BUSINESS AFFAIRS

Playing with the NBA Salary Cap

by Lionel S. Sobel

The National Basketball Association's 1984-85 season is approaching its conclusion, and fans and professionals soon will debate the factors that accounted for this year's successes and failures. Talent, coaching, scouting, injuries, schedules and luck all have played their usual roles. But this season another factor has been added to the mix: the NBA "salary cap."

In brief, the salary cap is the maximum amount that each NBA team is permitted to pay its players, in the aggregate. However, this capsule definition fails to do justice to the salary cap's essential subtleties. Indeed, so rich and complex are the cap's important details that the general manager of the Philadelphia 76ers, Pat Williams, said early this season that he was spending more time with NBA General Counsel Gary Bettman than he was with any other human being, including his wife. Williams was not alone. Mr. Bettman reported that he was receiving 20 calls a day about the salary cap, some of which kept him up until 2:00 a.m. helping teams work out trades.

The purpose of the salary cap is to force team owners to control themselves when it comes to bidding for players. The willingness of some owners to offer multi-million dollar contracts to star players was doing two potentially lethal things. It was upsetting competitive balance within the NBA, and it was pushing some teams towards bankruptcy. Recognizing that a financially healthy league is as important to players as it is to owners, the National Basketball Players Association agreed to the salary cap in April of 1983, and the cap took effect for the first time this season.

Reserve Clause

Conditions in the NBA were not always the way they were just before the cap was adopted. The Players Association traces its origins back to the early 1950s when it was organized by the legendary Bob Cousy. But the Players Association did not become a true labor union for many years. For a decade, it operated only informally. In 1962, it hired Larry Fleisher as General Counsel. Its first collective bargaining agreement was not entered into, however, until 1976.

Moreover, for many years, NBA employment contracts saddled players with a seemingly perpetual reserve clause giving teams the right to renew those contracts when they expired, if new employment terms were not agreed to by the start of the following season. (The reserve clause was "perpetual" because it could be read to renew itself along with the other provisions of the contract.) The NBA was forced to abandon a "perpetual" interpretation of its reserve clause in 1961. That was the year that Abe Saperstein (then the owner of the Harlem Globetrotters) organized the short-lived American Basketball League, thus igniting a modern-style, inter-league "war" for star players. The player whose case became a precedent was Dick Barnett, the number one draft choice of the NBA's old Syracuse Nationals two years earlier.

Barnett had a contract with the Nationals which expired at the end of the NBA's 1960-61 season. Prior to the start of the 1961-62 season, Barnett signed with the Cleveland Pipers of the then-new American Basketball League. When he did so, the Nationals sought an injunction prohibiting him from playing for the Pipers, alleging that the Nationals had the right to employ Barnett for the 1961-62 season as well. Barnett's defense was that the NBA contract was perpetual and therefore should not be enforced. The NBA, however, responded by saying that despite its seemingly perpetual language, the reserve clause could be renewed only once. Given that interpretation, the court did enjoin Barnett from playing for the Pipers, for one year. Central New York Basketball, Inc. v. Barnett, 181 N.E.2d 506 (Ohio Ct.Com.Pl. 1961).

Although the American Basketball League died in the middle of its second season, at a reported cost to Abe Saperstein of several million dollars, only four years later another group of businessmen sought to succeed where Saperstein had failed. The American Basketball Association was born and triggered another inter-league war for players. This time, Rick Barry was the point man for the new league. Barry sought to "jump" from the NBA's San Francisco Warriors to the ABAs

Oakland Oaks, and was sued in the process, just as Dick Barnett had been six years before. Once again, one of the issues in the case was whether the NBA reserve clause was perpetual. And once again, the NBA said that it was not. For that and other reasons, Barry too was enjoined for one year. Lemat Corp. v. Barry, 80 Cal.Rptr. 240 (Cal.App. 1969).

Compensation Rule

Although the Dick Barnett and Rick Barry cases established that players could play out (or sit out) their NBA reserve clause year, and then jump to a competing league, neither of these cases determined what would happen if an NBA player played out his reserve clause year and then signed with another team in the NBA itself. That question was answered in 1974 when Cazzie Russell became the first NBA player to do so. Neither the NBA Uniform Player Contract nor the league's Constitution and By-Laws had anything to say about this situation. Nevertheless, NBA team owners agreed that if a player jumped from one NBA team to another, the player's former team would be entitled to "compensation" from his new team, in the form of players, draft choices, or cash.

The stated purpose of the compensation rule was to make the player's former team as whole as possible for the loss of the player. But it also had two collateral effects: it discouraged teams from signing another team's player, by making it more expensive to do so; and it reduced the amount teams were willing to offer another team's player, because the total cost of hiring such a player then included the compensation due the other team, as well as the player's salary.

As a result of these factors, the NBA did not need a salary cap in the 1960s or '70s. Indeed, competition from the American Basketball Association was the principal cause of escalating player salaries from the mid-'60s through the mid-'70s, rather than intra-NBA bidding for players.

Competition for players between the ABA and NBA was so expensive that during its first four years of existence, not a single ABA team enjoyed even one profitable year. NBA teams too lost money on more than 60 percent of their seasons. By 1970, both leagues were so badly bloodied and bruised by their war that merger talks were begun.

Of course, one person's expenses are another's income. And when the NBA's players heard of the proposed merger, they were none too happy. They were so unhappy, in fact, that in 1970, Oscar Robertson, who was then president of the NBA Players Association, and other Player Association officials, filed an antitrust lawsuit to enjoin the proposed merger. A preliminary injunction was granted within weeks.

Right of First Refusal

By 1976, only six ABA teams remained in business. That year, the players' antitrust suit was settled, and four of the six ABA teams were admitted to the NBA. (The other two were compensated for going out of business.) The key feature of the settlement of the players' suit was a collective bargaining agreement that radically changed the terms of NBA employment contracts. Renewal options were eliminated (except from one-year rookie contracts), unless they are specifically negotiated. The compensation rule (entitling a player's former team to compensation from his new team) was eliminated at the end of the 1980-81 season. The compensation rule was replaced with a "right of first refusal" which gives the former team of a veteran free agent (i.e., a player whose contract has expired) the right to retain that player's services by matching any offer made to him by, another NBA team.

The "right of first refusal" rule allowed players to bargain for their "market" value. And the willingness of some team owners to spend heavily to buy winning teams pulled that market value up dramatically. In the three years between 1981 and 1984, the average annual salary of NBA players reportedly doubled from approximately $175,000 to almost $350,000. What was good for the players, however, was terrible for team owners. While some NBA teams made money, others were pushed to the brink of financial disaster-so much so that the league as a whole was said to be losing $15 million a year in the aggregate. In the opinion of the owners, something had to be done about ever escalating salaries. And in 1983, something was.

Salary Floor

The 1983 agreement between the NBA and the Players Association is usually referred to as the "salary cap" agreement. But "salary cap" is something of a misnomer. Although the players did agree to provisions that specify the maximum team salary that clubs are permitted to pay, the owners agreed in return that aggregate team salaries would not be less than a specified percentage of their gross revenues. In other words, the agreement imposes not only an aggregate salary cap, but also an aggregate salary floor.

Those who follow professional football saw a certain irony in the NBA's agreeing to a salary floor, calculated as a percentage of the gross. For in 1982, the National Football League Players Association went on strike because of the NFL's refusal to agree to a Player

Association demand that would have resulted in football players being paid 55 percent of their league's gross revenues. At the time, the players' demand for a percentage of the gross was criticized by team owners, the media, fans and agents, some of whom characterized it as a demand for ownership and control. Eventually, the NFL Players Association withdrew the demand.

When the NBA salary cap/floor agreement was reached the following year, however, it became apparent that there was nothing at all unreasonable about the percentage-of-the-gross concept proposed by the NFL Players Association. Perhaps the NFL was appalled by the players' demand for 55 percent of the gross. But even on this issue, it became apparent that 55 percent was not inherently unreasonable, because NBA owners agreed that their salary floor would be 53 percent of the gross. Moreover, for this season and the immediate future, actual NBA team salaries are likely to exceed 53 percent of the gross.

Salary Cap

The heart of the NBA salary cap is quite simple. For this season (1984-85), the most any team is permitted to pay its players, in the aggregate, is $3.6 million. Next season (1985-86), the cap goes up to $3.8 million. And the season after that (1986-87), the cap increases again to $4.0 million. It is the qualifications and exceptions to this simple heart that make the salary cap almost byzantine.

For example, if the 53 percent of the gross minimum salary should ever exceed these specified cap figures, the 53 percent minimum takes over and becomes the cap as well.

Furthermore, something had to be done about five teams whose aggregate salaries already exceeded - on the day the salary cap agreement was reached - the $3.6 million cap for 1984-85. Thus, an exception was created for those teams, and special caps were created for them. They are:

Los Angeles Lakers	$5.20 million
New Jersey Nets	$3.75 million
New York Knicks	$4.60 million
Philadelphia 76ers	$4.45 million
Seattle Supersonics	$4.60 million

Another exception had to be made for teams that already had entered into multi-year player contracts containing automatic salary escalation clauses. As a result of such contracts, four more teams reportedly went over the $3.6 million cap by the start of this season: the

Boston Celtics, the Detroit Pistons, the Phoenix Suns, and the Portland Trail Blazers.

Rookie Salary Exception

Another exception had to be made to allow teams at or above the salary cap to sign players selected by them in the annual college draft. This exception is a modest one, however - so modest, in fact, that it already has resulted in litigation. The agreement allows teams at or above the salary cap to sign the players they draft, but only at the thenapplicable minimum player salary. The minimum salary for first-round draft picks is $75,000 per year. While that would be a good salary for most people their first year out of college, it is not a good salary for an NBA first-round draft choice. Nevertheless, the salary cap agreement prohibits teams at or above the cap from paying their first round draft choices any more than

$75,000. And nothing in the agreement gives a drafted player the right to compel a team to trade him to a team that is below the salary cap.

This was precisely the predicament faced by Leon Wood last summer when he was drafted in the first round by the Philadelphia 76ers, an over-the-cap team. Mr. Wood was a star collegian at Cal State Fullerton and was a member of the United States' gold medal winning Olympic basketball team. He frankly was looking forward to earning something more than $75,000 this season, and was deeply disappointed to find that his earning power had been cut by the NBA salary cap. He was so disappointed that he filed an antitrust lawsuit against the league and the Players Association (which he was not a member of - because he was still in college - when the salary cap was agreed to). Mr. Wood lost his suit, however. The court ruled that the salary cap is exempt from the antitrust laws, because it is the product of collective bargaining. Wood v. National Basketball Association, 1984-2 CCH Trade Cases, para. 66,262 (S.D.N.Y. 1984) (ELR 6:10:7).

Though Mr. Wood lost his lawsuit, he and his lawyer, Fred Slaughter, eventually accomplished their mission. Mr. Wood signed a four-year contract with the 76ers worth more than $1 million, without violating NBA rules, despite the salary cap. Though the strategy used in his case is not available to every team and player, it does illustrate that with careful study and planning, it is sometimes possible to pierce the cap in an entirely legal fashion.

Piercing the Cap

Here is how the cap was pierced in Mr. Wood's case. The salary cap agreement provides that teams at or above the cap may re-sign their own veteran free agents without regard to the salary cap; may replace a player who is traded, or a veteran free agent who is not re-signed, with a new player whose salary is as great as the player being replaced; and may replace a player who is cut or who retires with a new player whose salary is as much as half the salary of the player being replaced. In order to sign Mr. Wood, the 76ers traded Leo Rautins, and his $155,000 salary, to the Indiana Pacers; and the 76ers did not re-sign veteran free agent Franklin Edwards, whose salary had been $126,000. The 76ers thus freed up $281,000 to pay Mr. Wood (and another player) during the 1984-85 season. At the conclusion of this season, four 76ers will become free agents, and their salaries will become available to pay Mr. Wood next season and the season thereafter, even if they are re-signed.

The manner in which the free agent re-signing rule works is illustrated by transactions carried out by the

Seattle Supersonics last summer in order to acquire veteran free agent Reggie King, formerly of the Kansas City Kings, at a hefty annual salary of $450,000. The Sonics were one of the teams above the $3.6 million cap on the day the agreement was entered into, and thus its cap was fixed at $4.6 million. First, the Sonics traded away players having annual salaries totaling $630,000. Next, the Sonics signed Mr. King for $450,000. Finally, the Sonics re-signed their own free agent David Thompson. The arithmetic looks like this:

Sonics' salary cap	$ 4,600,000
- trades	- 630,000
	3,970,000
+ King	+ 450,000
	4,420,000
+ Thompson	+ 400,000
New total salaries	$ 4,820,000

After signing King and re-signing Thompson, the Sonics' total salaries exceeded the team's cap by $220,000. But the Sonics were under their cap after signing King and before signing Thompson. And because Thompson was the Sonics' own veteran free agent, they were allowed to re-sign him without regard to the cap.

If the Sonics had re-signed Thompson before they signed King, they could not have offered King the $450,000 he wanted. Instead, they would have been able to offer him only $230,000 - an amount he probably would not have accepted, and an amount the Kansas City Kings may have matched (pursuant to the Kings' right of first refusal) if King had been willing to accept $230,000 from the Sonics. The arithmetic then would have looked like this:

Sonics' salary cap	$4,600,000
- trades	- 630,000
	3,970,000
+ Thompson	+ 400,000
	4,370,000
maximum for King	+ 230,000
New total salaries	$ 4,600,000

Since King was a veteran free agent from another team, there would have been no exception to the cap allowing the Sonics to exceed $4,600,000 in salaries. That is why the Sonics would not have been able to offer King any more than $230,000, if they had re-signed their own free agent first.

Clearly, the timing and order of signings is critical for teams that are at or above their caps, and this fact has not been lost on teams or player agents. This coming summer will probably see strategic maneuvering not only with respect to salary amounts, but also with respect to signing dates. Sports lawyering has virtually become an intricate sport itself.

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[ELR 6:11:3]

RECENT CASES

Sequel rights to "Gone With the Wind" belong to heirs of novel's author, rules Federal Court in Georgia

The sweeping saga of the sequelization rights to "Gone With the Wind" spans fifty years, for it was in August 1935 that author Margaret Mitchell Marsh entered into a contract with The Macmillan Company to publish her nowclassic novel. In 1936, Mitchell granted motion picture rights in the novel to Selznick International Pictures, and received $50,000. In 1939, Mitchell, Selznick and Loews Incorporated (the holder of the right to distribute the motion picture "Gone With the Wind") entered into a contract dealing with "commercial tie-ups."

When Mitchell died in 1949, her will transferred all rights in "Gone With the Wind" to her husband John Marsh. Marsh died in 1952 and his will transferred the rights to Stephens Mitchell, the brother of Margaret Mitchell Marsh.

In May 1963, MGM/UA (the successor in interest to Selznick International), Stephens Mitchell, and Mitchell's two sons entered into a contract concerning rights to "Gone With the Wind" during the renewal period of the novel's copyright. (This contract was dated December 6, 1961, and was referred to by the court as the 1961 contract.)

In 1975, Trust Company Bank in Georgia, the executor of Stephens Mitchell's will, became the representative of the Mitchell interests. Trust Company brought an action for declaratory judgment to determine the burning issue of the sequel rights to "Gone With the Wind."

Federal District Court Judge Vining, in finding that the Mitchell interests had retained their sequel rights in the novel through the years, first observed that the 1936 Mitchell-Selznick contract did not grant sequel rights to Selznick. Evidence outside the contract revealed that Mitchell did not intend to grant such rights and that Selznick valiantly, but unsuccessfully attempted to obtain the sequel rights. The court previously had granted a motion for partial summary judgment declaring that no sequel rights were conveyed by the 1936 contract, and declined to reconsider the prior ruling.

The 1939 contract specifically stated that Mitchell was not conveying to Selznick or to Loews any literary rights in the novel or its characters or their names or any sequel rights.

Judge Vining then turned to the 1961 contract. In negotiating with MGM, Stephens Mitchell, the holder of the copyright renewal rights, was steadfast in his refusal to grant any sequel rights. Thus, the 1961 contract refers only to the grant of "all the same rights under renewal copyright as were granted to Selznick International Pictures under the original Motion Picture Grant Agreement." But since no sequel rights were granted by the 1936 contract, MGM did not receive any sequel rights under the 1961 contract.

MGM cited in support of its position the following paragraph in the 1961 contract: "Metro shall have no right to produce any motion picture or other production with the plot or the story or the characters of the Novel, in which the lives of the characters therein shall be carried beyond the time of the ending of the Novel." The court was unwilling to hold that this paragraph amounted to a grant of sequel rights subject only to a restriction of the time period of any new story.

The court then cited the "seminal" case of Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945 (9th Cir. 1954), which dealt with the question of whether Dashiell Hammett, the author of "The Maltese Falcon," in granting to Warner Brothers the exclusive right to his work, included the exclusive right to the use of the characters and/or their names. The court, on the basis of its review of the copyright law and of the language in the relevant contract, held that the grant of the use of a copyrighted work did not carry with it a right to make sequels of the work. MGM was fully aware of the "Maltese Falcon" decision, declared Judge Vining and hence, could not rely on any "implicit" grant of sequel rights in a contract conveying motion picture rights, particularly given the Mitchell interests' clearly stated unwillingness to grant such rights. There was no evidence to support a finding that MGM obtained any sequel rights via the 1961 contract.

An additional argument presented to the court by MGM was based on Stephens Mitchell's conduct in 1975 when he indicated that he might no longer oppose the production of a sequel. At that point, Universal Pictures expressed an interest in participating in such a production, MGM expressed its opposition to the project, and negotiations were on. Even during these negotiations, the Mitchell interests did not concede that MGM had any sequel rights. MGM was a party to the negotiations so as to preclude the possibility of a lawsuit contesting the Mitchells' grant of any sequel rights. In any event, a sequel did not germinate from the 1975 negotiations.

MGM concluded by arguing that any sequel to "Gone With the Wind" would damage its property. But the court determined that the evidence was insufficient to establish the likelihood of any damage to MGM's interests. Therefore the sequel rights, both domestic and world-wide, in "Gone With the Wind" remain the property of the Mitchell interests.

Trust Company Bank v. MGM/UA Entertainment Co., 593 F.Supp. 580 (N.D.Ga. 1984) [ELR 6:11:6]

Federal Court of Appeals affirms judgment in favor of concert promoter against City of Burbank and city councilman based on violation of promoter's

First Amendment right to present concerts in municipally owned Starlight Amphitheater

The Starlight Bowl, located within shouting distance of beautiful downtown Burbank, is a municipally owned amphitheater. In 1975, the City of Burbank entered into an agreement with Cinevision Corporation to promote live entertainment at the amphitheater during the summers of 1975 through 1979. The contract provided, in litigious part: "The City shall have the right to disapprove and cancel any show or performance which has the potential of creating a public nuisance or which would violate any state law or City ordinance." This provision did not occasion concern in 1975 or 1976; and during these years, Cinevision presented a number of concerts in the amphitheater.

In 1977, James Richman was elected to the City Council. Richman opposed all of Cinevision's proposed concerts for 1977 and 1978. Notwithstanding this opposition, Cinevision did obtain Council approval for some concerts during these two seasons. In 1979, however, the Council rejected all but two of the eight concerts proposed by Cinevision. Citing objections to "hard rock" music, the Council refused to approve performances by Blue Oyster Cult, Jackson Browne, Roxy Music, Todd Rundgren, Patti Smith and Al Stewart (though concerts by Poco and Robert Palmer were approved).

Cinevision filed an action claiming that the City and Councilman Richman had violated the company's First Amendment rights. A Federal District Court jury ruled in favor of Cinevision and held the City and Richman liable to the company for $20,000 in compensatory damages. The jury also awarded Cinevision $5,000 in punitive damages against Richman for engaging in "willful, wanton, malicious or oppressive conduct" which resulted in depriving Cinevision of freedom of expression.

The District Court also ordered the Burbank parties to pay Cinevision $119,288 in attorneys' fees.

The lower court's disposition of the matter has been affirmed by a Federal Court of Appeals. The appellate court first rejected the City's contention that Cinevision did not have a protected First Amendment right to promote concerts. Music is a form of expression that is protected by the First Amendment, stated Judge Reinhardt. The protection extends to the promotion of concerts for profit since "allowing a concert promoter to vindicate the rights of persons to engage in musical expression furthers a crucial First Amendment value." The promoter's role in ensuring public access to live musical expression was compared by the court to the critical role of a bookseller or a theater owner. And just as booksellers are not required to read all of the books they plan to sell, or theater owners to view all of the movies they intend to show, a promoter need not know exactly what songs a performer will sing before First Amendment rights "attach." Furthermore, the members of the City Council did not even object to particular songs, but to certain types of music which they chose to label "hard rock" But even hard rock qualifies for First Amendment protection, as would any other political or nonpolitical musical expression, emphasized the court.

Judge Reinhardt then discussed the City's claim that the Starlight Bowl was not a public forum and that the City therefore was not limited by the First Amendment in regulating access to the facility. It was found that by granting Cinevision access to the Bowl, the City had "transformed publicly owned property into a forum for expressive activity...." The fact that the Bowl was "remote, fenced, seldom used, and locked when not in use," did not effect its status as a public forum for purposes of the First Amendment.

The court next determined that the prohibition against Cinevision's concerts was content-related and that there were neither compelling state interests justifying the denial of access to the Bowl nor narrowly drawn standards designed to prevent arbitrary decision-making by the Council. The contractual language did not adequately limit the Council's discretion to approve or disapprove proposed concerts. And neither the City's suggestion that hard rock concerts were a per se public nuisance nor a general fear that narcotics laws might be broken by concertgoers justified the attempted content-based restriction on expression.

Judge Reinhardt questioned whether the Council indeed possessed a good faith concern over potential law enforcement problems, in view of the fact that the Council disapproved a Todd Rundgren concert despite the recommendation of members of the Police Commission that the event be approved. A proposed Jackson Browne concert also was rejected without any evidence that problems had occurred at his previous concerts. Any anticipated crowd or noise concerns most likely could have been allayed by contentneutral, time, place and manner regulations.

The Council asserted that its goal of providing Burbank citizens either with a "diversity" of entertainment at the Bowl or with "family entertainment" which would inculcate "proper" community values also did not justify the arbitrary and deliberate exclusion of a particular type of music, stated the court. Judge Reinhardt suggested that a municipality may choose to dedicate a facility to promoting drama for children or may devote a museum to the exhibition of contemporary art, because a bona fide dedication of a forum to a specialized form of "speech" may be a positive governmental act to encourage a diversity of entertainment. This type of content-based decision making would not necessarily violate the

First Amendment, in Judge Reinhardt's view. But any claim that the municipality is attempting to suppress a form of expression rather than attempting to promote an otherwise underfunded form of entertainment must be considered closely by a court. The standards to be utilized by a reviewing court (get forth at length by Judge Reinhardt) briefly include: the dedicated category of expression and what standards are used to determine whether a performance or work falls within that category; the way in which a dedicated public forum is operated; whether other forums are available for the presentation of a particular form of expression; and the nature of the previous use of the forum.

Judge Reinhardt also chose to comment on certain other arbitrary and unlawfull factors apparently discussed by the City Council in disapproving the proposed concerts. Performances by Todd Rundgren and Patti Smith were rejected, in part, because members of the

Council thought the performances would attract homosexual crowds. Council members also discussed Jackson Browne's views on nuclear power, Patti Smith's purported propensity for "off-the-wall" statements, the lifestyles of various performers, and the race of the crowd a particular performer might attract-all constitutionally impermissible evaluative standards. And the Council rejected performers with both favorable and unfavorable police reports as it engaged in the violation of Cinevision's First Amendment rights.

Councilman Richman attempted to argue that he was absolutely immune from a damages award since he was performing a legislative activity. The District Court had concluded that the Council was acting in an executive capacity when it disapproved the proposed concerts and that Richman was entitled to qualified immunity. Then if the jury found that Richman acted in bad faith, as it did, he could be held liable for damages. The Court of

Appeals agreed with this assessment of Richman's position. Judge Reinhardt observed that the Council was administering a municipal contract when it voted on the proposed concerts - an executive decision-making function, which was distinct from the formulation of policy. The award of damages against Councilman Richman therefore was affirmed, as was the award of attorneys' fees.

In a concurring opinion, Judge Sneed stated his agreement with the conclusions reached by the court, but declined to join Judge Reinhardt's opinion.

Cinevision Corporation v. City of Burbank, 745 F.2d 560 (9th Cir. 1984) [ELR 6:11:6]

Federal Court of Appeals orders recalculation of damages owed to Cream Records for unauthorized

use of "The Theme from Shaft" in a Schlitz beer commercial

The dimness of the bar was pierced only by the sullen beam of light drifting from the television set brazenly perched above its unheeding companions. Sports, news and weather announcers droned on, interrupted at frequent intervals for commercial messages which were ignored by all - by all, that is, except for one Cream Records employee, who had happened to stop at the bar to use the telephone. It was then that the nameless employee heard Cream Records' copyrighted song, "The Theme from Shaft," in a Schlitz beer commercial. Yes, Schlitz had applied to Cream for a one-year license to use the Shaft theme music in its commercial. But after Cream quoted a fee of $100,000, Schlitz failed to take a license. This looked like a sleuthing job for the courts.

A Federal District Court jury indeed did find infringement; the parties then agreed to submit the issue of damages to the court. The court awarded Cream a total of $17,000 in damages - $12,000 for the loss of the license fee and $5,000 as the company's share of Schlitz' profits attributable to the infringement. Cream had argued that the value of a license for the use of the song for a year was $80,000. But since only a small portion of the song was actually used in the commercial, the value of a license for the use of that portion would be 15% of the value of a license to use the entire song, reasoned the District Court in arriving at the $12,000 figure.

Cream called for backup assistance from the Federal Court of Appeals. The Court of Appeals quickly detected that the only evidence before the District Court was that the unauthorized use of the Shaft theme music in Schlitz' commercial ended, or at least significantly decreased, Cream's opportunity to license the music to other advertisers. There was no evidence, stated the court, that "Schlitz sought, or Cream was willing to grant, a license for use of less than the entire copyrighted work, that a license limited to the portion used in the commercial would have had less value, or that use limited to this portion would have had a less devastating effect upon Cream's opportunity to license to another." Thus, since Schlitz' unauthorized use destroyed the value of the copyrighted work for commercial use, Cream was entitled to recover that value as damages.

On the other hand, the award of $5,000 as a share of Schlitz' profits attributable to the infringement was acceptable to the Court of Appeals. Cream offered proof that Schlitz' profit on malt liquor for the period during which the infringing commercial was broadcast was $4.876 million, and the company sought to recover $66,800 as the portion of Schlitz' profit attributable to the infringement. The District Court, while calling the infringement "minimal," and declaring that the infringing material did not add substantially to the value of the commercial, nevertheless conceded that the music did contribute to the commercial's success in selling "some beer." The $5,000 figure arrived at by the court amounted to one-tenth of one percent of a profit estimated at $5 million.

The Court of Appeals upheld the District Court award of $5,000 since it was clear in this case that not all of the profits earned by Schlitz were attributable to the infringing material. Cream was not entitled to recover all of those profits merely because Schlitz "failed to establish with certainty the portion attributable to the non-infringing elements." The jury verdict did not determine the degree to which the commercial infringed Cream's copyright. And the court's award was a "reasonable approximation" which did not conflict with the general verdict.

Cream also had sought to recover all of Benton and Bowles' profits from the television commercial. The District Court did not assess separate damages against the advertising agency, apparently incorporating the agency's profits with those of Schlitz. This was an improper disposition of the claim against Benton and Bowles, stated the Court of Appeals. In order to avoid the unjust enrichment of the agency, the District Court was ordered to assess a separate award of damages by again making a reasonable approximation of the portion of Benton and Bowles' profits due to the use of the infringing music.

So, although the case may not be closed, the sleuths did reveal the way to greater rewards. It's time to have a beer, and move on.

Cream Records, Incorporated v. Jos. Schlitz Brewing Company, Case No. 83-5713 (9th Cir., Feb. 25, 1985) [ELR 6:11:8]

Record pirates held liable for $1,450,000 in copyright infringement suit brought by major record companies

A Federal District Court in New York City has held that a record counterfeiting organization willfully infringed 27 copyrighted sound recordings by manufacturing and packaging counterfeit records and tapes containing these songs. These copyrights are owned by a number of plaintiffs, including RSO Records, MCA Records, Warner Brothers Records, and CBS Records, to name a few. In so holding, the court found the defendants jointly and severally liable for $1,450,000 in statutory damages.

The counterfeiting organization consisted of two corporations and three individuals. The two corporations were Creative Disc, Inc., which manufactured and packaged phonograph records, and Dynasty Graphics, Inc., which prepared photographic materials used in the printing of labels and paper packaging for phonographic records and prerecorded cassette and eight-track tapes. The individual defendants were all involved in the manufacturing of the sound recordings. Joseph Peri and Carl Feuerstein were officers and shareholders of Dynasty and both controlled Creative's operations. Sam Peri worked in a cassette duplicating facility, called Delmonico Audio Sounds, which was located in the same building as Creative.

The record companies brought suit for copyright infringement, requesting damages, attorneys fees, and the destruction of reproduction equipment seized from the corporate defendants. Two types of copyright infringements were alleged. First, the record companies alleged that the defendants produced "counterfeit" copies of its copyrighted sound recordings. In addition, the record companies alleged that the counterfeiters produced materials essential to the printing of packaging for counterfeit records. These packaging materials, known as "graphics"' included drawings or photographs which were designed to complement the recordings. An essential component of the "graphics" counterfeiting was a process known as color separation. A color separation is a series of four negative or positive photographs each in a different color, of the same set of graphics. These four photographs were used as the basis for reproducing four color printed copies of the original graphics.

The court began its analysis by noting that record and tape counterfeiting clearly constitutes copyright infringement. However, it stated that the question of liability was less clear for those defendants who made the color separations. Color separations were merely a means to an end, it stated. But, because that step was essential to the illegal end, the court stated that "their makers are contributory infringers, even if not technically infringers, and they are liable as though they had infringed."

The bulk of the record companies' evidence of infringement consisted of phonograph records seized by the FBI during a two-day raid of the premises of both Creative and Dynasty. The plaintiffs also relied on the testimony of an FBI agent who had witnessed and participated in acts of counterfeiting with the defendants.

Although at trial, the defendants called a number of witnesses who testified that a small portion of the defendants, business was the production of legitimate records, the defendants themselves were uncooperative. They refused to answer virtually all questions and refused to produce documents at their depositions, invoking their Fifth Amendment right against self-incrimination. Furthermore, the defendants did not testify at trial.

The court stated that the defendants' liability turned on two questions: "l) whether they violated any of plaintiffs' exclusive rights as copyright owners, and ... 2) whether, if so, they did so willfully." A finding of willful infringement, it added, "quintuples maximum statutory damages available" under the Copyright Act.

Based upon the evidence presented, and the defendants failure to directly refute this evidence, the court held that infringement had clearly occurred. In addition, the court held that the defendants' infringement had been willful. It stated that "willfully" as defined by the Copyright Act meant "with knowledge that the defendants conduct constitutes copyright infringement."

Joe Peri admitted while pleading guilty to two counts of criminal copyright infringement, that he knew the conduct was unlawful. "The crime to which he confessed was identical to the behavior at issue here ... I see no reason to doubt Peri's word nor to find that he did not similarly recognize that the other infringing acts here alleged, actual copying, were unlawful," the court stated.

In addition, the court inferred from Feuerstein's failure to respond to allegations of counterfeiting that he had knowledge that his conduct constituted infringement. The court stated that while invocation of the Fifth Amendment does not result in adverse inferences in a criminal action, "this protection does not, however, carry over into the civil sphere, where constitutional concerns are lessened."

Although there was no direct evidence of Sam Peri's involvement, he also refused to answer any questions on the grounds that he feared self-incrimination. In addition, over a year later, Peri requested an opportunity to be deposed in the hopes of exculpating himself. At that time he admitted seeing infringing tapes, but he claimed he did not know counterfeiting had been going on at the plant until the FBI raided it. The court was unsympathetic. It stated, "it is difficult to believe that anyone with some college education would not be aware of the act's unlawful nature."

The record companies had the right to request either actual damages or statutory damages. Because of the difficulty in ascertaining actual damages, the plaintiffs asked the court to award whichever type of damages resulted in the greatest amount. After evaluating all of the evidence the court held that there were actual damages of $42,239.85 and statutory damages in the sum of $1,450,000. In addition, the court awarded attorneys fees and ordered the destruction of the machinery used to manufacture the counterfeit records.

RSO Records, Inc. v. Peri, 596 F.Supp. 849 (S.D.N.Y. 1984) [ELR 6:11:8]

Action for breach of contract and copyright infringement in connection with nonpayment of royalties on musical compositions is subject to federal jurisdiction

The volcanic issue of state versus federal jurisdiction in actions involving both breach of contract and copyright issues recently erupted in a case brought by a Hawaiianbased songwriter against a music publisher and record company.

In 1974, James Kaholokula assigned his copyrights in twelve unpublished works to Oahu Music Publishing. Oahu agreed to publish the songs within a year, and to pay royalties on any copies or records sold. Hula Records, Inc. (Oahu's alter ego) did release a record, entitled "Ti Time," in 1974, which included eleven of the twelve songs. Then, in 1975, Hula released a record by Kaholokula which included the twelfth song previously assigned to Oahu and ten songs owned by Kaholokula.

When Hula and Oahu did not pay the agreed upon royalties, Kaholokula advised the companies that he considered the assignment and recording contracts breached and, consequently, revoked. Kaholokula then reregistered the copyrights in his songs and filed two copyright infringements suits against the companies.

A Federal District Court dismissed the actions for lack of subject matter jurisdiction, holding that both complaints stated claims for breach of contract but did not arise under federal copyright law.

The District Court judgment has been reversed by a Federal Court of Appeals. The court first determined that the complaint alleging the infringement of the eleven songs on Kaholokula's 1975 record raised contract issues as threshold questions, but also required the independent construction and application of federal copyright law.

The "more troubling" complaint was the one involving Hula's exploitation of the eleven songs released on the "Ti Time" record. As explained by Judge Fletcher, if Hawaiian contract law entitled Kaholokula to revoke or rescind the assignments, any exploitation by Oahu or Hula after the date of rescission or revocation necessarily infringed Kaholokula's copyrights. If Oahu's alleged breach did not entitle Kaholokula to revoke or rescind the assignment contract, Oahu would have continued to own the copyrights in the eleven songs. The dilemma thus was that if Kaholokula prevailed on the contract law issues, a determination of infringement would follow "inexorably" If he did not prevail on the contract claim, Kaholokula then would lack standing to sue in federal court. Kaholokula pointed out that if he indeed did prevail in state court on his contract claims, he might be entitled to statutory remedies for copyright infringement which state courts do not have the jurisdiction to award. If he then returned to federal court seeking a remedy, his infringement claims might be barred by the applicable three-year statute of limitations.

Judge Fletcher concluded that in circumstances such as these, when a party "would be entitled, as a matter of law, to remedies granted by the copyright statute should the threshold issue of ownership be resolved in his favor, his complaint arises under the federal copyright law"

The Entertainment Law Reporter has learned that the parties in the case have settled the lawsuits. The court, accordingly, dismissed the appeals and withdrew its opinion.

Kaholokula v. Hula Records, Inc., 746 F.2d 583 (9th Cir. 1984) [ELR 6:11:9]

New York court refuses to order arbitration of fee dispute between actress and management company because company was acting as unlicensed theatrical employment agency

On February 22, 1984, when actress Paige Price attempted to terminate her personal management contract with Niederlitz & Steele Ltd., the management company filed a demand for arbitration seeking to recover commissions allegedly earned and an award enforcing the parties' contract with respect to Price's future engagements. New York State Supreme Court Justice Maresca has declined to refer the dispute to arbitration because he found that the management contract was a voidable violation of New York's General Business Law.

Section 171(8) of the General Business Law states: "'Theatrical employment agency' means any person ... who procures or attempts to procure employment or engagements for ... the legitimate theater, motion pictures, radio, television, phonograph recording ... but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor."

Price contended that Niederlitz & Steele acted as a theatrical employment agency without having obtained a license from the New York City Department of Consumer Affairs, and that the management company therefore was barred from recovering the disputed fees for its services. Niederlitz & Steele responded that its attempts to obtain employment for Price were only "incidental" to its management services. It was pointed out that when the management company sent Price to commercial and theatrical calls and auditions, the company was informed of the audition opportunities by a licensed theatrical employment agency.

Justice Maresca stated that Niederlitz & Steele had failed to demonstrate that the company's activities on behalf of Price, apart from alerting her to the auditions, were merely incidental. "Procuring employment appears to be [Niederlitz & Steele's] main activity," observed the court. The fact that the management company obtained employment referrals from licensed employment agencies was not controlling in determining the company's status. Furthermore, a provision of the management contract stated that Niederlitz & Steele would receive commissions only when Price worked.

Justice Maresca concluded that public policy barred the enforcement of the management contract since Niederlitz & Steele, in the circumstances of this case, was a de facto employment agency and thus was required to obtain a license and to abide by statutory operating procedures and fee limitations. It would be against public policy, in the court's view, for the management company "when acting as an employment agency" to collect any fees not permitted under the General Business Law; the company's demand for arbitration was therefore denied.

In the Matter of Price, New York Law Journal, p.6, col.3 (N.Y.Cnty., Jan. 4, 1985) [ELR 6:11:10]

Arbitration provision in American Federation of Musicians standard form contract is ruled unenforceable by New Jersey appellate court

A New Jersey appellate court has refused to enforce an arbitration provision contained in a contract between the Gil Chimes Quartet and Oritani Motor Hotel, Inc., doing business as the New Earth Restaurant in Hackensack, New Jersey.

In November 1979, the parties signed a standard form contract which was provided by the American Federation of Musicians. Chimes agreed to perform at the New Earth restaurant for a period of about three months for a fee of $700 per week. The contract also contained a provision for binding determination of all disputes relating to the contract by the International Executive Board of the AFM.

According to Oritani, in late January 1980, Chimes agreed in writing to the early termination of the engagement, with the understanding that a different five-week engagement would be offered to the group at a later date in 1980. Nevertheless, Chimes filed a claim with the AFM in February 1980 seeking $3,500 from Oritani for breach of contract, and eventually received an award in this amount. The award was confirmed by a New York court although Oritani did not appear in the action. Chimes then sought to enforce the New York judgment in a New Jersey trial court. At that point, Oritani argued that the claim was void and unenforceable because the New York court never acquired jurisdiction over the controversy or over Oritani; and that the arbitration provision in the AFM standard contract was void and unenforceable as against public policy.

The New Jersey trial judge agreed with Oritani that the company had never consented to New York jurisdiction, and refused to enforce the judgment. This decision not to enforce the judgment has been affirmed, on different rounds, by an appellate court.

Judge Botter first cited with approval the case of Graham v. Scissor-Tail, Inc. (ELR 2:21:3) in which the California Supreme Court found that the AFM standard form contract, containing the same arbitration provision as in this case, was a contract of adhesion, and thus the California court declined to enforce the "oppressive and unconscionable" arbitration provision. Judge Botter stated that the arbitration provision, by giving the Executive Board the power to decide disputes relating to AFM members, was contrary to public policy, because "the relationship between the Board and its members is obviously too close to assure the dispassionate and impartial resolution of disputes between AFM members and non-members."

Judge Botter did not cite Jerry Kravat Entertainment v. Cobbs (ELR 5:4:4) in which a New York court chose not to follow Scissor-Tail and held that the challenged arbitration clause was valid in circumstances similar to those present in the Chimes-Oritani employment situation.

Given the unenforceability of the arbitration provision, neither the Board nor the New York court had jurisdiction over Oritani, and the New Jersey appellate court therefore refused to enforce the judgment based on the Board's award.

Chimes v. Oritani Motor Hotel, Inc., 480 A.2d 218 (N.J.App. 1984) [ELR 6:11:10]

Talent agents' motion for summary judgment in antitrust action challenging franchise fee system is denied

The American Federation of Television and Radio Artists requires that agents who represent AFTRA members become franchised by the union and pay an annual franchise fee of $50. AFTRA members are prohibited from using the services of agents who are not franchised.

Talent Representatives, Inc., brought an action claiming that the franchise fee requirement violated the antitrust laws. The claim will now proceed to trial since a Federal District Court in New York has refused to grant the agents' motion for summary judgment.

The issue of the validity of agent franchise systems and attendant fees first took center stage in the case of H.A. Artists & Associates, Inc. v. Actors' Equity Association, 451 U.S. 704 (1981) (ELR 3:3:4). In H.A. Artists, the District Court found that both the franchise system and the fee obligation were protected by the statutory labor exemption from the antitrust laws. The Court of Appeals affirmed both aspects of the decision (ELR 2:11:3). But the United States Supreme Court affirmed only with respect to the exemption of the franchise system, and reversed and remanded the issue of the franchise fee. The parties in H.A. Artists settled the suit after the Supreme Court decision. Thus, although the current case involves different parties, it finally has brought the spotlight to bear on the question of whether the franchise fee requirement violates the antitrust laws.

Federal District Court Chief Judge Motley first rejected Talent Representatives' argument that the Supreme Court, in H. A. Artists, actually held that the fee requirement constituted aper se violation of the Sherman Act. Also rejected was the per se violation claim derived from Talent Representatives' alternate argument that the application of the fee requirement was a group boycott. "Simply characterizing something as a group boycott is insufficient to establish that it constitutes a per se violation of the Sherman Act" stated Judge Motley. AFTRA contends that it did not intend the franchise fee to limit the number of franchised agents and that the fee did not have the effect of precluding any agent from the market, thereby raising material issues of disputed fact with respect to the purpose and effect of the fee.

Talent Representatives further argued that the franchise fee requirement violates section 2 of the Sherman Act as a restraint of trade in the market of theatrical agents' services. The absence of evidence on this disputed issue also required the dismissal of the motion for summary judgment, concluded the court.

It should be noted that in February 1983, the Screen Actors Guild settled a class action lawsuit which had been filed against the Guild by Talent Representatives by agreeing to end its practice of collecting franchise fees from agents and sub-agents. The stipulated settlement did note that if a determination is made in the AFTRA case as to the validity of the franchise fee system, the SAG settlement will not prevent SAG from reinstating franchise fees "on a lawful basis" (ELR 5:1:10).

Talent Representatives, Inc. v. American Federation of Television and Radio Artists, 593 F.Supp. 576 (S.D.N.Y. 1984) [ELR 6:11:11]

Federal District Court refuses to dismiss documentary filmmaker's breach of contract claim against Home Box Office, but claim alleging failure to negotiate "in good faith" is dismissed for uncertainty and vagueness

On July 21, 1982, Jillcy Film Enterprises, Inc. executed a letter agreement with Home Box Office whereby HBO gave Jillcy the right to produce a documentary on the filming of a feature-length production entitled "The Terry Fox Story." Jillcy agreed to submit, within six weeks after the commencement of the film, some rough footage of the documentary. Then, for a period of up to 90 days after the delivery of the rough footage, the parties agreed to "negotiate exclusively and in good faith with respect to the terms ... relating to the distribution, exhibition or other exploitation of the documentary." The parties subsequently extended the delivery date for the first assemblage of rough footage until November 15, 1982. At some point after that date, negotiations took place regarding a long term production and licensing agreement.

The potentially dramatic situations that occurred during the negotiations included: Jillcy's late December letter to HBO which contained 67 proposed changes in a draft production and licensing agreement; Jillcy's contention that an oral agreement was reached on January 7, 1983; a January 17th HBO memo, attached to a copy of the unexecuted agreement, directing payment to Jillcy "as soon as possible" pursuant to a provision of the agreement which provided for payment upon "approval by HBO of selected footage"; a notation, dated January 18, 1983, on the January 17th memo concerning the "deal being pulled"; the mailing by HBO to Jillcy, on January 18th, of three unexecuted copies of a licensing agreement that provided that

Jillcy's initial payment would be made no more than ten days after the execution and delivery of the agreement to HBO but did not provide for any initial payment by HBO prior to the execution of the agreement, as Jillcy had proposed; a January 19th call by HBO to Jillcy terminating the deal, apparently on the basis of an unfavorable review of Jillcy's rough footage; and the finale of HBO's failure to execute the licensing agreement.

Jillcy's action for the alleged breach of the purported oral agreement of January 7, 1983 and the alleged breach of the July 1982 agreement to negotiate in good faith came before Federal District Court Chief Judge Motley. Judge Motley first ruled that the question of whether the parties intended to be bound prior to the execution of a written agreement was a disputed issue which was not appropriate for resolution on a motion for summary judgment. If the parties did not intend to be bound until the written contract was fully executed, even if they may have agreed to all of the terms, then the purported agreement might be voidable under New York's statute of frauds, as argued by HBO.

Judge Motley did dismiss Jillcy's claim arising from the alleged breach of the good faith negotiation provision of the July 1982 agreement because "no definite, objective criteria or standards" against which HBO's conduct could be measured were provided in the letter agreement, thereby rendering the good faith negotiation provision unenforceable for uncertainty and vagueness.

Jillcy Film Enterprises, Inc. v. Home Box Office, Inc., 593 F.Supp. 515 (S.D.N.Y. 1984) [ELR 6:11:12]

Federal District Court in Rhode Island grants game manufacturer Milton Bradley's motion for judgement notwithstanding a $737,000 jury verdict in trade secret misappropriation action

When Roger Burten and Allen Coleman, the creators of an electronic board game, signed a disclosure agreement with Milton Bradley Company, they disclaimed the creation of a confidential relationship with the company. A Federal District Court judge has upheld the validity of the disclosure agreement and has ruled that Burten and Coleman, a former Milton Bradley employee, were precluded from asserting a claim against the company for the misappropriation of a trade secret. Accordingly, the court granted judgment for the toy manufacturer notwithstanding a jury verdict for the game creators of more than $737,000.

The genesis of Burten and Coleman's game "Triumph" was described at length by Judge Selya. Eventually, in February 1980, the game's creators presented Triumph to Milton Bradley, after signing the critical standard disclosure form. The company conducted a month-long evaluation of Triumph, but ultimately rejected the game. About a year later, at a toy fair, Burten and Coleman encountered the Milton Bradley electronic board game "Dark Tower," which, according to the court, "bore a strong family resemblance to Triumph."

Burten and Coleman proceeded to file a complaint alleging fraud and deceit, breach of contract, unfair competition, and misappropriation of a trade secret. The fraud claim was withdrawn and the court directed a verdict for Milton Bradley on the contract count. The jury then returned a verdict for Burten and Coleman in the sum of about $737,000, representing a reasonable royalty to the creators based on the Dark Tower profits as stipulated by the parties.

In ruling on Milton Bradley's motion for judgment notwithstanding the verdict, Judge Selya first pointed out that the effect of the disclosure form on the relationship of the parties was an issue both of novel impression and "surpassingly close." The sharing of a confidential relationship by the parties is one of the elements of a cause of action for the misappropriation of a trade secret, "a variant of the business tort of unfair competition." (The other elements, which were beyond dispute in this proceeding, are: the possession of a trade secret, the disclosure of the secret to the allegedly offending party, and the use of the secret to the detriment of the revealor.)

While it appeared that Burten and Coleman has been "wronged," and that Milton Bradley used their idea without compensation, Judge Selya observed that "the equities [were] not so one-sided ... Ideas are the most intangible of property rights and their lineage is uniquely difficult to trace." Burten and Coleman were wholly familiar with the game industry; they voluntarily and knowingly signed the disclosure agreement; the disclosure form was neither ambiguous nor uncertain in disavowing the creation of "any relationship" between the parties and in limiting the creators to their rights (if any) under the patent laws; and there was no showing of fraud by Milton Bradley. In all, concluded the court, the form's "unequivocal terms" were controlling, given the circumstances of the case, and the fact that under the applicable Massachusetts law, the voluntary transmittal of an idea without limitation upon its use, permits appropriation without obligation.

Burten v. Milton Bradley Company, 592 F.Supp. 1021 (D.R.I. 1984) [ELR 6:11:12]

Owners of NBA Chicago Bulls must pay more than $16 million in damages for acts which prevented Illinois Basketball, Inc., from purchasing Chicago NBA franchise in 1972

The long embattled legal struggle for control of the NBA's Chicago Bulls franchise has resulted in a substantial judgment of more than $16 million for Illinois Basketball, Inc., the prospective buyer illegally prevented from purchasing the Bulls back in 1972.

In 1972, both IBI and the Chicago Professional Sports Corporation wanted to buy the Chicago team. After a bitter struggle, CPSC emerged as the new owners of the Bulls. IBI then brought an action in a Federal District

Court in Illinois against CPSC and its investors, the NBA, the owners of several NBA member teams and others. Generally, IBI alleged that the defendants had violated federal antitrust laws and had committed state law tortious interference with contract by conspiring to prevent IBI from buying the Bulls.

Just before the case came to trial, IBI settled its claims against the NBA defendants for $750,000. Subsequently, the case went to trial. The trial court split the case into a liability portion and a damage portion. After trial on the liability issue, the District Court found that by virtue of their acts which had prevented IBI from buying the Bulls, the defendants had violated federal antitrust laws and had committed tortious interference with contract according to Illinois state law. Judgment was entered for IBI on the issue of liability, and the parties were given time to come to a settlement with regards to damages.

After extensive unsuccessful settlement negotiations, the damages portion of the trial was conducted. Essentially, IBI sought damages for its injury measured by the "lost appreciation in value" of the Bulls franchise. IBI calculated these damages by using the "basic yardstick measure of damages" which, basically, measures the difference between the appraised value of the Bulls' assets and CPSC's costs and expenses of buying and operating the team since 1972. In addition, IBI sought a trebling of its compensatory damages and an award of punitive damages.

In response, CPSC disputed the legal validity and applicability of IBI's "lost appreciation in value theory," contending that IBI's damages should be measured by the lost benefit of IBI's bargain as of 1972 - the difference between the fair market value of the Bulls' stock in 1972, and the 1972 purchase price IBI had negotiated for the stock.

In a long and financially detailed opinion, Federal District Court Judge Roszowski first considered the extent of IBI's injury and the proper approach to measuring IBI's damages. By their unlawful conduct, CPSC and the other defendants precluded IBI from acquiring the Chicago NBA franchise in 1972 and from enjoying the anticipated economic benefits of owning and operating that business, Judge Roszowski stated. Moreover, "CSPC has enjoyed substantial financial gain" in owning and operating the Bulls franchise. the measure of damages proposed by CPSC would not fully compensate IBI for its losses, the District Court stated. In these circumstances, "it is appropriate to use the actual financial experience of CPSC as a 'yardstick' to measure the damage of IBI." The District Court set out to measure CPSC's total financial gain by determining the net value of CPSC's business (i.e., market value of assets less liabilities) and subtracting from that business value the net amount of all monies contributed to CPSC by its shareholders (invested capital). After adjusting for certain other factors, the result measured the amount of CPSC's financial gain during the 10-year period in question.

After deciding the proper approach to measuring IBI's compensatory damages, the District Court proceeded to determine the market value of the CPSC's assets. To do so, Judge Roszowski gave "great weight" to the comparable sales method of valuation, wherein the actual sales prices of other, comparable basketball franchises were computed in fixing the value of the Bulls' basketball assets. Deferred compensation in player contracts was eliminated from all computations of the sale prices of the comparables to avoid problems arising out of the incomparability of otherwise reasonably comparable teams. In determining the closeness of comparability, the District Court considered city size, population growth, market interest in basketball and existing versus expansion franchise status. After considering the comparables offered by the parties, Judge Roszowski found "the most comparable transactions (to be) the most recent New Jersey, Philadelphia, Los Angeles, Houston and Dallas transactions."

Because of the limited number of transactions and the less than perfect comparability of the clubs used, Judge RoszoWski did not rely exclusively on the sales prices of the comparable clubs in determining team value, however. Other factors were also taken into account, most notably, upwards adjustments due to developments in pay TV and differences in arena availability, and downward adjustments for recent changes in tax law and in free agent rules.

After careful consideration of all the evidence, the District Court found that the market value of the CPSC's basketball and other assets less its total liability resulted in a franchise value for the Bulls of just over $10.8

million as of 1982. After deducting CPSC's invested capital in the Bulls franchise from this figure, and adjusting for other factors, the court concluded that IBI suffered actual damages of almost $4.2 million. Pursuant to section 4 of the Clayton Act, that figure was trebled bringing IBI's damages to about $12.5 million. From this amount IBI's prior settlement of $750,000 was deducted.

To top off the award, the District Court found that since several of the individual defendants were found to have acted willfully, with malice, and without justification, the circumstances of the case warranted the imposition of punitive damages against these individuals. The court awarded IBI punitive damages totaling $4.5 million, bringing the total award of damages to IBI over $16 million, plus costs of suit and reasonable attorneys fees.

Fishman v. Estate of Wirtz, 594 F.Supp. 853 (N.D.Ill. 1984) [ELR 6:11:13]

Basketball player's bankruptcy estate unsuccessful in bid for tax refund because deferred compensation payments received by trustee pursuant to player's contract were taxable income only when actually received even though payments were guaranteed by team's owners

A Federal District Court has held that income received by a trustee in bankruptcy on behalf of Joe Louis Caldwell's bankruptcy estate, was taxable income during the years that the money was actually received. In so holding, the court rejected the trustee's argument that this income was constructively received by Caldwell prior to the bankruptcy, and therefore, taxable to him personally.

In 1970, Caldwell entered into an agreement with Southern Sports Corporation (which then operated as the "Carolina Cougars") whereby Caldwell agreed to play basketball with the Cougars for five years. In return, Southern Sports agreed to pay Caldwell $1.1 million over a ten-year period. In 1975, difficulties arose between Caldwell and the Cougars, and Caldwell was dropped from the team. A year later, an involuntary bankruptcy proceeding was brought against Caldwell. During the next three years (1977, 1978 and 1979) the bankruptcy trustee received, on behalf of Caldwell's estate, $70,000 a year pursuant to Caldwell's agreement with Southern Sports. Approximately 20 percent of this amount was withheld as income taxes and paid over to the Internal Revenue Service.

Sometime thereafter, the trustee filed an amended federal income tax return claiming that the taxes paid during 1977, 1978 and 1979 should be refunded. The trustee argued that these contract payments were deferred compensation payments which would have been taxable to Caldwell prior to 1976. Consequently, he added, these payments were not taxable when received.

The trustee's argument was based on the theory that Caldwell constructively received the money prior to 1976. However, the court held that the facts did not establish constructive receipt by Caldwell. It stated that in order for income to be constructively received, it must be "credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time. . ." In addition, the court cited Revenue Ruling 60-31 which states that "a mere promise to pay, not represented by notes or secured in any way, is not regarded as a receipt of income within the intendement of the cash and disbursement method."

The trustee contended that this Revenue Ruling supported his position. He argued "that if a naked promise to pay - not secured in any way - is not a receipt of income, then a promise secured in some way would be such a receipt." Thus, he added, because the club's principals guaranteed Southern Sports' promise to pay Caldwell, this secured the promise to pay and consequently, the income was constructively received at the time of the promise. The court was not persuaded. It held that the guarantee did not secure the obligation. Rather, the guaranty was merely a "promise to pay." The court added, "no funds were set aside for Caldwell's benefit. No escrow or trust fund was established. Nor was any lien or security interest established to assure his position. Caldwell had no control or command of funds or property, so the rule of constructive receipt does not apply."

Berry v. United States, 593 F.Supp. 80 (M.D.N.C. 1984) [ELR 6:11:14]

Federal Court of Appeals reverses dismissal of suit against international amateur basketball association brought by former professional basketball player, because issues of fact exist as to whether association is subject to personal jurisdiction under Colorado's long-arm statute even though headquartered in Germany

In a decision which may ultimately leave former professional basketball player Ron Behagen with the "home court advantage" in his suit against the Federation Internationale De Basketball Amateur, a Federal Court of Appeals has ruled that the District Court erred in granting FIBA's motion to dismiss for lack of personal jurisdiction. The appellate court so ruled because there exist factual disputes material to whether the FIBA has "maintained continuous and substantial activity in Colorado" through acts of its American member sufficient to subject the FIBA to personal jurisdiction under Colorado's long-arm statute.

Behagen played professional basketball in the NBA from 1973 through 1979. In October 1979, Behagen accepted an offer from a team in an amateur Italian basketball league. The league is a member of FIBA, the international association that governs amateur basketball in its member countries.

Even though the Italian league gave Behagen a salary, transportation and living accommodations, the league is nonetheless considered an "amateur" one by FIBA. For Behagen to qualify to play amateur ball in the Italian league, FIBA reinstated his amateur status and he played in the Italian league during its 1979-1980 season.

In March 1980, Behagen returned to the United States and signed a "tryout" contract with the Washington

Bullets for the remaining two weeks of that team's season. Behagen played in eight games with the Bullets but was not offered a contract for the following season.

Behagen then signed another contract with the Italian team in the summer of 1980. Behagen was subsequently notified by the team that his FIBA license granting him amateur status had been revoked by FIBA because he had played for the Bullets, a professional basketball team. FIBA purportedly has a rule prohibiting reinstatement to amateur status more than once and therefore refused Behagen's request to be reinstated a second time. Without the FIBA license reflecting his amateur status, Behagen was no longer eligible to play in the Italian league.

Behagen then brought suit in the Federal District Court in Colorado against FIBA and its American member, the Amateur Basketball Association of the United States of America. Behagen alleged that FIBA's refusal to reinstate him to amateur status a second time was "made without giving him notice or a hearing, and was contrary to the regulations and practices of (the) ABA/USA, FIBA, or both."

FIBA filed a motion to dismiss for lack of personal jurisdiction, contending that it did not have sufficient minimum contacts with Colorado to support jurisdiction under Colorado's long-arm statute. The District Court granted the motion and Behagen immediately appealed.

On appeal, FIBA argued that the District Court ruling was proper "because (FIBA) is an association with headquarters, staff, and offices in Munich, Germany; it has no offices or assets in Colorado or even the United States; and it has committed no acts in the United States, in general, and Colorado, in particular." Furthermore, FIBA argued that "Behagen's claim that he was denied the right to play basketball in Italy is unrelated to Colorado." Behagen's response was that personal jurisdiction over FIBA was proper in Colorado "regardless of where the cause of action arose because FIBA has maintained continuous and substantial activity there through its American constitutent, ABA/USA; in other words, FIBA is 'present' in Colorado through ABA/USA."

In reversing the District Court ruling, Federal Court of Appeals Judge Seymour first noted that "in enacting the long-arm statute, the Colorado legislature intended to extend the jurisdiction of Colorado courts to the fullest extent permitted by the due process clause of the United States Constitution." Judge Seymour further noted that the Colorado courts have carried out such legislative intent by extending their jurisdiction to the limits permitted by the US. Supreme Court which has held that "when a foreign defendant carries on a continuous and systematic part of its general business in the forum state through its agent, that state's exercise of jurisdiction over an unrelated cause of action is reasonable and just."

The appellate court next considered whether the showing made by Behagen at the trial court supported his position that FIBA is "present" in Colorado through ABA/USA. Judge Seymour found that Behagen had "presented facts tending to show that FIBA consists of its members, that FIBA operates through committees made up of its members, that the members promulgate the governing rules as a congress, and that FIBA governs internationally related basketball in each country through its member organization there." The appellate court stated that such evidence constituted "a prima facie showing that FIBA maintains continuous and substantial activity in Colorado through the actions taken on its behalf by its constituent, ABA/USA."

In view of its findings, the appellate court held "that it would not offend due process to require FIBA to defend a lawsuit wherever members conduct FIBA activities if FIBA in fact consists of its members and acts only through them," and that "the undeveloped record in this case reveals that there exist factual disputes material to these issues " For these reasons, Judge Seymour concluded that dismissal of the action against FIBA by summary judgment was inappropriate.

Behagen v. ABA/USA, 744 F.2d 731 (10th Cir. 1984) [ELR 6:11:14]

Pay-TV company granted partial judgment on issue of liability against Indiana resident who assembled equipment to receive pay-TV service free of charge

TVQ, an Indiana based pay television service, is cracking down on those who assemble their own equipment to receive TVQ's programming without paying for it. In a suit brought by TVQ against Indiana resident Steven L. Adkins, a Federal District Court has ruled that Adkins' unauthorized access to TVQ's pay television service violated the Federal Communications Act and certain Indiana statutes relating to theft, conversion and deception, but did not violate the Federal "wiretap" statutes.

TVQ is in the business of providing for a fee television entertainment programming to residences and hotels in the Indianapolis metropolitan area. The actual programming is supplied by HBO in New York; and through a series of linkages, by wire, satellite, radio and microwave transmissions, the signal is ultimately available to consumers. TVQ's specific role in the process relates to the last step in the transmission and delivery of the signal as HBO's exclusive licensee in Indianapolis.

TVQ's subscribers normally pay a monthly fee to receive programming which consists mainly of commercially uninterrupted movies and sporting events. In addition, TVQ subscribers pay an installation charge and a refundable deposit for the receiving equipment. The monthly fees are the primary source of revenue for TVQ.

Through the use of standard electronic parts readily available in most electronic stores, Adkins assembled and installed his own receiving equipment and for a period of time used the equipment to receive TVQ's programs free of charge without TVQ's authorization.

After somehow discovering Adkins' unauthorized reception of its programming, TVQ brought suit against Adkins. Federal District Court Judge Barker has granted TVQ's motion for summary judgment, in part, on the issue of liability, but reserved ruling on the issue of damages.

Judge Barker first stated that the application of the facts of this case to the Federal Communications Act raises issues which are not novel and have been passed on in substance by many other courts. Persuaded by the clear interpretation given the statute by the FCC and the holdings in the overwhelming majority of similar cases, Judge Barker found Adkins' unauthorized reception and use of TVQ's programming in violation of the Act.

According to the FCC's interpretation, the unauthorized reception and use of communications from a "Multipoint Distribution Services" is a violation of Section 605 of the Communications Act. "MDS is a common carrier service which utilizes radio transmission...MDS stations are not television broadcasting stations ... Nor are their radio communications intended to be received by the general public ... Because material transmitted over (MDS) stations is not intended to be 'broadcast' material within the meaning of Section 605, authority for its reception and use must be given by the sender. Therefore, persons will be in violation of the law if they ... use for their own benefit any MDS communications which they were not authorized to receive." Judge Barker found that, according to the FCC, since TVQ's programming is distributed by a Multi Distribution Service, TVQ is protected under Section 605, and any unauthorized use of its programming is in violation of Section 605.

In reviewing the relevant case law, Judge Barker noted that the overwhelming majority of courts "have held that for the purposes of Section 605, the crucial factor in determining whether the programming is broadcasting for the use of the general public is not whether the content of the program has mass appeal or mass availability but rather, whether it was intended for the use of the general public." After observing that the only way access to the MDS programming can be received is through the use of specialized equipment, the courts in those cases held that the MDS transmissions were not broadcasting for the use of the general public and as such were protectable under Section 605. Similarly, in the present case, TVQ's programming is distributed by a MDS and specialized equipment is necessary to access TVQ's program, indicating that its programs are not intended for the use of the general public. Judge Barker concluded that this case offered no basis on which to distinguish as inapplicable these holdings or to challenge the clear interpretation of the statute by the FCC.

With respect to the alleged violations of the Indiana state statutes relating to theft, conversion and deception, Judge Barker simply concluded that such statutes were clearly violated by Adkins.

The more difficult legal question in this case, Judge Barker observed, relates to whether or not the unauthorized acquisition of the TVQ signal by Adkins constituted a violation of the Federal "wiretap" statutes.

Finding little case law directly on this point and relying on its analysis of the statute themselves and its review of the legislative history, the District Court concluded that it was clear that Adkins' actions did not violate the "wiretap" statutes. These statutes were originally enacted as pan of the Omnibus Crime Control Act of 197O and were directed at prohibiting those acts which threaten to violate the privacy interests of individuals in their personal conversations, Judge Barker stated. "The communications with which Adkins interfered in the case at bar were not private conversations between individuals." TVQ's signal was dispersed throughout the Indianapolis area. Judge Barker stated that TVQ's assertion of liability under the wiretap statutes distorted both the language of the statutes and the thrust of the statutes generally, as evidenced from its legislative history.

In conclusion, Judge Barker emphasized that "it is hoped that this ruling will serve as an aid to understanding by those who otherwise would err through inadvertence or confusion and a deterrent to those who otherwise would allow themselves to be in violation of these statutes."

Hoosier Home Theater, Inc. d/b/a TVQ v. Adkins, 595 F.Supp. 389 (S.D.Ind. 1984) [ELR 6:11:15]

FCCs direct broadcast satellite regulations are approved by Federal Court of Appeals, except for provision exempting customer-programmers from regulations applicable to broadcasters

A Federal Court of Appeals has upheld, for the most part, the Federal Communications Commission's adoption, in 1982, of interim regulations governing the operating of direct broadcast satellite services and the Commission's decision granting the application of Satellite Television Corporation to construct the first phase of its experimental DBS system that would provide subscription television service to the general public.

The National Association of Broadcasters and the County of Los Angeles sought to overturn the interim DBS orders and the grant of Satellite Television's DBS application. The broadcasters argued that the Commission did not have the power to approve a technology that is equipped to serve the public on a regional or a national basis, rather than being community-based - an argument characterized by Judge Mikva as "luddite," "shortsighted" and "impracticable." The FCC is obligated to regulate the distribution of communications services to the public, including the services distributed by an innovative system of technology, stated Judge

Mikva. The Commission's action did not eliminate local programming; rather, it was found that DBS will serve to supplement the existing local broadcast system.

Judge Mikva then discussed the Commission's decision not to apply to DBS all of the major regulatory restrictions traditionally imposed on broadcasters under Title III of the Communications Act, such as those requiring reasonable access to broadcast facilities by qualified candidates for federal office. The FCC had determined that DBS applicants which will provide service direct to homes and which retain control over the content of their transmissions will be treated as broadcasters. However, a DBS satellite owner instead might choose to operate as a common carrier. In this case, the satellite owner would not be treated as a broadcaster.

The Commission stated that those parties who lease satellite space from a DBS common carrier and then distribute programming via satellite to individual homes -

the "customer-programmers" - also would not be treated as broadcasters. This determination was "forbidden statutory experimentation," declared the court, for "when DBS systems transmit signals directly to homes with the intent that those signals be received by the public, such transmissions rather clearly fit the definition of broadcasting ... That remains true even if a common carrier satellite leases its channels to a customer-programmer who does not own any transmission facilities; in such an arrangement, someone - either the lessee or the satellite owner - is broadcasting." Any conclusion to the contrary would result in a variety of consequences, described at length by the court, which would be at odds with the objectives of the Communications Act.

The obligations imposed on common carriers under Title II of the Communications Act were not a "surrogate" for the Title III requirements such as reasonable access or equal opportunity to respond to the presentation of opposing viewpoints. The fact that customer-programmers lease or otherwise receive access to DBS satellite channels, rather than owning the channels, was a sufficient "use" to fall within the FCC's jurisdiction.

An argument advancing the position that the Commission never regulates programmers, but only station licensees, also was rejected. The Commission's application of broadcast restraints to programmers, although infrequent, has been upheld.

The part of the DBS Order exempting customer-programmers of DBS common carriers from the statutory requirements imposed on broadcasters thus was vacated. But the balance of the DBS Order was allowed to stand, as was the Satellite Television ruling. Satellite Television had applied to operate its DBS system as a broadcaster and agreed to comply with all the applicable regulations.

In the balance of its lengthy opinion, the court upheld the Commission's determination to suspend, temporarily, for DBS, both the multiple channel and cross-ownership rules. It was observed that DBS and traditional television broadcasting are not sufficiently similar in their technology, marketability, capitalization requirements or other relevant factors so that identical regulatory treatment of the two is required. The FCC's judgment that suspending ownership restrictions would better promote diversity was neither arbitrary nor capricious, concluded Judge Mikva in light of the significant differences between DBS and conventional television. In a "final caveat" on this issue, the court cautioned the FCC to remain alert to the factors of diversification of media viewpoints and control as the DBS industry grows, because multiple channel authority is a contingent right which remains subject to public interest considerations. The grant of three-channel authority to Satellite

Television and the Commission's suspension of the multiple channel rules for DBS therefore was upheld.

National Association of Broadcasters v. Federal Communications Commission, 740 F.2d 1190 (D.C.Cir. 1984) [ELR 6:11:16]

Holder of exclusive right to market Olympic coins outside United States may raise breach of contract and unfair competition claims against domestic bulk purchaser of coins

In May 1983, the United States Department of the Treasury awarded to Maison Lazard et Compagnie the exclusive right to market and sell Olympic commemorative coins outside the United States. In June 1983, a company known as Manfra, Tordella & Brooks, Inc., received a contract to sell and distribute the coins within the United States. According to Maison Lazard, Manfra arranged for the resale of the coins outside the United States in violation of its contractual obligation, thereby infringing various rights asserted by Maison Lazard.

Manfra first argued that Maison Lazard was not entitled to pursue a breach of contract cause of action since the Treasury Department agreement provided that "Treasury ... will prohibit domestic bulk purchasers from selling, directly or indirectly, Olympic Coins to persons outside the United States."

Federal District Court Judge Whitman Knapp ruled that Maison Lazard "clearly" was a third party beneficiary of the prohibition against foreign sales contained in the Bulk Purchase Agreement. Manfra thus may proceed with a claim for the breach of that contract.

Maison Lazard also properly raised claims for unfair competition under the Lanham Act and under New York law - the court having found that New York possessed a more significant relationship with Manfra's tortious activity than Germany or Japan, where the coins were being wrongfully sold. Furthermore, under New York law, Maison Lazard could maintain a cause of action for the unlawful interference with contractual relations since Manfra's actions made it impossible for Maison Lazard to enjoy the full benefit of its contract with the Treasury Department. The court concluded by refusing to dismiss Maison Lazard's request for punitive damages.

Maison Lazard et Compagnie v. Manfra, Tordella & Brooks, Inc., 585 F.Supp. 1286 (S.D.N.Y. 1984) [ELR 6:11:17]

Book's description of convict as "informant" was not defamatory among "right-thinking persons" rules New York court in dismissing action against publisher of "The Vatican Connection"

The fact that one's fellow prisoners might not take kindly to one's alleged status as an "informant" was an insufficient basis for a defamation claim, a New York court has ruled in dismissing a complaint against Charter Books/Berkley Publishing Group.

A Mr. Heimerle, who previously was convicted for criminal misconduct resulting in his incarceration, brought an action against the publishers for defamation and the violation of New York Civil Rights Law sections 50 and 51 in connection with statements contained in the softcover edition of the book "The Vatican Connection." Heimerle claimed that the book's reference to him as an informant on organized crime was false and subjected him to "contempt, ridicule [and] aversion...," not to mention placing him in danger, from other prisoners.

Without ruling on the question of whether Heimerle was or was not an informant, the court determined that the identification of an individual as an informant, even if false, was not susceptible of a defamatory meaning. The loss of esteem resulting from a purportedly defamatory statement must come from the minds of "right-thinking persons." The group of right-thinking persons does not include the criminal element or those who disapprove of informants, stated the court. Aiding in the investigation of crime is a lawful activity; hence, a statement concerning one's involvement in such conduct would not give rise to a cause of action for defamation.

The court also found that Heimerle did not possess a cause of action for invasion of privacy or for the violation of sections 50/51 "insofar as the common law right of privacy does not apply where, as here, a person's name is used to describe certain events in which he chose to participate... [events which] were newsworthy matters in which the general public had a legitimate interest."

Heimerle v. Charter Books/Berkley Publishing Group, New York Law Journal, p. 5, col. 1, (N.Y.Cnty., Dec. 27, 1984) [ELR 6:11:17]

Briefly Noted:

Sports.

Stockholders of the New England Patriots Football Club were partially victorious in their appeal against the club and controlling shareholder, William H. Sullivan, Jr., for violation of section 14(a) of the Securities and Exchange Act in making a misleading proxy statement regarding a merger. The Court of Appeals has affirmed in part, vacated in part and remanded for further proceedings. The stockholders alleged that they were induced to accept an offer of $15 per share for their common stock in the old Patriots corporation which was being merged with a new and separate corporation. They claimed that the proxy statement contained "various misrepresentations designed to paint a gloomy picture of the financial position and prospects of Patriots, so that the shareholders undervalued their stock." Consequently, they sought to rescind the merger or receive a higher price per share for their sold stock. The stockholders argued that the District Court applied an improper concept of materiality to the omissions and misleading statements. However the Court of Appeals found that the fact that a proxy statement is drafted by insiders acting in their own interest does not change the standard of materiality, though a self-dealing insider may have a "heavier burden of disclosure." Thus some of the District Court's disposition of claims were found not to be clearly erroneous. Other claims, however, were open to question. The stockholders asserted that the value of the NFL expansion franchises was some indication of the value of the Patriots franchise and thus would be a factor in deciding whether or not to vote in favor of the merger and whether the offered price per share represented the "fair value of their stock. They further argued that the proxy statement revealed that the non-voting shares had originally been issued for $5 per share, but failed to disclose that the issuance price of the voting shares had been $2.50 which was material in light of the fact that Sullivan subsequently purchased the voting stock at prices exceeding $100 per share while offering only $15 per share for the non-voting stock.

The appeals court remanded to the District Court to consider whether the issuance price of the voting shares was material and should have been disclosed. The proxy statement also failed to disclose that a local broadcasting contract had been renegotiated with an increase in revenues. The Court of Appeals held that the lower court should weigh this concealment in determining whether the proxy statement was materially misleading. Finally, the court remanded the issue of compensating balances. The stockholders claimed that Sullivan improperly used corporate funds to maintain compensating balances at Banks that had loaned him money to finance his purchase of the voting shares.

Pavlidis v. New England Patriots Football Club, Inc., 737 F.2d.1227 (1st Cir. 1984) [ELR 6:11:18]

Sports.

The Pittsburgh Penguins hockey team failed to score a win in court when the Philip Morris tobacco company brought suit for breach of contract as a result of the premature termination of Philip Morris' advertising contract. The Federal District Court in Pennsylvania has held that the Philip Morris-Penguins contract for the exclusive right of tobacco advertising in and around the Arena where the Penguins play, along with the right to display its own ads on the four panels on top of the scoreboard, in exchange for $13,500 annually is valid and enforceable until it expires in 1987. In 1976 the Public Auditorium Authority of Pittsburgh entered into a two-year contract granting the Penguins the right to sell advertising space within the Arena, subject to the Authority's approval of the advertising and the contracts. Nearly one year later the Penguins signed the contract with Philip Morris, and signs advertising Marlboro Cigarettes were mounted on the scoreboard. In 1983 the new owners decided that the old board needed to be replaced and that $100,000 could be secured annually for top panel advertising. The new owners alleged that the Philip Morris contract was unenforceable because the Authority-Penguins agreement terminated in 1978 and thus the Philip Morris contract should terminate at that time as well. However, the court held the contract clearly established that the Penguins had no right to sell space after 1978, but that date did not terminate any valid contract whose life extended beyond that time. Therefore the Court ordered a permanent injunction against the defendants to prevent rescission of the contract until 1987 since the loss of potential customers would be impossible to calculate and immediate and irreparable harm would occur.

Philip Morris Inc. v. Pittsburgh Penguins, Inc. 589 F.Supp. 912 (W.D.Pa. 1983), affd. without opinion, 738 F.2d 424 (3d Cir. 1984) [ELR 6:11:18]

Trademark Infringement.

Restaurant Lutece in New York City has been denied a preliminary injunction restraining Houbigant, Inc., from distributing a new line of cosmetics and fragrances called Lutece. The restaurant (whose international reputation for excellence, unfortunately, has not as yet been personally verified) registered the word Lutece as a service mark for "restaurant services" in 1977, and as a service mark for "cocktail lounge services. . . " in 1983. In mid-1983, Houbigant selected the name Lutece, which is defined in a French dictionary as "ancient Paris" for its fragrance line, with the expectation of

1984-1985 sales in the range of $15 million. The court applied a ten factor test in ruling on Lutece's claims of trademark infringement, violation of the Lanham Act, unfair competition and dilution, and concluded that Lutece had not met its burden of showing a probability of proving either a likelihood of consumer confusion resulting from Houbigant's use of the word Lutece, or that the restaurant's use of the name has acquired a "secondary meaning" in the fragrance market. While there was a high degree of similarity between the restaurant's mark and the allegedly infringing mark (with the effect of the similarity reduced somewhat by Houbigant's inclusion of its name on the fragrance packaging), the remaining factors did not support Lutece's position. In particular, the court cited: a consumer survey which suggested "little or no risk of ... actual confusion"; the fact that the evidence indicated numerous uses of the name Lutece in connection with a variety of products; the restaurant's failure to invest in advertising while Houbigant planned a vast marketing campaign; the lack of any overlap between the target markets; and Lutece's disinclination to enter the fragrance field. The restaurant also did not demonstrate a likelihood of success on the merits of its New York statutory or common law claims, concluded the court.

Restaurant Lutece, Inc. v. Houbigant, Inc., 593 F.Supp. 588 (D.N.J. 1984) [ELR 6:11:18]

Trademark/Radio Broadcasting.

A Federal District Court in Indiana has ruled that a likelihood of confusion between the radio station call letters WMEE and WMCZ warranted the issuance of a preliminary injunction on behalf of Pathfinder

Communications' station WMEE. The following factors were found significant by the court: an expert's well-supported opinion that the marks were overwhelmingly phonetically similar; the extreme similarity in the stations' targeted audience and "soft rock" music format; the overlapping service area of the stations; the lack of close attention by consumers in selecting a radio station; the strength of WMEE's mark in Fort Wayne, as indicated by its long-term use (since 1971); the station's expenditure of time, effort and funds (amounting to about $300,000) on promotion; the station's status as the number one radio station in its market area; and evidence of "at least some intent on the part of [WMCZ] to trade on the good will and reputation of [WMEE] ... in the Fort Wayne market area." Midwest Communications therefore was enjoined from using the call letters WMCZ to identify its radio station. However, pending the issuance of new call letters, the court stated that the station might continue to identify itself as WMCZ with the disclaimer "Not to be confused with WMEE, FM-97." Midwestern also was cautioned not to select any call letters which again might be confusingly similar to WMEE.

Pathfinder Communications Corporation v. Midwest Communications Co., 593 F.Supp. 281 (N.D.Ind. 1984) [ELR 6:11:19]

Copyright.

Copyright holder Richard Wolfe, representing himself, has been unsuccessful in appealing his copyright infringement action which had previously been dismissed. The Federal District Court in Pennsylvania held that it lacked subject matter jurisdiction for lack of diversity and that the action had erroneously been brought under the Copyright Act. Wolfe alleged that United Artists Corporation and derivative defendants Bayberry Music and Bald Eagle Music, printed and distributed revised editions of his work entitled "Richard Wolfe's Legit Professional Fake Book" in which was included his musical composition, "Twas The Night Before Christmas." However, Wolfe's name as composer was omitted and another copyright owner was erroneously designated. In addition, Wolfe charged that the defendants refused to account for the royalties attributed to sales and use of the composition and failed to pay him his share of the revenue derived therefrom. The court held that such claims did not constitute copyright infringement under the Copyright Act, but rather should be brought as a breach of contract case. The court also held that Wolfe's naming as "derivative defendants" Bald Eagle and Bayberry, both of which he owns and controls, destroyed diversity since the complaint conclusively established that

Bayberry is the copyright owner and was a party to all of the relevant agreements.

Wolfe v. United Artists Corp., 583 F.Supp. 52 (E.D.Pa. 1983) [ELR 6:11:19]

Winter Olympics/Lodging Rate Regulation.

In 1974, the town of Lake Placid in upstate New York was named the host of the 1980 Olympic Winter Games. In 1977, the state of New York enacted a statute which established an Olympic Accommodations Control Corporation to regulate, control and stabilize hotel and motel room rates in Lake Placid during the Olympic period. The Corporation notified the owners of two motels in the Lake Placid area, along with other motel owners, of the Corporation's intention to acquire the motels' guest rooms pursuant to its statutory power to exercise a "preferential right of leasing." The motel owners alleged that the Corporation's action was an unconstitutional taking of their property without just compensation and brought various claims against the responsible Olympic affiliated entities and New York state officials. Federal District Court Judge Miner, in a lengthy opinion, has declared that the challenged actions did not amount to an unconstitutional taking and, also finding that the motel owners' action was barred by the applicable statute of limitations, granted summary judgment to the Olympic/New York parties. Judge Miner noted that the motel owners' "disappointment in not being able to price-gouge Olympic patrons who sought motel accommodations" did not establish that an unconstitutional taking had occurred. The state had a substantial and legitimate interest in regulating room rates; the motel owners, notwithstanding rate regulation, eamed greater revenue during the Olympic period then during any previous season; and neither the owners' possession and title nor the essential value of the properties were disturbed by the state's regulation. The court also rejected, after extensive and less than sympathetic discussion, the motel owners' equal protection, due process and various pendent state law claims.

Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F.Supp. 304 (N.D.N.Y. 1984) [ELR 6:11:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Oddo v. Ries, 743 F.2d 630 (6:4:10); Buffalo Broadcasting v. ASCAP, 744 F.2d 917 (6:5:3); Motown

Record Corp. v. Brockert, 207 Cal.Rptr. 574, 160 Cal.App.3d 123 (6:5:5); Sanford v. CBS, 594 F.Supp. 711 (6:5:8); Cox Cable New Orleans v. City of New Orleans, 594 F.Supp. 1452 (6:6:17); Foodscience Corp. v. McGraw-Hill, 592 F.Supp. 362 (6:9:17). [ELR 6:11:22]

IN THE NEWS

Writers Guild ratifies new contract with motion picture and television producers

A 14-day strike by motion picture and television writers ended with the approval by Writers Guild members of a new three-year contract with the Alliance of Motion Picture and Television Producers.

The contract does not contain a controversial proposal which would have entitled writers to a share of distributors' videocassette income. Rather, writers will be receiving 1. 5 percent of producers' gross income to $1 million and 1.8 percent thereafter. These percentages are the same as those agreed to last year by the Directors Guild of America. (ELR 6:3:20)

Writers Guild members also will receive a compounded 6 percent increase in the minimum payments for motion picture and television scripts. The Alliance has agreed to contribute $1,000,000 to the Guild's health insurance plan; to "freeze" the "break amount" on writers' residuals on made-for-pay television projects and/or videocassettes; and to recognize greater creative rights for screen and television writers. The new contract will expire on February 29, 1988. [Apr. 1985] [ELR 6:11:20]

Two Alabama film exhibitors sign consent decrees barring their participation in split agreements

R.C. Cobb, Inc. of Birmingham, Alabama and Consolidated Theatres, Inc. of Charlotte, North Carolina have agreed to settle criminal and civil complaints filed by the Antitrust Division of the Department of Justice in which it was alleged that the exhibitors conspired to eliminate competition for film exhibition in three Alabama cities.

The government claimed that beginning in the fall of 1983 and continuing until July 1984, Cobb and Consolidated engaged in a conspiracy in violation of section 1 of the Sherman Act to split or allocate among themselves the rights to negotiate for film licenses and to refrain from competitive bidding or competitive negotiations for film licenses.

Under the consent decrees, the exhibitors are barred from engaging in the complained-of activities, and other similar collusive activities, such as splitting or allocating a right of first negotiation, or fixing the terms, such as percentage rental payments, guarantees, advances, or playtime, in film licenses. Each exhibitor also is barred, for five years, from acting as the booking agent for any theater located within 20 miles of a theater owned or operated by Cobb or Consolidated, unless permission is granted by the Antitrust Division.

The exhibitors agreed to enter guilty pleas to the criminal charges, and to pay fines of $100,000 for Cobb and $75,000 for Consolidated. [Apr. 1985] [ELR 6:11:20]

Director Peter Bogdanovich fails to enjoin Universal Pictures from releasing "Mask"

Los Angeles Superior Court Judge John Cole has denied director Peter Bogdanovich's request for a temporary restraining order which would have prevented Universal Pictures from releasing the film "Mask" unless the studio restored two scenes which it had deleted and included the Bruce Springsteen music the director had specified for the film.

Universal argued that the director did not have contractual rights to the final cut of the film and would not be harmed by its release. According to the studio, Bogdanovich shared the final cut of "Mask" with producer Martin Starger; Bogdanovich's 124 minute cut violated the specified 115 minute maximum length for the film; and Bogdanovich purportedly has agreed to the deletion of at least one of the scenes at issue.

With respect to the Springsteen music, Universal claimed that despite lengthy negotiations, the company was unable to reach an agreement with CBS Records on videocassette royalties. The studio therefore replaced the Springsteen songs with music by Bob Seger. [Apr. 1985] [ELR 6:11:20]

WASHINGTON MONITOR

Federal Communications Commission will accept applications for 689 new FM radio stations

The Federal Communications Commission has voted to accept applications for 689 new FM radio stations. The owners of AM stations currently operating primarily during daylight hours will receive a special preference when applying for the new licenses. This policy has been criticized as favoring incumbent AM broadcasters over minority applicants. But FCC Chairman Mark Fowler has expressed the view that a significant number of the new stations will be awarded to minorities.

Furthermore, in order to qualify for the preference, daytime broadcasters must have had substantial participation in managing their stations; the proposed FM station must be located in the same community as the daytime station; the AM station must have been owned for three continuous years; and the AM station owner must agree to be involved in the operation of the FM station, and agree to divest the daytime only station within three years. [Apr. 1985] [ELR 6:11:20]

Department of Justice will not challenge proposed USFL-network contract for Saturday afternoon telecasts in the fall, beginning in 1986

The Department of Justice has announced that it advised the United States Football League that the Department does not intend to challenge a proposed agreement covering Saturday afternoon network telecasts of USFL games in the fall beginning in 1986.

The Department's position was stated in a letter from J. Paul McGrath, Assistant Attorney General in charge of the Antitrust Division, to counsel for the USFL. The League had asked the Department for a business review letter stating the Department's enforcement intentions if the USFL and a television network entered into such an agreement.

Under the proposed agreement, the USFL would provide a network with exclusive rights to one to four games, all being played within the same three-hour "window" on Saturday afternoons. The network would be permitted to show one game on a national basis or several (or even all) of the available games on a regional basis, and would not be required to "blackout" any games. All other USFL games would be played on Saturday nights or on other days.

USFL teams would have the right to enter into other agreements covering the broadcast or cablecast of their games into their home markets, except during the Saturday afternoon window of network exclusivity.

The USFL's proposed network agreement would be in addition to a League agreement with ESPN regarding cablecasts on designated nights and possibly another agreement covering television rights to Sunday games. Under the USFL constitution, all television rights and income are divided equally among member clubs. The USFL began play in the spring of 1983, and in 1984, USFL teams had losses averaging $3.5 million per team.

McGrath's letter noted that the USFL's proposed network agreement would be subject to normal antitrust scrutiny, because it involves Saturday broadcasts in the fall and thus would not come within the statutory antitrust exemption covering some sports league television agreements, including those covering Sunday professional football games.

The letter stated that, as a general matter, the Department believes that the success of a sports league entails a certain amount of economic interdependence among teams. While the unnecessary elimination of competition between the members of a joint venture can present antitrust problems, the Department's letter said, the courts have recognized that limitations on some types of competition among members of a joint venture may enhance competition by facilitating the provision of a new or different product to the public in competition with products produced by those outside the venture.

The letter stated that it is the Department's view, based upon current market conditions, that the USFL's television proposal would be procompetitive. The letter said that the League's representations satisfied the Department that the proposed agreement, including the window of exclusivity, appears at the present time and under present market conditions to be reasonably necessary in order for the USFL to have a chance of surviving in competition in the market in which broadcast rights for professional football are sold and other markets as well.

Under the Department's business review procedure, an organization may submit a proposed action to the Antitrust Division and receive a statement as to whether the Division would challenge that action under the federal antitrust laws. [Apr. 1985] [ELR 6:11:21]

United States Senate ratifies Convention on Programme-Carrying Satellites

The United States Senate has ratified the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite which was enacted in 1974 under the auspices of the United Nations. The Treaty provides that signatory nations will take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the satellite signal is not intended.

The Convention does not apply where satellite signals are intended for direct reception from the satellite by the general public. And a "fair use" provision enables an otherwise "unintended" distributor to carry short excerpts, for informational purposes, of a satellite-conveyed program reported on current events, or to carry a program which might be used for educational or scientific research purposes in a developing country.

A "first-sale" type provision permits the distribution of "derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended." And the Convention declares that it does not "limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement." [Apr. 1985] [ELR 6:11:21]

Federal Communications Commission denies fairness doctrine complaint against CBS documentary "The Uncounted Enemy: A Vietnam Deception"

The Mass Media Bureau of the Federal Communications Commission has rejected a fairness doctrine complaint filed by the American Legal Foundation against CBS on account of the documentary "The Uncounted Enemy: A Vietnam Deception."

The Commission found that CBS had not deliberately attempted to distort the information which was presented in the program, which also was the target of the recent libel action brought by General William

Westmoreland. Although CBS admitted that the broadcast "contained breaches of its own standards of newsgathering," the Commission distinguished between committing mistakes which did not diminish the overall accuracy of the broadcast and the alleged deliberate commission of such mistakes or errors in judgment. [Apr. 1985] [ELR 6:11:21]

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[ELR 6:11:23]