BUSINESS AFFAIRS

The Importance of Entertainment Business Practices to the Practice of Entertainment Law

by Melvin Simensky

Over the past several years, this writer has been privileged to read many interesting articles on Entertainment Law in this and other publications. During such period, no one has apparently considered it appropriate in such articles to offer a definition of the area of law about which he or she has been writing. To this writer's knowledge, no one has yet sought to propose a conceptual framework for Entertainment Law to give cohesion to what may otherwise appear unrelated subject matter. The absence of attempts to define Entertainment Law is understandable, since the subject matter embodied under such rubric tends to defy definition. More than once has this writer heard comments to the effect that Entertainment Law is incapable of definition but, rather, that it is a "catchword" for unrelated - albeit individually definable - areas of law.

Definition of Entertainment Law

Unquestionably, there is truth to such comments, but they do not tell the complete story. Accordingly, this article will propose one definition of Entertainment Law which has been shaped by the experience of this writer and a colleague with whom this author has spent years teaching and writing about the theory and practice of Entertainment Law.

This is writer and his colleague have defined Entertainment Law as follows:

Entertainment law, as practiced in the United States, is that body of principles governing activities within the entertainment industry in this country. This industry has five branches: movies, television, live theatre, music and print publishing. Among these branches are common issues, such as the structure of power relationships within the branches; the importance of credit or billing; the methods of structuring compensation and related issues; creative control and the interests at stake in seeking to obtain or restrict such control; the different methods by which rights and creative products may be transferred; and representations, warranties, and indemnities relating to risks particularly characteristic of the entertainment world.

To understand the principles which apply to these issues throughout the entertainment industry, it is submitted that practitioners of Entertainment Law must first understand the business practices which exist in the different branches of the industry. The principles of Entertainment Law, after all, are merely aids for resolving disputes arising among business people in the industry. To use these aids effectively, however, it is essential to understand the business issues at stake for the parties to the dispute.

The Importance of the "Deal"

Our definition of Entertainment Law suggests a view, functionally speaking, which holds that the subject matter of Entertainment Law is "the deal," i.e., the exploitation of an entertainment project. Such view, in turn, supports an analogy wherein business is perceived to be the skeleton to which legal principles, in part, bestow flesh. In the world of Entertainment Law, therefore, business, not law dominates.

Different from most industries, in the entertainment business the foundation of a "deal" is an underlying piece of intellectual property. Thus, in the movie branch of the entertainment industry an obvious example of intellectual property with which such branch is identified is the screenplay. In the television branch, it is the teleplay; in the theater, it is the play; in music, it is records and songs; and in the print publishing branch of the entertainment industry, the analogy is books. Accordingly, the practitioner of Entertainment Law must have some knowledge of the legal principles governing the use and protection of intellectual property rights, i.e. , primarily copyright and trademark law.

The negotiation of intellectual property rights, in the context of making a "deal" in the entertainment business requires knowledge of certain additional matters primarily relevant to the entertainment industry. Echoing our definition of Entertainment Law above, this writer and his colleague have suggested that these additional matters comprise the following: issues of credit or billing (i.e., attribution of function to person); particular issues of compensation (dealing, for example, with concerns about contingent as opposed to present renumeration); artistic control (i. e. , determining the appearance of an entertainment project); grants of rights (dealing with such concerns as the differences between licenses and assignments); and representations, warranties and indemnities pertaining to risks based on rights characteristic of the entertainment industry (such as the rights of privacy, publicity and copyright).

Importance to the Practitioner

One question posed by our definition of Entertainment Law is the effect such definition might have upon the entertainment practitioner. It is submitted that such definition would heighten sensitivity to the fact that business considerations really dictate resolution of an issue, whether in the obvious context of resolving a dispute through litigation. Two (unreported) cases whose plaintiffs this writer has represented are described below in illustration of this point. They are Perin Film Enterprises, Ltd. v. TWG Productions, Inc., 78-4031 (SDNY 1978), and Silverman v. CBS, Inc., 84 Civ. 1894 (SDNY 1984).

In Perin, the court held that plaintiff stated a valid cause of action for unfair competition in claiming that he had been denied credit as the executive producer of a television series, while someone else was billed as the series' "executive in charge of production." Plaintiff had been the executive producer of the nationally syndicated television series "For You ... Black Woman." At the time of suit, the series was in its second year, and was seen in New York City on Sundays on WABC-TV. It was a half-hour weekly talk show presenting topics of special interest to black women. Plaintiff claimed that when the series went into its second year, he served as executive producer of the first twenty-two shows before he was dismissed, but that he received no screen credit for his work prior to dismissal. Instead, the name of another employee was substituted under the confusingly similar credit "executive in charge of production."

On the basis of these facts, plaintiff commenced suit, alleging that his failure to obtain an appropriate screen credit for his executive producer services, coupled with the unjustified attribution of a confusingly similar credit to another, constituted a violation of his trademark rights under Section 43(a) of the Lanham Act. Section 43(a) holds actionable the false designation of goods or services in interstate trade.

Plaintiff moved for a temporary restraining order and preliminary injunction enjoining defendants' television series until receipt of his executive producer credit. Plaintiff argued that his failure to receive proper screen credit represented an irreparable harm, supporting injunctive relief. Such argument presupposed recognition of the economic value of credit, so that the loss of credit represented an economic injury not readily calculable in precise damages.

In response to plaintiff s motion, defendants cross-moved to dismiss the complaint, charging that plaintiff s claim was not cognizable as a valid cause of action under Section 43(a) of the Lanham Act. In a bench decision, the court rejected defendant's motion, whereupon the case settled. Plaintiff obtained an immediate monetary settlement, and, in addition, received billing as executive producer on programs broadcast in major television markets, including New York, Los Angeles, Chicago, Philadelphia and San Francisco. Plaintiff also received the right, after deductions, to half the net proceeds of two thirty-second commercial spots.

Business Considerations Dominated

One conclusion which Perin suggests is that business considerations dominated the adjudication and resolution of plaintiff's rights. By claiming that the failure to receive screen credit constituted irreparable harm, in effect, plaintiff was really telling the court that his credit had substantial pecuniary value, whose deprivation represented real injury. To convince the court of such proposition, plaintiff sought - almost pedagogically - to inform the court about credit's economic value. Absent such information, the court would have lacked the requisite data to determine the appropriateness of granting injunctive relief for the failure to accord screen credit.

Perin's ruling denying defendants' motion to dismiss was not subsequently embodied in a published opinion, because the case settled shortly thereafter. Nevertheless, the legal theory espoused in Perin and the business oriented method of its litigation were subsequently endorsed in a reported decision in the Ninth Circuit Court of Appeals, namely, Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). The facts in Smith were very similar to those in Perin. Like Perin, the plaintiff in Smith argued that his failure to receive proper screen credit coupled with the misattribution of such billing to another constituted a violation of Section 43(a) of the Lanham Act. The Ninth Circuit, in citing Perin as persuasive authority, agreed. In pertinent language reflecting the business considerations informing its opinion, the Court stated: "In the film industry, a particular actor's performance which may have received an award or other critical acclaim, may be the primary attraction for movie-goers.

Some actors are said to have such drawing power at the box office that the appearance of their names on the theater marquee can almost guarantee financial success. Such big box office names are built, in part, through being prominently featured in popular films and by receiving appropriate recognition in film credits and advertising. Since actors' fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their names may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their 'services,' i.e., their performances. We therefore find that appellant has stated a valid claim for relief under section 43(a) of the Lanham Act."

"Amos 'n' Andy" Case

In Silverman v. CBS, plaintiff was engaged in producing a Broadway show using "Amos 'n' Andy" characters in a modern script. Plaintiff was aware that at various times, CBS had claimed ownership of such characters, and had threatened suit to restrain others' use of the characters. Although plaintiff did not necessarily agree with CBS' claim of ownership in the "Amos 'n' Andy" characters, nevertheless - to expedite matters and help assure his right to produce such characters on the stage - plaintiff sought to negotiate a license for their use from CBS. Plaintiffs efforts to obtain such license proved fruitless.

CBS' rejection of his request for a license posed for plaintiff a very real and immediate problem, since it called into question plaintiff s legal right to produce his play. Without being able to assure his investors of his possession of the necessary underlying rights, plaintiff stood little chance of raising the millions of dollars required to fund his production. Unable to negotiate a license from CBS, plaintiff was left with little choice but to sue CBS for a declaratory judgment, claiming that defendant possessed no intellectual property rights in the "Amos 'n' Andy" characters, whether under copyright, trademark or otherwise.

Plaintiffs litigation strategy raised the question whether plaintiff s claim was, in fact, justiciable, absent the appearance of plaintiff s characters on stage to determine, among other things, their "substantial similarity" to the characters in which CBS claimed ownership. CBS' expected motion which, indeed, occurred, was an application to dismiss the complaint as not being ripe for adjudication. CBS posed the issue whether, conceivably years before plaintiff s characters might, if ever, grace the Broadway stage, plaintiff s claim - under such circumstances - could be considered justiciable. Interestingly, no case law near point could be found.

In determining matters of justiciability, two standards to maintain suit must be satisfied: (1) notice to a claimant of a threat of suit, and (2) a present actual dispute sufficient to render the court's decision, were it to hear the case, other than an advisory opinion. To meet these standards, particularly the need to show a present actual dispute, plaintiff was compelled to demonstrate that he had generated present productive activity sufficient to make his claims against CBS genuine. To do so, plaintiff sought to educate the court about the business of producing theater on Broadway, and sequent by comparison to his own activities, demonstrate that he was actually and purposefully moving to such end. To compensate for the fact that he was not, at time of suit, able to put his characters on stage - and indeed, might never be able to do so - plaintiff was obligated to show the court that, nevertheless, the activities in which he had by then engaged represented very real and substantial acts of production.

The Business of Broadway Producing

To educate the court about producing theater on Broadway, and to indicate his own acts directed to such end, plaintiff submitted an affidavit opposing defendant's motion replete with business references to Broadway, from such sources as Variety, The New York Times, well-known theatre books, and the former Bible for producing Broadway theatre, i.e., the Dramatists Guilds' "Minimum Basic Production Contract."

One excerpt from plaintiffs opposition affidavit illustrates the business orientation which the entire affidavit took. Thus, at the beginning of the affidavit (at paragraph three) plaintiff stated:

"CBS' motion distorts business reality. It seeks to define my claim, which requests a declaration as to the invalidity of CBS' rights respecting the fictional characters, `Amos 'n' Andy' and their entourage, solely in terms of my use of such characters on the Broadway stage. CBS ignores the fact that the production of a play involves a multiplicity of activities and interdependent creations which, working and developed together, may result in the appearance of the play upon the stage. Probably the most significant of these activities and interdependent creations is the writing of the play's script. In the case of a character play, the script must, obviously, make preliminary use of such characters, both in their reproduction on the pages of the script and otherwise, before the play's 'final' stage presentation. Thus, a play - whether a drama or musical - represents the development of a project culminating in a stage presentation."

The court rejected defendant's motion to dismiss for lack of justiciability, and the suit presently continues.

Conclusion

The definition of Entertainment Law suggested above, with its emphasis on business as opposed to purely legal considerations, is not meant to lessen the importance of specific legal developments, such as new case law. It is this writer's view, however, that new cases involving new legal issues are only really understood as they relate to the underlying business to which they apply. The Sony Betamax case is illustrative. By validating the home taping of copyrighted materials, the United States Supreme Court legitimized an entire industry. Although possibly wrong as a matter of pure copyright law, the decision is probably correct as a matter of business. It is hard to imagine, irrespective of likely subsequent

Congressional remediation, that the Supreme Court would have effectively disenfranchised an entire industry worth hundreds of millions, if not billions, of dollars.

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[ELR 7:10:3]

RECENT CASES

"Star Wars" trademark was not infringed by public interest groups' use of the phrase in television advertisements referring to proposed government defense program

Federal District Court Judge Gesell has refused to issue a preliminary injunction restraining two public interest groups from using the phrase "star wars" to characterize the Reagan administration's proposed Strategic Defense Initiative. The court noted that due to extensive media coverage of the controversy over the defense plan, the phrase became a popular synonym or shorthand reference for the SDI proposal.

Lucasfilm Ltd. contended that the association of the trademark "Star Wars" with a political controversy would injure the goodwill value of the mark, particularly if the phrase were used in television advertisements.

Judge Gesell, although agreeing that "Star Wars" is a strong trademark and that any television messages using the phrase most likely would injure the value of the mark, nevertheless stated that the court had no authority to provide relief to Lucasfilm. The court noted that Lucasfilm had no property right "in the use of words commonly found in the English language." Trademark protection is available only against those parties who attach the mark to products or services that compete with merchandise licensed by the trademark holder, or against those who dilute the value of a mark, or who might offer goods or services that disparage the goodwill value of the mark.

In the instant case, the public interest groups did not affix the trademark to any goods or services for sale; did not compete with Lucasfilm; and did not create any confusion or mistake to take advantage of the company's goodwill in order to further a trade or business. The groups' only activity was the communication of ideas; and the promotion of ideas, even through the use of a television message, is not equivalent to selling or advertising them. Trademark and unfair competition laws "do not reach into the realm of public discourse to regulate the use of terms used outside the context of trade," stated the court.

In denying the requested injunctive relief, and finding that the public interest groups were not liable for infringement, Judge Gesell further noted that the phrase was not used as a title by the groups or in any way to create confusion as to sponsorship. And even though the descriptive meaning of the phrase originally was derived from the trade use, the court could not regulate "the parallel development of new dictionary meanings in the everyday give and take of human discourse." It will remain for Lucasfilm to maintain the strength of the mark by engaging in clear and convincing efforts at differentiation. The court cautioned that the use of star wars in a political or noncommercial context will not undermine Lucasfilms' exclusive property right to use the phrase in connection with goods and services - it has not become a generic term associated with an entire class of goods or services.

Lucasfilm Ltd. v. High Frontier, 622 F.Supp. 931 (D.C. Cir. 1985) [ELR 7:10:6]

Conan the Barbarian obtains partial victories in copyright and trademark infringement claims in New York and Texas

Conan the Barbarian, a fictitious character created by Robert E. Howard in 1929, recently has encountered an opponent in the not-so-imaginary realm of the Federal District Court in New York. In July 1981, Conan Properties, Inc. and Mattel, Inc. entered a license agreement whereby Mattel was granted the right to make and sell plastic action figures of Conan and ancillary characters. In April 1982, Conan Properties and Mattel terminated the license agreement; the termination occurred soon after Mattel introduced its fantasy character action figure "He-Man." Conan Properties sued Mattel, alleging that the company's Masters of the Universe toy action figures, including He-Man, were copies of Conan which were created under the license agreement and therefore belonged to Conan Properties.

The court first found that Conan Properties' copyright interest in the action figures was a derivative interest and that copyright protection was available only to the extent of the company's own contribution to the works. The issue of what portion of the copyrighted works was Conan Properties' contribution was a question of fact to be resolved at trial, stated the court.

Mattel's motion to dismiss Conan Properties' copyright infringement claims with respect to those works for which the copyright had not been registered was granted because a recitation of the fact of registration was a prerequisite to the exercise of the court's jurisdiction. Conan Properties was granted leave to file an amended complaint which included the required recitation; the company apparently did so because several months after the court's ruling, the company sought to file a third amended complaint. In this proceeding, Conan Properties also was permitted, with certain specified restrictions, to include in its complaint proposed claims of fraud and misrepresentation under the Racketeer Influenced and Corrupt Organizations Act. And Mattel was permitted to amend its counterclaim in the copyright infringement proceeding in order to join two parties, and to add a counterclaim under RICO.

A more substantial, and certainly spicier, proceeding involving Conan occurred in Texas where a Federal District Court jury ruled on behalf of Conan Properties in a trademark infringement claim against Conan's Pizza of Austin. However, the jury refused to award damages on the ground that Conan Properties unreasonably delayed in bringing its lawsuit.

A Federal Court of Appeals has affirmed the judgment entered by the district court, except for that part of the judgment denying injunctive relief to Conan Properties. Federal Court of Appeals Judge Jerre Williams observed that Conan Pizza, which opened in 1976 and subsequently expanded to a six-restaurant chain, used signs and other promotional materials featuring a barbarian-like man who closely resembled Conan Properties' character. Conan Properties learned about the restaurant in 1976, but did not object to the restaurant's use of the mark until 1981.

The court concluded that Conan Properties had presented sufficient evidence for the jury to find that the restaurant's conduct created a likelihood of confusion as to the source, sponsorship or affiliation of its service or product. Although Conan Properties never licensed the use of its mark in connection with restaurant services, ordinary consumers might have believed that the restaurant was licensed by Conan Properties.

But Conan Properties did not establish that the restaurant used the Conan the Barbarian mark with the bad faith intent of "passing off" its services as being endorsed by Conan Properties in order to capitalize on the company's goodwill, declared the court. The restaurant therefore was entitled to assert the equitable defenses of laches and acquiescence. However, the only area in which Conan Properties may have waived its right to obtain injunctive relief in order to protect its mark was in Austin; the company's delay in suing the restaurant "did not constitute an eternal abandonment nationwide," stated Judge Williams. The restaurant did not demonstrate that it would be prejudiced if it were barred from infringing Conan Properties' mark in any area other than Austin. Rather, the restaurant would receive an unjustified "windfall" if it were permitted to expand into new areas, particularly since Conan Properties failed only to challenge what the company may have viewed as a de minimis local infringement.

The court therefore issued a preliminary injunction barring the restaurant from using the Conan the Barbarian theme in its restaurants outside Austin, including any use of the name or theme on menus or signs. The restaurant also was barred from displaying certain artwork associated with the character. However, the restaurant still may use the name Conan's Pizza or Conan's because, while Conan Properties held protectable rights in the Conan the Barbarian name and character, the company did not have similar rights in merely the name Conan. And Conan Properties had not shown that its use of the name itself resulted in establishing the requisite secondary meaning.

The district court also had granted summary judgment dismissing Conan Properties' claim for misappropriation of its merchandising property. While stating that summary judgment was improper because a factual question existed regarding whether the restaurant used the company's property in competition with a licensing program, Judge Williams found that reversal was not warranted since the laches and acquiescence defenses would have barred Conan Properties from recovering on this claim.

A dissenting judge would have enjoined the restaurant from continuing to use the name Conan outside Austin, noting that the name was not descriptive of the restaurant, that the use "originated in infringement," and that the restaurant had no right to expand the use and thus increase the likelihood of confusion.

Conan Properties, Inc. v. Mattel, Inc., 601 F.Supp. 1179 (S.D.N.Y. 1984); 619 F. Supp. 1167 (S.D.N.Y. 1985); Conan Properties, Inc. v. Conan's Pizza, Inc., 752 F.2d 145 (5th Cir. 1985) [ELR 7:10:6]

Federal District Court in Pennsylvania awards damages to owners of copyrighted musical compositions performed without authorization at the Triple Nickel Saloon

The copyright infringement actions brought by the owners of musical compositions allegedly performed without authorization at the Triple Nickel Saloon have resulted in several court opinions (see ELR 1:4:5; 1:22:2; 3:18:1; and 3:13:4). Most recently, a Federal District Court in Delaware granted summary judgment to the copyright owners of eighteen musical works in their claims against MoorLaw, Inc. and against Robert C. Moor, Jr., the sole shareholder and president of the corporation. Although Moor may not have been present at the Triple Nickel when each of the alleged acts of infringement occurred, a finding of vicarious liability was supported by his right and ability to supervise the activities leading to the infringements and by his direct financial interest in those activities, stated the court. Moor "scouted out," groups to perform at the Triple Nickel, hired and fired managers, was aware that copyright infringement was occurring and that licenses from performing rights societies were required and, in all, exercised "more than the minimal degree of control necessary to make him vicariously liable."

Moor's counterclaim alleging copyright misuse by ASCAP (a nonparty in this proceeding) was dismissed for failure to state a claim. And Moor's contention that the blanket licenses utilized by ASCAP and BMI violated the antitrust laws was rejected because Moor presented only conclusory allegations of conspiracy on the part of the copyright holders and ASCAP to deny licenses to the Triple Nickel - the mere fact that ASCAP holds non-exclusive licenses from the owners of the copyrighted compositions was found insufficient to infer the existence of a conspiracy.

Federal District Court Senior Judge Caleb Wright, noting that the Triple Nickel's owners engaged in a knowing violation of the copyright law, awarded $500 to the copyright owners for each of the eighteen infringing performances, as well as costs and reasonable attorneys fees, and issued an injunction prohibiting the further infringement of the copyrighted works.

Blendingwell Music, Inc. v. Moor-Law, Inc., 612 F.Supp. 474 (D.Del. 1985) [ELR 7:10:7]

Federal Court of Appeals upholds jury award of $190,400 to publisher of religious music in copyright infringement action against Chicago Archdiocese, but vacates and remands for further proceedings verdict against Archdiocese on publisher's claim of tortious interference with a business relationship

F.E.L. Publications, a publisher of religious music, was awarded $190,400 in actual damages by a jury due to the unauthorized use and copying of the company's hymnals and songsheets by Catholic parishes within the

Chicago Archdiocese. A Federal Court of Appeals has upheld this award and has rejected F.E.L.'s request seeking statutory damages under the Copyright Act of 1909 in lieu of the allegedly inadequate actual damages awarded by the jury. Statutory damages would have amounted to $1.5 million, according to F.E.L.

The Court of Appeals concluded that the District Court properly exercised its discretion in refusing to award FE.L. statutory damages in addition to or in lieu of the actual damages awarded, particularly since the jury awarded F. E. L. the exact amount it requested. Furthermore, additional statutory damages were not necessary to deter future copyright infringement.

The jury also had awarded F.E.L. $2 million in compensatory damages and $1 million in punitive damages in connection with the publisher's claim that the Catholic Bishop of Chicago tortiously interfered with F.E.L.'s business relationship with the Chicago parishes. On appeal, it was argued that the award was improper because the Catholic Bishop and the parishes are the same entity. The Court of Appeals agreed with this argument since. in an action for tortious interference with a business relationship, the existence of a separate and independent business relationship with a third party must be established; the parishes within the Archdiocese arc not legal entities separate and independent from the Catholic Bishop. However, the tortious interference claim also was based on the Catholic Bishop's alleged conduct involving other Catholic dioceses throughout the nation. Since these dioceses function as independent entities, F.E.L. may have raised a valid tortious interference claim. The court could not determine from the record what amount of the tortious interference award was impermissibly based on the Catholic Bishop's contacts with the Chicago parishes; the jury's award for tortious interference therefore was vacated and the matter was remanded for further proceedings.

F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 754 F.2d 216 (7th Cir. 1985) [ELR 7:10:8]

Federal District Court dismisses a claim against ABC in connection with company's refusal, for editorial reasons, to broadcast commercial for a musical recording

When Vincent Rokus, the author of a copyrighted musical recording, submitted a television commercial incorporating the recording to American Broadcasting Company, ABC refused to broadcast the commercial for editorial reasons even though Rokus agreed to delete portions of the commercial, such as the name of the recording, as requested by ABC.

Rokus sued ABC, asserting various claims and sought, in addition to compensatory and punitive damages, an order directing ABC to broadcast the commercial as submitted.

A Federal District Court in New York, without providing any additional description of the recording, has dismissed Rokus' claims. Judge Edward Weinfeld pointed out that Rokus failed to state a claim of copyright infringement since he did not allege that ABC used his copyrighted recording or his commercial. Rokus also argued that ABC sought to restrain him from advertising and marketing his product in interstate commerce - but he failed to identify a legal basis for this claim.

Judge Weinfeld also dismissed Rokus' argument that ABC violated his right of freedom of expression by attempting to censor his work, pointing out that the First

Amendment is a restraint on governmental action. ABC's status as a federally licensed and regulated broadcaster did not transform its conduct into governmental action for purposes of the First Amendment, stated the court, unless Federal Communications Commission expressly approved or sponsored ABC's conduct. But the FCC apparently was not so involved in this matter.

Rokus further claimed that ABC violated its obligations under the Communications Act to serve the public interest. The Act does not provide for a private right of action, concluded Judge Weinfeld, and neither the Act nor the First Amendment required ABC to sell commercial time to persons seeking to discuss "controversial" issues. Rokus' state law claims - for breach of contract, unfair competition, prima facie tort and tortious interference with precontractual negotiations - also were dismissed for lack of subject matter jurisdiction- in view of the dismissal of the federal law claims before trial.

Rokus v. American Broadcasting Company, Inc., 616 F.Supp. 110 (S.D.N.Y. 1984) [ELR 7:10:8]

Master sound recording lease program conducted by Music Masters, Ltd. was an abusive tax shelter, rules Federal District Court in North Carolina

A Federal District Court in North Carolina has ruled that master sound recording investment plans marketed by Music Masters, Ltd. and Master Financial, Inc. were abusive tax shelter schemes in violation of section 6700 of the Internal Revenue Code, and has issued an injunction restraining the companies from engaging in the proscribed activities.

A master sound recording is a permanent tape made of a musical performance that can be reproduced onto other devices, such as records or tapes, for distribution and sale.

During 1982 and 1983, Music Masters bought about 135 master sound recordings; the company made a down payment totalling about $1.2 million in cash, and issued notes to the sellers totalling about $112.9 million for the masters. Each note was secured only by the master for which it was issued, although, observed Federal District Court Chief Judge Robert D. Potter, the company alleged that each note was to be recourse against all the assets of Music Masters. Payments on the notes before the 12 year due date were to be made solely out of profits generated from the sale of records made from the masters.

Music Masters leased interests in the masters to investors and transferred investment tax credits to the lessees.

According to the company, each investor was eligible to claim an investment tax credit based on the percentage of their investment in the master, and the amount Music Masters paid for the works. But the Internal Revenue Service argued that over $17 million in improper tax deductions and credits might be taken if each investor relied on Music Masters' claims.

The court first noted that it was "extremely doubtful" that the notes Music Masters issued to the owners of the master sound recordings, such as $30 million worth of notes to Hice Music Company, would be paid from record sales. For example, if Music Masters paid Hice the agreed upon price of $1.55 per album, a typical master, with a note of $990,000, would have to sell over 600,000 records just to pay the principal due (gold album status, a rarity in the music industry, is based on sales of 500,000 records).

Judge Potter further found that long term notes issued in conjunction with the purchase of masters are not normal in the music industry - the life of a master may be sweet, but it also is very short - and noted that the sale of records under the Music Masters program produced only about $6,000 in income for the company. Also, the Music Masters parties made "material gross valuation overstatements with respect to the masters they offered to investors;" the company apparently provided appraisers with a "purchase price" for each master, and this price usually was the basis of the appraisers' determinations of fair market value. But the overvaluations, in some instances in an amount exceeding 200 percent of the "correct" value, i.e., the cash paid, for the masters involved, constituted a misrepresentation to the investors, stated the court.

The government's expert witness declared that the correct value of the masters ranged from $1,000 to

$45,000, and also pointed out substantial defects in the masters, including selections on the albums which were not recorded to be marketed ("demos"), and albums that did not appear to be recorded by the claimed artist.

In his conclusions of law, Judge Potter determined that the master sound recording lease program was an abusive tax shelter in that gross valuation overstatements were furnished to investors, and the notes issued by Music Masters to purchase the masters were not bona fide. It was emphasized that the notes were only recourse as to Music Masters, not the individual lessees, and there was a "high possibility" that at the end of 12 years, Music Masters would be defunct with no corporate assets. In all, it appeared to Judge Potter that Music Masters' tax shelter plan "was organized and promoted solely for the purpose of generating tax benefits for the investors without any real expectation of profit to be derived by the investors."

Support for this conclusion, in addition to the points cited above, was provided by the fact that Music Masters could have purchased the masters directly from an individual sales broker for a small fraction of the price ultimately paid, and by the fact that the company sometimes set preproduction "prices" for the masters. Also, Music Masters on occasion stated to lessees that masters were purchased in 1982, when in fact, the purchase was made in 1983 - such statements were material false statements since investment tax credits are available only for property placed in service during the year the credit is claimed.

Other material false statements by Music Masters involved the representation that the company would not be a party to the agreements between the lessees and record distributors, and that the lessees themselves would be engaged in the business of distributing the recordings. But the Music Masters parties did carry on the business of manufacturing and distributing records; the representation to the contrary was material because Music Masters' participation might have caused the Internal Revenue Service to reclassify the lease arrangement, thereby threatening the investors' ability to claim the tax credit.

Injunctive relief was appropriate, stated the court, to prevent the further operation of Music Masters' investment programs, particularly since the president of two of the leasing companies, even after the commencement of the instant lawsuit, was assuring investors of the validity of their investment. The public interest also would be served by the issuance of an injunction in view of the fact that over 1,000 persons invested in the Music Masters program in 1982 and 1983, and auditing and litigating these cases would likely involve a substantial cost, in addition to the possibility of lost revenue amounting to over $17 million. Music Masters apparently advised its investors not to settle their cases with the Internal Revenue Service, insisting that the value of the masters as stated by the company were correct; such representations also were enjoined. And, as part of the injunctive relief order, the court ordered Music Masters to send each investor in the 1982 and 1983 marketing projects a copy of the court's judgment in the action and to advise each lessee that the company would rescind its lease agreement.

United States v. Music Masters, Ltd., 621 F.Supp. 1046 (W.D.N.Car. 1985) [ELR 7:10:8]

Letter circulated by Diana Ross concerning former employee contained statements which were capable of potentially defamatory meaning, rules Federal

Court of Appeals in reversing decision dismissing employee's libel claim

A letter circulated by entertainer Diana Ross concerning several former employees contained statements which might have been considered defamatory, a Federal Court of Appeals has ruled. The court therefore reversed a Federal District Court decision dismissing the libel complaint brought by Gail Davis, who, until her resignation in November 1982, worked for Ross as an executive assistant. Davis' name was mentioned in the October 1983 letter which stated: "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear from these people, and they use my name as a reference, I wish to be contacted." Davis claimed that the letter damaged her professional reputation by falsely asserting that she had been fired, and sought $1 million in compensatory damages and $1 million in punitive damages.

The District Court had concluded that the letter expressed only Ross' personal dissatisfaction with Davis, rather than an objective evaluation of the Davis' professional qualifications, and thus was not libelous. However, Federal Court of Appeals Judge Pierce agreed with Davis that the District Court erroneously focused on certain isolated statements and phrases in the letter instead of construing it as a whole, and that the letter could be read as falsely asserting that Ross fired Davis. While a statement concerning an individual's discharge from employment may not of itself constitute libel, the publication of such a statement might be defamatory if there is an indication that the discharge was for misconduct. The Ross letter could be interpreted by an average reader as insinuating that Davis was discharged for lack of professional competence, stated the court, especially because of the denial of a recommendation.

The court also rejected Ross' argument that the statements in the letter were protected expressions of opinion - the letter was sent to individuals who never asked for information about Davis, and also implied that Ross knew facts which would support the claim that the cited employees had unacceptable work and/or personal habits. It therefore will remain for a trier of fact on remand to determine whether the statements were libelous.

Davis v. Ross, 754 F.2d 80 (2d Cir. 1985); 602 F.Supp. 504 (S.D.N.Y. 1984) [ELR 7:10:10]

Los Angeles trial court judge rules that Jerry Plotkin, a former Iranian hostage, was not a public

figure when newspaper published allegedly libelous statement

On January 21, 1981, the Daily News in Los Angeles published an article stating that Jerry Plotkin, a just-released Iranian hostage, would likely be questioned by federal officials as to why he visited Iran; the article quoted an undisclosed source's comment that the questioning might pursue "any inkling that [Plotkin] was involved in drugs" in Iran.

Plotkin, who was the only private citizen among the Americans held hostage during 1979 to 1981, sued the Daily News for $60 million. The newspaper argued that Plotkin was a public figure because he sought to focus public attention on the hostage crisis by various means, including presenting a televised message urging the United States to return the former Shah of Iran to that country in exchange for the hostages' freedom.

Los Angeles Superior Court Judge Christian E. Markey ruled that Plotkin was entitled to private figure status in his action since he was not involved in a public controversy on January 21, 1981. The return of the Shah no longer was an issue, and even if the release of the hostages were viewed as a public controversy, the Daily News' article was not related to the release. Furthermore, Plotkin's conduct during his captivity was involuntary, given "the ever present guns in the hands of the captors." And neither Mrs. Plotkin or Plotkin's attorney achieved "special prominence" in the controversy or had an impact on its resolution; if they had so qualified, there was no legal basis, in any event, for imputing their conduct to Plotkin.

In all, Plotkin was not an all purpose public figure, a limited purpose public figure, nor an involuntary public figure since he had "no influence on the affairs of society. He never voluntarily assumed the risk of public exposure."

Plotkin now must prove that the Daily News acted negligently, rather than with malice, in publishing its article.

Plotkin v. Van Nuys Publishing Company, Inc., Case No. C359227 (Los Angeles Cnty., Feb. 25, 1986) [ELR 7:10:10]

Air traffic controller was involuntary limited purpose public figure in connection with reports on 1974 Virginia air crash, rules Federal Court of Appeals in granting summary judgment to Washingtonian Magazine

In a case cited by Judge Markey in the Plotkin case (ELR 7:10:10), a Federal Court of Appeals affirmed, on different grounds, a Federal District Court ruling (ELR 6:6:20) granting summary judgment to Washingtonian Magazine in a libel action brought by Merle Dameron, an air traffic controller.

The magazine published an article in October 1982 entitied "The Inside Story of the Crash of Air Florida's Flight 90: A False Feeling of Security." A short sidebar piece accompanying the article mentioned the partial blame assigned to air traffic controller error in, among other incidents, the 1974 crash of a TWA plane into Mt. Weather, Virginia. Dameron was the sole air traffic controller on duty at Dulles on the day of this crash. Dameron argued that he never had been found blameworthy for the accident, and that the magazine's statement was false and injured his reputation.

The District Court found that the allegedly libelous statement was protected by the conditional privilege for press reports of governmental proceedings. Federal Court of Appeals Judge Mikva, however, stated that the District Court erred in concluding that the privilege applied to the facts of the case - the challenged statement appeared in an article which did not relate directly to a governmental proceeding and did not indicate that the statement was a summary of a government report.

The District Court also had found that Dameron was not a public figure since he did not "inject" himself into the controversy over air traffic safety. But Judge Mikva declared that "Persons can become involved in public controversies and affairs without their consent or will." Dameron was found to be such a person - an involuntary public figure for the limited purpose of discussions of the Mt. Weather crash. There indisputably was a public controversy present, the alleged defamation was related to the question of controller responsibility for air safety, and Dameron played "a central, albeit involuntary" role in the controversy. There was extensive investigation into the events surrounding the l974 crash and Dameron, who appeared at government hearings concerning the widely publicized incident, indeed, was a central figure, "however involuntary" in the controversy. Since Dameron admitted that he could not prove actual malice, the entry of summary judgment for the magazine parties was affirmed accordingly.

Judge Markey commented on the fact that the alleged defamation in this case, as distinguished from the statement challenged in the Plotkin matter, arose directly from Dameron's participation in the controversy over air traffic safety, and that the controller was very prominent in the resolution of the controversy.

Dameron v Washington Magazine, 779 F.2d 736 (D.C.Cir. 1985) [ELR 7:10:10]

Federal District Court in New York refuses to dismiss libel action brought by writer Victor Lasky against ABC in connection with documentary on McCarthy era

A Federal District Court in New York, citing Davis v. Ross (ELR 7:10:10), has refused to dismiss a libel claim brought by Victor Lasky against American Broadcasting Companies in connection with the June 23, 1983 broadcast of an ABC News documentary entitled "The American Inquisition." The documentary, which focused on the McCarthy era of the 1950s, related an encounter between Lasky and Luella Mundel at a 1951 American Legion meeting in Fairmont, West Virginia. Mundel had been accused of being a security risk and an atheist by the president of the local school board, and as a result of these charges, Mundel lost herjob as the head of the art department at a state college. During the American Legion meeting, Mundel and Lasky apparently exchanged name-calling. But in a July 16, 1983 ABC News follow-up to the documentary, Lasky declared that he never labeled Mundel a communist.

Lasky subsequently sued ABC for libel, claiming that the documentary falsely asserted that he maliciously called Mundel a communist in order to show that Lasky was responsible for her discharge from employment, and that the network failed to publish, along with the documentary, Lasky's "unequivocal" denial of the purported accusation.

Federal District Court Judge Lowe stated the view that the name-calling exchange between Lasky and Mundel, in the context of public debate, was protected speech because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open..." However, the court declined to find, as a matter of law, that Lasky was not entitled to relief on his claim. The court also rejected, in view of the preliminary stage of the proceedings, ABC's argument that the privilege of neutral reportage would preclude liability in this case. While denying ABC's motion to dismiss, Judge Lowe refused to award attorneys fees to Lasky since the issues raised by ABC were neither "frivolous nor groundless."

Lasky v. American Broadcasting Companies, Inc., 606 F.Supp. 934 (S.D.N.Y. 1985) [ELR 7:10:11]

Federal Court of Appeals reverses jury verdict awarding damages to attorney in libel action against Penthouse magazine

A Federal Court of Appeals in Pennsylvania has ruled that attorney Frank Marcone was a limited purpose public figure who was required to prove that allegedly libelous statements in a Penthouse magazine article were made with actual malice.

A Federal District Court jury had awarded Marcone compensatory damages of $30,000 as well as punitive damages of over $500,000 on the basis of the court's rulings that Marcone was not a public figure, that the magazine article was libelous per se, and that damages were available upon a showing that the publisher was negligent (the court did order a remittitur of the punitive damages award to $200,000, and Marcone accepted the modified award; see ELR 6:8:12).

Federal Court of Appeals Judge Adams, in reversing the judgment, pointed out that Marcone had gained considerable notoriety during the mid-70's due to his representation of, and his association with, a motorcycle gang. In 1976, a Detroit grand jury indictment charged Marcone and about 20 other individuals with drug-related offenses; the charges against Marcone subsequently were withdrawn because of "legal technicalities." However, Penthouse's November 1978 article, "The Stoning of America," written by Edward Rasen, mentioned Marcone's name in a discussion of "criminal attorneys and attorney criminals" involved in drug transactions. Marcone claimed that the article libelled him since it set forth two statements which were untrue - that he was guilty of an offense for which he was only indicted, and that charges against him were dropped because he cooperated with investigators.

According to Judge Adams: the article was capable of a defamatory meaning; Marcone was not libel proof because of any prior negative publicity which may have "sullied" his reputation (although the jury's compensatory damage verdict may have reflected the "diminished status" Of Marcone in November 1987); and Marcone presented sufficient evidence of mental anguish and harm to his reputation to permit recovery for his actual damages. After lengthy consideration, the court concluded that Marcone was a public figure for the limited purpose of his alleged connection with illicit drug trafficking activities - a widely reported matter of public controversy which involved Marcone's voluntary "non-representational" contacts with notorious motorcycle gang members. Judge Adams stated that "when all the relevant factors are considered in context and as a whole, we believe that Marcone has crossed the line from private to limited purpose public figure," and the District Court erred in not so classifying the attorney.

In turning to the issue of damages, it was noted that the District Court did charge the jury that Marcone had to demonstrate actual malice to recover punitive damages and the jury apparently found that the attorney met the requisite standard. But the jury instruction stated that Marcone had to prove "outrageous conduct" by Penthouse - this was not equivalent to a finding of subjective awareness of falsity and the charge as to actual malice consequently was "flawed." Furthermore, the proper level of proof of actual malice - clear and convincing evidence - was not set forth in the jury instructions. The award of punitive damages was made under a constitutionally deficient standard and therefore could not be the basis of an award of compensatory or punitive damages, stated the court. Judge Adams then reviewed the evidence on the actual malice issue and declared that the magazine reasonably relied on the professional reputation of the author of the article, that Penthouse did attempt to verify Rasen's assertions (including obtaining a copy of the Detroit indictment), and that the failure to use the word "alleged" in describing Marcone's activities, under the circumstances, did not establish actual malice. The misstatement about Marcone's cooperation with government authorities may have been "unprofessional, even negligent," but did not rise to the level of actual malice since "mere falsity, without more" generally is not sufficient to establish actual malice. And the mistaken statements may have resulted from "insufficient editorial verification and checking procedures" but were not due to a conscious decision to present Marcone in false light. The judgment of the District Court was reversed accordingly.

Marcone v. Penthouse International Magazine, 754 F.2d 1072 (3d Cir. 1985) [ELR 7:10:11]

Federal District Court in California grants summary judgment to F. Lee Bailey and publisher in connection with libel claim brought by former San Francisco prosecutor; court denies Bailey's motion for summary judgment on related slander claim

Lawrence D. Murray, a former San Francisco assistant district attorney, unsuccessfully prosecuted F. Lee Bailey in April 1982 on two charges, one of which was driving under the influence of alcohol. Bailey wrote about his arrest in a book published by Stein & Day, entitled "How to Protect Yourself Against Cops in California and Other Strange Places."

Murray claimed that the book erroneously accused him of having been arrested for driving under the influence of alcohol and for assault and battery of police officers; he actually was charged for being drunk in public and resisting arrest. Murray also claimed that Bailey questioned his qualifications and character, and accused him of suborning perjury during the prosecution of Bailey's case.

Federal District Court Judge Orrick in granting summary judgment to Stein & Day, first stated the "well-established" principle that the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. Stein & Day's failure to investigate Bailey's account of Murray's arrest and his conduct during trial did not amount to a reckless disregard of the truth and was not even unreasonable, stated the court. The publisher had required Bailey, who was present throughout the trial proceedings, to confirm his statements; Bailey "represented and warranted" in his publishing contract that the book was not libelous; and as soon as the mistake about Murray's arrest was discovered, the publisher changed the text in the soft cover edition of the book.

Murray also sought to impose vicarious liability on Stein & Day with respect to statements made by Bailey on two San Francisco television stations during a promotional tour for the book. The statements incorrectly accused Murray of having been convicted of drunk driving. According to Murray, Stein & Day was liable for Bailey's statements because the publisher paid for the promotional tour and benefitted from the promotion of the book. But the stringent standards of the First Amendment preclude the use of an agency theory, and such a theory, in any event, was improper in this case, stated Judge Orrick because there was no evidence that

Stein & Day could expect that Bailey would accuse Murray of being convicted for drunk driving, an accusation that exceeded Bailey's published comments concerning Murray.

In turning to Murray's claims against Bailey, the court found that many of the book's comments about the prosecution of the case either were not defamatory or stated Bailey's opinion that the case was tried poorly. Other statements, according to Murray, "by way of innuendo," charged him with prosecutorial illegalities such as suborning perjury. But Murray did not demonstrate to a certainty that the challenged language was "of and concerning" him. Furthermore, the book's statements about Murray's arrest record were not actionable as fair and true reports of arrest records which were privileged under California law. A "fair and true" report is one that "captures the substance" of the proceeding -

the privilege was available to Bailey and summary judgment thus was appropriate.

However, Bailey's statements on the television programs were not covered by the privilege - the statements were not set in context and there existed a "substantial difference" between the television comments and the truth. Bailey admitted that he saw an arrest report that explicitly stated the correct charges against Murray. A jury might find by clear and convincing evidence that Bailey acted with actual malice as to the television statements and his motion for summary judgment on Murray's slander claim therefore was denied.

Murray v. Bailey, 613 F.Supp. 1276 (N.D.Ca. 1985) [ELR 7:10:12]

Indianapolis ordinance's definition of pornography as discrimination against women was unconstitutional regulation of content, rules Federal Court of Appeals; United States Supreme Court affirms decision

The United States Supreme Court has affirmed, without issuing an opinion, a Federal Court of Appeals decision declaring unconstitutional an Indianapolis anti-pornography ordinance. The ordinance, which has attracted attention from many civil rights and feminist organizations, defined pornography as a practice that discriminates against women by presenting, in specified situations, "the graphic sexually explicit subordination of women, whether in pictures or in words." The definition differed considerably from standard definitions of obscenity, which is not protected by the First Amendment, as follows: there was no reference to the prurient interest, to offensiveness, or to the standards of the community as set forth in Miller v. California, 413 U.S. 15; the categorization of a work depended on particular depictions rather than the work as a whole; and it was irrelevant whether a work had literary, artistic, political or scientific value.

Indianapolis argued that the ordinance provided a means "to alter the socialization of men and women" rather than attempting to set forth community standards of offensiveness.

Federal Court of Appeals Judge Easterbrook, in upholding a District Court decision, pointed out that the ordinance improperly distinguished among works on the basis of content. It appeared that works portraying women as "equals" would be considered lawful no matter how graphic the sexual content. But "the state may not ordain preferred viewpoints," stated the court. The claim that pornography is "low value" speech equivalent to obscenity was rejected. In the few instances where courts have balanced the value of speech against the costs of its restriction, this was done by category of speech, not on the basis of the content of particular works.

The District Court had found that the ordinance was vague and that it established a prior restraint, but Judge Easterbrook did not find these conclusions necessary to the Court of Appeals' judgment. The court concluded by determining that the ordinance's definition of pornography was defective "root and branch," and could not be rendered constitutional by severing particular terms.

American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985); 598 F.Supp. 1316 (S.D. Ind. 1984) [ELR 7:10:13]

Owners of Times Square bookstores and movie theaters are unsuccessful in First Amendment and antitrust claims against proposed redevelopment project

A comprehensive plan to rehabilitate the Times Square area of Manhattan, including the proposed condemnation of several adult retail stores on 42nd Street, was not an unconstitutional prior restraint on speech, a Federal Court of Appeals has held. In affirming a Federal District Court decision granting summary judgment to the development officials, and denying preliminary injunctive relief to the store owners, the court noted that the rehabilitation project was not aimed at suppressing speech, but was undertaken in an effort to eliminate blight, crime and decay in a three square block area of Times Square and to restore the area to "commercial and cultural vitality." Even if the contentneutral project had an incidental effect on speech, the proposed condemnation served substantial government interests unrelated to the suppression of speech, such as increasing tax revenue, raising employment in the area, saving architecturally and historically significant theaters, and reducing crime.

The fact that development officials may have hoped to reduce the number of sex-related businesses did not render the project unconstitutional. And the availability of sexually explicit material in the midtown area would not be entirely curtailed by the closing of the bookstores in the redevelopment project area - many other adult businesses operated nearby, and it was likely that the subject store owners would relocate.

The development project also was challenged in a separate proceeding brought by two companies affiliated with the Brandt Organization. The Forty-Second Street Company and World's Busiest Comer Corp. held long-term leases on eight motion picture theaters on 42nd

Street. The theaters, which exhibited primarily low-budget martial arts and horror films and some sexually explicit films, were scheduled to be condemned and converted to live theater and other non-movie uses as part of the development project. The theater companies claimed that the plan to condemn the theaters violated their First Amendment and equal protection rights and the rights of the theaters' many minority customers.

According to theater operators, there was little support for the position that historical, cultural or architectural goals would be furthered by the condemnation of their theaters. Furthermore, landmarking or condemning just the facades of certain theaters might adequately serve the developers' asserted interest in historic preservation, stated the theater operators, who also cited the hostility expressed by the project planners toward the content of the films exhibited at the Times Square theaters and toward the theaters' largely low income and minority audience.

Federal District Court Chief Judge Motley, after stating that the theater operators possessed standing to assert the rights of their patrons as well as their own claim of injury, concluded that while the development project might have an undeniable incidental impact on low-income individuals, an improper racially discriminatory purpose violative of equal protection rights had not been shown.

In turning to the First Amendment issue, the court, as in G.& A. Books, concluded that the proposed condemnation did not violate any free speech rights. The possibility that some of the theaters might be re-used rather than destroyed did not mean that the condemnation involved a prior restraint on protected speech. Judge Motley emphasized that the developers' goals were legitimate, and that there was no evidence suggesting an overall attempt to restrict public access to martial arts or action film or of any desire by the developers to "silence" the theater operators because of the message of the films they exhibited. In all, the planned condemnation was within the constitutional power of the government, the goals of the project were substantial, and any effect on the theater operators' free speech was minimal. Summary judgment therefore was granted to the development parties.

In a third proceeding involving the redevelopment of Times Square, Cine 42nd Street Theater Corporation and other owners of movie theaters in the Times Square area, sued the developers alleging that the conditional grant of renovation rights in the theaters to three major Broadway theater owners would substantially lessen competition in the Broadway theater industry in violation of section 7 of the Clayton Act and New York's Donnelly Act.

Federal District Court Judge William Conner granted the developers' motion to dismiss the complaint on the ground that the federal antitrust action was barred by the state action doctrine; the pendent state claim was dismissed for lack of subject matter jurisdiction. Judge Conner stated that the Urban Development Corporation and the City of New York were granted extraordinarily broad power under state legislation to eradicate blight in urban areas, and the legislature apparently specifically authorized the challenged anticompetitive activity in connection with the development project, thereby exempting the developers' grant to the Nederlander Organization and the other theater owners from the application of the antitrust laws.

In re G.& A. Books, Inc., 770 F.2d 288 (2d Cir. 1985); G.& A. Books, Inc. v. Stem, 604 F.Supp. 898 (S.D.N.Y. 1985); Forty-Second Street Company v.

Koch, 613 F.Supp. 1416 (S. D. N.Y. 1985); Cine 42nd Street Theater Corporation v. Nederlander Organization, 609 F.Supp. 113 (S.D.N.Y. 1985) [ELR 7:10:13]

Minneapolis ordinance restricting display of sexually explicit material is upheld

A Federal District Court in Minnesota has upheld a Minneapolis ordinance requiring that certain sexually explicit books, magazines and other materials deemed harmful to minors be kept in sealed wrappers and requiring other items to bear an opaque cover. The ordinance did not apply if minors were not able to view the proscribed materials. Thus, store owners could bar minors from entering or could segregate the proscribed materials in order to deny access to minors.

A trade organization of booksellers and publishers brought an action for declaratory and injunctive relief, challenging, on First Amendment grounds, the prohibition on the commercial display of the proscribed materials.

Federal District Court Judge MacLaughlin first stated that the trade organization did have standing to seek relief from the enforcement of the statute. However, the ordinance was ruled not unconstitutionally overbroad. The trade organization also had argued that the ordinance restricted the availability to adults of materials protected by the First Amendment. But the court set forth several options which would accommodate both the city's strong interest in protecting minors and the asserted First Amendment rights of adults. The sealed wrapper requirement presented a "mere inconvenience" to adults, rather than an unconstitutional restriction on distribution, and also did not limit the creators of the materials in any way. The fact that retailers might have to make separate determinations as to whether the covers and the contents of books and magazines might be harmful to minors did not present an increased risk of selfcensorship in the court's view, particularly since the ordinance contained a scienter requirement.

The booksellers also raised an equal protection challenge to the ordinance based on the exemption from criminal prosecution of schools, museums and other institutions. The court agreed that the exemption provision was unconstitutional, and severed this provision from the otherwise valid ordinance.

Upper Midwest Booksellers v. City of Minneapolis, 602 F.Supp. 1361 (D.Minn. 1985) [ELR 7:10:14]

Memorandum concerning sale of San Diego Clippers professional basketball team was sufficient to preclude statute of frauds defense in breach of contract action brought by Clippers owners, rules Federal Court of Appeals; dissent declares that alleged contract omitted essential material terms

A three page written memorandum may be sufficient to meet the requirements of the statute of frauds, a Federal Court of Appeals has ruled. The memorandum purportedly set forth the understanding reached by Irving H. Levin and Harold A. Lipton, the former owners of the San Diego Clippers professional basketball franchise and Philip Knight, who allegedly agreed to purchase the Clippers. When Levin and Lipton sued Knight for breach of contract and fraud, a Federal District Court granted summary judgment to Knight, citing the statute of frauds; Knight's motion for summary judgment on the cause of action for fraudulent misrepresentation also was granted since under the then-effective California law, the action could not be maintained upon an agreement unenforceable under the statute of frauds.

In reversing the District Court's decision, the Court of Appeals stated that the written memorandum included the terms which California courts have found essential to satisfy the statute of frauds: the subject matter, the price and the parties. The ruling on Knight's fraud claim also was reversed and the District Court was ordered, on remand, to instruct the factfinder that it may consider Levin and Lipton's tort claim even if it does not find that the memorandum constitutes a valid contract.

In concurring in part and dissenting in part, Senior Court of Appeals Judge Barnes questioned the majority's holding that the memorandum might be a valid and binding contract, even if all disputed matters were resolved in favor of Levin and Lipton. Judge Barnes pointed out that the memorandum was drafted by Levin during a discussion with Knight on December 3, 1980, and outlined some of the terms of their discussion. Knight then received a draft of a proposed agreement for the acquisition of the Clippers, but on December 15, 1980, Knight notified Levin of his decision not to purchase the team.

Judge Barnes did not agree with the finding that the memorandum contained the requisite essential terms, in that Levin was not present at the December 3rd meeting and his name did not appear in the "alleged contract." Furthermore, the memorandum did not refer to any type of stock transaction although the parties had discussed Knight's purchase of Levin and Lipton's stock. The majority had discounted the memorandum's failure to refer to the stock transaction as all parties apparently "understood" that the agreement was for the transfer of the Clippers as an entire unit and that if a stock transaction "were eventually to transpire," then all of the stock would be transferred.

Judge Barnes, however, stated that even if the statute of frauds governing the sale of securities was inapplicable, a writing was required since a lease was involved in the transfer of the team and a lease is an interest in real property. Again, the memorandum did not, as required for the sale of land, specifically name Levin or Lipton, or describe the lease. Parol evidence was not available to explain or add to the omitted fundamental material terms, stated Judge Barnes. Nor was the doctrine of equitable estoppel a bar to the statute of frauds defense since the 12 day period after the alleged formation of the contract was not a sufficient period of time for Levin and Lipton to have justifiably changed their position in reliance upon the proposed transfer; nor was an unconscionable injury suffered by the Clippers owners as a result of Knight's alleged breach of the contract, even if they indeed did obtain less for the team than they otherwise would have received from Knight. In the absence of a genuine issue of material fact, Judge Barnes would have affirmed the District Court grant of summary judgment to Knight on the breach of contract claim.

Levin v. Knight, Case No. 84-5855 (9th Cir., Jan. 13, 1986) [ELR 7:10:14]

New Jersey Supreme Court rules that racing association's proposal to conduct intertrack pari-mutuel betting on simulcast horse races violated state constitution

The New Jersey Supreme Court has ruled unconstitutional a proposed arrangement under which horse races conducted by the New Jersey Sports and Exposition

Authority at the Meadowlands race track would be simulcast by television to the Atlantic City Race Course, thereby permitting Atlantic City attendees to place pari-mutuel system wagers on horses running in Meadowlands races and to incorporate their wagers into a central pari-mutuel pool at the Meadowlands track.

A trial court, while noting that a state constitutional amendment unequivocally restricted pari-mutuel wagering on races to the track where a race is held, nevertheless had found that the Association's proposal was within the "external boundaries" of the state's constitution, provided that the proposal received legislative and regulatory approval (ELR 5:12:17).

After the trial court's decision, the Legislature passed the Interstate Wagering Law which provided for the simulcasting and intertrack wagering on horse races conducted within the state. The act was to expire on January 1, 1985 unless it was approved by the electorate in the November 1984 general election. But the Legislature, in a subsequent bill, repealed the public vote requirement of the Interstate Wagering Law, and authorized, on a permanent basis, simulcasting and intertrack wagering.

The Supreme Court of New Jersey, noting the "potential evils and problems of regulation of expanded gambling as well as the fundamental public policy judgment to be made concerning such expansion" declared the provisions of the Interstate Wagering Law ineffective until they are approved by a majority of the voters at a general election.

Atlantic City Racing Association v. Attorney General, 489 A.2d 165 (N.J. 1985) [ELR 7:10:15]

Briefly Noted:

Copyright Infringement.

A Federal District Court in California granted summary judgment to Paramount Pictures and the producers of the film "Trading Places" in a copyright infringement action brought by Marilyn Anderson and Walter Berk, the authors of a screenplay entitled "High Stakes." Federal District Court Judge Marshall found that the basic theme of the two works was very different and also found no meaningful similarity in the mood and pace, plot and sequence or the dialogue and settings of the two works (except for some common and stereotypical phrases). Some of the similarities between the screenplay and the film consisted of unprotectible scenes a fair such as engaging in a toast with champagne at a celebration. Any other resemblance between High Stakes and Trading

Places were random and insignificant, stated the court, with "no pertinence to the 'total concept and feel'" of the works. The claim for copyright infringement was dismissed accordingly.

Anderson v. Paramount Pictures Corporation, 617 F.Supp. 1 (C.D.Ca. 1985) [ELR 7:10:15]

Copyright Infringement.

A Federal District Court in Kentucky found a "virtual absence of similarity of specific features" between a drawing submitted to American Greeting Corporation by Mary Ann Pittman, and the character "Angel Cake" appearing on a line of American's greeting cards and related products. The court therefore granted summary judgment to American on a copyright infringement claim brought by Pittman. In comparing the drawings of the two characters, Judge Ballantine noted that the "Angel Cake" character created by American represented "a cloyingly sweet child," while Pittman's "Little Angel Food Cake" drawing was "in the nature of Renaissance concept of an angel." With reference to a claim of unjust enrichment, the court found that Pittman could not establish the novelty of her design, noting that the depiction of angels had long been employed by artists. And American already was developing the concept of "Angel Cake" at the time Pittman's drawings were submitted.

Pittman v. American Greeting Corporation, 619 F.Supp. 939 (W.D.Ky. 1985) [ELR 7:10:16]

Copyright Infringement.

A Federal District Court in Missouri has denied Roy F. Highfill's motion to dismiss a copyright infringement claim brought by LaSalle Music Publishers. Highfill claimed that LaSalle was required to plead and prove that the performance of the copyrighted work was "for profit." The court rejected Highfill's argument and further stated that if the performance was not "for profit," Highfill was obligated to raise this as an affirmative defense.

LaSalle Music Publishers, Inc. v. Highfill, 622 F.Supp. 168 (W.D.Miss. 1985) [ELR 7:10:16]

Copyright Infringement.

A Federal Bankruptcy Court in New Mexico has held that a "judgment debt" owed to BMI by John A. Gabaldon was a non-dischargeable debt under the bankruptcy laws. Gabaldon started a business called Al's Rock n' Country which hired bands to perform live music. BMI sent several letters to Gabaldon explaining the copyright laws and advising that a license was required to perform protected music. Gabaldon ignored these letters and a judgment for $8,100 was rendered against him in favor of BMI. Gabaldon filed for bankruptcy and attempted to categorize BMI's judgment as a dischargeable debt. The court stated that Gabaldon had willfully and maliciously violated BMI's copyrights; thus, the debt which arose from that conduct was non-dischargeable.

In re John Albert Gabaldon, Case No. 7-84-00810, (D.N.Mex. Bankruptcy Ct., August 15, 1985) [ELR 7:10:16]

First Amendment.

A Federal District Court Magistrate in Massachusetts has ruled that Forbes Magazine and its former reporter Carol Curtis did not have to participate in depositions or produce notes and documents in connection with Curtis' article "Fools Oil," which appeared in the November 19, 1984 issue of the magazine. Information concerning several statements in the article was sought by Oppenheim, Appel, Dixon & Co., a national accounting firm, which was named in a third party complaint in a complex action involving alleged securities law violations in oil and gas programs. Oppenheim contended that it required direct testimony from Ms. Curtis as well as an opportunity to review the underlying documentation for the article. In allowing Forbes' and Curtis' motion to quash Oppenheim's subpoenas, the magistrate stated that "in the case of the newsgatherer, the First Amendment may provide a qualified privilege under federal common law with respect to confidential sources ... This is particularly true when the law of the forum state does not provide for a reporter's privilege. Massachusetts ... does not have a shield law." The magistrate pointed out that Oppenheim did not show that the information requested went to "the heart of the entire case." Forbes and Curtis, however, had a confidential source who had been assured the protections afforded by the First Amendment. Furthermore, the information sought apparently was available from several other sources. It was emphasized that the subpoenaed writings were entitled to the same protection as the author and publisher.

Holton v. L.E Rothschild, Case Nos. 83-3253, 84-1557, 84-4081 (D.Mass., Dec. 20, 1985) [ELR 7:10:16]

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Constitutional Law.

New York appellate court has dismissed a declaratory judgment action brought by a group of Harlem residents challenging the appointment of Robert Morris as chief archivist of the Schomburg Center for Research in Black Culture. The residents alleged that the New York Public Library discriminated in its hiring of Morris because he was selected rather than a black woman who was an assistant archivist at the Center. The court stated that the residents lacked standing to bring the suit because they were not "within the zone of interest to be protected. . .

"nor had they asserted any injury arising out of the purportedly wrongful conduct.

Rodgers v. Koch, N.Y. Law Journal, p. 7 col. 5 (N.Y.App., July 1, 1985) [ELR 7:10:16]

Constitutional Law.

A Federal Court of Appeals has affirmed a District Court order granting a preliminary injunction which restrained the City of West Haven, Connecticut from enforcing its zoning and licensing ordinances against a company wishing to operate an adult bookstore. The court stated that, absent a definition of "adult bookstore" which would confine the application of the ordinance to stores selling "sexually explicit" literature, the ordinance acted as a prior restraint on anyone contemplating opening a bookstore business. The court also held that the ordinance was not a reasonable time, place, and manner restriction, and also was impermissible because the facts suggested that it was aimed solely at the company in question.

754 Orange Ave., Inc. v. City of West Haven, Connecticut, 761 F.2d 105 (2d Cir. 1985) [ELR 7:10:16]

Defamation.

A New York trial court granted NBC's motion to dismiss the claims brought by Maurice Frank, a tax consultant, under sections 50/51 of New York's Civil Rights Law. Frank's cause of action was based upon a "Saturday Night Live" skit in which actor Tim Kazurinsky portrayed "Mr. Maurice Frank-President of the 'Fast Frank' franchise of taxation consultants." "Fast Frank" gave the viewers several humorous and unscrupulous tax writeoffs. The court held that Frank failed to show that the use of his name was for advertising purposes. However, the court held that Frank had stated a defamation cause of action because a reasonable viewer could conclude that the skit was meant to ridicule Frank's actual business practice and impute that Frank was an unscrupulous businessman.

Rank v. National Broadcasting Company, Inc., N.Y. Law Journal, p. 13, col. 4 (Westchester Cnty., Aug. 9, 1985) [ELR 7:10:17]

Defamation.

A New York trial court has dismissed the New Deal Restaurant's defamation action against television station WPIX. A newscaster had made a critical comment regarding the restaurant's serving of lion and hippopotamus meat. Shortly after the newscast, the New Deal began receiving threatening letters and the property was vandalized, causing the restaurant to close down. The New Deal claimed that the newscaster's statement caused the public to have an adverse opinion of the restaurant. The court found that since the statement was true and was the newscaster's opinion, the complaint must be dismissed.

New Deal Restaurant v. WPIX. N.Y. Law Journal, p. 6, col. 3 (N.Y.Cnty., May 21, 1985) [ELR 7:10:17]

Defamation.

A New York trial court has granted Metromedia's motion for summary judgment in a defamation action brought by Samuel DeMilia, the former president of the New York Patrolmen's Benevolent Association. DeMilia contended that a newscaster on television station WNEW Channel 5 made defamatory statements concerning allegations of corruption involving DeMilia during his tenure in office. The court found that most of the newscaster's remarks about DeMilia's activities were true, and that there was insufficient evidence that one statement which may not have been true was made with actual malice.

DeMilia v. Metromedia, Inc., N.Y. Law Journal, p. 6, col. 5 (N.Y.Cnty., July 22, 1985) [ELR 7:10:17]

Defamation.

A Federal Court of Appeals has upheld a District Court's dismissal of a defamation action brought by scientist James W. Fitzgerald against Penthouse. A Penthouse article alleged that the United States Navy and Central Intelligence Agency used animals for military and intelligence purposes, and suggested that Fitzgerald was involved in espionage by selling dolphins as "open-ocean weapons systems" to several foreign countries. Following the second remand of this case to the District Court, the government intervened and requested that the case be dismissed because national security interests were at stake. In affirming the dismissal, the Court of Appeals held that there was no way the case could be tried without compromising sensitive military secrets.

Fitzgerald v. Penthouse International, Ltd., 776 F.2d 1236 (4th Cir. 1985) [ELR 7:10:17]

Libel.

A Federal Court of Appeals has reversed a District Court order dismissing a libel action brought by Action Repair Inc., a Chicago appliance repair company against American Broadcasting Companies, Inc. Action's claim followed the airing of a consumer report segment on station WLS-TV, a Chicago-based affiliate of ABC, during which various comments highly critical of Action's business practices were made. The Court of Appeals found that certain comments were clearly capable of innocent interpretation, and therefore were not actionable. Statements that Action was unwilling to talk to the media and that it canceled interviews were true and therefore not defamatory, held the court. Also not actionable was a statement that individuals should heed the caution "Buyer Beware" when considering dealing with Action. Even though unfavorable, such comments constituted honest opinion. However, a statement concerning a judge's belief about an upcoming customer suit against Action, if false, was at least potentially defamatory, held the court, as were allegedly inaccurate references to unfavorable Better Business Bureau reports about Action, and unsubstantiated allegations that Action was under investigation by the Attorney General's office. When taken in context, the court noted, such statements if false, might be defamatory. But Action's claim for special damages in excess of $1,000,000, without a demonstration of actual pecuniary losses, was ruled insufficient.

Action Repair, Inc. v. American Broadcasting Companies, Inc., 776 F.2d 143 (7th Cir. 1985) [ELR 7:10:17]

Libel.

A New York trial court has dismissed a libel action by Roy Innis, head of the Congress of Racial Equality, against American Broadcasting Companies, Newsday editor Les Payne, and ABC television commentator, Gil Noble. The action was based on comments made during an ABC panel discussion program hosted by Noble on the topic of the responsibility of black reporters to reveal information that might reflect adversely on black public figures. The court rejected Innis' claim that a comment made by Payne about a "contract" being put out on him implied that Innis had hired someone to kill Payne. Taken in context, the court held, the expression was no more than rhetorical hyperbole. And even if a comment about Innis "flacking for the CIA," was understood to imply that Innis was acting as a "front" for the CIA, the court noted that a false report of a lawful attempt to assist a government agency is not considered defamatory. This is true, noted the court, even if friends and colleagues dislike the agency and might disdain those who assist it.

Innis v. Payne, N.Y. Law Journal, p. 6, col. 1 (N.Y.Cnty., December 2, 1985) [ELR 7:10:17]

Libel.

A January 25, 1982 Sports Illustrated article concerning Coach Forrest Gregg related an incident involving Gregg and the Cleveland Browns' former player personnel director, Bob Nussbaumer. The article described how Gregg purportedly discovered Nussbaumer surreptitiously listening to a team meeting, and referred to Nussbaumer as a "spy." An Ohio trial court found that the statements published in the article were substantially true and granted Time, Inc.'s motion for summary judgment.

Nussbaumer v. Time,Inc., 11 Med.L.Rptr. 1398 (Cuyahoga Cnty. 1985) [ELR 7:10:17]

Insurance.

A Federal Court of Appeals has ruled that St. Paul Fire & Marine Insurance Company breached its duty in failing to defend Playboy Enterprises in a libel action brought by Penthouse International. The libel action was based on a letter sent by one of Playboy's regional advertising managers to eleven advertisers; the letter erroneously stated that Penthouse had failed to meet circulation guarantees. The suit was dismissed, but not before Playboy allegedly had incurred over $400,000 in attorneys fees and costs. St. Paul argued that the Playboy policy expressly excluded defamatory publications made "in the course of or related to" advertising activities. The court found that "advertising" constituted the widespread distribution of promotional materials to the public at large. The dissemination of eleven letters was not a publication conducted "in the course of" advertising activities. The court conceded that such publication appeared to come within the plain meaning of the clause "related to advertising activities" but noted that such construction might exclude any business activities conducted by Playboy's advertising manager. Finding the phrase ambiguous, and construing it against the insurer, the court held that St. Paul had breached its duty to defend Playboy in the libel suit, and remanded the matter for a calculation of attorneys' fees.

Playboy Enterprises v. St. Paul Fire & Marine Insurance Co)., 769 F.2d 425 (7th Cir. 1985) [ELR 7:10:18]

Trademark/Beauty Pageant.

There is little likelihood of the public confusing the trademark "Miss VenusU.S.A.," used by Alfred Patricelli to identify his national beauty contests, with the world renowned trademark "Miss U.S.A." used by Miss Universe, Inc. in the operation of its own popular pageants. So held a United States Court of Appeals in affirming a District Court order dismissing a trademark infringement claim brought against Patricelli by Miss

Universe, Patricelli, operating under various marks, had been the subject of three earlier successful trademark claims brought by Miss Universe. In the present case, the court referred to one of the prior actions in which it was held that the Patricelli mark, "Miss U.S.A.-World," was sufficiently similar to the "Miss U.S.A." mark to create possible public confusion. The court noted that Patricelli's subsequent insertion of the word "Venus" between the words "Miss" and "U.S.A." alleviated any such confusion. The facts that Patricelli was a franchisee of Miss Universe at the time of the earlier action, or that the "Miss U.S.A." trademark had strengthened considerably since then were found insignificant. The dismissal of Miss Universe's claim under the New York Anti-Dilution Statute also was upheld because of the failure to establish dilution of the value or quality of the "Miss U.S.A." mark due to Patricelli's use of the name "Miss Venus-U.S.A."

Miss Universe, Inc. v. Patricelli, 753 F.2d 235 (2d Cir. 1985) [ELR 7:10:18]

New York Civil Rights Law.

Carol McCarville, the winner of a "Wet-T-Shirt" contest held in Hampton Bays, New York, was unsuccessful in an action against American Tobacco Company, the sponsor of the contest and against thirteen other parties alleging defamation, infliction of mental distress and the violation of sections 50/51 of the New York Civil Rights Law. A tape of the contest was broadcast as part of a cable television program dealing with events and lifestyles in the Hamptons. McCarville claimed that she was maliciously portrayed in a "salacious manner" because two sensual rock videos were shown just prior to the tape of the contest. A New York trial court rejected

McCarville's claim that the program was an advertisement in disguise in violation of section 51, and also stated that the tape concerned a newsworthy event or matter of public interest which made the tape exempt from the provisions of the statute. The defamation claim was dismissed on the ground that no reasonable person could find that the program exposed McCarville to "shame or contempt." And the court, calling the lawsuit "frivolous, baseless [and] totally without merit ...," assessed costs against McCarville.

McCarville v. American Tobacco Company, 11 Med.L.Rptr. 2344 (N.Y.Cnty., 1985) [ELR 7:10:18]

Restaurant Review.

A restaurant review published by Ste. Jour Azur S.A. in April 1981 in the "Gault/Millau Guide to New York" was a constitutionally protected expression of opinion and did not libel Mr. Chow of New York, a Federal Court of Appeals has ruled. The court therefore vacated a Federal District Court judgment entered upon a jury verdict which awarded the restaurant $20,000 in compensatory damages and $5 punitive damages, and remanded the matter with instructions to dismiss the complaint. It was noted that the statements appeared in the context of a review and reviews "are not normally a breeding ground for successful libel actions." Furthermore the reviewer's use of metaphors and hyperboles did not turn his comments into factual statements-the statements still were entitled to the same constitutional protection as a straightforward expression of opinion.

Only one of the six challenged statements - that Mr. Chow served Peking Duck in one dish rather than the traditional three dishes - might have been considered an assertion of fact. But even if the statement were viewed as false and defamatory, Mr. Chow, a public figure for purposes of this action, did not establish with clear and convincing evidence that the statement was made with actual malice.

Mr. Chow of New York v. Ste. Jour Azur S. A., 759 F.2d 219 (2d Cir. 1985) [ELR 7:10:18]

Art/Ownership.

New York's Surrogate Court denied Douglas Courtnier ownership of a painting entitled "Mirror #3-1971" by Roy Lichtenstein, which Courtnier claimed was given to him by John Bedenkapp before Bedenkapp's death. The court found that no valid gift existed because intent and delivery were not proven. Courtnier relied upon his relationship with Bedenkapp to prove donative intent, but was unable to provide any written instrument demonstrating delivery. Courtnier also relied upon a loan agreement form which named him and Bedenkapp as lenders of the painting to a museum and a certificate of insurance naming both men as beneficiaries of an insurance policy on the painting. But the painting remained in Bedenkapp's home even after Courtnier moved out and the court held that Bedenkapp had not given up dominion or control over the property.

Estate of John Bedenkapp, N.Y. Law Journal, p. 13 col. 4 (N.Y.Surrogate's Ct., Sept. 17, 1985) [ELR 7:10:18]

School Athletics.

A Texas appellate court has reversed a trial court ruling, and held that the North Dallas Chamber of Commerce Soccer Association failed to establish that an eligibility rule promulgated by the University Interscholastic League violated the equal protection guarantees of either the Texas Constitution or of the Fourteenth Amendment and Section 1983 of the Civil Rights Act. The Association is a member of the United States Youth Soccer Association and conducts non-school soccer league competitions in Texas. The Interscholastic League organizes and directs extracurricular activities among Texas public schools. Under League rules, a restriction is placed on varsity high school soccer players, making those who participate ineligible for participation on their high school soccer teams. In reviewing the Association's claims for injunctive and declaratory relief, the court held that the League rule was reasonably related to the objectives of the rule, i.e., to prevent a competitive advantage to schools located in areas in which non-school club soccer was popular and to prevent coaching pressure on varsity team members. And the classification drawn by the rule was relatively narrow; it restricted only those students who were most likely to make the varsity squad and therefore, most likely to encounter the coaching pressure that the rule was designed to prevent.

University Interscholastic League v. North Dallas Chamber of Commerce Soccer Association, 693 S.W.2d 513 (Tex.App. 1985) [ELR 7:10:19]

School Athletics.

Thomas McHale, a college student, was denied a preliminary injunction which would have prevented Cornell University and the National Collegiate Athletic Association from denying his eligibility to play football. McHale questioned the constitutionality of the NCAA transfer rule which requires that a transfer student complete one year at a new college before competing in athletics. A Federal District Court in New York has found that McHale established a likelihood of irreparable harm since application of the NCAA transfer rule, and an Ivy League four year eligibility rule, could restrict McHale's participation in football to just three years. However, the court denied McHale's preliminary injunction because he failed to establish the necessary Fourteenth Amendment state action requirement.

McHale v. Cornell University, 620 F.Supp. 67 (N.D.N.Y. 1985) [ELR 7:10:19]

School Athletics.

Several students from Kentucky, who attended a high school in Ohio, challenged the constitutionality of an Ohio High School Athletic Association rule that barred nonresident students from participating in Ohio high school sports. The students claimed that the rule violated the Privileges and Immunities Clause. A Federal Court of Appeals has affirmed a District Court ruling that the right to participate in interscholastic sports is not a fundamental privilege protected by the Privileges and Immunities Clause and denied the requested relief.

Alerding v. Ohio High School Athletic Association, 779 F.2d 315 (6th Cir. 1985) [ELR 7:10:19]

School Athletics.

Jacqueline Lantz, a junior high school student, will be allowed to try out for her school's football team. A New York regulation prohibited mixed competition in football. But a Federal District Court has held that the regulation was overbroad since it failed to weigh the facts of each individual case. Additionally, the court held that the regulation violated the Fourteenth Amendment because it deprived Lantz of the opportunity to try out for the team.

Lantz By Lantz v. Ambach, 620 F.Supp. 663 (S.D.N.Y. 1985) [ELR 7:10:19]

Sports Franchise.

A Federal District Court in Illinois denied a motion by Chicago Professional Sports Corporation to amend a damage award entered against the company in an action brought by Illinois Basketball, Inc. (ELR 6:11:13). The court previously held that Illinois Basketball was entitled to recover the economic benefits it would have enjoyed if the company had not been wrongfully denied the opportunity to own and operate the Chicago NBA franchise. Chicago Professional Sports challenged the court's decision not to consider, in its "yardstick" measure of damages, the cost of arena expenses. Judge Roszkowski, noting the uncertainty of calculating lease expenses, declined to adjust the damage award. Illinois Basketball also moved to amend the judgment to "correct" the court's calculation of opportunity costs - this motion was granted. But the court affirmed its decision to award interest as of the date judgment was entered, rather than as of the date set forth in a proposed judgment order.

Fishman v. Estate of Wirtz, 609 F.Supp. 982 (N.D.Ill. 1985) [ELR 7:10:19]

Sports.

Brian Oldfield, an Olympic shot put champion, brought an action against The Athletic Congress and the United States Olympic Committee challenging his disqualification from amateur athletics. After competing, in the 1972 Olympics, Oldfield signed a professional performance contract which resulted in the suspension of his amateur status. Oldfield attempted to reestablish his amateur standing but the Athletic Congress sought to exclude Oldfield from the 1980 Olympic trials. Eventually, Oldfield was allowed to compete; presumably because the United States did not compete in the 1980 Olympic Games and the trials were not used to select an Olympic team. The Athletic Congress informed Oldfield that he was ineligible to compete in the 1984 trials. When Oldfield sought a temporary restraining order, a Federal District Court granted summary judgment to the Athletic Congress and the USOC. After reviewing the legislative history of the Amateur Sports Act, a Federal Court of Appeals in California affirmed the District Court's decision, holding that Oldfield had no private right of action against the sports organizations.

Oldfield v. Athletic Congress, 779 F.2d 505 (9th Cir. 1985) [ELR 7:10:19]

Cable Television.

A New York appellate court has set aside a $25,000 award for punitive damages granted to a building owner in New Rochelle, New York in its trespass counterclaim against UA-Columbia Cablevision of Westchester. UA, the holder of a cable television franchise for New Rochelle, had sought specific performance and injunctive relief against the building owner claiming that it had obtained written authorization to install its equipment in the building from an employee who had identified herself as the "managing agent." After determining that the employee was not authorized to permit the installation, the trial court dismissed UA's claims and awarded punitive damages of $25,000 to the building owner. In setting aside the damage award, the appellate court ruled that the damages were not justified since UA had not acted in reckless or wanton disregard of the rights of the building owner. In fact, the court noted, UA had attempted to comply with the New York statute regarding cable television installation. The judgment of the trial court denying compensatory damages and attorney fees was upheld by the court because no evidence was presented of damage to the properties or of any intent by UA to abuse the legal system.

UA-Columbia Cablevision of Westchester v. Fraken Builders, N.Y. Law Journal, p. 14, col. 1 (N.Y.App., Oct. 23, 1985) [ELR 7:10:20]

Cable Television.

A Federal District Court in Minnesota granted the city of Marble's motion for summary judgment and dismissed an action brought against the city by Carlson T.V. Carlson, an unsuccessful bidder to construct the city's cable television system, alleged violations of the federal antitrust laws, Minnesota's public bidding statute and the state's Cable Communications Act. The court held that the city was exempt from federal antitrust laws under the stateaction doctrine which exempts municipalities whose anticompetitive activities are authorized by the state. And Carlson was barred from recovery under the public bidding statute by not diligently challenging the bidding process; the company waited a year and a half after construction began to file suit. The court also found that the Minnesota Cable Communications Act did not apply to the city because the city properly passed a resolution exempting itself from the Act's coverage.

Carlson TV v. City of Marble, 612 F.Supp. 669 (D.Minn. 1985) [ELR 7:10:20]

Cable Television.

A North Carolina appellate court has held that a city ordinance did not authorize the City of Lexington to impose a franchise tax on revenues attributable to the HBO service provided by Summit Communications, Inc. The ordinance imposes a franchise tax on subscriber revenues received for CATV services rendered within the city. CATV service is partially defined under the ordinance as the business of providing an "improved television reception service" to the public. In reversing a trial court ruling, the appellate court found that the HBO satellite service, which did not originate from a television station and which was not accessible on a television set not connected to a CATV cable, did not come within the plain meaning of the ordinance, therefore was not subject to a franchise tax on gross subscriber revenues.

City of Lexington v. Summit Communications, Inc., 332 S.E.2d 519 (N.C.App. 1985) [ELR 7:10:20]

Previously Reported:

The California Supreme Court has let stand a California Court of Appeals decision (ELR 7:7:8) that the City of Oakland could not exercise its eminent domain authority to prevent the relocation to Los Angeles of the National Football League's Raider franchise.

The United States Supreme Court has declined to hear television newscaster Christine Craft's appeal seeking to reinstate a jury verdict which awarded Craft $325,000 in her fraud claim against Metromedia, Inc. The action, in which Craft also alleged that Metromedia's station, KMBCTV in Kansas City, engaged in sex discrimination, was reported in ELR 7:6:15.

A New York appellate court has dismissed with prejudice an action brought by the authors of the play "Everybody Comes to Rick's" against Warner Bros. Pictures and the National Broadcasting Company. A trial court had dismissed the playwrights' complaint without prejudice on the ground that the court lacked subject matter jurisdiction because of federal preemption (ELR 7:7:7). But the appellate court stated that it was not necessary to determine whether the playwrights' claim was preempted by federal copyright law for it was "beyond question" that they had failed to retain any rights which Warners or NBC could infringe, and therefore failed to state a cause of action. According to the court, the playwrights' 1942 assignment of rights to Warners Bros. "unequivocally" demonstrated their intent to assign to the company all their rights in the unpublished play, including "the absolute right to use the work in any manner or medium they desired and to add to or subtract from the work." The grant of rights was sufficiently broad to include the disputed character, continuation or sequel rights, such as the prequel story depicted in the 1983 Warner television series "Casablanca," concluded the court. Burnett v. Warner Bros. Pictures, Inc., 493 N.Y.S.2d 326 (N.Y. App. 1985).

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F.Supp. 1500 (7:8:13); Dryer v. Los Angeles Rams, 220 Cal.Rptr. 807 (7:8:14).

The United States Supreme Court also has declined to hear attorney Jerome Rosenthal's appeal of a $26 million

judgment entered on behalf of Doris Day in the actress' fraud and malpractice action against Rosenthal in connection with his management of the investments of Day and her late husband, producer Martin Melcher (ELR 7:8:12).
[Mar. 1986] [ELR 7:10:20]

DEPARTMENTS

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[ELR 7:10:22]