RECENT CASES

Warner Bros. awarded statutory damages of $100 in copyright infringement action against seller of "Gremlins" character doll, but Federal District Court rejects Warner's claim for attorneys' fees

In July 1984, Warner Bros. sued Dae Rim Trading, Inc. for infringing the copyrighted graphic representations of the Stripe and Gizmo characters from the film "Gremlins." Dae Rim admitted that on June 27, 1984, an employee sold six plastic Gizmo dolls to a customer for $2.50 per doll; the "customer" was an investigator acting for Warner. Soon after the sale, Dae Rim returned the six dolls remaining in its possession to a wholesale supplier. Warner, although eventually withdrawing the infringement claim with respect to the Stripe character,

sought $10,000 in statutory damages from Dae Rim, as well as costs and attorneys' fees.

A Federal District Court in New York has rejected Warner's claims, stating that Dae Rim did not cause any damage to Warner, and that Warner's real purpose was "to shift the business of promoting emotion picture away from its producer ... and to place it, not on a wilful infringer (emphasis by the court), but on a small shopkeeper who committed but a single and innocent infringement." In an 82-page opinion, Judge Inzer B. Wyatt repeatedly commented on Warner's "dubious" motives for the litigation, noting that the action was not necessary to protect any copyright interest of the company, to compensate Warner for any damages suffered or reasonable expenses incurred, or to deter and penalize Dae Rim.

Judge Wyatt enjoined Dae Rim from infringing the Gizmo copyright, and awarded statutory damages of

$100 to Warner, but also granted full costs and reasonable attorneys' fees to Dae Rim, although not allowing costs or attorneys' fees in connection with the Gizmo copyright infringement claim prior to the time when Dae Rim conceded that it had infringed that copyright.

The court's opinion initially questioned that "harsh and drastic" orders submitted ex parte by Warner, and stated that an ex parte temporary restraining order issued by then Federal District Court Judge Sofaer was unauthorized and in error, particularly in allowing Warner to conduct a search of Dae Rim's business premises and to seize "all copies or colorable imitations" of the two copyrighted works at issue, as well as a broad array of records and documents. Judge Wyatt also pointed out that in November 1984, Dae Rim submitted an offer of judgment to Warner; the judgment would have given Warner the principal relief sought in its complaint a permanent injunction against any infringement of its two

copyrights. Warner rejected the offer, and, noted the court, "for over three years has persistently and aggressively prosecuted this action to secure unwarranted statutory damages, costs and attorneys' fees (the amount claimed greatly increasing with each passing day." In describing the course of the proceedings, Judge Wyatt criticized Warner's use of the word "counterfeiters" to describe Dae Rim, noting that the word "counterfeit" does not appear in the copyright law. It was noted that Warner erroneously attempted to transfer other trademark concepts and cite trademark decisions in an action in which there was no possibility of product confusion.

Furthermore, the evidence for Warner at trial was "very sparse and generally ambiguous," stated Judge Wyatt, who concluded that the one infringement by Dae Rim was not committed willfully, and that there was no evidence that Dae Rim "made a penny's profit from its one petty infringement."

On the other hand, Warner's conduct with respect to the ex parte order once again was scrutinized by Judge Wyatt, who stated that the company, by failing to mention the applicable law and the Supreme Court's Special Copyright rules, obtained from Judge Sofaer an order which violated the rules, the copyright law and the Constitution.

In awarding statutory damages of $100 to Warner, the court took into account the small size of the Dae Rim business, the relatively small amounts involved, the large revenue and resources of Warner, the substantial profits made by Warner from its licensing of the copyrights, as well as from the film itself, the good faith of Dae Rim and its early consent to reasonable relief for Warner.

Nine other actions initiated by Warner involving the sale of Gremlin character dolls were tried together with the Dae Rim case; the court, according to news reports,

will issue separate decisions in those cases. As of April 30, 1985, Warner stated that its costs and attorneys' fees (in all the actions jointly tried) were over $166,000.

Warner Bros. Inc. v. Dae Rim Trading, Inc., 677 F.Supp. 740 (S.D.N.Y. 1988) [ELR 10:1:3]

Jimmie Rodgers may pursue royalty suit against Roulette Records only as to claims arising after November 1978, rules Federal District Court; singer's pre-1978 claims and other causes of action are dismissed on statute of limitations and substantive grounds

When singer Jimmie Rodgers sued Roulette Records and its president Morris Levy, Rodgers, who had made about 100 recordings for Roulette, including

"Honeycomb" and "Kisses Sweeter Than Wine," claimed that the company paid him insufficient or no royalties since the early sixties. Between 1957, when Rodgers signed a contract with Roulette, and 1960, Roulette advanced funds to Rodgers and charged his account with costs for recording totalling about $26,000. During the next twenty-five years, Roulette credited Rodgers' account with royalties of about $20,000, leaving Rodgers with an unrecouped balance of $6,000. After Rodgers sued the company, Roulette acknowledged that it owed the singer an additional $14,000 for royalties due for the early 1980s; Rodgers alleged that considerably more money was due from 1960 through the present.

Roulette first argued that the New York's six year statute of limitations barred recovery for any alleged breach occurring earlier than November 30, 1978. Rodgers responded that the statute of limitations did not begin to

run because his account with Roulette was an open, mutual account. Federal District Court Judge Shirley Wohl Kram initially agreed that the parties' contract and dealings supported Rodgers' characterization of the account. However, the contract also required Roulette to send Rodgers semiannual accounting statements. By stating the balance due, and paying the balance at the end of each six-month period, Roulette ended the running of an open, mutual account, and the running of the applicable statute of limitations began. It also was noted that since the early sixties, Roulette had only credited Rodgers' account the lack of offsetting debits and credits in the statutory period negated the existence of a mutual account, stated Judge Kram, and Roulette therefore was entitled to summary judgment with respect to Rodgers' claims based on statements issued or due to be issued prior to November 30, 1978.

Judge Kram next found that Rodgers' claim that the company converted for its own use the royalties which belonged to the singer was time-barred with respect to conduct which allegedly took place earlier than November 30, 1981 an action for conversion must be brought within three years from the time the action accrues. And Roulette was entitled to judgment as a matter of law on this claim because Rodgers could not establish that he ever had ownership rights in the royalties due him; when royalties are due under a contractual relationship, whether express or implied, stated the court, a party may not recover on a theory of conversion without establishing acts that are unlawful or wrongful.

Summary judgment also was available to Roulette on statute of limitations and substantive grounds with respect to Rodgers' causes of action for fraudulent inducement to enter the contract and fraudulent dispossession of Rodgers' royalties. The applicable statute of

limitations requires a fraud claim to be brought within six years of the date the fraud occurred or within two years from the time a party discovered or reasonably should have discovered the fraud.

Rodgers claimed that he did not discover the alleged fraud until 1984, shortly before he filed his lawsuit, because prior to that time, the royalty statements appeared accurate. Judge Kram observed that although Rodgers claimed that he was not aware of Roulette's licensing arrangements, it was "inconceivable that (Rodgers) or his agents did not notice that his songs were being released on records between 1960 and 1984." Credit for about $20,000 in royalties between 1962 and 1979 appeared on the accounting statements, noted the court, and in view of the singer's popularity, Rodgers' agent should have known that the royalties were understated. Rodgers at least should have investigated the status of his royalties "given the apparent discrepancy between the

sale of millions of his songs and the veritable trickle of royalties. . ." And any such investigation should have gone beyond "mere reliance" on Roulette's royalty statements, for reliance on statements suspected of being false would not have demonstrated the required due diligence on Rodgers' part. When a 1981 inquiry revealed that Rodgers still owed Roulette $6,000, any fraud claims should have been apparent to Rodgers at that time; the claims in the instant action therefore were time-barred.

In alleging the claim for fraudulent inducement, Rodgers stated that when he entered the contract with Roulette, the company promised to pay royalties and provide accountings, while secretly never intending to do so. But Rodgers did not present evidence as to Roulette's intent not to perform the contractual obligations. Judge Kram further found that the alleged wrongdoing

by Roulette was "nothing more" than a breach of contract claim.

Summary judgment also was granted to Roulette on Rodgers' causes of action seeking an accounting or the imposition of a constructive trust. The singer did not demonstrate the required fiduciary relationship, stated the court the fact that Roulette or Levy collected royalties or fees with an allegedly attendant obligation to pass certain fees on to Rodgers did not make them Rodgers' fiduciary.

Rodgers' claim of breach of fiduciary duty also was rejected. First, observed Judge Kram, there was no fiduciary relationship to be breached. And Rodgers did not identify any royalty or license fee that allegedly was unconscionably low or establish that Roulette had a duty to negotiate royalty or license fees with third parties.

Judge Kram refused to grant Rodger's motion to rescind the contract, but concluded that genuine issues of

fact existed on the issue of whether Roulette and Levy may have been unjustly enriched, particularly with respect to royalties on third-party licenses. Roulette denied a contractual obligation to pay royalties in connection with such license fees; Rodgers claimed that industry custom and practice required the payment of such royalties. Any recovery by Rodgers for unjust enrichment or breach of an implied-infact contractual duty would extend only to royalties or fees which accrued on or after November 30, 1978, concluded the court.

Rodgers v. Roulette Records, 677 F.Supp. 731 (S.D.N.Y. 1988) [ELR 10:1:3]

Robert Maheu's action against author, publishers and distributors of book "Citizen Hughes" was properly dismissed, rules California appellate court

A trial court properly granted an order dismissing Robert Maheu's complaint against CBS, Inc. and other parties in connection with the publication of the book "Citizen Hughes," a California appellate court has ruled.

In his fourth amended complaint against Donald Ray Woolbright, author Michael Drosnin, publishers CBS, Inc., Bantam Books and Playboy Enterprises, Inc., and booksellers B.Dalton, Inc. and Hunter's Books, Maheu alleged conversion, "conversion-constructive trust," invasion of privacy ("false light," "physical intrusion," and appropriation of name, likeness or personality), commercial appropriation of the right of publicity, and interference with prospective economic advantage. A Los Angeles trial court sustained demurrers to the complaint without leave to amend.

With respect to the conversion causes of action, Maheu, who was Hughes' aide from about 1956 to 1970

and who communicated with his reclusive employer largely by means of written notes, alleged that he was the owner of, and had a property interest in, certain "Confidential letters" from Hughes. Maheu claimed that Woolbright and Summa Corporation (a former party in the action) converted the documents to their own use; that, in 1977, the CBS parties conspired to acquire the documents; and that Maheu suffered a loss in the value of the letters because of the prior publication.

The false light invasion of privacy claim also was related to the allegedly unauthorized use of the confidential letters in the book "Citizen Hughes." According to Maheu, the book placed him in a "false light" by characterizing his relationship with Hughes as a "courtship and a marriage," with descriptions of the men exchanging vows, and Hughes telling Maheu, as described by appellate court Judge George, that "they would spend the rest of their lives together."

In his cause of action for physical invasion of privacy, Maheu claimed that "members of the conspiracy" broke into a locked, private building where the letters were stored, and took possession of the letters. It also was alleged that the CBS parties appropriated Maheu's name, likeness and personality in their publications; that his property and privacy interests in the confidential letters gave Maheu a right to publish his own account of his relationship with Hughes, using the private letters; and that the CBS parties intended to destroy Maheu's right to sell his letters, thereby diminishing the publicity value of his story.

The appellate court concluded that Maheu's claims for conversion were preempted by the Copyright Act of 1976 to the extent recovery was based on the reproduction of the intangible literary or intellectual property contained in the letters, and was barred by the statute of limitations to the extent recovery was sought for the

alleged mid-1970s conversion of the physical letters themselves. The court rejected the argument that the "last overt act" in furtherance of the alleged conspiracy to convert the letters was the publication of the letters in late 1984 or early 1985. Judge George stated that the act of publication was a distinct act involving not the taking of the property, but rather "the diminution of the intangible value of the property," and thus an act subject to federal preemption as an infringement of copyright.

In considering the "false light" claim, the court noted that Howard Hughes was "beyond doubt" a public figure, and that during the time Maheu was employed by Hughes, he was Hughes' "alter ego," functioned as his personal representative to the world, and was a public figure in his own right. Maheu's status has not reverted to that of a private figure, stated the court, and given the social value of the facts published in "Citizen Hughes," and the extent to which Maheu voluntarily assumed and

retained his status as a public figure, newsworthiness was clearly established, precluding any liability for the publication of private facts.

The claim of "physical intrusion" was found meritless because, in part, the applicable one year statute of limitations for invasion of privacy claims could not be tolled indefinitely by the allegation of a conspiracy to engage in the purported break-in.

The appropriation of name, likeness and personality claim and the right of publicity claim were rejected because Maheu did not allege that any of the CBS parties acted with knowing or reckless falsity, and did not allege that all or even the majority of the material published was false. And the claim alleging intentional interference with prospective economic advantage was based on the act of first publication by the CBS parties. Since the claim was tied to Maheu's right to reproduce the letters and derive the economic benefits from their

intangible value, and as such, was based on the unauthorized use or copying of copyrightable property, the claim was preempted by the Copyright Act.

Maheu v. CBS, Inc., Case No. B02485 (Ca.Ct.App., May 24, 1988) [ELR 10:1:4]

Author and publisher of "In the Spirit of Crazy Horse" obtain summary judgment dismissing libel action brought by FBI agent

Peter Matthiessen and Viking Penguin, Inc, the author and publisher of the book "In the Spirit of Crazy Horse" have been granted summary judgment by a Federal District Court in Minnesota in a $25 million libel action brought by FBI agent David Price.

Price alleged that he was defamed in connection with the book's account of the events at Wounded Knee, South Dakota in 1973 and of the 1975 killing of two FBI agents on the nearby Pine Ridge Indian Reservation. According to Price, the book suggested that he engaged in a variety of wrongful conduct, including murder; knowingly suborning perjury; violating constitutional and other rights in the performance of his duties as an FBI agent; and unlawfully harassing members of the American Indian Movement. When Price filed his action in 1984, Viking withdrew all hardcover copies from circulation; a paperback version of the book has not been published.

After noting that several of Price's causes of action were dismissed in an earlier proceeding (ELR 8:3:13), Judge Diana E. Murphy reviewed the complained-of statements. Several statements were characterized as vague and unverifiable. And an examination of the

author's style of writing and tone revealed the book's "mission of persuasion;" Matthiessen advocated a new trial for American Indian Movement leader Leonard Peltier, and displayed his sympathies with the Indian cause throughout the book, observed Judge Murphy. Although dealing with historical events, the book's tone and style suggested that the statements in question were opinions.

The court also found relevant the fact that the statements appeared in a book, for books "provide an environment for expression far less restrictive than that of a weekly newsmagazine ... an author has the freedom to develop a thesis, conduct research in an effort to support the thesis, and publish an entirely one-sided view of people and events... a discussion of history without synthesis and analysis has little intellectual content." Matthiessen's work was more than 600 pages long, loosely organized, lyrically written, and intended for an

audience far different from that of a daily newspaper, an audience "more likely to understand the book as opinion than might a broader audience." In all, the court found it almost impossible that a reader could confuse the book with purely objective, neutral, factual reporting.

Also favoring the classification of the statements at issue as opinion was the "public context" factor many of the statements were criticisms of public officials in connection with an issue of national importance, thereby implicating "core values of the First Amendment."

Thus, the allegedly defamatory statements did not provide the basis for Price's action because a reasonable reader would recognize the subjective character of the statements and, as criticism of government action, the statements were entitled to the maximum protection of the First Amendment.

The court next observed that the reporting by Matthiessen of claims or suspicions published by others was not

actionable, because the author did not espouse the validity of the suspicions reported. Indeed, Matthiessen discounted some of the reports concerning Price's conduct.

Summary judgment also was available to Viking and Matthiessen because of Price's failure to establish actual malice by clear and convincing evidence. Judge Murphy first determined that First Amendment and other concerns warranted extending the concept of "public official" to include FBI agents when acting publicly in the course of their duties.

Price sought to show actual malice by citing "the seriousness of the charges, lack of sources for certain information, obvious reasons to doubt sources, willful failure to consult obvious sources, awareness of inconsistent information ... and failure to verify information following denials' " Matthiessen responded by presenting evidence that the manuscript was shown to knowledgeable persons, that he sought other viewpoints to balance the pro-

Indian, anti-government sources, and that he devoted twelve pages in the book to an interview with Price.

Judge Murphy stated that the facts seemed to suggest that Matthiessen was careless in writing certain portions of the book, but did not reveal the recklessness required for a finding of actual malice. Actual malice also was not shown by the one-sided nature of the book, nor by purported "collateral falsehoods" false statements of fact unrelated to Price. And some of the allegedly defamatory statements were not false, noted the court. In the absence of genuine issues of material fact, summary judgment was granted to Viking Penguin and Matthiessen.

Price v. Viking Penguin, Inc., 676 F.Supp. 1501 (D.Minn.1988) [ELR 10:1:5]

Good faith purchaser of Monet painting is entitled to retain possession of it, despite claim by former owner that Painting disappeared from Germany during World War II, Federal Court of Appeals rules

Edith Marks Baldinger, the good faith purchaser of a painting by Claude Monet, "Champs de Ble a Vetheuil," that disappeared from Germany at the end of World War 11 was entitled to retain possession of the painting, a Federal Court of Appeals has ruled.

A Federal District Court (ELR 9:4:12) had found that Gerda Dorothea DeWeerth, the owner of the Monet from 1922 until 1943, was entitled to recover the work from Baldinger. Baldinger acquired the painting in New York in 1957. In reversing the District Court's decision, Judge Jon 0. Newman found that New York law requires an individual claiming ownership of stolen

personal property to use due diligence in trying to locate the property in order to postpone the running of the statute of limitations in a suit against a good faith purchaser; that DeWeerth did not exercise reasonable diligence in locating the painting after its disappearance; and that DeWeerth's action was untimely.

Judge Newman reviewed DeWeerth's unsuccessful efforts to locate the Monet during the period from 1945 to 1957, and pointed out that there were no further attempts to recover the painting from 1957 until 1982, when DeWeerth learned Baldinger's identity, demanded the return of the painting and was refused. DeWeerth argued on appeal that the unreasonable delay rule did not apply before a party learns the identity of the person to whom demand must be made.

The court determined that in an action for the recovery of stolen personal property, the New York Court of Appeals would not make an exception to the unreasonable

delay rule for DeWeerth's actions prior to learning of Baldinger's identity, but rather, would impose a duty of reasonable diligence in attempting to locate the stolen property, in addition to imposing the duty of making a demand for return within a reasonable time after the current possessor was identified.

DeWeerth's investigation was characterized as "minimal" by the courtshe did not take advantage of several services devoted to locating art lost during the war; did not publicize the loss of the Monet in various listings circulated to museums, galleries and collectors; and did not conduct any search for 24 years, during which time the Monet appeared in the catalogues of two public exhibitions at which the painting was shown, as well as in other publications, such as the Monet "Catalogue Raisonne" - a definitive listing and accounting of the works of the artist.

To require Baldinger, a good faith purchaser who owned the painting for 30 years, to defend her claim was unjust, concluded the court, given that key documents were missing, that DeWeerth's claim of superior title was supported largely by hearsay testimony of "questionable value," and that "memories have faded." New York law avoids such injustice, again noted Judge Newman, by requiring a property owner to use reasonable diligence in locating property; in this case, DeWeerth did not meet that burden.

DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir.1987) [ELR 10:1:6]

Art dealer awarded $115,000 in damages due to disappearance of James Wyeth painting from premises of frame repair company

In a dispute between an art dealer and a frame repair company involving the disappearance of the painting "The Woodchopper" by James Wyeth (not Andrew Wyeth, as incorrectly stated in a report on another ruling in the matter in ELR 9:3:15), a New York trial court has found that the painting had a value of $115,000 at the time of the loss, March 1,1982. Julius Lowy Frame & Restoring Co. was ordered to pay art dealer Frank Fowler that amount, together with interest from the date of the loss.

Judge Schackman noted that Lowy was not a bailee, and that the proper measure of damages therefore was the value as of the date of loss, rather than as of the date of trial. Fowler's valuation of the work, which had never before been offered for sale, was not objective, observed the court and two expert witnesses did not support their valuations, ranging from $125,000 to

$150,000 and from $125,000 to $165,000, with contemporary comparable sales. Judge Schackman also took into consideration the following factors in ascertaining damages: the rough execution of the work; the fact that Wyeth painted the work when he was developing a style and had switched from watercolor to tempura; the sale, in January 1979, of a painting close in time to the subject painting and of comparable size for $85,000, and the sale of a smaller piece in 1980 for $50,000 and in 1984 for $190,000.

Fowler v. Julius Lowy Frame & Restoring Co., Inc., New York Law Journal, p.15, col.3 (N.Y.Cnty., April 28, 1988) [ELR 10:1:7]

Copyright Royalty Tribunal announces allocation to copyright owners of royalty fees paid by cable systems for secondary transmissions during 1985

The Copyright Royalty Tribunal has announced its final determination in the proceeding to distribute to copyright owners the royalty fees paid by cable systems for secondary transmissions during 1985.

The Tribunal resolved a controversy in connection with claims filed by the Motion Picture Association of America and Multimedia Entertainment, Inc. by finding that the MPAA was entitled to 99.175 % of the royalties subject to distribution in the program suppliers category, and that Multimedia was entitled to 0.825 % of the royalty fees; the parties had claimed 99.74 % and 1.1%, respectively. The Tribunal declined to base its allocations solely on an MPAAcommissioned special Nielsen study of cable household viewing hours. It was pointed out

that the Tribunal "attempts to simulate a marketplace the importation by cable operators of distant broadcast signals which, by virtue of the compulsory license, does not exist." The marketplace closest to the importation of distant signals marketplace is that between the cable operator and the cable subscribers. But the cable industry, in the Tribunal's view, does not rely as much on audience viewing as does the broadcast industry because the cable industry is not advertising-based. Since the MPAA did not offer any new arguments to show why the Nielsen data should be the sole relevant information for royalty allocations, other than its view that the data " perfectly" reflects the marketplace, the Tribunal stated that the Nielsen study data would be considered along with other material in making its allocations.

With respect to a controversy among the performing rights societies which license the public performance of nondramatic musical works on behalf of copyright

owners, the Tribunal found that ACEMLA, the assumed name of Latin American Music Co., was entitled to a cash award of $1.00; the rest of the royalty award in the music category was allocated to ASCAP, BMI and SESAC. The Tribunal noted that ACEMLA was a "fledgling entity with an independent repertoire of Spanishlanguage music for which it has attempted to obtain licenses, but as of 1985, had not yet succeeded in licensing any television station, receiving any licensing income, or making any royalty distribution." ACEMLA also did not establish that it licensed a considerable amount of Spanish language music for television performances; a claim based on 40 songs purportedly performed a total of 50 times on two television station was "insignificant" in comparison to the hundreds of thousands of hours of songs, theme music and background music performed on television during 1985 and carried by cable systems on a distant signal basis. Nevertheless,

the Tribunal concluded that ACEMLA presented a prima facie case that it had some works performed over television broadcast stations, which works were retransmitted by cable systems to their subscribers, and that a minimal award therefore was warranted.

The controversy between NBC and Worldvision concerning the 1985 royalties attributable to "Little House on the Prairie" was held in abeyance by the Tribunal pending the outcome of an appeal of the Tribunal's 1984 determination on this issue (ELR 9:7:12).

Under its Phase I settlement, the Tribunal allocated 1985 basic cable copyright royalty fees, after subtracting the stipulated award to National Public Radio of 0.18 % of the entire fund, to the following claimants: Program Suppliers, 67.10; Sports, 16.35; Public Broadcasting Service, 5.20; Commercial Television, 5.00; Music, 4.50; Devotional Claimants, 1.10; Canadian Claimants, 0.75, Commercial Radio, 0.

Copyright Royalty Tribunal Notice of Final Determination in 1985 Royalty Distribution Proceeding, 53 Fed.Reg. 7132 (March 10, 1988) [ELR 10:1:7]

Cable television systems must include revenues from distant non-network programs and mixed tiers in calculating gross receipts for purposes of determining royalties due copyright owners, rules Federal Court of Appeals

Under the Copyright Act of 1976, cable television operators must pay a fee for the right to retransmit broadcast television programming. As described by Federal Court of Appeals Judge Silberman, when a cable system takes a broadcast signal ("primary transmission") and delivers it to the system's subscribers ("secondary

transmission"), the system is earning money by selling to its customers the copyrighted material licensed only for the primary broadcast transmission. Section Ill of the Copyright Act established a compulsory license system, whereby cable companies may retransmit primary transmissions made by a broadcast station licensed by the Federal Communications Commission upon the payment of a fee to be distributed to the copyright owners of distant non-network programs.

In determining the fee, a cable system, according to Judge Silberman, is required to calculate "the gross receipts from subscribers to the cable service ... for the basic service of providing secondary transmissions of primary broadcast transmitters. " Then, using one of three formulas (selected according to the amount of gross receipts), the cable system determines the percentage of gross receipts due as a fee. The number of distant

signals retransmitted by a system also is taken into account in calculating the fee.

The "crux" of the case, according to the court, was whether revenues from all tiers of stations other than pay cable, and from all channels within each included tier, must be included in gross receipts. The cable companies argued that gross receipts did not include receipts for subscriptions to cable-originated channels, because the fund for copyright owners was designed to reimburse those owners holding copyrights on distant broadcast programs (emphasis by the court). Thus, revenues from non-broadcast channels or tiers that were not equivalent to the "basic service" contemplated by Congress would not be included in gross receipts.

However, in 1978 the Copyright Office revised the regulations implementing section 111, and emphasized in the regulations that gross receipts included "the full amount of monthly (or other periodic) service fees," i.e.,

the Copyright Office determined that "intratier allocation" was impermissible.

In 1984, some time after hearings were held, the Copyright Office issued a regulation providing that gross receipts for the basic service of providing secondary transmissions of primary broadcast transmitters would include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals if a tier contains a broadcast signal, all subscription revenues from the tier are to be included in gross receipts.

Cablevision, Inc., even before the regulation took effect, sought a declaratory judgment regarding the proper definition of gross receipts. The Motion Picture Association of America and eight of its member companies filed counterclaims charging Cablevision with copyright

infringement under section 111 for retransmitting broadcasts without paying the proper statutory fee.

A Federal District Court questioned the basis of the Copyright Office's regulation defining gross receipts, and found that the statute required revenues attributable to nonbroadcast programming to be excluded from gross receipts (ELR 8:11:10); the District Court also dismissed the counterclaims against Cablevision.

On appeal, Judge Silberman first found that the Copyright Office's interpretation of section 111, if reasonable, was due the same judicial deference given those of any other agency. If the Copyright Office did not have the power to interpret the statute, every dispute over the meaning of the statute might result in an infringement action, noted the court, contrary to Congress' concerns with providing "a low cost transfer of copyrighted materials," and a means of obtaining the continuing interpretation of section 111.

The court then upheld the reasonableness of the Copyright Office's regulation, pointing out that the alternative interpretations of section 111(d)(1)(B) would "violate the canon of construction that effect should be given to every word of the statute so that no part is rendered 'inoperative or superfluous.'" The court rejected the proposed interpretations which seemed either to ignore the phrase "basic service" or to equate basic service with the first or lowest tier of programming.

Judge Silberman declared that the regulation "evinces a full understanding of the structure and purpose that underlie" the statutory language, particularly because given the increases in the distant signal equivalent value, a cable system pays only for distant non-network programming actually broadcast. And, upon further analysis, the court found no requirement in the Copyright Act or its history that the fee paid by a cable system reflect precisely the value received from retransmissions. Rather,

Congress chose an "easily calculable" revenue base, using the distant signal equivalents to approximate the value received by the cable companies, and, continued Judge Silberman, to ensure a revenue base large enough to perform the function Congress intended reimbursing copyright owners.

Although noting that Congress may never have considered the situation of multiple tiers containing broadcasting materials, the court did not agree with Cablevision that it was necessary to define basic service in accordance with the claimed trade meaning of the first tier of service. Furthermore, Cablevision's position was described as "untenable, since it could lead to the absurdity of only a minuscle portion of revenges, at the option of a cable company, being included in gross receipts hardly a reasonable interpretation of Congress' objective."

Judge Silberman mentioned that certain marketing practices, known as "discounts" and "tie-ins" were reviewed in a letter written by the General Counsel of the Copyright Office in response to hypothetical questions posed by the cable television parties. But the discount and tie-in questions were not addressed in the rulemaking proceeding attendant to the regulation at issue; the rulemaking focused on the treatment of individual tiers, and the litigation before the court focused on the first tier/basic service equivalence and the permissibility of allocating values within a tier. The court therefore declined to review the issue of tie-ins, suggesting, however, that the Copyright Office might wish to clarify its position on the issue.

The court concluded by stating that it was unsure of the basis for the District Court's dismissal of the copyright infringement claim against Cablevision, and,

accordingly, reversed the dismissal and remanded for further proceedings on the counterclaim.

According to news reports, the court's decision may mean that an additional $60 million will be paid to copyright owners for 1986, and that a similar amount may be due in subsequent years.

Cablevision Systems Development Company v. Motion Picture Association of America, Inc., 836 F.2d 599 (D.C.Cir.1988) [ELR 10:1:8]

Federal Court of Appeals upholds dismissal of RICO claim in connection with letter sent by HBO affiliates to alleged signal" pirates"; claim under Fair Debt Collection Practices Act also is dismissed

In early 1985, several Home Box Office affiliates in the Philadelphia area conducted a campaign to end the unauthorized reception of microwave signals containing HBO programming. As part of the campaign, the affiliates attempted to identify individuals suspected of such unauthorized access to the signal. According to John G. Zimmerman, the affiliates then sent him and about 5,600 other alleged signal recipients a letter in which the parties were warned that if specified conditions, including the payment of $300 to the HBO affiliates, were not met, the affiliates would bring a lawsuit seeking "maximum damages.. "

Zimmerman, who apparently was not engaged in receiving unauthorized signals (he had no antenna on his roof, and wires from an antenna on his neighbor's roof ran into Zimmerman's house, but were not connected to anything), sued the HBO affiliates for violating the Fair Debt Collection Practices Act and the Racketeer

Influenced and Corrupt Organization Act, and also alleged pendent state claims.

A Federal District Court decision dismissing Zimmerman's complaint has been upheld.

Federal Court of Appeals Judge Mansmann agreed with the District Court that the affiliates' demand for $300 represented a settlement offer for potential tort liability and was not a "debt" within the meaning of the Fair Debt Collection Practices Act. The legislative history of the Act did not indicate to the court that Congress intended to equate asserted tort liability with asserted consumer debt, and the dismissal of this cause of action therefore was affirmed.

Zimmerman also alleged that the affiliates, by attempting "to extort money by fraudulent pretenses" engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act. The District Court had found that the affiliates' action in

sending the letters did not constitute the criminal or quasi-criminal conduct necessary to support a RICO charge. Judge Mansmann agreed that the complaint did not state a cause of action under RICO, but focused on the fact that Zimmerman did not allege an injury "in his business or property," as required in a RICO claim.

claratory judgment sought by Zimmerman as to whether merely possessing an "unauthorized" antenna capable of receiving HBO programming was a violation of the affiliates' rights under the Federal Communications Act. Judge Mansmann held that the District Court did not abuse its discretion in determining that there was no actual controversy between the parties which would require the judicial interpretation of the Act in this case.

In view of the dismissal of all of the federal claims, the District Court properly decided not to exercise

jurisdiction over the pendent state law claims, concluded the court.

Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir.1987); rehearing and rehearing in banc denied 1988) [ELR 10:1:9]

Federal Court of Appeals, finding no pattern of racketeering activity, upholds decision rejecting RICO claim brought against SelecTV by television program distributor in connection with joint venture to acquire rights in telecast of 1981 heavyweight boxing match

Prior to the scheduled December 1981 boxing match between Muhammed Ali and Trevor Berbick, John Ettlinger, the owner of Medallion Television Enterprises,

Inc., obtained from the match promoter the right of first refusal to acquire the broadcast rights to the fight. Subsequently, Medallion and SelecTV of California entered into a joint venture to acquire the rights and to sell the telecast to pay and cable television stations. The joint venture paid the fight promoter over $2 million for the rights. Medallion discovered, however, that SelecTV did not, as the company allegedly represented to Ettlinger, have $2 million worth of broadcast licensing agreements with television stations. The parties were unable to sell telecast rights to as many stations as had been anticipated, and Medallion and SelecTV lost money in the joint venture.

Medallion brought a civil action under the Racketeer influenced and Corrupt Organizations Act, alleging that SelecTV's representations about the company's licensing agreements had induced Medallion to enter the joint venture and to obtain letters of credit, and that the

representations constituted mail fraud, wire fraud, and interstate transportation of stolen property-the predicate acts allegedly forming a "pattern of racketeering activity."

A Federal District Court in California granted SelecTV's motion for summary judgment; the court's decision rejecting Medallion's claim that there existed a "pattern of racketeering activity" has been upheld.

Federal Court of Appeals Judge Norris stated that in order to meet the pattern requirement, the circumstances of a case must suggest that the predicate acts "are indicative of a threat of continuing activity" In this case, such a threat was absent, for there was a single alleged fraud involving a single victim; the court stated that it could not believe that Congress intended RICO to apply to a single, isolated transaction.

Medallion Television Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360 (9th Cir.1987) [ELR 10:1:9]

Ceramic tile dealers did not establish fraudulent conduct by tile manufacturer, rules Federal Court of Appeals, in affirming dismissal of RICO claim

The opinion in Medallion Television (ELR 10:1:9) contained several references to California Architectural Building Products Inc. v. Franciscan Ceramics, Inc.

California Architectural involved a RICO claim brought by dealers in ceramic tile against Franciscan Ceramics, a manufacturer of ceramic tile; its American parent, Josiah Wedgwood & Sons, Inc.; and that company's English parent.

A Federal District Court granted summary judgment for the manufacturer on the ground that there was no showing of a pattern of racketeering activity.

In affirming the District Court's decision, although on a different ground, Federal Court of Appeals Judge Sneed noted the dealer's allegation that Franciscan fraudulently assured them that it would continue in business and supply them with tile until at least the end of March 1984. However, according to the dealers, Franciscan had decided prior to May 3, 1983 that it would close in the fall of 1983, but concealed its plan from the dealers so that they would continue to buy tile, thus allowing the company to reduce its inventory losses. Franciscan closed at the end of October 1983.

The Court of Appeals held that the dealers failed to establish that there existed a genuine issue of fact regarding the acts of fraud on which the RICO charge was based.

In contrast to the District Court, Judge Sneed found that the dealers alleged two or more acts of racketeering activity, i.e., the multiple sales resulting from Franciscan's purported misrepresentations via alleged mail and wire fraud during a five month period in 1983, and that such acts constituted the requisite "pattern" However, the court determined that Franciscan did not have an intent to defraud the dealers. Rather, the company incurred "massive, unforeseen operating losses" which upset its plans and forced it to close. The closing of the company did not "make fraudulent an intent that was honest during the relevant period" -there was no fraud.

The evidence revealed that Franciscan never explicitly promised to stay in business until a certain date; that a sales executive's target date was not a promise to remain open without regard to sales or a representation of sound economic health; and that Franciscan was not obligated to tell the dealers that the company was

investigating a contingent plan to close. In the absence of an independent duty, such as a fiduciary duty or an explicit statutory duty, the failure to disclose cannot be the basis of a fraudulent scheme, noted the court.

Judge Sneed concluded by reversing an award of sanctions against the tile dealers' attorney.

California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987) [ELR 10:1:10]

United States Supreme Court lets stand decision holding that Sacramento broadcaster would be required to offer equal time to opponents of one of its newscasters who sought public office

The United States Supreme Court has declined to review a decision by the Federal Court of Appeals in Washington, D.C. in which the court upheld the Federal Communications Commission's "equal time" requirement.

In 1984, William Branch, a news reporter for Sacramento television station KOVR, decided to campaign for election to the town council in Loomis, California. The television station calculated that it would be required to provide 33 hours of response time to Branch's opponents if he continued to work at the station during his campaign. Branch chose to continue working instead of taking an unpaid leave of absence to campaign. However, upon terminating his candidacy, Branch sought a declaratory ruling from the Commission as to the effect of the "equal time" requirement of 47 U.S.C. section 315(a) on newscaster candidates.

The Commission concluded that the fact that a candidate might be a newscaster did not exempt a broadcast station from the obligation to provide equal time to other candidates.

On appeal, Branch argued that the equal time requirement applied only when a candidate "used" a broadcast station, and that a candidate's appearance on a bona fide newscast did not constitute such a "use."

However, since-retired Federal Court of Appeals Judge Bork stated that "the apparent simplicity of this argument ... is misleading" After reviewing the legislative history of certain amendments to section 315 and the language of the statute, the court determined that the statute did not exempt all on-air work done by newscaster candidates. Rather, in order to allow wide broadcast coverage of political news events, Congress exempted from the equal time requirement any

intrinsically newsworthy on-air appearance by a candidate who was the subject of news coverage.

The court went on to reject Branch's claim that the statute unconstitutionally extinguished his right to seek political office by imposing an undue burden on any such attempt. It was noted that all radio and television personalities incur the burdens of section 315, and that "nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice."

Branch's First Amendment challenge to section 315 also was rejected, based on Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), in which the Supreme Court upheld as constitutional the Commission's authority to enforce the fairness doctrine. According to Judge Bork, the opinion held that the "equal time" requirement of section 315 and the Commission's fairness doctrine rested on the same constitutional basis of the

government's power to regulate scarce broadcast frequencies. The Commission has issued a report concluding that section 315 is unconstitutional and should be abandoned. But unless the Supreme Court overrules Red Lion, the Court of Appeals remained bound by the decision, stated Judge Bork.

Red Lion also foreclosed Branch's argument that section 315 impermissibly limited the discretion of broadcast stations to select its newscasters, concluded the court in denying Branch's petition for review.

Judge Starr, in concurring with the court's judgment, found it "crystal clear" that bona fide newscasts are exempt from the equal time requirement of section 315(a). Branch, in reporting his three-minute news segments, appeared on a bona fide newscast, and his appearance would not be deemed a use of a broadcasting station under a straightforward reading of the statute, stated Judge Starr. Judge Starr did not agree with the court's apparent

conclusion that Congress clearly intended to exclude newscasters from the exemption, and declared that Congress' intent was ambiguous. It was this ambiguity that led Judge Starr to agree that the court was required to defer to the Commission's interpretation of the statute, particularly given the legislative history supporting the interpretation. Nonetheless, in Judge Starr's view, the Commission itself was not bound to an interpretation which "embodies the less natural and indeed less sensible reading of what Congress passed."

Branch v. Federal Communications Commission, 824 F.2d 37 (D.C.Cir.1987) [ELR 10:1:10]

Federal Court of Appeals clarifies its opinion invalidating FCC's interim "must-carry" rules

The Federal Court of Appeals in the District of Columbia, in response to a motion filed by the Federal Communications Commission, has clarified the Court's opinion in Century Communications Corporation v. Federal Communications Commission (ELR 9:11:3) as follows: (1) The court has invalidated the interim "must carry" rules of the Commission that became effective on June 10, 1987; (2) The court did not strike down the requirements, due to take effect in February 1988, concerning input selector switches and consumer education-the requirements did not form part of an "inseparable package" with the mustcarry rules, but rather were independent measures for "easing a transition to a world without must-carry channels;" (3) On remand the Commission must make the appropriate adjustments to delete references to the invalidated must-carry provisions from the portions of the rules regarding consumer education and input selector switches.

Century Communications Corporation v. Federal Communications Commission, 837 F.2d 517 (D.C.Cir.1988) [ELR 10:1:11]

Federal Communications Commission properly preempted state and local regulation of technical standards for cable television signal quality, rules United States Supreme Court

The United States Supreme Court has upheld the authority of the Federal Communications Commission to establish technical standards governing the quality of cable television signals, and to adopt regulations that forbid local authorities from imposing more stringent technical standards.

The cities of New York, Miami, and Wheaton, and the National League of Cities challenged the scope of the Commission's preemptive authority, claiming that franchising authorities could impose stricter technical standards than those specified by the Commission.

A Federal Court of Appeals granted partial relief to the cities with respect to three classes of channels for which the Commission had not adopted technical standards, vacated those portions of the rule, and remanded the matter to the Commission for further proceedings. However, the majority of the panel of the Court of Appeals ruled that the Commission properly set technical standards applicable to the first class of cable channels.

In affirming the Court of Appeals decision, Justice Byron White stated that the Commission acted within the statutory authority conferred by Congress when it preempted state and local regulation of technical standards for cable signal quality. It was "quite significant," stated

Justice White, that nothing in the Cable Communications Policy Act of 1984 or its legislative history indicated that Congress "explicitly disapproved" of the Commission's preemption of local technical standards.

City of New York v. Federal Communications Commission, Case No. 87-339 (U.S.Sup.Ct., May 16, 1988) [ELR 10:1:11]

Federal Communications Commission's refusal to extend television station construction permit is upheld

A Federal Court of Appeals has upheld a decision by the Federal Communications Commission to terminate New Orleans Channel 20, Inc.'s permit to construct and operate a new television station in New Orleans.

In 1980, the Commission awarded the construction permit to a joint venture known as New Orleans Area Telecasters. The venture made no progress in starting construction. In March 1983, the Commission approved the transfer of the permit to the New Orleans Channel 20 group. The group filed its third extension request in July 1984, seeking to assign the permit to LeSea Broadcasting.

In June 1985, the Commission's Mass Media Bureau denied the extension request, canceled the construction permit, and dismissed the assignment application as moot. The Bureau found that Channel 20 did not have a transmitter site; had not begun construction or even ordered equipment; that it was not prevented from construction by causes beyond Channel 20's control; and that there were no other matters warranting an extension.

The Commission concluded, on appeal, that LeSea, the proposed assignee, failed to demonstrate that its plans for constructing the station were sufficiently definite to justify the extension of the construction permit. LeSea did not provide documentation of an contingent order of $2.5 million worth of television equipment; did not specify the location of a studio site or provide draft lease agreements; and, in all, did not demonstrate that the denial of the request for an extension of the permit was an abuse of the Commission's discretion.

New Orleans Channel 20, Inc. v. Federal Communications Commission, 830 F.2d 361 (D.C.Cir.1987) [ELR 10:1:11]

Group W Cable obtains injunction preventing the city of Santa Cruz from terminating company's cable franchise and from imposing excessive franchise fee or broad public access and technical requirements

Group W Cable, Inc. sought to enjoin the City and County of Santa Cruz from terminating its cable television franchise. In September 1986, Santa Cruz had granted a franchise to Greater Santa Cruz Cable TV Associated, Inc., but after Group W obtained a preliminary injunction, the parties stipulated that Santa Cruz would not disrupt or discontinue Group W's cable services until the court reached a final determination.

Federal District Court Judge Schwarzer found that the city's de facto policy of granting a monopoly franchise violated the First Amendment, as did conditioning the award of a franchise on providing a broad range of

concessions. Santa Cruz was entitled to require appropriate evidence of financial responsibility, and to charge a reasonable administrative fee and a reasonable fee for Group W's use of public streets and rights of way.

Judge Schwarzer, in considering the range of First Amendment protections due cable television, relied on Preferred Communications v. City of Los Angeles, 754 F. 2d 1396 (1985; ELR 7:1:12), aff'd on narrower grounds, 476 U.S. 488 (1986; ELR 8:2:17); although recognizing that much of Preferred was dictum and that the Supreme Court's affirmance on narrower grounds rendered it largely nonbinding, Judge Schwarzer nonetheless chose to follow the "persuasive" analysis of the Court of Appeals. The court, in dicta, had stated that cable television is afforded greater First Amendment protection than the broadcast media, primarily because the physical scarcity rationale underlying government intrusion into the broadcast media does not apply to the

cable industry. Many cable systems can accommodate over 100 channels, and multiple cable systems can be strung through preexisting utility facilities.

Santa Cruz argued that the utility poles and subsurfaces of the community's streets could accommodate only one cable system; that cable television was a natural monopoly, thereby justifying a franchise award to one operator; and that permitting more than one cable operator to string cables would cause undue disruption to the public domain.

Although agreeing that Santa Cruz was authorized to make franchising arrangements, Judge Schwarzer first rejected the physical scarcity rationale as a substantial government interest which would justify an exclusive franchise. It was noted that the physical scarcity rationale was rejected by another court in the district in Century Federal, Inc. v. City of Palo Alto, 648 F.Supp. 1465 (1986; ELR 9:3:17).

Also rejected as a justification for Santa Cruz's "paternalistic regulatory scheme" was the natural monopoly rationale, i.e., that government regulation was required to replace competition to ensure cable television's responsiveness to public needs. Judge Schwarzer found that the Supreme Court's rejection of the natural monopoly rationale in the context of newspapers, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, applied with equal force to the medium of cable television, for the "risk of intrusion into editorial judgment is too great to permit the government to select the exclusive cable operator."

And while Santa Cruz expressed legitimate interests in public safety and in maintaining public streets, these interests, again, were not a sufficient justification for granting a monopoly franchise, in the court's view. The evidence suggested that any replacement or rearrangement of wires upon the installation of a new system was

not likely to have any significant effect on traffic or the appearance of the utility poles.

In all, Santa Cruz did not raise a genuine issue as to whether its policy of granting a single cable franchise was supported by any important or substantial government interest and the policy therefore violated the First Amendment.

Turning to the requirements and conditions imposed on franchisees, the court found that public access requirements were not content-neutral; and that the city's technical requirements impermissibly intruded into the editorial functions of cable operators, and were not narrowly drawn to advance Santa Cruz's interest in minimizing physical disruption to the public domain.

However, Santa Cruz was entitled to seek the disclosure of financial information related to a cable operator's resources to install and maintain a cable system "safely and expeditiously," and may require a franchise

applicant to post a reasonable performance bond, obtain adequate insurance, and submit evidence of competence to operate the system.

The court next found that although Santa Cruz was entitled to charge an appropriate franchise fee as compensation for the grant of a permanent interest in public property, the fee had to be based on an appraisal of the fair market value of the rights of way, easements and other uses of property incidental to the exercise of Group W's cable franchise. The parties were directed to arrive at an appropriate figure by negotiation.

Santa Cruz was permanently enjoined from applying its cable television franchise plan to Group W or otherwise interfering in the company's operation of its cable television franchise.

Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N.D.Ca. 1987) [ELR 10:1:12]

New York appellate court denies building owner's claim for over $500,000 in attorney's fees incurred in 11-year action against cable television company

Many years have passed since Jean Loretto's initial appearance in the Entertainment Law Reporter (ELR 1:5:7). In the interim, Loretto successfully claimed that she was entitled to compensation from Group W Cable (previously known as Teleprompter Manhattan Cable TV Corp.) for allowing the company to install equipment on her apartment building (ELR 4:6:1; 4:24:6). But Loretto's action to recover more than $500,000 in attorney's fees expended during eleven years of litigation recently was rejected by a New York appellate court.

The court noted that Loretto had not yet applied to the State Commission on Cable Television for "just"

compensation. Rather, Loretto sued to recover attorney's fees on the ground that she was the prevailing party in a civil rights action and was entitled to such fees under federal law. But the court stated that although it had been found that Group W Cable took Loretto's property under color of state law, this action alone did not amount to the deprivation of and federal right. Loretto had not shown that her property was taken without just compensation or due process. Until Loretto submitted a claim for reimbursement to the Commission in accordance with the procedures set forth under state law, and was denied just compensation, she was not in a position to allege the denial of any federal right under section 1983. And if Loretto did not possess a section 1983 claim, she could not seek attorney's fees as a prevailing party, concluded the court.

Loretto v. Group W Cable, New York Law Journal, p.11, col.2 (N.Y.App., Dec. 17, 1987) [ELR 10:1:13]

Texas appellate court refuses to dismiss listener's claim that radio station breached oral contract in connection with $25,000 promotional offer

Upon remand from an appellate court ruling holding that Steve Jennings had stated a cause of action for breach of contract against radio station KSCS (ELR 8:7:20), the trial court once again granted summary judgment to the radio station parties. Jennings, a prisoner in the Texas Department of Corrections, claimed that the radio station had promised over the air that it would play at least three songs in a row without paid commercial interruptions, or it would "pay you $25,000 . " According to Jennings, KSCS interrupted the playing

of consecutive songs by stating "remember, when you want more country music without all the bull you want KSCS, 96.3," and then giving the names of the songs and singers. Jennings claimed that he notified the station that it played less than three songs in a row, but that the station refused to pay him $25,000. The appellate court once again has reversed and remanded the matter with respect to the radio station, although affirming the entry of summary judgment for four station employees.

Jennings contended that the station's receipt of records sent by record companies without charge was a "valuable consideration" amounting to a payment to the stations, and that announcing the names of the songs and singers thus constituted a paid commercial interruption. Chief Judge Fender held that a genuine issue of fact existed as to whether the interruptions were paid commercial interruptions as defined in the station's contest rules.

Judge Keltner agreed with the court that the KSCS employees were entitled to summary judgment, but also would have granted summary judgment in favor of the station. Judge Keltner stated that Jennings did not demonstrate that he had personal knowledge of the facts regarding the conduct of the undisclosed record companies, and that Jennings' description of the receipt of records by KSCS as a valuable consideration was a legal conclusion insufficient to raise an issue of fact.

Jennings v. Radio Station KSCS 96.3 FM., 745 S.W.2d 97 (Tex.App. 1988) [ELR 10:1:13]

Talent agent entitled to order confirming award by Screen Actors Guild Arbitration Tribunal in fee dispute with actor

A California appellate court has reversed a trial court order denying a petition to confirm a Screen Actors Guild arbitration award in favor of Michael Greenfield, doing business as Charter Management.

In January 1985, a dispute arose concerning Robert B. Mosley and MoLaud Productions' obligation to pay additional commissions to Greenfield with respect to compensation paid Mosley for acting services, including his role as "T.C." in the television series "Magnum Pl." Greenfield claimed that he was entitled to commissions on the basis of an agency contract filed with the Screen Actors Guild in March 1978. Mosley alleged that there was no written agency contract, and sought the return of payments he had made to Greenfield.

In November 1986, after arbitration hearings conducted by the Guild Arbitration Tribunal, Greenfield obtained an award against Mosley (for an amount not revealed by the court); Mosley was directed to file an

accounting with the Guild and pay further sums to Greenfield.

A Los Angeles trial court denied Greenfield's petition to confirm the arbitration award, stating that the award was made in violation of the Guild's regulations requiring all agency contracts to be in writing; Greenfield had not produced a copy of the written contract.

When Greenfield filed a motion for reconsideration, the trial court granted the motion, but once again determined to vacate the award, because no original or copy of a written contract between the parties was presented to the arbitration panel or the court the arbitration panel thus acted in excess of its jurisdiction, in the trial court's view.

Appellate court Judge Arabian, in reversing the trial court's order with directions to enter judgment confirming the arbitration award, first noted that both federal and California courts have acknowledged the strong

public policy in favor of arbitration, and pointed out that a trial court is limited in its authority to vacate the award of an arbitrator, even in the event of an error of fact or law. In this case, the issue of the existence of a written agreement and its compliance with Guild regulations fell with the arbitration panel's jurisdiction, and, stated Judge Arabian, "it is of no consequence that the actual written document, could not be produced during the arbitration proceedings or in the trial court." In the absence of an error appearing on the face of the award, no further inquiry by the trial court was proper; there was no stipulation or concession amounting to an error of law on the face of the award to Greenfield the failure to produce the original signed agreement did not amount to such an error. However, it was error for the trial court to examine the evidentiary record before the arbitration panel when the court considered the issue of the agreement's compliance with Guild regulations, for "Neither

federal nor California law permits such interference with the arbitral process..," concluded the court.

Greenfield v. Mosley,, Case No. B025 899 (Ca.Ct. App., May 25, 1988) [ELR 10:1:13]

Swiss bank was not entitled to attach proceeds from auction of Picasso painting sold for $3.5 million, rules New York trial court, because painting's consignor did not pledge art work as collateral for bank's loan to her husband

In May 1987, Picasso's painting "La Maternite" was sold at a Sotheby's auction for the price of $3.52 million. Scandinavian Bank Switzerland sought to attach the proceeds of the auction, claiming that the painting's consignor, Sonja Low, along with her husband, had

defaulted on a $6 million loan from the bank; the loan was secured by the assets of the Lows. However, in July 1982, just before Steven Low undertook not to sell, donate, deposit with a third person, or otherwise dispose of his paintings he gave to his wife, in part, his collection of art, including the work "La Maternite; " Sonja did not pledge her property as collateral for her husband's loan.

A New York trial court, assuming for the purpose of the motion that there was no issue of jurisdiction as to the nonresident Sonja and that the attachment was sought for security, has ruled that the bank did not establish a prima facie case on any of its five original causes of action against Sonja. With respect to the replevin claim, the court noted that there was no evidence that Sonja borrowed any money from the bank. For this reason, the court also rejected the banks' conversion and breach of contract claims, and refused to impose a

constructive trust on the proceeds of the sale. The cause of action seeking damages in fraud for the alleged misrepresentations by the Lows of the bank's right to possess the pledged collateral upon any default under the loans also was denied, again because there was no evidence that any loan was made to Sonja or that she pledged any of her property as collateral.

Scandinavian Bank Switzerland v. Low, New York Law Journal, p.13, col. 5 (N.Y.Cnty., Oct.20, 1987) [ELR 10:1:14]

Federal Court of Appeals reverses judgment in favor of former partner in art book publishing venture in connection with wrongful interference claim against another investor in project

In December 1983, Michael Zellman, Stephen Jacobs, and Joel Abel entered an oral partnership agreement to create and develop the "American Art Analog," a reference book about nineteenth and twentieth century American art. Zellman contributed about $15,000 to the project, Abel contributed about $8,000, and Jacobs made no capital contribution. The partners agreed to divide any profits from the venture equally, with Zellman receiving an additional ten percent of any proceeds derived from the book's first 5,000 sales.

Subsequently, an investor named Philip Cohen formed American Art Analog, Inc. to produce, sell and distribute the book; Cohen invested over $900,000 in the corporation and was the sole owner of its capital stock. The partners did not own any interest in the corporation, but were to receive thirty percent of the corporation's profits without incurring any obligation for losses. Zellman and Abel were hired as employees of American (Jacobs,

although remaining a partner in the venture, previously had been relieved of all substantive duties in connection with the project).

In late 1984, Cohen directed Zellman to terminate Abel's employment at American, and, according to Abel, Cohen also induced Zellman to breach the oral agreement by which Abel was to receive a share of the corporation's profits. In February 1986, Zellman's employment was terminated. The "Analog" went on sale in March 1986.

Abel's lawsuit against Cohen, American and Zellman resulted in a jury verdict finding Cohen and American liable for wrongful interference with the partnership agreement; the jury awarded Abel $622,500 for losses of the benefit of contract rights resulting from wrongful interference, $6,500 for consequential losses, and $48,483 for emotional distress.

The Court of Appeals reversed the judgment entered on behalf of Abel, agreeing with Cohen and American that the partnership completed the objectives for which it was formed and therefore was dissolved as a matter of Pennsylvania law. The District Court incorrectly denied the corporate parties' motion for a judgment notwithstanding the verdict because there could have been no wrongful interference, as alleged, with a non-existent partnership. Zellman conceded at trial that as a result of the agreement with Cohen, the partnership achieved the objectives for which it was formed. Furthermore, being entitled to a profit share did not establish a partnership; the partners' failure to obtain an ownership interest in American also "precluded their continuing status as a partnership," declared the court. Since there was no existing partnership between Abel, Zellman and Jacobs after the formation of American, the corporate parties could not be liable for wrongful interference by

intentionally effectuating a breach of contract between another and a third party. 'Although Cohen's conduct in freezing out Abel and later Zellman may be reprehensible," stated Judge Rosenn, Abel was not entitled to prevail on his claim. The court did not express an opinion as to whether the statute of frauds would preclude the enforcement of the apparent oral contract between Cohen and the former partners to exchange the ownership of the "Analog" in return for Cohen's promise to finance the project, employ Able and Zellman, and give them and Jacobs thirty percent of the profits.

Abel v. American Art Analog, Inc., 838 F.2d 691 (3rd Cir. 1988) [ELR 10:1:14]

Magazine publisher not entitled to deduct estimated value of unsold magazines in calculating federal income tax

Challenge Publications was liable for the payment of a deficiency of over $2.5 million imposed by the Commissioner of Internal Revenue for the tax years 1972 through 1976, a Federal Court of Appeals has ruled, affirming a Tax Court decision that Challenge could not accrue as a deductible business expense an estimate for unsold magazines that it anticipated would be returned.

Judge Wiggins noted that in accordance with customary practices in the publishing industry, Challenge, during each of the taxable years in question, printed and shipped to its distributor, Publishers Distribution Corporation, substantially more copies of each issue of each magazine than Challenge expected to be sold or were in fact sold. Under its agreements with Challenge, the

distributor was obligated to pay the company only for the net sales of each issue of Challenge's magazines. On its federal income tax returns, Challenge reported its net revenues derived from newsstand sales by recording as income the aggregate sales price of all copies of magazines printed and shipped through its distributor, reduced by the aggregate sales price of estimated unsold copies.

Section 461(a) of the Internal Revenue Code and its implementing regulation provide that under an accrual method of accounting, an expense "is deductible for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy. . . "

The Tax Court ruled that Challenge did not establish that its deductions for estimates of returned magazines represented a sufficiently fixed, absolute, and unconditional liability the first aspect of the "all events" test.

Judge Wiggins agreed that the legally significant moment was when the distributor returned the contractually required evidence of unsold copies; Challenge was under no obligation to reimburse Publishers Distribution until such documentation was presented, and that event occurred after the taxable year.

The court rejected Challenge's argument that even if the "all events" test was not satisfied, a deduction was available in accordance with generally accepted accounting principles and the practice of the magazine industry. Judge Wiggins stated that whether a business expense has been "incurred" to permit its accrual for tax purposes is governed entirely by the "all events" test.

Challenge Publications, Inc. v. Commissioner Internal Revenue Service, Case No. 87-7234 (9th Cir., May 6, 1988) [ELR 10:1:15]

Minor league baseball player did not establish that shoulder injury was aggravated by intentional conduct of team; player's exclusive remedy was under New York Workers Compensation Act

When Jeffrey DePiano chased a long fly ball into the left field fence at Ainsworth Field in Erie, Pennsylvania, he suffered an allegedly career-ending shoulder injury. DePiano sued the owner of the field and the Erie Cardinals Baseball Club, the groundskeeper of the field, for negligence, citing the failure to provide a "warning track" in front of the outfield fence. The field parties settled with DePiano.

The baseball player also sued his own team, the Jamestown Expos, and its major league parent, the Montreal Expos, alleging that the clubs did not provide timely and adequate medical care for his injury, and required him to continue playing despite his injury. According to

DePiano, continuing to play aggravated his injury and ended his career.

A Federal District Court in Pennsylvania, after ruling that DePiano's negligence claims against his employers were barred by New York Worker's Compensation Act, allowed the player to amend his complaint to plead a claim of intentional injury, an exception to the exclusivity of the Act.

The teams filed a motion for summary judgment in response to the amended complaint, and the court granted the motion, finding that there was nothing in the evidence to indicate that the teams' intention was to injure DePiano. Judge Gerald J. Weber emphasized that "negligence alone, no matter the degree, does not satisfy the intentional exception to the compensation bar." DePiano did not establish that the teams engaged in a deliberate act directed at causing harm to him. The fact that DePiano was kept in the lineup despite his injury because the

team was short of outfielders disproved rather than supported DePiano's case, stated Judge Weber, because it showed a motive for the teams' conduct other than an intention to injure the player.

DePiano v. Montreal Baseball Club, Ltd., 663 F.Supp. 116 (W.D.Pa. 1987) [ELR 10:1:15]

Jockey reasonably assumed risk of injury during horse race

A California appellate court has ruled that the doctrine of reasonable implied assumption of risk remains a viable defense even after the adoption of comparative fault.

In January 1983, jockey Judy Casella was injured when she was thrown from her horse during a race at

Los Alamitos Race Course. A horse named Over Shadow, owned by Homer Ordway, apparently caused another horse named Speedy Ball to stumble in front of Casella's horse. The California Horse Racing Board determined that the jockey riding Over Shadow violated a board rule by "crossing over without sufficient clearance, causing interference" Casella subsequently sued the riders, trainers and owners of Over Shadow and Speedy Ball.

When a trial court denied Ordway's motion for summary judgment, he sought a writ in the appellate court. The appellate court denied the writ application. The California Supreme Court granted review and, citing Turcotte v. Fell, 68 N.Y.2d 432 (ELR 9:1:14), returned the matter to the appellate court.

The appellate court first discussed the doctrine of reasonable implied assumption of risk - "the inferred agreement to relieve a potential defendant of a duty of care

based on the potential plaintiff s reasonable conduct in encountering a known danger." According to Judge Crosby, the decision in Neinstein v. Los Angeles Dodgers, Inc., 185 Cal.App.3d 176 (ELR 9:1:13) supported the position that when a party acts unreasonably in taking a specific risk, the claim is merged into the system of assessing liability according to fault. But when a party's conduct amounts to a release of another's obligation of reasonable conduct, the assumption of risk doctrine continues to operate.

In the instant case, Casella alleged only that her injuries were caused by the negligent, careless and unlawful training and riding of the horses, stating, in Judge Crosby's view, a "classic case of negligence, i.e., a failure to exercise due care." However, continued the court, "by participating in the race, Casella relieved others of any duty to conform their conduct to a standard that would exempt her from the risks inherent in a sport

where large and swift animals bearing human cargo are locked in close proximity under great stress and excitement."

The suspension of one of the jockeys for violating a Board rule did not amount to intentional conduct-the Board assessed the penalty because an infraction occurred, and no evidence was presented that the Board determined that the conduct was intentional.

Casella, as a professional rider, reasonably assumed the risk of her tragic injury, and the court issued a peremptory writ directing the trial court to grant Ordway's motion for summary judgment and enter judgment in his favor accordingly.

Ordway v. Superior Court of Orange County, Case No. G005171 (Ca.Ct.App., Jan. 29, 1988) [ELR 10:1:16]

Brokerage firm obtains judgment notwithstanding the verdict after jury awards $7 million to Burt Reynolds' former financial advisor in action alleging slander by the firm; new trial is ordered on advisor's fraud claim

A Federal District Court in Atlanta has granted motions by Shearson Lehman Brothers, Inc. for judgment notwithstanding the verdict and for a new trial in response to a jury verdict awarding financial advisor Alexander A. Simon $7 million on a slander claim against Shearson, as well as $25,000 for negligence, and about $41,000 in actual damages plus $3 million in punitive damages on Simon's cause of action for fraud (Simon elected to accept the award on the fraud count).

Simon, the financial advisor and investments manager for actor Burt Reynolds, caused a large portion of Reynolds' fund to be invested through Shearson and its

broker, Michael W. Swofford. However, Swofford, according to Judge Orinda D. Evans, used various deceptive or fraudulent tactics in handling Reynolds' and Simon's accounts; the broker allegedly transferred over $1 million of Reynolds' funds.

Shearson discovered the transfer of funds, suspended Swofford, and, in November 1984, spoke to Reynolds' attorney about the matter. In December 1984, Simon was notified that his services as Reynolds' business manager were being terminated. Simon claimed that his termination resulted from an allegedly slanderous comment made about him during Shearson's telephone call to Reynolds' attorney; Swofford purportedly stated that Simon had authorized the broker to sign his name to a letter authorizing funds to be paid out of Reynolds' account to various persons, including Simon, Simon's wife and other relatives and Simon's comptroller. Although such a letter did exist, Swofford actually stated that he

signed Simon's name on the instructions of one of Simon's associates.

Judge Evans, after reviewing at length the financial transactions at issue, acknowledged that under the evidence, the jury was entitled to conclude that Simon was not personally involved in a scheme to defraud Reynolds. However, stated the court, that determination alone was insufficient to sustain the judgment on the slander claim. It was found that the alleged slander was not a substantial factor in Simon's termination - Reynolds never was asked whether the challenged statement was a factor leading to the termination, and testified as to the personality conflicts that, prior to October 1984, led him to consider terminating Simon's employment. Simon's theory as to his termination was supported only by "slight speculative inferences and his own opinion," and the court ruled that the jury's determination on the slander claim therefore could not stand.

The court granted Shearson's motion for a new trial on Simon's fraud claim arising from Shearson's handling of his commodities account.

Simon v. Shearson Lehman Brothers, Inc., 665 F.Supp. 1555 (N.D.Ga.1987) [ELR 10:1:16]

United States Supreme Court dismisses (for lack of jurisdiction) special prosecutor's appeal from decision absolving Rhode Island newspaper of contempt for violating temporary restraining order barring publication of FBI material

The United States Supreme Court has dismissed the writ of certiorari granted to a special prosecutor who sought the reinstatement of a contempt judgment entered against the Providence Journal Company.

In November 1985, Raymond J. Patriarca, the son of the by then deceased Raymond L.S. Patriarca, sued the FBI and other government and media entities, seeking to enjoin further dissemination of material compiled from 1962 to 1965 during the course of illegal electronic surveillance of the senior Patriarca. The Chief Judge of the Federal District Court for the District of Rhode Island entered a temporary restraining order barring the publication of the FBI material prior to a hearing. Nevertheless, Charles M. Hauser, the executive editor of the Providence Journal, proceeded to publish two articles based on the restrained material.

Patriarca moved to have the Journal and Hauser held in contempt, but then declined to prosecute the contempt motion. Since the United States Attorney was representing various federal parties in the underlying civil action, the District Court appointed William A. Curran to prosecute the pending contempt motion. Following a

hearing, the court found the newspaper parties in criminal contempt of the temporary restraining order; determined that the order was valid even though it subsequently was vacated; and fined the Journal $100,000 and suspended a jail sentence for Hauser, placing him on probation for 18 months and ordering that he perform 200 hours of public service.

A Federal Court of Appeals reversed the judgment of contempt, finding that the temporary restraining order was "transparently invalid" under the First Amendment; that its constitutionality thus could be challenged in the contempt proceeding; and that none of the statutory or Fourth Amendment grounds asserted in support of the order justified the prior restraint ordered by the District Court.

The Court of Appeals, sitting en banc, modified the panel's opinion to require that even a party subject to a transparently invalid order must make a good faith effort

to seek emergency appellate relief. However, if timely access to an appellate court was not available to a publisher, or if a timely decision was not issued, the publisher was entitled to publish and then challenge the constitutionality of the order in a contempt proceeding. In this case, the Providence Journal most likely could not have obtained emergency relief before making a final decision as to whether to publish its articles, and the court found that it was unfair to subject the newspaper parties to substantial sanctions for failing to follow newly announced procedures.

The special prosecutor sought authorization from the Solicitor General to file a petition for a writ of certiorari with the United States Supreme Court. The Solicitor General denied the authorization, and the special prosecutor therefore lacked the authority to represent the United States before the Supreme Court, declared

Justice Harry A. Blackmun, in dismissing the writ of certiorari for lack of jurisdiction.

Justice Antonin Scalia, in concurring with the court's opinion, expressed the view that District Courts "possess no power, inherent or otherwise, to prosecute contemners for disobedience of court judgments and no derivative power to appoint an attorney to conduct contempt prosecutions."

Justice John Paul Stevens, with whom Chief Justice William Rehnquist joined in dissent, stated that both "history and common sense" suggested that Congress did not intend to grant the Executive Branch exclusive authority to control all litigation before the Supreme Court, in which a coequal branch of government maintained a substantial, justiciable interest, and thereby possibly to deny Congress and the judiciary access to the Court. Justice Stevens cited, among other factors, the Court's practice of appointing counsel, sometimes

designated as "amicus curiae," to argue cases in which the United States was interested, without asking for the approval of the Solicitor General.

United States v. Providence Journal Company, U.S. Sup.Ct. Case No. 87-65 (May 2, 1988) [ELR 10:1:17]

Briefly Noted:

Copyright Infringement/Music.

A Federal District Court in New York has dismissed a copyright infringement action brought by Lawrence Humphrey against Columbia Records and other parties involved in producing and distributing the album "Radio" by James Todd Smith, also known as LL Cool J. Judge Robert L. Carter noted that the cassette tape

containing the allegedly infringed works was manufactured in Japan in early October 1985, and that Humphrey could not have purchased the tape in the United States prior to October 26, 1985. However, the "initial date of the initial recording" of each of the songs on the Radio album, as set forth by the court, took place prior to October 1985. Judge Carter therefore rejected Humphrey's claim, stating that continuing the case would be "totally unwarranted."

Humphrey v. Columbia Records, Case 86 Civ. 6667 (S.D.N.Y., Sept.29, 1987) [ELR 10:1:17]

Copyright Infringement/Music.

In a decision issued in June 1987 but only recently published, a Federal District Court in Wyoming has

denied a motion by Wanda Hegglund, the owner of a bar in Douglas, Wyoming, for leave to amend her answer in an action brought by several copyright owners alleging the unauthorized performance of their songs in the bar.

Hegglund attempted to assert the affirmative defense that the copyright owners lacked standing to sue because of their failure to comply with Wyoming's Protection of Copyright Users Act. Chief Judge Brimmer first found that the failure to comply with a state licensing statute did not bar the enforcement in a federal court of rights granted by a federal statute. Furthermore, in this case, ASCAP, as the association offering a blanket licensing agreement to establishments in Wyoming, may have been required to comply with the statute. However, the copyright owners, unless themselves seeking to license or otherwise dispose of their copyrights in Wyoming, were not in violation of the statute.

Judge Brimmer also rejected Hegglund's request to assert a claim that ASCAP was an indispensable party to the action. ASCAP was a licensing agent of each copyright owner, stated the court, and was not a real party in interest indispensable to the action. A third-party complaint against ASCAP also was not properly raised, concluded the court.

Ocasek v. Hegglund, 673 F.Supp. 1084 (D.Wyo. 1987) [ELR 10:1:17]

Copyright Infringement/Music.

A Federal District Court in Maine has granted summary judgment to Broadcast Music, Inc. in a copyright infringement action against Caroline and Robert Larkin, the manager and owner, respectively, of Bubba's Cafe in

Portland, Maine. BMI claimed that nine copyrighted works, including "In the Midnight Hour," "The Rose," "Brown Eyed Girl," and "Oh Pretty Woman," were performed publicly at Bubba's Cafe without authorization. The court granted an injunction prohibiting the Larkins from engaging in further infringing activity, and ordered the payment of damages to BMI in the amount of $1,500 for each of the nine infringements established, for total statutory damages of $13,500, plus attorneys' fees of $2,880 and costs.

Broadcast Music, Inc. v. Larkin, 672 F.Supp. 531 (D.Me.1987) [ELR 10:1:18]

Copyright Infringement/Music.

A Federal District Court in Mississippi, in a decision issued in September 1986 but not published until late 1987, has granted summary judgment to Broadcast Music, Inc. in a copyright infringement action brought against Peggy Allis, doing business as Seafood Market Restaurant. The court, noting that there was no evidence either that Allis profited from or that BMI lost revenues because of the infringement, awarded BMI statutory damages of $250 for each of the six infringements as well as reasonable attorneys' fees, and granted injunctive relief restraining further infringements of the copyrighted works at issue.

Broadcast Music, Inc. v. Allis, 667 F.Supp. 356 (S.D.Miss. 1986) [ELR 10:1:18]

Copyright Infringement/Music.

A Federal District Court in Louisiana has entered judgment in favor of Broadcast Music, Inc. in a copyright infringement action against Xanthas, Inc. (doing business as TAC Amusement Company), the operator of unregistered jukeboxes. The court determined that Xanthas' infringements were willful, given the company's past registration history and its continuing refusal to register its juke boxes; found that a proper measure of damages in this case was an amount equal to three times the amount of unpaid registration fees; and awarded BMI a total of $319,500 in statutory damages, as well as attorneys' fees and costs.

Broadcast Music, Inc. v. Xanthas, Inc., 674 F.Supp. 553 (E.D.La. 1987) [ELR 10:1:18]

Copyright Jurisdiction.

A Federal District Court in New York has dismissed a complaint brought by Felix Cinematografica against Penthouse International and associated parties in connection with the film "Caligula." Felix alleged that Penthouse's distribution of videocassettes of the film infringed Felix's copyright. Penthouse contended that it obtained the copyright to the film via a 1984 settlement agreement with Felix. Judge William C. Conner determined that the dispute between the parties really was an action on a contract, and required the interpretation of the language in the settlement agreement, rather than the construction of the Copyright Act. The court therefore dismissed Felix's complaint for lack of subject matter jurisdiction.

Felix Cinematografica, S.R.L. v. Penthouse International, Ltd., 671 F.Supp. 313 (S.D.N.Y. 1987) [ELR 10:1:18]

Spectator Injury/Golf Tournament.

The Supreme Court of Minnesota has upheld a trial court decision granting summary judgment to amateur golfer Gene Koecheler in connection with a tragic injury suffered by a spectator, Mary Grisim, who was hit in the left eye by an errantly struck golf ball. The trial court based its ruling on the primary assumption of risk doctrine because Grisim chose to sit under a tree to the left of the green at the 18th hole, instead of in a designated area behind the green. An appellate court had concluded that factual issues remained as to whether the tournament sponsors or the country club provided adequate

protection for spectators, and also found erroneous the trial court's application of the same duty of care to Koecheler as was applied to the sponsors and the country club.

Minnesota Supreme Court Chief Justice Amdahl agreed that the claim against Koecheler was barred by the assumption of risk doctrine; the court did not address the appellate court's decision with respect to the other parties in the action since those parties did not seek review of the decision. However, the duty to provide adequate areas for the public did not extend to Koecheler he had no control over the arrangements for spectators and therefore breached no duty to Grisim in this regard. And factual issues were not presented as to whether Koecheler breached a separate duty to shout a warning to Grisim and others in a possible zone of danger. Justice Amdahl found that as a matter of law Koecheler could not have had any knowledge whether

Grisim was aware that the golfer was teeing off a duty to warn would be more appropriate in the context of regular play or practice, noted the court, when golfers might be obligated to warn their "preoccupied" fellow golfers, than in the context of a tournament involving spectators who are observing the course of play and have assumed the risks of straying too close to the playing area.

Grisim v. Tapemark Charity Pro-Am Golf Tournament, 415 N.W.2d 874 (Minn. 1987) [ELR 10:1:18]

Copyright Infringement/Discovery.

In June 1987, World Music brought an action for copyright infringement against Arrow Vending, Inc. and Arrow's president, Robert O'Donnell. In December 1987,

O'Donnell was indicted by a federal grand jury on bribery charges. Arrow and O'Donnell moved to quash World Music's discovery requests on the ground that producing the requested documents and answering interrogatories would violate O'Donnell's Fifth Amendment privilege against self-incrimination. A Federal District Court in Chicago has ordered Arrow to produce the requested corporate records, through any employee or agent, because the corporation did not possess a Fifth Amendment privilege, and was not entitled to assert O'Donnell's purported privilege as a shield to World Music's discovery requests.

World Music v. Arrow Vending, Inc., 675 F.Supp. 1131 (N.D.Ill. 1988) [ELR 10:1:19]

Copyright Infringement/Photos.

A Federal District Court in Texas has awarded photographer Dean M. Vane $60,000 in actual damages for the unauthorized use by The Fair, Inc. of certain slides in television advertising. Vane had agreed to take a series of photographs and slides which would be used only in advertising mailers. The court found that Vane was an independent contractor when he created the slides; that the slides were not "works made for hire;" and that Vane had not forfeited his right to the copyright by not including a copyright notice on the copies of the slides delivered to The Fair. Although Vane was not entitled to any profits attributable to the infringement, the court enjoined The Fair from further infringing the copyrights in the slides and ordered the company to return to the photographer any slides or copies of the slides still in its possession.

Vane v. The Fair, Inc., 676 F.Supp. 133 (E.D.Tex. 1987) [ELR 10:1:19]

Copyright/Jurisdiction.

A Federal Court of Appeals has affirmed a District Court decision dismissing an action brought by James B. Royal against his former employer Leading Edge Products, Inc. in connection with the pay' ment of royalties for a software package co-developed by Royal. Leading Edge terminated Royal's employment in April 1986. In his action, Royal sought, in part, a declaratory judgment that he was a co-owner of the copyright in the software package.

Judge Selya pointed out that it has been settled "beyond peradventure" that an action does not "arise under"

the federal copyright laws merely because it relates to a product that is the subject of a copyright. In this case, the court found little reason to imply any arrangement between Leading Edge and Royal as to the ownership of the copyright. The royalty agreement between the parties "occupie[d] the field" with respect to the consequences occurring upon the termination of Royal's employment-reversion of the copyright was not among those consequences. The dispute required an initial consideration of whether there was compliance with the terms of the royalty agreement, albeit a royalty agreement concerning copyrightable material, and the court declined to assume jurisdiction over the essentially "gardenvariety contract dispute."

Royal v. Leading Edge Products, Inc., 833 F.2d 1 (1st Cir.1987) [ELR 10:1:19]

Tax.

Two clients of professional sports agent Abdul Jalil al-Hakim signed contracts in 1977 to play for the Chicago White Sox. Pursuant to Special Powers of Attorney signed by the players, al-Hakim's fee of five percent of the contract was due upon signing. The players and the club signed the contracts in 1977, but the president of the American League did not sign the contracts until 1978. Tax Court Judge Clapp stated that the parties implicitly understood that the phrase "due upon signing" referred to signing a valid contract-the players' contracts provided that said contracts would be valid if and when the League president approved them. Judge Clapp therefore found that al-Hakim properly reported his fees on his 1978 return. The court also found that a January 1978 transfer of $112,500 from baseball player Lyman

Bostock to al-Hakim was a loan, not the payment of a fee.

Abdul Jalil al-Hakim v. Commissioner, 87 T.C. No. 136 (1987) [ELR 10:1:19]

Tax/Motion Picture Depreciation.

One of a series of enterprises formed to finance a motion picture was a limited partnership which acquired the film's negative and its copyright; the other enterprises assisted in financing and producing the film. The limited partners contended that they were entitled to deduct 100 percent of the depreciation that could be claimed for the film. The Commissioner of Internal Revenue rejected the limited partners' argument, and Tax Court Judge Hamblen sustained the IRS's determination, noting "the

capital contributions of the other entities, their shared risk of loss, their potential for sharing profits, and their shared control over the activity." Notwithstanding the limited partnership's copyright interest, the film was owned by a joint venture consisting of the various enterprises, stated the court. It was further found that the limited partners were required to use the income forecast method of depreciation, and that under this method, no deduction was available because the taxpayers did not present sufficient evidence to establish the estimated total income that might be derived from the film during its useful life.

Reinberg v. Commissioner, 90 T.C. No.10 (1988) [ELR 10:1:19]

Tax/"Body Heat" Financing.

In 1981, David and Irma Follender acquired a limited partnership interest in an entity that purchased the film "Body Heat." The Follenders agreed, in part, to assume a $257,058 portion of the principal of the Recourse Purchase Note due to be paid to the Ladd Company on January 10, 1991. A claim by the Follenders in 1981 of a partnership loss of $190,970, representing a distributive share of the ordinary loss claimed by the limited partnership, was disallowed. Tax Court Judge Cohen has agreed with the Follenders that they were fully at risk at the close of the taxable year at issue with respect to the amount borrowed for which they were personally liable. Furthermore, citing the absence of direction from Congress for determining the rate and manner for making present value computations, Judge Cohen found that the Internal Revenue Service was not entitled to apply a

"time value of money" concept in order to discount the amount due in 1991 to reflect 1981 dollars. It also was found that the Follenders' portion of the recourse purchase note bearing nonrecourse interest was not required to be discounted under section 483 of the Internal Revenue Code, because the interest on the recourse purchase note was not contingent interest.

Follender v. Commissioner, 89 T.C. No. 66 (1987) [ELR 10:1:19]

Labor Relations/Casino Employees.

A Federal Court of Appeals has upheld a District Court ruling granting summary judgment to the New Jersey Casino Control Commission and associated parties in an

action brought by the Hotel and Restaurant Employees and Bartenders International Union Local 54.

In 1982, the Commission issued an order requiring the removal of three officials of the union pursuant to their disqualification under the New Jersey Casino Control Act; if the named individuals retained their union positions beyond a specified date, the order provided that the union would be prohibited from collecting dues from certain casino industry employees.

Judge Seitz agreed with the District Court that requiring mandatory registration of unions representing casino employees did not impose an impermissible burden on the union's right of free association. And the union's right of free association did not extend so far as to include a right to elect particular officers, stated the court. The disqualification provision of the Act was found to be a reasonable regulation of the manner of expression,

only incidentally affecting the union's expressive activity.

In all, the challenged provisions of the Act were not unconstitutionally overbroad or vague, and the judgment of the District Court was affirmed accordingly.

Hotel and Restaurant Employees and Bartenders International Union Local 54, v. Read, 832 F.2d 263 (3d Cir. 1987) [ELR 10:1:20]

Spectator Injury.

Madison Square Garden Corp. has been granted summary judgment dismissing a complaint brought by an individual who allegedly sustained injuries when he slipped and fell on a staircase in Madison Square Garden while attending a musical concert. The corporate

entity that operates, owns and maintains Madison Square Garden is Madison Square Garden Center, Inc. A New York trial court found that while Madison Square Garden Center, Inc. is a wholly owned subsidiary of Madison Square Garden Corp, the two corporations are separate legal entities, and no issue of fact was raised which warranted ignoring the separate corporate status of parent and subsidiary. The court noted that a parent corporation cannot be held liable for the torts of its subsidiary corporation, even if the former has complete ownership of the latter's stock. In this case, the action as against Madison Square Garden Center was barred by the statute of limitations, and the claim against Madison Square Garden Corp. did not relate back to Madison Square Garden Center concluded the court, in denying a motion for an order allowing the service of a supplemental summons and amended complaint to add Madison Square Garden Center as a party defendant.

Hamilton v. Madison Square Garden Corp., New York Law Journal, p.14, col. 5 (Feb. 16, 1988) [ELR 10:1:20]

Libel/Ballet Performer.

Edward Villeta's libel action against the Eglevsky Ballet has been dismissed by a New York trial court due to the dancer's failure to plead special damages. Villella, who was employed by the Eglevsky Ballet during the period from February 1980 to January 1984, based his action on certain statements made by individuals associated with the ballet company concerning Villella's departure from his position as the company's artistic director. Judge Stecher concluded that the statements did not constitute libel per se, and that the failure to plead special damages therefore required the dismissal of the dancer's causes of action for libel.

Edward Villella v. Eglevsky Ballet Company of L. I., Inc., New York Law Journal, p.6, col. 5 (N.Y.Cnty., Jan. 12,1988) [ELR 10:1:20]

Libel/Newscast.

A news report broadcast by WABC-TV on April 1, 1981, discussed an alleged conspiracy to fix retail and wholesale milk prices, and stated that eight wholesale milk dealers had been indicted on charges of price fixing. Dairy Barn Stores, Inc. was not one of the milk dealers indicted and was not implicated in the alleged conspiracy in any manner. However, Dairy Barn's trademark and trade name were displayed briefly in background videotape footage accompanying the news report.

A Nassau County trial court judge found that the average viewer might have concluded that Dairy Barn had been implicated in the alleged price fixing conspiracy. However, stated Judge James J. Brucia, ABC was entitled to summary judgment because the subject of the news report was within the sphere of legitimate public concern, and ABC established that it was not grossly irresponsible. The court accepted as standard journalistic practice ABC's policy of not using videotape footage that would focus viewer attention on a person or thing that was not the subject of a news report. In this case, it was arguable that one of the two points when Dairy Barn's trademark or trade name was displayed violated the standard journalistic practice. But including the one brief shot in the background footage was not grossly irresponsible, found Judge Brucia in granting ABC's motion for summary judgment.

Dairy Barn Stores, Inc. v. American Broadcasting Company, Inc., New York Law Journal, p.16, col.2 (Nassau Cnty., April 27, 1988) [ELR 10:1:20]

Libel.

A California appellate court has ruled that summary judgment should have been granted to American Broadcasting Companies in an action brought by two former Orange County deputy public defenders. Jean Farley and James Egar claimed that Carole Hemingway, a former talk show commentator on KABC, damaged their professional reputation in the course of a report on the criminal justice system. Judge Wallin, in an opinion designated "Not to be Published,' found that Farley and Egar did not present sufficient clear and convincing evidence to raise a triable issue as to actual malice. There

was no evidence that Hemingway fabricated her reports, or any indication that Hemingway or anyone else at ABC believed the statements were false or entertained serious doubts respecting their truth. The broadcasts may have contained several inaccuracies, but "even sloppy reporting does not constitute recklessness'" noted Judge Wallin-there was no indication that the errors were deliberate or that Hemingway had any doubts as to whether she was telling the truth. The trial court was directed to enter orders granting the ABC parties' motions for summary judgment and judgment on the pleadings.

American Broadcasting Companies, Inc. v. The Superior Court of Orange County, Cae Nos. G004320 and G004378 (Ca.App., May 20, 1987) [ELR 10:1:20]

Libel.

A Federal Court of Appeals in Florida has upheld the dismissal of a libel action brought by Arthur Silvester against American Broadcasting Companies, Inc. in connection with a segment of the television program "20/20" dealing with allegations of corruption in the jai alai industry. The challenged report, which was broadcast on June 21,1979, contained three portions which the District Court identified as potentially defamatory allegations of arson, fraud and conspiracy arising from a fire at a Palm Beach fronton; the implicit linking of the Silvester parties to illegal betting and game fixing scandals; and an interviewee's statements which implicitly linked the Silvester parties to illegal betting. Accepting arguendo the determination that these three aspects of the report were susceptible to defamatory interpretations, the Court of Appeals nevertheless entered

judgment on behalf of ABC on the ground that the report addressed a matter of legitimate public concern, and that Silvester, a limited public figure, did not present clear and convincing evidence that ABC acted with actual malice.

Silvester v. American Broadcasting Companies, Inc., 839 F.2d 1491 (11th Cir. 1988) [ELR 10:1:21]

Libel.

A human interest story broadcast on the evening news on WHEC-TV on December 23, 1985 reported on a hermit known as "Red" who had lived for forty years in shacks that he built on land behind Richardson's Canal House Inn restaurant. The report mentioned that the restaurant planned to expand, which would leave Red

without a home. A New York appellate court has dismissed for failure to state a cause of action a libel claim brought against the station by the restaurant's owner, Vivienne Tellier-Wolfe, finding that the broadcast was not susceptible of a defamatory meaning "as it would not arouse in the mind of the average person in the community an evil or unsavory opinion" of the restaurant's owners or expose them to public hatred, contempt or aversion.

Tellier-Wolfe v. Viacom Broadcasting, Inc., 521 N.Y.S.2d 597 (App.Div. 1987) [ELR 10:1:21]

Contracts/"West Side Story" Touring Production.

Diana Corto was licensed to co-produce a touring production of "West Side Story" with Francine Lefrak

under an agreement with the play's authors, Leonard Bernstein, Arthur Laurents, Stephen Sondheim, and Jerome Robbins. The production closed after a brief run in Washington, D.C. Corto eventually sued Lefrak and the authors in a New York trial court, alleging fraud, defamation and conspiracy to interfere with contractual relations. Corto previously had sued Lefrak and the authors in federal court (in connection with a Chapter 11 bankruptcy petition); the action was withdrawn pursuant to an arbitration clause in the licensing agreement. The arbitrator ruled in favor of the authors, finding that the agreement was terminated by the failure of Corto and Lefrak to pay the authors' royalties. The co-producers were found to have no production rights to present or re-open the play under the agreement, and the authors were awarded royalties due from Corto and Lefrak. The United States Bankruptcy Court confirmed the arbitrator's award in April 1987. The trial court found that

Corto's action was barred as against Lefrak and the authors on the grounds of arbitration and award and res judicata. All of Corto's claims in the action arose out of the same agreement which was reviewed in the arbitration proceeding and Corto was not entitled to raise the claims again, stated Judge Nardelli. The action also was barred against certain individuals who were not parties to the arbitration proceeding because Corto had a full and fair" opportunity to litigate the issues, and was collaterally estopped from asserting the claims before the trial court.

Corto v. Lefrak, New York Law Journal, p.14, col.3 (N.Y.Cnty., April 29, 1988) [ELR 10:1:21]

Labor Relations.

A Federal Court of Appeals has upheld an application by the National Labor Relations Board seeking enforcement of an order finding that Richmond Recording Company, doing business as PRC Recording Company, violated various provisions of the National Labor Relations Act in connection with negotiating a collective bargaining areement. The Board charged the company, a manufacturer and distributor of phonograph records and tapes, with unilaterally implementing a proposal on job classifications before the proposal was approved by the union, or an impasse had been reached. It also was noted that when the union, a local of the International Brotherhood of Electrical Workers, went on strike, the company hired permanent replacements. The union eventually tendered the employees' unconditional offer to return to work, but six months passed before all of the striking employees were offered reinstatement; the refusal to reinstate the strikers violated sections 8(a)(3)

and (1) of the Act, held the Board. Substantial evidence supported the Board's conclusion with respect to the reinstatement issue, found the court, as well as the conclusion that the company violated section 8(a)(1) by threatening to withdraw its contract proposal if the union went on strike. Also upheld was the Board's determination upholding the dismissal of twenty-four of the striking employees.

Richmond Recording Corp. v. National Labor Relations Board, 836 F.2d 289 (7th Cir. 1987) [ELR 10:1:21]

Labor Relations.

A Federal Court of Appeals has upheld the National Labor Relations Board's determination that college basketball's Big East Conference did not violate the

National Labor Relations Act in refusing to bargain with the Collegiate Basketball Officials Association. The court found that substantial evidence supported the Board's decision that the basketball game referees were independent contractors and not employees. It was noted that the basketball officiating bureau affiliated with the Eastern College Athletic Conference did not deduct or withhold any taxes for the officials; that the officials contracted to hold the Conference harmless for their injuries; that officials paid for their own uniforms and any fees due the Association; that the Conference's contract with the officials provided that the officials were independent contractors, and did not recognize the Association as the bargaining representative of the officials. Judge James Hunter III stated that the officials were not "fungible;" the skill required to be a varsity basketball official combined with the fact that the Conference alone did not direct the acquisition of such skill

supported the Board's decision, a decision containing an element of policy-making best left to the Board, in the court's view.

Collegiate Basketball Officials Association, Inc., v. National Labor Relations Board, 836 F.2d 143 (3d.Cir. 1987) [ELR 10:1:21]

Advertising.

A Federal District Court in New York refused to grant Fruit of the Loom, Inc. a preliminary injunction barring Hanes Knitwear (a division of Sara Lee Corporation) from presenting a thirty-second television commercial. Fruit of the Loom argued that the commercial was facially false and created certain misleading impressions with respect to the shrinkage of the companies' T-shirts.

The court did not find a survey taken by Fruit of the Loom sufficiently persuasive, and dismissed the company's claims under the Lanham Act.

Fruit of the Loom, Inc. v. Sara Lee Corporation, 674 F.Supp. 1020 (S.D.N.Y. 1987) [ELR 10:1:22]

Outdoor Advertising.

When Georgia Outdoor Advertising challenged a City of Waynesville ordinance effectively barring all billboards within the city's jurisdiction, a Federal District Court found that the ordinance did not unconstitutionally infringe the company's right of commercial speech. A Federal Court of Appeals has upheld the District Court's decision, but remanded the matter for further consideration of the billboard company's claim that the ordinance

effected a taking without just compensation. The question of whether a zoning ordinance was so onerous as to require compensation under the Fifth and Fourteenth Amendments presented a federal question, stated Judge Widener, rather than a question for the state courts.

Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987) [ELR 10:1:22]

Advertising.

In a decision issued in December 1985, but not published until early 1988, a Federal District Court in New York enjoined two marketers of appetite suppressants from distributing materials containing certain claims of therapeutic superiority or durational effectiveness for their products, which claims were not yet supported by

competent scientific or clinical proof. Judge Vincent L. Broderick's decision announced that under the Lanham Act, if consumers perceived that the advertising for CIBA-Geigy Corp. set forth either explicitly or implicitly the therapeutic superiority of CIBA-Geigy's "Acutrim" products over the "Dexatrim" products of Thompson Medical Co., then, in the absence of clinical support, the advertisements could not continue to run. Judge Broderick, although finding that the consumer reaction surveys submitted by the parties were flawed, determined that a not insubstantial number of consumers were misled and deceived by the Acutrim commercials. However, Thompson had not concluded appropriate, well-controlled tests to support its own 15 hour duration claim. It was emphasized that the parties might present adequately supported blood level durational claims, as long as the claims were explicitly delineated as such.

CIBA-GEIGY Corp. v. Thompson Medical Co., Inc., 672 F.Supp. 679 (S.D.N.Y. 1985) [ELR 10:1:22]

Newsrack Ordinance.

A City of Arcadia ordinance setting a height limit for newspaper racks on city streets did not violate either state or federal constitutional guarantees, a California appellate court has found, in upholding a trial court ruling entering judgment in favor of the city. Newspaper distributors Paul and Eunice Duffy claimed that the application of the ordinance would result in an unreasonable limitation on the dissemination of protected ideas. However, Presiding Judge Roth noted that the ordinance appeared to have been properly enacted to further legitimate governmental concerns for safety and for the aesthetic quality of the environment. The argument that the

ordinance might preclude the Duffys from using allegedly more economically feasible double deck news racks and thus would unreasonably impinge upon the dissemination of ideas was rejected as being "vague, speculative, and conclusionary."

Duffy v. City of Arcadia, Case No.B019050 (Ca.Ct.App., Mar.31, 1987; ordered published on Sept. 17, 1987) [ELR 10:1:22]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Terillo v. New York Newsday, 519 N.Y.Supp.2d 914 (9:6:12); Velez v. VV Publishing Corp., 524 N.Y.Supp.2d 186 (9:11:15); Welch v. Group

W. Productions, Inc., 525 N.Y.Supp.2d 466 (9:9:11); Newton v. National Broadcasting Company, Inc., 677 F.Supp. 1066 (9:9:10); Polakof v. Commissioner, 85 T.C. No. 197 (9:6:13).

The United States Supreme Court has let stand the decision in Century Federal, Inc. v. City of Palo Alto (9:3:17).

[ELR 10:1:22]

DEPARTMENTS

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