BUSINESS AFFAIRS

Free Agency and the National Football League

by Bruce H. Singman

The existing Collective Bargaining Agreement between the National Football League Players Association and the National Football League Management Council expires on August 31, 1987, and negotiations for a new Collective Bargaining Agreement are now being conducted. The NFLPA has established several objectives for bargaining purposes. They are described in "Game Plan '87 - A Commitment To NFL Players Past, Present, Future" which the NFLPA published as its blueprint of bargaining priorities.

The most newsworthy objective is the pursuit of a "true free agency" system which will allow complete freedom of movement by players from one team to another. Such a true free agency system could have a major impact upon the economics of professional football in particular and the entertainment industry in general. The purpose of this article is to explain the reasons why NFL football players are not presently "free agents" with freedom of choice in the selection of an employer (a basic element of America's free enterprise system) and the reasons why free agency is important to NFL football players.

In 1968, the National Labor Relations Board recognized the NFLPA as a labor organization (within the meaning of 29 U.S.C. Section 152(5)) and as the exclusive bargaining representative of all National Football League players (within the meaning of 29 U.S.C. Section 159(a)). Subsequently, National Football League teams and the NFLPA have engaged in collective bargaining over various issues relating to employment by the teams of the players.

As a result of collective bargaining, the NFL and the NFLPA have entered into three formal Collective Bargaining Agreements. The first Agreement was in effect from July 15, 1968 to February 1, 1970, and the second Agreement was in effect from February 1, 1970 to January 30, 1974.

Mackey Case

Upon expiration of the second Agreement on January 30, 1974, the NFL and the NFLPA commenced negotiations for a new Agreement. During the course of these negotations, the case of Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), was decided.

The Mackey case involved an appeal by the NFL, 26 of its member teams, and NFL Commissioner "Pete"

Rozelle, from a District Court judgment holding that the "Rozelle Rule" violated Section 1 of the Sherman Anti-Trust Act. The Rozelle Rule provided that an NFL team which signed a player upon the expiration of the player's contract with another team had to compensate the player's former team; and, if the teams were unable to agree on compensation acceptable to both of them, the Commissioner was empowered to award compensation to the former team consisting of one or more players and/or draft choices as the Commisioner deemed fair and equitable.

The action underlying the Mackey appeal was commenced by then-present and former NFL players. They alleged that the enforcement of the Rozelle Rule constituted an illegal conspiracy in restraint of trade denying professional football players the right to freely contract for their services, and they sought injunctive relief and treble damages. At the conclusion of the trial, the

District Court granted the injunctive relief sought by the Plaintiffs and entered judgment in their favor on the issue of liability. Trial on the issue of damages was deferred until after the decision on appeal of the judgment on the issue of liability.

The District Court held that the "enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a per se violation of the Sherman Act." The Court found that the evidence offered in support of the Defendants' contention that the Rozelle Rule was necessary to the successful operation of the NFL was insufficient to justify the restrictive effects of the Rozelle Rule, and thus the Court also concluded that the Rule was invalid even under the Rule of Reason standard. Additionally, the District Court rejected the Defendants' argument that the Rule was not subject to attack under the Sherman Act because it had been the subject of a Collective Bargaining Agreement between NFL team owners and the NFLPA.

The issues raised by the Defendants on appeal were: whether the "labor exemption" to the antitrust laws immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability; and if not, whether the Rozelle Rule and the manner in which it had been enforced violated the antitrust laws.

The Court of Appeals held "that although non-labor parties may potentially avail themselves of the nonstatutory labor exemption to antitrust laws where they are parties to collective bargaining agreements pertaining to mandatory subjects of bargaining," the labor exemption from antitrust laws cannot be invoked in instances when agreements are not the product of bona fide arm's-length negotiations. The Court held further than the Defendants' enforcement of the Rozelle Rule was not exempt from the coverage of the antitrust laws, because it had not been the subject of such negotiations. and that the Rozelle Rule as implemented contravened the Rule of Reason and constituted an unreasonable restraint of trade in violation of the Sherman Act.

Consequences of Mackey Decision

Until the Mackey case, the NFL had operated under a reserve system in which each player who signed a Standard Player Contract with an NFL team was bound to play only for that team for the term of the contract plus one additional year at the option of the team, so that each player was bound to play for his team for at least two years. A player was able to become a "free agent" at the expiration of the option year by playing during the season of the option year without singing a new Contract (then subject to a 10% reduction in salary during the option year).

Upon conclusion of the Mackey case, the NFLPA was in an ideal position to be able to negotiate for substantial benefits in a new Collective Bargaining Agreement. In the Spring of 1977, the NFLPA, under the leadership of then Executive Director Ed Garvey, could have attempted to maintain a free agency system which would have allowed for player movement from team to team free of the restrictive effects of the then enjoined Rozelle Rule.

Free Agency

A true free agency system, without team-to-team "compensation" would not necessarily have resulted in rampant movement of players from team to team, but, rather, would have given the players the bargaining leverage necessary to achieve equitable compensation through contract negotiations and, in appropriate instances, guaranteed player contracts (binding upon the teams as well as the players).

At present, Standard Player Contracts are, in effect, unilateral and as such, binding only upon the players. This is because Paragraph 11 of the NFL Player Contract entitled "Skill, Performance and Conduct" provides as follows:

"Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract."

When a true free agency system was instituted in Major League Baseball, then Commissioner Bowie Kuhn and several team owners complained publicly that "free agency" would destroy baseball's competitive balance, making the rich richer and the poor poorer. They expressed concern that those teams willing to spend more money acquiring star players would dominate the league.

Such notions should have been dispelled by the realization that only one player can be a "starter" at each position at any specific time (and only a limited number of pitchers on a baseball team can be "starters"). An historical review of the developments in Major League Baseball since the institution of free agency reveals that the rich have not become richer, but, rather, that parity among teams has been established. For example, since the institution of free agency in Major League Baseball in 1976:

- Twenty-one of the twenty-six teams have won at least one division championship;

- Other than the Kansas City Royals' successive division championships in 1984 and 1985, no team has won consecutive titles since the New York Yankees won in 1980 and 1981;
- None of the 1986 division titlists had been in a playoff since 1982; and
- The division title in the American League East has been won by a different team in each of the last 6 years.

NFL Agreement Following Mackey

In 1977, in exchange for certain concessions including a "dues check-off provision" requiring NFL teams to withhold NFLPA dues payments from players' payroll checks, Ed Garvey and NFLPA management personnel negotiated a new five year Agreement which reinstated the "player draft" and provided a highly restrictive free agency system requiring NFL teams to give up high round draft choices in order to acquire players from other teams when such players' contracts expired. This highly restrictive system also is part of the current Agreement negotiated in 1982.

The current "Right of First Refusal/Compensation" system (as set forth in Article XV of the 1982 Collective Bargaining Agreement between the NFLPA and the Council) provides, in essence as follows: When a player's contract expires (on February 1), he has the right to solicit offers from other teams; upon the player's receipt of a qualifying offer ("First Refusal Offer Sheet") from another team ("New Club"), the player's current team ("Old Club") has a right of first refusal to match the New Club's offer through submission of a "First Refusal Exercise Notice" (on or before April 15); and if the Old Club does not exercise its right of first refusal within seven days of receipt of an Offer Sheet, the New

Club must compensate the Old Club by assigning draft choices to the Old Club, the number and rounds of which are determined by the amount of salary to be paid to the player by the New Club.

This System was agreed to again by the NFLPA in 1982 after five years during which only one player moved from one team to another (defensive back Norm Thompson moved from the St. Louis Cardinals to the then Baltimore Colts), even though the NFLPA was again in a position to attempt to negotiate for a free agency system which would give the players the leverage necessary to negotiate for more equitable compensation. However, the NFLPA bypassed the opportunity to affect a modification of the free agency system and opted instead to seek a "percentage of the gross standard wage scale system." Such a system would have provided for the allocation of 55% of the NFL teams' gross operating revenues into a pool for payment to players of a specified amount of salary according to their positions and number of years of service.

In defending this position, Garvey maintained that free agency would not "work" because it had not "worked" in the then recent past. However, the free agency system to which Garvey agreed (1977) was a system based upon (excessive) compensation (to be given by one team to another) upon the signing of a free agent and, therefore, was not a true free agency system.

Would Free Agency Work in Football?

If, as in professional basketball and baseball, there were a free agency system in football which did not involve excessive compensation in the nature of high round draft choices, a free agency system would succeed, as teams would be more inclined to make offers for quality free agent players. The District Court found that "the Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another."

The Court of Appeals, in finding substantial evidence in the record to support the findings of the District Court, noted that two economists had testified that the elimination of the Rozelle Rule would lead to a substantial increase in player salaries and that Carroll Rosenbloom, then owner of the Us Angeles Rams, had indicated that the Rams would have signed quite a few star players from other teams who had played out their options were it not for the existence of the Rozelle Rule.

The Defendants, in asserting a number of justifications in support of their contention that the restraints effected by the Rozelle Rule were not unreasonable, argued that without the Rozelle Rule, star players would flock to cities having natural advantages such as larger economic bases, winning teams, warmer climates and greater media opportunities, and that as a consequence, competitive balance throughout the NFL would be destroyed and that would be extremely detrimental to the successful operation of the League. The Defendants also argued that the elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity, and that the quality of play in the NFL would be affected to the financial detriment of both the teams and the players.

The Court of Appeals, in reviewing the evidence presented at trial with respect to existing player turnover by way of trades, retirements and new players entering the NFL, confirmed the District Court's conclusion that the team owners' arguments respecting the need for player continuity could not justify the Rozelle Rule, and, while recognizing that the NFL has a strong interest in maintaining competitive balance among its teams, concluded that the Rozelle Rule was not essential to the maintenance of such competitive balance and was, in effect, much too restrictive.

In 1982, during negotiations between the NFL Management Council and the NFLPA for a new Collective Bargaining Agreement, Garvey maintained that the owners have no incentive to seek out quality free agent players because team owners share most of their revenues and thus owners would not make any more money by producing a winning team. The fallacy in this thinking becomes apparent when one recognizes that money is not what motivated an owner of an NFL team to become an owner, as the financial rewards present in 1982 (and today) were not present when most of the current team owners became owners. NFL team owners are driven to success by self-pride and ambition, which are the very same attributes which led them to be successful businessmen, and their tremendous desire to have their teams participate in the Super Bowl. If the owners were not concerned with winning, they would not dismiss head coaches as often as they do and burden themselves with huge guaranteed contract payments which must be made to such coaches.

This Year's Negotiations

In the course of preparing the negotiations for a new Collective Bargaining Agreement upon expiration of the current Agreement in August of 1987, the current NFLPA management has adopted free agency as the major objective of the NFL players, and has made public (in "Game Plan '87") a proposal for the payment of playoff bonuses to owners as an incentive for winning and, thereby, an incentive to acquire available free agent players who would, theoretically, enable teams to win more games.

In "Game Plan '87," the NFLPA proposes "a league-wide playoff pool of money for owners to win during the playoffs" on the theory that "if the owner whose team wins the Super Bowl gets richer as a result, he will have an incentive to pay more to get the best possible players."

In a true free agency system (in which the assignment of draft choices by the Old Club to the New Club would be eliminated or modified), players would have much more bargaining power. When this bargaining power is coupled with what should be substantially increased team revenues from a new television contract in 1990 (which could involve significant overseas telecasts of NFL games), players should be better able to obtain more equitable compensation.

Because of the short span of the average NFL career (reported by the NLFPA to be a little less than four years), it is especially critical for players to have greater bargaining power through individual negotiations from the onset of their careers. Such greater bargaining power would also enable players to negotiate "guaranteed contracts" which, while common in professional basketball and baseball, are few and far between in professional football. (According to "Game Plan '87," 95% of Major League Baseball contracts, 50% of National Basketball Association contracts, and 4% of National Football League contracts are guaranteed.) The guaranteed contracts negotiated through increased bargaining leverage gained in a true free agency system would eliminate the "unilateral aspect" of NFL Player Contracts.

In the course of the 1982 negotiations, Garvey had contended that NFL owners operate in secret sessions to set wages. However, a review of salaries of players throughout the League reveals that such is not the case as such salaries vary widely from team to team. In a true free agency system, lower paying teams would be forced to pay higher salaries in order to prevent their players from moving to other teams upon the expiration of those players' contracts.

Under the present system in which players have almost no bargaining leverage, players are forced to enter into contracts for periods of time longer than they would prefer in order to obtain greater compensation (particularly when signing bonuses are involved, because General Managers are interested in amortizing bonuses over the term of the contracts). In view of the short life-span of an average NFL career, in many instances players are forced to negotiate away their opportunities to negotiate a second contract. Under a true free agency system, players could negotiate for greater compensation (because of greater bargaining power) without having to submit to contracts for long periods of time.

As set forth in "Game Plan '87," in addition to greater compensation, a true free agency system will enable players to realize substantial non-economic benefits such as: the opportunity to choose to play for a team with a more compatible coach or system; the opportunity to play for a team in a city which would provide more suitable educational and/or career opportunities; the opportunity to play under conditions more suitable to a player's particular preferences; and the opportunity to play closer to hometowns and/or families.

Conclusion

In conclusion, contrary to past assertions that true free agency would not work because NFL teams will not bid for available free agents, it should be recognized that only one NFL team has to bid for a free agent for a true free agency system to succeed. Over the past few years, there have been instances involving players such as Tom Cousineau and Bruce Clark in which no "draft choice compensation" was required (only the Old Club's right of first refusal was imposed upon the New Club), which have demonstrated clearly that a true free agency system without draft choice compensation will succeed.

These instances arose because Article XIII of the 1977 Collective Bargaining Agreement provided for the elimination of "draft choice compensation," but the retention by the drafting team of the right of first refusal, if a player, after being drafted, played for a team not in the NFL and returned to the NFL two or more years following the date of his initial draft. The 1982 Collective Bargaining Agreement provides for the elimination of draft choice compensation upon a return to the NFL four or more years following the date of the player's initial draft.

Tom Cousineau and Bruce Clark were drafted by NFL teams, but chose to play in the Canadian Football League instead. Tom Cousineau and Bruce Clark returned to the NFL from the Canadian Football League after the teams' (which had drafted them) right of compensation had terminated, and they were offered substantially more money by other teams than had ever before been offered to players in their circumstances. More recently, Mervyn Fernandez returned to the Los Angeles Raiders (having been drafted by the Raiders in 1983) from the Canadian Football League and was able to command a substantial amount of compensation in his initial NFL contract because the "right of draft choice compensation" had been eliminated.

These examples would become the rule rather than the exception upon the institution of a true free agency system in the NFL through the current negotiations for a new Collective Bargaining Agreement.

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[ELR 8:11:3]

RECENT CASES

Baseball clubs' ownership of broadcast rights to baseball players' performances during major league games is upheld

The Major League Baseball Clubs have improved their batting average in a dispute with the Major League Baseball Players Association concerning the ownership of broadcast rights to the players' performances during major league baseball games.

The clubs had sought a declaratory judgment that they possessed the exclusive right to broadcast the games, citing, in part, the "works made for hire" doctrine of the Copyright Act of 1976 and state master-servant law. A Federal District Court granted the clubs' motion for summary judgment on the two counts (ELR 8:1:1) and entered judgment for the clubs as well as a consolidated player-initiated action.

Senior Federal Court of Appeals Judge Eschbach has agreed with the District Court that the telecasts of major league baseball games were copyrightable works - the telecasts were fixed in tangible form upon being video-taped at the same time that the games were broadcast. Furthermore, the games involved creative labor and were audiovisual works within the subject matter of copyright.

The District Court also had found that the scope of the players' employment by the clubs encompassed the performance of major league baseball before "live and remote audiences," and that there was no written agreement that the players rather than the clubs would own the copyrights in the telecasts. The players argued that there existed genuine issues of material fact concerning the parties' agreement as to the ownership of the copyrights in view of certain provisions of the Uniform Players Contract, the Benefit Plan and the collective bargaining agreement between the players and the clubs. But an agreement altering the statutory presumption that an employer owns the copyright in a work made for hire must be both written and express, stated the court; the cited contract provisions did not meet these criteria. And the fact that the clubs traditionally donated about one-third of the revenues derived from nationally televised broadcasts to the players' pension fund did not serve to establish an issue of fact as to copyright ownership.

The club owners scored again when Judge Eschbach held that the clubs' copyrights in the telecasts of major league baseball games preempted the players' rights of publicity in their game-time performances. According to the players, the works in which they claimed rights were their performances; since the performances per se were not fixed in tangible form, they were not subject to preemption. But it was noted that the players' performances were included in the videotapes of the telecasts, and thus met the statutory fixation requirement. Also rejected was the claim that preemption was not available because the performances lacked sufficient creativity to be copyrightable. Regardless of the creativity of the players' performances, the works at issue were works within the scope of the Copyright Act because of the creative contributions of the individuals responsible for recording the performances, stated Judge Eschbach.

The court next carefully discussed the question of whether the players' rights of publicity in their performances were equivalent to any of the "bundle of rights" encompassed in a copyright. The right to perform an audiovisual work encompasses the right to broadcast the work. Thus, "a right in a work that is conferred by state law is equivalent to the right to perform a telecast of that work if the state law right is infringed merely by broadcasting the work," stated Judge Eschbach who continued: "Because the exercise of the Clubs' right to broadcast telecasts of the games infringes the Players' rights of publicity in their performances, the Players' rights of publicity are equivalent to at least one of the rights encompassed by copyright, viz. the right to perform an audiovisual work. Since the works in which the Players claim rights are fixed in tangible form and come within the subject matter of copyright, the Players' rights of publicity in their performances are preempted." (In a footnote, the court distinguished cases in which a player's right of publicity in his name or likeness would not be preempted, such as when a company, without the consent of the player, uses the player's name to advertise its product or uses a player's photograph on a baseball trading card.)

The court disagreed with the players' distinction between the interest served by copyright-to secure a benefit to the public-and the right of publicity-to protect individual pecuniary interests. Judge Eschbach pointed out that the interest underlying the recognition of the right of publicity also is to promote performances that appeal to the public; to do so, states may provide an incentive to performers to invest the time and resources required to develop such performances. In this case, the players' rights of publicity did not differ in kind from copyright and therefore did not escape preemption.

The effect of the court's decision was not to grant the clubs "perpetual rights" to the players' performances, for the players still may bargain with the clubs for a contractual agreement that the players own a joint or exclusive interest in the game telecasts.

In turning to the master-servant claim, the court noted the clubs' argument that, as employers, they owned the right to broadcast the players' performances, regardless of whether a game was reduced to tangible form (the claim thus extended to games that were not broadcast or were televised without being videotaped). The players asserted that their rights of publicity in their names, likenesses and performances barred any employer from using such "items" without the employees' consent notwithstanding the masterservant relationship.

Judge Eschbach observed that the parties had relied on "established principles of master-servant common law," but that there is no federal common law of master-servant relationships. Illinois conflicts law governed the choice of law in the case, stated the court. But in view of the diverse geographical background of the parties, the court stated that it could not determine on the basis of the record the appropriate choice of law rule under Illinois law. The District Court's opinion and judgment with respect to this issue therefore was vacated and the matter was remanded for further proceedings. The court suggested that the District Court consider that the clubs' master-servant claims were pendent to their copyright claims, and that the federal claims raised by the parties no longer were at issue. But rather than deciding whether to retain pendent jurisdiction, Judge Eschbach directed the District Court to consider whether to proceed further.

Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986) [ELR 8:11:7]

New York Yankees Partnership loses bid to reduce pay television programming services broadcast rights

The New York Yankees have suffered a hard-fought defeat in a pre-season match-up with SportsChannel Associates involving broadcast rights.

The Yankees and SportsChannel entered into a contract in 1982 under which SportsChannel was given the right to telecast a substantial number of Yankee games from 1982 through 1986, and in particular, 100 games each year from 1987 through 1996.

However, a dispute arose concerning the 1987 telecasts, and the Yankees sought to rescind the contract on the ground that SportsChannel could not deliver the audience contemplated by the contract since no cable wiring was in place in the anticipated markets, i.e., the Bronx, Brooklyn, Queens, Staten Island and parts of Manhattan. The Yankees also claimed that in June 1986, SportsChannel had agreed to modify the 1982 contract by reducing from 100 to 75 the number of games committed to the programming service in 1987 and 1988, and that in reliance on the purported modification, the Yankees entered into an agreement with WPIX concerning the broadcast rights for 75 games during those two seasons. The baseball club sought a preliminary injunction to prevent SportsChannel from interfering with the alleged WPIX contract and from telecasting any Yankee baseball games during the 1987 and 1988 baseball seasons.

The trial court granted the Yankees' motion for a preliminary injunction to the extent of barring SportsChannel from interfering with the WPIX contract, and from claiming any rights to telecast more than 75 New York Yankees' baseball games during the two seasons at issue.

In reversing the trial court's decision, the appellate court found that the Yankees did not meet the burden of showing that the club was likely to succeed on the merits of its claim that there was an oral modification of the

SportsChannel contract. It was noted that the contract called for amendments in writing. Furthermore, since the alleged modification involved an agreement which could not be performed within one year, the New York Statute of Frauds also required a written memorandum in order to enforce the alleged modification. The court pointed out that SportsChannel most likely did not intend to reduce the number of games unless the company received a financial settlement or other consideration from the Yankees, and did not engage in conduct serving to estop the company from denying the validity of the alleged modification. And the Yankees did not show that their reliance upon any alleged modification was reasonable, given the parties' past practice of amending the contract in writing.

The court also rejected the Yankee's claim of tortious interference by SportsChannel with the Yankee's performance of the purported agreement with WPIX;

declined to determine the merits of the Yankees' claim of rescission; and found that the Yankees did not demonstrate that the club would suffer irreparable injury absent an injunction, since money damages would be available if the Yankees eventually succeeded in showing injury to subscriber and advertising revenue.

New York Yankees Partnership v. SportsChannel Associates, New York Law Journal, p.8, col.2 (N.Y.App., Jan. 28, 1987) [ELR 8:11:8]

United States Football League was not liable for wages due to players of a member team

A finding by the National Labor Relations Board that the United States Football League and its member clubs were joint employers did not provide a basis for holding the League liable for unpaid player wages, a Federal District Court in Oregon has ruled.

In 1985 the Portland Breakers football team failed to pay its players their wages for the last four games of the season. An arbitrator determined that the Breakers were required to make all of the payments due to the players and also entered an award in favor of player Louis Bullard under his multi-year guaranteed contract.

The United States Football League Players Association sought to hold the League as well as the Breakers liable for the arbitration awards, citing a 1983 National Labor Relations Board ruling that the League and its member clubs held joint employer status.

Federal District Court Chief Judge Panner noted that two entities may be bound by a union contract signed by one of them if they are considered a "single employer" and the employees of each constitute a single bargaining unit. A single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise. In contrast, a joint employer relationship involves "separate legal entities that have merely chosen to codetermine important matters governing the employer-employee relationship." The Board had found that the League possessed significant authority over the labor relations of the clubs. But the Board did not inquire into the factors important to the single employer analysis - integration of operations, common management, and common ownership - and made no finding that the League and its member clubs were a single integrated enterprise.

Furthermore, the record in the instant case did not support a finding that the League and the Breakers were a single employer.

The uniform player contracts used by member clubs provided that it was each club's obligation to pay player wages. And the court, in granting the League's crossmotion for summary judgment, also rejected the Player Association's argument that it did not waive a purported right to hold the League responsible for player wages.

United States Football League Players Association, AFLCIO v. United States Football League, 650 F.Supp. 12 (D.Ore. 1986) [ELR 8:11:8]

University of Arizona head basketball coach was not entitled to further payments under contract with athletic shoe distributor upon his termination

When athletic shoe manufacturers enter into contracts with collegiate coaches, the contracts usually provide that the coach will direct the school's team to wear the manufacturer's shoes in practices and games. In this way, the manufacturers receive broad exposure of their products and the tacit endorsement of the universities, college basketball teams and the National Collegiate Athletic Association, according to Federal District Court Judge Carroll. (The NCAA does not prohibit the donation of equipment to an institution and publicity concerning the institution's use of the equipment if the names or pictures of student athletes are not directly involved in the publicity or promotion of the equipment, and if approval is obtained from the board in control of intercollegiate athletics at the institution.)

In May 1982, Clossco, a distributor of athletic products manufactured by adidas, entered into an oral contract with Ben Lindsey whereby Clossco agreed to pay Lindsey, during the next three basketball seasons, an annual "advisory and consulting" fee of $30,000 as well as providing the coach with a clothing allowance and various team and camp t-shirts. Lindsey, the head coach of the University of Arizona basketball team, agreed to have the team's players wear adidas basketball shoes. The agreement also provided that Lindsey would be available to Clossco for certain special events and for consultations concerning shoe design. The parties conducted further negotiations, and revised written agreements were exchanged, but the terms of the agreements were not revealed to school officials; Lindsey informed only the school's athletic director that he had entered a shoe endorsement agreement.

In March 1983, the University of Arizona terminated Lindsey from the position of head basketball coach. Lindsey demanded further payment under the agreement, but Clossco denied the demand; the company's denial has been upheld by a Federal District Court in Arizona.

After determining that California law governed the dispute (under the terms of the written agreements), Judge Carroll held that Lindsey's termination as head coach operated as a condition subsequent extinguishing Clossco's obligation to perform. The services to be performed by Lindsey, i.e., "encouraging" or promoting by his best efforts the use of adidas shoes by the school's basketball team could be performed effectively only if Lindsey had retained his position.

Lindsey v. Clossco, 642 F.Supp. 250 (D.Ariz. 1986) [ELR 8:11:9]

Author of Scrabble strategy book succeeds in breach of implied contract claim against Selchow & Righter, but Federal Court of Appeals modifies $1 million damage award

The author of a book on strategy for playing Scrabble has been awarded damages amounting to almost $1 million in his breach of implied contract claim against Selchow & Righter Co., the owner of the Scrabble trademark.

As described in reports of prior rulings in the matter (ELR 6:8:7), Mark Landsberg submitted a manuscript of his book to Selchow & Righter. The company considered publishing Landsberg's work, but eventually issued its own strategy book.

A Federal District Court, upon remand for further proceedings on Landsberg's breach of implied contract claim, found that the author's initial disclosure of his manuscript was confidential and for a limited purpose, and that because Landsberg intended to publish the work, Selchow & Righter's use of any portion of the manuscript was conditioned on payment. The reasonableness of Landsberg's belief that payment would accompany any use of his work was supported by the negotiations undertaken by the parties.

Although affirming the District Court's findings on the breach of implied-in-fact contract claim (a finding of copyright infringement earlier had been reversed on appeal due to the lack of the requisite similarity between the strategy books), a Federal Court of Appeals has modified the amount of damages awarded to Landsberg. The District Court granted Landsberg the profits realized by Selchow & Righter and by Crown Publishers through December 31, 1978 from the sale of Selchow & Righter's books, and attorneys fees and costs; the total liability including $100,000 in punitive damages against Selchow & Righter, was about $440,300. On remand, the District Court added post-1978 profits from the sale of the Selchow & Righter work, additional fees and costs, prejudgment interest, and an additional $100,000 in punitive damages.

The Court of Appeals declared that the damages were allowable under California law. Landsberg had argued that the contract was not for the use of his manuscript, in which case, he might have been entitled to recover no more than the fair market value of Selchow & Righter's use, but rather that the contract required Selchow & Righter to obtain permission for any use of his work. Judge Goodwin stated that "Because Selchow & Righter's breach resulted in Landsberg's losing the opportunity to market his work as he saw fit, the profits from Selchow & Righter's exploitation of it are... the best measure of his losses due to the breach... To read the contract as requiring anything less than both compensation and permission would be to sanction a forced exchange."

And while Crown Publishers was not a party to the implied contract and was dismissed from the case upon remand, Selchow & Righter and certain individual parties remained liable for the profits earned by Crown since the breach deprived Landsberg of those profits.

The District Court erred, however, with respect to its second award of punitive damages, stated Judge Goodwin, California allows an award of punitive damages if a breach of contract also is a tort. The District Court had found that Selchow & Righter denied the existence of the contract in bad faith and without probable cause; the initial punitive damage award of $100,000 therefore was upheld. But in doubling the punitive damage award on remand when the only "intervening event" in the matter was Selchow & Righter's successful appeal of Landsberg's copyright infringement claim, the District Court "imposed a chilling impediment to the right to appeal" particularly since there was no finding that the appeal was taken in bad faith and since other elements of the damage award would compensate Landsberg for the delay and inconvenience "wrought by the marathon litigation."

The court also ordered reductions in the amount of attorney fees and in the award of prejudgment interest.

Landsberg v. Scrabble Crossword Game Players, Inc., 802 F.2d 1193 (9th Cir. 1986) [ELR 8:11:9]

Motown Records was not entitled to summary judgment in breach of contract action against The Mary Jane Girls due to question of fact concerning alleged extension of deadline for album delivery

In February 1983, Mary Jane Girls, Inc. and the four performers comprising the musical group "The Mary Jane Girls" entered a contract with Motown Record Corp. Mary Jane Girls, Inc. agreed to provide Motown with a master recording of a record album during each of four time periods set forth in the contract. However, the group did not deliver the required master recording for an extended option period ending on July 15, 1986.

According to facts set forth by Federal District Court Judge Robert Sweet, from late May until August 1986, one of the key members of The Mary Jane Girls, Joanne McDuffie (professionally known as JoJo), refused to perform as a recording artist for the group; Motown apparently was aware in May that JoJo was refusing to record. JoJo eventually provided vocal recording services for the album and a preliminary rough cassette (not a master recording) was forwarded to Motown in mid-August. The group continued to work on the album, and alleged that with the knowledge and approval of Motown it engaged production personnel, assembled data for the album's label copy and credits, and considered adding to the album the 1963 song "Big Girls Don't Cry." Final production of the album was completed on September 26th.

However, on September 2nd, Motown had advised the group that no further costs would be approved, and in a lawsuit filed on September 5th, sought to substitute a producer selected by the company in order to obtain performances of the contract.

Judge Sweet stated that while no formal or written agreement extended the option period beyond July 15th, the contract did not contain a prohibition against modification except in writing. It was noted that under the applicable California law, contracts may be modified by conduct. And the court agreed with the group's argument that Motown's conduct constituted a waiver of the contractual option period and an extension of the period for performance. Since a factual question was raised as to the term of the extension granted by Motown's conduct, the company's motion for summary judgment was denied.

Motown Record Corporation v. Mary Jane Girls, Inc., 650 F.Supp. 123 (S.D.N.Y. 1986) [ELR 8:11:10]

Cable television systems may exclude revenue from nonbroadcast signals in calculating copyright royalty fees, but revenue from both distant and local signals must be included in calculating gross receipts for providing "basic service" according to Federal District Court

Section 111(d) of the Copyright Act of 1976 provides for the payment to copyright owners by cable television system operators of a semi-annual royalty fee based on a percentage of the "gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters..."

The Copyright Office subsequently defined gross receipts (in the context of the statute) as an amount including "the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmission [local or distant] of television or radio broadcast signals, for additional set fees. . . "

Cablevision Company and the National Cable Television Association sought a declaratory judgment as to the proper interpretation of section 111(d), claiming that under the Copyright Office's definition of gross receipts, cable systems would be paying royalties on nonbroadcast services, such as HBO, simply because those signals were contained in a tier of service with secondary transmission signals.

A Federal District Court in Washington, D.C. has agreed with the cable operators that the Copyright Office's definition of gross receipts did not have a reasonable basis in law. Judge June L. Green noted that if a cable system marketed all of its local and distant signals in one tier for $10, and separately offered HBO or a movie service for $9, the compulsory royalty fee would be calculated on the basis of the $10 fee. If the system combined services so that the only available package included the broadcast channels and the movie channel for a fee of $19, the $19 fee then would be used to compute the broadcast royalty fee "surely, Congress did not intend such an anomalous result," stated the court.

It was observed that cable systems usually obtain the right' to present nonbroadcast signals through contracts with the owners of copyrighted programming; the definition of gross receipts suggested by the Copyright Office parties might result in double payments to copyright owners, i.e., payment directly from the cable operators pursuant to a contract and again from the Copyright Royalty Tribunal.

Judge Green therefore found that nonbroadcast signals are not subject to the compulsory licensing scheme and that any revenue attributable to these signals should not be included in a cable television system's gross receipts.

The court went on to find that the term "basic service" as used in section Ill includes local signals, national network signals and distant signals. Thus, a cable system's gross receipts does include the revenue derived from the retransmission of local and distant signals, notwithstanding the tier of service in which the signals are included.

The copyright owners also had claimed that Cablevision's failure to file complete accounting statements and to pay statutory royalty fees (the prerequisites for obtaining a compulsory license to retransmit copyrighted works) constituted copyright infringement. But the court found that Cablevision had complied with the "spirit" of the Copyright Act in that the company remitted $800,000 in royalty payments and posted a $2 million bond to cover any difference between that amount and the amount of royalties claimed by the Copyright Office.

Cablevision Company v. Motion Picture Association of America, Inc., 641 F.Supp. 1154 (D.D.C. 1986) [ELR 8:11:10]

United States Supreme Court upholds constitutionality of Pole Attachments Act, finding that Federal Communications Commission did not effect a taking of property in setting reasonable utility pole rents for cable system operators

The United States Supreme Court has reversed a Federal Court of Appeals decision (ELR 8:8:13) and has found that the Pole Attachments Act did not effect an unconstitutional taking of property without just compensation.

Justice Marshall, delivering the opinion for the unanimous court, noted that cable television operators, in order to deliver signals to their subscribers, must have a physical carrier for the cable. Utility company poles provide the only practical medium for the installation of television cables, given the difficulty of underground installation. Utility companies have leased space on poles to operators of cable systems; the cable companies generally pay a yearly rent for space on each pole to which cables are attached, and also bear the fixed costs of making modifications to the poles and installing the cables.

The Pole Attachments Act provides that cable companies operating in a state which does not regulate the rates, terms and conditions of pole attachments may seek relief from any alleged overcharging before the Federal Communications Commission.

In 1963, Florida Power Corporation entered into a pole attachment agreement with Cox Cablevision Corporation. In 1977 and 1980, Florida Power entered into similar agreements with Telepromter Corporation and with Acton CATV, Inc.

In late 1980, Teleprompter filed a complaint with the FCC, alleging that its per pole rent of $6.24 was unreasonable under the Act. Acton subsequently filed a complaint concerning its per pole rent of $7.15. The FCC's Common Carrier Bureau found in favor of Teleprompter and Acton, ordered the agreements to provide for yearly rents by both companies of $1.79 per pole, and also ordered refunds of excess rents paid after the filing of the complaints.

When Cox Cablevision filed a complaint seeking the revision of its rent charge of $5.50 per pole, the FCC ordered the reformation of Cox's agreement as well to provide for rent of $1.79 per pole.

The Commission approved the orders of the Common Carrier Bureau and upheld the Bureau's rate calculations. But a Federal Court of Appeals, in aper curiam opinion, held that the Pole Attachments Act violated the Fifth Amendment, by effecting a taking of property and by authorizing a non-judicial determination of just compensation.

Justice Marshall first stated that the Court of Appeals erred in relying on the per se taking rule set forth in Loretto v. Teleprompter Manhattan CATV Corp. (ELR 1:5:7) because Loretto had no application to the facts of the case. The New York statute at issue in Loretto specifically required landlords to permit permanent occupation of their property by cable companies; the Pole Attachments Act, however, does not give cable companies any right to occupy space on utility poles or prohibit utility companies from refusing to enter into attachment agreements with cable operators. The argument that a taking under Loretto would occur when a tenant invited to lease at a rent of $7.15 remains attached at the regulated rent of $1.79 was rejected for "it is the invitation, not the rent, that makes the difference" - the cable companies were commercial lessees, not an "interloper with a government license."

The challenged FCC orders also did not effect a taking of property under traditional Fifth Amendment standards. The Act provided a range of reasonableness within which the FCC could undertake rate-setting, with a minimum measure equivalent to the marginal cost of attachments. In this case, the rate was calculated according to the statutory maximum measure as determined by the fully allocated cost of the construction and operation of the pole to which cable was attached, a cost which was not confiscatory.

In a concurring opinion, Justice Powell, joined by Justice O'Connor, questioned the majority's description of a case cited in connection with the scope of judicial review of rate determination by an administrative agency.

Federal Communications Commission v. Florida Power Corporation, Case Nos. 85-1658, 85-1660 (U.S.Sup.Ct.) [ELR 8:11:11]

Librarian of Congress' decision to eliminate Playboy magazine from braille program violated the First Amendment

The Librarian of Congress violated the First Amendment by discontinuing the production and distribution of braille editions of Playboy magazine, a Federal District Court has ruled.

Books and magazines in braille and recorded editions for blind and visually impaired individuals are produced by the Library of Congress through the National Library Service's Program for the Blind and Physically Handicapped. From 1973 until 1985, the program published the text of Playboy magazine in braille; the magazine's pictures and cartoons were not included due to the difficulty of reproducing them in braille.

In 1981, the National Library Service, in response to a request by Representative Chalmers Wiley, reviewed the program's selection criteria; the service decided to continue to publish Playboy. In 1985, Representative Wiley, in an amendment to a House appropriations bill, sought to reduce the funding for the Program for the Blind and Physically Handicapped by about $103,000 - the cost of producing Playboy in braille. The language of the amendment did not refer to Playboy or prohibit the production of any magazine in braille. But after the amendment passed, Daniel Boorstin, the Librarian of Congress, stated that he planned to eliminate Playboy from the braille program because it appeared from the floor debate on the amendment that he was precluded from continuing to distribute the work.

In ruling on behalf of the American Council of the Blind, Federal District Court Judge Thomas F. Hogan noted that the sole reason that Boorstin removed Playboy from the braille program was because "he adopted, albeit reluctantly, Representative Wiley's view that the inclusion of Playboy in the program was inappropriate given the sexual orientation of the magazine." Boorstin argued that the Library of Congress was under no obligation to subsidize the production of braille editions of Playboy. Judge Hogan responded that when Congress established a subsidy program for braille editions of books and magazines, it created "a nonpublic forum for the communication of ideas." Since it is costly to reproduce materials in braille, many blind individuals depend on the Library of Congress program for access to information. Therefore, to the extent that the program presented a government-sponsored means of communication to a group of private individuals, the program was subject to a forum analysis.

Boorstin contended that he eliminated Playboy, not because of its content, but to "avoid controversy" within the braille program, and thus had a rational basis for his decision. The court rejected this argument, declaring that Boorstin's action, in overruling a staff decision and eliminating Playboy was "viewpoint-based discrimination" impinging on freedom of expression.

In issuing its declaratory judgment, the court directed the Librarian to resume production and distribution of braille editions of Playboy; to produce and distribute braille editions of the magazine for the calendar year 1987; to notify all subscribers to the program and libraries of the availability of braille editions of Playboy; and to produce and maintain recorded or "talking book" editions of the 1986 issues of Playboy and provide notice of the availability of these editions.

American Council of the Blind v. Boorstin, 644 F.Supp. 811 (D.D.C. 1986) [ELR 8:11:11]

Federal District Court in Colorado enjoins Hallmark Cards from distributing a line of greeting cards allegedly infringing trade dress of competitor's "emotionally expressive" cards

A Federal District Court in Colorado has enjoined Hallmark Cards from continuing to distribute 83 cards from its "Personal Touch" line. Susan Polis Schutz, Stephen Schutz and Hartford House Ltd., doing business as

Blue Mountain Arts, a company well-known for "emotionally expressive" greeting cards, had claimed that the trade dress of its "Airebrush Feelings" and "Watercolor Feelings" card lines was infringed by Hallmark and sought $50 million in damages.

Judge Jim R. Carrigan first pointed out that "the arbitrary selection and combination of greeting card features may constitute protected trade dress even though the features serve useful purposes in conveying messages and invoking certain emotions and feelings. Decorative or stylistic nonessential greeting card features may serve these functions, yet at the same time identify their source." The sponsorship of the product can be anonymous as long as it is recognizable.

The Airebrush and Watercolor Feelings cards were described as having an inherently distinctive and highly uniform "look" which the public attributes to Blue Mountain. Among the features comprising the trade dress of the cards were: a two-fold card containing poetry on the first and the third page; a deckle edge on the right-side of the first page; a rough edge stripe of color, or wide stripe, on the outside of the deckle edge of the first page; a high quality, uncoated and textured art paper for the cards; lengthy poetry, written in free verse, typically with a personal message; appearance of hand-lettered calligraphy on the first and third page; and backgrounds of soft colors done with air brush blends or light watercolor strokes.

Hallmark argued that the court was required to examine each feature of individual cards separately for functionality. Judge Carrigan stated that this approach would be "alien" to the policies of the Lanham Act, and cited several cases (including American Greetings Corp. v. Dan-Dee Imports, Inc., 619 F.Supp. 1204; and Harlequin Enterprises Ltd. v. Gulf & Western Corp., 503 F.Supp. 647; ELR 3:13:5) in which courts have adopted an "aggregate approach" to deciding the question of functionality. Under this approach, the creation and arrangement of individual product features into a particular overall design may itself constitute a nonfunctional product feature. Blue Mountain's "amalgamation" of paper, verse and ink served to produce a nonfunctional "look" It also was noted that "infinite" alterna tive designs were available to Hallmark.

The court went on to find that Blue Mountain had established that the Airebrush and Watercolor Feelings "look" possessed a secondary meaning. Enlargements of portions of various Blue Mountain and Personal Touch cards were so nearly identical as to preclude a finding of coincidence, stated Judge Carrigan. And there was substantial evidence to support a finding that Hallmark copied Blue Mountain's cards for the purpose of "cashing in" on Blue Mountain's reputation and goodwill, with the result that the secondary meaning of Blue Mountain's cards was being diluted by Hallmark's intentional copying.

In all, the Hallmark Personal Touch cards were so substantially similar to the trade dress of Blue Mountain's cards that confusion was likely to occur among consumers; this likelihood was sufficient to establish the requisite probability that Blue Mountain would prevail on the merits of its claim and might incur irreparable harm in the absence of an injunction.

Hartford House Ltd. v. Hallmark Cards Incorporated, 647 F.Supp. 1533 (D.Colo. 1986) [ELR 8:11:12]

Publisher of Vanity Fair was not entitled to summary judgment in libel action brought by author Renata Adler

In the September 1983 issue of the Washington Journalism Review, an article written by Bruce Cook referred to the "firing" of author Renata Adler from the staff of the magazine Vanity Fair. Adler, who worked as a consulting editor for the recently revived magazine from some time in late 1982 until her resignation in May 1983, claimed that Cooks article defamed her by falsely asserting that she was fired (which she was not) for incompetence and dishonesty. Adler sought $500,000 in compensatory damages and $500,000 in punitive damages from Washington Communications Corporation, the publisher of the Washington Journalism Review, and from Conde Nast Publications, Inc., the publisher of Vanity Fair. It was alleged that certain Vanity Fair employees provided Cook with the purportedly defamatory information.

Federal District Court Judge Whitman Knapp first determined that Adler, interestingly enough the author of a new book about the Westmoreland and Sharon libel cases, possessed a "general fame or notoriety in the literary and journalistic community and pervasive... involvement in the affairs of society" and therefore was a public figure with respect to her activities in literature, journalism and criticism. Adler had invited public attention to her views prior to the publication of Cook's article; maintained regular and continuing access to the media; and injected herself into the public controversy surrounding the "resurrection" of Vanity Fair.

As a public figure, Adler was required to show with convincing clarity that the editors of the Washington Journalism Review or Cook (if he was acting as its agent) acted with actual malice in publishing the statement at issue. But Judge Knapp found that the conduct of the Review and Cook did not approach actual malice or even simple negligence. Cook relied on the information provided by a well-respected editor of Vanity Fair in preparing his article (although a question of fact was raised about the nature of the statements possibly made by the magazine's editor-in-chief, see below); the Review had no reason not to rely upon Cook; and the information provided by Cook was "extremely plausible" given the extensive personnel changes at Vanity Fair.

With respect to Conde Nast, the court found it necessary to construe the Supreme Court's holding, in Anderson v. Liberty Lobby, 106 S.Ct. 2505 (ELR 8:3:7), that to defeat a motion for summary judgment in a libel case, a party must show that the evidence is such that a reasonable jury might find that actual malice had been shown by clear and convincing evidence. In Judge Knapp's view, this standard meant that it would be possible, "clearly and convincingly," to draw an inference of malice from facts which the jury is entitled to find by ordinary evidentiary rules.

Judge Knapp stated that Adler presented a question of fact as to whether Leo Lerman, Vanity Fair's editor-in-chief, told Cook that he had fired Adler, and whether Lerman accused her of incompetence in having bought unusable material; if a jury found the facts on these issues in Adler's favor, a determination of actual malice might be reached with the requisite convincing clarity. Conde Nast's motion for summary judgment was denied accordingly.

Adler v. Conde Nast Publications, Inc., 643 F.Supp. 1558 (S.D.N.Y. 1986) [ELR 8:11:13]

Federal District Court in Minnesota orders venue transfer to California of trademark infringement action brought by creator of "Gobots" toy against developer of "Mighty Orbots" children's television program

In a decision rendered in May 1985, but only recently published, a Federal District Court in Minnesota transferred to the Central District Court of California a trademark infringement action brought by Tonka Corporation against TMS Entertainment, Inc. Tonka, a Minnesota corporation with its principal place of business in Spring Park, Minnesota, manufactures children's toys including sturdy trucks and the popular "Gobots" (robot characters that convert to vehicles). TMS, a California corporation with its principal place of business in Los Angeles, produces and sells children's television shows, including the allegedly infringing program "Mighty Orbots" Mighty

Orbots was broadcast by KSTP, an ABC television station affiliate in the Twin Cities area, beginning in September 1984.

According to Tonka, each household viewing the program constituted a separate infringement resulting in about 700,000 acts of infringement by TMS in Minnesota as of February 1985. Apart from the broadcasts of the Mighty Orbots program, TMS had no contacts with the state of Minnesota.

The court first determined that it possessed personal jurisdiction over TMS because there was "much more than a foreseeable possibility" that ABC would broadcast Mighty Orbots nationwide, including Minnesota; TMS therefore had a reasonable expectation that it might have to litigate an action arising from its contact, albeit limited, with the state. However, with respect to venue, the court stated that although Minnesota and the Central District of California had equal access to evidence and witnesses, the California court was a more convenient forum for TMS' presentation of evidence concerning the development of the Mighty Orbots program. And the court rejected Tonka's argument that venue was proper because TMS was doing business in Minnesota-ABC, not TMS, sold the Mighty Orbots programs to KSTP.

Tonka Corporation v. TMS Entertainment, Inc. 638 F.Supp. 386 (D.Minn. 1985) [ELR 8:11:13]

Dispute over agreements to produce and exploit cartoon properties required further proceedings on issue of royalty payments, rules New York appellate court

In March 1960, Total Television Productions granted Leonardo Television Productions an exclusive license in perpetuity to use and exploit, throughout the world, a cartoon property entitled "King Leonardo and His Short Subjects." Total obtained the right to 50% of the net profits remaining after the deduction of Leonardo's fee (up to 45% of the gross sales price) from foreign distribution.

In January 1969, Leonardo and Total modified the 1960 agreement by granting Total all rights in one of the properties - the "Beagles" - and music rights in all of the properties. The agreement also provided that to the extent of Total's "right, title and interest therein," Total granted to Leonardo an exclusive license to televise all programs based on the properties, outside the United States, for a period of twelve years. During the twelve year period, Total was to receive only 20% of the net profits, and Leonardo was to advance Total $117,500 against Total's 20% share of the net profits. The 1969 agreement further provided: The parties hereby confirm that, except as herein specifically modified and amended, all prior agreements are hereby ratified and confirmed and shall remain in full force and effect.

Total claimed that at the conclusion of the twelve year period set forth in the 1969 agreement, Leonardo lost its exclusive rights and Total became entitled to 50% of all monies derived from the exploitation of all of the subject properties, except the "Beagles," i.e., Leonardo no longer would be entitled to deduct its percentage fee. A New York appellate court noted, in setting forth the terms of the twelve year license, that the 1969 agreement referred to Total's "right, title and interest." Leonardo already had a perpetual right to exclusively exploit and license the properties. Therefore, Total could only have been giving up its right under the 1960 agreement to receive 50% of the net profits from the foreign exploitation of the properties and its rights to receive even 20% of the net profits until the sum of $117,500 was repaid from those proceeds. The fact that the parties confirmed their prior agreement except as specifically modified, meant that Total's argument that the 1969 agreement implicitly modified the 1960 agreement was insufficient to raise a triable issue of fact.

Thus, the court held that at the conclusion of the twelve year period, the parties' rights with respect to exploitation and compensation again would be governed by the 1960 agreement.

Total also claimed that Leonardo breached its agreement by entering into sublicenses during the twelve year period, which, in some cases, extended beyond that period. The court found that a triable issue of fact was raised as to the calculation of Total's compensation with respect to the sublicensing agreements and that partial summary judgment should have been denied on this claim.

Total Television Productions, Inc. v. Leonardo Television Productions, Inc. 502 N.Y.S.2d 744 (N.Y.App. 1986) [ELR 8:11:14]

Preliminary injunction barring nude dancing in establishment serving alcoholic beverages is upheld

In 1984, the California Department of Alcoholic Beverage Control revoked Midway Restaurant System's liquor license after finding that the establishment had violated a state regulation which prohibits certain activities, such as nude dancing, in conjunction with the sale of alcoholic beverages. Midway appealed the Department's decision to the Alcoholic Beverage Control

Board; the appeal automatically stayed the license revocation. However, the Department, invoking a recently-enacted section of the California Business and Professions Code, obtained a preliminary injunction barring Midway from continuing to violate the regulation at issue during the pendency of Midway's appeal to the Board.

A California appellate court has affirmed the trial court's decision, holding that the Legislature was entitled to add to the remedies available to the Department in the exercise of its alcoholic beverage control activities, and that the trial court had jurisdiction to grant the injunction. It was noted that the statute might be invoked only in circumstances where a licensee continued to violate the same rules which occasioned an administrative hearing resulting in a license revocation. The court further held that the injunction did not violate Midway's equal protection rights, and that the application of the statute did not violate any ex post facto principle in either the United States or California Constitutions.

The injunction also was not an impermissible prior restraint on Midway's free expression in violation of the First Amendment. The complained-of activities took place in conjunction with the sale of alcoholic beverages and injunctive relief in this instance did not call the First Amendment into play as it otherwise might have if no alcoholic beverages were involved. And it was not necessary for the Department to establish that the activities it sought to enjoin amounted to "gross sexual conduct or bacchanalian revelry."

Stroh v. Midway Restaurant Systems, Inc., 180 Cal.App.3d 1040 (Ca.App. 1986) [ELR 8:11:14]

Boston Globe did not have constitutional or common law right of access to documents submitted to court in connection with discovery motions in civil case, but Federal District Court erred in exempting local public television station from protective orders

In May 1982, some residents of Woburn, Massachusetts filed a civil action in a Federal District Court against Cryovac, Inc. (a division of W.R. Grace & Co.), and several other parties alleging that the companies and individuals had contaminated the city's water supply by discharging toxic chemicals into the ground.

On September 4, 1985, after three years of discovery, the court issued a protective order prohibiting the parties, their attorneys, consultants and experts from making public statements about the lawsuit. The order (which was superseded by a narrower order issued in October) also prohibited the parties from divulging any information based on material obtained through discovery except to government environmental or health officials.

In late September, the WGBH Education Fund and Chedd-Angier Production Co. were allowed to intervene in the action; WGBH sought access to the protected information in order to produce a documentary for the Public Broadcasting Service's "Nova" television series. The court granted WGBH's request for access to discovery materials and permitted the broadcaster to conduct interviews with the parties' attorneys, consultants and experts. However, WGBH was prohibited from revealing the information it obtained from these sources until after jury selection.

On December 12, 1985, the Globe Newspaper Company intervened in the case, seeking access to discovery materials. And one day later, CBS Inc. intervened to obtain information for a segment of the "60 Minutes" television program. When the court refused to grant the Globe or CBS access to the protected information, the newspaper appealed.

Federal Court of Appeals Judge Bownes first determined that the Globe's appeal did not become moot when the protective order was vacated (after the jury was selected) or when the case was settled. The Globe probably will encounter similar protective orders in the future and the use of such orders to deny access to discovery materials was characterized as an "unsettled and important" issue. And the protective order in this case was too short in duration to be litigated before it was vacated, with the result that the question presented to the court was "capable of repetition, yet evading review," thereby precluding a finding of mootness.

In turning to the Globe's argument that the District Court violated its First Amendment rights, Judge Bownes cited Seattle Times Co. v. Rhinehart, 476 U.S. 20

(1984; ELR 6:3:17) and stated that Seattle Times "foreclosed any claim of an absolute public right of access to discovery materials." But the United States Supreme Court did not hold that the First Amendment was not involved at all when a protective order is issued, in Judge Bownes' view. Rather, the First Amendment remains a "presence" in the process of reviewing discovery protective orders, albeit to a lesser extent that restraints on the dissemination of information in other contexts.

In order to withstand the First Amendment test, a protective order must be issued in good cause; this standard was met in the instant case, given the District Court's concern that "massive and potentially harmful" publicity might prevent the selection of an impartial jury. Furthermore, the press had almost three years of unrestricted access to the material obtained via discovery; access was limited only as the trial approached. But the District Court erred, stated Judge Bownes, in granting access to the material to WGBH and not to other news organizations. WGBH was a "privileged media entity" that could, over a four month period review otherwise confidential information and "shape the form and content of the initial presentation of the material to the public" - this exception made the protective order untenable.

The court noted that the public's right of access to judicial proceedings still is in the process of being defined, but held, after reviewing relevant case law, that there is no right of public access to documents submitted to a court in connection with civil discovery motions; the same good cause standard is to be applied that must be met for protective orders in general. The court declined to extend to materials used only in discovery the common law presumption that the public may inspect judicial records.

Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986) [ELR 8:11:15]

California Supreme Court rejects racehorse owner's action for interference with prospective economic advantage arising from competing harness driver's alleged misconduct during a race

Harlan Youst's luck with his horse Bat Champ took a setback during the eighth race at Hollywood Park on October 24, 1982. According to Youst, a competing harness driver, Gerald Longo, managed to direct his horse, The Thilly Brudder, into Bat Champ's path. Longo purportedly then stuck Bat Champ with his whip and caused the horse to break stride. Bat Champ finished sixth in the race; The Thilly Brudder finished second, but was disqualified after the California Horse

Racing Board reviewed the race. Bat Champ, as the fifth place horse, earned a purse of $5,000, far less than the winning, second and third place prizes of $50,000, $25,000 and $12,000, respectively.

The next window Youst visited was in the courthouse, where he filed a complaint against Longo asserting causes of action for intentional and negligent interference with Bat Champ's progress in the race, and conspiracy to so interfere. The trial court sustained Longo's demurrer without leave to amend for failure to state a cause of action. An appellate court affirmed this decision, holding that as a matter of law, the facts did not set forth the tort of negligent interference with prospective economic advantage (ELR 7:2:17), and that given the special circumstances surrounding sports competition and as a matter of public policy, the allegations of intentional interference with prospective economic advantage were insufficient to state a cause of action. The court stated that a claim for civil conspiracy to intentionally interfere with prospective economic advantage might be actionable in the context of a sporting event but that the Board had the initial authority to award compensation when the alleged interference occurred during a horse race. And in this case, Youst had failed to pursue his administrative remedies before the Board.

The California Supreme Court affirmed the appellate court decision to dismiss all three causes of action, but observed that the dismissal should have been based on substantive rather than procedural grounds, and emphatically concluded that "tort liability for interference with prospective economic advantage is not available, as a matter of law and public policy, in the context of a sporting event." Judge Lucas pointed out that the tort requires proof that it is reasonably probable that the lost economic advantage would have been realized but for another's interference; that the outcome of a horse race in most cases, including the race at issue, is too speculative to meet the "reasonably probable" standard; that the courts "are not appropriate forums for adjudicating claimed sporting event violations which allegedly resulted in prospective economic loss"; and that regulatory agencies have successfully managed to supervise sports conduct.

Furthermore, in the context of a horse race, "to impose liability on drivers for acts which may he a necessary consequence of their jockeying for track position would effectively eliminate the type of intense competition permitted by the rules of racing." Even conspiracies formed between competitors or between competitors and non-competitors would not justify liability with respect to a claim for intentional interference with prospective economic advantage in the sports context, declared Judge Lucas, in part due to the lack of any reasonable probability that economic gain would have been realized.

Heading into the stretch, the court determined that contrary to the appellate court's conclusion, the Board, a regulatory and disciplinary entity, does not have the authority to award monetary tort damages.

In a concurring opinion, Judge Reynoso stated that he would have limited the holding in the matter to prohibiting, on the basis of public policy, tort liability for potential economic loss as a result of illegal conduct which occurs during a sporting event. A concurring opinion by Judge Grodin focused on the "even narrower" ground that a tort cause of action for intentional interference with prospective economic advantage was inappropriate because of the authority granted to the California Horse Racing Board to regulate the racing industry, and questioned the source of the public policy cited by the majority. Judges Reynoso and Grodin would not have addressed the question of whether the Board had the statutory authority to provide compensatory relief to a party allegedly injured by the violation of a Board regulation, noting that Youst never sought such relief from the Board.

Youst v. Longo, Case No. L.A. 32114 (Ca., Jan. 2, 1987) [ELR 8:11:15]

Polo club owner/player was not entitled to injunctive relief in antitrust action challenging suspension by polo association

The United States Polo Association did not violate federal antitrust laws when it suspended Peter Brant from participating in association-sanctioned events for a six week period during early 1986, a Federal District Court in Florida has ruled.

Brant claimed that the association and certain individual association members illegally combined and conspired to create a group boycott in restraint of trade by excluding Brant from the association's matches, including the "Gold Cup" tournament, and that the suspension was intended to impair competition by damaging Brant's reputation and obstructing his efforts to form an organization which would compete with the association in sponsoring, and obtaining corporate support for, polo matches. The association argued that Brant was suspended, after notice and a hearing, because he allegedly verbally abused the umpires during a polo match in June 1985.

In denying Brant's application for preliminary injunctive relief on his antitrust and defamation claims, the court cited NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (ELR 6:4:3) in which the United States Supreme Court applied a rule of reason analysis and struck down the NCAA's television plan. Several other courts have followed the rule of reason approach in sports self-regulation cases. Under this approach, Brant was required to show that his suspension from play in some manner restrained prices, restricted competition and decreased output. The court found that Brant did not establish a substantial likelihood of success on the merits in that he did not show that a "facially neutral rule," designed to limit the propensity to violence in a competitive and dangerous sport and to preserve the integrity of the game, was a rule that would almost always so restrict competition. It also was noted that the suspension was triggered by a complaint from two umpires, and did not originate from Brant's competing polo club owners; that Brant's team was not excluded from competing in the Gold Cup; and that the association's rules did not limit Brant from establishing a rival polo association.

Brant v. United States Polo Association, 631 F.Supp. 71 (S.D.Fla. 1986) [ELR 8:11:16]

Briefly Noted:

Pirate Records.

A Federal District Court in Florida has reversed the convictions of five individuals who were charged with engaging in the interstate transportation of pirate records and tapes in violation of section 2314 of the National Stolen Property Act. In 1985, the United States Supreme Court, in Dowling v. United States (ELR 7:5:9), held that "phonorecords that include the performance of copyrighted musical compositions for the use of which no authorization has been sought nor royalties paid [were not] 'stolen, converted or taken by fraud'" for purposes of section 2314. The decision in Dowling was issued about six months after the convictions of George Washington Cooper, III and four other individuals were affirmed. Federal District Court Judge Melton ruled that the Dowling decision should be given retroactive effect and that because the National Stolen Property Act did not cover the activity with which Cooper and the other parties were charged, the court lacked jurisdiction in the matter; the convictions were vacated on the counts alleging the interstate transportation of stolen property. But the court went on to find that Dowling did not affect the convictions of some group members on various counts of wire fraud and of violating the RICO Act. New sentences were imposed on certain members of the group in accordance with the court's decision.

Cooper v. United States, 639 F.Supp. 176 (M.D.Fla. 1986) [ELR 8:11:16]

Copyright Infringement.

In August 1985, Broadcast Music, Inc. obtained a judgment against Frank Canul, doing business as the Las Vegas Troubadour, in the amount of about $21,000 based upon the copyright infringement of ten songs. BMI was the assignee of the public performance rights in the songs. A United States Bankruptcy Court in Nevada, after noting that Canul was aware that he was required to enter a licensing agreement for the public performance of copyrighted songs but did not obtain such an agreement, has declared that the debt owed to BMI for intentional copyright infringement was not dischargeable in bankruptcy.

In a separate case, a United States Bankruptcy Court in Illinois also declared nondischargeable the debt owed by Michael G. Hasley and Linda J. Hasley to Broadcast Music, Inc. resulting from a judgment against the Hasleys in a Federal District Court.

Broadcast Music, Inc. v. Canul, Case No.BK-S-85-1468 (D.Nev. Bankr.Ct.,Oct.29,1986); In re Michael G.Hasley, Case No.86 B03123 (N.D.Ill. Bankr.Ct., June 2, 1986) [ELR 8:11:17]

Copyright Infringement.

The television program entitled "Disraeli: Portrait of a Romantic," produced and exhibited by ITC International Television Corporation, Mobil Corporation and Channel 13, Public Broadcasting Channel, did not infringe Anna

Friedman's copyrighted biographical work "Benjamin Disraeli," a Federal District Court in New York has ruled. Friedman's biography was an essentially chronological account of the life of the British statesman. The television program differed from the biography in its language and its perspective, stated the court in granting summary judgment to the broadcast parties, and no reasonable observer could find them substantially similar "beyond the level of generalized or otherwise nonprotectible ideas." Copyright protection does not extend to historical facts or to true events, even if they were discovered through Friedman's original research, concluded the court.

Friedman v. ITC International Television Corporation, 644 F.Supp. 46 (E.D.N.Y. 1986) [ELR 8:11:17]

Contracts.

Cadence Industries Corp., the owner, through its division Marvel Entertainment Group, of certain "superhero" characters, entered into a distribution agreement in 1976 with a corporation called Arp Films, Inc. Under the contract, Arp was required to obtain approval from Cadence for any sale of stock. Arp eventually used Cadence for breach of contract alleging that Cadence granted exclusive video cassette distribution rights to a third party; Arp also claimed that Cadence unreasonably refused to approve Arp's plan to sell stock in a public offering.

A Federal District Court in New York has refused to grant Arp's request for a preliminary injunction because the company failed to demonstrate a likelihood of success on the merits of its claim that Cadence's conditions were unreasonable. The evidence seemed to support

Cadence's claim that the contract did not contemplate a public offering. And the balance of hardships was not in Arp's favor - the company did not demonstrate that the timing of its public offering or of its expansion plans was "critical to its success." Cadence's motion to dismiss the matter on the ground that Arp was not in good standing in its state of incorporation at the time the complaint was filed also was denied.

Arp Films, Inc. v. Marvel Entertainment Group, 645 F.Supp. 876 (S.D.N.Y. 1986) [ELR 8:11:17]

Video Game Infringement.

Tim O'Reilly was convicted of criminal copyright infringement for selling counterfeit copies of the circuit boards for Data East USA's video games Karate Champ and Kung Fu Master. A Federal Court of Appeals in Georgia has affirmed the conviction, holding that the introduction of copyright registration certificates for the games proved that the video images were copyrighted and that the Government established a prima facie case as to the authenticity and identification of the games. O'Reilly's argument that the Government did not compare the entire play of his games with the copyrighted games was rejected. In all, an expert's testimony that the attract modes and initial play of the games were similar, the jury's viewing of the games side-by-side with the counterfeit copies, and O'Reilly's representations of his game boards as Karate Champ and Kung Fu Master could have been found by the jury to establish proof of infringement beyond a reasonable doubt, concluded the court.

United States v. O'Reilly, 794 F.2d 613 (11th Cir. 1986) [ELR 8:11:17]

Sports Car Injury.

Race car driver Douglas Hoffman sued the Sports Car Club of America for personal injuries he sustained in a collision during a race at Riverside International Raceway. The club contended that Hoffman had signed an agreement releasing all parties conducting the race from liability for injury caused by their negligence. But Hoffman argued that he was fraudulently induced into signing the release. A Riverside County trial court granted summary judgment on behalf of the club and this decision has been affirmed. The appellate court held that Hoffman did not present any evidence establishing mistake, fraud or undue influence in connection with the signing of the release.

Hoffman v. Sports Car Club of America, 180 Cal.App.3d 119 (Ca.App. 1986) [ELR 8:11:17]

Jurisdiction.

When Viacom International brought an action in a Federal District Court in Puerto Rico alleging that the owners of television stations in Puerto Rico and in the Virgin Islands breached a licensing agreement, Antilles Broadcasting Corporation (the owner of the television station located in St. Croix, United States Virgin Islands) moved to dismiss the complaint for lack of personal jurisdiction. The court held that Antilles Broadcasting had sufficient contacts with Puerto Rico to justify the court's exercise of jurisdiction. It was noted that although the licensing agreement was entered into outside of Puerto Rico and the case did not arise out of Antilles Broadcasting's contacts with Puerto Rico, the signal of the St. Croix station was received in Puerto Rico both directly and by cable relay. Further, the broadcaster derived substantial revenue from its advertising contracts with Puerto Rico advertisers; had a resident of Puerto Rico as one of its principal officers and shareholders; and carried on a "continuous and systematic but limited part of its business" within Puerto Rico.

Viacom International, Inc. v. Three Star Telecast, Inc., 639 F.Supp. 1277 (D.P.R. 1986) [ELR 8:11:18]

Athletic Injury.

While participating in the Westchester Summer Baseball Camp on the campus of Concordia College in 1981, then-fourteen year old Robert Blair, Jr. was struck on the forehead by a batted ball; Blair suffered a cerebral concussion and other injuries as a result of the accident. The youth sued various parties, alleging improper supervision and improper maintenance of the camp facilities in that the batting practice session took place on a grassy soccer field, not on a baseball field; the batters used metal, rather than wooden bats; there were no protective helmets; and the distance between the pitcher and batter was shorter than the regulation distance.

Concordia College moved for summary judgment on the ground that it owed no duty of care to Blair. The college relied upon a contract with the operator of the camp in which the camp agreed to indemnify the college for any sports injury claims. The camp asserted, in part, that the college was a joint venture in the camp, noting that the camp director, Al Zoccolillo, was the college's head baseball coach.

A New York trial court has ruled that triable issues of material fact were raised concerning the college's role in the camp. It was observed that all publicity for the camp was reviewed by the college, and that a camp brochure could have given the impression to the public that the college controlled the camp's daily activities which were held on the college grounds - the college was not an absent commercial sponsor of a sporting event. A jury therefore will be required to determine whether the college owed a duty of care to Blair and whether that duty was breached.

Blair, Jr. v. Westchester Summer Baseball Camp, N.Y. Law Journal, p. 15, col.6 (Westchester Cnty., Sept. 10, 1986) [ELR 8:11:18]

Arbitration.

A dispute concerning payment for booking services rendered by Directors Cinema, Inc. to Almi Theatre Associates must proceed to arbitration in accordance with the contract between the parties, a New York trial court has ruled. Directors sought payment for its services in obtaining motion pictures for the Cinema 57 theater in Manhattan, which Directors and Almi operated as a joint venture. Almi's argument that Director's claim did not arise under or in relation to the joint venture agreement was rejected by the court; although the contract did not require Directors to obtain films for Cinema 57, it did provide that Directors would be paid at an agreed-upon rate for any booking services the company might render to the joint venture. The fact that the parties could not agree on a rate of compensation did not preclude Directors' right to seek compensation. The court stated that Directors claim was within the scope of the contract's broad arbitration provision, and that the controversy between the parties was not explicitly excluded from the joint venture agreement, as argued by Almi. Almi's application to stay arbitration therefore was denied.

Almi Theatre Associates, Ltd. v. Directors Cinema, Inc., New York Law Journal, p. 14, col. 1 (N.Y.Cnty., March 2, 1987) [ELR 8:11:18]

College Athletics.

A group of female student athletes at West Texas State University claimed that the university's intercollegiate athletics department engaged in sex discrimination in violation of Title IX of the Education Amendments of

1972. A Federal Court of Appeals in Texas noted that the athletics department received no earmarked federal funds and that Title IX coverage was not triggered by the indirect or "trickle-down" benefit provided to the athletics department from federal funds received by the financial aid program or other university programs. The court also rejected the contention that the discrimination allegedly practiced by the athletics department was so pervasive that it could be imputed to other departments which did receive federal funds, and determined that there existed only a "ministerial relationship" between the university's financial aid office and the athletic scholarship program - such a relationship was insufficient to bring athletic scholarships within the coverage of Title IX. The District Court order granting summary judgment to the university therefore was affirmed.

Bennett v. West Texas State University, 799 F.2d 155 (5th Cir. 1986) [ELR 8:11:18]

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Cable Television.

A Federal District Court in Massachusetts has granted a temporary restraining order enjoining four local taverns from intercepting and retransmitting satellite signals without authorization. Quincy Cablesystem and New England Sports Network contended that the taverns violated state and federal law by using satellite dishes to intercept signals intended for Quincy and exhibiting the network's programs to tavern customers without permission or payment. The court determined that the cable company and the programming service established a likelihood of irreparable harm because the unauthorized signal interception deprived them "of the full value of their business investment" cost them business opportunities, and had a negative impact on their reputation and good will. And the public "has an interest in ensuring the integrity of communications systems, including satellite transmissions,' concluded the court.

Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 640 F.Supp. 1159 (D.Mass. 1986) [ELR 8:11:18]

Copyright Infringement.

A Federal Court of Appeals in Florida has affirmed a directed verdict in favor of the Coca-Cola Company in a copyright infringement suit brought by songwriter John T. Benson. In 1983, Benson sued Coca-Cola alleging that the song "I'd Like To Buy The World A Coke" which appeared in Coca-Cola commercials in the early

1970s, was an infringement of his 1960 song "Don't Cha Know." The court found that Benson produced no evidence that Coca-Cola's songwriters visited any of the places where his song was performed or that the songwriters had any other access to Benson's song. Furthermore, the court determined that the songwriter's testimony regarding their creation of the Coca-Cola song in London in 1971 constituted uncontradicted evidence of independent creation which fully negated any claim of infringement.

Benson v. Coca-Cola Company, 795 F.2d 973 (11th Cir. 1986) [ELR 8:11:19]

Satellite Dish.

When homeowners in Summercrest, a Kansas subdivision, installed a satellite dish at their residence, members of the Summercrest home association demanded that the dish be removed. The home association contended that the dish violated a restrictive covenant barring Summercrest residents from erecting television receiving devices outside of their residences. The homeowners sued the association, seeking a declaratory judgment that the covenant violated the First and Fourteenth Amendments and therefore was unenforceable. A Federal District Court held that the possibility of judicial enforcement of the covenant was insufficient to constitute state action and granted the home association's motion to dismiss the lawsuit for lack of subject matter jurisdiction. The court noted that actual judicial enforcement is required before state action can be found, and rejected the homeowners' argument that state action existed because Summercrest was similar to a company-owned town, concluding that Summercrest was merely a residential area.

Ross v. Hatfield, 640 F.Supp. 708 (D.Kan. 1986) [ELR 8:11:19]

Aquatic Park.

When the National Marine Fisheries Service granted a permit to Sea World, Inc. in 1983 authorizing the capture of killer whales for scientific research and public display, environmental organizations, wilderness tour boat operators and the state of Alaska sought injunctive relief alleging that the issuance of the permit without preparation of an environmental impact report violated the National Environmental Policy Act of 1969 (NEPA). A Federal Court of Appeals in Alaska has affirmed in part and reversed in part a District Court's grant of summary judgment in favor of those seeking the injunction. The Service and Sea World argued that it was not necessary for the Service to prepare an environmental impact report along with issuing the permit since the conditions imposed upon Sea World sufficiently mitigated any significant environmental effects that might have resulted. The Court of Appeals agreed that the Service's decision not to prepare an environmental impact statement was unreasonable, the Service must consider the requirements of the NEPA and provide a reasoned explanation of its decision not to prepare the environmental impact statement.

Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986) [ELR 8:11:19]

Antitrust.

Kerasotes Illinois Theatres and associated enterprises were charged in a federal grand jury indictment with having engaged, during the period from December 1983 through July 1985, in a conspiracy in restraint of trade in violation of section 1 of the Sherman Act. The jury returned a verdict of not guilty (ELR 8:8:21). A Federal District Court has entered judgment on the jury's not guilty verdict, noting that the unsettled legal status of split agreements entered into by film exhibitors during the period of December 1983 through April 1985 - all but three months out of the indictment - precluded a guilty verdict. The jury's finding that the Kerasotes parties lacked the intent to produce anticompetitive effects was "overwhelmingly" supported by the evidence, including the fact that several federal courts (in decisions reviewed by Judge Mills) were uncertain as to whether the probable consequence of the practice of exhibitor allocation of the right to negotiate for films was an anti-competitive effect which could be labeled unlawful per se in a civil case.

United States v. Kerasotes Illinois Theatres, Inc., 650 F.Supp. 963 (C.D.Ill. 1987) [ELR 8:11:19]

Copyright.

A Federal Court of Appeals has affirmed the decision of the Register of Copyrights to refuse to register a logo submitted for copyright by John Muller & Company, Inc. Muller's logo for the New York Arrows soccer team consisted of four angled lines forming an arrow, with the word "Arrows" written in cursive script underneath. The Register of Copyrights determined that the design lacked the minimal creativity necessary to support a copyright and twice refused to register the logo. The Court of Appeals upheld a Federal District Court's finding that the Register had not abused his discretion in refusing to register the logo.

John Muller & Company, Inc. v. New York Arrows Soccer Team, Inc., 802 F.2d 989 (8th Cir. 1986) [ELR 8:11:19]

Rock Concert.

Prior to its annual concert in Central Park, Rock Against Racism, a rock concert organization, sought an injunction prohibiting the New York City Department of Parks and Recreation from imposing its newly created guidelines for the use of Central Park facilities. A

Federal District Court held that requiring Rock Against Racism to use the sound system provided by the Department instead of its own equipment was not justified by any significant governmental interest; absent such an interest, the First Amendment protection granted to live music extended not only to the words and songs presented, but also to the sound which would emanate from the amplification system. And the Department had failed to demonstrate a constitutionally sufficient basis for ending Rock Against Racism's concert at 6 p.m., when the guidelines permitted that evening events could continue until 9:30 p.m. under certain circumstances.

However, the court rejected Rock Against Racism's challenge to the increased cost of obtaining a permit for the concert, i.e., a $100 application processing fee and a $1000 cleanup bond. Furthermore, the Department's requirement that applicants obtain liability insurance for the day of the concert was not per se unconstitutional.

Rock Against Racism v. Ward, 636 F.Supp. 178 (S.D.N.Y. 1986) [ELR 8:11:19]

Copyright.

A professional commercial announcer who recorded a television commercial for Kibbles 'N Bits dog food sued the members of the musical band Bronski Beat, the writers of the song "Junk" and the companies involved in recording and publishing the song for copyright infringement. Larry Moran alleged that incorporation of his performance in the television commercial into the song "Junk" was unauthorized. A Federal District Court in Illinois granted MCA Records' motion to dismiss the suit on the grounds that Moran had no legal interest in the commercial's copyright and therefore lacked standing to sue. Although the legal owner of the copyright was Moran's employer, Quaker Oats Co., the announcer contended that he was a beneficial owner of the copyright because his employment contract limited the commercial's use to television broadcasts and linked his remuneration to the frequency of that use. The court concluded that Moran was never a part of the chain of title to the Kibbles 'N Bits commercial and also that his employment contract expressly barred him from claiming any interest in the commercial's copyright.

Moran v. London Records, Ltd., 642 F.Supp. 1023 (N.D.Ill. 1986) [ELR 8:11:20]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Salinger v. Random House, Inc., 650 F.Supp. 413 (8:7:12); National Association of Broadcasters v. Copyright Royalty Tribunal, 809 F.2d 172 (8:9:10).

The Federal Communications Commission has reaffirmed an earlier finding (8:6:21) that neither Loews Corp. nor Laurence Tisch took de facto control of CBS when Loews became the company's largest stockholder, and has rejected Fairness in Media's petition seeking reconsideration of the decision.

The United States Supreme Court has let stand the decision in Baltimore Orioles, Inc. v. Major League Baseball Players Association (8:11:7) which upheld the major league baseball club owners' copyright interest in televised baseball games.

An action brought against Paramount Pictures by an individual who claimed that his life story was the basis for the film "Saturday Night Fever" has been settled; the terms of the settlement were not announced. Eugene "Tony" Robinson's claims for intentional infliction of emotional distress and for fraud had been rejected by a New York appellate court, but the court determined that Robinson stated a cognizable claim in quasi-contract and a supportable cause of action for fraud. Robinson v. Paramount Pictures Corporation, 504 N.Y.Supp.2d 472 (N.Y.App.1986); see also ELR 7:7:15.
[ELR 8:11:20]

NEW LEGISLATION AND REGULATIONS

California amends Labor Code provisions relating to talent agencies

Several significant amendments to the California Talent Agencies Act (California Labor Code sections 1700 et.seq.) took effect on January 1, 1987 (with certain provisions being deemed effective as of January 1, 1986).

Section 1700.4 of the Labor Code defines "talent agency" as a person or corporation who engages in the occupation of procuring, offering, promising or attempting to procure employment or engagements for an artist. Any person who engages in the occupation of a talent agency must obtain a license from the state Labor Commissioner.

As amended, the section provides that acting to procure recording contracts for an artist will not of itself subject a person or corporation to regulation as a talent agency.

However, the California Entertainment Commission, in a report accompanying its recommendations concerning the licensing of talent agents, rejected an "incidental booking" exemption (an exemption contained in the corresponding New York statute) whereby unlicensed personal managers could engage in procuring employment for an artist without being licensed as a talent agent. Personal managers may represent a performer in the negotiation of an employment contract if acting in conjunction with, and at the request of, a licensed talent agency.

A one year statute of limitations on proceedings under the Act was adopted by the amendments, as was a provision barring talent agencies from collecting a registration fee, such as a charge for listing an artist as an applicant for employment in the entertainment industry, or for letter writing, photographs or costumes.

Talent agencies are required to deposit a surety bond with the Labor Commissioner; the amount of the bond has been increased from $1,000 to $10,000.

The prior law stated that talent agencies could not conduct business in rooms "used for living purposes, where boarders or lodgers are kept, where meals are served, where persons sleep, or in connection with a building or premises where intoxicating liquors are sold or consumed." These restrictions have been deleted. As amended, the relevant section provides, in part, that no license shall be granted to conduct the business of a talent agency in a place that would endanger the health, safety, or welfare of the artist.

The amendments also would require a licensee who receives any payment of funds on behalf of an artist to deposit the amount in a trust fund account, to disburse the funds, less the talent agency's commission, to the artist within fifteen days, and to maintain separate records of all funds received on behalf of an artist.

Added to the Labor Code was a provision making it unlawful for a licencee to refuse to represent any artist on account of that artist's race, color, creed, sex, national origin, religion, or handicap.

A 1983 modification in the Act which has been adopted by the amendments precludes criminal sanctions for failing to obtain a license from the Labor Commissioner.

The arbitration of disputes between talent agencies and artists also is covered by the Act. Section 1700.44 of the Labor Code refers controversies arising under the Act to the Labor Commissioner, subject to review by the superior court. The Commissioner may certify without a hearing that there is no controversy for determination if it is established that there is no dispute as to the amount of the fee due.

Notwithstanding section 1700.44, the Act validates contract provisions calling for the decision by arbitration of "any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination" if the provision is contained in a contract between a talent agency and a person for whom the agency is endeavoring to obtain employment, or in a contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to a talent agency, and if the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and provides that the Commissioner has the right to attend the hearings. If there is an arbitration provision in a contract, the contract need not provide that the talent agency agrees to refer any controversy between the agency and the applicant regarding the terms of the contract to the Labor Commissioner, and section 1700.44 shall not apply to controversies pertaining to the contract.

An act to amend Sections 1700.2 et.seq. and to repeal and add Sections 1700.25 and 1700.47 of the California Labor Code. [ELR 8:11:21]

DEPARTMENTS

In the Law Reviews:

Com/Ent, Hastings Journal of Communications and Entertainment Law, has published Volume 8, Number 3/4 with the following articles:

Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform by Kurt A. Wimmer, 8 Comm/Ent 329 (1986)

Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations by Donna G. Cole-Wallen, 8 Comm/Ent 481 (1986)

Preferred Communications, Inc. v. Los Angeles: Broadening Cable's First Amendment Rights and Narrowing Cities' Franchising Powers by D. Scott Shaffer, 8 Comm/Ent 535 (1986)

A Coat of Paint on the Past? Impediments to Distribution of Colorized Black and White Motion Pictures by Richard J. Greenstone, 5/2 The Entertainment and Sports Lawyer 1 (1986) (published by the ABA Forum Committee on the Entertainment and Sports Industries, 750 North Lake Shore Drive, Chicago, IL 60611)

California's Revised Talent Agencies Act: Fine-Tuning the Regulation of Employment Procurement in the

Entertainment Industry by Richard L. Feller, 5/2 The Entertainment and Sports Lawyer 3 (1986)

No Pass, No Play: Texas Style by Walter T. Champion, Jr., 5/2 The Entertainment and Sports Lawyer 5 (1986)

Copyright and Writers-A Study in the Balancing of the Public Interests which Affect the Limits of the Protection Afforded to Literary Works by the Law of Copyright in Australia by Colin Golvan, 9 European Intellectual Property Review 66 (1987) (published by ESC Publishing Limited, Mill Street, Oxford OX2 OJU, England)

Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming by Lynn D. Wardle, 63 Denver University Law Review 621 (1986)

The Professional Sports Community Protection Act: Congress' Best Response to Raiders? by Daniel S. York, 38 The Hastings Law Journal 345 (1987)

The Independent Legal Lives of Fictional Characters by Leslie A. Kurtz, 1986 Wisconsin Law Review 429 (1986)

Structuring Limited Partnership Offerings: Recent Developments by Fred A Little and Robert A. Robbins, 43 Washington and Lee Law Review 829 (1986)

Factual Compilations and the Second Circuit by Beryl R. Jones, 52 Brooklyn Law Review 679 (1986)

The Fact-Opinion Distinction in Libel Law: The Second Circuit Adopts a More Comprehensive Approach, 52 Brooklyn Law Review 879 (1986)
[ELR 8:11:22]