BUSINESS AFFAIRS

The Personal Manager Controversy: Carving the Turf

by Fred Jelin

Many kinds of professionals assist artists in their careers. The demarcation between the role of the agent, the lawyer, the personal manager and the business manager has never been crystal clear. It is no secret that lawyers and personal managers at times solicit employment for their clients. Legally, however, only licensed agents should perform that function.

This divergence between the law and day-to-day reality is clear in the following common scenario. An aspiring entertainer comes to Los Angeles hoping to break into show business only to find closed doors. He can't get an agent to represent him and he can't get union work because he isn't yet in the union. A personal manager discovers this aspiring entertainer and takes him on, investing time and money in him, all in the hope that he will become a star and the personal manager will share in the fruits of that stardom.

The manager and the aspiring entertainer enter into a personal management contract in which the manager agrees to advise, counsel and direct the development and enhancement of the entertainer's artistic and theatrical career. In return for these services, the manager is to receive 15 percent of the entertainer's income for two or three years. In the first year, the personal manager will receive 15 percent of nothing. However, both parties are betting on the future.

The dream comes true; the artist is a commercial success. Then comes the twist: just when the personal manager is ready to reap the benefits of his contract, the artist declares the contract void. As the law presently stands in California, if the manager has even attempted to procure employment, the artist will succeed.

This scenario is a personal manager's nightmare and his most compelling argument for a change in the law. However, there also are nightmarish stories of the personal manager who took advantage of the aspiring artist. As explained by Carol Cole, Regional Manager for the Division of Labor Standards Enforcements, "There are marginal characters who roll into town and take advantage of the person with stars in his eyes."

For this reason the law requires that those who procure employment for entertainers be registered. Registration provides stability. In order to register, one must provide affidavits from persons in the community, have an office, and pay a licensing and filing fee. The Labor Commissioner generally oversees the fairness of the relationship. For example, registered talent agents must send the Labor Commissioner copies of their sample contracts and fee schedules, to be reviewed for general fairness; and registered talent agents must keep accurate books and records. Personal managers are not required to be registered and therefore are not subject to these requirements (though they are, of course, subject to the general obligations of a fiduciary to their clients).

What is a Personal Manager?

A personal manager's function is to advise and counsel artists concerning their careers and generally to see that all business and personal matters are in order. A manager, like an agent, is someone with contacts and information. A personal manager looks to building the long term career as opposed to signing the next deal.

Actually, several types of service providers call themselves personal managers.

Music.

The need for a personal manager originated in the music industry. Musical acts frequently need more attention than an agent could or is motivated to give. Managers who represent recording artists enjoy music, understand the music business, and are interested in investing in groups they feel have promise, and for whom they think they can get record deals. It is not unusual for a manager to take on a young band which is earning $75.00 per night if the manager thinks they make good music. Musical groups typically get a manager before they get an agent.

David Helfant, a music-personal manager and an attorney points out that even after a music group gets an agent, the manager will continue to handle the recording, publishing, video and merchandising contracts, plus search for corporate sponsors; the agent will concentrate on booking live, television and motion picture performances. Music personal managers are favored by the California law, because it now sanctions their unlicensed procuring of recording contracts on behalf of their clients. Interestingly, managers may now help a group get a recording contract but are forbidden by law from booking them into a bar. (See below on the New California Act.) Also, the American Federation of Musicians (AF of M) recognizes the usefulness of personal managers in many ways that other entertainment unions do not. (See section on Why Managers Do Not Register.)

Managing the Newcomer.

Some personal managers service actors or writers who simply cannot get an agent; the number of agents has dwindled in recent years and it can be hard to get one. These managers usually tell their clients that they will help get them jobs. Some managers work out of their homes (something agents are prohibited by law from doing) and frequently will do everything for the client from guiding his career to helping with the laundry, being a good friend and generally believing in and encouraging the artist. If the artist-manager collaboration works well, they may end up with a long-term relationship that includes producing projects together.

The Producer-Manager. Many artists who are already successful retain personal managers to develop their careers. Frequently, the personal manager is the closest person to the artist. In that case, the manager hires and supervises the agent, the business manager, the lawyer, and the press agent. The most visible personal managers are producermanagers like Larry Thompson, Bernie Brillstein, Sandy Gallin, and Management Company Entertainment (formerly known as Blake Edwards Entertainment). These organizations are miniature versions of the old studio system. As a matter of fact, it is in part the demise of the studio system, where players were under long-term contracts, that has brought about the need for personal managers.

Jonathan Krane, President of Management Company Entertainment, notes the analogy between his company and the old studio system by explaining that he has a stable of actors, writers and directors who he uses in projects he produces. Krane does not charge a management fee when putting a client into his own production. The concept of "linkage" - using a hot property controlled by the manager to bolster the career of an actor who is also a client of the same management company - can benefit all involved. The flipside of linkage is the potential for conflict, a problem resolved by making sure all elements have independent representation. Krane, who like Larry Thompson is an attorney, does not have management contracts with his clients. He explains that the decision not to have contracts was based on a business judgment that negotiating contracts and their renewals was not worth the time. He relies on the continued strength of the relationship to see that he gets paid.

The Jurisdiction Issue and The Jefferson Airplane Case

The problem for personal managers is that they belong to no defined legal category and therefore often find themselves punished for violating rules that were not specifically promulgated to regulate their profession. Yet it cannot be denied that there is potential for abuse in manager-artist relationships. The question is largely jurisdictional: under what rules and procedures, if any, should personal managers be regulated?

The complicated nature of the jurisdictional dispute is exemplified in the landmark Jefferson Airplane case, Buchwald v. Superior Court, 254 Cal.App.2d 347, 62 Cal.Rptr. 364 (1967). In 1965, members of the Jefferson Airplane all individually entered into personal management contracts with Matthew Katz. Their contracts all had the standard clause which stated that Katz was not promising to obtain employment and was neither obligated nor expected to do so. A dispute arose between Katz and the Airplane. Katz commenced proceedings with the American Arbitration Association as provided in the management agreement. The Airplane countered by filing a "Petition to Determine Controversy" with the California Labor Commissioner. The Airplane argued that the Labor Commissioner had exclusive jurisdiction since Katz had promised to secure and did in fact secure employment for them.

The Airplane also brought an action in the Superior Court seeking to enjoin the pending arbitration on the ground that since Katz had acted as an employment agency the Labor Commissioner's office was the exclusive forum for this dispute. The matter eventually reached the appellate court which found that the Artist Manager's Act (now the Talent Agencies Act) applied not only to licensed managers (as defined in Cal. Labor Code Section 1700.4) but also to unlicensed managers who engage in acts of procurement. The court further held that "Since the clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public, a contract between an unlicensed artists' manager and an artist is void." 254 Cal.App.2d at 351, 62 Cal.Rptr. at 367.

Ever since the Buchwald decision, personal managers in California have anticipated that the Labor Commissioner will hear these matters whenever they sue to enforce their contracts with clients. California Labor Code Section 1700.44 gives the Labor Commissioner exclusive jurisdiction to decide cases arising under the Act, though the Commissioner's findings are subject to a trial de novo in Superior Court. The most significant aspect of these hearings is that they occur much faster than would a court hearing. Petitions to Determine Controversy are also commonly filed by registered agents seeking to force their clients to pay their commissions.

Personal managers frequently ask why procuring employment is so pernicious that it should cause a voiding of their contracts. The Labor Commissioner's position is that the procurement of employment is a licensable activity and that those who run unlicensed employment agencies run the risk of having their contracts voided.

Definition of Procurement is Unclear

California Labor Code Section 1700.4 states as follows: "A talent agency is hereby defined to be a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or a corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."

In short, an unlicensed manager may not procure employment for an artist. But the definition of "procuring employment" is not clear. See generally Kearney v. Singer (Cal. Lab. Comm'r Dec. 1, 1977). In the Richard

Pryor Case, Pryor v. Franklin (Cal. Lab. Comm'r August 12, 1982), it was found that initiating, negotiating or furthering an offer constitutes a significant aspect of procurement and is prohibited by law. Bo Derek originally was introduced to producer Blake Edwards for consideration in the motion picture "10" by an intermediary who claimed the right to 15 percent of Derek's gross compensation, but whose activities were held to be in violation of the act. Derek v. Callan (Cal. Lab. Comm'r January 8, 1982). On the other hand, it has been found that introducing an artist to a casting director may not be enough to constitute procurement. Fisher v. Sheppard (Cal. Lab. Comm'r Jan. 23, 1981). There is a slight inference in Raden v. Laurie, 120 Cal.App.2d 778, 262 P.2d 61 (1953), that some incidental unlicensed procurement activity will not void the entire contract but this is not the position of the Labor Commissioner's office. A little bit of procurement is like being a little bit pregnant, according to the Labor Commissioner. The argument for incidental booking was rejected by the Derek v. Callan hearing officer with this language: "That is like saying you can sell one house without a real estate license or one bottle of liquor without an off-sale license."

The remedy for acting as an unlicensed artist's manager also is unclear. In some cases, managers may be left totally in the cold, ordered to return previously earned commissions, and not even given the right to reimbursement of outof-pocket expenses and loans made to their artist-clients. This is consistent with the Labor Commissioner's position that the entire contract is void. On the other hand, under a quantum meruit theory, Erin Fleming was found to be entitled to keep the lion's share of money she received for services performed on behalf of Groucho Marx. Bank of America v. Fleming (Cal. Lab. Comm'r Jan. 14,1982). The hearing officer in the

Fleming case found that only 20 percent of her time was spent performing prohibited services.

Buchwald v. Katz and Raden v. Laurie are the only reported decisions on this issue. Labor Commissioner decisions are unreported and therefore have no precedential value. But, attorneys appearing before the Labor Commissioner will invariably refer to previous rulings. (See the Bibliography at the end of this article regarding the availability of these rulings.)

Could one instance of procurement be enough to force the manager to disgorge all earnings from the relationship, even though the procurement represented only a minuscule fraction of the work done for the artist? Under the California rule, yes. There have been efforts to create a legislative exception for "incidental bookings," but they were unsuccessful. Roger Davis of the Los Angeles office of The William Morris Agency expresses the agents' concern that "incidental booking" cannot be defined and that such an exception would allow managers to do everything that agents may do. On the other hand, New York (which also has an office of The William Morris Agency) has managed to live with such an exception for more than half a century.

New York's Incidental Booking Exception

Section 172 of New York's General Business Law provides that no person shall operate an employment agency without being licensed as such. However, section 171.8 provides a major exception:

"'Theatrical employment agency' means any person who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings, transcriptions, opera, concert, ballet, modeling or other entertainments or exhibitions 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."

The exception is only available to the person who is primarily a personal manager for his client. In other words, someone cannot simply do a little bit of booking and then rely on the exception. There are cases which have upheld the exception in favor of managers. Pine v. Laine, 36 A.D.2d 924, 321 N.Y.S.2d 303 (1st Dept. 1971), aff'd 321 N.Y.2d 988, 341 N.Y.S.2d 448 (1973); Nazarro v. Washington, 81 N.Y.S.2d 769 (Sup.Ct. 1948) (where the court found that the terms of the contract brought it within the incidental booking exception; in California the Labor Commissioner will "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality." Buchwald v. Katz, supra, 254 Cal.App.2d at 355, 62 Cal.Rptr. at 370); Gervis v. Knapp, 182 Misc. 311, 43 N.Y. S. 849 (Sup.Ct. 1948); Pawlowski v. Woodruff, 122 Misc. 695, 203 N.Y.S. 819, affd 212 A.D. 891, 208 N.Y.S. 912 (1924).

There also are New York cases which found that the procurement was more than "incidental" to the relationship and therefore was outside the exception. Friedkin v. Harry Walker, Inc., 90 Misc.2d 680, 395 N.Y.S.2d 611 (1977); Russell-Stewart, Inc. v. Birkett, 24 Misc. 2d 528, 201 N.Y.S.2d 687 (1960); Anglileri v. Vivanco, 137 N.Y.S.2d 662 (1954); Matter of Price, (ELR 6:11:10, and see Previously Reported section of this issue, ELR 7:1:17).

California is more hospitable than New York to managers in one respect: the exception for managers who work in concert with a licensed agent. As a matter of fact, in New York, working in concert with an agent has been successfully used as evidence that the manager was doing too much securing of employment. In Matter of price, supra, the court stated that the manager's "informing the (artist) of 150 theatrical calls and auditions cannot be considered to be 'incidental' to managerial services. Instead, procuring employment appears to be respondent's main activity and the fact that respondent utilized licensed employment agencies to obtain employment is not controlling." In every one of the 150 calls, the manager was informed of the call by a licensed agency.

New York also has nothing comparable to the California Labor Commissioner as a forum to resolve these disputes. Failure to procure a theatrical employment agency license is punishable as a misdemeanor in New York.

New York also has statutory limits on the amount of fees a licensed theatrical employment agency may charge. California does not control the fees by statute, though the Labor Commissioner does review the fee schedules for fairness. Fee schedules in California are primarily regulated by the entertainment unions.

The United Kingdom

England also has experience with personal manager litigation. That country's seminal decision involved singer-composer Gilbert O'Sullivan. In addition to a management agreement, O'Sullivan had entered into recording and publishing agreements with his manager. These agreements were declared void and unenforceable on the grounds that O'Sullivan never had independent counsel, something that the court felt was necessary due to the trust and confidence O'Sullivan had in his manager.

Need Attorneys Be Licensed?

Some attorneys believe that they may procure employment for their entertainment clients, and need not be licensed to do so. They reason that attorneys are already registered with the State Bar and that this will suffice. This is the reasoning behind the express exemption for attorneys from California's Athlete Agencies Act. Cal. Labor Code 1600; Sobel, The Regulation of Player Agents (ELR 5:10:3).

However, there is no such exemption in California's Talent Agencies Act. Some lawyers are, in fact, registered as talent agents. As a general rule, lawyers have not run afoul of the Act in the same way personal managers have, probably because a lawyer's participation in the negotiation of a contract is part of his or her function as a lawyer. (But see, Pryor v. Franklin, supra.) Nevertheless, some disgruntled artist may someday make the argument that since his attorney did some procurement the entire retainer agreement is void.

Why Personal Managers Do Not Register

Eighteen years have passed since the Buchwald decision in 1967. Yet California law is as murky as ever. Personal managers remain at sea. The conundrum is that their ultimate goal is to see their clients gainfully employed, but if managers even attempt to procure employment for their clients, they risk voiding their management contracts.

Since personal managers are on such shaky legal ground in the enforcement of their contracts, the obvious question is: why don't they simply become licensed as talent agents and avoid these problems? The reason is that to do so would subject them to the rules of the entertainment unions as union franchisees. Union rules affect the amount of compensation an artist's representative may receive, the duration of representative's contracts, and the sorts of business activities the representative may engage in.

Amount of Compensation.

The American Federation of Television and Radio Artists (AFTRA) and the Screen Actors Guild (SAG) both limit agents' maximum compensation to 10 percent of the artist's gross compensation, and there can be no "double compensation." This means that if both an agent and a personal manager are involved, they would have to split the 10 percent fee, something neither of them is willing to do. The AF of M has a more liberal rule because the musicians union generally recognizes that personal managers serve a purpose to their members.

The 10 percent cap is unacceptable to personal managers since, unlike agents, they have very few clients. A personal manager may have between one and, at most, ten clients, whereas an agent may have more than 50 clients.

Duration.

SAG and AFTRA also limit the term of the agents agreement to 3 years and in some circumstances SAG only allows a one-year agreement. Some personal management agreements last for five years, since personal managers feel they need that time to recoup their investment. SAG and AFTRA also provide that artists may terminate their agreements with agents if the agent fails to obtain work for the artist within a certain specified period. If personal managers were covered by such a rule, they would be encouraged to do the very thing they are forbidden from doing: procuring employment.

Preclusion from other activities.

The unions also preclude their franchisees from conducting other business activities, such as producing. The purpose of this rule is to avoid conflicts of interest between agents and their clients. This rule is not acceptable to personal managers, since they want to produce and frequently will have an equity interest in the projects of their clients. (This union prohibition does not prevent agents from "packaging" their clients into projects, a fact that irks some personal managers. Agents respond to this concern by pointing out that agent-packagers do not have an equity interest in their projects.)

The dilemma has been aptly described as follows:

"The personal manager wishing to procure employment is forced to choose between violation of California law and economically restrictive conditions imposed by the entertainment guilds. In practice, most personal managers opt against state licensing and union franchising, choosing instead a no man's land wherein lurks the petition to determine controversy." Johnson and Lang, The Personal Manager in the Entertainment Industry, 52 So.Cal.L.Rev. 375, 418 (1979).

Personal manager Larry Thompson explains: "I wouldn't mind the managers being licensed which would give us some identification, presence and professionalism. I just don't want them regulated by the unions." Interestingly, there is no articulated reason why personal managers' lack of state registration stops the unions from regulating them. SAG and AFTRA have simply chosen not to recognize personal managers.

The New California Act

In 1982, the California legislature enacted an interim new act to solve this problem. The legislation made some significant changes that benefit personal managers. Now, those persons engaged in the procurement of recording contracts are exempt from licensing requirements. This is a major development since personal managers are prevalent in the recording industry. The new law does not address the procurement of related music contracts concerning publishing, merchandising, video and personal appearances. The most significant omission is the publishing contract, which is often collateral to the recording contract.

The new law often allows an unlicensed person "to act in conjunction with, and at the request of, a duly licensed and franchised talent agency in the negotiation of an employment contract." This creates the closest thing to a safe harbor. The "in conjunction with and at the request of' language has not been interpreted in any case. It also creates an uneasy alliance. Some agents are cooperative, feeling that the personal manager provides a valuable service to his clients. These agents will give the personal manager a letter confirming the fact that the manager is authorized to work on specified deals for their mutual clients. On the other hand, most agencies make it a policy not to issue such letters. Tension between an agent and a personal manager frequently begins when a manager advises an artist not to take a job that an agent has found.

The new law also establishes a one-year statute of limitation. "No action or proceeding may be prosecuted under this chapter with respect to any violation occurring or alleged to have occurred more than one year prior to commencement of the action or proceeding." This language has not yet been interpreted, but it seems that acts of procurement more than one year old are now stale. The remedy of disgorgement may also be limited to money earned within the last year. The old criminal liability provision also has been repealed.

Litigating for the Personal Manager

Even the most optimistic litigators pause before expressing confidence in cases in which they represent personal managers trying to enforce contracts with their artist-clients. Nevertheless, attorney Richard Feller points out that "The Labor Commissioner is not a Kangaroo Court where the manager never wins. Frequently a manager can accomplish a negotiated settlement or a litigated result more favorable than outright surrender."

A hearing officer in California may be sensitive to the unfairness of depriving a manager of all compensation, due to a few isolated acts of procurement. In Nussbaum

v. The Chicken Company (Cal. Lab. Comm'r 1981), the hearing officer found that since the manager did not engage in acts of moral turpitude, ordering the repayment of all commissions would be disproportionately harsh. This is similar to the quantum meruit result in Fleming, supra.

The one-year statute of limitations is the clearest opportunity for managers to retain some of their commissions. The manager's attorney may also attempt to show that the client was not an "artist," as required to invoke the act, but actually is a "producer."

The Entertainment Commission

The new act included a "sunset clause," meaning it is repealed by its own terms in January 1986 (following an extension from January 1985). A California Entertainment Commission has been appointed and charged with the responsibility of suggesting a model bill. The Commission is composed of 10 members: three personal managers, three talent agents, three artists and the Labor Commissioner, Robert Simpson. The talent agents are Jeff Berg of I.C.M., Richard Rosenberg of Triad, and Roger Davis of The William Morris Agency. The artists are all actors and all well established: John Forsythe, Cicely Tyson and Ed Asner. The personal managers are Pat McQueeney, Robert A. Finkelstein and Larry Thompson. As Carol Cole has said, "People from the industry were chosen to recommend a bill that would be acceptable to all segments."

The Entertainment Commission has its work cut out for it; lawyers have been struggling with this problem for more than a decade. A successful model bill would be one which accomplishes two results: it would define "procurement activity," and it would decide if personal managers should be regulated and, if so, how.

Larry Thompson has expressed the view that the law is supposed to "shield" artists from abuse, not provide a sword" for voiding contracts. Thus, Mr. Thompson suggests a three-tiered approach to the definition of procurement: (1) casual conversation, which a manager should be able to do; (2) solicitation employment, which a manager should be able to do only in conjunction with an agent; and (3) negotiation of contracts which should be done only by an agent, unless the agent requests the manager's participation. Thompson remarked that under the present law, "You could go to a dinner party, be sitting next to a producer, suggest your client for a role and that would be procuring."

Richard Rosenberg gives the agent's perspective on personal managers: "They are not the victims. They chose to go unregulated. They have to trade. If they want to reap the benefits of unlimited commissions, no conflict of interest problems, then they should run the risk of their contracts being invalid if they violate the law."

Carving The Turf

As part of the effort to define job responsibilities, agents and personal managers are carving the turf. The agents' primary concern is that personal managers will be entitled to do the same things as agents and yet be free of restrictions. There seems to be a recognition that personal managers perform a separate function and have the right to exist alongside agents. On the other hand, this issue has caused many tempers to flare. Some observers say that there is a war going on between agents and personal managers with the unions on the side of the agents.

Report of the Entertainment Commission

The Commission is obligated to present a model bill to the legislature in October 1985. Commissioner Simpson revealed the key points of the present version of the model bill to a recent Symposium of the Beverly Hills Bar Association, though he emphasized that the work of the Entertainment Commission is not yet finished. Tentatively, the Commission has considered and answered six questions:

1. Under what conditions should a personal manager or anyone be allowed to procure employment without being licensed? None.

2. What changes should be made to the recording exemption? None. 3. Should the criminal sanctions be reinstated? No.

4. Should the sunset clause be removed? Yes.

5. Should the Act be repealed? No.

6. Should there be a separate licensing law for personal managers? No.

In effect then, the Commission is expected to recommend that the 1982 changes become permanent. Commissioner Simpson has restated the general proposition that procuring employment is a licensable activity but that advising and counseling are not. The Commissioner feels that it should be left to the case law to further define "procuring employment."

The task soon goes to the California legislature, where it is predicted there will be a fight. As it stands now, the manager in New York can do incidental booking; the manager in California will probably be allowed to continue procuring if it is done in concert with an agent. Otherwise, the personal manager had best stick to career counseling or he will be in a difficult position should he have to litigate against his client.

Bibliography

1. Artist v. Manager v. Agent v. Labor Commissioner - Developments in the Regulation of Entertainers' Representatives, Syllabus for the Symposium of the Beverly Hills Bar Association (R. Feller, ed., November 12, 1983).

2. Artist v. Manager Revisited - Further Developments in the Regulation of Entertainers' Representatives, Syllabus for the Symposium of the Beverly Hills Bar Association (R. Feller, ed., June 1, 1985). (The above two books are the best sources for the unreported decisions of the California Labor Commissioner.)

3. Johnson and Lang, The Personal Manager in the California Entertainment Industry 52. S.Cal.L.Rev. 375 (1979).

4. Nimoy, Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils, 2 Loyola Ent.L.J. 145 (1982).

5. Greenberg, The Plight of the Personal Manager in California: A Legislative Solution, 46 Comm/Ent L.J. 837 (1984).

6. Thaler and Joseph, Personal Managers - Their Legal Status and Problems, Current Trends and Developments in the Entertainment and Sports Industries, Materials of the A.B.A. Forum Committee on the Entertainment and Sports Industries Program (1979).

Fred Jelin, Esq., a business litigator, is a 1982 graduate of Rutgers School of Law. The author wishes to thank Beth Maloney Jelin, Esq., for her helpful and humorous comments.

[ELR 7:1:3]

RECENT CASES

Estate of Tennessee Williams is granted preliminary injunction by New York appellate court barring the renaming of Broadway theater after the playwright; court declares that Williams' right of publicity is descendible

A New York appellate court has ruled that the Southeast Bank of Miami, Florida, the representative of the estate of playwright Tennessee Williams, was entitled to a preliminary injunction barring producers Jack and Richard Lawrence from renaming their Broadway theater the "Tennessee Williams." The court found that Williams had a valuable property right in his name, and that this right of publicity survived his death.

Judge Ross first commented upon Williams' honored career, during which the playwright retained complete artistic control of the production of his plays-control which extended to a provision in Williams' will barring any revision of his works. Then, after pointing out that Williams had been most selective in lending his name to promote various causes or artistic projects, Judge Ross declared that "the name Tennessee Williams is synonymous with theatrical excellence." Since Williams' death on February 23, 1983, Southeast has not approved any of the numerous requests for permission to use the playwright's name in connection with dramatic festivals or similar events. Thus, when Southeast teamed that Jarick Productions, Ltd. (the Lawrences' corporation) was planning to name a theater after Williams, and had erected a marquee so identifying the theater, Southeast sought and obtained a preliminary injunction against Jarick's unauthorized use of the playwright's name.

In affirming the granting of the injunction on behalf of Southeast, Judge Ross went back to the case of Haelan

Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816, in which a Federal Court, stating that it was applying New York law, recognized a "right of publicity" apart from New York's statutory right of privacy. Judge Ross noted that some courts have held that in order for the right of publicity to be descendible, an individual must have exploited that right during his or her lifetime. However, if such a test were applied in this case, it would be met since Williams had promoted himself via: the publication of an autobiography; the authorized publication in 1978 of a book of photographs and memorabilia; and the support provided by the playwright for the Tennessee Williams Fine Arts Center at a Florida community college.

Most significantly, Judge Ross held that there was no prerequisite for Williams to have exploited his right of publicity when he was alive in order to "preserve" the potential rights of his heirs.

Judge Ross concluded by noting that Jarick's purpose in renaming its theater was "to derive financial benefit from the use of the name" rather than to honor Williams, and that even such a laudable purpose would require the permission of the representative.

In a concurring opinion, Judge Sandler expressed some "uncertainty" as to whether the right of publicity "as it has been developed" is so closely related to the rights sought to be protected in New York Civil Rights Law sections 50 and 51 that those sections should be deemed to preclude the acceptance of the separate common law right "on behalf of those whose name and picture have an established commercial value." Judge Sandler would have granted the injunctive relief sought by Southeast on a more limited ground, focusing on the untenable situation which might be created if their owners en masse chose to "appropriate" Williams' name for their theaters, thereby not only damaging Southeast's commercial interests, but creating a potentially deceptive and confusing dilemma for theater-goers.

Southeast Bank v. Lawrence, 483 N.Y.S.2d 218 (1984) [ELR 7:1:9]

Federal Court of Appeals enjoins musical group from recording under the name "New Edition," but allows group to continue to present live performances under that name

A Federal Court of Appeals in Massachusetts has ruled that a group of young performers as well as a producer/record company both may possess an interest in the name "New Edition."

The rap, as it were, began in the early 1980s when five young men (Ricardo Bell, Michael Bivens, Robert Brown, Ronald DeVoe and Ralph Tresvant)-described by the court as "a song and dance group"-began performing in the Boston area under the name The New Edition. In October 1982, a company known as Street-Wise Records, Ltd. entered into employment contracts with each of the members of the group. The contracts (except for the contract signed by Tresvant) each stated: "Artist performs in a musical group named The New Edition and confirms that the name is wholly owned by Boston International Records, Inc. and that Artist has no right or interest in and to the name."

Boston International Records (subsequently known as Boston International Music) was a company owned in part by Larry Johnson, also known as Maurice Starr, a singer, songwriter and producer. Starr worked with StreetWise to produce and record the group's performances of a number of his songs, including "Candy Girl." StreetWise spent about $330,000 on the recordings. "Candy Girl," according to the court, has sold more than 1 million records.

In November 1983, the five performers notified StreetWise of their disaffirmance of the 1982 contracts on the ground of their "infancy." They then sued StreetWise and Boston International, asserting claims under section 43(a) of the Lanham Act, and alleging the violation of Massachusetts' anti-dilution statute and state law of unfair competition. The group sought a preliminary injunction barring StreetWise and Boston International from using the New Edition name on records which do not contain the group's services.

A Federal District Court denied the performers' motion for a preliminary injunction. The court found that although the group members were the exclusive owners of the New Edition name, the disaffirmance of their employment contracts constituted "unclean hands" and precluded an award of equitable relief. StreetWise also had sought a preliminary injunction in connection with its counterclaim under section 43(a) of the Lanham Act, but the company's motion was denied as well.

The Court of Appeals has affirmed the denial of injunctive relief to the group members (albeit on different grounds), but has reversed the denial of StreetWise and Boston International's motion for a preliminary injunction.

Judge Wyzanski first noted that the performers had presented only a "skimpy affidavit" as evidence of the public's association of the New Edition name with the members of the group, and that the trade name "if such it was" had no secondary meaning outside of Boston lounges, clubs, and schools. Though it found the Lanham Act inapplicable, the court nevertheless concluded that under Massachusetts law, the group members were entitled to protection against the use by others of the name New Edition "in connection with song and dance performances in Greater Boston." But the group was not entitled to prevent the use of the name by others in the national record market. Thus, the performers did not contribute rights in a trade name to a joint venture or partnership with StreetWise when they signed employment contracts. Rather, stated the court, the employment contracts related solely to the utilization of the group members' musical services.

Additional support for the court's conclusion that StreetWise retained all rights, in the national record market, to the New Edition name, was found by Judge Wyzanski in a provision of the employment contracts granting StreetWise the exclusive right to use and permit others to use the "Artist's" professional name.

The court stated that the fact that the group eventually performed throughout the United States under the New

Edition name did not change the form of the performer's rights. They remained employees compensable by royalties. And the group members' disaffirmances of their employment contracts did not recover for the group any legal title in the New Edition name in the national record market since the youths never possessed such title.

Judge Wyzanski found no need to resolve the "difficult" question of the performers' rights in the event StreetWise and Boston International seek to use the New Edition name in connection with the production and distribution of records which do not employ the musical services of the current members of the group. The court cited the possibility that StreetWise will not use the name except when referring to the five current group members, or that, since StreetWise used the group to "put life" into the name, the group members might not be limited to receiving royalties only from New Edition records on which they perform. Judge Wyzanski also fondly opined that the performers and the record company might "resume in full" their prior relationship.

The matter was remanded to the District Court for the issuance of injunctive relief on behalf of StreetWise and Boston International subject to the conditions that (1) StreetWise "(a) continue reasonably to exploit the phonorecords in which [the group members] appear as singers ... and (b) pay all royalties now or hereafter due under the employment contracts, and (2) [StreetWise and Boston International] not interfere with the group's rights to give live performances without any obligation to account for any portion of the proceeds of such performances."

In a concurring opinion, Justices Breyer and Coffin voiced the hope that the District Court would give the parties an opportunity to present further evidence. Under the decree, the group members and the record company each are free to use the trade name at issue. The concurring justices pointed out that this would serve to create the very confusion of source by the public that trademark and trade name doctrine were designed to prevent.

Furthermore, the District Court apparently had concluded that the New Edition name belonged to the group on the basis of the court's finding that the public associated the name with the group. However, a company may create a fictional name for a live employee and retain the right to the name. For example, CBS, not Richard Boone, owns the name Paladin. In the absence of a contractual specification of rights, further factfinding would be useful, in the concurring justices' view, to determine future rights in the name, with "perhaps offsetting compensatory monetary payments."

Bell v. StreetWise Records, Ltd., Case No. 84-1415 (1st Cir., May 8, 1985) [ELR 7:1:9]

Federal District Court denies CBS Records' motion for preliminary injunction prohibiting MCA Records from releasing album by musical group Boston

Federal District Court Judge Vincent L. Broderick has refused to issue an injunction sought by CBS Records which would have prevented MCA Records from releasing an almost-completed album by the musical group Boston.

CBS had signed Boston to a recording contract in 1976, but disputes between the company and the group resulted in CBS filing a $20 million breach of contract suit in 1983. In denying the company's motion for an injunction, Judge Broderick cited CBS' failure to establish a probability of success in its breach of contract suit, and the company's failure to prove that it would suffer "irreparable harm" without the injunction. Apparently, CBS made a $900,000 "buyout" offer to MCA for the rights to the group, and the offer "destroyed any argument of irreparable damage," in the court's view. Judge Broderick also noted that CBS improperly withheld more than $3 million in royalties from Tom Scholz, the leader of the group.

One additional observation made by the court was that issuing a preliminary injunction would extend "still further a contract which at the present time has been extended far beyond its originally contemplated expiration date."

In a previous ruling arising out of the Boston-CBS dispute, Judge Broderick granted attorney Donald Engel's motion for summary judgment dismissing CBS's claims against Engel with respect to his representation of Scholz and Boston in settlement discussions with CBS, contract negotiations with MCA, and in the CBS litigation (see ELR 6:10:20).

CBS, Inc. v. Scholz, U.S.D.C. Case No. 84 Civ. 5995 (S.D.N.Y., April 11, 1985), (unpublished transcript of oral ruling from the bench) [ELR 7:1:10]

Hal Roach Studios, the owner of copyrights in Laurel and Hardy films, infringed its licensee's right to produce and distribute soundtrack albums by issuing a conflicting license

In 1969, Hal Roach Studios entered into an agreement with Richard Feiner & Company which provided, in part, that Feiner would have the exclusive right to produce and distribute record albums made from the soundtracks of certain Laurel and Hardy films. Feiner, in turn, licensed Mark 56 Records to produce the albums entitled "In Trouble Again" and "Way Out West."

A dispute arose between Roach and Feiner, which resulted in an arbitration proceeding. In February 1980, a New York state court confirmed the arbitration award. Subsequently, Roach brought an action against Feiner in Federal District Court alleging conversion and copyright infringement; Feiner responded by filing a counterclaim charging Roach with copyright infringement.

Chief District Court Judge Motley found that Feiner was the exclusive licensee of a copyright owner and, as such, had standing to sue for copyright infringement. The court then pointed out that the state court had determined that the arbitration ruling, while partially rescinding the Roach-Feiner agreement, clearly stated that Feiner was entitled to receive income from sales of the Laurel and Hardy soundtrack records which were produced prior to the date of the arbitration award.

However, in December 1982, Roach had embarked upon its own licensing agreement with Mark 56. Mark 56 proceeded, apparently with Roach's consent, to release a three record set entitled "The Best of Laurel and Hardy" which incorporated two of the albums produced under the Roach-Feiner license, and thereby infringed Feiner's rights, declared Judge Motley.

Roach's conduct was that of a "vicarious infringer," stated Judge Motley, since Roach was the ultimate owner of the copyrighted works and also possessed the "right and ability" to supervise Mark 56. Roach met the "direct financial test" for a vicarious infringer in that the company required Mark 56 to turn over to Roach the royalties which formerly were paid to Feiner, and possessed a contractual right to inspect Mark 56's accounting records.

The court ordered Roach to pay damages of $3,250. (The statutory minimum of $250 per infringing act was a correct measure of damages, stated the court, because Feiner did not present sufficient evidence to warrant a higher figure.)

Roach v. Feiner, CCH Copyright Law Decisions, para. 25,709 (S.D.N.Y. 1984) [ELR 7:1:11]

Federal Court of Appeals upholds injunction barring Milwaukee area film exhibitors from engaging in split agreements throughout the United States

A Federal District Court order enjoining four motion picture exhibitors "from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States" has been upheld on appeal.

District Court Judge Robert W. Warren, in a civil antitrust action brought by the United States Government, had found that Capitol Service, Inc., Kohlberg Theatres Service Corporation, Marcus Theatres Corporation and United Artists Theater Service, Inc., had engaged in a product split arrangement which amounted to a per se violation of section 1 of the Sherman Act. (ELR 5:3:8) According to Judge Warren, the four exhibitors, who operate approximately 90% of the first run motion picture theaters in the Milwaukee metropolitan area, had agreed to allocate particular films to specific theaters in order to eliminate competition. The exhibitors agreed not to bid on films, not to negotiate for a film until it was split, and not to negotiate for a film split to another exhibitor. By so doing, the exhibitors succeeded in reducing the amount of guarantees paid to film distributors and shortened the length of the playtime for particular films, stated the court. The breadth of the injunction was based upon the presentation of evidence indicating that the four exhibitors were engaged in split agreements in other markets throughout the United States.

On appeal, the exhibitors argued that a nationwide injunction against all forms of split agreements was unjustified since certain split agreements, such as those allocating a right of first negotiation, did not constitute illegal price fixing or market allocation and therefore were not per se illegal. But Senior Court of Appeals Judge George C. Edwards first suggested that the exhibitors were on shaky ground in relying for support on Greenbrier Cinemas, Inc. v. Attorney General (ELR 3:14:4), and pointed out that the District Court had found that "even a limited right of first negotiation has a profound effect on price competition." In all, the breadth of the District Court order was not an abuse of the court's "large discretion" in redressing antitrust violations.

The appeals court has denied the exhibitor's motion for a rehearing by the full court of the ruling of the three judge panel.

United States of America v. Capitol Service, Inc., Case No. 83-2518 (7th Cir., Feb. 28, 1985) [ELR 7:1:11]

Federal District Court enjoins use of cassette copying machine to reproduce copyrighted recordings

A Federal District Court in New York has granted a preliminary injunction to several record companies which sought to restrain All-Fast Systems, Inc., dba Ditto Copy Press, from using a cassette copying machine, known as the "Rezound," to make copies of prerecorded cassettes containing copyrighted musical compositions. District Court Judge Haight declared that

"A clearer case of copyright infringement could hardly be imagined." All-Fast's employees often aided customers in the copying process and were found to have been well aware of the copyrighted nature of the tapes copied and the wrongfulness of the copying. The fact that the copying machine produced monaural rather than stereo copies was irrelevant, stated Judge Haight, who went on to conclude that the record companies had shown the requisite likelihood of success on the merits and also had shown irreparable harm.

All-Fast argued that its return of the cassette copying machine to the manufacturer rendered an injunction pointless and the motion moot. The court, however, reminded the parties that without an injunction. All-Fast would be free to reacquire the Rezound or another type of copying machine and "pick up where it left off." Also rejected, after patient consideration, was All-Fast's argument that the issuance of an injunction was precluded by

Sony Corp. of America v. Universal City Studios (ELR 5:9:10). As distinguished from the circumstances in Sony, All-Fast was in a position to exercise complete control over the use of the cassette copying machine. Thus, the court stated that the company fit "the traditional definition of a contributory infringer."

An injunction therefore was issued preventing All-Fast from reproducing copyrighted sound recording, from using a Rezound cassette copying machine or any other instrumentality capable of duplicating the record companies' copyrighted sound recordings, and from selling Rezound cassette tapes or other blank cassette tapes which All-Fast would have reason to believe would be used to reproduce copyrighted sound recordings.

Judge Haight denied the record companies' request for seizure of the Rezound copier, noting that there was evidence that the machine was used, for the most part, to copy noncopyrighted cassettes. An order of seizure thus would "prevent the legitimate and socially beneficent uses of the machine." An injunction would suffice to prevent improper use, stated the court, which also denied attorneys fees since the proceeding was not yet terminated.

RCA Records v. All-Fast Systems, 594 F.Supp. 335 (S.D.N.Y. 1984) [ELR 7:1:12]

Los Angeles ordinance establishing exclusive cable television franchise service areas violates the First Amendment; antitrust claim against city is denied

The "auction" process used by the City of Los Angeles to allocate cable television franchises violated the First Amendment rights of a prospective cable television operator, a Federal Court of Appeals has ruled.

In order to determine which cable television company would receive an exclusive franchise in a particular area of the city, Los Angeles established various financial and operating criteria. "Bidders" for a franchise were required to pay a $10,000 filing fee; demonstrate a sound financial base; set forth a nine-year plan of proposed operations; agree to pay the City a percentage of future annual gross revenues; provide a variety of customer services, mandatory access and leased access channels, and channels for use by government and educational entities; and allow the City to control certain pricing and customer relations decisions.

Preferred Communications, Inc., was organized for the purpose of operating a cable television system in the South Central District of Los Angeles. Preferred approached Pacific Telephone and the Los Angeles Department of Water and Power to negotiate leases for space on the companies' poles and conduits for

Preferred's network of distribution cables. The utilities informed Preferred that the company would first have to obtain a cable television franchise from the City. But the City refused Preferred's request for a franchise because the company declined to participate in the auction process.

Preferred brought a lawsuit against the City claiming the violation of its First Amendment rights and of federal antitrust laws. A Federal District Court ruled that Los Angeles' regulatory scheme did not violate Preferred's First Amendment rights and that the City was immune from antitrust liability. The District Court decision with respect to the antitrust claim has been affirmed, but Federal Court of Appeals Judge Sneed has reversed the dismissal of Preferred's First Amendment claim, declaring that a city may not use a franchise procedure to limit a cable television company's access to a service area when public utility facilities adequate for the installation of the cable system are available.

Judge Sneed, after finding that Preferred possessed standing to challenge the City s auction procedure, and stating that cable television operators are entitled to First Amendment protection, discussed the City's argument that the standards applicable to government regulation of broadcasting were equally applicable to its regulation of cable television operators. The court observed that there are "significant differences" between broadcasting and cable television - the most significant for Judge Sneed being that broadcasting is conducted via a relatively scarce spectrum of radiowaves which might well be useless unless allocated via licensing. However, the fact that the available space on utility poles may be to some extent physically limited did not warrant the same type of restrictive licensing by Los Angeles with respect to prospective cable television operators, according to the court. In this case, Preferred alleged that space was available on utility poles and conduits so that the physical scarcity rationale could not justify the City's restrictions on the company's right to install its cables.

The court found it unnecessary to decide the issue of whether the auction procedure was justified because cable television is a natural monopoly. Preferred had alleged that competition for cable services was economically feasible in the Los Angeles area.

The court next directed its attention to the issue of whether the possible disruption of public resources would serve to justify the City's exclusive franchise system. It was found that while some government regulation of cable operators might be warranted in order to insure the proper maintenance of public thoroughfares and to avoid public inconvenience, the restriction of access attempted by Los Angeles was quite a different matter, for, as plainly stated by Judge Sneed, "The City's interest is not enough to counterbalance the risk that diversity in editorial judgments will be limited by the City's determination to choose the cable providers that it will permit to use the medium." The court adverted to the recent United States Supreme Court decision upholding a Los Angeles ordinance prohibiting the posting of signs on public property, including public utility poles, Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984). The ban in Vincent appeared to have been a viewpoint neutral and "narrowly tailored measure to promote the City's interest in eliminating visual clutter." On the other hand, using the franchise procedure to limit the installation of cable lines was not necessarily the least restrictive way to further the City's purported interest in minimizing public disruption. Rather, the City's franchise policy created "an impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming" and did not constitute an acceptable time, place or manner restriction.

The court rejected the argument that Preferred could exercise its First Amendment right of expression by disseminating its programming on access time leased from a successful franchisee. The opportunity to share access time was not an adequate substitute for Preferred's loss of the opportunity to engage in the protected First Amendment "right" to operate an entire cable system, declared Judge Sneed.

The court, in remanding the matter to the District Court for further consideration, concluded by holding that Preferred's adequate allegation of a First Amendment violation did not mean that the City was subject to antitrust liability, as argued by the company.

It should be pointed out that the court, in a footnote, did cite the enactment of the Cable Communications Policy Act of 1984 which "envisions" a franchising model similar to the procedure which was utilized by Los Angeles. The Act prohibits cable operators from providing cable service without a franchise and empowers a franchising authority "to award one or more franchises within its jurisdiction." In commenting on Preferred, James C. Goodale, Esq. (The National Law Journal, March 25, 1985) expressed the opinion that the Act's apparent authorization of exclusive franchising most likely will be "read out" by courts considering the constitutionality of the Act. Goodale suggests that municipalities will be able to limit the number of franchise holders only to "the degree its utility poles or its streets cannot accommodate more cables." And he questions the continued relevance of the franchise renewal provisions of the Act, given that the renewal provisions were designed for the benefit of the now-outmoded exclusive franchisee. "As long as there is enough space to install the cable of all companies seeking to wire a city, franchises effectively can be perpetual. If a cable operator wants to 'speak'...at the end of a franchise period, how can a city stop him without violating the First Amendment?" For Goodale, Preferred is only the "opening shot in a battle that may last many years as the rights of cable speakers are finally settled."

Preferred Communications, Inc. v. City of Los Angeles, Case No. 84-5541 (9th Cir., March 1, 1985) [ELR 7:1:12]

Landowner's consent was not required prior to installation of cable television equipment on utility poles, because installation was within scope of telephone company easement

In Preferred Communications (ELR 7:1:12), a cable television operator seeking to utilize surplus space on public utility poles cited California Public Utilities Code section 767.5. In enacting section 767.5, the state legislature found that public utilities had dedicated a portion of their utility poles to cable television companies for pole attachments, and declared that it was "in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations."

In 1979, Pacific Telephone and Telegraph Company entered into an agreement with Falcon Cable Television whereby Pacific granted Falcon the right to place its equipment in or on Pacific's conduit system and telephone poles. Pursuant to its agreement with Pacific and its franchise from the City of Alhambra, Falcon installed cable television equipment on a telephone pole located on Pacific's easement on the property of Benjamin B. Salvaty and Marion R. Salvaty.

The Salvatys sued Falcon and Pacific, alleging causes of action for inverse condemnation, trespass, nuisance, unfair business practices and false and fraudulent misrepresentation. A trial court in Los Angeles dismissed the Salvatys' complaint, and this ruling has been upheld on appeal.

The appellate court noted the Salvatys' argument that section 767.5 concerns relations between public utilities and cable television corporations, and does not mention private property owners. But the section demonstrated a strong public policy in favor of encouraging cable attachments such as Falcon's, stated Judge Woods. And while the cable television industry did not exist in 1926, when the easement was created, the installation of cable equipment "was consistent with the primary goal of the easement, to provide for wire transmission of power and communication," and thus was within the scope of the easement. The fact that the Falcon-Pacific agreement called for Falcon to obtain any necessary permits or licenses from landowners was not applicable in this case since, due to the existence of the easement, the Salvatys' permission was not required.

Salvaty v. Falcon Cable Television, 165 Cal.App.3d 798 (1985) [ELR 7:1:13]

Regulations preventing the installation of lights for night baseball games at Wrigley Field are upheld by Illinois judge

In a 64-page ode to the glories of baseball and the Chicago Cubs, Cook County Judge Richard Curry has denied, on the basis of his experience "as a boy, as a man, as a sports fan and as a Chicagoan;' as well as on the basis of the record before him, the Cubs' challenge to state and municipal regulations prohibiting stadium owners from installing lights for nighttime athletic events.

Section 1025 of the Illinois Revised Statutes provides for the regulation of noise emissions, and states that such regulations "shall apply to any organized amateur or professional sporting activity." In particular, "Baseball, football or soccer sporting events played during nighttime hours, by professional athletes, in a city with more than 1,000,000 inhabitants, in a stadium at which such nighttime events were not played prior to July 1, 1982, shall be subject to nighttime noise emission regulations..." A Chicago Municipal Code section also makes it unlawful to present any athletic contest, sport or game if any part of such event "takes place between the hours of 8:00 P.M. and 8:00 A.M. and is presented in a stadium or playing field which is not totally enclosed and contains more than 15,000 seats where any such seats are located within 500 feet of 100 or more dwelling units."

In upholding the regulations, which were enacted in 1982 and 1983, Judge Curry took the opportunity to recount the history of the Cubs and of "beautiful Wrigley Field." It was noted that Wrigley Field is located in a residential district which is not served by a major highway, resulting in an influx of fans seeking surface street access to the stadium. Thus, the legislative bodies responsible for the enactment of the challenged regulations, in a "modest exercise of police power," most likely considered the "cumulative impact of crowd noise, traffic congestion, stadium-related litter, parking inadequacies and crowd-related indignities." These neighborhood concerns would become even more significant at night when the municipal government would be subject to overtime pay for street cleaning and refuse collection and the neighborhood would be subject to "the loud and raucous revelry of a beer-soaked mob numbering in the thousands." Judge Curry viewed the regulations as a fair and equitable accommodation of competing commercial and residential interests, particularly the interest of the local community in "nighttime safety and tranquility."

The court further observed that prior to 1981, when the Tribune Company became the owner of the Cubs and of Wrigley Field, the baseball club had made "frequent and public disclaimers" concerning night lighting, disclaimers upon which state and local authorities had a right to rely. The government entities' forbearance from legislating noise control was an "indicia of the spirit of mutual respect which existed between the club owner and the community those days'" but did not estop subsequent regulation.

Most significantly, the regulations did not diminish the Cubs' present use of Wrigley Field, noted Judge Curry. The club was not required to make any scheduling accommodations different from those of prior years; and neither preseason exhibition nor post-season championship play would have to be restricted. The Cubs did not allege declining attendance as the basis for their action or assert the need for lights and night games in order to "stimulate local interest or turnstile support." The team did state that the regulations would mean that the Cubs would not have the opportunity to host the All-Star game and that scheduling problems might arise with respect to post-season championship play. But the court pointed out that the All-Star game is hosted on a rotating basis by each major league team. This would mean that the Cubs' injury might arise about every 25 years - a "ludicrous" claim.

The court also discounted the club's argument that the Commissioner of Baseball had "ordered" the team to install lights, or face the possibility that post season championship "home" games might have to be scheduled in another stadium. Judge Curry observed that the Cubs apparently had not applied for building or electrical permits necessary for the installation of lighting at Wrigley Field. On the whole, observed the court, the nature of the injury suggested by the Cubs was "so contrived, speculative and unclear" as to impair the club's standing to bring its action.

Also rejected was the Cubs' argument "similar to a batter swinging at a pitch-out," that the challenged regulations amounted to a bill of attainder in that the club was singled out for punishment "by legislative fiat." Rather, it was Commissioner Ueberroth's letter to the club, stated Judge Curry, `which had "the sinister and foreboding tone of attainder," in suggesting, without any "game-related justification (other than money)" that the team might face "drastic" consequences if lights were not installed at Wrigley Field. Judge Curry took the time to point out that the Ueberroth letter also contained several references to baseball's interstate financial ties and the sport's nationwide fans, references which may well be of interest to the next court considering a challenge to baseball's exemption from the antitrust laws.

For loyal ELR readers who have made it to this point, your reward is the last section of Judge Curry's opinion, aptly entitled "...YOU'RE OUT!":

"Yes, you're out. 0... U... T... The Cubs are out. The inning is over. The contest is lost. Now it's time for the box score, summary and the wrap up. Have you ever heard a postmortem on a sporting event when some 'intangible' wasn't cited as an element in the victory or the defeat? Well we have one in this case also. The Cubs lost, of course, for all of the reasons stated above but, in addition thereto, they should have had a better scouting report before coming to Court. Everyone around the courthouse is familiar with 'Justice' with her robes flowing, her blindfold and her scales. What the Cubs' 'book' on her failed to note is that she is a southpaw. Justice is a Southpaw and the Cubs just don't hit lefties!!!"

Chicago National League Ball Club, Inc. v. Thompson, Case No. 84CH 11384 (Cook Cnty., March 25, 1985) [ELR 7:1:14]

Professional basketball player is enjoined from proceeding with court action against Kansas City Kings for alleged breach of player contract because contract provided for arbitration

There's no debate, the parties must arbitrate! In essence, that's what a Federal District Court in Missouri has ruled in granting a request by the NBA's Kansas City Kings to enjoin one of its former players from proceeding with a state court action charging the Kings with wrongful termination and breach of player contract. Senior District Judge Oliver found that the parties had contracted for arbitration and held that under applicable federal laws, neither of the contracting parties could ignore that contract and resort to court litigation rather than arbitration.

Since April of 1976, there have been collective bargaining agreements in effect between the NBA and the NBA Players Association. Common to these agreements is a requirement that each player and team enter into specified employment contracts called "Uniform Player Contracts." In addition, the agreements contain Grievance and Arbitration Procedures for dispute resolution between the parties, including the NBA, its member clubs, the Players Association and players themselves. The Uniform Player Contract incorporates by reference these arbitration provisions.

In September 1976, Michael Green entered into a Uniform Player Contract with the Seattle Supersonics. Sometime thereafter, the rights to Green's contract were transferred to the San Antonio Spurs. In 1979, the rights to Green's contract were again transferred, this time to the Kansas City Kings. However, prior to the 1980-81 season, the Kings declared that they no longer needed Green's services.

Then, in October 1983, Green brought suit in a Missouri state court against the Kings. Green alleged that the Kings had wrongfully terminated his player contract in October 1980 and had breached the contract by failing to invite him to the 1980-81 training camp and by failing to provide adequate notice to him of termination of his Player Contract. Green sought damages in excess of $1.3 million.

In November 1983, the Kings filed a motion in the state court requesting a stay pending arbitration of the matter. The Kings argued that neither Green nor the Players Association had ever initiated any grievance or arbitration as required under both Green's player contract and the collective bargaining agreements. In 1984, the state court denied the Kings' motion. Immediately thereafter, the Kings filed a federal action seeking to enjoin Green from proceeding with the state court action.

Judge Oliver first noted that the contract language in the collective bargaining agreements and Green's Uniform Player Contract provided for arbitration as the exclusive means of resolving the type of issues involved in this case. Section 1 of the Grievance and Arbitration Procedures in the Collective Bargaining Agreements provided that any dispute involving "the interpretation or application of, or compliance with, the provisions of a Player Contract ... shall be resolved exclusively in accordance with the (Arbitration Provisions)." According to Section 2 of the Arbitration Procedures, "the resolution of all disputes by arbitration shall be full, final, and complete."

In addition, Paragraph 21 of Green's Uniform Player Contract provided that "any dispute arising between the Player and the Club relating to any matter arising under this Contract, or concerning the performance or interpretation thereof .. shall be resolved in accordance with the Grievance and Arbitration Procedure set forth in the Agreement currently in effect" between the NBA and the Players Association. According to Judge Oliver, the parties had clearly contracted for arbitration.

After reviewing the relevant case law, Judge Oliver stated that where the issue is the "arbitrability of a dispute;' the Federal Arbitration Act governs that issue in either state or federal court. Citing the U.S. Supreme Court recent decision in Southland Corp. v. Keating, 104 S.Ct. 852 (1984), Judge Oliver found that Congress, in enacting Section 2 of the Federal Arbitration Act, "declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." The court emphasized that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, and that the federal courts have a virtually unflagging obligation ... to exercise the jurisdiction given them." According to Judge Oliver, "Keating made clear under presently applicable federal labor law that: 'Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.'"

The court then considered Green's contention that the real issue in this case was whether the time limitation contained within the arbitration provision of the Collective Bargaining Agreement is the one that is applicable to this fact situation, or whether the five-year Statute of Limitation provided by Missouri law is applicable. Green argued that since the state court held that Missouri law should prevail and that arbitration was not mandatory under the law of Missouri, the federal court should uphold the state court decision by refusing to stay those proceedings.

Judge Oliver rejected this argument relying on the Supreme Court's benchmark decision in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), which held that "once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

For these reasons, the court entered a final judgment granting the Kings' motion to enjoin Green's proceeding with the state court action.

Subsequently, Green filed a motion for an extension of time within which to file a notice of appeal claiming he did not receive actual notice of the final judgment until after the time for filing a notice of appeal had expired. In denying Green's motion, Judge Oliver held that Green's counsel's neglect in delegating to the law firm's temporary receptionist the duty of ascertaining when the final judgment would be entered was not excusable, and therefore, Green was not entitled to an extension of time.

Kings Professional Basketball Club, Inc. v. Green, 597 F.Supp. 350 and 366 (W.D.Mi. 1984) [ELR 7:1:15]

____

NBC denied summary judgment in libel action brought by local government employee in connection with news report about his testimony before a legislative investigating committee

A New York trial court judge has denied a motion for summary judgment filed by the National Broadcasting Company in a libel action by Michael Flynn, a Suffolk County employee. Flynn had testified before a legislative committee investigating allegations of corrupt activities on a local public works project which Flynn had inspected. NBC broadcast a news report concerning his testimony, and Flynn claimed that the report was a gross distortion of his statements and suggested that he "took the county" for thousands of dollars in fraudulent overtime pay.

Justice Kenneth Shorter noted that the NBC reporter covering the story had not personally witnessed the testimony at issue but had relied on information provided by members of the legislative committee. According to Flynn, these individuals were not a reliable source of accurate information. While WNBC-TV broadcast a retraction of some of the statements in the original report, Flynn claimed that the retraction was insufficient because it did not present his entire testimony but only repeated the allegedly defamatory charges.

The court ruled that the standard applied in New York when a private individual sues a media party for defamation is whether the individual has proved "by a preponderance of the evidence" that the publisher has acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and discrimination ordinarily followed by responsible parties."

Justice Shorter then stated that, taken as a whole, the broadcast could connote that Flynn had engaged in "certain irregularities" in his employment with the county. And questions had been raised as to NBC's verification procedures; as to whether the reporter had reason to question his sources' reliability; as to the company's motivation in broadcasting the report; and as to alleged script changes in the reporter's copy by "unknown employees of NBC."

In all, concluded the court, there existed material issues of fact which warranted a trial on the question of whether NBC acted in a grossly irresponsible, manner in reporting on Flynn's testimony.

Flynn v. National Broadcasting Co., Inc., New York Law Journal, p.6, col. 4 (N.Y.Cnty., Sept. 20, 1984) [ELR 7:1:16]

Statute regulating illustrative use of United States currency is ruled unconstitutional in part by United States Supreme Court in case involving Sports Illustrated cover photo

The now-memorable front cover of the February 6, 1981 issue of Sports Illustrated included a color illustration showing $100 bills pouring into a basketball hoop. The corresponding article concerned a bribery scandal in amateur basketball. According to the Treasury Department, the illustration violated 18 U.S.C. sections 474.6 and 504, statutes which were enacted to carry out the Constitution's mandate to Congress to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (U.S.Const.,Art.I, Sec.8, cl.6).

Section 504 does permit the publication of illustrations of United States currency without criminal liability for "philatelic, numismatic, educational, historical or newsworthy purposes..." in articles, books, journals, newspapers or albums. However, the Treasury Department, in granting permission for the creation and use of such illustrations, generally requires the illustrations to be in black and white, and to be undersized or oversized in comparison to real currency. Furthermore, the negatives and plates used in making the illustrations must be destroyed after their final authorized use.

The Secret Service notified Time, Inc. that the Sports Illustrated cover photograph violated federal law, that the Service would seize all plates and material used in connection with the production of the cover, and asked for information about the individuals who had worked on the cover. Time proceeded to sue various government entities seeking a declaratory judgment that the relevant statutes were unconstitutional, and an injunction to prevent the enforcement of the statutes.

A Federal District Court in New York granted summary judgment to Time, finding that the illustration was speech protected by the First Amendment, and that the challenged statutes were unconstitutional. The court declared that while the government may have a compelling interest in preventing counterfeiting, section 474 was an overbroad response to this interest. And section 504 was not a valid time, place and manner regulation, in the District Court's view, because government officials were being asked to distinguish among uses of currency illustrations on the basis of content or subject matter.

The United States Supreme Court has upheld the District Court's decision with respect to the "purpose" requirement of section 504. Justice White observed that determinations concerning the newsworthiness or educational value of an illustration "cannot help but be based on the content of the photograph and the message it delivers." But Justice White found that the color and size specifications of the statute were reasonable manner regulations, and reversed the judgment of the District Court with respect to these regulations. The Court, as it were, then concluded that with the removal of the improper "purpose" requirements, neither statute was unconstitutional on its face or as applied to Time.

Justice Brennan, concurring in part and dissenting in part, stated that despite the court's removal of the purpose language of the statute, the "revised" statute would abridge the speech of a significant number of individuals, and hence, remained unconstitutional. After reviewing the history of section 504, Justice Brennan concluded that the "essence" of the statute was to exempt only those currency illustrations which carried out the specified purposes. Thus, once the purposes clause was invalidated, the fact that illustrations might appear in the enumerated types of publications could not serve as an independent ground for granting an exemption, in Justice Brennan's view, since nonpublishers using likenesses of currency then would argue, not without cause, that their First Amendment rights were being arbitrarily and impermissibly infringed.

Justice Powell, also concurring in part and dissenting in part, agreed with Justice Brennan that the purposes clause was essential to the statutory plan, and that if the clause was unconstitutional, the entire statute was invalid.

Justice Stevens, however, in his concurrence/dissent, expressed support for the discredited purposes clause, stating that he did not interpret the provision as giving government officials a "license" to determine newsworthiness, but rather, as a guideline to determine when illustrations of currency were being used to convey information or express an idea - an "easily-met" requirement. And Justice Stevens supported the color and size requirements as "permissible methods of minimizing the risk of fraud as well as counterfeiting, with only a minimal impact on Time's ability to communicate."

Regan v. Time, Inc., 52 USLW 5084 (1984) [ELR 7:1:16]

Music publisher did not have to include royalties earned in 1978 but paid by performing rights society in 1979, in company's 1978 taxable income, rules Tax Court of Canada

The Tax Court of Canada has ruled that music publisher Boosey and Hawkes (Canada) Limited did not have to include, as part of its 1978 income, the royalty payment which was earned by the publisher from the Composers, Authors and Publishers Association of Canada Limited in 1978, but which CAPAC did not pay to Boosey and Hawkes until June 1, 1979.

CAPAC is a performing rights society which undertakes services for its members similar to those carried out in the United States by ASCAP and BMI. A music publisher such as Boosey and Hawkes may assign performing rights in its copyrighted musical compositions to CAPAC; the association then collects the revenue due from the users of the compositions and distributes the revenue collected (minus operating expenses) to its members in accordance with a specified formula. The process of determining the appropriate payment for each party with an interest in a composition, such as the composer, lyricist, publisher, or subpublisher, requires a substantial amount of time. Thus, in line with CAPAC's normal operating procedures, Boosey and Hawkes' royalties for July 1 to December 31, 1978, in the amount of $29,596, were not paid to the company until June 1, 1979.

Boosey and Hawkes consistently reported its mechanical license and performing rights revenue on a cash basis while reporting expenses on an accrual basis - a practice apparently well-followed by the music industry in Canada. The company pointed out to the tax court that there could not have been a receivable in existence on December 31, 1978 because the amount of royalties due could not be determined on that date.

The Minister of National Revenue, however, contended that Boosey and Hawkes was legally entitled to receive its revenue from CAPAC at the end of the 1978 tax year, and that CAPAC's administrative procedures were irrelevant to the fact that the royalties, albeit as yet unquantified, were earned from 1978 performances.

Tax Court Judge Sarchuk agreed that Boosey and Hawkes, at the end of 1978, had the legal right to receive the amount ultimately paid to the company by CAPAC. But Judge Sarchuk concluded that there was no evidence to suggest that the accounting method used by Boosey and Hawkes was uncommon in the music industry or did not accurately reflect the company's income for the tax year. Furthermore, the Minister of National Revenue, by failing to challenge, for over 20 years, Boosey and Hawkes' method of computing income, had indicated an "unqualified acceptance" of the method and thus could not require Boosey and Hawkes to include the royalties as a receivable for the 1978 taxation year.

Boosey and Hawkes (Canada) Limited v. The Minister of National Revenue, CCH Dominion Tax Cases p. 1728 (Tax Court of Canada, 1984) [ELR 7:1:17]

Briefly Noted:

Broadcasting.

A thirty-year-old proceeding before the Federal Communications Commission has ended with a Federal Court of Appeals decision affirming the Commis sion's decision to terminate a special exemption granted to WNYC, a radio station owned by the City of New York. The termination of the exemption means that WNYC's evening broadcast hours will be restricted, thereby ending the station's longstanding interference with the nighttime operations of WCCO, Minneapolis, a clear channel station. Federal Court of Appeals Judge Bork declared that the Commission had rationally reached its decision that the public interest would best be served by restricting WNYC's broadcast schedule to daytime service, notwithstanding the fact that the non-commercial station is almost completely devoted to presenting public affairs programs, classical music broadcasts and other high quality programming.

City of New York Municipal Broadcasting System (WNYC) v. Federal Communications Commission, 744 F.2d 827 (D.C.Cir. 1984) [ELR 7:1:17]

Copyright.

After having distributed videotaped copies of twenty-one copyrighted motion pictures, without authorization from the copyright owners, to various military clubs at bases overseas, Keith C. McCool and Sherman Smith were convicted of one count of copyright infringement and eight counts of mail fraud. In their defense, McCool and Smith cited a civil statute which provides "in essence" that a suit against the Government is the exclusive remedy for owners who claim their copyrighted works are infringed either by the Government or by one acting for the Government, such as a contractor. In aper curiam opinion, published "to insure that [the defense argument] will not he repeated again," a Federal Court of Appeals in California has cautioned that the statute, 28 U.S.C. section 1498(b), does not afford a defense to parties facing a criminal prosecution for willful copyright infringement. "The statute applies by its terms to copyright owners and has no application in a criminal proceeding," concluded the court in a ffirming the convictions on all counts.

United States of America v. McCool, 751 F.2d 1112 (9th Cir. 1985) [ELR 7:1:18]

Copyright.

In 1983, P.I.T.S. Films, a partnership doing business as Tandem Productions sued Richard Laconis doing business as "Archie Bunkers Junkers." Tandem set forth various causes of action arising from Laconis' allegedly unauthorized use of slogans, marks and characters developed by Tandem in conjunction with its. television series "All in the Family" and "Archie Bunker's Place." Laconis argued that Tandem's claim under state law for unjustment enrichment and quantum meruit was preempted by section 301 of the Copyright Act of 1976. Laconis was correct, a Federal District Court in

Michigan has ruled, in dismissing this count of Tandem's complaint. In this case, the rights alleged under state law were equivalent to those protected by copyright law. The complaint did not set forth an invasion of personal rights or the breach of a fiduciary relationship, which might have served to differentiate the charge from a copyright infringement claim.

P.I.T.S. Films v.Laconis, 588 F.Supp. 1383 (E.D.Mich. 1984) [ELR 7:1:18]

Copyright.

The "idea" of a tower structure was not copyrightable, a Federal Court of Appeals has ruled in affirming a District Court's grant of summary judgment to the Knoxville International Energy Exposition in a copyright infringement action brought by the trustee in bankruptcy for the estate of Marc Arion Cardoso. In 1977, Cardoso had presented to members of the Exposition his copyrighted drawings for a proposed structure at the 1982 World's Fair in Knoxville, Tennessee. But the District Court had found, and the Court of Appeals agreed, that there was no substantial similarity between Cardoso's drawings and the structure known as the "Sunsphere," which was built for the Fair.

Wickham v. Knoxville International Energy Exposition, Inc., 739 F.2d 1094 (6th Cir. 1984) [ELR 7:1:18]

Video Game Regulation.

The owners of coin-operated video game machines in a town in upstate New York have successfully challenged the town's attempt to increase the license fee for each machine from $25 to $125. The owners claimed that the increased fee was an improper revenueraising device which was not reasonably related to the cost of administering a regulatory licensing ordinance. New York State Supreme Court Justice Gerard E. Delaney stated that it was apparent that the license fee increase "was not for regulation but to prevent the spread of the video industry within the town by imposing an unrealistically high ... fee for each machine..." The court agreed with the machine owners that the town had failed to establish a relationship between the increased license fee and the cost of "regulating" the game machines and therefore ruled that the fee increase was unconstitutional as applied. Summary judgment was granted to the game machine owners on the issue of liability for damages resulting from the higher license fee.

Bally's Aladdin's Castle, Inc. v. Town of Clarkstown, New York Law Journal, p.16, col.5 (N.Y. Sup.Ct., Rockland Cnty., Dec. 7, 1984) [ELR 7:1:18]

Sports.

The New York Supreme Court has granted summary judgment to professional jockey Jeffrey Fell and horse owner David P. Reynolds, defendants in an action involving a horse racing accident brought by jockey Ronald Turcotte, rider of the renowned horse "Secretariat." In 1978, three years after riding "Secretariat" to victory in all three "Triple Crown" races, Turcotte was riding another horse in a Belmont Park race in New York. Turcotte claimed he was injured when Fell caused the horse he was riding to cross and weave into the path of Turcotte's horse, causing Turcotte's horse to move into the lane of a third horse, clipping its heels, stumbling, and propelling Turcotte to the ground. Turcotte suffered serious physical injuries including paraplegia. Fell argued that "since professional horse racing is inherently dangerous, a jockey's duty with respect to other jockeys is discharged if he refrains from intentionally causing injury." The court held that Turcotte, as an experienced professional jockey, was aware of the inherent dangers of his sport and by participating in it, relieved his fellow participants of their duty to care "at least with respect to those dangers normally associated with the sport." However, the court qualified its holding, stating that they were not relieved of their duty to refrain from reckless, wanton, or intentionally injurious conduct. Turcotte's complaint did not allege, nor was evidence brought before the court concerning, Fell's wantonness, recklessness or intentional infliction of injury. Thus, while the court granted Fell and Reynolds summary judgment, it permitted Turcotte to serve an amended complaint concerning any such conduct.

Turcotte v. Fell, 474 N.Y.S.2d 893 (1984) [ELR 7:1:18]

Sports.

A Federal Court of Appeals has held that "state action" was present in a case brought against a racetrack and its president by a racehorse trainer who sought damages and injunctive relief for the alleged violation of his civil rights. Herbert Roberts, a trainer of thoroughbred racehorses for Paradise Farms, regularly raced horses at Louisiana Downs Racetrack. Roberts and others disputed the racetracks' practice of allowing horses to race using a particular type of shoe and urged that the practice be investigated. Later, the track denied him stalling privileges for the next season, and as a consequence Roberts lost his job. He sued, alleging that the track's action was in response to his disputing the practice and thus violated his right of free speech. For a private individual's conduct to meet the state action requirement of the civil rights laws, there must be a sufficiently close connection with the state or the conduct to be attributed to the state. Here the court found that the stalling decision regarding Roberts was made by a committee composed of the racing secretary, the chief of security and three others. While the racetrack contended that the secretary is a private employee, elected and paid by track management, the court held that this did not determine his status as a state actor. Rather, the racing secretary is, by statute and by Racing Commission regulation, under the supervision of racing stewards who are state officials involved in the day-today management of the track with the power to override the track management's decisions.

Thus, the secretary's actions "in areas in which the state's interest is evidenced by specific assignment of duties may be considered to be pursuant to authority emanating from them." The court qualified its decision, stating it was to be narrowly construed to this specific situation and did not extend to interpreting all acts of the track or the racing secretary as state action.

Roberts v. Louisiana Downs, Inc. and Bartimo, 742 F.2d 221 (5th Cir. 1984) [ELR 7:1:19]

Previously Reported:

The April 1985 issue of the Entertainment Law Reporter carried a report of a Federal Court of Appeals decision in Kaholokula v. Hula Records (ELR 6:11:9). The report stated that "When Hula and Oahu did not pay the agreed upon royalties, Kaholokula advised the companies that he considered the ... contracts breached..." Reader Gerald B. Weiner (of Fischbach, Mahoney, Fischback & Weiner, in Los Angeles) represented Hula and Oahu in that case. And Mr. Weiner wrote to advise that it is, and always has been, his clients' contention that Kaholokula's allegations in this regard are false. In its published decision in the case, the Ninth Circuit Court of Appeals stated that "Neither Hula nor Oahu paid the agreed royalties..." But, as Mr. Weiner points out, the court apparently was merely reciting Kaholokula's allegations, the truth of which had not been determined, because the District Court had dismissed the case for lack of subject matter jurisdiction prior to any trial. It was that dismissal the Court of Appeals reversed in the reported decision.

The December 1984 issue carried a report on the case of American Greetings Corporation v. Easter Unlimited, Inc. (ELR 6:7:15) in which a Federal District Court found that Easter's Message Bears did not infringe the copyright or trademark of American Greetings' Care Bears. Carol F. Simkin (of Cowan, Liebowitz & Latman in New York City, the attorneys for American Greetings) wrote to advise that after post-trial motions by American Greetings, based on Easter's alleged failure to present certain material evidence to the court (an allegation which Easter denied), the parties settled their lawsuit, and the judgment on behalf of Easter was vacated. Easter, reportedly without receiving any financial consideration, also consented to the entry of an injunction barring the company's manufacture and sale, throughout the world, of the Message Bears or any other toy "substantially similar in overall appearance to the Care Bears..."

The April 1985 issue of the Entertainment Law Reporter reported that New York Supreme Court Judge

Maresca has ruled that actress Paige Price was not required to arbitrate a fee dispute with her personal management company, Niederlitz & Steele, because the company had acted as an unlicensed employment agency in finding work for Price.

It has since been reported in the trades that Judge Maresca's decision was "overturned" by a subsequent ruling of another judge of the same court. However, the Entertainment Law Reporter has been informed that Judge Maresca's decision was not truly "overturned" - at least not on grounds going to the legal merits of the opinion.

Rather, the Reporter has been informed that the parties had settled the case prior to the issuance of Judge Maresca's decision, but did not file their stipulation to discontinue the action before the decision was announced. The opposing lawyers agreed that since the case had been settled, the decision should be "recalled

and vacated." A motion to that effect was made. But since Judge Maresca had retired in the meantime, the motion had to be heard by another judge. The motion was allowed, and the decision has been "recalled and vacated" - but not technically "overturned."
[June 1985] [ELR 7:1:19]

IN THE NEWS

London court rules that music publisher breached management obligations to Westminster Music

The High Court of Justice, Chancery Division, in London, in a 196-page judgment issued after a 77-day trial in late 1984, has found that David Aron Platz committed the "grossest possible breaches of contract" in managing

Westminster Music Limited (formerly Essex Music International Ltd.)

Westminster and its affiliates control the European publishing rights to many famous songs of the 1960s and 1970s, including works by The Rolling Stones, George Harrison, Procul Harum and the Moody Blues. According to a resume of the judgment, as prepared by Bernard A. Sheridan & Co., Solicitors, London, the three actions decided by Mr. Justice Walton involved disputes between the United Kingdom directors of Westminster-David Platz and other Platz family members-and the United States directors of the company-Howard Spencer Richmond and other members of his family. One of the witnesses during the trial was Allen Klein, a former manager of The Rolling Stones and The Beatles. Klein has been engaged in an ongoing lawsuit with Westminster concerning the copyrights in certain works by The Rolling Stones.

Apparently, during the course of the trial, it emerged that Platz was paying Klein, without Richmond's knowledge, $500,000 for "services connected with his claims" and 1500 pounds sterling per week from the beginning of the trial. Mr. Justice Walton, according to the Sheridan report, stated that he "was by no means sure that this sum was not intended to include Mr. Klein giving evidence for Mr. Platz," and that Platz' employment of Klein, presumably in order to assist in obtaining Richmond's consent to releasing Westminster assets to which Klein and Platz may not have been entitled, "passed belief."

In reaching his decision, Mr. Justice Walton discounted Platz' credibility and cited other actions by Platz which were against Westminster's best interests, including his unauthorized disclosure to Klein of confidential information about Westminster; his attempt to dispose of the lease of the premises which the company occupied; forming his own companies in direct and wrongful competition with Westminster; and using Westminster assets to conduct the competing companies.

The court issued an injunction limiting Platz' authority as managing director of Westminster and, in particular, ordered Platz not to participate in any litigation by Westminster against Klein's companies. The question of the damages Platz must pay for the unlawful use of Westminster's premises and for the diversion of Westminster's assets to his own companies was left for determination by a separate inquiry. Mr. Justice Walton, however, did order the immediate payment to TRO Essex Music of over 68,000 pounds sterling wrongfully withheld by Westminster, on Platz' instructions, and rejected Platz' claims to a large number of copyrights owned by TRO Essex (Richmond's English company). [June 1985] [ELR 7:1:20]

Louisiana Attorney General declares that prison screenings of rented videocassettes of copyrighted films is fair use

When the Louisiana Department of Corrections sought an opinion as to whether the once-per-month showing of rented videocassettes to about 20 to 30 institutionalized individuals would be permissible under federal copyright law, the state's Attorney General advised the Department that the showing were a fair use of copyrighted material.

The Attorney General's opinion characterized the fair use doctrine as an "equitable rule of reason." And, citing the Supreme Court's decision in Sony Corp. of America v. Universal City, Studios (ELR 5:9:10), the Attorney General's opinion stated that the showing of the videocassettes to institutionalized individuals would not threaten an author's "incentive to create" and would not even have a minimal effect on the rental market for videocassettes.

An opinion of the California Attorney General (ELR 3:24:3) that the showing of videocassettes at state prison facilities violated the copyright laws was discounted. The Louisiana Attorney General pointed out that his California counterpart had relied on the fair use analysis adopted by the Ninth Circuit in the "Betamax" case-but the Ninth Circuit's decision was reversed by the Supreme Court. Furthermore, the occasional showing of movies to a small part of the prison population did not amount to a "public performance," in the Louisiana Attorney General's view.

It should be noted that the Motion Picture Association of America has obtained a permanent injunction restraining Wisconsin correctional authorities from the unauthorized showing of videocassettes of copyrighted films to inmates (ELR 6:10:20). In the Wisconsin case, the MPAA had alleged that the offending correctional facility was renting as many as ten videocassettes a week from a local retailer, while prior to owning a VCR, the facility had obtained licenses from copyright holders for the "public" performance of their films. [June 1985] [ELR 7:1:20]

DEPARTMENTS

Book Notes:

"This Business of Music" (Revised and Enlarged 5th Edition) by Sidney Shemel and M. William Krasilovsky

Billboard Publications has issued a Revised and Enlarged 5th Edition of "This Business of Music" by Sidney Shemel and M. William Krasilovsky. The most recent edition of this now-standard and always invaluable work incorporates material on the Copyright Act of 1976, including a discussion of the right of termination under the Act. And, along with reviewing such topics as artist contracts, record clubs, work permits for foreign artists, piracy, copyright infringement, foreign publishing, arrangements and abridgements of music, show music, names and trademarks, and taxation matters, the authors dare to explore the world of music videos.

The Appendix provides additional useful information-forms from the Copyright Office, and from ASCAP, BMI and the Songwriters Guild; a bibliography; and many sample license agreements.

It would be difficult to argue with Lionel Richie's backcover statement describing the book as "The best guide I know of to establishing a career in the music industry..." "This Business of Music" is available from Billboard Publications, 1515 Broadway, New York, New York 10036. 672 pages. $19.95. [ELR 7:1:21]

In the Law Reviews:

Comm/Ent, Hastings Journal of Communications and Entertainment, has published Volume 6, No. 4, which contains the following articles:

The FCC and "Pay Cable": Promoting Diversity on Television by David Coursen, 6 Comm/Ent 773 (1984)

Two-Way Cable Television and Informational Privacy by Kenneth M.H. Hoff, 6 Comm/Ent 797 (1984)

The Plight of the Personal Manager in California: A Legislative Solution by Gary A. Greenberg, 6 Comm/Ent 837 (1984)

Tuning Out the Electorate: Early Network Projections and Decreased Voter Turnout by Jeff Polsky, 6 Comm/Ent 865 (1984)

A Tale of Two Standards: Antitrust, the Public Interest, and the Television Industry by Edward P. Sangster,6 Comm/Ent 887 (1984)

Sports and the Law: A Comprehensive Bibliography of law-related Materials, Five-year Supplement (1979-1984) by Frank G. Houdek, 6 Comm/Ent 921 (1984)

Theatrical Motion Pictures and the Law: A Comprehensive Bibliography of Law-related Materials, Supplement (1980-1984) by Frank G. Houdek, 6 Comm/Ent 951 (1984)

Music and the Law: A Comprehensive Bibliography of law-related Materials, Supplement (1982-1984) by Gail F. Winson, 6 Comm/Ent 967 (1984)

Promotional Trademark Licensing: A Concept Whose Time Has Come by W.J. Keating, 89 Dickinson Law Review 363 (1985)

Fair Use Old and New: The Betamax Case and its Forebears by M.B.W Sinclair, 33 Buffalo Law Review 269 (1984)

Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws by Robert A. McCormick and Matthew C.McKinnon, 33 Emory Law Journal 375 (1984)

Signal Piracy: The Theft of United States Satellite Signals, 8 Fordham International Journal 62 (1984-85)

Equal Protection Scrutiny of High School Athletics by Barbara L. Pryor, 72 Kentucky Law Journal 935 (1983-84)

Media Liability for Injuries that Result from Television Broadcasts to Immature Audiences, 22 San Diego Law Review 377 (1985)

Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television by Mark

Mininberg, 11 Hastings Constitutional Law Quarterly 551 (1984)

The First Amendment and Mandatory Courtroom Closure in Globe Newspaper Co. v. Superior Court: The Press' Right, the Child Rape Victim's Plight by Arthur S. Frumkin, 11 Hastings Constitutional Law Quarterly 637 (1984)

The Commercialization of College Football: The Universities of Oklahoma and Georgia Learn an Antitrust Lesson in NCAA v. Board of Regents by Suzanne E. Rand, 12 Pepperdine Law Review 515 (1985)

A Common Law for the Ages of Intellectual Property by Dan Rosen, 38 University of Miami Law Review 769 (1984)

The Copyright Act of 1976 Served on a Satellite Dish by Daniel J.Wilkerson, 21 Willamette Law Review 79 (1985)

Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author's Reasonable Expectations by Calvin R. House, 51 Brooklyn Law Review 95 (1984)

Cardozo Arts and Entertainment Law Journal has published Volume 3 including the following articles:

Bronze Sculptures: Casting Around for Protection by Leonard D. DuBoff, 3 Cardozo Arts & Entertainment Law Journal 235 (1984)

Copyright Protection, the Right to Privacy, and Signals that Enter the Home by Stephen L. Carter, 3 Cardozo Arts & Entertainment Law Journal 289 (1984)

The Use of an Altered Song in Amateur Musical Productions as Copyright Infringement by Cynthia B. Somervill, 3 Cardozo Arts & Entertainment Law Journal 319 (1984)

Section 116 of the 1976 Copyright Revision Act: Jukebox Operators and Copyright Owners Juke it Out Over Royalties, 3 Cardozo Arts & Entertainment Law Journal 343 (1984)

Broadway's Newest Hit: Incentive Zoning for Preserving Legitimate Theatres, 3 Cardozo Arts & Entertainment Law Journal 377 (1984)

USIA Censorship of Educational Films for Distribution Abroad 3 Cardozo Arts & Entertainment Law Journal 403 (1984)

Book Review: Melville R Nimmer: Nimmer on Freedom of speech by Franklyn S. Haiman, 3 Cardozo Arts & Entertainment Law Journal 427 (1984)

The Videotape Rental Controversy: Copyright Infringement or Market Necessity? by Julie Kane-Ritsch, 18 The John Marshall Law Review 285 (1985)

Not "Never on a Sunday" R. v. Videoflicks Ltd. et al. by Andrew Petter, 49 Saskatchewan Law Review 96 (1984)
[ELR 7:1:22]