BUSINESS AFFAIRS

The Regulation of Player Agents: State of California, NFL Players Association and NCAA Adopt Rules to Regulate Athletes' Agents

by Lionel S. Sobel

In 1975, the United States House of Representatives appointed a Select Committee on Professional Sports. The Committee's charter was a broad one, and over the next year or so, it conducted hearings in Washington on a wide range of subjects, including baseball's antitrust exemption, the movement of teams from one city to another, and the role of player agents in the sports industry.

While the testimony offered on all topics was frank and opinionated, the testimony offered on the subject of player agents was especially acerbic. The Committee was told that agents are "frauds" and "parasites," "the most destructive forces in sports today," and even the prime cause of higher ticket prices. Though such a caustic indictment could hardly be true of all or even most of those who represent professional athletes, it may accurately reflect the public's perception of agents. And it certainly explains why there is a movement under way to regulate agents, in the name of player protection.

Anecdotes

How have agents earned themselves such a bad reputation? Most of the evidence about agents and their activities is little more than anecdotal. But some of the anecdotes are dramatic and tend to be retold whenever

the subject of agents arises. Three of these illustrate the point well. The first involves a former reporter named Richard Sorkin who was an agent for hockey and basketball players in New York in the early 1970s. Sorkin negotiated his clients' contracts and was to have managed their income. Instead, he gambled away or lost in the stock market almost $900,000, including everything some of his clients had ever earned. In 1977, Sorkin pled guilty to seven counts of larceny and was sentenced to three years in prison. Agents of Professional Athletes, 15 New England Law Review 545, 568-569 (1980); The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation, 30 Buffalo Law Review 815, 820-821 (1981).

A somewhat similar case involves an accountant named Norman Young who set up an agency named Probus Management, Inc., to represent professional

football players. Young negotiated his clients' contracts and also was to have managed their money. Instead, his clients bills and taxes went unpaid, their phone calls went unanswered, their demands for the return of their money went unheeded, and finally, judgments against him totaling hundreds of thousands of dollars went unsatisfied. Inquiry into Professional Sports, Final Report of the Select Committee on Professional Sports, House Report No. 94-1786, 94th Congress, 2d Session (1977) at pages 73-74.

Yet another case involves Mike Trope, a successful Los Angeles agent who probably has represented more Heisman Trophy winners than any other single person. Trope is "credited" with having devised something known as an "offer sheet" which was intended to avoid the letter, if not the spirit, of NCAA rules that prohibit college athletes from contracting with an agent until their NCAA eligibility has expired. In form, the "offer

sheet" was a written offer by which college athletes asked Trope to represent them when their collegiate playing days were over. The "offer" was not to have been "accepted" by Trope until the athletes' NCAA eligibility had expired. Thus, according to Trope's analysis, no "contract" existed between him and the athletes who signed offer sheets until after they were no longer eligible to play in college, consistent with NCAA rules. The NCAA, however, took the position that signing an "offer sheet" did violate its rules. The Offer Sheet: An Attempt to Circumvent NCAA Prohibition of Representational Contracts, 14 Loyola of Los Angeles Law Review 187 (1980). The NCAA does not have jurisdiction over player agents, and thus has no way to penalize them for inducing college athletes to violate NCAA rules. The NCAA's jurisdiction extends only to the colleges that are its members. Thus, if "offer sheets" did violate NCAA rules, the NCAA could penalize only the school

whose athlete signed one, not the agent to whom it was given.

Other Complaints

In addition to these stories in which specific agents have been named, other complaints involving conflicts of interest and incompetence have been lodged against unnamed and unknown agents and even against agents as a class. The most recent example of this occurred in the wake of last month's ruling by a Federal District Court in Los Angeles that the USFL's eligibility rule violates the antitrust laws. (See ELR 5:10:17) The National Football League has a similar if not identical eligibility rule, and thus the NFL's rule appears in jeopardy as well. When asked to comment on this development, NFL counsel Jay Moyer said, "The primary interest of any sports league is an orderly assimilation of

new talent. We have that through the draft. A change in the eligibility rules wouldn't compromise that basic interest, but we fear there would be a spate of agents descending on colleges and, for their own financial reasons, enticing kids to come out before they're ready. An athlete has to believe in himself to be effectively competitive. But all too often, with immature young men, that belief is translated into overrating his own ability relative to others. Some agents will prey on that weakness. The real losers will be players, not agents." Oates, How Will NFL React To Ruling?, Los Angeles Times, March 2, 1984, Part III, pg. 1 & 11.

In America, when anecdotes and complaints such as these accumulate - in any field - it is only natural to think of regulation as a solution. That is what happened in this area too, though not as quickly as might have been supposed. Player agents are not an entirely new phenomenon. History records that Red Grange himself

was represented by an agent when he signed with the Chicago Bears in 1925, immediately after playing his last college game for the University of Illinois. However, as recently as twenty years ago, player agents were virtually unheard of. In fact, some professional teams would not negotiate with agents, as a matter of principle. It has only been within the last ten to fifteen years that agents have become common. Even according to the House Select Committee on Professional Sports, "player agents are now generally accepted as a permanent, highly visible, and at times positively beneficial element in the sports labor relations process . . . Today there is recognition of the benefits in negotiating personal services contracts with a knowledgeable, competent representative rather than with a youthful or unsophisticated athlete, his parent or a friend of the family. There is also acknowledgement of the importance of the legal, investment and personal counseling services a

competent agent may provide a player, particularly the younger athlete, and the right of the player to engage for those services."

Necessary Qualifications

While the value of agents has been acknowledged, at least by some, many remain concerned about those agents who would abuse the trust placed in them by their clients. This is so because until a year ago or so it could be said - and frequently was - that the only qualification a person needed in order to become a player agent was a client. No training, no degree, no license of any kind was required.

Credit for those changes that are now taking place does not go to Congress. Although the House Select Committee on Professional Sports took extensive testimony on player agent issues, the Committee concluded

that "further investigation in the area" was "warranted." As a result, it recommended the creation of a "successor committee" to study abuses of the agent-client relationship and the need for protective legislation. It also recommended that player associations, bar associations, and league officials meet to establish standards for agents and "mechanisms for industry self-enforcement of such standards." Congress never did appoint a "successor committee." And thus federal legislation has never been introduced, let alone enacted, even though there is "precedent" for such legislation in the form of federal statutes that regulate the practices of farm labor contractors and stock brokers.

Instead, credit - or the blame, depending on point of view - for agent regulation goes to the National Football League Players Association (NFLPA). In 1978, the NFLPA helped to form an organization known as the Association of Representatives of Professional Athletes

(ARPA). ARPA is a voluntary membership association, similar in many ways to the American Bar Association. ARPA has a code of ethics, similar to the ABA's Code of Professional Responsibility, which deals with such problems as fee gouging, breach of fiduciary relations, conflict of interest and fraud. ARPA, however, has no way to enforce its ethical code. Membership in ARPA is not required by any league or player association. Nor has ARPA's ethical code been enacted into law by any state. As a result, ARPA did not resolve any of the complaints that had been lodged against player agents, nor did it improve the image or reputation of agents as a class - not even those who are members of the organization.

California Athlete Agencies Act

The NFLPA took another and more concrete step in 1981. In that year, and at the urging of the NFLPA, the California legislature adopted the nation's firstand thus-far only-player agent law. The bill added a chapter to the California Labor Code requiring "athlete agencies" to register with the state Labor Commissioner. California Labor Code sections 1500-1547. The law is similar to other already existing chapters of the Labor Code which have long required registration of employment agencies in general and entertainment industry talent agencies in particular.

The California Athlete Agencies Act took effect January 1, 1982 and already has achieved what must be a rare distinction. At one and the same time, it is being virtually ignored and is surprisingly controversial. Hearings were held in July of 1983 with a view towards amending the Act. But the proposed revision bill which resulted from those hearings won so little support that

further hearings are likely to be scheduled and a new revision bill drafted. As presently written, the Act requires certain things of player agents and affords athletes certain substantive protections.

First if not foremost, the California Athlete Agencies Act requires player agents to register with the state Labor Commissioner (section 1510). Doing so is not difficult, though it is expensive. The Labor Commissioner has developed a registration form which is available upon request to anyone. (Contact the Division of Labor Standards Enforcement, 525 Golden Gate Avenue, San Francisco, CA 94102.) No training or degree is required though two "reputable" residents of the city or county where the agent is going 0 establish an office must sign an affidavit that the agent is "a person of good moral character" (section 1511). The registration fee is $100, but that covers registration only. When the license is issued, there is an additional license fee of $500 per year

plus $150 per year for each branch off-ice maintained by the agent. California Administrative Code, Chapter 6, Group 3, Article 8, section 12501.

Act's Requirements

The Act also requires player agents to obtain approval from the Labor Commissioner of the form of the written contracts they sign with their clients (section 1530). The contract form must not be "unfair, unjust or oppressive" to the athlete (Section 1530); but neither the Act nor the Labor Commissioner's regulations state whether the Commissioner will review fees under this standard, or whether for example the inclusion of a general power of attorney in such a contract would make it "unfair" or "unjust." The law does require agent-athlete contracts to do one thing: it requires the contract to warn the athlete, in 10 point type, that signing the contract may

jeopardize his or her amateur standing (section 1530.5). The Act requires agents to file a schedule of their fees with the Labor Commissioner; and though the Act says that changes in fees shall not become effective until seven days after the change has been filed, the Act is silent about what if anything the Commissioner may do if an agent's fees are considered excessive.

The Act also requires player agents to post a $10,000 surety bond (section 1519), though the practical utility of such a bond in the context of professional sports is something of a mystery. The Act indicates that the bond is to assure an agent's clients that the agent will pay those clients all sums due to them when the agent has received such sums. If for some reason an agent is receiving compensation due to his or her clients, and fails to pay it over, a $10,000 bond is hardly adequate security, given the amounts that professional athletes now earn. Nor would a $10,000 bond be adequate

malpractice insurance, even if that is what it was intended to be, but in fact, the bond does not cover malpractice. It does cover damage caused by "misstatement, misrepresentation, fraud, deceit, or any unlawful acts or omissions" by the agent. But simple negligence or ignorance is not covered, and $10,000 is certainly inadequate to protect athletes from the intentional acts itemized in the Act.

Substantive Protections

On the substantive side, the Act prohibits agents from making false or misleading representations (section 1537), thus making such representations not only grounds for a civil cause of action, but also a misdemeanor punishable by a $1,000 fine and 60 days imprisonment (section 1547). The Act also requires agents to file their registration certificates with an athlete's school

before they contact the athlete, and a copy of the agent's contract with the athlete must be filed with the athlete's school within five days after the athlete signs it (section 1545). The Act voids any contract signed by an athlete with an agent who is not registered, or with an agent who has not filed his or her certificate with the school, or who has not filed a copy of the contract with the school within five days after the athlete signs it (section 1546). An agent's failure to register, failure to file his or her certificate with the school, or failure to file a copy of any contract signed by an athlete with the athlete's school also is a misdemeanor punishable by fine and imprisonment.

Finally, the Act gives the Labor Commissioner jurisdiction to hear and decide disputes between agents and their clients, though the Commissioner's decision is not final. An appeal to the California Superior Court is

allowed where the case will be heard again de novo (section 1543).

Although failing to register is a misdemeanor, fewer than 30 agents have registered as of last month, according to Carol Cole, a Regional Manager with the California Department of Industrial Relations who is responsible for the administration of the Athlete Agencies Act. This is truly remarkable for a state which has dozens of football, basketball, baseball, hockey and soccer teams at the professional and college levels. The failure of agents to register may be explained by their ignorance of the law, and by an apparent but ambiguous exemption for lawyers.

Ignorance of the law, of course, is no excuse. But those agents who are not lawyers have had virtually no way to learn of its existence. The Labor Commissioner has not yet sought to prosecute anyone for failing to register, and thus the Act's existence has not been noted in the

general press. The Entertainment Law Reporter published a description of the Act shortly after it took effect (ELR 3:17:5) as did the newsletter of the Sports Lawyers Association (FallWinter 1982, page 4). But these two reports are more likely to have been seen by lawyers than non-lawyers. And lawyers may have been led to believe that they do not have to register, or otherwise comply with the Act, because of the Act's definition of an "athlete agency."

Lawyer Exemption

As originally introduced in the California legislature by Assemblyman William Lockyer, the Act did not exempt lawyers. Lockyer has said that he intended his bill to include lawyers along with non-lawyer agents. Gene Upshaw, who is now the Executive Director of the National Football League Players Association, also has

said that his organization wanted lawyers to be covered by the Act as well. The California State Bar, however, objected to the regulation of its members by the Labor Commissioner. As a result, the bill was amended before enactment, and the Act now provides that an "'athlete agency' does not include ... any member of the State Bar of California when acting as legal counsel for any person" (section 1500).

At first glance, the exemption for lawyers seems clear enough. However, the Act does not simply exempt "any member of the State Bar of California" and leave it at that. It limits the exemption to members of the State Bar "when acting as legal counsel."

Presumably then, when members of the State Bar are not acting as legal counsel, they must register and comply with the Act, just like non-lawyers. Why this limitation, and what exactly does it mean? Unfortunately, legislative history in California is sparse to non-existent,

and the intentions of the drafters of the limitation apparently are unknown.

It is possible that the exemption for lawyers is limited to when they are "acting as legal counsel" for the following reason. Player agents do four different things. They negotiate employment contracts with sports teams. They seek endorsements and other employment opportunities for their clients. They manage their clients' money. And they give investment advice. Not all agents do all four of these things, of course. Some do only one. It is likely that the California State Bar was of the opinion that lawyers are practicing law when they negotiate employment contracts with sports teams, and thus lawyers who only negotiate employment contracts should not be regulated by the Labor Commissioner because the State Bar already regulates the practice of law. The State Bar also probably concluded that seeking endorsements, managing money and giving investment advice is

not the practice of law; and thus lawyers who do only those things could be regulated by the Labor Commissioner.

Labor Commissioner's Interpretation

If this was the State Bar's thinking when it agreed to the lawyer exemption language found in the Act, then the State Bar made a serious mistake, because the Act does not apply at all to agents who only seek endorsements, manage money or give investment advice. Rather, the Act applies only to agents who negotiate employment contracts with professional sports teams (section 1500). Thus, the regulatory authority over lawyers which the State Bar may have been willing to give to the Labor Commissioner (namely, authority to regulate lawyers when they seek endorsements, manage money or give investment advice) is regulatory authority

the Act itself does not give to the Labor Commissioner. As a result, the Labor Commissioner had to decide what, if anything, the "acting as legal counsel" limitation means. The commissioner did so in a way that has sparked controversy with the State Bar. The Labor Commissioner has decided that the Act exempts lawyers only when they are "acting primarily as legal counsel for an athlete and only incidentally negotiating a sports services contract for such client-athlete." The Commissioner has further decided that a lawyer is "acting primarily as legal counsel" when "more than 50% of the attorney's services to the athlete are rendered as legal counsel on matters unrelated to the negotiation of sports services contracts for such athlete." California Administrative Code, Chapter 6, Group 3, Article 8, section 12500. Thus, a lawyer who negotiates an employment contract with a sports team for one client, and who does little or nothing else for that one client, must register

with the Labor Commissioner and otherwise comply with the Act - according to the Commissioner's interpretation of it.

This interpretation seems to turn the exemption on its head, and seems to require the registration of lawyers precisely in the circumstance when they should be exempt. Furthermore, requiring lawyers to comply with the Act when all they do is negotiate employment contracts with sports teams makes no sense at all in a number of specific instances. For example, State Bar rules prohibit lawyers from soliciting clients. Therefore, lawyers cannot file their player agent registration certificates with schools prior to "contacting" student athletes, because lawyers should not be "contacting" athletes at all. Lawyers should wait for athletes to contact them. Likewise, lawyers contracts with their clients are confidential; and thus lawyers cannot file copies of their client contracts with schools, as the Act requires. The Act prohibits

agents from transferring any interest in their agencies without the prior consent of the Labor Commissioner (section 1535). If applied to a lawyer-agent, this would appear to prohibit the lawyer from taking in a new partner without the Commissioner's consent. The Act also requires that "all . . . cards" and "all letterheads" used by agents contain the words "athlete agency" (section 1537). If applied to lawyeragents, this would appear to require that the words "athlete agency" appear on all of the lawyer's stationery, no matter how small a portion of the lawyer's practice is devoted to representing professional athletes, and indeed, even if the lawyer represents only one athlete.

Proposed Revision

A draft of a proposed bill to revise the current Act has been prepared and circulated by the California Senate

Select Committee on Licensed and Designated Sports. The proposed revision bill would continue to require lawyers to register with the Labor Commissioner and to post a bond or proof of malpractice insurance. The revision bill would not require lawyers to pay a filing or license fee, however. Nor would it require lawyers to file their registration certificates or client contracts with the schools in which their clients are enrolled. The revision bill would require lawyers to notify their clients' schools and the Labor Commissioner when they have been retained, however.

The revision bill received so little support that it was not even introduced in the California legislature. And further hearings are likely to be scheduled later this spring or summer. Because this is an election year, the California legislature will adjourn early this fall, and thus it is unlikely that the Act will be amended until next

year at the earliest. In the meantime, of course, the current Act - whatever it means - remains in effect.

California's Labor Commissioner has indicated an intent to exercise jurisdiction over all agents who reside or have an off-ice in California, as well as over all agents who solicit clients within California regardless of where those agents have their offices. California Administrative Code, Chapter 6, Group 3, Article 8, section 12500. New York, Texas and Indiana also have thought about adopting player agent laws, but have not done so yet. Thus, those agents who have no connection with California are not regulated by federal or state agencies at all. Perhaps for this reason, the National Football League Players Association decided to take matters into its own hands, at least insofar as its members are concerned. The NFLPA did so in 1982, when it negotiated its current collective bargaining agreement with the NFL Management Council.

NFLPA Plan

In 1971, the National Labor Relations Board certified the NFLPA as the collective bargaining representative of all players employed by teams in the National Football League. Section 9 of the National Labor Relations Act makes certified unions the "exclusive representatives" of all employees in the certified unit for the purpose of collective bargaining concerning wages, hours, and other conditions of employment. Until 1982, it was the uniform custom in the entertainment industry for unions to bargain for minimum wages, while expressly reserving the rights of their individual members to bargain for more, either personally or through their own agents or lawyers. In fact, the collective bargaining agreement entered into by the NFLPA in 1977 specifically provided that during the term of that agreement "all NFL players

will have the right to individually negotiate salaries above the minima established in this Agreement."

In 1982, however, the NFLPA broke with tradition and its own prior practices. The collective bargaining agreement negotiated that year sets forth minimum salaries, as in the past. It then provides, however, that "A player will be entitled to receive ... additional salary payments . . . as may be negotiated between his club ... and the NFLPA or its agent." In other words, the NFLPA has retained the right to be the "exclusive" bargaining representative for all players employed by NFL teams. And in doing so, it has created a system in which the players' own agents must become "agents" of the NFLPA itself. A player agent does so by applying to become a "Certified NFLPA Contract Advisor." Agents who are not certified by the NFLPA are not eligible to represent NFL players in individual contract negotiations, according to

regulations adopted by the NFLPA in September of 1983.

Obtaining certification does not appear to be a difficult task. The NFLPA has prepared a written application form which is only nine pages in length, including spaces for answers and a signature. (Contact the NFLPA, 1300 Connecticut Avenue, N.W., Washington, D.C. 20036.) The application asks for such information as education, occupation, and memberships in professional organizations. It also asks about professional disciplinary actions that may have been taken against the applicant and whether the applicant has ever been convicted of a crime. References are requested, as is a statement of the applicant's professional sports experience. The regulations provide that certification may be denied if the applicant has committed conduct involving fraud, misrepresentation, embezzlement, misappropriation of funds, or theft, or any other conduct which

adversely affects the competence, credibility or integrity of the applicant. if certification is denied, the regulations provide for an appeal to an outside arbitrator.

Certification Requirements

As a condition of certification, agents are required to abide by NFLPA regulations. The regulations specify the exact wording of the "Standard Representation Agreement" that must be used by certified agents. And they specify the maximum fee that a certified agent may charge a player. The maximum fee is 100% of the amount by which the player's salary exceeds the minimum salary set forth in the collective bargaining agreement for the first year of the player's contract, plus 5% of the excess for the second year, plus 2% of the excess for the third year. If the player's salary does not exceed the minimum set forth in the collective bargaining

agreement, then the maximum fee that may be charged is $125 per hour or $1,000, whichever is less. The regulations allow greater fees if the player's salary is guaranteed. But the fee may not be based on incentive or performance bonuses, nor may an agent receive his or her fee until the player actually receives the compensation on which the fee is based.

The NFLPA regulations also contain standards for player agents which are designed to assure effective representation and to avoid conflicts of interest. Among other things, these standards require agents to attend an annual NFLPA briefing on contract negotiations, and they prohibit agents from having a financial interest in any professional football team. The regulations also prohibit agents from providing a player "anything of significant value" in order to become that player's "Contract Advisor," and they prohibit agents from providing anything of significant value to anyone else in return for a

recommendation that a player hire that agent. Violations of the regulation may result in disciplinary action and penalties including reprimands, fines, suspension, and revocation of certification, though an appeal to an outside arbitrator is allowed before any disciplinary action takes effect.

Potential Problems

The NFLPA agent certification plan clearly addresses abuses committed by player agents in the past, and it appears as likely as any plan to prevent such abuses in the future. Even the NFLPA plan, however, is not entirely free of problems. One of the principal problems with the plan is that it does not cover agents for rookie players who are negotiating their first contracts. The reason that agents for unsigned rookies do not have to be certified, even according to the NFLPA's own interpretation of its

plan, is that unsigned rookies are not members of the "unit" of employees the NFLPA was certified to represent back in 1971. The NFLPA's certified unit of employees consists of players actually employed by NFL teams. As a result, unsigned rookies are not members of that unit, and do not become members of it until they sign their first contract and report to their first preseason training camp. Unfortunately, it appears that to the extent players are taken advantage of by their agents, the abuses have tended to occur in connection with players' rookie contracts. Thus, this gap in the coverage of the NFLPA agent certification plan is an especially significant one. The gap is of course one the NFLPA itself clearly recognizes. Both Ed Garvey and Gene Upshaw (the NFLPA's former and current Executive Directors) have publicly stated that the NFLPA intends to petition the National Labor Relations Board for an amendment to the definition of the "unit" of

employees the NFLPA is certified to represent. The NFLPA hopes the NLRB will redefine the NFLPA's unit to include even unsigned rookies, so that their agents too may be required to seek NFLPA certification as Contract Advisors.

Another problem with the NFLPA certification plan concerns its enforceability, should a player agent challenge the plan. The legal validity of the plan depends on whether the NFLPA has the right to bargain collectively for uniform minimum wages and has the exclusive right to bargain on behalf of individual players for wages in excess of the minimum. While the National Labor Relations Act clearly gives the NFLPA the exclusive right to bargain collectively for its members, it is not as clear that the Act also gives the NFLPA the exclusive right to bargain on behalf of its members individually. If the Act does not give the NFLPA the exclusive right to bargain individually, then player agents would not need to

become the certified agents of the NFLPA itself in order to represent individual players in their individual contract negotiations.

Antitrust Issues

There is also a potential question concerning the legality of the NFLPA plan under the antitrust laws. A similar agent certification plan is used by Actors' Equity Association, a national union representing stage actors and actresses. In the 1981 case of H.A. Artists & Associates v. Actors' Equity Association, the United States Supreme Court held that the Actors' Equity plan is immune from antitrust attack because of the "labor exemption." (ELR 3:3:4) The holding of that case may protect the NFLPA from antitrust attack as well.

However, the Actors' Equity case would not offer as much protection to the National Basketball Players

Association and the National Hockey League Players Association, should they wish to adopt an agent certification plan similar to the NFLPA'S. This is because the executive directors of the National Basketball Players Association and the National Hockey League Players Association also represent individual athletes in individual contract negotiations - something that NFLPA officials do not do. Thus, if basketball or hockey player agents were denied certification, they could argue that the denial was anticompetitive, because it restrained competition between non-certified agents and the executive director of the players association requiring certification. In such a case, it is possible the labor exemption would not apply and an antitrust violation would be found. See, e.g., Blalock v. Ladies Professional Golf Association, 359 F.Supp. 1260 (N.D.Ga. 1973).

Interaction with California Act

Another potential problem with the NFLPA plan - at least from the point of view of California agents - is the way in which it interacts with the California Athlete Agencies Act. In June of 1983 - before the NFLPA Contract Advisors Regulations were adopted - Ed Garvey publicly stated that the NFLPA would not certify any California agent who was not licensed by the California Labor Commissioner. Given the NFLPA's involvement in the enactment of the California law, this was not at all a surprising position. However, it appears that the NFLPA has since backed away from this position. The application for NFLPA certification does not ask agents whether they are licensed by the Labor Commissioner, and a license is not specifically required for certification. On the other hand, the NFLPA does advise California agents of the requirements of the California Act. And NFLPA regulations do generally require agents to "fully

comply with applicable state and federal laws." As a result, unlicensed California agents are not only in jeopardy under California law, they also run the risk of losing their NFLPA certification, should the NFLPA ever decide to take compliance with the California Act into account.

The problem created by the interaction of the NFLPA certification plan and the California Act results from the limits on fees imposed by NFLPA regulations and the expense of become licensed by the California Labor Commissioner. Suppose, for example, that a rookie California agent has just one client, a second-string offensive lineman who will be starting his third year in the NFL when the season begins later this year. The NFL Collective Bargaining Agreement provides that this player's minimum salary for 1984 shall be $60,000. Suppose further that the player's team is willing to pay him $65,000, but no more. Under NFLPA regulations, the

agent's fee cannot exceed $500, because that is 10% of the amount by which the player's salary exceeds the minimum. Ironically, if the team had been unwilling to pay anything more than the $60,000 minimum, despite eight or more hours of negotiations by the agent, the agent could have charged a $1,000 fee. Ironically too, it will cost the agent $100 out of the agent's own pocket to negotiate the player's contract, because the agent will have to pay a $100 application fee plus a $500 license fee to the Labor Commissioner, but only will be able to collect a $500 fee from his or her client. It therefore appears that one of three things may result from the Labor Commissioner's high fees and the limit on fees that may be charged by NFLPA Contract Advisors: agents may ignore the California law; agents who only have one or two clients may be driven out of the profession; or agents may be even more receptive to the United States Football League than they otherwise would have been,

because USFL players are not represented by a players association and there is no regulated limit on the size of the fee they may pay their agents.

NCAA Plan

While California regulates California agents, and the NFLPA regulates veteran football player agents, that still leaves many agents totally unregulated. It now appears that the National Collegiate Athletic Association may soon seek to fill at least a part of that void. The NCAA's Special Committee on Player Agents, chaired by USC Athletic Director Dick Perry, has proposed a system that would require player agents to register with the NCAA before contacting college athletes. The NCAA would then provide its members with the names of registered agents, and players would be discouraged from talking with unregistered agents. The NCAA

Council is expected to approve this proposal next month.

Once again, agent Mike Trope figured in an incident that is being cited in support of the need for such a registration system. Trope represented Mike Rozier when the University of Nebraska tailback signed with the Pittsburgh Maulers of the USFL last January 3rd. Rozier played in the Orange Bowl the day before he signed, leading to speculation that Rozier had hired Trope as his agent before the Orange Bowl game, rather than in the early morning hours of January 3rd as Trope has said.

The NCAA has acknowledged that its plan would not prevent players from violating the rule against hiring an agent before their eligibility has expired, if they know they are violating the rules and keep their actions secret. Apparently, however, it is felt that such a rule will give the NCAA and its members more influence with players concerning the hiring of agents-influence which the

NCAA believes will be valuable to players and colleges alike.

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[ELR 5:10:3]

RECENT CASES

Jacqueline Kennedy Onassis wins injunction barring further distribution of Christian Dior advertisement featuring "look-alike" model whose use is ruled a violation of New York Civil Rights Law

"The Diors in Court" was not originally intended to be one of several advertisements featuring the "idle rich,

suggestively decadent and aggressively chic" Dior trio whose adventures were created by photographer Richard Avedon and by a division of the J. Walter Thompson agency to promote Christian Dior merchandising activities. The judicial sojourn was occasioned by the advertisement which depicted a "Dior wedding." The copy in the ad read: "The wedding of the Diors was everything a wedding should be ... Just a legendary private affair." The "frothy mix" of guests in attendance included Gene Shalit, Shari Belafonte, Ruth Gordon, a model resembling Charles DeGaulle, and Barbara Reynolds. Reynolds happens to bear a "remarkable resemblance" to Jacqueline Kennedy Onassis. The advertisement ran in September and October 1983 in such publications as Esquire, the New Yorker and the New York Times Magazine. Mrs. Onassis brought an action under sections 50 and 51 of the New York Civil Rights Law seeking an injunction to restrain the further

use or distribution of the advertisement, alleging in her complaint that the ad made it appear that she was acting as a model for Christian Dior or had otherwise approved the ad.

New York County Supreme Court Judge Edward J. Greenfield has granted the requested injunction on the ground that Dior impermissibly misappropriated Mrs. Onassis' identity for purposes of trade and advertising. And Ms. Reynolds was enjoined from appearing in commercial advertisements "masquerading" as Mrs. Onassis.

Judge Greenfield, in an opinion containing quotes from Shakespeare, Norman Mailer and American Express advertisements, noted that sections 50 and 51 prohibit the unauthorized use for purposes of advertising or trade of the name, portrait or picture of any living person. According to case law, a "portrait or picture" does encompass "a representation which conveys the essence of an

individual ... the close and purposeful resemblance to reality." It is the exploitation of an individual's identity, as that is conveyed "verbally or graphically," that is proscribed. For example, in Ali v. Playgirl, Inc., 447 F.Supp. 723, a composite photo-drawing depicted a nude black man in a boxing ring who possessed the recognizable facial features of Muhammad Ali. A Federal District Court held that the phrase "portrait or picture" as used in the Civil Rights Law was not restricted to actual photographs, but would apply to any representations which are recognizable as likenesses of the complaining party.

The court emphasized that it was the Dior ad's deceptive or confusing identification with Mrs. Onassis that was being enjoined. Dior, by placing Ms. Reynolds in the midst of a gathering which, although stylized, nevertheless included several real-life personalities, sought to impart an "aura of authenticity to the trumped up

tableau." However, the use of a look-alike model, a sketch, a cartoon or a caricature all are prohibited when the end result is trading on the name or features of another and the "rapacious" commercial exploitation of an individual who has not consented to endorse a product.

Judge Greenfield observed that there are many aspects of an individual's identity which may not fall within the statutory proscription, such as voice, movement, characteristics and style. In Lombardo v. Dovle, Dane & Bernbach, Inc., 58 A.D.2d 620, a case cited by Dior, the court dismissed an invasion of privacy action brought by bandleader Guy Lombardo against the creator of a television commercial for a car. The commercial featured an actor conducting a band at a New Year's Eve party; the "conductor" was leading the band in playing "Auld Lang Syne" in a manner similar to the way Lombardo had conducted for many years. The court in Lombardo refused to equate a person's style, characteristics or

musical arrangements with a "name, portrait or picture." Lombardo's name was not mentioned and the actor did not physically resemble the bandleader. Thus, the Onassis ruling will not restrict imitators who conjure up an impression of another individual by the use of voice, gestures or clothing, or writers and actors who may comment upon or re-enact current events. (Judge Greenfield noted that while the imitation of a distinctive voice does not appear to fall within the statute, this may have been an oversight resulting from the lack of technology available for disseminating the sound of a voice when sections 50 and 51 were first enacted in 1903.)

Barbara Reynolds argued that she could not be prevented from using her own face. And the court agreed, in part. Reynolds' artistic career is not to be impeded. She may continue to capitalize on her facial features, in a way that is not deceptive or confusing, at parties and in appearances on television or in dramatic works, but

not in commercial advertisements, for "No one has an inherent or constitutional right to pass himself off for what he is not."

The court rejected the argument that the advertisement was privileged as protected free speech, noting that the advertisement dealt only with the sale of goods and contained no significant informational aspect. While the fact that Mrs. Onassis is a public figure might allow for cartoons or caricatures portraying her, or for her portrayal as a character in reenactments of recent events, nevertheless "she has not forfeited her right of privacy and does not become a subject for commercial exploitation..."

In issuing its injunction the court refused to recall the ad or to grant Mrs. Onassis possession of the prints, plates and negatives used in preparing the ad. Dior had claimed that the injunction was unnecessary since the advertisement was not scheduled for republication. The

court noted, however, that the company declined to enter a formal stipulation to that effect, and that trade papers have speculated about the "resurrection and reincarnation" of the "Diors" campaign, with possible television showings to reach an even wider audience.

In a column in the New York Law Journal, attorney Richard Kurnit commented that Judge Greenfield's injunction actually has narrower significance than the widespread media response would suggest since the injunction extends only to material which was deemed to contain a false implication as to Mrs. Onassis. According to Kurnit, if Ms. Reynolds appears in advertisements "where the context or obvious disclosure made it apparent to all readers that she was not Mrs. Onassis but an impersonator, there would seem to be no violation of the statute as interpreted by Judge Greenfield." And the First Amendment would likely protect the use of a lookalike in a completely accurate manner, such as in an

advertisement for the individual's legitimate services or in an ad for an accurate magazine article where the look-alike is used to re-create an event described in the article. If a look-alike is used in a satire or parody in a manner which is not confusing or misleading, or just as part of the "creative presentation of an advertiser's message' " the court then might be required to balance an individual's section 50 and 51 rights against the particular First Amendment rights asserted, concluded Kurnit.

The attorney who defended the Thompson agency criticized the court's failure to require Mrs. Onassis to demonstrate that readers of the advertisement were indeed deceived by the ad, particularly since Ms. Reynolds apparently "looks like the Jackie of 20 years ago," and since the ads were "a humorous sendoff of the jet scene that no viewer could take at face value." The decision is being appealed.

Onassis v. Christian Dior-New York, Inc., New York Law Journal, p. 6, col. 4 (N.Y. Cty., Jan. 13, 1984) [ELR 5:10:10]

Universal enjoins unauthorized manufacture and sale of "E.T." dolls, mugs and other novelty items on copyright and trademark infringement grounds

The enormous success of the movie "E.T. the Extra Terrestrial" and the popularity of E.T. dolls, drinking mugs and other novelty items has led to a barrage of copyright infringement lawsuits. Universal Studios and its merchandising arm, Merchandising Corporation of America, Inc., have been successful in obtaining injunctions against various toy companies seeking to profit from the E.T. phenomenon.

Universal has successfully prevented a toy company (and other defendants) from marketing an unlicensed E.T. doll which infringed Universal's copyright. The replica E.T. doll also interfered with a license previously granted by Universal to kamar Intemational, Inc. In a hearing before Federal District Court Judge Andrew H auk in Los Angeles, Universal demonstrated that the infringing toy company had the opportunity to view the licensed E.T. dolls at the New York Toy Fair and therefore had sufficient access to the dolls. Judge hauk found the replica E.T. dolls to be substantially similar to Universal's E.T. in terms of the oddly-shaped head, facial features, squat torso, wrinkled skin, blue eyes, hand gesture (finger outstretched toward the sky), red spot on its chest, and the same mood of lovableness. In addition, Judge Hauk found that the defendants had initially marketed the replica E.T. dolls under the name "I.T.," thereby showing their intent to copy. Since Judge Hauk

found a likelihood that Universal would succeed at trial and irreparable harm and concluded that the balance of hardships tipped in favor of Universal, he issued an injunction.

Similarly, in a separate lawsuit, Universal successfully enjoined the manufacturer of E.T. drinking mugs, pencil holders and other novelty items from making use of E.T.'s central themes, such as "I Love E.T." and "E.T. Phone Home!!" without a license or authorization. Federal District Court Judge DeAnda in Texas found that Universal was likely to prevail on the merits at trial, and therefore, a presumption of irreparable harm arose. Accordingly, the Texas court likewise issued an injunction.

Universal City Studios v. J.A.R. Sales, CCH Copyright Law Decisions para. 25,460 (C.D.Cal. 1982); Universal City Studios v. Kamar Industries, CCH Copyright Law Decisions para. 25,452 (S.D.Tex. 1982) [ELR 5:10:11]

Composers of musical theme for ABC's Monday Night Football television program lacked standing to bring copyright infringement action to prevent ABC's use of different, but allegedly similar theme

In 1976, American Broadcasting Music and ABC Sports commissioned Jack Cortner and Jon Silberman to compose a musical theme for ABC's Monday Night Football television program. The theme was used by ABC from 1976 until 1979 and for a part of 1980. Since the end of 1980, ABC has used a different but similar theme.

Cortner and Silberman brought an action against ABC alleging that the new theme infringed their copyrighted work. A Federal District Court in New York, however, has granted ABC's motions to dismiss and for summary

judgment on the ground that the composers had no standing to sue for copyright infringement because they had assigned all legal and equitable right, title and interest in the composition to ABC.

The court noted that under the 1909 Copyright Act, an assignor of a copyright who maintains a beneficial interest under a publication contract can bring an infringement action against a third party if his or her assignee refuses to bring such an action and the assignee is joined as a party to the action. (The 1976 Copyright Act provides that the legal or beneficial owner of a copyright can sue for infringement; there is no such express provision in the 1909 Act which governed this lawsuit.) But Silberman and Cortner had assigned their interests to ABC in return for a fee, the right to receive royalties, and for the right to share in any profits from an infringement suit. This was "essentially a one-shot deal," the court explained. Unlike other cases in which songwriters

were found to have standing to sue despite an assignment of copyright to a music publisher, Cortner and Silberman had not retained the right to control future uses of the theme; to reclaim ownership of the copyright if ABC was not making it productive (ABC was not obligated to make any use of the theme); or to bring a suit for infringement.

Futhermore, in cases in which beneficial ownership with attendant standing has been found, the author usually assigned the copyright with the expectation that the assignee would exploit the work for their joint benefit. In this case, the theme became ABC's „sole and exclusive property . . . ." In the court's view, the concept of "beneficial or equitable ownership would be stretched a bit far if (Silberman and Cortner) were allowed to sue for copyright infringement." Any rights retained by the writers would have to be enforced in an action based upon their contract with ABC, suggested the court.

Cortner v. Israel, 568 F.Supp. 1217 (S.D.N.Y. 1983) [ELR 5:10:11]

Colorado high school athletic association loses antitrust action challenging NFL's antitrust exemption for league-wide network telecasting agreements

The dismissal of an antitrust action brought by the Colorado High School Activities Association against the NFL and several broadcasting companies has been affirmed by a Federal Court of Appeals.

The action arose as a result of the telecasting of professional football games in the Denver area on the second Saturday in December in the years 1977, 1978 and 1979. On those self-same Saturdays, the Association was presenting the Colorado state 4A football championship.

The Association challenged the NFL's right to the anti-trust exemption for joint professional football television broadcast agreements. This exemption enables the member clubs of a professional football league "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." However, another provision of the law denies the exemption to any joint agreement which permits the telecasting, by any television station located within 75 miles of the game site of an interscholastic or intercollegiate football contest, of any professional football game after 6:00 P.M. on Friday or on any Saturday during the period extending from the second Friday in September to the second Saturday in December. The game site must be announced via publication prior to August 1st of any year.

The Association attempted to comply with the site publication requirement by announcing that the state championship game in 1977 would be played "in Denver" on the second Saturday in December. The game was played in Boulder. In 1978 and 1979, the announced game site was "the Denver metropolitan area." The 1978 game was held in Boulder, and the 1979 game was held in Lakewood. Professional football games were telecast in the Denver area on the three Saturdays in question.

The Association argued that it had identified the game site with sufficient specificity and that the telecasts of the professional games therefore were not exempt. Under the Association playoff system, the championship finalists are not known until shortly before the final game is to be played. The designation of the "Denver area" thus was the most specific identification available to the Association as of August 1st. It was contended that

requiring a more specific game site identification might frustrate the statute's purpose of protecting scholastic football gate receipts.

The NFL claimed that "game site" means the particular location where the game is to be played. A Federal District Court agreed (ELR 3:18:4), and so has a Court of Appeals. The Court of Appeals stated that the "common sense, unambiguous meaning of game site' is that particular football field or stadium where the game is to be played." The "site" in this way provides a fixed point from which to establish the specified 75 mile blackout radius. The court concluded that the Association's claim failed to state a cause of action under federal law.

Colorado High School Activities Association v. National Football League, 711 F.2d 943 (10th Cir. 1983) [ELR 5:10:12]

Pittsburgh concert promoter wins injunction barring Philadelphia competitor from engaging in alleged blockbooking; jury award of damages is reinstated by Federal Court of Appeals

Electric Factory Concerts, a Philadelphia-based promoter of popular music concerts, has been permanently enjoined by a Federal Court of Appeals from entering into any conspiracy with concert artists by which the artists would agree to refrain from dealing with Danny Kresky Enterprises Corporation, a competing concert promoter. Kresky had alleged that performing artists signed with Electric Factory because the company would otherwise threaten to refuse to promote them at the Spectrum, the largest facility for concerts in Philadelphia, a city which is one of the most lucrative concert markets. In 1972, Electric Factory was granted exclusive access to the Spectrum for the promotion of

concerts. And while the written access agreement between Electric Factory and the Spectrum terminated in 1977, Kresky suggested in his action that the exclusivity arrangement between the parties had continued pursuant to an oral understanding.

Kresky, which is headquartered in Pittsburgh, contended that Electric Factory conspired to unlawfully restrain trade in connection with the promotion of "black-oriented" concerts in the Pittsburgh market through the blockbooking of concerts. In particular, Kresky alleged that Electric Factory threatened artists and their agents and managers that it would not deal with them in any market unless Electric Factory obtained the artist's services for the Pittsburgh market.

In 1981, a jury found that Electric Factory had conspired to restrain trade in violation of section 1 of the Sherman Act and that Kresky had suffered damages in the amount of $5,500. But a Federal District Court

granted Electric Factory's motion for judgment notwithstanding the verdict and vacated the damage award to Kresky. The permanent injunction against Electric Factory was allowed to stand.

A Federal Court of Appeals has reinstated the jury's damage award, finding that there was sufficient evidence that Larry Magid, one of the partners in Electric Factory, coerced performing artists as alleged.

The fact of injury to Kresky, proximately caused by Electric Factory, was adequately shown by the fact that Kresky was unable to even bid on many of the black-oriented concerts scheduled for Pittsburgh. Kresky specifically claimed damages for two Parliament Funkadelic concerts presented in Pittsburgh by Electric Factory in 1978 and 1979. These concerts were presented on terms consider-ably less favorable than would be expected by a group of this stature. There was no guarantee and the profit was to be split on a 50-50 basis with Electric

Factory. Kresky testified that only rarely will a group not receive a guarantee, and in such cases, the group usually receives a 90-10 share of the profits.

The Court of Appeals stated that the District Court had erred in ruling that Kresky would be entitled to only those damages which were the direct and certain result of Electric Factory's antitrust violation. This was a needlessly stringent causation requirement, the appellate court ruled. Kresky had not been allowed to submit his bid for the concerts so there was no evidence as to his hypothetical bid terms. But Kresky declared that he had never offered terms as unfavorable as those set by Electric Factory. The damage award of $5,500, an amount representing half the profits for one Parliament Funkadelic concert, therefore was ordered reinstated.

Danny Kresky Enterprises Corporation v. Magid, 716 F.2d 206 (3dCir. 1983) [ELR 5:10:13]

Nebraska Supreme Court upholds jury award of $18,000 to television sports announcer as liquidated damages for termination of employment

In June 1980, David Sanders entered into an employment agreement with Nebraska television station KMTV. Sanders was hired as sports director and as the sports announcer for prime time newscasts, with certain other production and announcing and promotion responsibilities. The term of the agreement was 24 months, but it provided that either party could terminate the agreement voluntarily by payment of an amount equal to six months salary to the other party.

In April 1981, the station's news director advised Sanders that within the next 30 days, Sanders would be responsible for a wide variety of tasks, including

contacting local school coaches, accepting speaking and sports dinner invitations, covering at least one story daily, and covering major regional sports events. These "goals" were set forth in a memo which stated that if Sanders did not reach the goals, it would be considered a breach of the employment agreement and would result in Sanders' termination without compensation.

Sanders responded by declaring that he considered the memo a constructive discharge since the memo contained new, more burdensome employment requirements without an increase in compensation. Sanders then requested payment of liquidated damages as provided in the 1980 employment agreement. The station, however, viewed Sanders' response as a resignation.

Sanders brought an action to recover the liquidated damages. He testified that the demands in the April 1981 memo would be nearly impossible to accomplish in the 30-day time period and were otherwise

unreasonable. The jury returned a verdict for Sanders in the amount of $17,996 and this verdict has been upheld on appeal by the Nebraska Supreme Court.

The court noted that although no one item in the April 1981 memo was outside the scope of Sanders' duties as sports director, the fact that each was to be accomplished within 30 days was a "substantial change" from his original agreement, which change KMTV failed to justify. The court concluded that the demands were designed to make Sanders' working conditions intolerable so that he would resign, and therefore, the jury properly found that Sanders was entitled to treat the memo as a constructive discharge and breach of the employment agreement.

Sanders v. May Broadcasting Co., 336 N.W.2d 92 (Neb. 1983) [ELR 5:10:13]

Copyright infringement claim against author Andrew Tobias and Simon & Schuster is dismissed because plaintiff failed to establish access or similarity

A Federal District Court in Boston has granted summary judgment to Andrew Tobias and to Simon & Schuster, the author and publisher of the book "The Invisible Bankers," in a copyright infringement action brought by Sina Najarian, the publisher of "Set for Life? The Insurance Rip-Off and How to Beat It!"

"Set for Life?" was published by Sina Najarian, the wife of the book's author, in 1979. Prior to its publication, the manuscript of "Set for Life?" was sent to 20 publishers, including Simon & Schuster. Each of the publishers rejected the manuscript and returned it. Sina Najarian, doing business as SMDN Publishing, eventually printed 1000 paperback copies of the book; about 400 copies were sold, mostly in the Boston area.

Tobias began working on his book about the insurance industry at the suggestion of an editor at Simon & Schuster. A publishing contract was entered into in November 1976; and the book was published by Linden Press, a division of Simon & Schuster, in February 1982.

The court found that Najarian had failed to establish that Tobias had access to "Set for Life?" "Access," stated the court, is "the reasonable opportunity on the part of the defendants to view the plaintiff's work." Najarian's manuscript was present in Simon & Schuster offices for less than 90 days, was never removed from the office of one of the company's editors (who was not Tobias' editor), was never copied or shown to anyone other than the editor and her assistant, and was never discussed with or described to Tobias or his assistants. Furthermore, there was no evidence that Tobias or his assistants ever saw the book at Boston area bookstores

or were aware of its existence. Although one of Tobias' assistants lived in the Cambridge-Boston area and Tobias occasionally visited there, this was insufficient to establish access, the court ruled.

The court also found that there was no substantial similarity in expression between the books, observing that "the absence of similarity is so striking as to call into question the motives of the plaintiff in bringing this action."

In dismissing the complaint, the court determined that three state law claims arose wholly from the alleged copyright infringement cause of action and therefore were pre-empted under the Copyright Act.

Najarian v. Tobias, Civil Action No. 82-1973-MA (D. Mass., October 20, 1983) [ELR 5:10:14]

Federal District Court dismisses claim seeking to impose liability on Hustler Magazine for publishing article which allegedly resulted in young man's death

In several recent cases, broadcasters have successfully resisted claims for damages for injuries allegedly incurred as a result of the depiction of criminal or dangerous activities on television programs (Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (S.D.Fla. 1979) (ELR 1:21:2); Olivia N. v. National Broadcasting Co., Inc., 126 Cal.App. 3d 488 (1981) (ELR 3:16:2); DeFilippo v. National Broadcasting Co., Inc., 446 A.2d 1036 (R.I. 1982) (ELR 4:13:8).

A Federal District Court in Texas, following the above decisions, has dismissed claims for strict liability and negligence brought against a magazine by the relatives of a young man who died apparently while engaged in the practice of "autoerotic asphyxiation." Hustler

Magazine had published an article on this practice, and the relatives claimed that the article was an attractive nuisance and a "dangerous instrumentality or a defective, unreasonably dangerous product."

The court found no support for a strict liability claim, noting that no court has held that the content of a magazine or other publication is a "product" as defined in the Restatement of Torts. Furthermore, while "negligent publication" is an element of the cause of action in defamation cases, there was no basis for the relatives' position that the written word might be an "attractive nuisance" which would impose a special duty on Hustler. A magazine article is not comparable to gunpowder, fireworks, gasoline or a slingshot, observed the court.

First Amendment considerations also preclude the imposition of liability on a publication for a reader's reaction to an article, absent incitement. While it was

contended that Hustler "should have known (the article) would encourage young boys to hang themselves," incitement, as the ground for denying First Amendment protection,
was not adequately alleged, concluded the court.

Herceg v. Hustler Magazine, Inc., 565 F.Supp. 802 (S.D.Tex. 1983) [ELR 5:10:14]

Lack of substantial similarity in copyrightable elements of arcade games thwarts infringement claim; issues of fact preclude summary judgment as to alleged Lanham Act violations

The Rapid-Fire pinball game distributed by Bally Manufacturing Corporation is not substantially similar to Williams Electronics' copyrighted Hyperball game, a

Federal District Court has ruled in granting summary judgment to Bally in a lawsuit charging Bally with copyright infringement.

Working from the "fundamental premise of copyright law" that a copyright only protects the particular expression of an idea, not the idea itself, the court noted that a game as such is not protected by the copyright laws. "What is protected is a particular form of a game." The concept of a game where a player shoots rolling balls at advancing "enemies" is not copyrightable.

Furthermore, Williams was entitled to copyright only those aspects of Hyperball that were separable from its utilitarian aspects. This limitation meant that many elements of Hyperball, which combines features of a traditional pinball game with those of a video game, would be unprotected. The color, shapes and placement of the targets, ball cannon, grip handies and indicator lights on the targets, among other features, were physically

inseparable from the functional elements of the game. Judge Prentice H. Marshall stated that "Once the non-copyrightable elements of Hyperball are put to one side, little remains. The color and shape of the playing field is all that is left."

Judge Marshall distinguished the scope of copyright protection accorded video games and rolling ball games such as Hyperball. In a video game, the audiovisual aspects of the game that appear on the screen are conceptually separable from its utilitarian aspects - the computer program and hardware. But in a rolling ball game, many of the audiovisual aspects of the game, such as the cannons and targets, are mechanical devices with a functional purpose, rather than "merely" audiovisual displays generated by a distinct functional element.

When the copyrightable features of the two games were compared, an almost complete absence of substantial similarity was found. The court emphasized that in

addition to certain specific dissimilarities, there was an overall difference in the aesthetic impression generated by the two games. In particular, Hyperball presented an adversary in the form of a geometric representation of a thunderbolt, while Rapid-Fire displayed enemy creatures with a "more personalized" humanoid appearance. Again, the similarities that were present were almost wholly the result of the games' reliance on similar but non-copyrightable game concepts, the court concluded in finding that Bally did not infringe Williams' copyright.

Williams also had charged Bally with violating the Lanham Act by making false representations in connection with the sale of goods in interstate commerce. It was alleged that five statements concerning Rapid-Fire in a memorandum prepared by a Bally employee were false. Another issue of fact was whether the representations in the memo were likely to influence the ultimate purchasers of Rapid-Fire.

Although it denied summary judgment on this claim, the court nevertheless felt constrained to observe that the Lanham Act claim was "much ado about nothing" and suggested to counsel that it be spared further "frivolity."

Williams Electronics, Inc. v. Bally Manufacturing Corporation, 568 F.Supp. 1274 (N.D.Ill. 1983) [ELR 5:10:15]

FCC's refusal to hold hearings on television stations' failure to broadcast children's programming every day is upheld by Federal Court of Appeals

Lobbyists for children's television have lost another battle in their fight to fill the air waves with programs for the young. The battle began at the FCC where the

Washington Association for Television and Children (WATCH) challenged the license renewals granted to three Washington, D.C., network affiliates. WATCH charged that the affiliates violated the 1974 FCC report Children's Television Report and Policy Statement. According to WATCH, the Report required broadcasters to schedule regular weekday children's programming. WATCH claimed the affiliates did not comply with the Report and thus their licenses could not be renewed without a hearing. However, the FCC found that the Report made no such requirement and renewed the licenses without hearings. WATCH subsequently petitioned the Federal Court of Appeals for the District of Columbia to force the FCC to hold renewal hearings. The court has refused to order these hearings. Instead, it has affirmed the renewals and has held that the Report only requires broadcasters to provide some weekday kids' shows.

According to the court, how much and what kind has not been specified in the report.

The court stated that the FCC may renew a license without a hearing if it finds the renewal consistent with the public interest. However, the FCC must hold hearings whenever a petition to deny a renewal raises a material question of fact or whenever the Commission has doubts as to whether a renewal would serve the public interest.

In its opening brief, WATCH asserted that the Children's Television Report and Policy Statement implicitly required stations to regularly schedule weekday programs for children. Because the Washington, D.C., affiliates did not schedule regular weekday kids' shows, WATCH argued that the Commission should have had doubts as to whether the renewals would serve the public interest. Once the FCC maintained these doubts,

WATCH reasoned that the Commission would be required to hold hearings.

Despite WATCH's argument, the court affirmed the renewals after finding that the Report did not implicitly or explicitly set any quotas for children's programming. According to the court, the Report merely stated that the absence of any weekday children's programming would be unacceptable. Not only did the court hold that WATCH misconstrued the Report, the court also noted that WATCH's position would make no sense in situations where a license could be renewed if one station broadcast cartoons daily while another license would be in jeopardy if the station scheduled educational children's shows every other day. The court's tradition of giving great deference to an agency's interpretation of its own regulations also helped tip the scales in favor of the FCC.

In order to avoid the pit-falls of its first arguments, WATCH broadened its petition in a reply brief. WATCH said that it meant to object to the overall sufficiency of the stations' programming. The court refused to hear this issue because WATCH did not raise it to the FCC. According to the court, 47 U.S.C. section 405 required WATCH to give the FCC a "fair opportunity" to determine the adequacy of the stations' programming. The court found that WATCH failed to fulfill this obligation by neglecting to raise the issue to the FCC. WATCH's FCC petition asserted that it intended only to raise the "single issue" of whether the Report required regularly scheduled weekday programming for children. The FCC took WATCH's petition at face value, and the court held that the FCC was reasonable in doing so. The court also noted that the WATCH would have raised the broader issue by reformulating its original FCC petition and asking the FCC for a rehearing. Because WATCH

declined to take advantage of this opportunity, the court refused to make a special exception for WATCH.

The court also held that WATCH's case did not fit into any of the exceptions for the "exhaustion doctrine." In general, courts require that a complainant exhaust all of its administrative remedies before appealing to the courts. However, an exception will be made when a complainant cannot bring an issue before an agency due to a significant change in circumstances or a defect in the administrative process. Courts also make exceptions when it would have been futile to present the issue to the agency or when the agency exceeds its authority. Holding that none of these exceptions applied, the court refused to consider the general sufficiency of the stations' children's programming.

Washington Association for Television and Children v. Federal Communications Commission, 712 F.2d 677 (D.C. Cir. 1983) [ELR 5:10:15]

Briefly Noted:

Sports.

A Federal District Court in Indiana has dismissed a sex discrimination case because the plaintiff failed to show that a private baseball league had acted under color of state law in allegedly violating her constitutional right of association. The plaintiff, a girl, sought to play baseball in the defendants' boy's baseball league rather than in their girl's softball league. She sued pursuant to 42 U.S.C. section 1983 and section 1985(3), alleging a violation of her constitutional right of association due to her

gender, as well as a violation of her Fourteenth Amendment Equal Protection right. These statutes only apply to state actions. The plaintiff, noting that the league had received Federal Revenue Sharing funds from the township, argued that the league's baseball program served as a substitute for the township's recreational programs, thus establishing the league's nexus with the state. The court held that even if a nexus existed, the plaintiff had failed to allege or prove that the league's allegedly discriminatory act had been compelled by the state, thus leaving little hope that the girl would succeed on the merits of her claim.

McDonald v. New Palestine Youth Baseball League, 561 F.Supp. 1167 (S.D.Ind. 1983) [ELR 5:10:16]

Unpaid Wages.

A statute imposing criminal penalties on an employer for failing to pay wages due does not create a private civil right of action, the New York Supreme Court has ruled. Players for the now defunct Rochester Lancers soccer team commenced this action for unpaid wages pursuant to Article 6 of the New York labor law. The statute compels employers to pay wages rightfully owing and provides for criminal penalties against employers who do not pay wages and corporate officers who knowingly permit the corporation to violate the statute. The court noted that the statutory language does not refer to civil actions against officers of a corporation, and ruled that the New York Legislature did not intend to subject corporate officers to unlimited liability by holding them personally liable for the unpaid wages of corporate employees.

Stoganovic v. Dinolfo, 461 N.Y.S.2d 121 (N.Y.A.D. 1983) [ELR 5:10:16]

IN THE NEWS

New York court enjoins the unauthorized use of the Motion Picture Association of America's trademarked "R" rating format in the marketing of the film "I Spit on Your Grave"

A Federal District Court in New York has enjoined the distributors of the theatrical and video cassette versions of "I Spit on Your Grave" from using an "R" rating designation in marketing the original 98-minute version of the film. The ruling was issued in a trademark infringement action brought by the Motion Picture Association of America against Jerry Gross, the Jerry Gross

Organization, JGO Management Co., Wizard Video and Cinemagic Pictures.

According to the MPAA, the film originally was produced by Cinemagic in 1978 under the title "Day of the Woman." Due to the film's extreme sexual violence, the Code and Rating Administration advised the distributor that the film would be rated "X." Cinemagic re-edited the film and removed the most objectionable portions. The re-titled film, now 17 minutes shorter, received an "R" rating. But the trademarked "R" rating format allegedly was used by Gross and Wizard in advertising the theatrical release, and the video cassette, of the more grisly 98-minute version of the film.

The MPAA declared that its action was "aimed at defending the integrity of its film rating system" and preserving public confidence in the "guidance" of its letter ratings. [Mar. 1984] [ELR 5:10:17]

United States Football League college player eligibility rule violates antitrust laws, Federal District Court rules

A United States Football League rule which prohibits USFL teams from drafting or signing college football players until their collegiate eligibility has expired violates the antitrust laws, a Federal District Court in Los Angeles has ruled. The decision was handed down by Judge Laughlin Waters in a lawsuit brought by punter Bob Boris who left the University of Arizona before his collegiate eligibility had expired. Boris now plays for the USFL's Oklahoma Outlaws.

Last year, the USFL made a highly-publicized exception to its eligibility rule to permit Herschel Walker to sign with the New Jersey Generals before his college playing days were over. In response to that signing, legislation was introduced in Congress which, if adopted,

would permit leagues to adhere to rules prohibiting the signing of underclassmen.

Judge Waters held that the USFL's eligibility rule is a group boycott. The National Football League has long had a similar if not identical rule. Although the NFL's rule has been challenged, no case against the NFL has progressed as far as a judicial ruling on this issue.

The Federal Trade Commission recently commenced an investigation into the legality of the USFL's and NFL's eligibility rules. (ELR 5:9:19)

The Entertainment Law Reporter will publish a more complete account of Judge Laughlin's decision, as soon as a copy of his opinion has been obtained. [Mar. 1984] [ELR 5:10:17]

Federal Court of Appeals affirms antitrust judgment won by Raiders and Los Angeles Coliseum Commission against National Football League

A Federal Court of Appeals in San Francisco has affirmed the multi-million dollar antitrust judgment won last year by the Raiders and the Los Angeles Coliseum Commission against the National Football League. At issue in the case is a provision of the NFL Constitution and By-Laws which require the approval of three-fourths of all NFL team owners before any team may move from one city to another. The Raiders moved from Oakland to Los Angeles without such approval.

The appellate court rejected the NFL's contentions that the rule in question does not restrain trade and that in any event the NFL is a single entity which cannot conspire with itself

The Entertainment Law Reporter will publish a more complete account of the court's ruling, as soon as a copy of its decision has been obtained. [Mar. 1984] [ELR 5:10:17]

Yale University obtains injunction against the use of the name "Yale" in the title of a national literary magazine

The Yale Literary Journal, which has published the writings of Yale University students since the journal's founding in 1821, may no longer use the name "Yale" in its title, a Connecticut court has ruled.

The discord between the university and the magazine arose from Andrei Navrozov's purchase of the magazine in 1978. Navrozov, a 1978 Yale graduate, transformed the magazine into a national publication with a

conservative viewpoint and few undergraduate contributors. Protests were heard from alumni and former contributors to the magazine, including Archibald MacLeish and John Hersey.

In June 1983, the magazine's editors failed to register with the university as an undergraduate organization. The university then directed the editors to stop using the Yale name in their title. The editors in turn sued, to prevent Yale from taking away the name, contending that they had bought the name when they bought the magazine from a student organization for $1.00. The editors have claimed that Yale wants to stop the magazine from publishing because of the publication's conservative viewpoint.

Yale, in countersuit, argued that due to the magazine's refusal to register with the university's dean of students, the magazine had lost the right to such privileges as fund-raising or advertising drawing on the Yale name.

New Haven Superior Court Judge Howard F. Zoarski agreed. The university has stated that the court's ruling establishes the principle that only Yale University has the right to grant permission to use the Yale name, and that no student organization may sell that name. [Mar. 1984] [ELR 5:10:17]

WASHINGTON MONITOR

Internal Revenue Service disallows investment tax credit for nonexclusive licensing of master tape sound recordings

The Internal Revenue Service has disallowed a claim for the investment tax credit in a master tape sound recording. A recent revenue ruling dealt with a corporation that acquired all rights in the master recordings of

musical performances by various groups. The corporation claimed a standard investment tax credit which it planned to pass through to nonexclusive lessees of the rights to produce and sell the recordings.

The IRS has determined that this arrangement actually was a license since the assignor had retained rights to use the property simultaneously, and to make additional assignments to others. The transfer of the credit on such a basis is not permitted under the Internal Revenue Code, the IRS ruled.

The IRS also stated that "the facts may demonstrate that the amount on which the investment tax credit was computed exceeds 150% of the fair market value of the master tape." The corporation therefore may be subject to additional taxes. [Mar. 1984] [ELR 5:10:18]

DEPARTMENTS

Book Notes:

"An Athlete's Guide to Agents" by Robert H. Ruxin

Stories about player agents who take advantage of their clients have become so common that agentregulation rules have been adopted by the State of California and the NFL Players Association, and are being considered by the NCAA. But no amount of regulation can fully protect athletes who blindly allow themselves to be exploited. As a practical matter, players have to look out for themselves, more than a little. How should they do so, however? Indeed, what should they look out for? With these questions in mind, Robert H. Ruxin has written a book for athletes designed to instruct them on how

to evaluate agents and how to benefit from the services good agents offer.

In An Athlete's Guide to Agents, Ruxin asks and answers twenty questions. "What is an agent?" "How do I find an agent?" "How much will it cost me?" "When do I pay?" "Should the agent collect his fee directly from the club?" "How can the agent's other clients affect my interests?" These are only some of the important topics addressed in the 163-page volume. The book also includes information on how the professional player drafts are conducted; on player salaries (as of 1981); and the names, addresses and phone numbers of leagues, player associations, and organizations for agents and lawyers. The book also contains sample contract forms for player agents, investment managers, and financial managers.

Though the book is intended primarily for athletes, it will be of value to those who wish to become agents, as well.

An Athlete's Guide to Agents is published by Indiana University Press, 10th & Morton Streets, Bloomington, Indiana 47405, and is available in paperback for $6.95 and in hardcover for $15.00 (plus $1.50 for shipping and handling, and sales tax for Indiana residents). [ELR 5:10:19]

"Law & Amateur Sports" Edited by Ronald J. Waicukauski

In 1981, the Center for Law & Sports at Indiana University sponsored a national conference on the relationship between amateur sports and the law. The papers presented at that conference have been developed into articles and have been published in book form.

William Buss examines due process requirement in the enforcement of amateur sports rules. Cym Lowell covers

legal issues that arise in fixing liabilit for sports injuries. The application of the Equal Protection Clause and Title IX to sex discrimination in amateur sports is explored by Mark Kadzielski. James Nafziger reviews the Amateur Sports Act of 1978. Ronald Waicukauski examines the NCAA's regulation of academic standards for collegiate athletes. Robert Ruxin writes on player-agent relationships under NCAA rules. And judicial review of rule-making in high school sports is covered by John Weistart. The 298-page book also contains a comprehensive bibliography of books, articles and government publications compiled by Keith A. Buckley.

Law & Amateur Sports is published by Indiana University Press, 10th & Morton Streets, Bloomington, Indiana 47405, and is available for $32.50 (plus $1.50 postage and handling, and sales tax for Indiana residents). [ELR 5:10:19]

"Representing Professional Athletes and Teams 1983" Edited by Philip R. Hochberg and Martin E. Blackman

Last summer, the Practising Law Institute conducted its annual program on representing professional athletes and teams in Washington, D.C. The 1051-page course handbook produced in connection with that program contains a valuable collection of important - but usually difficult to come by documents. It includes, for example, the collective bargaining agreements of the National Football League, Major League Baseball, the National Basketball Association, the National Hockey League, the North American Soccer League, and the Major Indoor Soccer League. It also includes the standard player contract of the United States Football League as well as recent cases and existing and proposed legislation on

player-agent regulation and franchise relocation restrictions.

Several of the program's speakers prepared outlines of their remarks. As a result, the volume contains material on the legal evolution of reserve clauses and player drafts; on legal issues facing the United States Football League; on player contract negotiations; and on the regulation of sports broadcasting.

Representing Professional Athletes and Teams 1983 is available for $35.00 from the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019 (Order No. G4-3725). [ELR 5:10:19]

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[ELR 5:10:21]