RECENT CASES

Federal District Court Magistrate sets terms for payment by local television stations to ASCAP of interim music licensing fees

The interim license fee which local television stations were obligated to pay during the period from November 1984 through March 1985 for the use of copyrighted musical works of ASCAP members, has been determined by a Federal District Court Magistrate in New York.

In a comprehensive 47-page opinion, Magistrate Michael H. Dolinger ruled that approximately 750 local television stations were liable for fees for the use of ASCAP-licensed music in syndicated and locally produced programming in accordance with the terms of the

1969 settlement of a previous licensing rate dispute. The settlement in United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.) set a fee, for per program music licenses, of nine percent of the revenue of the program using the ASCAP works. The blanket music license fee under the settlement was reduced from a 1954 rate of 2.05 percent of total station revenue (less certain deductions) to a payment based upon two percent of the average of a station's revenues in 1964 and 1965 and one percent of any increment above that average. (For further information about licensing procedures and the background of the interim fee proceeding, see ELR 6:5;3; 4:19:2; 4:9:1.)

According to the All-Industry Television Station Music License Committee, which has been representing local television stations in their ongoing negotiations with music licensing organizations, the reduction of the blanket license fee in 1969 was expected to save television stations a total of $53 million between 1969 and 1977, the scheduled termination date of the settlement. In fact, stated Magistrate Dolinger, the estimated saving to the stations was exceeded because of an unexpectedly rapid increase in station revenues.

Notwithstanding the acknowledged benefits received by local television stations under the Shenandoah formula, the Committee argued that the November/March interim fee should be based on a District Court order issued in the recently concluded Buffalo Broadcasting Company v. ASCAP antitrust lawsuit. In that lawsuit, local television stations challenged the validity of ASCAP's practice of issuing blanket music licenses. The District Court order, issued on January 4, 1983, directed ASCAP, at least on a temporary basis, to make its blanket license available to the television stations for an annual fee consisting of the same dollar amount as had been paid by the stations to ASCAP in 1980 (less than

$37 million). The fee would not be adjusted to conform to station revenues.

When a Federal Court of Appeals reversed the District terminated its January 4, 1983 order, effective as of November 16, 1984.

In calculating the amount of a reasonable November/March interim fee (which fee remains subject to retroactive correction when a final fee decision is reached), Magistrate Dolinger declined to heed the Committee's suggestion that he follow the District Court formula. It was pointed out that the local stations had not shown that the use of a percentage of the revenue measure for license payments was inherently unreasonable; and that the clearinghouse services performed by ASCAP in obtaining performance rights to music incorporated in syndicated programming saves the local stations considerable expense, making it reasonable to price a blanket license, in part, on the cost saving to the stations and on the profitability of the syndicated programming. Furthermore, the three major television networks have agreed to the Shenandoah rates for the 15 stations that the networks own and operate. And Magistrate Dolinger found it unlikely that the Shenandoah settlement was the result of coercion, as argued by the Committee. In all, Shenandoah was characterized as a "potentially relevant signpost of reasonableness for purposes of setting an interim fee."

United States of America v. American Society of Composers, Authors and Publishers (Application of Buffalo Broadcasting), Case No. 13-95 (S.D.N.Y., June 17, 1985) [ELR 7:4:3]

BMI and local television stations reach agreement on new music performance license, following preliminary rulings in case involving allegations and cross-allegations of antitrust and corporate law violations

Broadcast Music, Inc. and the All-Industry Television Station Music License Committee have agreed to the terms of a music performance license extending to the end of 1987. BMI will receive a sliding scale of increases based on the fees which local television stations pay to ASCAP. It also has been reported that a Federal District Court Judge has ordered the local television stations to pay BMI retroactive fees (amounting to approximately $30 million) for the period from February 1983 to November 1984.

BMI's licensing agreement with the local television stations was reached after lengthy negotiations. Initially, when BMI failed to come to terms with the All-Industry

Television Music License Committee, BMI informed its television station licensees that their oft-extended licenses would expire on June 30, 1985 and that the organization would be sending the stations new licenses.

Several BMI shareholders, who are also broadcasters, then demanded that BMI call a special shareholders meeting, at which the shareholder-broadcasters planned to present certain resolutions and amendments to the organization's bylaws dealing primarily with the establishment of a "rate court" to resolve license fee disputes.

In response to this demand, BMI filed an action in Federal District Court in New York, moving to restrain the shareholder-broadcasters from taking any steps to call the special meeting, from communicating with other broadcasters who are BMI licensees concerning existing or proposed licenses, and from otherwise interfering with BMI's efforts to deal with its local television station licensees. According to BMI, the shareholder broadcasters were engaging in anticompetitive conduct in that they allegedly sought "to force BMI to deal only through the Committee, to prevent BMI from individual licensing of its affiliates, and to fix the rates paid to BMI at an artificially low level." The call for the special meeting purportedly was issued in furtherance of the broadcasters' price-fixing conspiracy, claimed BMI.

Federal District Court Judge Edward Weinfeld denied BMI's request for a preliminary injunction on the ground that the shareholders' request to call the meeting was not a sufficient showing in and of itself to establish that BMI was likely to prevail on the merits of its antitrust claim. The requisite showing of irreparable injury also was not made, because the proposed resolutions, even if adopted by the shareholders, remained subject to the approval of BMI's Board.

Judge Weinfeld concluded by granting the shareholders' cross-motion for a preliminary injunction directing

BMI to call the special shareholders meeting. The court, however, declined to order BMI to refrain from negotiating directly with individual broadcaster licensees or to hold the special meeting prior to June 30, 1985.

Broadcast Music, Inc. v. All-Industry Television Station Music License Committee, Case 85 Civ. 4507 (S.D.N.Y. June 21, 1985) [ELR 7:4:3]

Donkey Kong video game did not infringe Universal City Studios' purported trademark rights in the name "King Kong," rules Federal Court of Appeals

After an illustrious career of waging mighty battles against legendary and ferocious creatures, King Kong apparently has met his match in a video game featuring a "malevolent, yet humorous gorilla." As described previously and at great length in these pages (ELR 5:11:8) Universal City Studios claimed, inter alia, that Nintendo CO.'s Donkey Kong video game infringed Universal's purported trademark in the name, character and story of King Kong. A Federal District Court granted summary judgment to Nintendo on several grounds, and a Federal Court of Appeals has affirmed the judgment.

Federal Court of Appeals Judge Meskill, after assuming that the King Kong trademark was validly developed and conveyed to Universal, and that the King Kong mark has a secondary meaning, held that Universal failed to raise a question of fact concerning the likelihood of consumer confusion as to the source of the Donkey Kong game. The District Court had stated that there was a "totally different concept and feel" between the game and the King Kong movies. In agreeing with the District Court's holding, Judge Meskill catalogued the differences in the two properties; rejected Universal's contention that the mere use of the name "Kong" raised a question of fact concerning the likelihood of consumer confusion; discounted, as "badly flawed," a Universal survey which the company claimed demonstrated the existence of such confusion; and concluded that Universal did not establish a likelihood that "an appreciable number of prudent purchasers are likely to be misled or confused as to the source of Donkey Kong."

The District Court's grant of summary judgment to Nintendo on Universal's claims for injunctive relief under New York's anti-dilution statute also was upheld, since Universal did not present any evidence indicating that Donkey Kong would have an adverse effect on King Kong's reputation or deprive the mark of its distinctiveness.

Universal City Studios, Inc. v. Nintendo Co., Ltd., 746 F.2d 112 (2d Cir. 1984) [ELR 7:4:4]

Federal District Court enjoins singing telegram company's unauthorized use of advertising and messengers which referred to "Superman" or "Wonder Woman" characters; court rejects parody defense

A singing telegram service whose messengers sometimes identified themselves as "Dark Dent" or "Super Stud" or "Wonder Wench," violated DC Comics' copyright and trademark interests in the Super man and Wonder Woman cartoon characters, a Federal District Court in Georgia has ruled. In granting summary judgment to DC Comics on its infringement claims, the court also found that Unlimited Monkey Business' use of the same or similar trade names as the fictional characters in the company's advertising and costume design violated Georgia's anti-dilution statute.

Federal District Court Judge Shoob stated that Monkey Business' use of the Superman name and chest shield in its advertising was likely to create "confusion, mistake or deception" as to the source of the singing telegram services and as to any affiliation between DC Comics and Monkey Business.

Judge Shoob rejected Monkey Business' claim that its activities involved a parody and that the company therefore was entitled to a fair use defense. First, it was noted that a script provided to the telegram service's licensees as a model for the "Super Stud" "cull[ed] the most characteristic and memorable portions of the Superman plots ... The similarity - based on plot structure, phrases, costumes, and names - is striking."

The court then evaluated the four statutory fair use factors and found that DC's copyrighted works were being used in commerce; that Monkey Business was benefitting from DC's substantial creative effort; that Monkey Business' copying went beyond what would be necessary to "conjure up" the object of the parody; and that Monkey Business' services would create competition for DC should DC choose to exploit the singing telegram market.

For Judge Shoob, "Parody in its proper role creates something new by drawing from the old; but when it has the effect of refashioning or destroying the old, it is not protected." Monkey Business, in the court's view, traded on DC's imagination and originality and this was not fair use.

Accordingly, a permanent injunction was issued prohibiting Monkey Business and its affiliates from continuing to exploit DC's
copyrighted and trademarked Superman and Wonder Women works.

DC Comics Inc. v. Unlimited Monkey Business, Inc., 598 F.Supp. 110 (N.D.Ga. 1984) [ELR 7:4:4]

Tax Court upholds deficiency assessed against tax-

master sound recording of "The Deep" soundtrack album

Judge Tannenwald of the United States Tax Court has upheld the determination of the Commissioner of Internal Revenue that Sylvia S. Baron and the late Sydney S. Baron were liable for income tax deficiencies of about $230,000 in 1977 and $82,000 in 1978.

On their tax returns for the years in question, the Barons deducted depreciation costs in connection with master sound recording rights the couple had acquired in the soundtrack album of the movie "The Deep." In May 1977, Casablanca Record and Filmworks sold to the Barons the United States and Canadian rights in the album for $650,000: $90,000 in cash and $560,000 in two nonrecourse notes (one note for $460,000 and a soon-canceled note for $100,000) payable solely out of royalties from Casablanca's sale of records in the specified territories.

The film version of "The Deep" did not have the boxoffice bite of author Peter Benchley's prior creation, "Jaws." And the soundtrack album, despite Casablanca's vigorous promotional efforts and the participation of Donna Summer and composer John Barry, also was not successful. The Barons' total royalty receipts were about $32,000. The couple deducted depreciation costs on the master recording of approximately $400,000 in 1977 and $148,000 in 1978.

The Tax Court ruled that the Barons were not entitled to include the $460,000 nonrecourse note in the basis of the master recording rights. Judge Tannenwald stated that irrespective of any amount which might be set as the fair market value of the master recording rights, the obligation represented by the nonrecourse note "was too contingent at the time Sydney Baron entered into the transaction to permit its inclusion in basis." The court noted that the rights in question apparently had no value apart from the "income stream" which might be generated; and that the income stream depended totally upon public acceptance of the movie and the album, neither of which, at the time of the Baron-Casablanca transaction, had been released. Witnesses attested to the speculative nature of the record industry and the difficulty of predicting public acceptance of a project, however star-studded.

Judge Tannenwald distinguished those cases where courts have valued film rights and income earnings after the release of the film when the public reaction has been established; and also distinguished the project from cases which might involve the works of an author "whose stature practically guarantees that his or her book, regardless of its quality, could make the Best Sellers list;' or the works of a recording artist of similar renown.

Also distinguished were acquisitions of rental real estate or equipment where the payments on a nonrecourse note usually are fixed in amount; the obligation to make payments is not confined to the income produced; and the underlying property has a potential value apart from the income stream which it is expected to generate. Furthermore, in these cases, the value of the underlying property is not "so directly and totally dependent" upon public acceptance as in the case of a master recording.

Judge Tannenwald also held that the Barons' acquisition of the master recording rights constituted "an activity not engaged in for profit," agreeing with the Commissioner that tax profit, rather than economic profit, motivated the Barons in entering the transaction. The court viewed Baron's purported consultations with industry experts as "mere window dressing" to conceal tax motives; and could not overlook the "complete" absence of contact with Casablanca regarding the progress of the album.

Estate of Sydney S. Baron, 83 T.C. No. 28 (1984) [ELR 7:4:5]

Record company has standing to bring Lanham Act claims against company marketing albums which

allegedly contained a false representation as to Jimi Hendrix's performance

The nature of the business relationship between the late Jimi Hendrix and PPX Enterprises arose in an action brought by PPX, Mod Music, Inc. and J.H. Records, Inc. against Dante J. Pugliese's wholly owned corporation, Audiofidelity Enterprises, Inc. PPX alleged that Audiofidelity was marketing phonograph record albums with covers and accompanying promotional material falsely describing the recordings as featuring musical performances by Hendrix.

A Federal District Court granted summary judgment to Audiofidelity with respect to PPX's claims under the Lanham Act, for lack of standing, finding that PPX had not shown that it possessed any interest in Jimi Hendrix's recordings. PPX's state law claims for unfair competition, tortious interference with a contract and nonpayment of royalties then were dismissed for lack of federal jurisdiction.

A Federal Court of Appeals has determined that the District Court erred in concluding, on a motion for summary judgment, that PPX lacked the requisite interest in the Hendrix works and has remanded the matter for further proceedings.

Federal Court of Appeals Judge Pratt pointed out that PPX claimed an interest in Hendrix's work via a 1965 agreement with the artist whereby Hendrix was to produce and perform exclusively for the company for a period of three years. Subsequently, a 1968 settlement agreement resolving a dispute concerning the ownership of Hendrix's work, apparently gave PPX certain royalty interests in sales of Hendrix's albums. PPX then transferred some of its rights in two Hendrix albums, "Flashing," and "Get That Feeling," to Mod Music and J.H.

Records. These companies, in turn, sold to other parties, "at least some" of their interests in the albums.

In granting summary judgment to Audiofidelity, the District Court stated that PPX had not presented documentary evidence that it held any interest in Jimi Hendrix's recordings, even under the 1965 agreement, since Hendrix had entered into a contract with a company known as Sue Records, Inc. about three months before he entered the contract with PPX. The District Court therefore concluded that Sue Records rather than PPX held a protected interest in the Hendrix albums.

This conclusion was improper on a motion for summary judgment, stated Judge Pratt, particularly since there was considerable uncertainty concerning the effect of the Sue Records contract, and since the parties had stipulated that PPX did retain its claimed royalty interest. This stipulation as to PPX's royalty interest was sufficient to provide standing to the company to raise a

Lanham Act claim, for the false representation of goods, because as the holder of a "pecuniary stake" in the sales of the Hendrix recordings, PPX was a genuine business competitor of Audiofidelity.

PPX Enterprises, Inc. v. Audiofidelity, Inc., 746 F. 2d 120 (2d Cir. 1984) [ELR 7:4:5]

Federal Court of Appeals upholds denial of claims brought by National Independent Theater Exhibitors against Columbia Pictures and investment company in dispute over distribution rights to "The Buddy Holly Story"

Following an increasingly popular release pattern, "The Buddy Holly Story" now is available via judicial opinion. In 1977, James Patterson, the president of National

Independent Theater Exhibitors, Inc., an association of independently owned theater operators, entered an oral motion picture distribution agreement with Charter Financial Group, an investment brokerage company. NITE proposed to have 750 of its member theaters sign exhibition contracts with Charter obligating the theaters to rent "The Buddy Holly Story" for a specified period at a guaranteed minimum rental. In return for NITE's distribution services in the United States, Charter, the co-executive producer of the film, agreed to pay the organization $50,000 and to underwrite certain solicitation expenses; and to pay NITE 20% of the film rentals collected from the member exhibitors.

Subsequently, when Charter sought to obtain production funding, the company was advised that the NITE agreement would be a "poor risk" in view of the organization's lack of film distribution experience and the perceived "worthlessness" of the exhibitor member guarantees. Charter then entered into an exclusive distribution agreement with Columbia Pictures.

Upon learning of the Columbia agreement, Patterson and NITE sued Charter and Columbia, alleging the violation of the Sherman Act, Charter's breach of its distribution agreement, and Columbia's tortious interference with NITE's contract with Charter.

A Federal District Court directed a verdict for Columbia, stating that the company did not tortiously interfere with the Charter-NITE agreement because there was no evidence that Columbia had knowledge of any outstanding distribution agreement or caused its breach. After NITE presented its evidence to a jury, the court directed a verdict for Charter on the antitrust claim, finding that the company acted unilaterally in canceling the proposed distribution agreement. There was no evidence of a conspiracy between Charter and any other party, or of any attempt by Charter to create a monopoly or restrain trade in the relevant product market. The jury then ruled in Charter's favor on NITE's breach of contract cause of action.

NITE's appeal challenging the disposition of its claims has been denied by a Federal Court of Appeals. The appellate court rejected Patterson's argument that the District Court erred in finding that he lacked standing to prosecute the antitrust claim. There was no evidence, stated Federal Court of Appeals Judge Tjoflat, that Charter's alleged conduct was directed against Patterson individually. Patterson therefore was "outside the target area" and lacked standing to sue. Patterson also was not entitled to bring an action in his own right for the alleged antitrust injury incurred by NITE. And the District Court's decision to submit Charter's statute of frauds defense to the jury also did not amount to prejudicial error, either as to Patterson or NITE, for the evidence indicated that "no contract of any kind existed between Charter and Patterson."

National Independent Theater Exhibitors, Inc. v. Charter Financial Group, Inc., 747 F.2d 1396 (11th Cir. 1984) [ELR 7:4:6]

Federal Court of Appeals upholds preliminary injunction prohibiting the University of Notre Dame and the University of Nebraska from abiding by the "crossover" restraint in College Football Association's broadcast contract with ABC

The exclusive broadcast contract between the College Football Association and ABC contains, among other provisions, a "crossover" restriction. The restriction bars the broadcast, on other networks, of games in which

Association members participate, even when the opposing team is not a member of the Association. The Association has about 63 members; however, teams in the PAC-10 and Big Ten Conferences do not belong to the Association.

In the fall of 1984, UCLA was scheduled to play the University of Nebraska, and USC was scheduled to play the University of Notre Dame. But if Association members Nebraska and Notre Dame adhered to the crossover restriction, the games could not be telecast by CBS, which had entered an exclusive broadcast contract with the PAC-10/Big Ten Conferences.

The PAC-10/Big Ten parties brought an action against ABC, alleging the violation of section 1 of the Sherman Act in that the enforcement of the crossover restriction would unlawfully restrain CBS' coverage of the games.

A Federal District Court issued a preliminary injunction prohibiting Notre Dame and Nebraska from withholding, solely on the basis of the crossover restriction, their consent to CBS' broadcast of their games against USC and UCLA. The District Court further enjoined the Association and its members from imposing or threatening to impose any sanctions on Notre Dame or Nebraska to "inhibit" the schools from voluntarily consenting to the CBS broadcasts.

The first scheduled game took place when the University of Nebraska consented to the CBS telecast. Under the injunction, Notre Dame was entitled to determine, free of the constraint of the crossover restriction, whether to consent to CBS' telecast of the game with USC.

The District Court's decision to issue the preliminary injunction has been upheld on appeal. Federal Court of Appeals Judge Ferguson, without reaching the issue of whether a per se or rule of reason analysis would govern the antitrust claims raised, nevertheless declared, in a lengthy opinion, that under either analysis the District Court had not abused its discretion in finding that the PAC-10/Big 10 parties had raised "serious questions" on the merits of their antitrust claims; that the balance of hardships tipped in favor of the PAC-10/Big 10 parties, who allegedly had suffered irreparable injury beyond the mere loss of broadcast income; and that the public interest would be served by the issuance of the preliminary injunction.

In a strong dissent, Federal Court of Appeals Judge Beezer questioned the legal standards relied upon by the District Court and the court's application of those standards.

Regents of the University of California v. American Broadcasting Companies, Inc., 747 F.2d 511 (9th Cir. 1984) [ELR 7:4:7]

NCAA eligibility bylaw did not violate college tennis player's equal protection and due process rights; college basketball player's action seeking preliminary injunction against enforcement of eligibility rule also is denied

A Federal Court of Appeals for North Carolina has vacated an injunction issued by a Federal District Court in connection with college tennis player Chaim Arlosoroffs action challenging the constitutionality of a National Collegiate Athletic Association eligibility bylaw. The bylaw provides that any participation in organized competition in a sport during each twelve month period after a student's 20th birthday and prior to matriculation with a member institution counts as one year of varsity competition in that sport. Under the bylaw, Arlosoroff's freshman year at Duke University would have been his only year of eligibility for varsity competition since the tennis player, after being discharged from the Israeli army at the age of 22, participated in amateur tennis tournaments for about three years prior to enrolling at Duke.

Arlosoroff contended that the bylaw was a denial of equal protection because it was designed to exclude aliens from competing at NCAA member institutions. The District Court issued an injunction prohibiting the enforcement of the eligibility bylaw, but the Court of Appeals reversed this ruling on the ground that there was no showing of state action.

Senior Court of Appeals Judge Haynsworth pointed out that while the NCAA is not a public institution, various courts have held that the organization's actions amounted to state action subject to the limitations of the Fourteenth Amendment. However, those courts relied on the premise that the indirect involvement of state governments in the NCAA, via the membership of statefunded schools, could convert what was otherwise private conduct into state action. The United States Supreme Court rejected this premise in two recent rulings, stated Judge Haynsworth. And the circumstances of the instant case did not warranty attributing state action to the NCAA. The organization may perform a public service function as the "overseer of the nation's intercollegiate athletics," Judge Haynsworth said. But this function is not one "traditionally exclusively reserved to the state." And although one-half of the NCAA's members are public institutions which provide more than one-half of the association's revenue, this fact did not alter, for the court, the basic character of the association.

Furthermore, it was not shown that any states ordered or caused their schools to adopt the challenged bylaw. Rather, it appeared that the bylaw was adopted "not as a result of governmental compulsion," but to serve the common, private interests of the NCAA members, concluded the court.

The eligibility bylaw also was considered by a Federal Court of Appeals for Pennsylvania in an action brought by Albert Butts, a would-be varsity basketball player at LaSalle University. Butts was a member of a private military academy's basketball team after his 20th birthday and before he entered LaSalle. Therefore, according to the NCAA, Butts was ineligible to play basketball during his senior year at LaSalle. A Federal District Court ruling denying injunctive relief to Butts and LaSalle has been upheld by a Federal Court of Appeals.

Federal Court of Appeals Judge Higginbotham found that the District Court did not abuse its discretion in determining that although Butts showed a "strong likelihood" that the bylaw would have a "racially disparate impact," the NCAA had presented a legitimate nondiscriminatory justification for the bylaw. Butts' age discrimination claim also was rejected by the District Court since "age combined with experience could be legitimately used as measures of the maturity and level of athletic skill of the athlete."'

Arlosoroff v. National Collegiate Athletic Association, 746 F.2d 1019 (4th Cir. 1094); Butts v. National Collegiate Athletic Association, 751 F.2d 609 (3d Cir. 1984); 600 F.Supp. 73 (E.D.Pa. 1984) [ELR 7:4:7]

New York court grants summary judgment to Christie's auction house in breach of contract and misrepresentation action; Sotheby Parke-Bernet settles dispute over auction of Judaica

As creators of art continue the solitary pursuit of inspiration, purveyors of art manage to attract the spotlight of international attention. Such was the case when David Bathurst, the president of Christie, Manson & Woods, International, which operates Christie's Auction House in New York, arranged for the sale of eight Impressionist paintings owned by Cristallina, S.A. of Switzerland. Bathurst had estimated that the paintings could be sold at public auction for a total amount of between $8.5 million and $12.6 million. A "reserve price," which represents the lowest acceptable bid for an item, was set for each painting. However, despite considerable media coverage and a sold-out gallery for the May 19, 1981 auction, only one painting was sold for $2.2 million. No bid reached the reserve price on the remaining seven paintings and they were "brought in." Nevertheless, Christie's issued a press release which stated that three paintings had been sold, for a total of $5.6 million.

Cristallina proceeded to sue Christie's for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty and the violation of New York law. Cristallina sought to recover the difference between the amount it received from the sale and the $10 million it anticipated. Cristallina argued that Bathurst and Christie's had misrepresented their abilities to estimate accurately the value of the paintings, and that the initial estimate of value was given solely to induce Cristallina to engage Christie's services. It also was claimed that the reserve price for each painting was set too high in relation to its actual value, thereby reducing the chance that the painting would be sold at auction; that the failure to sell the seven paintings would have an adverse effect on the value of the paintings at any future sale; and that Christie's did not promote the auction properly or use its best efforts to minimize the effect of certain preauction "rumors" about the ownership and legal title to the paintings.

A New York trial court has granted summary judgment to Christie's on the ground that no actionable misrepresentation had occurred in connection with the gallery's estimate of the value of the paintings.. Misrepresentation as to value is not ordinarily treated as constituting fraud, but rather, is an expression of opinion-and a finished work of art is not capable of objective valuation so as to be an exception to this rule, stated the court. Justice Wolin noted that: "The monetary value of a work of art is dependent upon the vagaries of the marketplace. The valuation of the Cristallina paintings and the establishment of reserve prices necessarily entailed a prediction of the mood and behavior of an auction crowd not yet assembled in economic conditions which could not be calculated with precision. The estimates were Christie's best opinion as to the value of the Cristallina paintings."

Cristallina did not present any proof that the estimates were either inaccurate or grossly disproportionate to the value of the paintings; and the "mere fact" that a painting was not sold was not sufficient to sustain a finding of negligence. The court also found that the auction was adequately publicized; rejected any claim based upon "nebulous rumors" or any claim alleging a breach of fiduciary duty, for it was "incredible" that Cristallina's principal officer was, as he claimed, totally unfamiliar with auction procedures; and concluded that any damages suffered by Cristallina would be "entirely speculative." Justice Wolin emphasized that an auctioneer is not a guarantor as to what price an item will fetch or even that an item will be sold at all. . ." Four of the seven unsold paintings subsequently were sold, but Cristallina did not present any evidence comparing the current value of those paintings with their May 1981 value, therefore failing to establish a triable issue concerning diminished value or lost profits.

According to news reports, after the recent revelation of Christie's false report of the sale of the two paintings, David Bathurst resigned as chairman of Christie's New York and London operations. And Christie's, under a settlement with New York City's Consumer Affairs Department, will pay $80,000 to the city in penalty fees.

In another intriguing saga, Sotheby Parke-Bernet, as part of the settlement of a lawsuit brought against the auction gallery by the New York State Attorney General, has agreed to recover 59 manuscripts and books that the gallery sold, for about $145 million at a June 1985 auction of Judaica. The works, which included a book by Maimonides printed in 1470 and a handwritten Passover prayer book produced in 1730, were consigned to the gallery by Dr. Alexander Guttman who had smuggled the material out of Germany in 1939. The Attorney General's office was asked to examine Guttman's ownership of the works, since it was alleged by various scholars that the material originally belonged to a rabbinical seminary in Berlin and that Guttman possessed the items for temporary safekeeping only.

The Attorney General's office determined that the "ultimate beneficiaries" of the long-closed seminary would be "members of the public with a scholarly, religious or historical interest in the documents" and several educational institutions. A preliminary court order had directed Sotheby's to retain the proceeds of the auction as well as any items not yet turned over to the purchasers. The settlement requires the 59 buyers of the auctioned items to return those works which have not been made available for scholarly research in order to arrange for the appropriate placement of the works. Any funds realized from the sale of the books and manuscripts whose return might not be required will be donated to institutions carrying on the study of Jewish history and culture.

Professor Guttman will be paid $900,000 under the terms of the settlement, which has just been approved by Justice Robert E. White of the New York State Supreme Court. Sotheby's, which has not been charged with any wrongdoing, has agreed to waive all commissions from the sale.

Cristallina, S.A. v. Christie, Manson & Woods International, Inc., New York Law Journal, p. 6, col. 2 (N.Y.Cnty., July 12, 1985); Abrams v. Sotheby Parke-Bernet, Inc., New York Law Journal, p. 6, col. 2 (N.Y.Cnty., Sept. 10, 1984) [ELR 7:4:8]

Federal Court of Appeals upholds decision granting summary judgment to Michigan television station in invasion of privacy action brought by dinner theater

owner; qualified privilege was available to broadcaster

In January 1976, WZZM-TV of Grand Rapids, Michigan broadcast a news report concerning the cancellation of a forthcoming production at the Thunderbird Dinner Theater. The report noted that the cancellation might leave "in the lurch" many advance ticket holders and the production company headed by Jerry Moore, and that the theater recently had had financial problems, as had its owner, Richard Bichler. Within a few days after the broadcast, a local bank repossessed from the theater certain personal property covered by security agreements, and other creditors also removed equipment. The theater never reopened.

The news report did not mention that Bichler had been served with a garnishment issued pursuant to a judgment rendered against Moore and therefore had stopped payment on a check to Moore for $9000, which check otherwise would have paid for the services and expenses of the cast. It was after Bichler stopped payment on the check that Moore arranged a press conference, attended by WZZM, at which Moore announced that the scheduled production would not be presented.

Bichler, the president and principal shareholder of Rebel Promotions, Inc., which operated the dinner theater, brought a lawsuit against WZZM for invasion of privacy alleging that the station broadcast embarrassing private facts about him and placed him in a false light in the public eye. A Federal District Court granted summary judgment to WZZM (ELR 5:11:13). And a Federal Court of Appeals, after a rehearing en banc, has affirmed, over a vocal dissent, the judgment of the District Court.

The Court of Appeals first agreed with the District Court that WZZM was entitled to Michigan's common law defense of "privileged communication." The broadcast dealt with a matter of legitimate public interest, and the statements concerning Bichler's financial condition were reasonably related to the privileged subject of the report, declared the court.

Furthermore, Bichler did not demonstrate the existence of a genuine issue as to the existence of malice on the part of WZZM. According to Judge Lively, Michigan has chosen to adopt the constitutional standard for determining if malice is present in cases where a private individual brings an invasion of privacy action against a publication or a broadcaster and a matter of public interest is involved. To adopt a lesser standard, such as that urged by the dissent, "would so chill the activities of news dispensers as to render them toothless tigers," concluded Judge Lively.

Various judges concurred and dissented in the court's opinion. However, Senior Circuit Judge Weick's dissent occupied about one-half of the 28-page opinion. Judge Weick, who would have submitted what he perceived as numerous factual issues to a jury, characterized the District Court's judgment as "grievous error." After carefully reviewing the relevant case law, Judge Weick expressed doubt that the Michigan Supreme Court would shield a publisher of a false report about a private individual's financial dealings solely because such information might bear a reasonable relationship to a question of legitimate public concern. Rather, noted Judge Weick, it would be more likely that the Michigan Supreme Court, in accordance with its own precedent and the majority of jurisdictions (per the dissent) would uphold the right of private citizens to redress media attacks upon reputation via the "honestly believed to be true and published in good faith" test or via the traditional negligence standard.

Bichler's right to privacy was "irresponsibly and irreparably invaded, as a direct and proximate result of the false, defamatory and libelous broadcast of the television station," concluded Judge Weick, who then stated that even under the standard of New York Times Co. v. Sullivan, managed to demonstrate a genuine issue as to the existence of malice due to WZZM's alleged failure to provide Bichler with an adequate opportunity to reply to its broadcast, to further investigate Moore's reliability, or to retract the challenged statements.

Bichler v. Union Bank and Trust Company of Grand Rapids, 745 F.2d 1006 (6th Cir. 1984) [ELR 7:4:9]

Briefly Noted:

Trade Name/Musical Group.

A manager's interest in the registered musical group trade name "Vito and the Salutations" was not subject to attachment and sale to satisfy a monetary judgment against the manager, a Federal Court of Appeals has ruled.

Larry Marshak, the holder of an unsatisfied judgment for about $17,000 against manager and promoter David Rick (see ELR 3:1:1) obtained an ex parte order from the District Court which directed the United States Marshal to attach and sell Rick's proprietary interest in the "Vito" name. Rick sought a stay of the attachment, execution and sale in view of his pending trade name infringement action against a competing musical group, in which action an issue had been raised as to Rick's ownership of the challenged trade name. Rick's application was denied, and at the sale Marshak was the successful bidder.

In reversing the District Court order and setting aside the purported sale, the Court of Appeals cited the principle that a registered trade name or mark may not he validly assigned "in gross," i.e., apart from the goodwill it symbolizes. The court rejected Marshak's argument that it was not the name, per se, which was attached, but rather Rick's interest in the name as the subject matter of his pending infringement cause of action. However, although New York law permits the enforcement of a money judgment against any debt which is past due or which is yet to become due, or upon an assignable cause of action, or against any property which could be assigned or transferred, whether or not it is vested, a trade name in gross, reiterated the court, is not "property" within the meaning of the applicable statues.

Marshak v. Green, 746 F.2d 927 (2d Cir. 1984) [ELR 7:4:9]

Contracts/Non-Compete Covenant.

A Federal Court of Appeals in Louisiana has declared moot a broadcaster's request for injunctive relief to enforce a former employee's contractual covenant not to compete. The personal service contract between Gaylord Broadcasting Co., the owner of New Orleans television station WVUE-TV, and news anchorperson Lynn Gansar provided that during the term of the contract and for a period of one year following the dissolution of the contract, Gansar would not appear on any radio or television station in the greater New Orleans area other than WVUE-TV without Gaylord's permission. Gansar's employment with Gaylord ended on September 30, 1983; and on December 12, 1983, Gansar began appearing on Cosmos Broadcasting Co.'s New Orleans television station.

Gaylord brought a diversity action in Federal District Court seeking to enforce the non-compete covenant, but was turned down on the ground that the broadcaster had not shown the requisite irreparable injury.

In its per curiam opinion, the Court of Appeals did not discuss the merits of the District Court ruling since Gaylord's right, if any, to specifically enforce the non-compete covenant ceased as of September 30, 1984. The court concluded by noting that a trial on the merits would he required as to the issue of any damages which might have arisen from Gansar's alleged breach of the non-compete covenant.

Gaylord Broadcasting Co. v. Cosmos Broadcasting Corp., 746 F.2d 251 (5th Cir. 1984) [ELR 7:4:10]

Antitrust/Concert Promotion.

In 1983, a federal grand jury in New Jersey returned a felony indictment against several corporate and individual parties involved in promoting live musical performances in northern New Jersey and upstate New York. John Scher Presents, Inc. and Monarch Entertainment Bureau, Inc. were charged with violating the Sherman Act by conspiring to reduce or eliminate competition in the promotion of concerts by allocating exclusive markets in upstate New York.

After the parties filed "nolo contendere" pleas, the government recommended the imposition of fines of $80,000 and $5,000, for Monarch and John Scher, respectively. The corporate parties, however, requested that the court suspend the imposition of sentence and instead impose a three-year term of probation on the special condition that the corporations contribute their "services and talents" in concert promotion in order to raise and donate $100,000 to approved charities. The District Court's acquiescence in this request exceeded the scope of its discretion to impose monetary conditions of probation, a Federal Court of Appeals has ruled.

In vacating the sentences imposed by the District Court and remanding the case for resentencing, Federal Court of Appeals Judge Becker conceded that Federal District Courts do have the power to impose "community service" sentences as a condition of probation. But in this case the condition of probation did not involve community service. Instead, the concert promoters, without having to alter their normal business operations, were merely required to pay money to charitable organizations which were in no way aggrieved by their offense, rather than to the United States Treasury. The condition therefore went beyond the restrictive "payment of money" provisions of the Probation Act, concluded Judge Becker.

United States v. John Scher Presents, Inc., 746 F.2d 959 (3d Cir. 1984) [ELR 7:4:10]

Constitititutional Law.

A Federal Court of Appeals has reversed a District Court order which denied several newspapers and broadcasters permission to copy audiotapes admitted into evidence at the racketeering and extortion trial of seven former Philadelphia police officers. The court also had postponed the media parties' access to transcripts of the tape recordings which had been given to the jury, until after the tapes were played in the upcoming trial of the remaining eight indicted police officials.

Federal Court of Appeals Judge Higginbotham, applying the principles set forth in United States v. Criden (ELR 2:22:1), first noted that although the transcripts provided to the jury had not been admitted into evidence, there was a strong presumption in favor of access to the transcripts (which were sufficiently reliable and helpful) on the basis of the common law right of access to judicial records, and the public interest in monitoring judicial proceedings. There also was considerable public interest in the case. And, after careful review, Judge Higginbotham concluded that the release of the audiotapes and transcripts would not make it impossible to obtain a fair and impartial jury in the next scheduled trial.

A dissenting judge would have deferred to the trial court's evaluation of the effect on potential jurors of the publicity which would surround the release of the tapes and transcripts, particularly since the District Court had stated that it would only temporarily postpone the media parties' access to the subject material.

United States v. Martin, 746 F.2d 964 (3d Cir. 1984) [ELR 7:4:10]

Toys and Games.

A Federal District Court in Delaware has ruled that CBS Inc. (the successor to the Ideal Toy Corporation) infringed a patented puzzle game invented by Larry D. Nichols. In a long and technical opinion dealing only with the issues of the validity and infringement of the patent, Chief Judge Stapleton ruled on behalf of Moleculon Research Corporation, the assignee of Nichols' 1972 patent, in finding that CBS induced the infringement of several of the patent claims by selling, and by instructing others in the use of, various Rubik's Cube items.

Moleculon Research Corporation v. CBS Inc., 594 F.Supp. 1420 (D.Del. 1984) [ELR 7:4:11]

First Amendment.

A Federal District Court in Mississippi has enjoined the enforcement of an obscenity ordinance enacted by the City of Jackson on the ground that several booksellers were likely to succeed on the merits of their claim that the ordinance was preempted by a state statute regulating the same material. The court further found that the scienter requirement of the ordinance was constitutionally "infirm"; that the ordinance was unconstitutionally overbroad in that some of the material subject to regulation might be entitled to First Amendment protection; that the booksellers had demonstrated irreparable injury in having to refrain from selling material arguably protected by the First Amendment; and that the public interest would be served by issuing the preliminary injunction.

Fernwood Books and Video, Inc., 601 F.Supp. 1093 (S.D.Miss. 1984) [ELR 7:4:11]

Broadcasting.

When the League of Women Voters announced that "Pooled" media coverage would be required for the October 7, 1984 presidential candidate debate, WPIX, a local television station in New York, claimed that the pool arrangement denied reasonable access to the station's independent Network News-a syndicator to small television stations of a national news program. Apparently, the pool proposed to charge Independent about $15,000. Independent stated that its own two-camera coverage of the debate would cost about $3,000. Federal District Court Judge Sofaer first found that sufficient state action was present for the court to consider Independent's First Amendment claim. However, the court, although sympathetic to Independent's alleged concern with presenting its own viewpoint of the debate, nevertheless found that the equities of the matter precluded injunctive relief. Judge Sofaer found it significant that WPIX more often had objected to the extra costs of television pools, rather than to any restriction on its expression. And a "last minute" injunction prohibiting the League from denying Independent reasonable access to the debates, concluded the court, would be unfair to the candidates, the

League, and other television stations and might thwart future cooperative arrangements among media parties.

WPIX, Inc. v. League of Women Voters, 595 F.Supp. 1494 (S.D.N.Y. 1984) [ELR 7:4:11]

SMATV.

The Federal Communications Commission's decision to preempt state and local regulation of satellite master antenna television has been upheld by a Federal Court of Appeals. The court discounted the argument that the Commission exceeded its authority in refusing to give local governments the same regulatory role with respect to SMATV operators as they have over cable system franchisees. Federal Court of Appeals Judge Tamm pointed out that the Commission made a "critical" distinction, in terms of regulation, between cable systems, which use public rights of way, and communications systems, such as SMATV, which are operated solely on private property. The Commission consistently has retained exclusive authority over those elements of cable television that do not involve the use of public rights of way, noted the court. And it was found that the FCC did not act arbitrarily or capriciously in concluding that state and local regulation might impede the growth of SMATV.

New York State Commission on Cable Television v. Federal Communications Commission, 749 F.2d 804 (D.C.Cir. 1984) [ELR 7:4:11]

Advertising.

A Federal Court of Appeals has affirmed a District Court order denying preliminary injunctive relief to Chesebrough-Pond's and to the Procter & Gamble Company in their actions against one another under section 43(a) of the Lanham Act. At issue were comparative advertisements for Procter & Gamble's "New Wondra" hand and body lotion and for Chesebrough-Pond's "Vaseline Intensive Care" lotion. Federal District Court Judge Goettel had concluded that the tests relied upon by the companies as support for their claims of product superiority or equality did not establish whether each company's claims actually were true or false, and that neither party showed a likelihood of success on the merits of its claim that its competitor's advertising was false or misleading. In upholding the District Court decision, Federal Court of Appeals Judge Mansfield stated that

Judge Goettel had carefully analyzed and evaluated the parties' tests and had not applied an erroneous legal standard in reaching the conclusion that injunctive relief was not warranted.

Procter & Gamble Company v. Chesebrough-Pond's, Inc., 747 F.2d 114 (2d Cir. 1984) [ELR 7:4:11]

IN THE NEWS

Concert promoter recovers $4.6 million jury award against city of Burbank in breach of contract action

A Los Angeles Superior Court jury has awarded Cinevision Corp. $4.6 million in damages in the company's breach of contract action against the city of Burbank.

Cinevision, a concert promotion company, alleged that in 1979 the city illegally banned seven out of nine concerts scheduled for the municipally owned Starlight Amphitheater, including performances by Jackson Browne and Todd Rundgren.

The jury found that the city not only breached Cinevision's five-year contract (entered into in 1975) to manage and promote live entertainment at the theater, but also illegally prevented Cinevision's attempt to negotiate the renewal of its contract pursuant to its option to do so.

Burbank unsuccessfully cited its contractual authority to cancel any show that had the "potential for creating a public nuisance;' and expressed the view that shows by certain of the scheduled performers might attract anti-nuclear protesters, narcotics users or homosexuals.

Cinevision originally brought its action in federal court, claiming civil rights violations along with its breach of contract claim; the contractual issues were severed and remanded to the state court. Cinevision eventually won a $20,000 judgment against the city on the constitutional issues and a $5,000 judgment against former City Councilman James Richman. The United States Supreme Court recently declined to review the Federal Court of Appeals' judgment that the city violated Cinevision's First Amendment rights by improperly canceling the concerts at least in part on the basis of content (ELR 6:12:17; 6:11:6).

Burbank officials have announced their intention to appeal the jury verdict. [Sept. 1985] [ELR 7:4:12]

Federal District Court enjoins MTM Enterprises from interfering with airing of commercials featuring "Hill Street Blues" actor Bruce Weitz

Federal District Court Judge Mariana Pfaelzer has granted a preliminary injunction sought by the Burger King restaurant chain whereby Burger King may continue to air commercials featuring actor Bruce Weitz. MTM Enterprises had claimed that it has an exclusive contract with Weitz, a star of the television show "Hill Street Blues," and that Weitz had to obtain authorization from MTM before appearing in the television commercial. According to Burger King, MTM had stated that it would contact the networks and independent television stations in order to have the commercials withdrawn. [Sept. 1985] [ELR 7:4:12]

WASHINGTON MONITOR

Federal Communications Commission declines to repeal Fairness Doctrine

The Federal Communications Commission will not propose the repeal of the Fairness Doctrine, although the commissioners have stated that the 25-year-old rule may no longer serve the public interest and may violate the First Amendment by requiring the FCC to evaluate broadcast content. Under the doctrine, broadcasters must air a balanced presentation on controversial issues of public concern. In the Commission's view, the doctrine no longer is necessary due to the large number of broadcasters and other sources of public information. However, any further action on the matter will be left to Congress. [Sept. 1985] [ELR 7:4:12]

DEPARTMENTS

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The Role of Self-Incorporation of Professional Athletes in Today's Tax Climate-After TEFRA and TRA '84 by John Connors, 2 Entertainment and Sports Law Journal 1 (1984)

Satellite Transmissions: The Laws and Policies That Affect The Programmers, Individual Earth Stations and SMATV (Private Cable) Owners by Barry L. Miller, 2 Entertainment & Sports Law Journal 33 (1984)

Remedying Athlete-Agent Abuse: A Securities Law Approach by Michael J. Sullivan, 2 Entertainment & Sports Law Journal 53 (1984)

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Two Approaches to the Fair Use Doctrine: A Look at the Harper & Row, Publishers, Inc. v. Nation Enterprises, Decisions, 2 Entertainment & Sports Law Journal 89 (1984)

Regulation of Cable Television: A Multi-Tiered Governmental Approach, 2 Entertainment & Sports Law Journal 105 (1984)
[ELR 7:4:14]