BUSINESS AFFAIRS

The Regulation of Player Agents (Revisited)

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The social status of player agents - like the outcome of most pre-season ball games - is highly indeterminate. On the one hand, knowledgeable witnesses (who were sworn to tell the whole truth and nothing but) once testified before Congress that agents are "frauds" and "parasites," "the most destructive forces in sports today," and even the prime cause of higher ticket prices. A few years ago, The Boston Globe went so far as to publish a political cartoon depicting an otherwise unidentified "sports agent" as an enormous rat smoking a long cigar.

In all likelihood, the agent was not identified because the cartoonist intended his rat to represent all agents.

On the other hand, after a lengthy investigation in 1975, the U.S. House of Representatives Select Committee on Professional Sports concluded that "player agents are now generally accepted as a permanent, highly visible, and at times positively beneficial element in the sports labor relations process." The House Committee noted that, "Today there is recognition of the benefits in negotiating personal services contracts with a knowledgeable, competent representative rather than with a youthful or unsophisticated athlete, his parent or a friend of the family." The Committee even reported that "There is also acknowledgement of the importance of the legal, investment and personal counseling services a competent agent may provide a player, particularly the younger athlete, and the right of the player to engage for those services."

Although the value of services rendered by player agents was thus acknowledged and duly noted by Congress more than a decade ago, critics of sports agents persisted, and sometimes with good reason. On several well-publicized occasions, players found that their agents had mismanaged or even embezzled their money, had charged excessive fees, had provided inadequate representation due to conflicting interests, or had simply been incompetent. There is, no doubt, more than one precise reason why players have been thus victimized. But one reason has been plain for some time. Until a few years ago, it could be said - and frequently was - that the only "qualification" a person needed to become a sports agent was a client. No training, no degree, no license of any sort was required-until recently.

Agent Regulation Plans

The first mandatory scheme for regulating player agents was adopted in 1981 by the California legislature. The National Football League Players Association (NFLPA) instituted an agent regulation program in 1982. And the National Collegiate Athletic Association (NCAA) put into effect its own agent registration plan in 1984.

Two years ago, the Entertainment Law Reporter published a "Business Affairs" article that described and analyzed the California law and NFLPA program, and briefly reported the major features of the then-proposed (but not yet adopted) NCAA plan. (ELR 5:10:3). The time has now come to revisit the topic of player agent regulation, for several reasons. The state of Oklahoma has since passed an Athlete Agents Act. The California legislature recently amended, quite extensively, that state's sports agency statute. And the National

Basketball Players Association (NBPA) has just adopted a player agent regulation plan of its own.

All five of the player agent regulation plans now in effect resemble one another in significant ways, though no two are identical. Indeed, in many ways, the differences between them are as significant - and far more interesting - than their similarities. This is so because some of these differences are the product of fundamental disagreements concerning such basic issues as: what constitutes a conflict of interest; how large a fee is excessive; what kinds of athletes need protection; and how that protection can best be provided. Therefore, what follows is a comparative analysis of the five plans, organized topic by topic (rather than a summary and analysis of each plan taken one plan after another). Information (including addresses and telephone numbers) indicating where the details of each plan may be obtained is set forth at the end of the article.

Key Questions

Each one of the existing player agent regulation plans addresses itself to six key questions:

1. What kinds of agents does the plan cover? None of the existing plans attempts to regulate every player agent in the United States. Instead, each plan asserts jurisdiction over particular kinds of agents only. For example, some plans cover agents for athletes who participate in one particular sport only, while other plans cover agents for all types of athletes. Some plans cover agents who represent veteran professional athletes only, while other plans cover agents who represent rookies. Some plans cover agents throughout the country, while others cover only those agents who have some connection to a particular state. All of the plans cover agents who provide certain services but not those who provide only other services. And some plans have special provisions for

lawyers in particular, while other plans treat lawyers and non-lawyers alike.

2. What qualifications or characteristics does the plan require a person to have in order to be eligible to act as an agent? Each of the existing plans has provisions concerning educational backgrounds, personal integrity, and the like. And some (though not all) plans require that agents register as individuals rather than as partnerships or corporations.

3. What must an agent do to comply with a plan's requirements? All of the existing plans require registration of one sort or another. Some (though not all) also require such things as: the payment of annual fees to the regulating organization; the use of prescribed or approved forms of agent/athlete retainer agreements; adherence to a maximum fee schedule and rules concerning the manner and timing of the payment of fees by the athlete to the agent; a surety bond or

malpractice insurance; and educational seminar attendance.

4. What sorts of conduct by an agent is prohibited by the plan? All of the existing plans prohibit agents from engaging in certain kinds of conduct, though the particular prohibitions vary from plan to plan. For example, agents are prohibited from doing the following by one plan or another (though not by all): paying a player (or anyone else) to induce the player to become a client; owning a team in the client's sport; representing executives of a team in the client's sport; working as a full-time employee of the client's player association; and requesting or accepting compensation from a team.

5. How are the plan's requirements enforced? Most (but not all) existing plans require that agents be registered or certified. Thus, most plans are enforced by revoking the registration of an agent who has violated the plan's requirements. In some cases (though not all), an

agent whose registration has been revoked will be unable to represent athletes, because teams simply will not deal with an unregistered agent. Some plans (though not all) make violation of their requirements a criminal offense. And civil cash penalties are imposed by some plans.

6. What procedures does the plan contain for resolution of disputes? All of the existing plans create their own potential for disputes between agents and the regulatory organization, and between agents and their player-clients. Some of the plans provide procedures for the resolution of such disputes, though these procedures differ from plan to plan.

In most cases, the answers to these six questions are not at all surprising. In some cases, however, the answers differ from plan to plan; and these differences demonstrate that despite a consensus on the need for the regulation of player agents, there remains significant disagreement on the proper way to do so.

Here is a comparison of the five existing plans, topic by topic. (Please keep in mind that what follows is narrative description of the plans, written in a style that is intended to provide a readable overview of their key provisions. The exact language of the plans should of course be consulted before making a decision about whether or how a particular plan applies to a particular agent in a particular setting.)

Agents Covered

National Football League

The NFLPA plan covers agents who represent veteran NFL football players in negotiations with NFL clubs, and agents who handle the money paid to players for playing services by NFL clubs. (Although the plan does not say so explicitly, it does not cover agents who merely represent players who have never before signed an NFL contract. Ed Garvey and Gene Upshaw, the NFLPA's former and current Executive Directors, have publicly acknowledged that the plan covers only those agents who represent NFL veterans.) Lawyers are covered in the same fashion as nonlawyer agents.

National Basketball Association

The NBPA plan covers agents who represent veteran or rookie NBA players in negotiations with NBA clubs. (But apparently the plan does not cover agents who merely handle the money paid to NBA players, even if it has been paid for playing services.) Lawyers are covered in the same fashion as non-lawyer agents.

National Collegiate Athletic Association

The NCAA plan covers agents who intend to contact NCAA student-athletes who have NCAA eligibility remaining in any sport for the purpose of offering to represent those athletes in professional player contract negotiations, or in connection with endorsements, legal, tax or financial planning, or money management. Lawyers are covered in the same fashion as non-lawyer agents.

State of California

California's Athlete Agents Act covers agents who represent rookie and veteran athletes in all sports (including individual, non-team sports) in negotiating professional sport services contracts, and in seeking employment as a professional athlete. "Professional sport services contracts" are employment agreements with professional sports teams as well as other contracts by which a person agrees to render services "as a professional athlete."

The California Act does not cover agents who merely provide legal, tax or financial planning advice, or who merely manage an athlete's money. Moreover, the California Act may not cover an agent who merely seeks endorsement opportunities and negotiates endorsement contracts, because endorsements do not seem to involve "services as a professional athlete." The issue, however, is not perfectly clear, because it could be argued that when an athlete endorses a product, the athlete is rendering a service "as" a professional athlete, even if the endorsement service itself is not athletic.

The California Act is ambiguous in another important respect as well: it does not indicate whether it covers only those agents who reside (or have an office) in California, or whether it also is intended to cover out-of-state agents who represent California resident athletes, or even nonresident athletes who were contacted by the agent in California or who may have been offered employment by a California team or event promoter. In all likelihood, this ambiguity means that the "geographic" scope of the Act is as great as permitted by Constitutional "due process."

The California Act specifically exempts lawyers (by excluding lawyers from the definition of "agent"), when-but only when-the lawyer is "acting as legal counsel." However, the Act does not specify the circumstances under which a lawyer will be considered to be "acting as legal counsel." Prior to the Act's recent amendment, the California Labor Commissioner proposed a definition that would have meant that lawyers who merely negotiated employment agreements for their athlete-clients (but did not render other legal services as well) would not have been "acting as legal counsel," and thus would have been covered by the Act. The Labor Commissioner's proposed definition created something of a controversy with California's lawyer-agents and it has not been carried forward into the newly-amended Act. Instead, it is now clear that California lawyers are exempt from the Act's registration requirement and many other provisions. But, some sections of the Act are made expressly applicable, by their own terms, to California lawyers; and violations of those sections by California lawyers is made a violation of the State Bar Act, punishable by the State Bar (rather than by the Labor Commissioner).

State of Oklahoma

The Oklahoma Athlete Agents Act covers agents who represent rookie athletes in negotiating employment agreements with professional teams. Thus, the Act does not cover agents whose clients all are veterans; nor does it cover agents whose clients participate in individual (rather than team) sports, such as golf and tennis.

The Oklahoma Act is clear about its intended geographic reach (and is far narrower than the potential reach of the California Act). The Oklahoma act covers agents whose clients are student-athletes who have remaining eligibility at NCAA schools located in Oklahoma; and agents whose clients are student-athletes who reside in Oklahoma (even if those athletes do not attend NCAA schools); if (but apparently only if) the contact between the agent and the athlete occurred in the state of Oklahoma. Thus, it appears (from the wording of the Act itself) that if an agent contacted an Oklahoma resident student-athlete, while that athlete was enrolled in an NCAA college and still had eligibility remaining, but made the contact outside of Oklahoma (while the team was playing an away game, for example) the Oklahoma

Act would not apply. Whether this loophole was intentional or an accident of draftsmanship is unclear. What is clear, however, is that Oklahoma does expect out-of-state agents to register; "Rules and Regulations" issued by the Oklahoma Secretary of State expressly provide for the registration of non-residents. Lawyers are covered by the Oklahoma Act in the same manner as non-lawyer agents.

Eligibility Requirements

Educational Requirements

Not a single one of the existing agent regulation plans expressly requires any minimum level of education. Thusat least insofar as the written regulations are concernedeven a high school dropout could represent a first round draft choice in the negotiation of a multi-year, multi-million dollar contract. On the other hand, all of the existing plans (except California's) require agents to disclose their educational backgrounds (including schools attended and degrees awarded) as part of the registration process.

The California Athlete Agents Act requires "affidavits or certificates of completion" of formal training or practical experience in contracts, negotiations, and complaint resolution. The Oklahoma Athlete Agents Act also requires information concerning training or experience in these areas, and in the areas of income taxation and estate planning. The NFLPA, NBPA, and NCAA plans also request information concerning any professional or occupational licenses an agent may have.

Presumably, all of this information will be made available to any athlete who requests it about a particular agent. (The NFLPA and NBPA plans expressly indicate that such information may be made available to player association members; and the NCAA plans says that the NCAA will respond to requests for specific information from member schools.) If the information is made available, an athlete who is sharp enough (or well enough advised) to request it, would be able to take into account an agent's educational background in deciding whether to retain that agent.

Whether any of the five existing agent regulatory organizations may flatly deny registration to an agent in the first place, on the grounds that the agent's educational background is inadequate, is a more difficult question. The California Act expressly authorizes that state's Labor Commissioner to "evaluate" the "education, training and experience" of an applicant, and to refuse to grant a registration. That Act also authorizes the Labor Commissioner to adopt rules and regulations establishing (among other things) minimum educational requirements; but no such regulations have been proposed as yet.

Similarly, the Oklahoma Act authorizes that state's Secretary of State to adopt rules necessary to carry out the Act. The Secretary of State did adopt some rules, but did not specify what education or experience would be considered necessary. Instead, the rules simply provide that if the Secretary finds an agent's application to be "unacceptable," the agent must be notified in writing of the reason for the rejection of the application.

Agent's Organizational Structure

The NFLPA and NBPA plans require agents to apply for certification as individuals; neither will certify a corporation, partnership or association. The NCAA registration form also seems to contemplate the registration of agents as individuals, though the plan itself makes no mention of whether corporations, partnerships or associations may register in their own names.

On the other hand, the California and Oklahoma acts both expressly provide for the registration of corporations, partnerships and associations, each one of which may employ (or have as partners or associates) more than one agent. Given the expense of registering as an athlete agent in those two states, it may be fortunate that two (or even more) agents may join together to register as a corporation, partnership or association.

Disqualifying Characteristics

The NFLPA and NBPA plans expressly provide that an agent may be denied certification if he or she has ever committed fraud, misrepresentation, embezzlement, misappropriation of funds, theft, or any other conduct which adversely affects his or her credibility, integrity or competence to serve as a player agent. The California application form asks whether the agent has ever been convicted of (or plead guilty or nolo contendere to) a crime; and the California act authorizes the Labor Commissioner to evaluate the agent's "character" in deciding whether to register the agent.

Compliance Requirements

Registration

The NFLPA and NBPA plans require agents to apply for "certification." The California and Oklahoma plans require "registration." And the NCAA plan permits and encourages "registration" (though it does not strictly "require" it).

Payment of Fees

The California Labor Commissioner charges a filing fee of $100 at the time an application for registration is submitted, plus an annual $500 fee for an agent's "main office" and an additional $150 per year for each "branch office." Oklahoma charges an annual fee of $1,000. The NFLPA, NBPA and NCAA do not charge filing or annual fees; but the NFLPA and the NBPA do require agents to attend annual seminars, for which a fee is charged.

Use of Approved Agent/Athlete Contract Forms

The NFLPA and NBPA plans require that representation agreements between players and agents be entered into using standard form contracts, the exact wording of which is prescribed by the rules of those plans.

The California Act does not specify the exact language to be used in agent/athlete contracts, with two exceptions: it requires that such contracts contain a provision warning players that entering into the contract may jeopardize their amateur standing; and the Act requires that such contracts state that the agent is registered with the Labor Commissioner though registration does not imply approval of the contract or the competence of the agent. Although (with these two exceptions) the Act does not specify the exact language to be used in such contracts, it does provide that an agent's contracts with player-clients must be entered into using a form approved in advance by the Labor Commissioner. Approval will not be withheld unless the contract is "unfair, unjust or oppressive" to the athlete, but the Act does not indicate what sorts of provisions would make a contract "unfair, unjust or oppressive."

The requirements of the Oklahoma Act concerning agent/player contracts are quite similar to those of the California Act. The Oklahoma Act also requires that the contract form be approved (by the state's Secretary of State). Oklahoma also requires such contracts to indicate that the agent is registered, though registration does not imply approval of the contract or of the agent's competence. Unlike California law, the Oklahoma Act does not require an amateur standing warning. And Oklahoma's law differs from California's in one other respect as well: use of an approved contract in Oklahoma is required only when an agent enters into a representation agreement with a " non-NCAA athlete." Apparently, agent contracts with NCAA athletes do not need to be approved, though neither the Act itself, nor the Rules and Regulations which implement it, indicate why NCAA athletes are treated differently.

The NCAA plan does not impose any requirements concerning the form of contracts entered into between agents and athletes. No doubt the NCAA is silent on this, because players are not supposed to enter into such contracts at all until their NCAA eligibility is exhausted; and in any event, once such a contract is entered into, the athlete loses whatever remaining NCAA eligibility he or she might otherwise have had. Thus, the NCAA does not have (nor does it claim to have) any regulatory interest in the forms used for agent/player contracts.

Maximum Agent Fee

The fees that agents charge their player-clients have been a subject of controversy for quite some time. Those who criticize agents have attacked the amount of their fees and the timing of fee payments.

Agents often charge their clients a percentage of their clients' income, rather than flat or hourly fees. Critics contend that 10% to 25% (which once was the percentage range for agents' fees) of an athlete's gross income is excessive in relation to the time and effort expended by agentsespecially if that income amounts to, say, a quarter of a million dollars a year or more. It also has been said that such fees became excessive in relation to the results obtained by agents when minimum wages increased significantly as a result of collective bargaining conducted by players associations.

The timing issue arose because some agents used to collect the full amount of their fees as soon as their clients signed contracts with teams, even if those contracts were not "guaranteed" and even if they were multi-year contracts. (Usually, the agent's fee would be paid out of the player's "signing bonus.") In other words, agents used to charge and collect a percentage of the full amount of the salary specified in a player's contract, even though the player might be "cut" from the team and thus not be paid all of that salary. In such cases, a "10%" fee could become more than half of what a player actually received from his team, especially if the fee was a percentage of the total salary called for by a multi-year contract and the player was cut from the team in the first year.

Four of the five existing player agent regulation plans address these fee issues head-on. (The NCAA plan says nothing about fees, because athletes with remaining NCAA eligibility are not permitted to enter into agreements with agents at all. Thus the NCAA does not have, or claim to have, any regulatory interest in fees charged by agents.)

NFLPA Plan.

The NFLPA plan establishes the maximum fee that may be charged an NFL player. The maximum fee for the first year of a contract is 10 % of the amount by which the player's compensation for that year exceeds the minimum salary required by the NFL Collective Bargaining Agreement for that player, or $1,000, whichever is greater. (The minimum salaries required by the NFL Collective Bargaining Agreement increase as a player's years of NFL experience increase.) The maximum fee for the second year of a multi-year contract is 5% (7% if the contract is guaranteed) of the amount by which the player's compensation for that year exceeds the minimum salary required by the collective bargaining agreement. And the maximum fee for the third year of a contract is 2% (3% if the contract is guaranteed) of such excess.

If an agent is unable to negotiate compensation in excess of the minimum required by the NFL Collective

Bargaining Agreement, the maximum fee an agent may charge is $125 an hour or $1,000, whichever is less; and even this fee may not be collected unless and until the player has been on his team's "Active List" for at least one regular season game.

The compensation on which a fee may be based includes signing and reporting bonuses as well as salary. But it does not include, and thus agents are not entitled to fees based on, incentive or performance bonuses, collectively bargained for benefits, or option year compensation. Moreover, an agent may not receive a fee unless and until the player receives the compensation upon which that fee is based.

In cases of "exceptional achievement" by an agent, or in cases where negotiations required "an extraordinary amount of additional time," the NFLPA may allow an additional fee (above the maximum) if the agent applies for it and the player approves it.

NBPA Plan.

The NBPA's rules concerning agent fees are similar in concept to those of the NFLPA, but different in detail. Under the NBPA Plan, the maximum fee an agent may charge for negotiating a contract providing for compensation in excess of the collectively bargained for minimum is 4% of the player's compensation (the total compensation, not just the excess over the minimum). If the player receives only the minimum required by the collective bargaining agreement ($75,000 for the 1986-87 season), the maximum fee an agent may charge is $2,000 for each season covered by the contract. In the NBA, an agent's fee is not affected by whether the player's contract is guaranteed.

An agent is not entitled to receive his fee until the player receives the compensation on which the fee is based. (However, the plan states that the NBPA recognizes that there may be circumstances under which it would be in the player's best interest to pay his agent in advance; and thus the rules give the player the option to do so, if he chooses to do so, though the agent may not require advance payment.)

In the NBA, the compensation on which a fee may be based includes performance bonuses as well as signing bonuses and salary. Agents are not entitled to a fee, however, based on the value of personal loans from teams to players, insurance, autos, residences, or the like.

The NBPA plan makes it plain that the maximum fee applies only to player contract negotiation services, and that agents may charge additional fees for other services, such as financial consulting, money management, or endorsement contract negotiations. However, the plan prohibits agents from increasing the fees they would have charged for such other services, in order to circumvent the limitation on fees for player contract negotiations.

California Athlete Agents Act.

California law requires that agent/player contracts (including those used by lawyers) describe the types of services to be performed and the fees to be charged. In addition, agents (though not lawyers) must file a schedule of their fees with the California Labor Commissioner, and though changes in the schedule may be filed from time to time, changes do not become effective until seven days after they are filed.

California law also imposes a limit on the amount that an agent may charge for negotiating a "professional sport services contract." An agent may not collect, in any calendar year, a fee greater than 10% of the compensation received by the athlete under such a contract during that calendar year. This fee limitation is perfectly compatible with - and is in fact a good deal more generous than - the fee limitations imposed by the NFLPA and NBPA. Moreover, by virtue of competition among agents, it is unlikely that an agent would be able to charge more than 10% for negotiating player contracts for professional baseball, hockey or soccer players.

However, fees charged by some agents for professional golfers and tennis players still do exceed 10%, though the services such agents provide usually are more comprehensive and time consuming than the negotiation of a single employment agreement every one to four years. If a golfer or tennis player agent provides money management services or investment advice, the agent's fee for those services is not subject to the 10% limitation, because those services do not involve the negotiation of a "professional sports services contract."

California law is not quite as clear on whether the 10% limitation applies to obtaining endorsement opportunities or negotiating endorsement agreements. As noted above, the 10% limit applies only to the negotiation of a "professional sport services contract." Such a contract is defined to include "any contract" by which a person renders services "as a professional athlete." It could be argued that when a golfer endorses a product, he or she does so "as a professional athlete" and the 10% limit does apply. On the other hand, the endorsement service itself is not athletic; so it could be argued that an endorsement agreement is not a "professional sport services contract" and the 10% limit does not apply.

Insofar as golf agents are concerned, the California act is ambiguous in another way as well. Professional golfers earn money in at least two different ways (quite apart from any endorsement income they may enjoy). Golfers earn income by playing well in tournaments and winning money for doing so. Tournament participation agreements that provide for the payment of prize money are contracts by which golfers render services "as a professional athlete, "because such agreements do require golfers to render "sport services." Thus, the negotiation of tournament participation agreements would be subject to California's 10% limitation.

Some golfers also receive "appearance fees" from tournament sponsors, just for showing up. Although sponsor and golfer both naturally assume that a golfer who has been paid an appearance fee will participate in the tournament, actual participation often is not an express written condition of agreements that provide for "appearance fees." There is thus some question as to whether an "appearance fee" agreement is subject to the 10% limitation. Such agreements usually are negotiated by agents; and agents often charge more than 10% to do so, especially when the agent sought out and successfully obtained the appearance opportunity for his or her client in the first place. As was true in the case of endorsements, it may be argued that a mere "appearance" is not a sport service, and thus appearance money agreements are not subject to the 10% limitation. On the other hand, it also could be argued that an agreement by a professional golfer to appear at a tournament is an agreement to render a service "as a professional athlete" (even if the appearance is not athletic), and therefore the 10% limit does apply.

Oklahoma Athlete Agents Act.

Oklahoma law also contains what appears at first glance to be a maximum fee limitation. On closer inspection, however, it becomes clear that the limitation protects only a narrow class of athletes, and insofar as amounts are concerned, is the most generous towards agents of any of the other agent regulation plans.

The fee limitation applies only to agents who represent rookies who reside in Oklahoma and who have not attended an NCAA school located in that state. Furthermore, the limitation applies only when an agent has negotiated a multiyear contract with a professional sports team. In such cases, an agent may not collect, in any 12-month period, a fee that is greater than the amount the athlete will receive under the contract during that 12-month period.

Agents must file a schedule of their fees with the Oklahoma Secretary of State. (Fees may be changed from time to time, seven days after the change is filed.) However, Oklahoma law only requires agents to file schedules of the fees they charge rookies who reside in

Oklahoma and who have not attended an NCAA school located in that state.

Neither the Oklahoma act, nor Rules and Regulations adopted to implement it, suggest any reason why NCAA student-athletes have not been afforded even this minimal protection.

Submission of Agent/Player Contracts

The NFLPA plan requires agents to submit to it copies of their contracts with players within 10 days of their execution. The NBPA requires agents to file such contracts within five days.

The Oklahoma Athlete Agents Act requires agents to file with the Oklahoma Secretary of State, within five days of execution, contracts entered into with rookies who are Oklahoma residents and who did not attend NCAA schools. In addition, if the athlete is a student at a non-NCAA institution of higher education in Oklahoma, the agent must file the contract with the athletic director at the student's school.

California law no longer requires agents to file their contracts with athletes with anyone. Prior to the recent amendment of the California Athlete Agents Act, the law did require agents to file client contracts and registration certificates with the president of a student-athlete's school. But that provision was repealed as of January 1, 1986.

As soon as an athlete enters into a contract with an agent, the athlete loses whatever NCAA eligibility he or she otherwise would have had. Therefore, the NCAA has no regulatory interest in such contracts, and the NCAA plan does not require that they be filed with anyone. However, the NCAA plan does require agents to notify the athletic director of an NCAA school before contacting any of that school's student-athletes who have remaining NCAA eligibility, and before contacting any of their coaches.

Advising Regulatory Body

The NFLPA plan requires agents to keep it informed of developments in contract negotiations on behalf of individual players with NFL teams. It also requires agents to advise the NFLPA of known violations by an NFL team of a player's contract rights.

The NBPA does not require agents to keep it advised concerning developments in contract negotiations. It does, however, require agents to advise it concerning any violations by an NBA team of a player's contract.

There are no comparable provisions in the California or Oklahoma acts, or in the NCAA plan.

Surety Bond

Both the California and Oklahoma acts require agents to post surety bonds covering payments due to their clients, and covering damages caused by such things as fraud and even negligence. California law requires a $25,000 bond; Oklahoma requires a $100,000 bond. Oklahoma lawyers are permitted to provide proof of professional liability insurance in lieu of the bond. California lawyers are not required to post a bond or have malpractice insurance.

The NFLPA, NBPA and NCAA plans do not have bonding requirements. Nevertheless, the NFLPA and NBPA registration forms do ask agents whether they handle players' funds, and if so, whether they are bonded and the name of the bonding company.

Seminar Attendance

The NFLPA and NBPA plans each require agents to attend an annual seminar conducted (separately) by those associations on contract negotiations. There is no comparable requirement in the California or Oklahoma acts, or in the NCAA plan.

Maintaining Financial Records

The California and Oklahoma acts each require agents to maintain described financial records (and Oklahoma requires agents to file copies of those records with its Secretary of State). California law also requires agents to establish a trust fund if they receive their clients' salaries. There are no comparable requirements in the NFLPA, NBPA or NCAA plans.

Prohibited Conduct

The compliance requirements outlined above are designed to remedy some problems in an affirmative way by compelling agents to do certain things. Some problems, however, can be cured (if at all) only by prohibiting some conduct outright. Not surprisingly, therefore, all of the existing agent regulation plans contain a number of prohibitions. This is the area, more than any other, where differences among the plans are truly significant, because some of these differences are the result of fundamental disagreement about what agent conduct is acceptable and may be permitted, and which is not and must be prohibited.

Client Solicitation Methods

None of the regulation plans prohibits agents from soliciting clients. None of the plans prohibits even in-person solicitation of athletes with whom the agent has no prior relationship-though of course the American Bar Association Model Rules of Professional Conduct and the corresponding laws of virtually all states do prohibit solicitation by agents who are lawyers. On the other hand, four of the five plans do prohibit agents from doing certain things as part of their recruitment efforts.

The NFLPA plan prohibits agents from providing "anything of significant value" to a player in order to become that player's agent, or to anyone else in return for a personal recommendation. The NFLPA also prohibits agents from providing false or misleading information to anyone in the context of soliciting clients, including the use of titles or business names which imply the existence of professional credentials which the agent does not actually have. The NBPA plan contains similar prohibitions (though their exact wording differs somewhat from the NFLPA's).

The California and Oklahoma Athlete Agents Acts prohibit agents from offering anything of value (including free or reduced price legal services) to a college employee in return for the referral of clients.

Team Ownership

The NFLPA plan prohibits agents from owning a financial interest in "any" professional team (which would include, for example, a USFL team). And the NBPA plan bars agents from owning a financial interest in "any" professional basketball team.

The California act similarly prohibits agents (and lawyers) from owning a financial interest in "any entity which is directly involved in the same sport" as their clients. The Oklahoma act is, however, silent on this issue.

Representation of Team Management Personnel

The NFLPA plan permits agents to represent NFL management personnel, but requires agents to disclose to potential player-clients the names of any management personnel the agent has or is representing.

The NBPA plan differs from the NFLPA's, in that the NBPA does prohibit agents from representing the general manager or coach of any NBA team (or other management personnel who participate in decisions concerning how much compensation to pay players).

The California and Oklahoma acts are silent on this issue.

Other Conflicts of Interest

Both the NFLPA and NBPA plans also prohibit agents from engaging in any other activity which creates an actual or potential conflict of interest with the effective representation of players (though the NBPA plan specifically states that the representation of more than one player on one team is not itself prohibited). The California and Oklahoma acts do not prohibit conflicts of interest in general; but the California act does require agents who give investment advice to disclose any ownership interest the agent may have in any entity about which such advice is given.

Collective Bargaining Agreement Violations

Both the NFLPA and NBPA plans prohibit agents from negotiating or agreeing to player contract provisions which would deprive players of the benefits of their collective bargaining agreements. California law does not contain this exact prohibition, but it does prohibit agents from obtaining employment for clients where a strike, lockout or other labor trouble exists without notifying the client of any such condition. The Oklahoma act is silent on this issue.

Employment by a Players Association

Neither the NFLPA nor the NBPA plan prohibits player association employees from being agents for individual association members at the same time the agent is employed by the player association. The Oklahoma act also is silent on this issue.

The California Athlete Agents Act, on the other hand, prohibits full-time employees of players associations from being player agents. Lawyers are expressly covered by this prohibition.

Receiving Payment of Agent's Fee Directly from Team

The NBPA plan prohibits agents from accepting payment of their fees from their clients' teams. Indeed, the plan even prohibits agents from discussing the amount of their fees with NBA teams.

The NFLPA plan, on the other hand, contains no such prohibition. Although the California act does not address this issue clearly or directly, it does expressly permit an agent to "require security that his or her future fees will be paid." One practical form of "security" for the payment of fees is an agreement between the agent, player and team that the team will pay the agent's fee directly, after deducting it from payments that are to be made to the player. Oklahoma law is silent on this issue.

Other Prohibited Conduct

Each of the five existing plans contains additional prohibitions which do not fall neatly into any of the foregoing categories. Among the more significant of these miscellaneous prohibitions are the following.

The NFLPA and NBPA plans both prohibit agents from accepting gifts from teams in their respective leagues.

The California and Oklahoma acts prohibit agents from dividing their fees with a professional team or league or any of their employees.

The Oklahoma act also prohibits agents from contacting NCAA student athletes before their NCAA eligibility expires, unless the school itself sponsors on-campus interviews with agents. Even the NCAA plan is not as strict as the Oklahoma act on this issue, because under NCAA rules, mere contacts between agents and athletes are not prohibited. (In fact, the NCAA plan contemplates that there will be contacts between agents and NCAA athletes; it merely requires agents to notify athletic directors before making those contacts.) However, the NCAA plan does prohibit agents from doing anything that would jeopardize a student-athlete's NCAA eligibility.

Enforcement of Requirements and Prohibitions

Revocation of Registration or Certification

All five agent regulation plans enforce their provisions by making violations a ground for suspending or even revoking an agent's registration or certification: The consequences to an agent of revocation or suspension vary from plan to plan.

Under the NFLPA and NBPA plans, teams in the NFL and NBA are themselves prohibited from dealing with uncertified agents, and thus the consequences of revocation or suspension are immediate and self-enforcing.

Under the NCAA plan, an agent's name is removed from the NCAA's list of registered agents, if the agent violates the plan's requirements. The consequences here are not as immediate or as certain as they are under the NFLPA and NBPA plans, however, because players are not prohibited from talking with unregistered agents. Moreover, although the NCAA has strongly urged coaches and athletic directors to advise student-athletes to consider hiring only those agents who have registered, the NCAA has no control over who student-athletes actually do hire to represent them.

Under the California and Oklahoma Athlete Agents Acts, an agent whose registration is suspended or revoked is not permitted to act as an agent, and doing so in violation of those acts is an additional and separate violation which may be punished by the state (in the ways described below).

Civil Penalties

In addition to suspension or revocation of an agent's registration or certification, violation of a plan's provisions may give rise to further penalties.

Under the NFLPA and NBPA plans, suspension or revocation of an agent's certification automatically terminates any representation contracts then in effect between the agent and NFL players. (The NBPA plan provides that even if a representation agreement is terminated, the agent is entitled to be paid any fee he or she earned for services already performed. The NFLPA plan is silent on this issue.)

The California and Oklahoma acts contain contract termination provisions which are similar to, but not quite as clear as, those of the NFLPA and NBPA. In California, a contract between a player and an agent who has failed to register is "void and unenforceable." Apparently, however, if the agent was registered when the contract was entered into, suspension or revocation of the agent's registration at a later date does not automatically terminate the contract. In Oklahoma, an agent/athlete contract "that is negotiated by an athlete agent who has failed to comply with this act is void." This seems to mean that the contract is void only if the agent "failed to comply" at the time the contract was negotiated. If this is the proper interpretation, the Oklahoma act is similar to the California act on this issue. Arguably, however, the Oklahoma act means that the contract becomes void whenever it is determined that the agent "failed to comply"-Whether that failure was before or after the contract was "negotiated." If this is the proper interpretation, the Oklahoma act is similar to the NFLPA and NBPA plans on this issue.

The NFLPA plan also authorizes the NFLPA to impose a "fine" of as much as $5,000 to be paid to charity, and to require the agent to pay his or her client the amount of any loss suffered by the player as a result of the agent's violation of the plan's regulations. The Oklahoma act provides for the payment of a "civil penalty" of as much as $10,000; repayment to the agent's clients of any fees paid by them; and payment of any attorney's fees and court costs incurred by an athlete who sues an agent for violating that act. Neither the NBPA plan nor the California act provide for the payment of civil cash penalties.

The NFLPA and NBPA plans also authorize those two associations to privately or publicly "reprimand" agents who violate plan regulations.

Criminal Liability

Violation of the California and Oklahoma acts is a misdemeanor, punishable in California by a fine of not less than $1,000 and/or imprisonment for not more than 90 days, and in Oklahoma by a fine of not more than $500 and/or imprisonment for not more than one year.

The NFLPA, NBPA and NCAA do not of course have legal authority or jurisdiction to impose criminal sanctions themselves; and none of their plans purports to do so.

Dispute Resolution Procedures

Four of the five existing agent regulation plans contain fairly extensive provisions describing the procedures that are to be used to resolve disputes. (Only the NCAA plan does not.)

Disputes between Agents and Regulators

Under the NFLPA and NBPA plans, an agent who has been denied certification, or whose certification has been suspended or revoked, may appeal to an "outside" arbitrator. The procedures for such an appeal, and for the appointment of an arbitrator, are quite detailed, and were clearly designed to provide agents with a Constitutional degree of due process.

The California act provides that before the state Labor Commissioner may refuse to register an agent, or suspend or revoke a registration, the Commissioner must conduct a hearing. The procedures for such hearings are quite detailed (and are set forth in the California Government Code).

The Oklahoma act itself does not provide for hearings. But the Oklahoma Secretary of State has adopted Rules and Regulations which do, in the event the Secretary rejects an application for registration or seeks to suspend or revoke an agent's registration or seeks to impose a fine. The procedures for such hearings are quite detailed.

Disputes between Agents and their Player-Clients

The NFLPA and NBPA plans each provide an "exclusive" procedure for the resolution of disputes between agents and their player-clients. The procedure may be initiated by players or by agents and is begun by the filing of a "written grievance." The NFLPA or the NBPA (as the case may be) then investigates and attempts to mediate the dispute itself, informally. If, however, the dispute is not resolved through mediation, either party may proceed to arbitration before an "outside" arbitrator who will conduct a hearing. The arbitrator's decision is final and binding, and is intended to preclude resort to litigation in court.

The California act provides that disputes between athletes and agents are to be referred to a hearing before the state Labor Commissioner, though the Commissioner's decision may be appealed to court where the case is to be heard and decided again "de novo." However, the California act also provides that if, as a result of a player association rule, an agent/athlete contract contains a provision for arbitration of disputes, such disputes need not be referred to the Labor Commissioner, so long as the Commissioner is given notice of the arbitration and the right to attend all hearings. Thus, under the California act, the NFLPA and NBPA arbitration procedure takes precedence.

The Oklahoma act itself does not provide any special procedure for the resolution of disputes between agents and their player-clients. The Rules and Regulations adopted by the Oklahoma Secretary of State do permit "a person having a complaint against an agent" to file a complaint with the Secretary of State, which may result in an investigation and hearing by the Secretary's staff. However, it appears that the complaint must be based on an alleged violation of some provision of the Oklahoma Athlete Agents Act; and it appears that the sole remedy that may be awarded is the revocation or suspension of an agent's registration. The Rules and Regulations do not provide agents with a procedure for initiating complaints against players. And thus it appears that in Oklahoma, disputes between agents and players will be resolved by the NFLPA or NBPA (if members of those associations are involved) or by the courts.

Conclusion

This article has described and compared the five currently existing agent regulation plans, and the words "currently existing" are emphasized on purpose. More such plans are in the works, and at least one of them is likely to be implemented in the next year or two.

At the state government level, the legislatures of New York and Texas have considered enacting statutes of their own. New York's bill dates back to 1979 and was not passed. The Texas bill is a more recent vintage. It was introduced in 1985, and though it was not enacted in Texas, the Texas bill was the model for the Oklahoma Athlete Agents Act. It hardly would be surprising if the passage of virtually identical legislation in neighboring Oklahoma has encouraged the sponsors of the Texas bill to reintroduce it in the Texas legislature another time or two.

At the U.S. government level, the Sports Lawyers Association has proposed a federal Professional Sports Agency Act. The proposed bill has not been introduced in Congress as yet, but it has been studied, informally, by the staff of the Senate Committee on Commerce, Science and Transportation. In this era of deregulation in Washington, D.C., many observers think it unlikely that Congress will enact new regulatory legislation; and perhaps it will not. On the other hand, a player agent's practice is likely to be national (rather than intrastate), and thus there is a good deal to be said for a single, uniform, national standard for the regulation of player agents. If and when Congress completes its work on tax and budget reform, it may in fact decide to pass a federal Professional Sports Agency Act.

In the near term, a new agent regulation plan is most likely to come from the Major League Baseball Players Association which reportedly intends to have regulations of its own in effect by the 1987 season.

For More Information

Copies of all five existing plans, including registration forms, (plus copies of the New York, Texas, and federal bills) have been reprinted in Representing Professional Athletes and Teams 1986, a course handbook published by the Practicing Law Institute. For information on how to order the handbook, see the "Book Note" section of this issue of the Entertainment Law Reporter.

The NFLPA plan, including an application for certification and a Standard Representation Agreement, is available from the National Football League Players Association, 1300 Connecticut Avenue, N.W, Washington, D.C. 20036; phone (202) 463-2200.

The NBPA plan, including an application for certification and a Standard Player Agent Contract, is available from the National Basketball Players Association, Committee on Agent Registration and Regulation, 15 Columbus Circle, New York, N.Y. 10023; (212) 541-6608.

The NCAA plan, including a registration form, is available from the National Collegiate Athletic Association, Nall Avenue at 63rd Street, P.O. Box 1906, Mission, Kansas 66201; phone (913) 384-3220.

The California Athlete Agents Act is codified in the California Labor Code at sections 1500 through 1547, and in the California Business and Professions Code at section 6106.7. A copy of the act and registration forms are available from the California Department of Industrial Relations, Division of Labor Standards Enforcement, 525 Golden Gate Avenue, P.O. Box 603, San Francisco, California 94101; phone (415) 557-2347.

The Oklahoma Athlete Agents Act is codified in Title 70 of the Oklahoma Statutes at Sections 821.61 through 821.70. Rules and Regulations implementing the act, and an Application for Registration, are available from the Oklahoma Secretary of State, 101 State Capitol Building, Oklahoma City, Oklahoma 73105.

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[ELR 8:2:3]

RECENT CASES

Apple Corps is awarded over $7.6 million in damages and injunctive relief in right of publicity and unfair competition claims against producers of "Beatlemania"

Multiple-choice quiz. Beatlemania: (a) hysteria aroused by the sight of little insects; or (b) a production consisting of Beatles look-alike, sound-alike imitators performing for about 90-100 minutes, live on stage, about 30 of the more popular Lennon-McCartney songs, accompanied by slides and movies depicting events occurring during the 1960's.

The correct answer - (b) - was the subject of an action brought by Apple Corps Limited against Steven Leber and David Krebs, the producers of Beatlemania. The producers argued that Beatlemania contained significant political and social comment about the 1960's, and therefore met the "newsworthy or public interest" provision of sections 50/51 of the New York Civil Rights Law (New York law was applied in the case) or that the work was absolutely protected by the First Amendment.

Los Angeles Superior Court Judge Paul G. Breckenridge Jr. in a Memorandum of Intended Decision recalled, citing Zacchini v. Scripps-Howard, 433 U.S. 563, that the protection of the First Amendment is not absolute. However, in order to resolve the apparent conflict between the protection of the First Amendment and the right of publicity, courts have refused to find that publications concerning newsworthy matters or matters of legitimate public interest amount to "use for the purposes of trade." Instead, courts have considered the facts and circumstances of each case. In the instant proceeding, given the absence of "any clear cut New York or California standards," Judge Breckenridge found it appropriate "as a matter of California public policy," to rely on the reasonable and predictable factors set forth in the fair use provision of the Copyright Act in order to evaluate the Beatlemania parties' conduct. Without reviewing the fair use factors in detail, Judge Breckenridge concluded that the appropriation in this case greatly exceeded any fair use.

Apart from fair use considerations, the court declared that as in Zacchini, the Beatlemania producers' taking or use amounted to "virtually a complete appropriation of the Beatles' 'persona' at least in a qualitative sense." According to Judge Breckenridge, the primary purpose of Beatlemania was the commercial exploitation of the Beatles persona, goodwill and popularity. While acknowledging that Beatlemania was a "top quality performance," the court pointed out that the effect of the production was to cause audiences to "fall prey to the illusion that they were actually viewing the Beatles in performance.'" Furthermore, the audiences engaging in this illusion apparently amounted to several million people during the more than three years that Beatlemania was presented in New York and as it was staged by two national touring companies. The $45 million earned by Beatlemania was a "massive appropriation" of the Beatles persona, stated Judge Breckenridge who concluded that a New York court most likely would find a violation of sections 50/51, and, accordingly, granted judgment to Apple Corps on its right of publicity claim.

Apple Corps also was entitled to judgment on its unfair competition cause of action because "common sense and a reasonable inference from established facts support[ed] the conclusion that there was a reasonable likelihood that many viewers of Beatlemania were confused as to whether the Beatles had authorized, consented, or approved the Beatlemania production." The Beatlemania advertising and promotional material did not disclaim any inference that the Beatles had licensed or approved the production. And the disclaimer in the film version of Beatlemania most likely was not seen or read by most viewers.

The Beatlemania producers contended that the Beatles and Apple did not suffer any damages from the presentation of Beatlemania, particularly since they received substantial music royalties. But it was not necessary for Apple to prove an out of pocket loss; the harm in this case was the taking of a right and the measure of damages was the reasonable value of what was taken, stated the court. Also rejected was a statute of limitations defense - the producers of Beatlemania were on notice "from the very beginning" that the Beatles and Apple objected to Beatlemania, and there was no express or implied consent to the production.

Judge Breckenridge, after observing that in the mid-197O's Apple "could have named its own price for the exercise of the right to license a production such as Beatlemania," determined that a royalty rate of 12 1/2 % of the gross earnings of the production represented the fair market value of the right taken by the stage performance of Beatlemania, and set $2 million as the value of the right taken by the film version. Prejudgment interest was imposed, but punitive damages were not awarded since the court expressed the view that Leber did not act maliciously. The total judgment announced against the Beatlemania producers amounted to $5,625,000 plus interest; the movie parties were found liable for $2 million plus interest. And injunctive relief was granted barring further unconsented presentations of Beatlemania or the exploitation of the Beatles persona in any form.

Apple Corps Limited v. Leber, Case No. C299149 (L.A.Cnty., June 3, 1986) [ELR 8:2:13]

Distributor of "Miami Mice" products did not infringe Universal City Studios' trademark rights in television show "Miami Vice"

A Federal District Court in Florida has denied Universal City Studios' motion for a preliminary injunction against Casey & Casey, the manufacturer of clothing, posters and other products featuring cartoon figures under the caption "Miami Mice." Universal, the producer of the television series "Miami Vice," applied for a trademark for the logo of the series; the company has marketed various products bearing the logo which consists of the tide printed in stylized block letters with the word "Miami" above the word "Vice."

Casey & Casey's "Miami Mice" design consisted of two mice in casual dress clothing similar to the fashions seen on "Miami Vice." Above the mice, the words "Miami Mice" appear in block letters with the words "Miami" and "Mice" printed side-by-side.

The District Court found that although there were similarities between the "Miami Vice" characters and the "Miami Mice" cartoon figures, consumers would not likely believe that the "Miami Mice" items were sold with the authorization or consent of Universal. "The word 'Miami' is not a proprietary term, either when used in conjunction with the word 'Vice' or in connection with any other element of [Universal's] television series;' stated the court, in denying the studio's trademark infringement claims.

The court also stated that the copyrighted elements of the television series were not "minutely reflected" in Casey & Casey's products-the mice were comical figures which would appeal to children whereas "Miami Vice" features law enforcement officers who are portrayed as "the embodiment of style, courage, and determination."

Universal City Studios, Inc. v. Casey & Casey, Inc., 622 F.Supp. 201 (S.D.Fla. 1985) [ELR 8:2:13]

Copyright infringement claims brought by competing distributors of the film "The Bicycle Thief" are dismissed as Federal District Court finds that the Italian language version of the film entered the public domain in 1976

In August 1967, Richard Feiner and Company entered into a ten year contract with Produzioni de Sica for the rights to the theatrical, non-theatrical and television exploitation in the United States of an English-language dubbed version of the 1948 film "The Bicycle Thief." In 1970, the contract was amended to include the right to distribute an Italian-language version of the film, with or without subtitles, and Feiner's distribution rights were extended through 1992. Feiner then granted an exclusive license to Corinth Films for the non-theatrical distribution of the film, and to Arnold Jacobs for its theatrical distribution (Corinth subsequently assumed Jacobs' license).

In 1974, Produzioni de Sica went bankrupt and Italfilmexport acquired all "rights of economic utilization" in the film except for any rights previously acquired by authorized third parties. Italfilm assigned its rights in the film to G.F.C. General Film Company. In October 1974, General Film and International Film Exchange entered into agreements whereby International Film acquired an exclusive license to create and distribute a subtitled version of the film for a 12 year period beginning in 1977. In 1977, International Film granted an exclusive ten year license in the film to Macmillan Films.

When International Film eventually sued Corinth for copyright infringement, it was alleged that Feiner had not obtained the proper authorization from Italian officials of the company's transfer of its rights, thus voiding the transfer to Corinth.

A Federal District Court in New York has dismissed the copyright infringement claims of both International Film and Corinth, finding that the original work entered the public domain in 1976. Under the 1909 Copyright Act, copyright protection was available to the film for 28 years from the date of its first publication. But neither Corinth nor International Film applied for a renewal copyright in the film during the specified period of December 1975 through December 1976. In November 1976, International Film did receive a renewal certificate, in its own name, from the Copyright Office. But as a licensee of rights rather than an assignee, the company was not entitled to renew the copyright in its own name. The rights acquired by International Film were for a set term of years and for a limited geographical area. The fact that International Film's license granted the company the "right of renewal" to the film only meant that the company had a right to secure the renewal copyright in the name of the author. The film therefore irrevocably entered the public domain upon the expiration of the initial term of copyright.

The court concluded by recognizing that its decision did not preclude the existence of a valid derivative work copyright interest in either an English language version (if one existed) or a subtitled version of the film. Under the Copyright Act of 1976, derivative works, including a translation of a preexisting work, are independently copyrightable. It was unclear, however, whether Corinth or International Film was claiming the infringement of a derivative work and the court therefore declined to grant summary judgment with respect to any infringement claims based on derivative versions of the film.

International Film Exchange, Ltd. v. Corinth Films, Inc., 621 F.Supp. 631 (S.D.N.Y. 1985) [ELR 8:2:14]

Twentieth Century-Fox obtains dismissal of breach of contract and antitrust claims brought by co-producer of television show, but Federal District Court in New York refuses to dismiss claim alleging intentional misstatement of financial information

In June 1980, International Television Productions Ltd. entered into a joint venture with Jerry Harrison & Associates with the object of producing a series of television programs entitled "The Roots of Rock 'N Roll." In October, the joint venture signed an exclusive distribution agreement with Twentieth Century-Fox Television Division whereby the joint venture would produce six one-hour television programs to be distributed worldwide by Fox. Fox agreed to pay the joint venture $100,000, after the delivery of each show,, as an advance against royalties. In order to finance the production costs for the programs, Harrison obtained funds from Harold M. Cerra;

the sums advanced by Cerra were to be repaid from the Fox revenue.

The joint venture delivered the six programs to Fox and the programs originally were broadcast in 1981. But according to International Television, Fox refused to pay the joint venture $300,000 of the $600,000 fee specified in the distribution agreement.

Federal District Court Judge Goettel, after commenting on the "conundrum" style of the complaint presented by International Television and Cerra, discerned the following causes of action: breach of contract, fraud arising from Fox's alleged misrepresentation of certain financial projections upon which Cerra and the joint venture claimed to have relied to their detriment; and restraint of trade in violation of state and federal antitrust laws.

Fox argued that the breach of contract claims belonged to the joint venture and that neither International Television nor Cerra (who was neither a member of the joint venture nor a party to an agreement with the venture) was entitled to assert the claims individually. Judge Goettel agreed with Fox's position and dismissed these claims.

Also dismissed was International Television's cause of action alleging the violation of section 1 of the Sherman Act based upon a purported agreement between Fox and Harrison whereby Harrison received $250,000 from the funds intended for the joint venture. Although an agreement between two independent business entities was set forth and International Television (but not Cerra) did possess antitrust standing and antitrust injury, it was ruled that International Television did not state a claim under section 1. Judge Goettel pointed out that International Television did not sufficiently delineate the relevant market or specify the economic impact in the market of the claimed violation of section 1. And the complained-of activity-an agreement to breach a single contract-absent a refusal to buy or sell from the alleged target of the conduct, was not found to be aper se violation of the antitrust laws. The "only conceivable case authority," Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), did not proscribe the conduct allegedly engaged in by Harrison and Fox, stated Judge Goettel. Klor's does not apply to an agreement by a purchaser to assist one supplier in breaching a contract with another supplier, and, in all, the described conduct was "not so pernicious as to warrant a presumption of anti-competitiveness." A common law action for breach of contract or tortious interference with business relations was available to International Television, and in the absence of a showing that competition was impaired, the antitrust claim was precluded.

International Television's claim under New York's Donnelly Act also was subject to dismissal because the company, a Bermuda corporation with its principal place of business in London, did not indicate how the purported Harrison-Fox agreement affected commerce in New York. If International Television's ability to compete in the market for the production or development of television programs was harmed, any indirect economic impact of the purported agreement in New York was purely speculative and not cognizable under the Donnelly Act, stated the court.

Judge Goettel concluded by dismissing International Television's demand for $1.2 million in punitive damages in its fraud claim against Fox. But the court declined to grant Fox's request for an order requiring International Television to replead its demand for $400,000 in compensatory damages for Fox's purported failure to account accurately for the proceeds and profits from the distribution of the program.

International Television Productions Ltd. v. Twentieth Century-Fox Television Division, 622 F.Supp. 1532 (S.D.N.Y. 1985) [ELR 8:2:14]

Manager of the musical group "Vito and the Salutations" held a valid service mark in the group name and was entitled to prevent competing use of the name by former members of the group

David Rick, the holder of the registered service mark "Vito and the Salutations," was entitled to a preliminary injunction to prevent the use of the name by a musical group containing musicians who had performed at some point in their careers in the "Vito" group managed by Rick.

Federal District Court Judge Robert J. Ward recounted the history of the group from its discovery by Rick in

1961 to its major commercial success with a recording of "Unchained Melody" in 1963, followed by a decline in popularity. It was noted that the group experienced frequent turnovers in personnel; within one year after its formation, three of the group's original four members had left. And during the 1960s and 1970s, as Rick continued to secure bookings for live performances, approximately 22 different individuals performed in the group at various times. There were at least ten individuals, in addition to the "original" Vito Balsamo, who played the role of "Vito."

In 1980, several members of the Vito group, including Balsamo and Sheldon Buchansky, entered a management agreement with Charles Garone. Garone began booking the group for live performances under the name Vito and the Salutations, and Rick began his action for service mark infringement.

Judge Ward noted that it was conceded that the Vito mark was entitled to federal trademark protection both because of its distinctiveness and because of the secondary meaning it had acquired during more than twenty years of continuous use. Also conceded was the likelihood of confusion between the group managed by Garone and Rick's group. However, the Buchansky parties argued that Rick was not the rightful owner of the mark. This argument was rejected by the court because the evidence supported Rick's contention that he conceived of using the name to identify a musical group and first used the mark in commerce.

Judge Ward observed that Rick not only arranged bookings for the group, but handled its promotional and financial matters, selected songs, meals and lodging and functioned as a "producer of a theater company or owner of a sports team," overseeing the style and substance of the group's "act," and in effect, becoming its longest-playing member. Rick, in all, assumed the leadership and control of the group, with a corresponding claim to the ownership of the Vito mark. The statutory presumption that Rick held a valid mark was not rebutted by the argument that he never received an assignment of Vito Balsamo's name. Apart from his performances in the group, Balsamo never made independent commercial use of the Vito name. Thus, it was not clear to the court what trademark rights Balsamo may have acquired in the name which then could have been assigned to Rick. And Balsamo testified that Rick had suggested adding Vito to the name of the group, that Balsamo consented to this proposal, and continued to acquiesce in group's use of the name even after he ceased performing in the Rick group in 1974.

The Buchansky parties further argued that Balsamo's name, in any event, was unassignable since it was identified with the reputation of a particular individual and could not be separated from that individual's personality. Therefore, any rights which Rick may have acquired to use the mark expired when Balsamo left the group. Rick's continued promotion of the group as Vito and the Salutations, it was argued, misled the public into assuming that Balsamo still performed in the group.

Judge Ward stated that there was no basis upon which it could be found that the Vito mark was "inextricably" linked by the public with the personal skill or reputation of Vito Balsamo, notwithstanding his participation in the group, and rejected this argument as a ground for finding that Rick was not the owner of the registered service mark at issue.

The remaining claims raised by the Buchansky parties were found to be "of dubious merit" by the court. Rick's service mark registration was valid despite an innocent and immaterial misstatement in the registration application. It also was suggested that Rick could not properly register a mark identifying the entertainment services of the group since he was not one of the performers. The court noted that a trademark need not be registered in the name of the manufacturer of goods; an individual who controls the quality of the subject goods or services may properly register a mark. Since Rick was the only individual in a position to control the content and quality of the entertainment services provided by Vito and the Salutations, he was properly entitled to register the mark even if his own name was not a part of the mark and even if he did not perform in the group. And it was not necessary for Rick to obtain Balsamo's consent to register the mark because Vito and the Salutations did not identify Vito Balsamo in any manner.

Judge Ward also found that Rick did not abandon the ownership rights he had acquired in the name because of changes he allegedly made in the nature and quality of the entertainment services identified with the mark. The

Buchansky parties did not establish Rick's non-use of the service mark or his intent to abandon the mark - Rick not only made continuous use of the mark, but vigorously litigated his claim of ownership rights. And the purported changes in the nature of the group, i.e., the inclusion of female and/or black performers, did not imply abandonment because the membership of the group had changed constantly during its twenty year history.

The equitable defenses of laches and unclean hands also were unavailable to the Buchansky parties, found Judge Ward, who then analyzed the equities of the matter, including Rick's interest in protecting the goodwill he acquired in the mark, and the Buchansky group's less than innocent, good faith use of the service mark, given their knowledge of Rick's prior use and his repeated objections to their use.

Judge Ward further determined that Rick, in addition to prevailing on his federal infringement claim, had established the Buchansky parties' violation of New York's antidilution statute and common law unfair competition.

In granting injunctive relief, the court cautioned that such relief should not inflict any additional confusion upon the public, and propounded a decree requiring the Buchansky parties to discontinue the use of the mark Vito and the Salutations in connection with the promotion or sale of live or recorded singing performances. All parties were enjoined from misrepresenting the identities of the individuals participating in any musical groups containing one or more individuals who performed under the name Vito and the Salutations-included in this ban was the use of photographs and other pictorial representations.

Rick v. Buchansky, 609 F.Supp. 1522 (S.D.N.Y. 1985) [ELR 8:2:15]

CBS obtains summary judgment in unfair competition, conversion and statutory theft claims against alleged distributor of bootleg records

When CBS sued Charles Garrod for selling bootleg records and tapes, Garrod claimed that CBS had no common law copyright in the records, or that if it had, CBS lost the right upon "publication" of the records through duplication and commercial sale.

A Federal District Court in Florida granted CBS' motion for summary judgment, holding that "a record producer's common law copyright protects the record itself, whether it is the master recording or a copy." The court reasoned that if Garrod's argument were adopted, no record producer would distribute a record until enough copies were made to sell to the entire market since a limited release would be a great risk. Furthermore, record producers may have an intangible property interest in their professional investment of time, skill, and money in recordings. Therefore, independent of its common law copyright, CBS had a protectible property interest in the professional expertise invested in the recordings at issue, stated the court.

CBS also established the elements of an unfair competition claim, as well as a wrongful taking of its recordings by Garrod, concluded the court.

CBS, Inc. v. Garrod, 622 F.Supp. 532 (M.D.Fla. 1985) [ELR 8:2:16]

Federal Communications Commission imposes $2,000 forfeiture on Storer Cable because company failed to provide blackout protection for Washington Bullets basketball game in violation of FCC rules

The Federal Communications Commission has issued a Notice of Apparent Liability in response to the National Basketball Association's request for an order requiring Storer Cable Communications to cease and desist from violating section 76.67 of the Commission's rules.

The rule provides that if a sports event is not being broadcast live by a television station in the same community where the event is taking place, then cable systems serving subscribers in that community shall not carry the event either (by importing a television broadcast of the event from a distant city), if the holder of the broadcast rights to the event requests the cable system not to.

In its petition, the NBA alleged that on four occasions, Storer did not comply with the NBA's request for protection, and thus displayed "a pattern of gross indifference to the Commission's Rules." Storer argued that its failure to provide blackout protection for four NBA games (and one NHL game) were "isolated" incidents.

The Chief of the FCC's Mass Media Bureau decided that although three of the complained-of incidents did not warrant the imposition of a forfeiture, the circumstances at Storer's "hub site" in Hyattsville, Maryland, which resulted in a lack of protection for a December 21, 1984 Washington Bullets basketball game (and a December 15th National Hockey League game) were more serious. In these instances, a Storer employee bypassed purportedly faulty equipment and locally inserted the WOR-TV signal from New York. Such conduct was found to constitute the willful and repeated violation of section 76.67.

Therefore, Storer Cable Communications of Prince George's County was ordered to forfeit $2,000. An order to show cause why Storer should not be ordered to cease and desist from further violations of the rule was not issued, however, because it appeared from the record that Storer would comply with the rule in the future.

In re National Basketball Association, Memorandum Opinion and Order of the Mass Media Bureau, Case No. CSC-334 (FCC, Oct. 4, 1985) [ELR 8:2:17]

Limited partners were not entitled to depreciation deduction in connection with investment in the film "Mitchell" because partnership did not receive income from film's distributor

In May 1975, an Illinois partnership called the Mitchell Film Company purchased all rights in the motion picture "Mitchell." The film was distributed by Allied Artists Picture Corporation and earned revenues from its theatrical release and television exhibition of about $700,000, $350,000 and $375,000 in 1975, 1976 and 1977, respectively. Allied did not pay any portion of the revenues to the partnership and in 1979, the distributor filed for reorganization under Chapter 11 of the Bankruptcy Code.

In the years 1975, 1976 and 1977, the partnership, using the cash method of accounting, reported no income with respect to the film, but did claim deductions for depreciation; the deductions resulted in tax losses for the partnership for each year, and each partner then deducted a share of the losses.

The Commissioner of Internal Revenue disallowed the partnership's depreciation deductions and the resulting loss deductions claimed by the taxpayers, and the Tax Court upheld this determination. A Federal Court of Appeals has affirmed the Tax Court's decision.

The court noted that the partnership had elected to use the income forecast method to calculate its depreciation deduction. Under this method, the partnership was required to multiply its basis in the film by a fraction, with the income from the film less distribution expenses as the numerator and the forecasted total income as the denominator. The Commissioner argued that since the partnership received no income during the taxable years in question, the numerator of the fraction was zero and no depreciation was allowable. The taxpayers contended that using Allied's gross receipts as income in the numerator was proper because the partnership also had used Allied's gross receipts in its forecast of total income in the denominator of the fraction.

Federal Court of Appeals Judge Cudahy, in rejecting the taxpayer's claim, emphasized that a net income figure must be used in the numerator and that "income" meant income to the taxpayer. Allied's revenues were not actually or constructively received by the taxpayers and thus could not be included in the numerator-given a zero numerator, the allowable depreciation was zero.

Gordon v. Commissioner of Internal Revenue, 766 F.2d 293 (7th Cir. 1985) [ELR 8:2:17]

United States Supreme Court orders further proceedings in cable television operator's First Amendment challenge to Los Angeles' exclusive cable television franchise ordinance

As described in ELR 7:1:12, Preferred Communications was denied a cable television franchise by the city of Los Angeles because the company did not participate in the auction process which was used to determine the exclusive franchisee for the South Central area of the city. Preferred sued the city, alleging the violation of its First Amendment rights and of federal antitrust laws. A Federal District Court dismissed the complaint; this ruling was affirmed by a Federal Court of Appeals with respect to the antitrust claim on the ground that the city was immune from antitrust liability. But the Court of Appeals reversed the dismissal of the First Amendment claim, and remanded this issue, stating that the city may have violated the First Amendment by refusing to issue a franchise to more than one cable television company if there was sufficient excess physical and economic capacity to accommodate additional companies.

United States Supreme Court Justice Rehnquist, delivering the opinion for a unanimous court, agreed with the Court of Appeals that Preferred's complaint should not have been dismissed, but affirmed the Court of Appeals' decision on the narrower ground that material factual disputes remained to he resolved by the parties at trial.

Justice Rehnquist expressed the view that Preferred's allegations concerning its proposed activities seemed to involve First Amendment interests "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," Preferred would be communicating various messages. However, the city had contended that exclusive franchises were required to minimize the demand that cable systems make for the use of public property. Justice Rehnquist stated that the court would refrain from resolving any constitutional issues raised by the parties until more information was available concerning "the present uses of public utility poles and rights-of-way," and how Preferred planned to install and maintain its facilities.

A concurring opinion, written by Justice Blackmun, with whom Justices Marshall and O'Connor joined, emphasized his understanding that the court left open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Justice Blackmun pointed out that "in assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis;" factual information about the nature of cable television was lacking in this case.

City of Los Angeles v. Preferred Communications, Inc., Case No. 85-390 (U.S.Sup.Ct., June 2, 1986) [ELR 8:2:17]

Federal District Court upholds arbitration award setting fee for performers on soap opera "Texas" upon rebroadcast of the programs by superstation WTBS; AFTRA succeeds in obtaining remand as to Benton & Bowles' unauthorized editing of the program

The 1979-1982 AFTRA National Code of Fair Practice for Network Television Broadcasting sets a pay scale for compensating performers when programs in which they have appeared are rebroadcast. An addenda to the Code sets forth smaller fees payable when a program is released for exhibition on pay cable, on basic cable, in flight or on videocassette. The Code also restricts a producer's right to edit a previously broadcast program without first obtaining AFTRA's consent on mutually agreeable terms, except where the editing is required by "program time exigencies."

In 1981-1982, Benton & Bowles produced the television soap opera "Texas;' which was broadcast on NBC; each episode of "Texas" was sixty minutes long. After NBC cancelled the show in 1982, Benton & Bowles agreed to provide "Texas" to WTBS Superstation, Inc. for exhibition as two thirty-minute episodes on consecutive days each week. Beginning in October 1983, the original episodes of "Texas" were exhibited by WTBS, a "free" television station in Atlanta, and simultaneously, via satellite, to cable television systems throughout the county.

Benton & Bowles paid the performers who had appeared on the programs the fees payable under the TV

Code when a network television program is rebroadcast over basic cable. AFTRA argued that the performers were entitled to both the basic cable fee and to the payment for rebroadcasts over free television.

In November 1984, an arbitration panel concluded that Benton & Bowies had violated the TV Code by exhibiting each one-hour program as two one-half hour programs without obtaining AFTRA's consent. And the panel ordered Benton & Bowles to pay each performer an additional amount of money equal to the amount already paid the performer to date for the rebroadcasts on WTBS. Upon any further rebroadcasts of the program in the one-half hour format, Benton & Bowles would be required to pay each performer double the amount each had been paid for the WTBS rebroadcasts prior to the date of the arbitration award.

AFTRA brought an action in the Federal District Court in New York claiming that the arbitrators had exceeded the scope of their authority under the TV Code; the organization sought an order modifying the arbitration award by directing Benton & Bowles not to further edit or use edited versions of "Texas" without obtaining AFTRA's consent, and directing the agency to pay the show's performers the combined basic cable and replay fees.

Federal District Court Judge Goettel first pointed out that the arbitrators had found that the TV Code did not specify the fee for a "hybrid" broadcasting network such as WTBS; the panel therefore was free to determine an appropriate payment. A rebroadcast fee falling between the basic cable and television replay fees was "plausibly derived" from the Code and the arbitrator's award was upheld by the court.

However, although the arbitration panel found that the rebroadcast in the one-half hour format violated the TV Code, the panel's award appeared to authorize the continued showing of the episodes. The "editing" aspect of the award therefore was vacated and the issue was remanded to the arbitrators with an instruction to modify the award to enjoin Benton & Bowles from showing "Texas" in any form other than the original one-hour programs unless prior consent was obtained from AFTRA.

American Federation of Television and Radio Artists, AFLCIO v. Benton & Bowles, Inc., 627 F.Supp. 682 (S.D.N.Y. 1986) [ELR 8:2:18]

Brooke Shields is found liable for damages to photographer under $30,000 undertaking posted in connection with actress' action seeking to enjoin use of nude photographs taken when she was 10 years old

In accordance with New York law, Brooke Shields posted an undertaking to compensate photographer Garry Gross in the event it was determined that Shields was not entitled to injunctive relief in her action to bar Gross' use of nude photographs taken of the actress when she was 10 years old. After a series of rulings, the New York Court of Appeals found that a release which had been signed by Shield's mother was effective under New York's Civil Rights Law and that injunctive relief therefore was not available to Shields (ELR 5:5:9).

Gross then sued Shields for malicious prosecution, claiming that the actress improperly obtained a temporary restraining order and preliminary injunction from the trial court; the action was dismissed on the ground that Gross could not, as a matter of law, establish that Shields acted with malice in bringing her action.

In a second proceeding, Gross sought to recover damages in the amount of $750,000 from Shields, an amount reflecting his legal fees, lost income and the costs he allegedly incurred as a result of the various injunctions.

A New York trial court has ruled that Gross's remedy against Shields was limited to an action on the undertaking posted by the actress. However, the initial $5,000 and $45,000 undertakings had been discharged by the trial court while an appeal to the Court of Appeals was pending. An appellate court affirmed the discharge three days after the Court of Appeals determined the merits of Shields' action. The Court of Appeals eventually denied Gross leave to appeal the issue of the discharge of the first two undertakings-this ruling was a final determination on the merits, stated Judge Edward J. Greenfield. Therefore, Gross was barred by res judicata from bringing an action on the discharged undertakings.

Shields also had posted a $30,000 undertaking in connection with an injunction she obtained pending the consideration of her motion for reargument of the Court of

Appeals decision; the undertaking was granted to protect Gross from any damages arising from the diminished sales value of his photographs during this time. The Court of Appeals denied Shields' motion to reargue. The actress therefore was liable to Gross for the damages (to be considered by a magistrate) which he incurred during the period from April 5 to April 29, 1983-the time during which he was restricted from selling his photographs of Shields to newsworthy publications.

In refusing to dismiss Gross' action for damages, the court rejected Shields' alternative argument that the action was barred by res judicata because Gross' previous action for malicious prosecution had been dismissed.

Gross v. Shields, 496 N.Y.S.2d 894 (N.Y.Cnty. 1985) [ELR 8:2:19]

Briefly Noted:

Music Publishing.

Composer Charles F. Paul was not entitled to 50% of the publishers royalties received by music publisher Emil Ascher, Inc. for six copyrighted musical compositions, a Nassau County court has ruled. In June 1939 the parties entered a written agreement wherein Paul transferred his rights in two compositions to Ascher; Ascher agreed to pay Paul a royalty of 10% of the list price of all copies of the compositions sold by Ascher and 50% of the net sums received by Ascher from mechanical licenses. Paul argued that Emil Ascher orally agreed to pay him the claimed royalties for the two works set forth in the agreement, as well as for four other works. But the court rejected Paul's claim on the basis of the statute of frauds. The fact that Ascher paid Paul about $25,000 between 1971 and 1974 did not preclude the application of the statute of frauds, stated the court, particularly since Paul did not show that the payments unequivocally referred to the alleged oral agreement. Furthermore, Paul had not attempted, between 1939 and 1971 and between 1974 and 1980, to collect the money purportedly owed him.

Paul v. Emil Ascher, Inc., New York Law Journal, p.16, col. 2 (Nassau Cnty., April 29, 1985) [ELR 8:2:19]

Tax.

The Tax Court has refused to allow the Commissioner of Internal Revenue to amend a pleading in order to assert a claim under the Tax Reform Act of 1984 to a higher rate of interest on allegedly substantial underpayments of tax attributable to a taxpayer's participation in a limited partnership organized to acquire and distribute a motion picture. The Commissioner disallowed the taxpayer's claimed distributive share of the partnership's net losses for 1978 and 1979 on numerous grounds, including the partnership's purported failure to obtain a depreciable interest in the unnamed film. If the partnership did acquire a depreciable interest in the film, such interest was overvalued, argued the Commissioner. In this case, an amendment to the pleadings to allow the Commissioner, at a welladvanced stage of the proceedings, to claim that the taxpayer's underpayments were attributable to a tax motivated transaction and therefore subject to the payment of a higher rate of interest would result in unfair prejudice to the taxpayer, concluded the court.

Law v. Commissioner, 84 T.C. No. 64 (1985) [ELR 8:2:19]

Tax.

The Dallas Symphony Association, a nonprofit corporation which had obtained an exemption from federal income taxes, also was entitled to a local property tax exemption, a Texas appellate court has ruled. In reversing a lower court order denying the exemption, the appellate court found that the Association was a purely public charity as a matter of law and was engaged in its stated purpose of promoting and operating a symphony orchestra.

Dallas Symphony Association, Inc. v. Dallas County Appraisal District, 695 S.W.2d 595 (Tex.App. 1985) [ELR 8:2:19]

Billboard Ordinance.

An outdoor advertising company was denied summary judgment in its challenge of a Raleigh city ordinance regulating billboards. The advertising company claimed that the ordinance was a vague, standardless, content-based infringement of freedom of speech because it failed to define the terms "commercial" and "noncommercial." A Federal District Court in North Carolina has granted the city's motion for summary judgment, stating that the failure to define these terms did not render the ordinance unconstitutionally vague since the terms had been defined in prior court decisions. The court also rejected the advertising company's argument that the ordinance was a prior restraint since it gave zoning inspectors unbridled discretion to decide whether a particular sign was commercial or noncommercial.

Major Media of the Southeast, Inc. v. City of Raleigh, 621 F.Supp. 1446 (E.D.N.C. 1985) [ELR 8:2:20]

Copyright/Jurisdiction.

A Federal Court of Appeals in California has found that subject matter jurisdiction was present in a copyright infringement action filed by Peter Starr Production Co. against Twin Continental Films, Inc. arising from the allegedly unauthorized European distribution of the film "Take it to the Limit." In 1983, Twin, without authority from Starr, entered into a license agreement with Alpha Films Limited purporting to grant Alpha the exclusive right to exhibit the film in certain areas outside the United States. Alpha was informed that Starr did not want to deal with the company, but nonetheless distributed 400 videocassette copies of "Take it to the Limit" in Sweden or the United Kingdom or both. As a result of Alpha's conduct Starr did not enter a pending distribution deal with another company and incurred substantial losses.

A Federal District Court dismissed Starr's copyright infringement action for lack of subject matter jurisdiction, citing Starr's allegation of infringing acts which took place outside of the United States. In reversing and remanding the District Court decision, the Court of Appeals noted that the Twin-Alpha contract (a copy of which was attached to the complaint) was executed in Los Angeles; and that Twin's purported authorization of the film's use by Alpha "standing alone" sufficiently alleged an act of infringement in the United States to confer subject matter jurisdiction on the District Court.

Peter Starr Production Co. v. Twin Continental Films, Inc., 783 F.2d 1440 (9th Cir. 1986) [ELR 8:2:20]

Copyright Infringement.

"The Berenstain Bears' Easter Surprise," created by Stan and Jan Berenstain and first broadcast by NBC in April 1981, did not infringe Douglas and Mary Mahr's story "The Easter Hippopotamus," a Federal District Court in California has ruled. The Berenstains and NBC did not have access to, or any knowledge of, the story. The court, after comparing the two works, also found that there was no substantial similarity of ideas or expression between the story and the television show and that the show was totally different in concept and feel from the Mahr work and was created independently. Summary judgment therefore was granted to the Berenstain parties.

Mahr v. National Broadcasting Company, Inc., 1985 Copyright Law Reports, Para. 25,816 (C.D.Ca. 1985) [ELR 8:2:20]

Copyright.

A Federal Court of Appeals has upheld a District Court ruling rejecting a claim by Law & Technology Press that the publication deposit requirement of the Copyright Act was an unconstitutional taking under the Fifth Amendment and an unconstitutional burden on the press under the First Amendment. Summary judgment was properly granted the Register because the requirement that a copyright holder must deposit two copies of a publication with the Library of Congress was found to be a valid condition on the granting of copyright benefits which did not burden the expression or dissemination of ideas or implicate First Amendment rights. When Law & Technology, the owner of the copyright in the periodical "The Scott Report," failed to respond to the Registers' request for the deposit copies, the Register filed a lawsuit to recover the statutory penalties - a $250 fine for each issue not deposited and the retail price of the two copies of each issues (the failure to comply with the deposit requirement no longer results in forfeiture of the copyright). In upholding the District Court's order granting summary judgment to the Register, Federal Court of Appeals Judge Boochever pointed out that Law & Technology did not identify any specific facts that it hoped to uncover upon conducting discovery; that acquiring publications for the national library was necessary and proper to carry out the copyright clause of the Constitution; and that the deposit requirement was a constitutional condition of obtaining copyright protection.

Ladd v. Law & Technology Press, 762 F.2d 809 (9th Cir. 1985) [ELR 8:2:20]

Employee Benefits.

Several former employees of Hurok Concerts, Inc. were not entitled to damages in a fraud action against General Electric Co., a New York trial court has ruled. From 197l until 1975, Hurok Concerts operated as a subsidiary of General Electric. In 1975, the company was sold to American Management Corp., and in 1977, Hurok ceased operations and was declared bankrupt.

The former Hurok employees alleged that in order to induce them to remain with the company, GE had falsely represented to them that they would receive all of the benefits to which GE employees were entitled, including job security. It also was alleged that similar promises were made by American Management. New York State Supreme Court Justice Allen Murray Myers ruled that the evidence did not support the claim that GE deliberately made false representations about anticipated employee benefits, and granted summary judgment to the company accordingly. Justice Myers also rejected the employees' attempt to rescind the 1975 contract between GE and American Management (noting that the employees were not parties to the contract), refused to hold GE liable for the debts of Hurok Concerts, found no breach of an alleged fiduciary duty owed by GE to Hurok's creditors, and concluded that there was insufficient evidence to prove that GE conspired with American Management to defraud Hurok's creditors.

Purves v. General Electric Co., New York Law Journal, p.7, col.3 (N.Y.Cnty., April 25, 1985) [ELR 8:2:20]

Contracts.

A California appellate court has ruled that CM Record Corporation lacked the capacity to sue MCA Records in a dispute concerning a record distribution contract because CM forfeited its corporate charter in Missouri from January 1, 1979 until July 11, 1980. The parties signed their contract on April 31, 1979 and CM brought its action on February 13, 1980, five months before its corporate status was revived. According to a state statute, CM's action to enforce the contract was not retroactively ratified when the Missouri secretary of state rescinded the forfeiture of the company's charter. Since CM was incapable of entering a contract in Missouri, the company had no greater capacity to sue in California than in its home state, and summary judgment was properly granted by the trial court, found Judge Roth.

CM Record Corporation v. MCA Records, Inc., Case No. B008347 (Ca.App., May 31, 1985) [ELR 8:2:21]

Contracts.

In February 1982, Alvin (Buddy) Griesedieck, the holder of a two percent interest in the New Orleans Saints professional football team, transferred his interest in the partnership to Paul Kalmanovitz as trustee for

Falstaff Brewing Corporation. Griesedieck declared in the transfer document that he had held the interest as the trustee for Falstaff. John W. Mecom, Jr., the owner of a 50% interest in the team, alleged that the transfer violated the partnership agreement because Griesedieck did not first offer to sell his interest to Mecom.

A Federal District Court in New Orleans has granted summary judgment to Griesedieck. The court noted that when Falstaff sought to purchase an interest in the partnership in 1968, the National Football League had an unwritten rule prohibiting publicly held corporations from owning an interest in an NFL franchise. There was evidence that the Saints and Mecom knew and consented to the arrangement whereby Griesedieck acted as the nominee for Falstaff. Since the transfer from Griesedieck to Kalmanovitz did not involve a change of ownership, the right of first refusal provision of the partnership agreement was not violated, concluded the court.

New Orleans Saints v. Griesedieck, 612 F.Supp. 59 (E.D.La. 1985) [ELR 8:2:21]

Subscription Television.

Subscription Television of Greater Washington has obtained a permanent injunction barring A. Bart Kaufmann from engaging in the unauthorized manufacture and sale of decoding devices. The devices enabled a user to receive and unscramble STV signals without making payments to the signal provider. A Federal District Court in Washington, D.C. ruled that Kaufmann's conduct violated section 605 of the Communications Act, and that a permanent injunction was warranted in view of the irreparable injury caused to STV, the inadequate compensation provided by money damages, and in order to further the public interest. The court also ordered Kaufmann to pay STV about $60,000 in compensatory damages and $50,000 in punitive damages and to turn over its customer lists so that STV would be able to contact the purchasers of the modified decoders and arrange for payment for its services.

Subscription Television of Greater Washington v. Kaufmann, 606 F.Supp. 1540 (D.D.C. 1985) [ELR 8:2:21]

Children's Television.

The Federal Court of Appeals in the District of Columbia has declined to review the Federal Communications Commission's 1984 Report and Order (see ELR 5:8:20) defining the obligations of television broadcast licensees to their child audiences. The Commission had found that the television market, as a whole, did not clearly fail to serve the needs and interests of children, and refused to call for mandatory programming rules. The court, in rejecting a petition filed by Action for Children's Television, concluded that the Commission's decision was within the broad scope of its discretion; that the Commission correctly considered the programming available on cable television or on noncommercial television broadcasting stations; and that the Commission had not relieved licensees of their obligation to provide age-specific programming.

Action for Children's Television also has been involved in a proceeding challenging the showing of alleged "program-length commercials." According to ACT, animated programs such as "He-Man and the Masters of the Universe," "G.I. Joe," and "The Shirt Tales," purportedly feature various products such as toys, and the commercials for these products use the same voices, animation, characters and logos as those depicted during the programming. In ELR 6:12:19, it was reported that the Commission voted to dismiss a petition filed by ACT and the National Association for Better Broadcasting which claimed that the airing of children's shows featuring toys and products violated the obligation of broadcaster to act in the public interest. The FCC's report in this matter has now been published.

Action for Children's Television v. Federal Communications Commission, 756 F.2d 899 (D.C.Cir. 1985); In re complaint of Action for Children's Television v. Television Stations KTTV, et.al., 58 R.R.2d 61 (FCC 1985) [ELR 8:2:21]

Horse Racing Regulation.

Several race horse jockeys have been denied injunctive relief against the enforcement of the New Jersey Racing Commission regulations authorizing breathalyzer and urine tests for alcohol and drug use. Federal District Court Judge Brotman, after carefully reviewing the test procedures, rejected the jockeys' argument that the warrantless administration of tests to licensed individuals, at the racetrack and proximate to race time, subjected them to an unreasonable search and seizure in violation of the Fourth Amendment. Rather, according to Judge Brotman, the regulations provided a reasonable means of maintaining the integrity of the racing industry and the safety of the sport, even in the absence of any individualized suspicion of wrongdoing. And the testing was administered by the Commission neutrally and with adequate procedural safeguards.

Also rejected were the jockeys' claims that the regulations deprived them of constitutional rights to due process and equal protection, and violated their right to privacy. While denying the jockeys' claims, the court did order the Commission to provide the same confidentiality guidelines for the results of the breathalyzer test as for the urine test, and to conduct the test privately.

Shoemaker v. Handel, 608 F.Supp. 1151; 619 F.Supp. 1089 (D.N.J. 1985) [ELR 8:2:21]

IN THE NEWS

Dennis Stanfill reaches settlement of his lawsuit against 20th Century Fox

According to news reports, Dennis Stanfill has settled, for $4 million, his lawsuit against 20th Century Fox and Marvin Davis, the former owner of the studio. Stanfill had sought $10 million in damages for breach of contract and wrongful termination, contending that the studio and Davis conspired to force him to leave his position as chairman and chief executive. Stanfill also alleged that the studio defamed him in a July 1981 statement declaring that Fox would not take any action against Harris Katleman, the head of the studio's television division; Stanfill had fired Katleman in May 1981, alleging that the executive had certain discrepancies in his expense account. Davis subsequently rehired Katleman.

20th Century Fox did not verify the amount of the settlement, which was reached just prior to a trial in Los Angeles Superior Court. The studio stated that a "package" was assembled which included "enhanced pension benefits" and a fund to be used to set up a university seminar in business ethics. Mr. Davis apparently will not be responsible for making any payment to Stanfill. [July 1986] [ELR 8:2:22]

Federal District Court jury awards Margaret Keane $4 million in damages in slander action related to paintings of "big-eyed" children

In July 1984, USA Today published an article based on an interview with artist Walter Keane, in which it was stated "Thinking he was dead, the second of his three ex-wives (also a painter) claimed to have done some of the Keane paintings." Margaret Keane sued Keane and Gannett Co. Inc., the publisher of USA Today, for slander. A Federal District Court in Hawaii dismissed the action against Gannett, finding that Ms. Keane was a public figure and that actual malice had not been shown. However, the jury awarded Ms. Keane $4 million in damages against Walter Keane. Apparently, the Keanes had agreed, during their 1955-1965 marriage, that Mr. Keane was the creator of the "Keane-eyed" children. But Ms. Keane contended that she had been forced to agree to give her husband credit. The jury may have been impressed by Ms. Keane's creation, in their presence, of a painting of a big-eyed child; Mr. Keane declined to demonstrate his artistic ability, citing a shoulder injury. [July 1986] [ELR 8:2:22]

Jury award of $4.5 million to stuntwoman Heidi Von Beltz is voided by Los Angeles Superior Court Judge

Los Angeles Superior Court Judge Philip Jones has voided a $4.5 million jury award to stuntwoman Heidi

Von Beltz in her lawsuit against director Hal Needham. Von Beltz was left a quadriplegic after a stunt car crash during the 1980 filming of "Cannonball Run," which was directed by Needham.

The jury had awarded Von Beltz $7 million, but decided that she was 35 percent responsible for her injuries, thus reducing the award to $4.5 million. In voiding the award, the court noted that Von Beltz already had received about $5.8 million in settlement payments from the other parties in the matter and from a workers compensation award; under California law, these payments were subtracted from the amount of the jury award.

In the first trial of this action, a mistrial was declared (ELR 8:1:21), the issue of court costs for the trials remains to be determined. [July 1986] [ELR 8:2:22]

WASHINGTON MONITOR

Federal Communications Commission approves merger of General Electric Co. and RCA Corp.

The Federal Communications Corporation has approved the merger between General Electric Co. and RCA Corp., including NBC. GE will be required to divest itself of NBC's five AM and FM stations in New York, Washington, D.C. and Chicago, cities where NBC also owns television stations-the waiver of FCC rules, which allowed NBC to own two broadcast properties in these markets, ended upon the sale of the stations. [July 1986] [ELR 8:2:22]

DEPARTMENTS

Book Note:

Representing Professional Athletes and Teams 1986 by Philip R. Hochberg and Martin E. Blackman (editors)

This 900-page volume was published in connection with the Practicing Law Institute's annual sports law program, held this year in San Francisco from June 30th to July 2nd.

Once again, the book is an excellent source for recent and sometimes hard-to-come-by materials, including a complete set of the standard player contracts used by all of the currently operating professional leagues: the NFL, USFL, Major League Baseball, NBA, NHL, and Major

Indoor Soccer League; and a sample product endorsement agreement.

The book also contains the complete text and registration forms for all five of the player agent regulation plans described in the "Business Affairs" article in this issue of the Entertainment Law Reporter.

Stephen A. Schneider, a partner in the Beverly Hills law firm of Nagler & Schneider, contributed an outline of his presentation on baseball salary arbitrations. Los Angeles lawyer Brentnall P. Turley authored an outline of his presentation on representing professional golfers. Tax attorney Martin P. Merrill, of the Los Angeles firm of Glick & Glodney, contributed an outline of his presentation on tax planning for professional athletes. And program cochairman Philip R. Hochberg, of the Washington, D.C., law firm of Baraff Koerner Olender & Hochberg, prepared an outline of his presentation on communications law issues affecting sports, and federal legislation of importance to those who represent teams and players.

This year's volume also contains material that is not strictly of a legal sort. James Cantor, an employment counselor with Right Associates in New York City, discussed (and submitted an outline on) preparing athletes for their retirement from professional sports. And drug counselor Rex Fine, of ASAP Family Outpatient Center in Van Nuys addressed cocaine addiction and drug and alcohol intervention.

The book also contains schedules of NFL and Major League Baseball player salaries and an analysis of the economic viability of professional baseball, prepared for the Major League Baseball Players Association by Stanford economics professor Roger G. Noll.

Finally, the book reproduces several recent judicial decisions involving the world of sports, some of which have yet to be published elsewhere.

Representing Professional Athletes and Teams 1986 is Course Handbook Number 228, Catalog Number G4-3793, in PLI's Patents, Copyrights, Trademarks, and Literary Property Series. It is priced at $40 and may be ordered directly from the Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019. [ELR 8:2:23]

In the Law Reviews:

Law & the Arts, Volume 10, Number 2, has been published by Columbia University School of Law and Volunteer Lawyers for the Arts, 1560 Broadway, New York, NY 10036, and contains the following articles:

Solving Common Problems Arising from Use of Trademarks in the Arts by William M. Borchard and William M. Hart, 10 Law & the Arts 171 (1986)

Commodities and Art: A Delicate Relationship by Franklin Feldman, 10 Law & the Arts 1917 (1986)

Protection for Utilitarian Works of Art: The Design Patent/Copyright Conundrum by Neal Milch, 10 Law & the Arts 211 (1986)

The Musician's Personal Management Contract: Sample Contract and Comments by Cynthia Pinkos and Alan H. Bomser, 10 Law & the Arts 245 (1986)

Denial of the Preliminary Injunction in Copyright Infringement Cases: An Emerging Judicially Crafted License by Timothy J. McClimon, 10 Law & the Arts 277 (1986)

The Semiconductor Chip Protection Act of 1984: The Shape of Things to Come? by Steven Budd, 10 Law & the Arts 309 (1986)

Copyright Fair Use, the First Amendment, and New Communications Technologies: the Impact of Betamax by Frank W Lloyd and Daniel M. Mayeda, 38 Federal Communications Law Journal 59 (1986) (published by the UCLA School of Law and the Federal Communications Bar Association)

Video Voodoo: Copyright in Video Game Computer Programs by Alan R. Glasser, 38 Federal Communications Law Journal 103 (1986) (published by the UCLA School of Law and the Federal Communications Bar Association)

"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation by Barry W. Lynn, 21 Harvard Civil Rights-Civil Liberties Law Review 27 (1986)

Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of Ollman v. Evans, 71 Iowa Law Review 913 (1986)

Price-Fixing - NCAA May Not Establish Price and Output Level of Televised College Football Games (NCAA v. Board of Regents, US. 1984), 16 Seton Hall Law Review 170 (1986)

Cable Television: A New Challenge for the "Old" First Amendment, 60 St. John's Law Review 114 (1985)

Defamation - Actionable Statement of Fact Versus Privileged Opinion: Ollman v. Evans, 34 The University of Kansas Law Review 367 (1985)
[ELR 8:2:23]