or that the "leading available contender" rule had been suspended by a majority vote of the Championship Committee by invoking "Regulation 19."

In order to resolve the question of whether Ayala had been denied property without due process of law, the

court addressed three issues: first, the issue of whether the WBA's sanctioning of the Moore-Wier bout constituted state action; second, whether Ayala's ranking constituted a protectable property right; and third, whether the WBA had in fact denied Ayala procedural due process.

The court ruled that the actions of the WBA did constitute state action because the "WBA clearly performs a public function," namely, the regulation of boxing. The court drew a parallel to the plethora of federal cases which hold that the regulatory activities of the NCAA constitute state action and concluded that the regulatory activities of the WBA were no different.

At the same time, the court reasoned that Ayala's right to fight for the title was a protectable property interest because of his status as the third-ranked contender and because of the "leading available contender rule" embodied in "Regulation 6." The court recognized that

Ayala earned this property right, literally, by sweat and blood and that the court would not allow the WBA to undermine this right by improperly sanctioning the Moore-Wier fight. Moreover, Judge Stern rejected the WBA's contention that the right belonged only to the number 2 ranked boxer on the ground that this would enable promoters to "buy off" the number one contender and transfer the right to any fighter.

Finally, the court found that the WBA violated procedural due process by denying Ayala the right to fight for the championship without informing him that Wier would be getting a title bout instead of him and by failing to explain its reasons for such a decision. Moreover, the court was appalled by the WBA's invocation of "Regulation 19" which the court viewed as an attempt to "change the rules in the middle of the game." As a result, the court enjoined the WBA from sanctioning the

Moore-Wier fight although it refused to issue an order enjoining the fight altogether.

Duva v. World Boxing Association, 548 F.Supp. 710 (D.N.J. 1982) [ELR 4:21:3]

Three separate courts rule that unauthorized interception of pay television signals is illegal

Distributors of subscription television services have prevailed in three cases involving the unauthorized appropriation of their signals.

In Home Box Office, Inc. v. Advanced Consumer Technology, HBO has been granted an injunction barring the manufacture and sale by ACT of antennas and down-converters that enable purchasers of the equipment to intercept the microwave signals used to transmit

HBO programs and thereby avoid the need to pay HBO's subscription fees. The antennas and down-converters otherwise would have been supplied by HBO's affiliates to paying subscribers. A Federal District Court in New York found that ACT's activities violated section 605 of the Communications Act which provides that no unauthorized persons "shall receive or assist in receiving any interstate or foreign communication ... for his own benefit or for the benefit of another not entitled thereto." ACT argued that HBO's services are "intended for the use of the general public" and thus fall outside the reach of section 605. ACT pointed out that HBO's signal can be received by equipment widely available to, and within the means of, the general public, that HBO has not protected its signal from unauthorized reception via scramblers, and that HBO wishes to reach as wide an audience as possible.

District Court Judge Sofaer reviewed the legislative history of section 605, which originated as Regulation 19 to section 4 of the Radio Act of 1912. Judge Sofaer concluded that the section consistently has been used "to protect communications access to which the sender intends to restrict and is authorized by the FCC to restrict, even though unauthorized recipients could readily obtain the signal involved, and irrespective of the content of the transmission." Congress did not intend to protect only transmissions that were difficult to intercept or only those persons who take affirmative steps to keep transmissions confidential. HBO may aim to reach a wide audience, but this does not mean that its signals are intended for the general public.

Further, signal scrambling and other means of technical protection are not only costly but might not enhance signal security; it appears that all practicable forms of scrambling are subject to unscrambling via readily

available equipment. The court's decision concurs with such cases as the frequently cited Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980) (ELR 2:19:1), National Subscription Television v. S&H TV, 644 F.2d 820 (9th Cir. 1981) (ELR 3:2:6), and Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F.Supp. (E.D.N.Y. 1979) (ELR 1:11:6). The decision also follows the FCC's position that pay-TV signals are not "broadcast" and therefore are within the protection of section 605.

In Cablevision of Breckenridge v. Tannhauser (Condominium Association), a Colorado corporation providing cable television and FM radio services to subscribers has been awarded damages for the unauthorized use by a condominium association of Cablevision's transmissions. In 1972, Cablevision agreed to provide its services to the 33 units in the condominium. However, beginning in 1974, Cablevision was paid for service to

only three of the units, though the remaining units continued to receive television service via an amplifier connected to the Cablevision line. Cablevision terminated all service to the condominium in 1976 after the company discovered the unauthorized use.

In its action against Tannhauser, Cablevision was awarded approximately $11,500 by a trial court for Tannhauser's conversion of Cablevision's property interest. An appellate court reversed, finding that the trial court erred in granting damages for conversion when the issue before the court was whether Tannhauser had breached a contract with Cablevision. The Colorado Supreme Court has reversed the appellate court ruling and has granted damages to Cablevision on an alternative basis of liability - unjust enrichment. The court found that it would be inequitable not to require Tannhauser to pay for the benefit it had received from Cablevision. Cablevision obviously never intended to provide service to

all of the condominium units in exchange for payment from three units. Tannhauser's representatives knew that Cablevision expected compensation for each unit receiving the Cablevision transmissions. Tannhauser's conduct "impaired the ability of Cablevision to sell its service to other potential subscribers." While Cablevision does not have an exclusive Tight in the broadcast signals it receives, the company does have a legally protected interest in its reception, processing and distribution system and the services attendant to this system. Cablevision therefore was entitled to damages based on the rate set in the company's franchise with the city of Breckenridge. The matter was remanded to the trial court for the entry of judgment.

The Colorado Court of Appeals reappears in the case of American Television and Communications Corporation v. Manning, in which the court granted a preliminary injunction barring Manning's continued sale of

antennas and down converters capable of receiving HBO signals. ATC is the exclusive supplier of HBO programming in the Denver metropolitan area. The court found that the trial court had erred in refusing to grant a preliminary injunction to ATC. The company had a reasonable probability of success on the merits of its common law unfair competition claim and could show irreparable harm which could not be compensated with monetary damages, because the number of sales by Manning and the amount of damages to be awarded for each lost sale would be very difficult to determine, according to the appellate court.

Home Box Office, Inc. v. Advanced Consumer Technology, 549 F.Supp. 14 (S.D.N.Y. 1981); Cablevision of Breckenridge v. Tannhauser Condominium Association, 649 P.2d 1093 (Colo. 1982); American Television and

Communications Corporation v. Manning, 651 P.2d 440 (Colo.App. 1982) [ELR 4:21:3]

Federal court lacked jurisdiction to rule on franchise fee dispute between Peoria and its cable television franchisee prior to obtaining review of FCC's rule on cable franchise fees

A Federal Court of Appeals has ruled that an action in which the validity of a Federal Communications Commission rule on cable television franchise fees was raised by the parties must be presented to the FCC prior to any further proceedings in the matter.

The rule in question, 47 C.F.R. section 76.3 1, limits cable franchise fees to three percent of franchisee's revenue. Franchises in existence at the time the rule was

adopted in 1972 are not subject to the rule until 15 years after the date the franchise was granted.

In 1966, the City of Peoria granted a 20-year cable television franchise to General Electric Cablevision Corporation. GE agreed to pay the city an annual franchise fee equal to ten percent of GE's gross revenue. On the day in 1981 that Rule 76.31 became applicable to GE's Peoria franchise, the city brought suit in a Federal District Court against GE, seeking a declaration that the rule is invalid and also claiming breach of the franchise contract under state law. GE named the FCC as a third-party defendant, claiming that the controversy really was between the city and the FCC. GE also brought a separate proceeding before the FCC to waive the application of Rule 76.31.

The District Court found that the rule was invalid and directed GE to comply with existing franchise agreement. Soon after, the FCC's Cable Television Bureau

denied GE's petition for a waiver on the ground that no evidence had been submitted that the ten percent fee was an "appropriate element" of Peoria's program for regulating cable television.

However, a Federal Court of Appeals has found that the District Court lacked jurisdiction to rule on any of the claims with which it was presented. "Peoria's action against (GE) to declare the FCC's rule invalid was brought in the wrong court at the wrong time against the wrong party," declared the Court of Appeals. Proceedings for judicial review of final orders of the FCC must be brought in a Federal Court of Appeals, and the proper defendant is the FCC, not an interested private company. The court also could not recall a case where a party raising a defense based on a law or regulation was allowed to name the enacting government body.

On remand, the court suggested that the District Court stay the litigation before it to enable Peoria to file a

petition with the FCC to repeal Rule 76.31 or a petition for a waiver, in which it might request the FCC to consider the validity of the Rule. If the waiver is denied, the Court of Appeals then may review the validity of the Rule if asked to do so. After the validity and application of the rule are determined, the District Court will be in a position to dispose of any remaining issues.

City of Peoria v. General Electric Cablevision Corporation, 690 F.2d 116 (7th Cir. 1982) [ELR 4:21:4]

Hawaii Supreme Court rules that issues of material fact preclude award of summary judgment to entertainers in libel action against writer of newspaper article suggesting possible connection between the entertainers and organized crime

In 1978, the Valley Isle, a biweekly Hawaiian newspaper, published an article written by Rick Reed entitled "Link Between Crime Leader and Government is the Key." The article discussed the recently released report of the Hawaii Crime Commission and cited the Commission's view that organized crime had "linkages" with high political, social and entertainment circles in Hawaii. The article also quoted what is described as an "oft-used axiom in Hawaii": "If you want to know which candidate is backed by organized crime, watch to see who the big-name musicians perform for." The article then listed about 25 entertainers who would be performing at a forthcoming fundraising rally for Governor George Ariyoshi.

Several of the entertainers named in the Valley Isle article brought a defamation action alleging that Reed had implied they were connected with or controlled by

organized crime because of their participation in the Ariyoshi rally.

The trial court granted summary judgment for the entertainers, finding that Reed's article constituted libel per se and that it was published with reckless disregard for its truth or falsity.

The court issued a similar ruling in connection with certain statements regarding the Ariyoshi gathering and the possibility that organized crime has a "foothold" in the entertainment business, made by Wayne Nishiki, a candidate for lieutenant governor to a group of university students. The statement, which did not refer to any specific entertainer, was videotaped and aired by television station KITV.

On appeal, the Hawaii Supreme Court determined that the actual malice standard would apply to Nishiki. although he was an individual rather than a media defendant, particularly since Nishiki is a public figure. In the

court's view, "The United States Supreme Court itself, while not articulating a standard explicitly applicable to nonmedia defendants, has made no distinction between media and nonmedia defendants and has further abandoned the traditional dichotomy between libel and slander actions."

Nishiki maintained that he never suggested that any of the individual performers was actively involved in organized crime and that he based his remarks on the Commission report and on a series of articles in a Honolulu newspaper. The Court also found that issues of fact were present requiring the reversal of summary judgment granted by the trial court to the entertainers.

Rodriguez v. Nishiki, 653 P.2d 1145 (Hawaii 1982) [ELR 4:21:5]

Advertising company's right to radio spot advertising did not extend beyond seven-year term of contract

The lack of clarity in a key contractual provision has cost the William B. Tanner Company approximately $11,500 worth of radio advertising time. Tanner is in the business of providing radio stations throughout the United States with audio promotions, including the Tanner Total Sound Library - a collection of prerecorded business commercials, musical jingles and sound effects for use in radio advertising. Tanner usually is paid by a station partly in cash and partly through the right to have a station broadcast a specified number of "spot announcements" - air time advertising segments of one minute or less. Tanner then sells the spot announcement time to advertisers.

In 1971, Tanner entered an agreement to provide its Library to radio station KOWO in Minnesota. The station agreed to pay Tanner $65 per month for the seven year term of the agreement and to provide Tanner with 2,800 one-minute spot announcements. In 1978, KOWO chose to terminate its agreement with Tanner, and advised Tanner that it would refuse to honor any additional requests for spot announcements after the contract's termination date.

Tanner, awakening to the fact that it had requested only 67 spot announcements during the preceding seven years, sued for anticipatory breach of contract. Tanner argued that the spot announcement supply remained "valid until used" and that KOWO was obligated to provide the advertising time to Tanner until Tanner had requested all 2,800 spots.

The contractual provision stated that the station would provide the spots, "And since they are considered

prepayment for service(s) rendered, they are to be valid until used." A Federal District Court in Minnesota noted "the remarkable lack of clarity of the ... contract" and observed "It is almost inconceivable that a large company, doing business nationwide, would adopt such a poorly drafted document as its standard form of contract."

The agreement did not provide that the station was required to honor Tanner's requests for time after the termination of the agreement. Given the seven-year term, Tanner would have had to request one or two spots per day to utilize all of the 2,800 spots, but this was not an unreasonably large number, stated the court. -ne agreement also contained a provision whereby any assignee of the station's license would be bound by the time credit and payment provisions. But a license may only be assigned during the term of an agreement and the KOWO-Tanner agreement did not contain a provision

requiring the station to bind its successor to assume any post-termination obligations to Tanner.

The reasonable term for the performance of the advertising time provision was found to be the sevenyear term of the agreement. This provision expired on the agreement's termination date, and therefore the state was granted summary judgment on Tanner's claim for the value of the unused spot announcements.

William B. Tanner Company, Inc. v. Waseca Owatonna Broadcasting, 549 F.Supp. 411 (D.Minn. 1982) [ELR 4:21:5]

Nevada Supreme Court upholds state statute authorizing selective investigation of individuals operating non-gaming enterprises on the premises of gaming establishments

The Supreme Court of Nevada has upheld the constitutional validity of a statute providing that any person or entity that engages in a non-gaming business operation on premises occupied by a licensed gaming establishment may be required by the Nevada Gaming Commission to apply for a determination of suitability to be associated with a gaming enterprise. The court ruled that the statute was not vague, because its purpose clearly was to provide a basis for the selective investigation of individuals choosing to conduct businesses in proximity to gaming activities when state authorities are suspect of the activities of such individuals. This purpose is both legitimate and reasonable, stated the court, given the need for "resourceful" and complete controls over the "quicksilver" gaming industry.

The business in question was Freddie's Dress Shops, owned by Frederick J. Glusman, which maintains retail

stores at the Las Vegas Hilton and Stardust Hotels. Glusman and the hotels had argued that the statute was overbroad because it regulates all types of businesses regardless of any connection with gaming. But a contention of overbreadth generally is available only in cases involving First Amendment rights and Glusman did not demonstrate that any of his First Amendment rights were impaired by the statute.

The statute also was ruled a reasonable exercise of the state's police power and was found not to violate Glusman's right to privacy. A business voluntarily located near a gaming establishment was not entitled to invoke a right of privacy claim which might undermine the state's capacity to regulate gaming.

The statute did not impair Glusman's contractual rights without just compensation, found the court. The Stardust lease covered the possibility of termination in the event of a denial of suitability. And police power concerns of

public health, safety and welfare in this case overrode the impairment of contracts clause in the Nevada and Federal constitutions.

The court did find that the statutory imposition of the costs of the investigation on the non-gaming business was unreasonable and beyond legitimate public purposes, stating that "It is not within the scope or purpose of gaming control to selectively impose on non-gamers the financial burden of gaming enforcement." The cost assessment provision of the statute therefore was declared invalid.

State v. Glusman, 651 P.2d 639 (Nev. 1982) [ELR 4:21:6]

Briefly Noted:

Copyright.

"Statutory damages provided by Congress for violations of the Copyright Act are equitable and not legal in nature," and therefore do not entitle a defendant in an action seeking statutory damages for copyright infringement to a trial by jury, according to a Federal District Court in Indiana. BMI filed suit against Club 30 for eight alleged instances of copyright infringement. BMI sought a permanent injunction, minimum statutory damages and attorney fees. In its answer to BMI's complaint, Club 30 demanded a jury trial. BMI moved to strike Club 30's demand for a jury trial, contending that the claims for relief "are entirely equitable in nature." Recognizing there is a split of opinion among different Circuit Courts of Appeal on this issue, the Indiana court granted BMI's motion to strike Club 30's request for a jury trial. "Congress has simply authorized by statute

what equity courts have long done as a matter of course, i.e., not to suffer a wrong without a remedy. In codifying this remedy, Congress did not remove it from the equitable jurisdiction of the courts, instead they simply provided guidelines to be used by the courts in the exercise of their discretion," the court explained.

Broadcast Music, Inc. v. Club 30, Inc., Civil No. F 82-312 (N.D.Ind., Jan. 28, 1983) [ELR 4:21:6]

First Amendment.

The Meadowlands Sports Complex in New Jersey is not a "public forum," and the New Jersey Sports and Exposition Authority's policy of prohibiting the distribution of literature and solicitation of money there is a reasonable one, according to a Federal Court of Appeals.

The Authority's nonsolicitation policy prevented the International Society for Krishna Consciousness, Inc. (ISKON) from soliciting money at the state-owned sports complex. ISKON brought suit in Federal District Court, challenging the policy as a violation of the First Amendment. The District Court denied ISKON's claim, finding that the race track, stadium and surrounding blacktop was not "designed, built, intended or used as a public forum." The District Court further found that the Authority's non-discriminatory policy had a rational basis in ensuring the unhampered movement of large crowds. ISKON appealed, contending that the sports complex is a public forum, and therefore the distribution of literature in return for donations is subject only to reasonable restrictions, not a total ban. The Court of Appeals disagreed, holding that "the complex is not intended to be a public forum, and it is not unreasonable for the Authority to prohibit outside groups from

engaging in activities which are counterproductive to its objectives." "Consequently, die-hard football fans and railbirds may anticipate some bad days for their favorite teams and steeds, but the irritation will not be compounded by the importunings of those seeking contributions for special interest groups."

Intern. Soc. for Krishna v. New Jersey Sports, Etc., 691 F.2d 155 (3rd Cir. 1982) [ELR 4:21:7]

High School Sports.

An Ohio Court of Appeals' has ruled that a state high school athletic association eligibility rule barring certain students from participating in sports does not require "strict scrutiny" analysis in reviewing its Constitutionality. The rule in question prevents students whose parents

live out-of-state from participating in athletic programs in schools that are members of the association. The court found that nonresident high school students do not constitute a "suspect class" entitling them to a stricter standard of review than the "rational basis" test used by the trial court. Further, the court held that education is not a "fundamental right, " noting that "education is not protected by the United States Constitution either explicitly or implicitly." In response to the students' due process argument, the court held that although students do have property and liberty interests in their education, participation in athletics (though a component of education) is not by itself a separate and distinct property or liberty interest, deprivation of which gives rise to due process considerations.

Menke v. Ohio High School Athletic Association, 441 N.E.2d 620 (Ohio App. 1981) [ELR 4:21:7]

Sports.

The New York Mets baseball team has been held liable to a spectator hit by a foul ball which came through a hole in the protective screen behind home plate at Shea Stadium. An earlier decision by the New York Court of Appeal concluded that "the owner (of the stadium) must screen the most dangerous section of the field - the area behind home plate." The question presented in this case was whether the woman could sue the Mets directly, as exclusive sole tenant of Shea Stadium, and if so under what theory? The provisions of the stadium lease with the City of New York, the owner of Shea Stadium, obligate the Mets to maintain the playing field, and the court found the screen to be part of the field. Consequently, the court held that the Mets were

"at all times under a duty to maintain and control the protective screening for the safety of plaintiff who has purchased a ticket seating her behind the safety screen, thereby causing her to rely on its protection." Unable to find the requisite " notice" to support liability under common law negligence, the court used the res ipsa lo-quitur doctrine and found that the accident would not have occurred in the absence of negligence on the part of the Mets.

Uzdavines v. Metropolitan Baseball Club Inc., 454 N.Y.S.2d 238 (N.Y. City Civ. Ct. 1982) [ELR 4:21:7]

DEPARTMENTS

In the Law Reviews:

Hastings College of the Law has published Volume 4, Number 4, of Comm/Ent, A Journal of Communications and Entertainment Law. Copies of the issue are available for $6.50 each directly from Hastings whose address is 200 McAllister Street, San Francisco, California 94102. The current issue features a Symposium of papers and comments that were presented at the American Bar Association Conference on Media Labor Law issues held in Washington, D.C., in February 1982. Specific article titles are the following:

A Media Labor Law Symposium Introduction by David Tajgman, 4 Comm/Ent 575 (1982)

Labor and the Media in the Eighties by Robert M. Segal, 4 Comm/ent 579 (1982)

Collective Bargaining Issues in Newspapers by John B. Jaske, 4 Comm/Ent 595 (1982)

Impact of New Technology on Existing Bargaining Units in the Newspaper Industry by Martin R. Ganzglass, 4 Comm/Ent 605 (1982)

VDTs as a Health Problem: The Newspaper Guild's Experience by David J. Eisen, 4 Comm/Ent 625 (1982)

OSHA, NIOSH and the VDT Issue by L. Peyton Hendricks, 4 Comm/Ent 631 (1982)

Hiring Referral Systems: Priority and Liability by Donald F. Sugerman, 4 Comm/Ent 637 (1982)

Employee and Independent Contractors: Legal Implications Of Conversion from One to the Other by Allan L. Bioff and Robert E. Paul, 4 Comm/Ent 649 (1982)

Double-Breasted Operations: Construction Tool Being Used in Broadcast Industry by Mary Ellen Krug, 4 Comm/Ent 677 (1982)

Personal Contracts for Bargaining Unit Employees: An Analysis of Media Labor Implications by Victor Strimbu, 4 Comm/Ent 687 (1982)

Can a Computer be an Author? Copyright Implications of Artificial Intelligence by Timothy L. Butler, 4 Comm/Ent 707 (1982)

Direct Broadcasting Satellites: FCC Adopts "Open Skies" Policy for Space Age Technology by Jeff Edward Johnson, 4 Comm/Ent 749 (1982)

As Interactive Cable Enters, Does Privacy Go Out the Window? by Gary Selvin, 4 Comm/Ent 781 (1982)
[ELR 4:21:7]