BUSINESS AFFARIS

Incorporating the Entertainer: Is It Still Valuable?

by Leslie S. Klinger

The Tax Reform Act of 1984 made extensive changes in the rules relating to employee benefit plans, creating what has been popularly referred to as "parity" between corporate and noncorporate employee benefit plans. In addition, in 1982, Congress enacted new Code n1 Section 269A which was designed to eliminate substantially all of the advantages of the corporate form of doing business for the person engaged in a personal service business. Have these changes eliminated the advantages of forming a corporation for the provision of services of an entertainer? In short, the answer is that substantial advantages remain for entertainers who do not have long-term employment relationships, and the corporate form of doing business should be carefully explored.

Loanout Companies

The "loanout" company is a "Hollywood" term for a device that has received wide acceptance among doctors and lawyers - the personal service corporation. The following is a typical example: Entertainer forms Entertainer, Inc., a corporation all the stock of which is owned by Entertainer. Entertainer, Inc. enters into an employment agreement with Entertainer, pursuant to which Entertainer agrees to render services for Entertainer, Inc. and to such third parties as Entertainer, Inc. may from time to time lend Entertainer's services. Producer enters into an agreement with Entertainer, Inc.

which requires Entertainer, Inc. to provide the services of Entertainer for a specified job. The employment agreement between Entertainer and Entertainer, Inc. may call for Entertainer to render services exclusively to Entertainer, Inc.; more commonly, the agreement will provide only for Entertainer's domestic services to be exclusive. Of course, "Entertainer" might be an actor, director, writer, producer, songwriter, singer, performer, comedian, athlete, n2 or other entertainer.

Originally, this device was used as a means to avoid high personal rates of income tax (once up to 90%) by accumulating income in the corporation, or to convert the income to capital gain. These plans were effectively eliminated by the enactment of the personal holding tax scheme in 1934, which was revised and extended in 1937 and again in 1964, and the "collapsible corporation" provisions, added to the Code in 1950. However, another important advantage of the arrangement remained: Entertainer, Inc. was permitted to adopt a pension or profit-sharing plan for the benefit of Entertainer. The effect might have been as follows: Entertainer, Inc. received $250,000 from various sources for the services of Entertainer during 1970. Entertainer, Inc. paid Entertainer a salary of $150,000 and contributed the sum of $100,000 to a pension plan for the sole and exclusive benefit of Entertainer. Thus Entertainer would be taxable currently on the sum of $150,000; taxation of the balance would be deferred to distribution of the pension plan benefits. Prior to "retirement," Actor could invest the money set aside through the retirement plan on a taxdeferred basis, borrow unlimited funds from the plan when needed, and control the timing of taxation of all funds held by the plan. This was a result that could be achieved only through the vehicle of Entertainer, Inc. Without it, Entertainer might be treated as an employee of the various employers and unable to make any pension contributions other than to individual retirement accounts (IRA's) n3 or, if self-employed, able to adopt only a "Keogh" or "H.R.10" form of employee benefit plan, which permitted (at that time) maximum contributions of $2,500 (tater raised to $7,500, $15,000, and now $30,000).

Congressional Response

The response of Congress to this perceived abuse was originally merely to limit the amounts which could be contributed to pension and profit-sharing plans. The Employee Retirement Income Security Act of 1974, commonly known as "ERISA," imposed the first significant limits on pension contributions, which have been lowered since. In the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), however, Congress took a broader approach. First, for years after 1983, it enacted what has been popularly termed "parity." This was a comprehensive revision of the pension rules to permit the same federal income tax deductions for contributions to pension and profit-sharing plans of corporations and self-employed individuaIs n4 and to eliminate a number of restrictions which the law had previously imposed on plans for self-employed individuals. n5

TEFRA went even farther, however, in attempting to cure the "abuse" of the personal service corporation. Section 269A of the Code was enacted to give the Commissioner of Internal Revenue the power to rearrange the tax effects of personal service corporations if a number of conditions were met. Section 269A is applicable only if a personal service corporation provides "substantially all" of its services to one other entity. n6 "Personal service corporation" means a corporation the principal activity of which is the performance of services, and such services are substantially performed by more-than-10%-shareholder-employees. n7 In addition, the principal purpose for forming or availing of the corporation must be the avoidance or evasion of federal income taxes by reducing the income of the employeeowner or securing the benefit of deductions not otherwise available. n8 In most cases, it will be impossible to find meaningful non-tax motives for incorporating (except possibly for protecting touring entertainers from liability). Before examining the potential impact of Section 269A on the typical loanout corporation, however, it is appropriate to consider whether the typical entertainer's loanout corporation is even within its ambit.

Applicability of Section 269A

Before the Commissioner can apply Section 269A to a corporation, it must be determined that the corporation provides "substantially all" of its services to a single entity. Some entertainers may, in any given year, provide the bulk of their services to a single entity - for example, a recording artist to a record company, a television series actor to a single television production company, a motion picture actor to a single motion picture producer. Other types of "entertainers," e.g., directors, writers, producers, and of course, most actors, provide services to many entities each year and are therefore not covered by Section 269A.

Note, however, that the requirement of the Code relates to "substantially all of the services," not the income? Therefore, an unprofitable musical tour or low-paid guest appearance on television shows may put the entertainer in a position of not rendering substantially all of his or her services to one entity. Although the Proposed Regulations n10 give no hint as to the meaning of "substantially all" in a different context, the courts have interpreted the phrase to mean as little as 51%. n11

But is it necessary that the performer in fact provide services to multiple entities in each taxable year, or is it sufficient to hold oneself out as available for employment with multiple entities in each year? The Congressional intent, as evidenced by the Committee reports, n12 was to deter the use of personal service corporations by persons who had long-term relationships with a single entity, such as doctors affiliated with a medical practice, corporate executives, or salespersons. n13 There is no indication that Congress considered the problem of entertainers who may in one year provide services all to one entity and in another year provide their services to entirely different entities. Accordingly, some practitioners have expressed the view that Section 269A is inapplicable to entertainers. This view seems to be based on wishful thinking at best, but final regulations may deal with the problem.

If Section 269A were determined to be applicable, then none of the advantages outlined below for the incorporating of entertainer would be available. For the entertainer who, but for the loanout corporation, would be treated as someone else's employee, such as the typical actor, even the retirement plan itself might be in jeopardy. This is so because the Proposed Regulations under Section 269A contain a dire warning that the Commissioner has the power to disallow all benefits unavailable to employees, including pension benefits. Thus, a loanout corporation's pension plan may be disallowed, because in almost all cases, but for the loanout corporation's nominal involvement, the relationship between a television series actor or motion picture actor and the producer would have been that of employee-employer, and the actor would not have been entitled to establish any retirement plan other than an IRA. n15

Benefits of Incorporation

If the entertainer can successfully run the gauntlet of Section 269A, numerous advantages still obtain to incorporating. First, the loanout corporation can establish a fiscal year (such as January 31) which overlaps the individual taxpayer's taxable year. n16 This allows the loanout corporation to be used for a short-term deferral of income, by delaying the payment of salary reflecting income earned in one year to a subsequent year, so long as the salary payment occurs before the end of the corporation's fiscal year. For example, if the corporation accumulated all income earned by the entertainer in February 1985 through December 1985 and paid such income to the entertainer as salary in January 1986, the corporation would have no taxable income for the fiscal year February 1985 through January 1986 and (assuming no constructive receipt of the funds by the entertainer) the entertainer would not realize the taxable income until 1986, instead of in 1985 when it was received by the corporation.

Second, the corporation can be used to provide fringe benefits not otherwise available, such as a self-insured medical payment plan, n17 group term life insurance, n18 or accident and health insurance. n19 These deductions, although of no significant magnitude, may provide tax benefits in excess of the cost of incorporating.

Third, for actors who would otherwise be limited to making IRA contributions because they would be treated as employees, the corporation presents a tremendous advantage - the opportunity to contribute substantially more to a retirement plan than the $2,000 permitted for IRA contributions. For other entertainers, despite the advent of federal "parity" of retirement plans, there are other significant advantages to establishing a corporate retirement plan, instead of a "Keogh" or "H.R.10" type plan.

When federal law was amended to provide the same contribution and coverage rules for "incorporated" and "unincorporated" retirement plans, Congress did not change the rules respecting prohibited transactions between "parties-in-interest" and the plan. While participants are not prohibited from borrowing from a corporate plan, n20 Section 4975 continues to prohibit any borrowing by "owneremployees" n21 from a noncorporate retirement plan. n22 Therefore an entertainer who establishes a retirement plan without a corporation will not be able to borrow from the plan, n23 while an entertainer with a loanout corporation n24 with a retirement plan will be able to so borrow. Of course, there are limitations on the amounts which may be borrowed, n25 but borrowing on a tax-free basis continues to be a significant "benefit" of a retirement plan.

Another important difference between corporate and noncorporate plans is the state income tax limitation applicable to contributions to the plans. California, for example, has not conformed to the federal limits on deductibility of contributions and continues to limit deductions to unincorporated retirement plans to $2,500 (as compared to a federal limit of $30,000 for defined contribution plans). n26 This difference would result in the disallowance of $27,500 of deductions on an entertainer's California income tax return, potentially costing as much as 11% of $27,500, or $3,025, less the federal tax effect of 50%, or approximately $1,500 per year. California has conformed to the federal changes applicable to corporate plans, so that a loanout corporation adopting the same defined contribution plan could deduct the full $30,000.

Disadvantages of Loanout Corporations

Establishment of a loanout corporation is not free from disadvantages. Certainly the chief disadvantage for many entertainers will be the uncertain applicability of Section 269A, and use of a loanout corporation requires careful monitoring on a year-by-year basis of those persons to whom the corporation provides services, to avoid "substantially all" of the corporation's services being provided to only one of them. Other disadvantages are the complexity of postmortem planning if the entertainer dies, and planning for marital dissolution.

In addition, the cost of incorporation is not insubstantial. The actual corporate filings themselves, while not typically highly customized, should be done in a manner tailored for entertainers and will involve both legal fees and out-of-pocket costs.

There are annual expenses of maintaining the loanout corporation as well. A California corporation will be subject to minimum franchise tax in California of $200. Compensation paid to the entertainer will be subject to both the employer's share and employee's share of Social Security tax (FICA), as well as unemployment tax (FUTA). For actors. these "employer" taxes may be an extra cost that otherwise would be borne by their employers. For other entertainers, the combined employer/employee rate of FICA is higher than the rate paid by a self-employed person (although the deductibility of the employer's share of the tax may make the net after-tax cost lower). n27 Extra accounting and legal fees will be incurred on an annual basis to prepare payroll and corporate tax returns and annual minutes. Additional actuarial and administrative costs may be involved in a customized corporate retirement plan. Finally, the loanout corporation presents a certain degree of complexity which may make some entertainers uncomfortable and confused about their financial affairs.

Conclusion

Although the loanout corporation is no longer the powerful tax planning technique it once was, when unquestionably it was for many entertainers the single greatest tax plan available, there remain many advantages which accrue to use of the loanout corporation, especially for actors who wish to set aside substantial retirement funds. Certainly there is little justification to eliminate loanout corporations which are already in use. There are extra costs entailed by the use of the loanout corporation, not the least of which may be the psychological "cost" of a complex legal arrangement being substituted for a simple way of conducting business. However, the thoughtful advisor should carefully consider the use of this time-tested tool for entertainer clients.

NOTES

1. The Internal Revenue Code of 1954, as amended.

2. Note that the National Football League and both the American and National Leagues of Baseball prohibit teams from contracting with players through loanout corporations. However, nonplaying income (endorsements, personal appearances, etc.) of athletes can be channeled through loanout corporations.

3. Actors are generally treated as employees by producers and subject to wage withholding; as a matter of practice in the entertainment industry, if an actor is employed by a loanout corporation, no withholding will be

taken on payments to the corporation. For the Internal Revenue Service's view, see note 15 below.

4. TEFRA sec. 237.

5. TEFRA sec. 237, 242.

6. I.R.C. sec. 269A(a)(1).

7. I.R.C. sec. 269A(b)(1).

8. 1. R.C. sec. 269A(a)(2).

9. See note 6 above and accompanying text.

10. Prop. Treas. Reg. sec. 1.269A-1.

11. See James Armour, 43 T.C. 295 (1965) ("C" reorganization).

12. The Conference Committee Report on P.L. 97-248, Conf. Committee Report 97-760, at 633-34 (1982), specifically expresses an intent to overturn "cases like" Daniel F. Keller, 77 T.C. 1014 (1981) (physician). See note 13 below.

13. See also Silvano Achiro, 77 T.C. 881 (1981) (corporate executive); Bernard L. Pacella, 78 T.C. 604 (1982) (physician); Frederick H. Fogelsonq, 77 T.C. 1102 (1980), rev'd, 691 F.2d 848 (7th Cir.1982) (sales representative).

14. Prop. Treas. Reg. sec. 1.269A-1(d)(2)(ii).

15. The Internal Revenue Service has made it clear that it will examine the true relationships between an entertainer, a loanout corporation, and a producer, at least in the context of wage withholding obligations. See Rev. Rul. 74-330, 1974-2 C.B. 278, Examples 1 and 2 (foreign loanout corporation treated as agent of nonresident alien entertainer, U.S. promoter required to make wage withholding on amounts payable by loanout corporation to entertainer), PLR 8240091. dated July 13, 1982 (hockey player loaned to team by loanout corporation employee of team); PLR 5402033580A, dated February 3, 1954 (employees of Corporation A loaned to Corporation B remain employees of A because A retained control).

16. S corporations must use the calendar year unless the Internal Revenue Service permits otherwise. Section

1378(b) of the Code. However, there is little reason to elect "S corporation" status for a loanout corporation.

17. I.R.C. sec. 105.

18. I.R.C. sec. 101.

19. I.R.C. sec. 105.

20. See I.R.C. sec. 4975(d).

21.An "owner-employee" is a sole proprietor, greater-than-10% partner, or greater-than-10% shareholder-employee of an S corporation. I.R.C. sec. 401(c)(3), 4975(d).

22. See the first sentence of I.R.C. sec. 4975(d) following subsection (15) thereof.

23. Borrowing is permitted only with the permission of the Department of Labor-see ERISA sec. 408(a).

24. This does not apply to an S corporation; see note 21 above.

25. See I.R.C. sec. 72(p).

26. Cal. Rev. & Tax. Code sec. 17513(b).

27. Self-employment tax is 12.3% of first $42,000 for 1986,for a net after-tax cost of $5,166. The employee's share of FICA is 7.15% of first $42,000, as is the employer's share, but the latter is deductible by the corporation and thus reduces the employee's income if the corporation pays out its net earnings. Accordingly, the net after-tax cost (assuming a 55% bracket) is (7.15% x

142,000)+ (45% x 7.15 x $42,000), or S3,003 plus $1,351, or $4,354.

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[ELR 8:3:3]

RECENT CASES

United States Supreme Court reverses ruling denying summary judgment to Jack Anderson with respect to allegedly libelous statements in magazine article concerning Liberty Lobby because Court of Appeals did not consider whether clear and convincing evidence of actual malice was presented

In ruling on a motion for summary judgment in a libel action brought by a public figure or a public official, courts must consider whether clear and convincing evidence has been presented that the publisher of the purportedly defamatory statement acted with actual malice, the United States Supreme Court has announced.

The question of whether the "heightened" evidentiary requirements of New York Times Co. v. Sullivan, 376 U.S. 254, are to be applied at the summary judgment stage of a libel proceeding arose in an action brought by Liberty Lobby, Inc. against Jack Anderson, the publisher of The Investigator magazine, and other magazine officials. As described in ELR 7:6:13, in October 1981 The Investigator published several articles concerning Willis Carto, the founder and treasurer of Liberty Lobby; the articles allegedly portrayed the Liberty Lobby and Carto as "neo-Nazi, anti-Semitic, racist and fascist." After discovery was completed, Anderson moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, asserting that as a matter of law, no actual malice had been shown. Included in the material submitted to the court by the magazine was an affidavit of the writer of two of the articles, stating his belief that the facts contained in the articles were truthful and accurate, and detailing his sources for each of the purportedly libelous statements.

Liberty Lobby contended that there existed an issue as to actual malice because the writer had relied on several "patently unreliable" sources, and had not adequately verified his information prior to publication. Liberty Lobby also claimed that an editor of The Investigator told another official of the magazine that the articles were "terrible" and "ridiculous."

A Federal District Court ruled that the Liberty Lobby parties were public figures, that the New York Times standard applied, and that the writer's conduct in preparing his articles precluded a finding of actual malice. Summary judgment therefore was entered on behalf of The Investigator parties.

A Federal Court of Appeals, however, in a decision written by Judge Antonin Scalia, reversed the District Court's ruling as to nine of the twenty-one allegedly defamatory statements. The court held that, for the purpose of defeating a motion for summary judgment, the Liberty

Lobby parties did not have to show that a jury could find actual malice with "convincing clarity." Because a jury could reasonably conclude that the nine statements were defamatory, false, and made with actual malice, it was found that summary judgment was improperly granted.

In vacating the Court of Appeals decision and remanding the matter, Justice White first noted that the mere existence of a factual dispute between litigants is not sufficient to defeat a motion for summary judgment. But while a court, at the summary judgment stage of a proceeding may not weigh the evidence and determine the truth of the matter, the court must determine whether there is a genuine issue requiring resolution by a finder of fact. If the evidence presented is "merely colorable," or is not significantly probative, summary judgment may be granted.

Justice White then stated that in considering a motion for summary judgment, courts must advert to the substantive evidentiary standard of proof that would apply at the trial on the merits. Thus "when determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times." Justice White rejected Liberty Lobby's argument that summary judgment was rarely warranted where a party's state of mind is at issue and a jury might not believe a party or his/her witness as to this issue, and reminded the organization that a party may defeat a motion for summary judgment by presenting evidence showing that a jury might return a verdict in its favor, i.e., by raising a genuine issue of fact requiring a trial.

In dissent, Justice Brennan questioned the authorities cited by the majority in support of its conclusion and expressed concern with what Justice Brennan viewed as the court's failure to explain the manner in which trial judges are to consider the heightened evidentiary standards when ruling on a motion for summary judgment. Although trial courts may not engage in weighing evidence, the language of the majority opinion, including the suggestion that judges must assess the "quantum" of proof, might result, according to Justice Brennan, in transforming a summary procedure into a "full blown paper trial on merits." Justice Brennan would have left to the factfinder the determination of whether evidence is clear and convincing or amounts to a mere preponderance, particularly since, as distinguished from Justice Rehnquist, Justice Brennan viewed the majority decision as changing summary judgment procedure for all litigants, not only those parties raising First Amendment claims.

Justice Rehnquist, joined by Chief Justice Burger in dissent, viewed the majority's action as mistakenly engrafting a standard of proof applicable to a factfinder onto the law governing the procedural motion for summary judgment, with the likely effect of causing the decisions of trial judges as to summary judgment in libel cases "to be more erratic and inconsistent than before."

Anderson v. Liberty Lobby, Inc., Case No. 84-1602 (U.S.Sup.Ct., June 25, 1986) [ELR 8:3:7]

Private figure had the burden of showing falsity of allegedly defamatory statement published by Philadelphia Inquirer as well as fault, declares United States Supreme Court

In another significant libel action, the United States Supreme Court ruled that Maurice Hepps, a private figure, was required to establish not only that the Philadelphia Inquirer was at fault in publishing certain allegedly defamatory statements about Hepps, but that the statements at issue were false.

A series of articles published by the Inquirer between May 1975 and May 1976 suggested that Hepps, the principal stockholder of General Programming, Inc., had links to organized crime and attempted to influence certain state legislative and administrative decisions. General Programming, a corporation that franchised a chain of beverage and snack stores, purportedly obtained special treatment from the State liquor Control Board.

After both sides presented their evidence in Hepps' defamation action, the trial court judge concluded that the Pennsylvania statute which would have placed upon the newspaper the burden of proving the truth of the statements at issue, violated the Federal Constitution; the court therefore instructed the jury that the Hepps parties were required to prove the falsity of the statements. The jury ruled in favor of the Inquirer.

On appeal, the Pennsylvania Supreme Court concluded that the showing of fault required under Gertz v. Robert Welch, Inc., 418 U.S. 323 did not require a showing of falsity, that placing the burden of showing truth on the Inquirer did not unconstitutionally inhibit free debate; and that the matter should be remanded for a new trial.

Justice O'Connor, in reversing the Pennsylvania Supreme Court's decision, first pointed out that the statements at issue were of public concern. Thus, in this case, although Hepps may have been a private figure, the Constitution superseded the state's common law rule, and Hepps was properly required to bear the burden of showing falsity as well as fault before recovering damages. Justice O'Connor stated that "to ensure that true speech on matters of public concern is not deterred, . . . the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."

While acknowledging that requiring a party to show falsity may protect some speech that is "unprovably" false, Justice O'Connor found support for the court's ruling in previous decisions concerning the restrictions imposed by the First Amendment upon the common law of defamation. And it was noted that the evidence presented by a party as to a publisher's fault also usually will relate to the falsity of the challenged report. Pennsylvania's shield law, which allows media employees to refuse to divulge their sources, might increase a party's burden in showing falsity, but most likely would not require a different constitutional conclusion, stated the court (this issue was not raised on appeal in this case).

Justice Brennan, joined by Justice Blackmun concurred in the court's decision on the ground that the First Amendment requires all parties challenging allegedly defamatory speech of public concern to prove the statements at issue to be false. Justice Brennan would not have reserved the question, as did the court, whether the rule would apply to non-media defendants.

In dissent, Justice Stevens, joined by Chief Justice Burger, and Justices White and Rehnquist, cautioned that the only litigants likely to benefit from the court's decision will be those who act negligently or maliciously and that by attaching "no weight to the state's interest in protecting the private individual's good name," the court reached a "pernicious result."

According to Justice Stevens, "deliberate, malicious character assassination" is not protected by the First Amendment, but the court's ruling would serve to grant potential character assassins an absolute license to defame by means of statements that can be neither verified nor disproven. In this case, the defamatory character of the statements about Hepps' company were undisputed, but the truth or falsity of the specific allegation contained in the newspaper's statements depended on the difficult-to-establish character and conduct of a third party. In Justice Stevens' view, the requirement that a private party prove fault would be sufficient to allay the concern that a significant amount of true speech might be deterred; thus, by imposing on private parties the burden of proving falsity, the court's decision "trades on the good names of private individuals with little First Amendment coin to show for it."

Philadelphia Newspapers, Inc. v. Hepps, Case No. 84-1491 (U.S.Sup.Ct., April 21, 1986) [ELR 8:3:8]

ABC Sports fails to obtain summary judgment in copyright infringement action brought by owner of the song "Walkin' With Mr. Lee" alleging unauthorized use of the composition on soundtrack of sports feature

During ABC Sports' coverage of the 1984 Winter Olympics, the broadcaster aired a three minute documentary entitled "Ski Jump - Evolution of Style." One of the musical works accompanying the assemblage of film clips was a 19 second excerpt from Lee Allen's 1957 composition "Walkin' With Mr. Lee," a copyrighted song owned by Angel Music, Inc.

When Angel complained that ABC had failed to obtain a synchronization license for the use of the song, ABC's response was that the use of the music was covered by the broadcaster's blanket performing rights license. In January 1982, BMI granted ABC performance and related rights in the musical works licensed to the organization by copyright owners, including Angel. But Angel argued that ABC's use of "Walkin' With Mr. Lee" as background music during the display of visual images of ski-jumping was an unauthorized synchronization which was not included within the scope of the incidental right granted to ABC by BMI to record the composition for the making of regularly scheduled network broadcasts.

Synchronization rights - the use of music in synchronization with visual images on a soundtrack of a film or videotape-are, as described by Federal District Court Judge Robert W. Sweet, a subset of the larger category of reproduction rights granted to music publishers under section 106(1) of the Copyright Act; such rights are distinct from the performance rights set forth under section 106(4).

Angel brought a class action lawsuit on behalf of all music publishers represented by the Harry Fox Agency, alleging that any incidental recording right granted to ABC was designed only to facilitate the performance use of the composition; and that ABC's interpretation of the Angel Music and BMI agreements was contrary to the intent of the parties and violated the widely accepted industry practice of separating performance rights licenses from recording rights licenses. Synchronization licenses customarily are obtained from the Harry Fox Agency (Angel's claim against the agency for breach of fiduciary duty for failing to enforce the publisher's synchronization rights was dismissed by the court for lack of federal jurisdiction; see Angel Music, Inc. v. ABC Sports, Inc., 609 F.Supp.764; ELR 7:8:15.).

Judge Sweet found that a factual dispute existed as to "the scope and the meaning of the category of rights granted by the BMI-ABC agreement" and that summary judgment therefore was not available to ABC. Judge Sweet also refused to grant summary judgment to Angel Music with respect to the publisher's claim that ABC's interpretation of the BMI-ABC licensing agreement was preempted by the Copyright Act. According to Judge Sweet, the cases cited by Angel Music did not suggest that a copyright license "cannot, if so interpreted, convey distinct categories of rights in the same license."

Thomas A. Dickerson, the attorney for the plaintiffs in Angel Music, in the May 2, 1986 issue of the New York Law Journal, suggested that the case is significant because "it seeks to require television producers to pay for the synchronized use of all background including the so called onetime use ... it pits BMI against The Harry Fox Agency in what amounts to a turf contest over the right to represent music publishers in licensing performance and synchronization rights ... [and] demonstrates what a small publisher can do to defend itself against the unauthorized and uncompensated use of copyrighted music."

Angel Music, Inc. v. ABC Sports, Inc., 631 F.Supp. 429 (S.D.N.Y. 1986) [ELR 8:3:8]

Regulations which operated to prevent Chicago Cubs from playing night baseball games at Wrigley Field are upheld by Illinois Supreme Court

The Illinois Supreme Court has affirmed a Chicago trial court judge's ruling upholding the constitutionality of state and city environmental regulations concerning the presentation of nighttime athletic events (ELR 7:1:14).

The Chicago National League Ball Club, the owner and operator of the Chicago Cubs, sought a declaratory judgment, claiming that the regulations violated the separation of powers principle, deprived the club of the right to due process, and violated state and federal equal protection clauses by declaring as law "the conclusive presumption that night baseball at Wrigley Field alone constitutes a private nuisance."

Judge Ward found that the state legislature and the city possessed the discretion to determine the measures necessary to secure the public interest and welfare. And the classifications in the regulations, such as the population criteria, the distinction between night time and daytime sporting events, between amateur and professional sports, and between open-air and enclosed stadia, were found to be reasonably related to the government entities' legitimate purpose of protecting the property and other rights of residents living near sports stadia.

Chicago National League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245 (Ill. 1985) [ELR 8:3:9]

Permanent injunction barring organizers of Gay Olympic Games from using the word "Olympics" is upheld by Federal Court of Appeals; denial of rehearing en banc is challenged by dissenting judge due to presence of significant First Amendment issues

The United States Olympic Committee and the International Olympic Committee, after a series of proceedings, have obtained a permanent injunction, in an action under the Amateur Sports Act barring San Francisco Arts & Athletics from using the phrase "Gay Olympic Games" to describe an athletic competition conducted by the organization. However, a panel of the Federal Court of

Appeals vacated and remanded the District Court order awarding attorneys fees to the Olympic committee parties. And while the full court denied SFAA's petition for a rehearing and rejected a suggestion for rehearing en banc, Federal Court of Appeals Judge Kozinski, joined by Judges Pregerson and Norris, strongly dissented from this decision.

Initially, Federal Court of Appeals Judge Goodwin pointed out that section 380 of the Amateur Sports Act of 1978 "was intended to make the civil remedies of the Trademark Act of 1946 available to USOC and to give USOC the exclusive right to market licenses for use of the protected words and symbols" - confusion between uses of the words or symbols was unnecessary. Furthermore, when Congress adopted the Amateur Sports Act, it provided that Lanham Act remedies would be available to the USOC but omitted any provision for Lanham Act defenses. In view of the purposes of the Act, i.e., to give the USOC greater power than usually is granted to trademark holders by allowing it to prohibit nonconfusing uses, Congress' omission of the defenses most likely was intentional. Thus, the Lanham Act defenses raised by SFAA were "irrelevant."

SFAA also alleged that prohibiting its use of the word "Olympics" was unconstitutional as a denial of equal protection. According to SFAA, the United States Olympic Committee discriminated between homosexual groups and other organizations with respect to using "Olympics" to describe an athletic contest. The court pointed out, however, that there was no governmental involvement in the alleged discrimination - neither the USOC's exploitation of its government granted property rights in the United States Olympic Committee trademark nor the judicial enforcement of those rights constituted the state action required to assert an equal protection claim.

A First Amendment challenge raised by SFAA also was rejected on the ground that the word Olympic and its associated symbols and slogans essentially are property, and "such property rights can be protected without violating the First Amendment." It also was noted that SFAA had satisfactory alternative means for expressing any opposition to the Olympics.

Judge Goodwin concluded by finding that the injunctive relief granted to the Olympic committee parties was not overbroad. The District Court, in granting attorneys fees found that SFAA intentionally used the word Olympic, knowing that there was a risk of violating the Act. But in view of a statement in Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (1980), SFAA might have thought that its proposed usage of the word was not barred by the Act. And the discrimination and state action arguments also were not unreasonable or insubstantial. Thus, further proceedings were ordered to determine whether SFAA's conduct was "sufficiently exceptional" to justify an award of attorneys fees, and, if so, the amount of that award.

Judge Kozinski dissented from the denial of SFAA's petition for rehearing, stating that the panel's decision threatened "a potentially serious and widespread infringement of personal liberties." In Judge Kozinski's view, the Amateur Sports Act, as interpreted by the panel, was an action by Congress that served to extract a word from the English language and give it to a private party to use in connection with any commercial endeavor or public event. But the word Olympic has been used to describe a wide range of athletic competitions; Judge Kozinski doubted whether Congress could restrict the use of the word and, in particular, "the ideas it embodies" to one private entity. SFAA may have chosen the word Olympics to foster a more wholesome image of the gay community. Denying the organization the right to use the word thwarted this purpose, stated Judge Kozinski, for the organization could not have conveyed the same message if its event had been named "The Best and Most Accomplished Amateur Gay Athletes Competition."

The panel's description of the word Olympics as property was not responsive, according to Judge Kozinski, to SFAA's contention that Congress did not have the power to transform the word into private property so as to restrict its use in connection with any product or public event. Trademark, copyright and patent rights are intended to strike a balance between the interests of the property owner and those of the public. But the Amateur Sports Act by not requiring a showing of likelihood of confusion and not allowing Lanham Act defenses "stake[d] out an intellectual property fiefdom quite unlike anything we have seen in our law before ... If Congress has the power to grant such a crown monopoly in the word Olympic, one wonders how many other words or concepts can be similarly enclosed, and the extent to which our public discourse can thereby be impoverished."

Furthermore, the USOC apparently has allowed many other groups, including the handicapped and police groups, to carry the Olympic torch. The asserted subjective assessment by the committee of the "wholesomeness" of proposed users of the word was "troublesome," declared Judge Kozinski, as such a potentially arbitrary evaluation was being made by a private body not necessarily subject to equal protection and due process considerations.

If the First Amendment was implicated when Congress gave the Olympic committees the right to use the word Olympics, the Amateur Sports Act still would likely survive a First Amendment challenge if the Act prohibited only those uses of the word which were likely to cause confusion or otherwise mislead the public. But the panel found that all unauthorized uses of the word were barred. Since there had been no trial, Judge Kozinski speculated that the governmental interests served by the broad prohibition on the unauthorized use of the word may have resulted from the need to insure the market value of licenses so as to subsidize the United States Olympic Committee. If so, this interest would not justify even a minor restriction on free speech, stated the dissent. The commercial licenses could have been adequately protected by giving the Olympic committee rights coextensive with the Lanham Act, and Judge Kozinsky suggested that such a narrow construction of the Act would be appropriate.

Judge Kozinski concluded by expressing concern with the "barren record" in the case, and with the haste with which SFAA was "ushered" out of court. A group seeking to hold a public event to promote views some might offensive was engaged in an activity "lying at the very heart of the First Amendment;' and the title Gay Olympic Games was essential to the group's message. The petition for rehearing raised questions which should have been resolved by the court en banc, stated Judge Kozinski, for the "blunderbuss injunction" issued by the panel might not only result in "undermining not only the right to free speech, but also the laws protecting intellectual property, to the ultimate detriment of both."

International Olympic Committee v. San Francisco Arts & Athletic, 781 F.2d 733 (9th Cir. 1986); modified, 789 F.2d 1319 (9th Cir. 1986) [ELR 8:3:9]

"The Ray Briem Program" is ruled a bona fide news interview program exempt from the "equal opportunities" provision of the Communications Act

The Fairness/Political Programming Branch of the Federal Communications Commission's Mass Media Bureau, in a staff ruling, has classified "The Ray Briem Program" as a bona fide news interview program.

In granting American Broadcasting Company's request for a declaratory ruling, the FCC cited the following factors: "Briem'" a news interview and talk show, has been broadcast on KABC on a regular basis for 18 years and on the ABC Talkradio Network for three years; the program features newsworthy guests on two or three of the five programs a week; KABC is directly responsible for the production and control of the broadcast, including prescreening the call-in portion of the program to insure that each speaker addresses the relevant topic; and Mr. Briem can cut off any caller who attempts to promote or oppose a political candidate.

As a result of the ruling, appearances on the program by legally qualified candidates for public office, under the circumstances set forth above, will be exempt from the equal opportunities requirement of section 315 of the Communications Act.

In re Request by American Broadcasting Cos., Inc., 59 R.R.2d 843 (FCC, Dec. 1985) [ELR 8:3:10]

Union representation election for estimators employed by Lorimar Productions was conducted improperly, rules Federal Court of Appeals

In early 1981, a Regional Office of the National Labor Relations Board certified a collective bargaining unit composed of the estimators and production coordinators employed by Lorimar Productions, Inc. Lorimar requested a review of the Board's decision, contending that the unit was inappropriate because the estimators were technical employees; Lorimar also claimed that the estimators and production coordinators were confidential and managerial employees. Just prior to a scheduled election, the Board granted Lorimar's request for review of the status of the production coordinators. Nevertheless, the election took place as scheduled.

Subsequently, the Board found that the production coordinators were confidential employees and excluded them from the unit. Lorimar proceeded to challenge the results of the election, in which six out of the eleven estimators voted for the union. The Board overruled Lorimar's objection and certified the Production Office Coordinators and Accountants Guild Local 717, International Alliance of Theatrical Stage Employees as the estimators' bargaining representative.

When the union requested that Lorimar bargain with it, the company refused. After unfair labor practice charges were filed, the Board issued an order requiring Lorimar to cease and desist from refusing to bargain with the union. Lorimar contended that it did not commit an unfair labor practice by refusing to bargain with the union because the Board's unit determination as to the estimators was inappropriate.

Federal Court of Appeals Judge Alarcon first upheld the Board's determination that the estimators did not qualify as confidential employees and denied Lorimar's crosspetition for review of the Board's unit determination. The court noted that the estimators did not maintain a confidential work relationship with managerial employees responsible for labor policy and did not have access to confidential information that might be used in future contract negotiations.

Lorimar also argued that the Board erred in certifying the unit of estimators when the voters in the election, including six production coordinators, believed that the unit would include both estimators and production coordinators. Judge Alarcon agreed, stating that the procedure followed by the Board "significantly impaired the conduct of the election by misleading the voters as to the scope of the unit ... The ultimate unit certified by the Board (eleven estimators) differed substantially in size and nature from the unit voted upon. . ." By not collecting two ballots from each voter, one on each potential unit, the Board deprived the employees of their right to cast a vote for representation in the unit ultimately certified by the Board, stated the court. Lorimar's cross-petition for review on this ground therefore was granted; the Board's application for enforcement of its bargaining order was denied; and the matter was remanded to the Board.

In dissent, Judge Pregerson expressed the view that the Board did not abuse its discretion in the election procedure it followed in this case, given the importance of avoiding delays in conducting representation elections.

National Labor Relations Board v. Lorimar Productions Inc. 771 F.2d 1294 (9th Cir. 1985) [ELR 8:3:11]

Million dollar jury verdict to American Multicinema in antitrust action against Syufy Enterprises is vacated and remanded for recalculation of damages arising from alleged monopolization of film exhibition in San Jose, California

A jury verdict awarding about $1 million to American Multicinema on its claim that Syufy Enterprises monopolized the San Jose area market for "industry anticipated top grossing films" has been vacated and remanded by a Federal Court of Appeals. The District Court had denied Syufy's motions for judgment not withstanding the verdict and entered judgment for treble the amount of damages awarded by the jury and for attorneys fees (ELR 5:6:16). The Court of Appeals, however, found that the evidence was insufficient to support two of the four theories suggested by American Multicinema as a basis for finding that Syufy violated section 2 of the Sherman Act.

Federal Court of Appeals Judge Norris first noted that during the relevant time period - from about 1973 to 1979 - Syufy owned all four drive-in theater complexes in the San Jose market and also operated a total of 15 screens in large domed hardtop theaters, known as "event" theaters. AMC owned and operated four theater complexes in the San Jose area; each complex contained six auditoriums, each with a seating capacity of about 250 people.

AMC, in a counterclaim responding to an antitrust action filed by Syufy, had charged that Syufy used its dominant position as a theater owner to monopolize the exhibition of films in the San Jose market. On appeal, Syufy first challenged AMC's definition of the product market as "industry anticipated top grossing films." Judge Norris found that there was sufficient evidence to permit a jury to recognize this product definition because about 30 films a year were likely to meet the definition on the basis of national advertising support, longer playtimes, guaranteed rentals, star talent, and lucrative terms offered by exhibitors. Such films were not in substantial competition with other films.

Syufy next argued that the fact that it possessed a 60-69% share of the market was insufficient, in itself, to establish that it had monopoly power within the market.

AMC pointed to other evidence of Syufy's power to control prices or exclude competition in San Jose, such as the fragmentation of competition and the barriers faced by prospective competitors seeking to enter the market in the form of exclusive runs and Syufy's requirement of "excessive" geographic clearances for the distribution of certain films. In all, Syufy's market share, in conjunction with other factors, adequately supported the jury's determination that Syufy possessed monopoly power in the San Jose market, that the company willfully maintained its monopoly power via the use of excessive clearances, and that AMC had been injured as a result of Syufy's conduct.

The court also determined that sufficient evidence had been presented to support a finding that Syufy attempted to monopolize the hardtop film exhibition market, with resulting antitrust injury to AMC.

AMC also had claimed, as a separate theory of liability under section 2 of the Sherman Act, that Syufy used its monopoly power in the San Jose drive-in theater market as leverage to influence the licensing of films in the hardtop theater market. In particular, it was alleged that Syufy submitted bids to exhibit certain films in its drive-in theaters on the condition that the film could play only one hardtop theater in the area - if such a restricted bid were accepted, the film most likely would have an exclusive run at a Syufy hardtop, according to AMC. But AMC did not prove that Syufy succeeded in using the purported leveraging scheme to acquire a single exclusive hardtop run by submitting restricted bids in connection with its drive-in theaters. Thus, there was no showing of causal antitrust injury to AMC, and Judge Norris found that the District Court had erred in not granting Syufy's motion for judgment notwithstanding the verdict on this claim.

The District Court also erred with respect to AMC's conspiracy to monopolize claim against Syufy, stated Judge Norris. AMC's argument that Syufy conspired with film distributors to monopolize the San Jose market in violation of section 2 of the Sherman Act was "murky at best." And there was no evidence that any of the distributors, in licensing films to Syufy, knew or should have known that Syufy would use the licenses for alleged monopolistic purposes. AMC was required to present some showing that more than one of the alleged coconspirators had "at least some awareness" that the underlying conduct was anticompetitive or monopolistic.

Judge Norris remanded the matter for the recalculation of damages. In refusing to approve the general verdict, the court pointed out that the potential for confusion of the jury in this case was great due to the erroneous submissions of the leverage theory and of the conspiracy to monopolize claim. Furthermore, AMC's case against

Syufy was "marginal" even with respect to the claims of monopolization and attempted monopolization of the hardtop film exhibition market. Thus, these claims did not provide a sufficient basis for upholding the jury verdict, concluded the court.

Syufy Enterprises v. American Multicinema, Inc., 783 F.2d 878 (9th Cir. 1986) [ELR 8:3:11]

Sydney Barrows may bring New York Civil Rights Law action for unauthorized sale to news media of nude photographs taken of her by former lover, rules New York appellate court

Sydney Barrows, a member of a socially prominent East Coast family, was arrested in October 1984 on a charge of promoting prostitution. Soon after, Steven

Rozansky, Barrows' former lover, provided to the news media nude photographs he had taken of Barrows about eleven years earlier. Barrows sued Rozansky under sections 50151 of the New York Civil Rights Law, seeking, in part, to enjoin Rozansky from selling or distributing the photographs.

The trial court granted Barrows' request for a temporary restraining order. However, after a hearing, trial court judge Stecher refused to issue a preliminary injunction and dismissed, sua sponte, Barrows' complaint, concluding that she did not set forth a prohibited use of the photographs for advertising or trade purposes. It was noted that Rozansky sold the photographs to media parties whose use of the photographs in connection with a newsworthy event, i.e., the reporting of Barrows' activities, was constitutionally privileged.

A New York appellate court, in reinstating the complaint and granting the preliminary injunction, found that

Barrows sufficiently alleged a cause of action since the "nonconsensual sale of a person's photograph to a newspaper alleges an unauthorized use under the statute for purposes of trade." The trial court erred in not accepting as true Barrows' allegation that she had not consented to the commercial use of the photographs and in granting constitutional protection to the publication of the photographs without a showing that the allegedly privileged use was legitimately related to the informational value of the publication.

Furthermore, Barrows' complaint suggested that Rozansky did not intend to sell the photographs only to publications reporting on her arrest. Injunctive relief was warranted, stated the appellate court, because Barrows made the requisite showing of probable success on the merits, possible irreparable injury and a balance of equities in her favor.

Justice Milonas dissented from the court's opinion on the ground that the publication of Barrows' photograph was constitutionally protected, notwithstanding the fact that Rozansky sold rather than gave the photographs to the news media. Justice Milonas pointed out that Barrows had an adequate remedy against Rozansky-an accounting for the profits he earned from his allegedly unauthorized sale of the photographs.

Barrows v. Rozansky, 489 N.Y.S.2d 481 (N.Y.App. 1985) [ELR 8:3:12]

FBI agent may proceed with defamation action against author and publisher of book about Wounded Knee incident, but claims based on protected expressions of opinion and on references to FBI agents as a group are dismissed

In 1983, Viking Press published "In the Spirit of Crazy Horse" by Peter Matthiessen. The book included a discussion of the role of the FBI in the prosecutions arising from the Wounded Knee incident in 1973 and the killing of two FBI agents on the Pine Ridge, South Dakota Reservation in 1975.

David Price brought a defamation action against Viking and Matthiessen, contending, in part, that the book accused him of complicity in the murder of an AIM member and in the alleged coverup of that murder.

A Federal District Court in Minnesota initially dismissed those of FBI agent Price's claims which were based on statements not susceptible of a defamatory meaning. The Viking parties argued that several other statements did not concern Price but only referred generally to FBI agents as a group. Furthermore, at the time of the Wounded Knee incident, the number of FBI agents in Rapid City exceeded the small number of agents typically assigned to the FBI branch. The court therefore agreed that the book's references to a group of FBI agents or to the FBI itself were not actionable since there were no facts or circumstances mentioned from which readers might know that Price was the person allegedly defamed.

In turning to the question of whether the challenged statements were protected expressions of opinion, Judge Diana E. Murphy noted that Matthiessen "candidly" declared his sympathy for the Indian people. presented the opposing viewpoint, and used cautionary language. Accordingly, several of the allegedly defamatory statements were found to be constitutionally protected statements of opinion.

Judge Murphy declined to apply the neutral reportage privilege because of the presence of several factual issues concerning the use of the privilege. And since no discovery had taken place, the court declared that it could not determine the accuracy of certain statements republished by Matthiessen. The lack of discovery also caused the court to refuse to dismiss the action on the basis of the actual malice privilege. Matthiessen also was unsuccessful in claimIv ing that dismissal was appropriate because the allegedly defamatory statements were protected by the qualified common law privilege for comment on the conduct of public officials or reports on judicial proceedings.

Judge Murphy did dismiss Price's claim for intentional infliction of emotional distress, finding that the publication of the name of the city where Price and his family lived did not, as a matter of law, constitute the requisite "outrageous activity,' and that the allegedly defamatory statements were not so extreme as to go "beyond all possible bounds of decency" Also dismissed were Price's claims for false light invasion of privacy, a cause of action not recognized under Minnesota law, and for prima facie tort.

Price v. Viking Press, Inc., 625 F.Supp. 641 (D.Minn. 1985) [ELR 8:3:13]

Newsweek statement concerning Governor of South Dakota's conduct toward American Indian activist was protected opinion, rules Federal Court of Appeals

The February 21, 1983 issue of Newsweek magazine contained an article entitled "Dennis Banks' Last Stand;" the article described the relationship between Banks, an American Indian activist, and William Janklow, the Governor of South Dakota. When Janklow was state attorney general, he had prosecuted Banks. Banks fled the state in the mid 1970s, after being convicted of two felony counts arising from a 1973 riot at the Custer County courthouse. Janklow, as Governor, sought Banks' extradition.

The article contained a statement referring to Bank's initiation, in 1974, of tribal charges of assault against Janklow in connection with the allegation (later acknowledged to be false) that Janklow had raped a teenaged Indian girl five years before. According to Janklow, the article defamed him by implying that revenge motivated his prosecution of Banks.

A Federal Court of Appeals in South Dakota has upheld a District Court decision granting summary judgment to Newsweek on the ground that the article was opinion and was absolutely protected by the First Amendment. In accordance with the standards set forth, both by the court and by concurring Judge Bork, in Ollman v. Evans, 750 F.2d 970 (ELR 7:5:13), Judge

Arnold first noted that the challenged statement - that Janklow "was prosecuting Banks" eight months after the tribal court's unfavorable finding - did not state, precisely, that Janklow's motive in conducting the prosecution was revenge. Janklow argued that Newsweek could have written a clearer sentence to convey the information that his prosecution of Banks already was underway prior to the tribal proceedings, and that the statement therefore was actionable. But Judge Arnold observed that the First Amendment "cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words."

With respect to the remaining Ollman v. Evans factors, the court determined that the Newsweek statement was not verifiable, and that the article appeared in a national news magazine which, as opposed to local daily newspapers, has a tradition of "spirited language." Furthermore, news magazines, far more than local papers, must condense the coverage of issues. And the challenged article conveyed a "transparently pro-Banks posture" which would signal readers to expect a fair amount of opinion. The fact that the statement concerned a government official's purported response to an important issue also was significant in terms of the First Amendment protection available to Newsweek, noted Judge Arnold.

Janklow next argued that Newsweek deliberately distorted the chronology of events in the Banks matter to suggest retribution on Janklow's part, and that the statement, even if read as opinion, therefore was actionable. But the court observed that Newsweek had not made any direct suggestion of fact. Rather, the complained-of implication arose from "semantic ambiguity." Judge Arnold agreed that the article might have been fairer to Janklow and more informative to readers if the chronology of the rape charge and riot prosecution had been more fully explained. However, the First Amendment required that the magazine's editorial judgment, and not that of the court, should prevail.

A dissenting opinion expressed the view that the court's decision did not strike a fair balance between media interests and the interests of individuals. Judge Bowman declared that the court had added, to the "fortress of actual malice," a "virtually impenetrable outer barrier built upon an extremely broad and elastic definition of opinion," with the predicted result that many libel cases will be dismissed before the issue of actual malice is ever reached. The dissent would have found that the implied meaning a jury could have drawn from the article amounted to an assertion of fact rather than an expression of opinion. Janklow then would have been allowed to present evidence of actual malice and, according to Judge Bowman, would likely have made a strong showing on the issue, particularly as to

Newsweek's purported knowledge that Janklow's prosecution of Banks began before the tribal matter.

Judge Bowman concluded by pointing out that all libel actions turn, in one way or another, on word choice and that the question was "not whether courts will be making editorial judgments about these specific word choices but rather whether Newsweek will be held accountable for its editorial judgments, i.e., for the words that it does choose." Newsweek's statement contained a precise and factually based implication, declared Judge Bowman and was incorrectly categorized as protected opinion by the court.

Janklow v. Newsweek, Inc. 788 F.2d 1300 (8th Cir. 1986) [ELR 8:3:13]

Twentieth Century-Fox was properly required to base Oregon property tax on the value of the company's film negatives rather than on the cost of prints distributed in the state, rules Oregon Supreme Court

The Oregon Tax Court ruled that the state's Department of Revenue did not sufficiently establish its departure from using a statutory three factor apportionment formula to determine the extent of Twentieth Century-Fox's business activity in the state. Fox had included as part of the formula the cost of the positive prints of its films - the company's only tangible property in Oregon. The Department of Revenue, however, citing the economic reality of the film industry, modified this factor to include a portion of the value of the company's film negatives. The negatives, which the company stores in

California, generally are valued at the cost of producing a film.

The Tax Court ruled that the Department of Revenue erred in varying the apportionment formula. But the Oregon Supreme Court, in reversing the Tax Court's decision, stated that it was not necessary for the Department of Revenue to apply the apportionment formula in cases where the formula did not fairly represent the business activity of the taxpayer, particularly a taxpayer in a nonmerchandising, non-manufacturing industry. It was observed that Fox's prints had a value ranging from $800 to $1,000, depending on the footage. The negatives, however, varied in value from under $5 million to over $20 million and "it would be inaccurate to describe taxpayer's business activity as distributing reels of prints without reference to the negatives from which they are made ... The business activity of taxpayer in Oregon is the distribution for display of the embodiment of a story or theme, photographed, edited, acted and captured on film." Using the value of the prints in the apportionment formula would substantially under-represent Fox's business activity in Oregon, stated the court. The Department's modified apportionment formula reasonably reflected the cost or value of the films distributed by Fox. But the court could not determine whether the hearing officer included in the property factor the value of all films in release or only those films distributed in Oregon during the tax year in question. The matter therefore was remanded to the Department of Revenue for clarification of this factor.

Twentieth Century-Fox Film Corporation v. Department of Revenue, 700 P.2d 1035 (Ore. 1985) [ELR 8:3:14]

Assumption of risk doctrine precluded award of damages to former New York Yankee baseball player Elliot Maddox

Elliot Maddox, a former player for the New York Yankees, was injured on June 13, 1975 when he slipped and fell during the ninth inning of a night game with the Chicago White Sox. The game was played at Shea Stadium because Yankee Stadium was being renovated. As a result of his knee injury, Maddox was forced to retire prematurely from playing professional baseball.

In his action against New York City, the owner of Shea Stadium, and against the Metropolitan Baseball Club, the lessee of the stadium, Maddox claimed that the drainage system in the stadium was negligently designed or maintained. A trial court refused to grant summary judgment to the stadium parties, holding that there was an issue of fact as to whether Maddox assumed the risk of injury. An appellate court reversed the trial court's ruling and dismissed Maddox's claim, pointing out that Maddox had admitted that he was aware that the previous night's game was canceled because of poor weather and field conditions. During the game, Maddox observed that centerfield was "awfully wet," with mud and standing water above the grass line and he reported the conditions to a ground crew member; but Maddox presented no evidence that, after he made the field conditions known, a supervisor ordered him to continue playing.

On appeal, Maddox argued that although he may have assumed the risks of the game of baseball, such risks did not include an unreasonably dangerous playing field; that his only alternative was to continue to play; and that the evidence did not show that he was aware that his foot could get stuck in the mud. The Court of Appeals rejected these arguments and affirmed the appellate court's decision, observing that "the risks of a game which must be played upon a field include the risks involved in the construction of the field" In all, no issues of fact remained as to the assumption of risk defense.

Maddox v. City of New York, 496 N.Y.S.2d 726 (N.Y. 1985) [ELR 8:3:14]

Copyright Royalty Tribunal is ordered to reconsider distribution of 1982 royalty fees from jukebox operators

The Copyright Royalty Tribunal improperly allocated the 1982 compulsory royalty fees collected from jukebox operators, a Federal Court of Appeals has ruled. There were nine claimants to portions of the nearly $3 million in 1982 jukebox royalties; four of the claimants -

ASCAP, BMI, SESAC and IBC (Italian Book Company) reached a voluntary agreement as to the distribution of the fund among themselves. Two individuals filed claims as unaffiliated owners of copyrights, but their claims were denied. The remaining three claimants were ACEMLA (Asociacion de Compositores y Editores de Musica Latino Americana), Latin American Music and Latin American Music, Inc.; these organizations sought at least five per cent of the fund based on claimed interests in more than 20,000 copyrights to Spanish language songs.

In August 1984, the Copyright Royalty Tribunal rejected the ACEMLA parties' claim and concluded that the entire fund should be distributed to ASCAP, BMI, SESAC and IBC pursuant to their agreement. But Judge George C. Pratt found that the Tribunal's distribution order was not reached in accordance with law, stating that there was a substantial basis for regarding Latin

American Music as a performing rights society, rather than as an unaffiliated owner of copyrights. When distributing royalties to performing rights societies, the Tribunal may allocate the fund in "the pro rata share to which such performing rights societies prove entitlement." The Tribunal also may distribute the fund in accordance with an agreement reached by the societies, but only if each group has agreed to the distribution, emphasized Judge Pratt. And while Latin American Music had not shown that any of its recordings actually was performed on any licensed jukebox, ASCAP, BMI, SESAC and IBC also failed to prove any actual performances - their distribution agreement was not a sufficient substitute for proof. If the Tribunal chose to take notice that some performances of the copyrighted works of the societies must have occurred because of their dominant position in the industry, the Tribunal had to set forth this criteria in its order.

The court acknowledged that proof of actual performances is not necessarily a prerequisite to receiving a portion of the royalty fund, but "when the performing rights societies fail to agree on a distribution, the same standards of proof of entitlement must be applied to all the competing societies.. ." and the Tribunal must state the specific reasons underlying its distribution order. The matter therefore was remanded for further proceedings.

In November 1985, the Copyright Royalty Tribunal stated that it would award .15% of the 1982 fund and .15% of the 1983 fund to the Latin American Music Co. The Italian Book Company was awarded $1500 from the 1983 fund, with the balance allocated to ASCAP, BMI and SESAC.

ACEMLA v. Copyright Royalty Tribunal, 763 F.2d 101 (2d Cir. 1985) [ELR 8:3:15]

Federal Communications Commission modifies record keeping requirements for commercial radio and television stations' public interest programming in response to ruling by Federal Court of Appeals

On May 1, 1986, the Federal Communications Commission ordered commercial radio and television stations to maintain a list of their most significant programs, during the preceding three month period, involving issues of community concern. The Commission apparently acted in response to a Federal Court of Appeals decision which vacated., as arbitrary and capricious, a prior FCC regulation requiring radio station licensees to maintain a quarterly list of five to ten community issues addressed by the station's programming (the court's decision did not involve television station licensees).

In the early 1980's, as part of a sweeping deregulation of the radio industry, the FCC substituted for its extensive program logging requirements an annual "issues/program" list. In 1983, the Court of Appeals stated that the FCC had not explained adequately the change in licensee reporting requirements and questioned whether the list would provide the public with sufficient information to evaluate the public interest programming of broadcast licensees. The matter therefore was remanded to the FCC. The Commission's decision to require a quarterly issues/program list also was rejected by the court.

In response to the United Church of Christ's challenge to the issues/program record keeping requirement, Federal Court of Appeals Judge J. Skelly Wright pointed out that the FCC has stated that public participation is a vital element in the broadcast process in order to insure that applicants for license renewal have met their public interest obligations under section 309 of the Communications Act. Parties seeking to deny a license renewal must make a prima facie case alleging with specificity that an applicant's "overall" programming efforts did not include adequate treatment of issues of public concern.

But according to Judge Wright, such petitioners might be unable to demonstrate the existence of substantial factual issues as to a licensee's programming if there were inadequate information in the licensee's public file. The FCC's issues/program list would not enable a petitioner to "even come close" to making the requisite prima facie case with respect to the overall quality of a licensee's public interest broadcasts, ruled the court.

Judge Wright agreed with the Commission's decision not to adopt. on the basis of purportedly high costs, an "issues log" record keeping alternative. A more acceptable alternative, in the court's view, was a list of issues of community concern which had received "significant treatment" by the licensee. The cost to broadcasters of maintaining such a list would not be as substantial as those entailed by a daily issues log, stated Judge Wright, the Commission's failure to explain its rejection of this option suggested "a lapse of rational decision making" On remand, the Commission was asked to reconsider a "significant treatment" alternative. an alternative it now seems to have adopted, or to develop another adequate means of providing a basis upon which parties seeking to deny a license renewal might state a prima facie case.

Officials of Communication of the United Church of Christ v. Federal Communications Commission, 779 F.2d 702 (D.C.Cir. 1985) [ELR 8:3:15]

Record club's antitrust claims against United Artists Records were barred by release agreement, rules Federal District Court in New York, but summary judgment was not available as to record club's claim for tortious inducement of breach of contract

In 1970, the Record Club of America settled an antitrust action against United Artists Records and obtained a three year nonexclusive license to sell by mail order all of the records and tapes manufactured and distributed by the company. The club also agreed that during the term of the license agreement it would purchase United Artists' records from the company's wholly owned record manufacturing subsidiary, All-Disc Records, and that it would purchase tapes from another wholly-owned subsidiary, Liberty/UA Tape Duplicating.

In late 1972, a dispute arose among the parties concerning the payment of royalties due under the license agreement. Various lawsuits were filed and eventually, in 1983, the record club sought damages for United Artists' alleged anticipatory breach of the license agreement during 1973-1977, and for All Disc's breach of its contract, which allegedly was tortiously induced by United Artists. The record club also claimed that UA unreasonably restrained trade in violation of the Sherman Act by combining with All Disc, Liberty Tape and other unnamed conspirators to coerce the record club to enter the agreements with the subsidiaries, or that the UA entities had engaged in an illegal tying arrangement.

A Federal District Court in New York granted UA's motion for summary judgment, fending that the parties' settlement agreement (which was formally executed in l972), barred the record club's antitrust claim. Judge William C. Conner stated that the release specifically and unambiguously covered any claim arising out of any matter "connected with" or "related to" the 1970 antitrust lawsuits filed by the record club; the release therefore covered the antitrust claims set forth in the club's 1983 complaint.

However, Judge Conner refused to grant UA's motion for summary judgement on the record club's claim for tortious inducement of breach of contract arising from All Disc's failure to fill the record club's orders during 1973-1977, purportedly as directed by UA. Judge Conner pointed out that there was evidence tending to suggest that All Disc's failure to supply the record club was due to UA's belief that the record club had defaulted on its contract, and that a factual dispute existed as to whether UA's conduct in dealing with All Disc was fraudulent or malicious.

Record Club of America, Inc. v. United Artists Records, Inc., 611 F.Supp. 211 (S.D.N.Y. 1985) [ELR 8:3:16]

Jury award of $737,000 to game inventors in trade secret misappropriation action against Milton Bradley Company is reinstated by Federal Court of Appeals

As reported in ELR 6:11:2, a Federal District Court in Massachusetts granted game manufacturer Milton Bradlet's motion for judgment notwithstanding a $737,000 jury verdict in an action brought by inventors Roger Burten and Allen Coleman. Burten and Coleman had developed an electronic board game named "Triumph"; when they submitted the game to Milton Bradley, the inventors signed a standard disclosure agreement. In 1981, when Burten and Coleman discovered that Milton Bradley was marketing an electronic board game called "Dark Tower" they sued the company alleging that the toy contained structural and design similarities to Triumph and misappropriated their ideas and their technology. The District Court found that the terms of the disclosure agreement precluded the formation of a confidential relationship by the parties.

A Federal Court of Appeals has reversed the District Court decision, thereby allowing the jury verdict to stand. The court noted that under Massachusetts law, a confidential relationship will not be implied if the disclosing party voluntarily conveys a trade secret to another without limitation upon its use. Milton Bradley argued that its disclosure form waived any duties or obligations the company might have owed to Burten and Coleman other than those under the patent laws. But Federal Court of Appeals Judge Coffin expressed concern with the undifferentiated terminology used in the disclosure agreement - the agreement apparently did not contain explicit language waiving the existence of a confidential relationship among the parties only during Milton Bradley's review of Triumph. In all, the disclosure agreement did not adequately apprise Burten and Coleman "of the rights and obligations of the parties upon Milton Bradley's affirmative use or appropriation of the ideas submitted."

Judge Coffin also noted that Massachusetts law does not encourage contracts disclaiming liability for tortious behavior. The language of the Milton Bradley agreement, again, was not sufficiently explicit to preclude such liability. And the company had agreed to pay royalties to the inventors if the submitted game was not returned to them within a specified time period. Thus, on its face, the disclaimer agreement was not an unambiguous waiver by Burten and Coleman of all rights in Triumph and did not, as a matter of law, bar their action for misappropriation.

Judge Coffin concluded by referring to Massachussetts' effort to protect trade secrets in order to serve the public interest in commercial innovation and development and in order to maintain standards of commercial ethics - essential to this effort was the expectation that ideas will be exchanged in trust and confidence, absent an explicit waiver. The effect of the disclosure agreement on the relationship of the parties was a factual question appropriately submitted to the jury, and there was sufficient evidence before the jury for it to have entered a verdict on behalf of Burten and Coleman and grant them an award reflecting the evidence of the likely royalties from sales of their game.

According to news reports, Milton Bradley recently paid Burten and Coleman a total of $1.3 million - the jury award plus accrued interest.

Burten v. Milton Bradley Company, 763 F.2d 461 (1st Cir. 1985) [ELR 8:3:16]

Atlanta radio station fails to obtain preliminary injunction barring competitor from including the numeral "99" as part of its station identification

In computing the market share of radio stations in the Atlanta area, Arbitron, a market research company, relies on diaries maintained by station listeners. The diary keepers are instructed to identify the stations they tune in either by call numbers, frequency response or by the name of a program. In April 1985, Susquehanna Broadcasting Co.'s radio station WRMM (formerly WLTA), broadcasting on the assigned frequency of 99.7, began to identify itself as "WARM 99 FM." In this way, Susquehanna became entitled to Arbitron credit for listener diary entries referring on] y to the station call number 99.

Cox Communications operated Atlanta station WSB-FM, which was assigned a frequency at 98.5. In March

1982, Cox began promoting the station as 99 FM. When Susquehanna adopted the WARM 99 FM identification, Cox brought an action for trademark infringement, alleging that the designation 99 or 99 FM had acquired a secondary meaning as a result of the high promotional expenses incurred by Cox and the purported public association of WSB with the numeral "99."

Federal District Court Judge Forrester noted that the preponderance of the evidence showed that listeners were responding to the product, i.e., the program material, rather than to the producer, stating that "to demonstrate producer allegiance in a broadcasting case would require a showing that the listener has come to select the station because over a period of time the listener has come to like that station's artistic taste and journalistic style, reliability, and content and has chosen to listen to that station on the basis of opinions formed after a period of evaluation." In this case, however, listeners apparently were determining station preference solely by the immediate content of the service.

Judge Forrester next determined that Cox did not establish confusion in the marketplace as to the source of the service - it was not argued that any significant number of listeners of WRMM selected the station out of a mistaken belief, occasioned by the WARM 99 FM slogan, that they were listening to WSB. And the source of any actual confusion most likely would have been caused by the nearly identical formats of the stations and their close physical proximity, rather than by the similarity of the identifying slogans. Even when WRMM used the contested 99 FM identification, it was used in connection with the term "WARM."

In all, any listener confusion was not the result of Susquehanna's use of the 99 FM identification; Cox "created this opportunity for confusion," stated Judge Forrester, by deciding to use a numeral in its identification which another station also was entitled to use.

Since Cox did not establish a substantial likelihood that it would prevail on the merits, in view of the failure to demonstrate secondary meaning or a likelihood of confusion, a preliminary injunction was denied. An injunction also was not warranted because Cox failed to show irreparable injury and because enjoining Susquehanna's use of the numeral 99 would be adverse to the public interest. The court concluded by declaring that it would be "absolutely unconscionable to allow one station to appropriate for itself and exclude all others from using a whole number which truthfully describes an approximate geographical location on the FM dial. To allow that would be to give that station an unfair competitive advantage. Trademark law protects competitive advantages which are fairly acquired. It does not, however, allow one radio station to prevent another from locating itself for potential listeners."

Cox Communications, Inc. v. Susquehanna Broadcasting Co., 620 F.Supp. 143 (N.D.Ga. 1985) [ELR 8:3:17]

Constitutionality of Indiana gross receipts tax on ticket sales to closed circuit or subscription telecasts of boxing or wrestling matches is upheld

During 1980-81, Sunshine Promotions presented closed circuit, simultaneous telecasts of several boxing matches, including the fights between Muhammed Ali and Larry Holmes and Sugar Ray Leonard's fights with Roberto Duran and Thomas Hearns. Under Indiana law, the promoters of closed circuit or subscription telecasts of boxing or wrestling matches are subject to a ten percent tax on gross receipts from ticket sales.

Sunshine paid about $80,000 in taxes and then sued for declaratory relief, claiming that the tax unfairly discriminated against boxing promoters.

An Indiana appellate court has affirmed a trial court's decision upholding the constitutionality of the statute, agreeing that the statute did not display a legislative intent to discourage boxing matches, but rather was enacted to raise revenue in order to defray the cost of regulating boxing so as to protect boxers from "the inherent dangers of their sport." The tax thus was fairly and substantially related to a reasonable state objective.

The court rejected Sunshine's argument that the tax violated the state and federal equal protection clauses since subscription cable television systems were not subject to the tax. It was noted that the only characteristic shared by Sunshine and subscription cable television systems was the presentation of televised boxing matches. Sunshine's customers purchased the right to see a particular match at a particular time and place, and on a receiver over which they had no direct control; they viewed boxing matches in circumstances similar to live boxing matches, entry to which also is taxed under Indiana law.

By contrast, subscription cable services present boxing matches only occasionally and on a limited number of the channels available to their viewers. Subscribers view the matches on their own receivers; do not need permission to enter the arena or other facility; and need not deal with other members of the public. Thus, concluded the court, the services provided by Sunshine differed substantially from those provided by subscription cable services, precluding a finding that the statute violated the state or federal equal protection clauses.

Sunshine Promotions, Inc. v. Ridlen, 483 N.E.2d 761 (Ind.App. 1985) [ELR 8:3:17]

Listener group was not entitled to specific performance of option agreement to acquire assets of classical music radio station, rules New York appellate court in remanding matter for determination of damage award

In 1974, Starr Broadcasting Co. changed radio station WNCN's format from classical music to rock music. In 1975, when Starr applied for a renewal of its broadcast license, various listener groups organized Concert Radio, Inc. and filed a competing application for the license. During the license renewal proceeding, GAF Corp. offered to buy WNCN and to restore the station's classical music format. Eventually, in early 1976, Starr, GAF, Concert Radio and the listener groups entered an agreement which made it possible for GAF to acquire WNCN. The agreement provided that GAF would operate the station for at least five years primarily as a classical music station, and granted Concert Radio an option to acquire the station's assets under certain circumstances. The option price was to be somewhat more than GAF's book cost for the radio station - $2.2 million - plus GAF's additional capital expenditures less depreciation.

In December 1980, GAF decided to offer the radio station for sale. Without waiting for notice from GAF, Concert Radio announced its intention to exercise its option. But GAF, responded that the option could not be exercised until it had approved an identified buyer and set a selling price. Concert Radio then sued GAF seeking specific performance of the option agreement and compensatory damages.

A New York appellate court agreed with a trial court decision finding that the plain meaning of the option agreement did not require a known buyer to "trigger" the option, and that Concert Radio's option arose when GAF no longer wished to operate the station primarily as a classical music station. However, while the company's conduct in December 1980 manifested "an unequivocal decision to sell the station," the appellate court found that granting specific performance in this case was inappropriate because Concert Radio "took no risks, invested no money and suffered no losses as a result of the option contract" If specific performance were granted, Concert Radio would be entitled to purchase WNCN for approximately $2.9 million, resulting in a loss to GAF of at least $1.8 million. GAF apparently misunderstood the contractual language and technically triggered the option situation. But the court refused to order the equitable remedy of specific performance in order to provide a "windfall" for Concert Radio.

The court next found that there was a strong showing that GAF breached the option agreement and that Concert Radio might be entitled to recover the difference between the market value of the radio station at the time of the breach and the price set by the option agreement. Therefore the matter was remanded to the trial court for a determination of damages at the time of the purported breach.

In a dissenting opinion, Justice Kassal declared that a damage award would be an inequitable and inadequate remedy in this case. In Justice Kassal's view, GAF knew exactly what it was doing in announcing the sale of WNCN and proceeding according to a calculated plan of divestiture of about eight or nine business opportunities including WNCN. And Concert Radio had provided fair and substantial consideration with respect to the option agreement in connection with the license renewal proceeding. The refusal to grant specific performance would provide an unwarranted windfall to the well-counselled GAF, declared Justice Kassal, in concluding that specific performance was a meaningful and critical remedy which would have given full effect to the clear and unmistakable terms of the option agreement.

Concert Radio, Inc. v. GAF Corporation, 488 N.Y.S.2d 696 (N.Y.App. 1985) [ELR 8:3:18]

Recipient of letters written by founder of spiritual movement did not obtain copyright interests in letters

In 1947, Joel S. Goldsmith founded "The Infinite Way," a non-traditional, non-structured spiritual movement. Goldsmith collaborated with Lorraine Sinkler on a number of works, including a monthly newsletter; the authorship of each work was attributed to Goldsmith. After Goldsmith's death in 1967, Sinkler continued editing the newsletter.

In 1983, Goldsmith's widow registered a copyright for a work designated "Group of Letters Written by Joel S. Goldsmith to Lorraine Sinkler from 1949 to 1964." Sinkler sued Goldsmith seeking a declaration of the rights of the parties with respect to the letters, memoranda and manuscripts of Joel Goldsmith.

A Federal District Court in Arizona first determined that it possessed jurisdiction over the action because the First Amendment did not prevent the court from deciding a property dispute between the parties - the issues raised were not ecclesiastical.

Judge Hardy next found that there was no evidence, as argued by Sinkler, that Joel Goldsmith had granted

Sinkler an express license to publish material he had written and that a question of fact existed as to whether Emma Goldsmith granted a written or oral license to Sinkler to publish the letters at issue. Furthermore, although Sinkler claimed that her unpublished book "Horizons of Consciousness" (a large part of which consisted of correspondence between Sinkler and Joel Goldsmith) was a joint work, the court pointed out that the book was compiled between 1978-1981, many years after Joel Goldsmith's death. There was nothing in the record to suggest that Goldsmith and Sinkler had intended that their letters to each other "be merged into inseparable or interdependent parts of a unitary whole" so as to constitute a joint work.

In turning to Emma Goldsmith's claims, the court cited the general rule, as set forth in Nimmer on Copyright, that "the author of a letter retains the ownership of the copyright or literary property contained therein while the recipient of the letter acquires ownership of the tangible physical property of the letter itself." Upon Joel Goldsmith's death, the ownership of the copyright in his letters passed to his widow. However, some of the letters had been published in Sinkler's book "The Spiritual Journey of Joel S. Goldsmith," either with Emma Goldsmith's permission or acquiescence; the court deemed abandoned whatever copyright interest Mrs. Goldsmith had in those letters.

Mrs. Goldsmith's motion for summary judgment on her copyright infringement claim against Sinkler was granted since there was no evidence that Joel Goldsmith had released his letters for public consumption. Therefore, Sinkler's readings of certain unpublished letters to large groups of students, without authorization from Mrs. Goldsmith, did not constitute fair use.

Summary judgment was denied Mrs. Goldsmith on her trademark infringement claim. Sinkler had used the mark

"The Infinite Way" for twenty years, and the defenses of laches and acquiescence by Mrs. Goldsmith applied as a matter of law. Also dismissed was Mrs. Goldsmith's right of publicity claim for it was not shown that Joel Goldsmith had exploited the use of his name and personality during his lifetime by assigning the right to use them to another.

Sinkler v. Goldsmith, 623 F.Supp. 727 (D.Ariz. 1985) [ELR 8:3:19]

New York regulations concerning administration of drugs to racehorses are upheld

The Equine Practitioners Association challenged the constitutionality of rules adopted by the New York State Racing and Wagering Board which regulated the administration of drugs to racehorses prior to the horses' participation in pari-mutuel races. The rules established a schedule for the administration of various drugs for 72 hours before a race and also provided that anyone granted a license by the Board automatically consented to searches and inspections conducted at the racetrack. Veterinarians were required to keep written records of their treatment of racehorses.

The Association claimed that the rules arbitrarily distinguished among various drugs as to their time and method of administration and were therefore a denial of due process. A New York appellate court, however, determined that the rules were rationally based and reasonably related to the promotion of the public welfare.

The Association also claimed that the Board exceeded its statutory authority by attempting to regulate the practice of veterinary medicine. The court disagreed, stating that the rules only applied to horses entered in a race and did not attempt to regulate veterinary medicine outside of this narrow situation.

Finally, the Association alleged that the rules permitted unlawful search and seizure. The court reasoned that the Board was empowered to attach certain conditions to licenses and that racetrack veterinarians, as participants in a highly regulated business, were fully aware and have chosen to be subjected to governmental regulation. The appellate court therefore reversed a lower court ruling and granted the Board's motion for summary judgment, declaring the rules to be constitutional.

The New York Court of Appeals affirmed the appellate court's decision, in a brief (one paragraph) memorandum opinion. In doing so, however, the Court of Appeals modified the lower court's order by deleting the order's declaration concerning Board rules that were said to permit warrantless searches and seizures. The Court of Appeals did so on the grounds that the Equine

Practitioners Association did not have standing to challenge those rules, because they do not apply to licensed veterinarians (who are the Association's members).

Equine Practitioners Association, Inc. v. New York State Racing and Wagering Board, 483 N.Y.S.2d 239 (App.Div. 1984), affd. as mod., 497 N.Y.S.2d 901 (Ct.App. 1985) [ELR 8:3:19]

Briefly Noted:

Horse Shows.

The American Horse Shows Association, a national equestrian federation, maintains a rule which limits the time and place of holding various categories of horse shows. Ashley Meadows Farm, the operator of a number of horse shows, claimed that as a result of the Association's rule, Ashley Meadows was excluded from competing in the horse show market on certain allegedly desirable dates. Federal District Court Judge Sweet, after extensive litigation, granted summary judgment to the Association with respect to Ashley Meadows' antitrust claims, noting that Ashley Meadows failed to present evidence to support its allegations of economic injury resulting from the denial of its show date applications. While the challenged rule may have caused Ashley Meadows some "inconvenience," the horse show operator lacked standing to bring an antitrust action in the absence of a showing of damage to its business, concluded the court.

Ashley Meadows Farm, Inc. v. American Horse Shows Association, Inc., 617 F.Supp. 1058 (S.D.N.Y. 1985) [ELR 8:3:20]

Tax.

In 1981, a group of individuals formed a joint venture known as Sioux Shares Company. The joint venture entered into three master recording lease agreements with Sagittarius Recording Company whereby Sagittarius was to obtain title to certain master recordings from American Variety International Records. Sagittarius then would lease the recordings to Sioux Shares for production and distribution and also was expected to pass the investment tax credit for the master recordings through to Sioux Shares to be claimed by the individual investors. When Sagittarius failed to deliver the master recordings, the joint venturers were unable to take the anticipated investment tax credit on their 1981 tax returns; they proceeded to bring a variety of claims against

Sagittarius, American Variety and against Booth, Lipton and Lipton, a New York law firm which had prepared two tax opinion letters advising Sagittarius of the potential tax consequences of the company's proposed master recording lease transactions.

A Federal District Court in Michigan denied the joint venture's motion for summary judgment on its claims and granted Booth's motion for summary judgment with respect to Sioux Shares' cause of action for common law fraudulent misrepresentation on the ground that it was not shown that the law firm's alleged misrepresentation proximately caused harm to the joint venture-any harm suffered by the investors was due to the failure to deliver the masters. The record, according to the court, did not show that Booth was aware of, or participated in, any purported fraud as to such delivery.

Pasternak v. Sagittarius Recording Co., 617 F.Supp. 1514 (E.D.Mich. 1985) [ELR 8:3:20]

Fourth Amendment.

The United States Supreme Court has ruled that two allegedly obscene magazines were properly admitted in evidence in a proceeding charging a Maryland sales clerk with distributing obscene material in violation of a state statute. After purchasing the magazines in a bookstore, an undercover police officer, along with several other officers concluded that the magazines were obscene; the officers then returned to the bookstore and arrested the clerk, Baxter Macon. A Maryland appellate court, citing the First Amendment rights involved, reversed Macon's conviction, finding that a warrant should have been obtained for the seizure of the magazines and for Macon's arrest.

Supreme Court Justice O'Connor, in reversing the judgment of the appellate court, ruled that the officers' conduct was not an unreasonable search or seizure within the meaning of the Fourth Amendment - the entry into the bookstore and subsequent examination of the material offered for sale was not a search, and the purchase of two magazines did not effect a seizure, stated Justice O'Connor. Furthermore, the magazines were not the "fruit of the arrest" but already were in police possession, and therefore were properly admitted in evidence at Macon's trial.

Justice Brennan, joined by Justice Marshall in dissent, emphasized that an "official seizure of presumptively protected books, magazines or films is not 'reasonable' within the meaning of the Fourth Amendment unless a neutral and detached magistrate has issued a warrant particularly describing the things to be seized." And permitting the warrantless arrest of an individual for allegedly distributing such material has a disruptive potential which might threaten to restrain protected expression in the same way as the seizure of presumptively protected material does, cautioned Justice Brennan.

Maryland v. Macon, Case No. 84-778 (U.S.Sup.Ct., June 17, 1985) [ELR 8:3:20]

First Amendment.

A New York trial court has granted the National Broadcasting Company permission to copy electronic audio tapes that are admitted into evidence and played to the jury during the course of the trial of former Secretary of Labor Raymond J. Donovan. Donovan is scheduled to be tried in Bronx Supreme Court on charges of defrauding the New York City Transit Authority of millions of dollars in connection with a subway excavation project.

Justice John P. Collins rejected Donovan's argument that the broadcasting of copies of the tapes would create an additional risk of prejudicial publicity, and found that Donovan's objections were "insufficient to justify the shielding of the tapes from public scrutiny." The court cautioned that NBC must copy the tapes without any inconvenience or disruption of court proceedings.

People v. Schiavone Construction Company, New York Law Journal, p.13, col.3 (Bronx Cnty., June 11, 1986) [ELR 8:3:20]

Spectator Injury.

A nine year old boy who was struck in the face by a hockey puck while standing in an unprotected area during a hockey game was not entitled to recover damages from the operator of the rink, the New York Court of Appeals has ruled in affirming an appellate court's order. It was not shown that the operator of the rink had a duty, in the exercise of reasonable care, to provide protective screening around the entire rink. And even assuming that there was a breach of any duty to provide a sufficient number of protected seats to accommodate as many spectators as might attend an ordinary game, any such negligence was not a direct cause of the injuries suffered by the boy because he was not sitting in the bleachers when the accident occurred, and did not assert that there was no room to stand along a protected section of the dasher boards or that he was prevented from doing so.

Gilchrist v. City of Troy, N.Y. Law Journal, p.18, col. 1 (N.Y., June 3, 1986) [ELR 8:3:21]

Copyright/Jurisdiction.

In August 1981, Dr. Stuart Berger agreed to deliver to Simon & Schuster a book entitled "The Southampton Diet;" the book was published in June 1982. In 1985, another publisher issued "Dr. Berger's Immune Power Diet." When this book became a bestseller, Simon & Schuster began reprinting "The Southampton Diet." Berger proceeded to sue Simon & Schuster for copyright infringement, claiming that pursuant to his agreement with the publisher, he had revoked the company's right to publish further copies of "The Southampton Diet."

Federal District Court Judge Sand, in granting Simon & Schuster's motion to dismiss Dr. Berger's action for lack of subject matter jurisdiction, found that the complaint was an action on a contract in which Berger sought a declaration that certain conditions precedent to the revocation of a contract had occurred. A trial court, after interpreting the relevant contractual provisions, would not need to construe the Copyright Act. The court distinguished several cases cited by Berger, including Kamakazi Music Corp. v. Robbins Music Group, 684 F.2d 228 (ELR 4:7:3), in which it was found that federal jurisdiction was proper in an action involving the continued publication of the works in question after the contract between the parties expired.

Judge Sand pointed out that if federal jurisdiction were to be determined solely from the allegations of Berger's complaint, the action might be characterized as a copyright infringement suit. But Berger's assertion that the publishing contract expired on its own terms was "disingenuous," given the facts presented to the court. The contract dispute " at the heart of the controversy" could not be ignored, and the complaint was dismissed accordingly.

Berger v. Simon & Schuster, 631 F.Supp. 915 (S.D.N.Y. 1986) [ELR 8:3:21]

Copyright/Jurisdiction.

A Federal District Court in Nebraska has found that personal jurisdiction and venue were properly asserted over Gerald Martin Buckner and Gary Lee Garcia, residents of Georgia, and over two Georgia corporations in a copyright infringement action brought by the publisher of a musical composition entitled "Pac Man." Thomas Jackson Publishing, Inc. claimed that Buckner and Garcia infringed the company's copyright by publishing and performing a song entitled "Pac Man Fever." It was found that sufficient minimum contacts with Nebraska were shown. On the basis, in part, of the distribution in the state of sheet music and phonograph recordings of the allegedly infringing work and the performance of the song on national television programs which were broadcast in Nebraska, Buckner and Garcia should reasonably have anticipated being sued in the state, particularly since their activities were "purposefully directed" at Thomas Jackson Publishing, a resident of Nebraska.

Thomas Jackson Publishing, Inc. v. Buckner, 625 F.Supp. 1044 (D.Neb. 1985) [ELR 8:3:21]

Corporations.

A Federal District Court in Georgia denied Turner Broadcasting System's motion for a preliminary injunction in an action alleging that CBS, Inc. breached its fiduciary duty to CBS stockholders and violated federal securities laws during Turner Broadcasting's attempt to make an exchange offer for all the outstanding shares of the common stock of CBS. Turner Broadcasting sought to enjoin the efforts of CBS and its directors to retain control of the company by CBS' current management. The court first found that the misstatements purportedly made by CBS in connection with Turner Broadcasting's tender offer were "mere puffery" and did not warrant granting injunctive relief. Judge Vining then reviewed CBS' conduct in initiating a recapitalization program, and the basis for the company's determination that

Turner Broadcasting's offer was not in the best interests of CBS stockholders. In all, it appeared to the court that the decisions and actions of the CBS board of directors "were fair and reasonable in their best business judgment. . ." and were not undertaken in bad faith or for the primary purpose of enriching themselves to the detriment of the stockholders. In view of Turner Broadcasting's failure to show a substantial likelihood of success on the merits, the company's motion for a preliminary injunction was denied.

Turner Broadcasting System, Inc. v. CBS, Inc., 627 F.Supp. 901 (N.D.Ga. 1985) [ELR 8:3:21]

Previously Reported:

The following cases, which were reported in a previous issue of the Entertainment Law Reporter, have been published: Southeast Bank, N.A. v. Lawrence, 498 N.Y.S.2d 775 (7:7:8); Beverly Glen Music, Inc. v. Warner Communications, Inc. (7:12:11). Reader Rick Joseph has suggested a clarification in the report on Beverly Glen Music. In the sentence reading "However, in California, such injunctive relief is not available unless a written personal services contract provides for maximum compensation for the services rendered at the rate of not less than $6,000 per year," the word "maximum" should be deleted.

The New York Court of Appeals, at 497 N.Y.S.2d 901 (N.Y. 1985) has affirmed, as modified, the order of the appellate court in Equine Practitioners Association, Inc. v. New York State Racing and Wagering Board (ELR 8:3:19) to delete any declaration as to the validity of the

Board's rules which authorized warrantless searches of all Board licensees anywhere on racetrack premises. [ELR 8:3:21]

IN THE NEWS

Raquel Welch obtains $10.8 million jury verdict in action against MGM over her firing from "Cannery Row"

A Los Angeles Superior Court jury has awarded $10.8 million to actress Raquel Welch in her breach of contract action against MGM and several studio executives in connection with her firing from the movie "Cannery Row." Welch claimed that MGM sought to save the $194,000 which was due Welch on her $250,000 salary by replacing her (Debra Winger eventually appeared in the film) and that the firing ruined her movie career. MGM argued that it properly fired Welch because she applied her makeup at home instead of at the studio, and refused to meet with, and follow the instructions of, studio executives.

The jury apparently found that the studio breached its contract with Welch, and that the actress lost income and suffered damage to her reputation as a result of the purported conspiracy to induce Welch to breach her contract, The verdict included about $7.5 million in punitive damages; $194,000 for breach of contract; $450,000 for defamation; and $2.1 million in compensatory damages for lost earnings. Producer Michael Philips was ordered to pay Welch about $500,000, and former MGM executive David Begelman was ordered to pay $27,500. [Aug. 1986] [ELR 8:3:22]

WASHINGTON MONITOR

Internal Revenue Service will not challenge tax exempt status of organizations operating art galleries in connection with charitable and educational activities

The Chief Counsel of the Internal Revenue Service has recommended acquiescence in Goldsboro Art League, Inc. v. Commissioner, 75 T.C. 337 (1980; ELR 2:22:7). The Tax Court had found that a nonprofit corporation which operated two art galleries was engaged in fostering "community awareness and appreciation of contemporary artists;" the fact that the galleries earned substantial income (80% of which was distributed to the artists) did not warrant the disqualification of the educational organization from exempt status. [Aug. 1986] [ELR 8:3:22]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, Volume 8, Number 3 has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880 and contains the following articles:

The Judicial Outlook on Signal Piracy by David L. Abney and Lynne W. Abney, 8 Communications and the Law 3 (1986)

Fair Use after Sony and Harper & Row by William F. Patry, 8 Communications and the Law 21 (1986)

Freedom of Speech: A Review Based on Analytical Communication Models by William A. Haskins, John C. Patzke and Michael J. Price, 8 Communications and the Law 37 (1986)

Broadcasting and Telecommunication: An Introduction by Emily Jane Goodman, 8 Communications and the Law 55 (1986)

Freedom for the College Student Press by Walter E. Volkomer, 8 Communications and the Law 57 (1986)

Pornography and the First Amendment: American Booksellers v. Hudnut by Rebecca Benson, 9 Harvard Women's Law Journal 153 (1986)

The Defamed Reputation: Will Declaratory, Judgment Bill Provide Vindication? by Anna L. Moore, 13 Journal of Legislation 72 (1986) (published by Notre Dame Law School, Notre Dame, IN 46556)

Gladiator Traps: A Primer on the Representation of Black Athletes by Weldon C. Williams III, 9 Black Law Journal 263 (1985) (published by UCLA School of Law, 405 Hilgard Ave., Los Angeles, CA 90024)

Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts by Judson Graves, 12 The Journal of College and University Law 545 (1986) (published by West Virginia University College of Law. Morgantown, WV 26506)

Right of Publicity Reified: Fame as Business Asset by Todd F. Simon, 30 New York Law School Law Review 699 (1985)

Regulating Election Projections: A Conflict of Guarantees, 63 Washington University Law Quarterly 797 (1985)

Protecting Fair Access to Cable Satellite Programming: The Satellite Television Viewing Rights Act of 1985 by U.S. Senator Albert Gore, Jr., 15 Memphis State University Law Review 341 (1985)

Fair Comment and Music Criticism: New York Law Under the Constitutional Defenses to Libel by Kevin M. Moore, 37 Syracuse Law Review 79 (1986)

Broadcasters' First Amendment Rights: A New Approach? by L. Allyn Dixon, Jr., 39 Vanderbilt Law Review 323 (1986)

First Amendment: Awarding Exclusive Cable Franchises Through Auction Process Violates the First Amendment Rights of Private Cable Companies-Preferred Communications, Inc. v. City of Los Angeles, 11 University of Dayton Law Review 439 (1986)

Who's Sorry Now? Termination Rights and the Derivative Works Exception by Howard B. Abrams, 62 University of Detroit Law Review 181 (1985)

Is There Any Hope for Cities? Recent Developments in Cable Television Law by Alan F. Ciamporcero, 18 The Urban Lawyer 369 (1986) (The National Quarterly on Local Government Law, published by The American

Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611)

Sports League Restraints on the Labor Market: The Failure of Stare Decisis by Gary R. Roberts, 47 University of Pittsburgh Law Review 337 (1986)

Copyright: The Public Figure Expansion of the Fair Use Doctrine Rejected by Timothy B. Phelps, 25 Washburn Law Journal 385 (1986)

Satellite and Cable Television in Europe - Developments and Prospects by Gillian Davies, 8 European Intellectual Property Review 139 (1986) (published by ESC Publishing Limited, 25 Beaumont Street, Oxford OX 1 2NP, England)

The British Films Act 1985 by Richard McD. Bridge, 8 European Intellectual Property Review 154 (1986)

License Fees Payable for Broadcasting in Australia: Reference by the Australasian Performing Right Association Limited Re Australian Broadcasting Corporation by Jim Lahore, 8 European Intellectual Property Review 156 (1986)
[ELR 8:3:23]