LEGAL AFFAIRS

International Taxation of Entertainers and Athletes: Report by Organization for Economic Cooperation and Development Spotlights the Area

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The Organization for Economic Cooperation and Development (OECD) has issued a report titled "Taxation of Entertainers, Artists and Sportsmen," which "describes the problems that arise for tax authorities from entertainment and sporting activities and the measures

they have taken to counteract non-compliance in this area."

The Report considers both the international and domestic aspects of the problem. Basically, the Report recommends: (1) reducing exemptions for artistic and athletic events, because they are seen as inequitable and lead to noncompliance in other areas; (2) increased information gathering domestically and information exchange internationally; and (3) withholding at the source. The Report is based on submissions by 19 of the 24 OECD countries (including the three countries of the authors of this article) and was prepared by the Working Party on Double Taxation of the Committee on Fiscal Affairs.

We discuss the OECD Report particularly from the viewpoints of the United States, United Kingdom and Sweden. We also discuss the 1981 U.S. Treasury report titled "Tax Havens and Their Use by United States

Taxpayers--An Overview," to the extent it relates to perceived tax abuse by entertainers. In addition, we discuss the impact (and potential impact) of the worldwide trend to lower individual tax rates. This trend, coupled with tightening anti-abuse legislation, shows signs of reducing tax haven arrangements: more sports and entertainment superstars are merely putting the money in their pockets and paying their taxes. Lastly, we discuss particulars of the U.S., U.K. and Swedish tax rules that nonresident athletes and entertainers (superstars and otherwise) should find of particular interest.

Collection worries

The OECD Report notes considerable evidence that entertainers, at both ends of the ladder of success, do not pay the taxes they should. At the bottom, income simply is not reported, sometimes with the cooperation

of club management. At the top, "sophisticated tax avoidance schemes, many involving the use of tax havens, are frequently employed by ... artists and athletes." The Report notes that although the number of persons and the amount of money involved are relatively small, "there is general agreement that where a category of--usually well-known--taxpayers can avoid paying taxes this is harmful to the general tax climate..."

The Report then registers an opinion on the nature of the business, the taxpayers, and the taxpayers' advisers: "The problems of effectively taxing artists and athletes are rooted in the diverse forms their activities take. Success can be sudden but ephemeral.

Relatively unsophisticated people--in the business sense--can be precipitated into great riches, income sources can be many and varied. Travel, entertainment and various forms of ostentation are inherent in the business and there is a tendency to be represented by

adventurous but not very good accountants." We should note that there is also a growing tendency for entertainers and athletes to be sophisticated in business matters and to be represented by non-adventurous, highly qualified accountants.

The Report notes that "self-assessment" can leave the tax collector with an "empty basket," even when an entertainer has the best intentions. "It is the nature of the industry that large tax bills relating to a period of popularity and affluence sometimes arrive at a time when popularity has waned and the money gone."

Wide variety of income

The Report states that performers frequently receive income not directly related to actual performances. Such income can include copyright royalties from records and free advertising. Sportsmen are paid for using and

publicizing sports equipment, and payments are frequently made for advertising goods not related to the entertainer's activities. The numbers involved for people at the top, from directly related, peripheral, and unrelated activities, can be astronomical. "Bankable" movie stars get several million dollars a picture, U.S. basketball players get up to $500,000 (and more) a year for endorsing basketball shoes, and several golf and tennis players make several million dollars a year for endorsements, commercials, and personal appearances. The OECD Report concentrates on income from actual performances, but we also discuss peripheral income.

Main principles

The Report concludes that entertainers and athletes should be taxed in the host country (the country of performance). This is despite a belief that entertainers and

athletes, like other taxpayers, are "fully liable to tax in their ,country of residence and, ideally, should be taxed accordingly." The Report notes, however, that the country of residence has difficulty identifying the activities of its residents abroad, and will have to rely mostly on information provided by the host country. "For this reason, and also in order to avoid practical difficulties, it was felt that the principle on which Article 17 of the 1977 Model Convention is based should be followed. The main purpose of this report is therefore to help Member Countries to establish a system by which the income of artists and athletes could effectively be taxed in the country of performance."

Short stay/low pay (non-treaty)

All the industrial countries exclude income earned by nonresidents within their borders if the stay is short

enough, the pay is low enough, and (quite often) the payment is made from abroad and/or is not deducted by the payor in the host country. The de minimis money thresholds alone make these provisions of little practical value. (In the U.S., for example, the threshold is a mere $3,000.)

Tax treaties

The industrial countries follow the theory of the 1977 OECD model income tax treaty quite closely. Four articles of the model treaty are significant to entertainers and athletes.

Permanent establishment. Article 7 of the model treaty provides that the business profits of a resident of a treaty partner are not taxable in the host country unless the nonresident has a " permanent establishment." Article 5 defines a permanent establishment as a significant

presence, such as an office, branch or place of management; but it also includes a person (other than an independent agent) who acts on behalf of the nonresident and has, and habitually exercises, authority to conclude contracts. The major tax planning device of nonresident entertainers is that offshore management companies can conduct significant business in a host country without creating a permanent establishment.

Independent personal services. Article 14 provides that income from "professional services or other activities of an independent character" are not taxable in the host country unless the individual has "a fixed base regularly available to him," and then only to the extent the income is attributable to the fixed base. The income that touring entertainers and athletes earn as independent contractors from one-night stands and tournament competition would be excluded by this provision. Income for a

continuing engagement in one place (e.g., a nightclub act or a play) probably would be taxable.

Dependent personal services. The host country can tax a nonresident's income from employment only if the employment is exercised in the host country. Notwithstanding this provision, Article 15 provides that the host country cannot tax employment income if: (1) the employee is in the country no more than 183 days in the fiscal year; (2) the salary is paid by or on behalf of a nonresident employer; and (3) the remuneration is not borne by a permanent establishment or fixed base of the employer in the host country. Thus Article 15 often would exclude the 'salaries of members of offshore sports teams, orchestras, and theatrical troupes, if the 183-day limit was met.

Artists and athletes. Article 17 undoes most of the benefits of Articles 14 and 15 for entertainers and

athletes. As will be discussed, some older OECD-type treaties do not contain Article 17. Article 17 provides:

"1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer ... or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

"2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues ... to another person, that income may, notwithstanding the provisions of Articles 7, 14, and 15, be taxed in the Contracting State in which the activities ... are exercised."

"Slave agreements"/dependent services

The OECD Report addresses what are known as "slave agreements," stating that:

"In some countries, tax does not have to be paid on income earned by non-residents in respect of dependent services in the country if the employer is a foreign company which does not maintain a permanent establishment in that country. This opens up wide avenues for tax avoidance, the most famous one being known as 'slave agreements' with foreign employers. Other countries whose tax systems are not restricted in this way and which can tax domestic source income providing it relates to duties undertaken in that country also find that 'slave agreements' are used to negate or reduce the tax charge. Payment is made to the artists or athletes from abroad to convert the income to an overseas source. This may remove the income from the scope of the charge completely. (This is, for example, the case in Australia.)

"In a typical case of a 'slave agreement,' the performer receives a salary from a foreign employer for services

undertaken in the country of performance. There is no legal relationship between the domestic promoter of an event and the entertainer. The foreign company enters into a contract with the promoter. This provides for a lump-sum payment which represents the fee for the entertainer's appearance as well as a fee for the company for planning and organization. This payment is usually made abroad, often before the performance is given. As contracts are signed and other business is done abroad, it is not possible to contend that the company is carrying on a trade or business in the country of performance. Many of these foreign employers are companies controlled by the performers themselves and are based in tax havens (rent-a-star companies). There are also organizations which specialize in entering into employment agreements with artists and athletes."

Independent services

The Report states that the problems arising in taxing the independent services of artists and athletes are substantially similar to those of taxing dependent (employee) services. But they are aggravated by the mobility of the taxpayers, including the ease with which they may change status at will between dependent and independent services. The self-employed pose a particular problem where there is no withholding and assessment and collection is in the following year, often after the "taxpayer" has left the country.

Improving compliance

The Report notes with approval that "certain countries (e.g., France, United Kingdom) have general powers to call for retums of payments (fees, commissions, etc.)

made by residents to people not in their employment (whether resident or non-resident)...

"Another measure which has been adopted by both France and the United Kingdom is the ability to 'look through' controlled overseas companies set up by residents to receive income relating to their activities ... In neither case are the provisions restricted to the entertainment and sporting fields. "

As to nonresidents, considering the aim of taxing entertainment and sporting events in the country of performance, the Report recommends tax withholding at source on payments to nonresident artists and athletes, especially where the individual has no fixed base or is an employee of a foreign company having no permanent establishment in the country. The withholding rate should be rather high, and the payer of income should be held responsible for the payment of the tax.

Counteracting "slave" contracts

The Report states that counteracting "slave" contracts with "artist companies" is difficult where there are no domestic provisions to " pierce" the corporate veil (as in the Netherlands). The Report notes that Austria, France, Germany, the U.K., and (to some extent) the U.S. have measures to deal with " slave" contracts. Austrian tax law, for example, since 1972 has provided that independent personal services income of nonresident artists and athletes for performances in Austria is subject to withholding even if diverted to a third person (e.g., an "artist company"), and the U.K. adopted similar provisions in 1987.

Since 1985, Germany has treated all income from artistic and athletic performances as domestic income from trade or business, regardless of to whom the income accrues, and regardless of whether there is a permanent

establishment or a permanent representative in Germany. Tax is withheld regardless of to whom the income accrues.

The Report notes that in the U.S., the IRS "has ruled that where, among other things, the artist or athlete retains control over the detailed organization of his work, an employer-employee relationship does not exist. This ruling, Rev.Rul. 74-330, helped defeat the improper use of a tax convention by claiming exemption under the 183- day rule. [The Tax Court held that the fees received by the French conductor Pierre Boulez (through an off-shore company) from CBS Records were payments for personal services.] Also in the United States, foreign personal holding company provisions extend to income from the performance of certain personal service contracts. Thus, a United States artist or athlete who is a 25 percent or more shareholder in a foreign personal

holding company cannot avoid United States tax by performing services for that entity."

Article 17 of OECD model treaty

As previously noted, paragraph 2 of Article 17 of the model treaty provides that "where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such does not accrue to the entertainer or athlete himself but to another person, that income may ... be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised."

The Commentary on Article 17 (the official explanation) states that the second paragraph "is to counteract certain tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is paid ... to ... a so- called artist-company, in such a way

that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor as profits of the enterprise in the absence of a permanent establishment."

The newer income tax treaties of the OECD countries with each other generally contain an Article 17-type provision, but some older treaties do not. Where this is the case, a "slave agreement" may still work. The United States has attacked such arrangements on the basis that the offshore company is the performer's agent (i.e., the employment arrangement is a sham).

The OECD's Report states that Paragraph 2 can apply even where the performers do not control the offshore entity (e.g., where the members of an orchestra have no ownership interest). In such cases, the amounts accruing indirectly to the performers and the profit element should be taxed. Where the performers own the entity,

the host country should be able to tax the entire payment.

In considering the types of income covered by Article 17, the Report states that "account should be taken of the extent to which the income was connected with the actual activity of the artist and athlete in the country concerned. In general, Articles other than Article 17 would apply whenever there were no direct links between the income and a public exhibition by the performer in the country concerned." The other articles that might apply, depending on the facts, are Article 12 (royalties), Article 14 (independent personal services), Article 15 (dependent personal services), and Article 7 (business profits).

In most treaties, Article 17 applies only to on-camera" artists. Technical, production, and other "off-camera" personnel are not impacted by the Article. A planning possibility, particularly with the trend of movie actors

becoming involved in producing and directing films, is to allocate compensation between "off- camera" and "on-camera" duties. As a result, the compensation allocated to "off-camera" duties generally should be protected under Articles 14 or 15. All income should be considered foreign source for purposes of claiming a home-country foreign tax credit, thus reducing the effective foreign tax rate on such compensation.

OECD Report conclusions

The Report concludes that in the international sphere additional information exchange is needed to inform countries that their residents are performing abroad. This, preferably, should be spontaneous, with competent authorities issuing special instructions or guidelines. In addition, for the reasons mentioned, there should be substantial tax withholding by the host country.

Music royalties

Article 12 of the OECD model treaty provides that there is no withholding tax on " royalties" (although the treaty policies of some OECD countries is to impose withholding tax of up to 10 'percent on royalties, and some non- OECD countries insist on even higher rates). The OECD Commentary on Article 12 states that "royalties" include "royalties on the sale and/or public playing of .. records," even where the performance was recorded in the host country. In addition, such royalty payments generally are deductible in full in the payor country.

The 1981 report by the U.S. Treasury Department on tax havens notes a perceived abuse this treatment makes possible. The report discusses instances where tax havens are used in concert with tax treaties. For example,

a foreign entertainer may establish a corporation in a tax haven country like Switzerland and enter into a long-term contract with it. The corporation then contracts with a U.S. promoter to arrange a tour for the entertainer. The tour proceeds are paid to the corporation, which pays the entertainer an annual salary. The corporation does not have a fixed place of business in the U.S. and therefore pays no tax, and the entertainer's salary might not be taxed because of a treaty. (The U.S.-Switzerland treaty, for example, does not contain an Article 17-type provision.) The entertainer's corporation also contracts with a U.S. distributor of records. Profits are paid by the distributor to the corporation, which takes the position that the amounts are royalties and that the treaty benefits apply. Under the Swiss treaty these amounts would not be taxed by the U.S.

The U.S. Treasury report describes various defenses the IRS might take to thwart these results, and notes that

under the (then) new U.S.-U.K. treaty the tour income would be subject to U.S. tax (under Article 17-type provisions). However, the report states that in many cases the tour income will be low because of high expenses, and that the reason for the tour often is to promote records. It states that the character of payments made for works created by artists must be clearly defined in the treaties to distinguish personal services from royalties, and how such income of artists and athletes is taxed should be further distinguished.

This view of the U.S. Treasury is interesting, because the official U.S. Treasury view (as stated in the U.S.'s current, 1981, model treaty) still treats record royalties as "royalties," although it does exclude payments for the right to use "cinematographic films or films or tapes used for radio or television broadcasting."

The U.S. and U.K. (and others) as tax havens

The tax planning arrangements for U.S. and U.K. athletes and entertainers are of much less value since the U.S. lowered its tax rate to 28 percent in 1988 and the U.K. apparently will lower its tax rate to 40 percent.

The proof of the pudding is that international superstars, who can live anywhere, are choosing to live in the U.S. We would guess that in view of (1) the new low rates, (2) the fact that much of their worldwide income will be subject to tax (and tax withholding) in the source country, and (3) the fact that the U.S. grants credit for foreign income taxes paid by its citizens and residents, it probably costs these people little if anything to be subject to U.S. tax on their worldwide income.

A stated purpose of the proposed 40 percent rate in the U.K. is to bring home expatriate authors, entertainers and athletes. And, as pointed out in the April 4, 1988 Wall Street Journal, many industrial countries are

following the U.S. lead in lowering individual tax rates (but not to 28 percent). In addition to the U.K., these include Australia and Canada. This trend should reduce the use of artificial business arrangements and inconvenient living arrangements.

U.S. anomaly

Unless reduced by tax treaties, the U.S. requires 30 percent tax withholding on most payments of income to nonresidents. This rate has been in effect for many decades, including periods when the individual rate was as high as 91 percent. There is no policy reason why this rate should be higher than the marginal personal tax rate, and there are obvious reasons why it should be as low or lower than the top personal rate. We are sad to report that, despite lobbying efforts, there is little likelihood that Congress will lower the 30 percent rate. The only

visible reason for Congressional inaction is that foreigners do not vote.

U.S. travel expenses

Travel expenses, including transportation, lodging and (80 percent of) meals are deductible as business expenses while an entertainer or athlete is away from home on business. For the most part, the rules are straightforward, but there are several points that the nonresident should be aware of:

1. "Tax home" requirement. The IRS frequently denies traveling salesmen's travel expenses for meals and lodging on the basis that they have no fixed base and are on the road almost all the time. There are court decisions going both ways on whether arrangements, such as paying your married sister nominal rent for a spare bedroom where you store a few things and spend a very few

weeks a year, constitute a "tax home." This could apply just as easily to touring golf and tennis professionals. It also could apply to a British actor who, for example, gets a six-month assignment in New York (Actor's Equity permitting) and severs all ties with London.

2. Shifting "tax home." The U.S. tax rules presume your tax home is where you work, regardless of where you live, if the assignment is permanent or indefinite. The IRS ruled in 1983 that where an assignment to the U.S. from abroad is intended to be for two years or more (or actually lasts two years or more) it is "indefinite." Assignments originally intended for one year or more, but less than two years, are temporary if: (1) they in fact last less than two years; (2) the alien retums to his tax home; and (3) certain specified connections with the foreign tax home are maintained during the stay in the U.S. An assignment extended beyond two years probably will not be considered temporary beyond the

date of extension. If an alien's assignment is for less than one year, it most likely will be deemed temporary (although the individual still must have a tax home beyond commuting range).

U.S. residency

Aliens are deemed U.S. residents for income tax purposes if they (1) have permanent ("green card") status or (2) satisfy the substantial presence test. The latter test is satisfied if (1) the individual is physically present in the U.S. 183 days or more during the calendar year or (2) the individual is present in the U.S. 183 days or more during the current year and the preceding two years (counting current-year days as one day, the preceding year's days as one- third of a day, and the second preceding year's days as one-sixth of a day). Under the formula, being present in the U.S. 122 days in each of three

consecutive years would make one a resident in year three.

A special rule, designed specifically to encourage a handful of world-class professional golfers to play in the U.S. pro tour, provides that the time spent playing in charitable sporting events does not count as time in the U.S. in determining residency. Many of the tour events contribute their profits to local charities, so a foreign golfer could spend most of the year in the U.S. without satisfying the substantial presence test. Since both the U.S. Golf Association and the. U.S. Tennis Association have charitable status, the time spent participating in the "open" championships in either sport would not count as U.S. days.

The most famous foreign athlete to litigate his tax status with the IRS is Ingemar Johansson, the Swedish heavy-weight champion. The IRS scored a first-round knockout. The court held that: (1) Mr. Johansson (and

not a Swiss corporation) was taxable on the income he earned boxing in the U.S. in 1960 and 1961; (2) the use of the Swiss corporation on business contracts was a sham; (3) he was a resident of Sweden in 1960 and 1961 (and not Switzerland, whose treaty benefits he had claimed); and (4) no part of the compensation he received was royalties within the meaning of the U.S. income tax treaty with either Switzerland or Sweden.

Lavish and extravagant travel expenses

The U.S. tax code provides that traveling expenses are not deductible if they are "lavish or extravagant under the circumstances." The " circumstances" referred to relate primarily to the taxpayer's business income. Superstar entertainers and athletes can maintain their standards of living on the road--and deduct the cost. We know of no instance where travel by private jet or very

expensive hotel suites have been seriously challenged. The few reported cases in the area hold for the taxpayer, essentially on the basis that very successful people can go very first class.

Expenses of the entourage

The reported cases concerning the expenses of an entourage relate to the travel expenses of wives. The one most in point allowed the expenses of the wife of the renowned singer John Charles Thomas on the basis that she herself was trained as a singer. She coached her husband, perfected his pronunciation of certain foreign languages, planned itineraries, acted as his secretary, etc.

Where there is no obvious family or social connection between the performer and those who make up his or her official party, we doubt if the IRS would question

the deductibility where the accompanying person's presence was business-connected on its face -- for example, coaches and physical therapists in the case of tennis players, or hairdressers in the case of actresses.

Swedish expatriates

Swedish income taxes are 75 percent on income exceeding US$34,000 a year. Because of this and other taxes, a number of successful Swedish entertainers and athletes have taken up residency abroad. To do so a Swede must qualify as nonresident under domestic tax law, or according to relevant treaty provisions if he or she moves to a treaty country.

When a Swede moves abroad the tax authorities will still regard him as a resident if his main connections are with Sweden. The criteria for determining if this is the case include: (1) citizenship; (2) a permanent abode

abroad; (3) a year-round home available in Sweden; (4) family remaining in Sweden; (5) business activities in Sweden; (6) otherwise engaged economically in Sweden; and (7) direct or indirect ownership of real estate in Sweden. The authorities look at all the circumstances, so an individual can be regarded as a Swedish resident even if some of these criteria are not met. A Swede who achieves nonresident status retains no rights under Swedish tax treaties.

A Swedish entertainer or athlete who is resident abroad is taxed only on Swedish source income. A nonresident performing in Sweden is subject to a special 30 percent tax on his gross income (which is final and paid by the organizer rather than the performer). This tax is paid the same way if the entertainment is furnished by a foreign company and payment is received abroad.

If the foreign company is resident in a treaty country and the treaty does not include the wording of Article 17

paragraph 2 (discussed above), Sweden normally cannot impose any taxes on the foreign company if it does not have a permanent establishment in Sweden. In such cases, the individual nonresident performers will not be taxed in Sweden if payment is made to the nonresident company.

Swedish-source payments to nonresidents for endorsements are not taxed in Sweden.

Non-U.K. resident sportsmen and entertainers

Under U.K. domestic legislation, a non-U.K. resident sportsman or entertainer who performs in the U.K. is subject to U.K. income tax at the rates applicable to individuals. Slave agreements are ignored, subject to treaty protection.

The U.K. recently imposed withholding tax on virtually any payment made in connection with an appearance by

a sportsman or entertainer in the U.K. Tax is withheld at the U.K. basic rate, currently 25 percent. The withholding applies to payments directly to the entertainer or his loan- out company and to payments to third party suppliers, agents, promoters, etc. There is a de minimis threshold of Pound Sterling 1,000 in any one tax year. The newer tax treaties generally provide little or no protection, but the older ones may, particularly where there is a slave arrangement.

The new scheme of withholding tax does not apply to record royalties (following pressure from interested bodies), nor does it apply where withholding tax would be due under existing legislation (e.g., copyright royalties). Note that some record royalties may not be subject to U.K. withholding tax at all unless they are paid on the copyright in a recording.

A lower rate of withholding tax may be negotiated with the Inland Revenue if it is anticipated that the final tax

liability will be less than 25 percent of the gross payments. Any liability in excess of the tax withheld must be paid to the Inland Revenue. The profits on which tax is finally borne are calculated in accordance with basic U.K. principles, and a deduction allowed for business expenses. The cost of travel from (but not to) the U.K. is deductible.

As in the U.S., where an entertainer performs a concert tour in the U.K., it is possible that the net taxable profits of the tour itself may be small, while the royalties resulting from increased record sales may, in some cases, be paid free of U.K. tax.

The withholding tax obligation applies in principle to any person who makes a payment in connection with a U.K. appearance. The income liable to withholding tax includes sponsorship income. The ability of the U.K. Revenue to enforce payment where the payer is not U.K. resident and does not have a U.K. taxable

presence has not been tested, but the U.K. Revenue has indicated that it will not pursue the withholding tax liability where payments are made by a non-U.K. payer under genuine commercial arrangements (e.g., where an overseas film production company pays a fee outside the U.K. to an actor for making a film in the U.K.). The position must be considered on a case-by-case basis, as the U.K. Revenue is likely to review the financial arrangements of all nonresident entertainers and sportsmen appearing in the U.K. But even where the withholding is not enforced, the liability of the entertainer or sportsman remains. The withholding tax is only a payment on account, not a final tax.

The withholding tax should be taken into account in making commercial arrangements. If not, a company may find that the fee for a performance in the U.K. is payable free of withholding tax, and that it must pay the tax from its own pocket.

Tax exiles

An entertainer or sportsman is subject to U.K. tax only if he is resident in the U.K. or if he gives performances there. Many U.K. entertainers and sportsmen have therefore become tax exiles, based in territories such as the U.S., the Channel Islands, the Isle of Man, Monaco, or Spain. Provided their visits to the U.K. do not average more than 90 days in a tax year, and that they do not set foot in the U.K. in any tax year in which they possess available accommodation in the U.K., their non-U.K. source income remains completely free of U.K. tax. It will be interesting to see whether any of these tax exiles return to the U.K. in the wake of the 1988 tax rate cuts (to a top rate of 40 percent, from 60 percent).

In a recent case it was held that an entertainer could, in particular circumstances, establish non-U.K. residence

for one tax year even though he left the U.K. only shortly before the beginning of the tax year and returned shortly after the end of that year. If a sportsman or entertainer can manage his affairs such that he is characterized as non-U.K. resident, he should arrange for as much income as possible to fall into the period of non-U.K. residence. It may be more difficult to avoid U.K. capital gains tax in this way.

It is very difficult for a U.K. resident sportsman or entertainer to set up offshore vehicles to receive non-U.K. income free of U.K. tax. U.K. anti-avoidance legislation in this area is comprehensive in its scope and severe in its effect. Lack of protection from double tax treaties is also potentially a problem.

However, where an individual is non-U.K. domiciled (i.e., broadly, is not a U.K. citizen and does not regard the U.K. as his permanent home) it can be possible for him to achieve a low effective rate of U.K. tax by

exploiting the remittance basis of taxation for non-U.K. source income, while obtaining in certain circumstances the benefit of the U.K. tax treaty.

More changes to come

The OECD Report, new low individual rates, a world-wide trend to more exchange of information, and increased cross-border activities by entertainers and athletes mean that this tax field will continue to change--as to both tax planning and enforcement. Stay tuned!

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NEW LEGISLATION AND REGULATIONS

Congress passes, and the President signs, a new trade bill containing provisions designed to open foreign markets for U.S. entertainment products and to assist U.S. copyright and trademark owners in their fight against overseas piracy

Congress has passed, and President Reagan now has signed, the long-awaited "Omnibus Trade and Competitiveness Act of 1988."

The Act has the bulk to match its tongue-twister of a title. It weighs in at four pounds, wrapped only in a paper cover. But nestled within its more than 1100 pages are two provisions (totaling some 50 pages in themselves) that have been hailed by the Recording Industry Association of America, the Motion Picture Association of America, the American Film Marketing Association, the National Music Publishers' Association, and the Association of American Publishers (as well as other U.S. copyright owners).

The bill has won the praise of the entertainment industry because of one provision that is designed to help open foreign markets for U.S. entertainment products, and a second provision that will help U.S. copyright and trademark owners in their fight against overseas piracy.

The Act does not amend U.S. copyright or trademark laws in any fashion, nor does it directly impose any additional obligations on foreign countries in which U.S. entertainment products are exploited. Instead, the Act involves somewhat longer-term strategic planning, the benefits of which to the American entertainment industry are likely to appear over time.

GATT negotiating policy

One provision of the Act (Sections 1101(b)(10)) simply declares what U.S. policy is to be in connection with this country's participation in ongoing multi-national trade negotiations concerning the General Agreement on Tariffs and Trade (commonly referred to as the GATT). The GATT dates back to 1947 when the U.S. and 21 other countries met in Geneva to develop a framework for reducing then-existing trade barriers. More than 80

countries are now parties to GATT, and periodically, negotiating "rounds" are conducted for the purpose of further reducing tariffs and non-tariff trade restrictions. The current round, known as the "Uruguay Round," began in 1986.

As a result of the new Omnibus Trade Act, it is now statutorily declared that in GATT negotiations, the principal objectives of the U.S. regarding intellectual property are "to seek the enactment and effective enforcement by foreign countries of laws which... recognize and adequately protect ... copyrights.... trademarks [and other forms of intellectual property], and ... to establish in the GATT [the] obligations [of GATT members] ... to implement adequate substantive standards based on ... the standards in existing international agreements that provide adequate protection, and... [based on] the standards in national laws if international agreement standards are inadequate or do not exist...." The

quoted provision goes on to state that the U.S. also will seek GATT-imposed obligations requiring members to establish effective procedures for enforcing adequate substantive standards, and the U.S. will seek effective dispute settlement procedures.

The reference (quoted above) to standards based on "existing international agreements that provide adequate protection" is probably a reference to Berne Convention standards; while the reference to international agreement standards that are "inadequate" is probably a reference to Universal Copyright Convention standards. If so, the United States' failure (thus far) to adhere to the Berne Convention itself is an apparent irony to which other GATT members (especially those whose standards are "inadequate") are certain to allude when the U.S. presses its current "negotiating objectives." Thus, enactment of the Omnibus Trade Act -- while a welcome milestone -- is by no means an adequate substitute for

adherence to Berne itself by the United States. Nonetheless, if the U.S. is successful in getting certain GATT members to raise their copyright and trademark standards, and to implement effective enforcement procedures, it will aid U.S. copyright and trademark owners in their efforts to prevent piracy in those countries.

U.S. Trade Representative actions

Another provision of the Omnibus Trade Act (Sections 1301-1303) deals both with piracy abroad and with certain countries whose own foreign trade laws constitute barriers to the distribution in those countries of U.S. films, television programs, recordings, and other copyrighted and trademarked products. Such barriers include tariffs, quotas, language-dubbing requirements, currency-repatriation limitations, and the like.

This provision of the Act uses retaliation -- or at least the threat of it -- as a device to induce foreign countries to do two things: to improve the level of copyright and trademark protection they provide to U.S. works; and to reduce barriers to the profitable exploitation in those countries of U.S. entertainment products. The Act does so by authorizing the United States Trade Representative (the Government's designated foreign trade treaty negotiator) to take certain actions against those countries whose laws do not provide "adequate and effective protection of intellectual property rights" or which deny "fair and equitable" market access to U.S. businesses.

The actions which the U.S. Trade Representative is authorized to take include suspending trade benefits otherwise available to offending countries, and imposing import restrictions on goods from such countries. The obvious theory behind this provision is that beneficial trading relations with the United States should be

available only to those countries that reciprocate by providing marketing opportunities to U.S. businesses and by protecting U.S. copyrights and trademarks.

While the U.S. Trade Representative may initiate investigations on its own, the Omnibus Trade Act also provides a procedure by which "interested persons" may petition the Trade Representative to initiate an investigation. Such a petition triggers certain mandatory procedures that the Trade Representative must take within specified time limits, leading ultimately to, the making and publishing of a "determination." Moreover, the Act also requires the Trade Representative to identify those foreign countries that "deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely on intellectual property protection," and then to publish a list of such countries in the Federal Register, within a specified period of time.

The interested-party-petition procedure and the mandatory identification-and-publication procedure are likely to put new pressures on this country's trading partners which do not provide adequate copyright and trademark protection, and which do not allow fair access to their markets. Thus, in time, improvements in the laws of such countries can be expected.

It appears that the first interested-party- petition may be filed quite soon. Daily Variety has reported (Sept. 9, 1988) that in an interview it conducted with Myron Karlin, president of the Motion Picture Export Association of America, it learned that such a petition is now being prepared on behalf of several major motion picture studios against South Korea.

President's veto of earlier trade bill

Representatives of the entertainment industry have been working with the Reagan administration and with Congress for at least five years in efforts to secure these provisions. Earlier this summer, it looked as though all their efforts would be for naught, when the President vetoed what has generally been known as the Omnibus Trade Bill (H.R. 3) because it contained provisions, to which the administration objected, concerning plant closing notices and Alaskan oil imports. Following the President's veto, Congress enacted a separate plant closing notice bill (which the President allowed to become law). Congress then reintroduced and voted to enact a new trade bill (H.R. 4848), identical to the vetoed one in all respects except for its omission of the plant closing and oil import provisions to which the President had objected.
[ELR 10:4:11]

RECENT CASES

Ginger Rogers' action against producers and distributor of the film "Federico Fellini's 'Ginger and Fred'" is barred by the First Amendment

The ten musical films in which Ginger Rogers co-starred with Fred Astaire between 1933 and 1949 established the couple as "the icons of elegant ballroom dancing during Hollywood's Golden Age," according to Federal District Court Judge Robert W. Sweet. Indeed, the term "Fred and Ginger" came to be a "metaphorical symbol" for fine ballroom dancers, and often has been used by writers to refer to elegant dancers and dancing.

In 1986, the film "Federico Fellini's 'Ginger and Fred'" was distributed in the United States, albeit briefly, by MGM/UA Entertainment Co.; the film was produced by PEA Produzioni Europee Associate and by Alberto

Grimaldi. Fellini's work was a fictional account of a reunion between two retired dancers. In their cabaret act, the dancers had imitated the American movie stars and were nicknamed "Ginger and Fred." The film satirized "the world of television," observed Judge Sweet, by setting the reunion against the background of an Italian television special; the fictional dancers, portrayed by Marcello Mastroianni and Giulietta Masina, were asked to present their cabaret routine during the television show.

Ginger Rogers sued the producers and distributor of the film, seeking $3 million in compensatory damages and $5 million in punitive damages, alleging the violation of section 43(a) of the Lanham Act, false light invasion of privacy, and the violation of her right of publicity. Rogers argued that the unauthorized use of her name in the screenplay and title of the film constituted a false designation of origin, and that the First

Amendment did not bar her claim because the filmmakers had alternate ways to convey the film's message.

In granting summary judgment to the Fellini parties, Judge Sweet first cited the principle that films are a form of expression protected by the First Amendment. Rogers' reliance on Allen v. National Video, Inc., 610 F.Supp. 612 (S.D.N.Y. 1985) (ELR 7:5:7) was misplaced, stated the court, because in Allen the advertisement at issue was purely commercial speech; National Video's sole purpose in using a Woody Allen look-alike in its advertising was to capitalize on the artist's familiar name, face and "reputation for artistic integrity" in order to increase its movie rental business.

Also distinguished by the court, after careful review, were the decisions in Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F.Supp. 366; aff'd., 604 F.2d 200 (2d Cir. 1979) (ELR 1:4:5; 1:15:2). Judge Sweet noted that the language of the opinions in the

Dallas Cowboys cases did not expressly limit the Lanham Act's "override" of the First Amendment to cases involving speech that is primarily commercial. However, a narrow reading was implicit in subsequent decisions, such as Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2d Cir.1981) (ELR 4:6:6) in which the court held that "(m)isleading commercial speech" regulated by the Lanham Act "is beyond the protective reach of the First Amendment."

Judge Sweet therefore determined that before expression through film can be curtailed by the Lanham Act, a party must establish that the challenged speech is intended primarily to serve a commercial function.

In the instant case, Fellini used Rogers' first name in the title and screenplay of the film to invoke an American cultural symbol, and such use was an exercise of artistic expression, ruled the court. The Fellini parties did not intend primarily to persuade the public to consume

something that had no connection to Rogers or to convey the false impression that Rogers was somehow involved with or had endorsed the production. The fact that the distributors of the film arranged some promotional activities which may have exploited commercially the public's familiarity with Rogers' name did not turn either the film or its title into commercial speech.

Upon finding that the challenged speech was protected artistic expression, entitled to the full scope of protection under the First Amendment, the court declined to consider whether there were alternate means by which Fellini might have conveyed the message of his film.

The Fellini parties also were entitled to summary judgment on Rogers' right of publicity and invasion of privacy claims, ruled the court. Again, the status of the film as a protected work of artistic expression, "the product of one of the world's great cinematic artists," warranted the dismissal of the claims.

The court distinguished the case of Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), in which Zacchini's "human cannonball" act was broadcast on a news program. In a narrowly drawn opinion, "effectively limited to its facts" (according to Judge Sweet), the Supreme Court held that the First Amendment did not bar Zacchini's claim because the performer's entire act had been appropriated by the unauthorized broadcast, thereby destroying the economic viability of Zacchini's act. The Fellini film did not interfere with Rogers' "economic viability," for there was no showing that Rogers' reputation suffered from the critically acclaimed film.

Judge Sweet concluded by emphasizing that the film was not a commodity or an advertisement in disguise for a commercial product, but rather, an artistic work, the title of which, as an "integral part of the work's artistic expression," was equally protected.

Rogers v. Grimaldi, Case No. 86 Civ.1851; Rogers v. PEA Produzioni Europee Associate, S.R.L., Case No. 86 Civ.7481 (S.D.N.Y., Aug.5, 1988) [ELR 10:4:13]

"Starcade" television program did not infringe proposal for "Electronic Game Show" based on the use of video games

The television program "Starcade" did not infringe an outline for a proposed television game show based on the use of video games, a Federal District Court in California has ruled.

An outline entitled "Electronic Game Show," prepared by Jeanne Kalmansohn and Donald 1. Kelly, contained many elements common to all game shows. Furthermore, most of the alleged similarities between the

"Electronic Game Show" and "Starcade," noted Judge Stephen V. Wilson, consisted of "common, stock elements." The only unique element in the outline was the idea (emphasis by the court), not protectable under copyright law, of a game show involving the use of video games - the "broad and sketchy" description of the other aspects of the proposed game show precluded a finding that the outline constituted Kalmansohn and Kelly's individual expression.

To the extent that Kalmansohn and Kelly expressed the basic idea of a game show using video games, such expression was indispensable and entitled to protection only against identical copying. However, identical copying did not occur in this case; there was no substantial similarity between the works at issue; and summary judgment was available to the "Starcade" parties, including Atari Holdings, Inc. (the moving party) on the alternate grounds that Kalmanssohn and Kelly sought to

protect an unprotectable idea, and that no reasonable juror could properly conclude that there was substantial similarity between the "Electronic Game Show" outline and "Starcade."

Kalmansohn v. J.M. Productions, Co., Case No. CV 87-5490 (C.D.Ca., July 15, 1988) [ELR 10:4:14]

Dispute over National Basketball Association's college player draft, salary cap and right of first refusal involved issues of fact which precluded summary judgment in now-resolved antitrust action

A Federal District Court in New Jersey has ruled that neither the National Basketball Association nor a group of current and former basketball players were entitled to summary judgment in the players' action challenging the

NBA's reliance, after the expiration of a collective bargaining agreement, on certain allegedly restrictive practices such as the college player draft, the salary cap and the right of first refusal.

A 1976 agreement settling litigation between the players and the NBA had included provisions modifying the college player draft and instituting the right of first refusal; the settlement agreement was scheduled to expire at the end of the 1986-1987 NBA season. The players and the NBA also entered a collective bargaining agreement in 1976, and a subsequent agreement in 1980; the collective bargaining agreements incorporated the terms of the settlement agreement. The 1980 agreement expired on June. 1, 1982.

In 1983, the NBA sought to introduce the salary cap. When the players brought a lawsuit challenging the legality of the practice, a Special Master, appointed pursuant to the settlement agreement, determined that the

salary cap would violate the terms of the agreement. Subsequently, the Players Association and the NBA modified the expired 1980 collective bargaining agreement to include, among other provisions, a salary cap. The agreement was extended through the 1986-1987 season.

When the parties failed to reach a new collective bargaining agreement, the players informed the NBA that they no longer would consent to any player restraints. The NBA claimed that the player draft, the right of first refusal, and the salary cap still were entitled to a limited nonstatutory exemption from antitrust sanctions. But the players argued that the practices no longer were protected by the nonstatutory exemption because they were not part of a currently effective collective bargaining agreement.

Judge Dickinson R. Debevoise did not agree with the players' argument that the restrictions included in a

collective bargaining agreement lose their antitrust immunity "the moment the agreement expires." The court noted the possibility that some of the provisions in an expired agreement might be included in a future agreement, and that removing antitrust immmunity from player restraints the moment a collective bargaining agreement expires might inhibit the collective bargaining process.

However, the court also disagreed with the NBA's argument that the exemption should continue indefinitely after an agreement expires as long as the employer maintains the status quo by not imposing any new restraints.

Judge Debevoise chose to focus on the point at which parties end their agreement on restrictive practices, and concluded that, instead of tying the exemption for such practices to progress in the negotiations as a whole, an antitrust exemption for a particular practice " survives

only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement." When an employer no longer has such a reasonable belief, the employer is unilaterally imposing the restriction on its employees, and the restriction is not a product of arm's length negotiations. An exemption thus may expire before, during or after impasse - a state of bargaining when the parties "have exhausted the prospects of concluding an agreement and further discussions would be fruitless."

In the instant proceeding, applying the rule presented issues of material fact that precluded summary judgment, declared Judge Debevoise; indeed, such issues might not be resolved until the parties enter a new collective bargaining agreement.

The court also denied the NBA's motion to require joinder of the National Basketball Players Association.

In the spring of 1988, the NBA and the Players Association agreed on a new six-year contract; the Players Association agreed to discontinue, upon ratification of the contract, its antitrust action against the NBA (ELR 9:12:20).

Bridgeman v. National Basketball Association, 675 F.Supp. 960 (D.N.J. 1987) [ELR 10:4:14]

National Football League entitled to antitrust exemption with respect to player restraints until it and NFLPA reach impasse in negotiations; court refuses to grant free agency status to about 300 unsigned players

One month after the court in Bridgeman (above) declined to rely on the "impasse" test to determine whether certain practices of the National Basketball Association were immune from antitrust scrutiny, a Federal District Court in Minnesota applied the test in finding that the National Football League Players Association was not entitled to summary judgment in an antitrust action against the National Football League.

The Association and several professional football players claimed that the NFL parties willfully acquired or maintained monopoly power in the market for major league professional football in the United States, and sought to enjoin the continued use of the right of first refusal/compensation system and the NFL Players Contract.

Among the contract provisions challenged by the players was the "waiver system" whereby players allegedly may be denied free agency if they are discharged by the

club for which they are playing unless and until all NFL clubs sequentially "waive" their rights to employ the player under the terms of the player's existing contract. The player thus must accept the terms of the standardized contract or not play football.

Under the right of first refusal/compensation system, as described by Judge David S. Doty, every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's old team may keep the player by matching the competing offer. The player's old club therefore has a "right of first refusal" as to the player's services. If the club to which the player was under contract does not choose to match a competing offer, the club will receive draft choice "compensation." According to the players, the system, in addition to restraining

player movement, served to eliminate competition among NFL clubs for player services.

The instant action was filed on October 15, 1987, the last day of a 24 day player strike. The players argued that because the 1982 collective bargaining agreement containing the allegedly unlawful system of player restraints at issue expired on August 31,1987, the restraints no longer were entitled to the nonstatutory labor exemption from the antitrust laws (the court stated that it would assume that the challenged player restraint system was unlawful for the limited purpose of deciding the players' motion).

Judge Doty rejected the NFL parties' initial argument that the player restraints, as subjects of mandatory collective bargaining, were entitled to indefinite, blanket protection from antitrust scrutiny.

The NFL next asserted that the nonstatutory exemption for the player restraints survived the expiration of the

collective bargaining agreement. Judge Doty found that there were "sufficient indicia of bona fide arm's length bargaining...to warrant entry of summary judgment on this issue" in favor of the NFL. Provisions of collective bargaining agreements relating to mandatory subjects of bargaining generally survive the formal expiration of the agreement; until an impasse is reached, an employer is not free unilaterally to change the essential provisions of an expired collective bargaining agreement but must keep those provisions in effect and bargain with the union as to their possible modification.

In determining the period of time during which the labor exemption remains in effect after the expiration of the collective bargaining agreement, the court decided not to accept the players' argument that immunity from antitrust liability extends only until the employees have made it "unequivocally clear" that they no longer consent to the challenged conduct. Judge Doty cited, in

part, the strong federal labor policy underlying the collective bargaining process, a policy encouraging "intense, good faith negotiations following termination of an agreement..." The apparent lack of "proper regard" for federal labor policy in Bridgeman drew objections from Judge Doty, who stated that Judge Debevoise's test did not "strike the proper accommodation between labor and antitrust interests..."

In all, the court concluded that the labor exemption relating to a mandatory bargaining subject survives expiration of the collective bargaining agreement until the parties reach impasse as to that issue; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and an employer continuing to apply the condition may be subject to liability. It was emphasized that "impasse" merely signifies a stalemate in negotiations, and is not equivalent to termination of the collective bargaining relationship. The test to

determine the existence of an impasse is whether the parties, following intense, good faith negotiations, have exhausted the prospects of concluding an agreement - "impasse is generally synonymous with deadlock; it occurs when the parties have discussed the matter and, despite their best efforts to achieve agreement, neither is willing to move from its position."

Once the NFL and the players reach an impasse concerning the player restraint provisions, those provisions will lose their immunity, declared Judge Doty, and the further imposition of player restraints may result in antitrust liability if, again, the challenged practices are found to violate the antitrust laws. The court stayed its decision pending the determination of the "impasse" question.

In July 1988, Judge Doty refused to grant the players' request for a preliminary injunction which would have barred the NFL from continuing its restrictions on player

movement; about 300 unsigned veteran players thus will remain subject to the challenged restraints. The court did not agree that the labor dispute between the parties had ended; stated that " greater harm would befall the owners if the injunction were granted than would befall the players if injunctive relief were not granted" since many players who moved would sign long- term contracts with their new clubs; and found that federal labor policy which dictated non- interference in the bargaining process also compelled the denial of the players' request for injunctive relief.

Even if the Norris-LaGuardia Act did not prohibit the court's intervention, Judge Doty concluded that an injunction was not available under a four-factor balancing test. The court found it "probable" that the players will prevail at trial, and that at least some of the players are likely to sustain irreparable harm if they are not immediately permitted to sign with other NFL clubs, but again

observed that the potential migration of many key players from less attractive clubs to more desirable ones "could have devastating, long-term impact on the competitive balance within the league. The danger that destruction of the competitive balance could ultimately lead to diminished spectator interest and franchise failures itself constitutes a sufficient basis for denying the requested injunctive relief."

In a footnote comment, Judge Doty expressed the hope that the court's ruling would move the parties closer together in negotiations by allowing the players' antitrust suit to move forward and at the same time protecting, and even promoting, the bargaining process.

Powell v. National Football League, 678 F.Supp. 777 (D.Minn. 1988); Case No. 4-87-917 (D.Minn., July 11, 1988) [ELR 10:4:15]

IN THE NEWS

Recording Industry Association reports successful anti-piracy efforts during first half of 1988

The extent of the record piracy problem in this country is reflected by the extensive anti- piracy efforts undertaken by the Recording Industry Association of America. Fortunately, according to statistics released by the RIAA, those efforts have been successful, though it also is apparent that the job is likely to be a never-ending one.

The RIAA's Anti-Piracy Unit, under the direction of Deputy General Counsel Steven J. D'Onofrio, has been focusing on major manufacturers and distributors of illicit product, while also maintaining an effective "street presence." Dozens of street vendors, flea market dealers and record convention dealers had counterfeit and

bootleg product seized from them by various law enforcement agencies, during the RIAA's latest reporting period.

During the first half of 1988, the number of counterfeit or pirated cassettes seized by law enforcement officers rose by 283% over the first half of 1987. The majority of the 308,184 counterfeit cassettes seized during this period were Hispanic music. The rise in the seizure of illicit Hispanic product is due in part to the increased focus on the piracy of such music since the RIAA's formation of an Hispanic Music Advisory Committee. The RIAA also has hired additional bilingual staff for its Anti-Piracy unit. A majority of the actions taken during the first half of 1988 were in California, "a hotbed of Hispanic piratical activity," the RIAA reports.

It appears that music pirates are becoming more sophisticated and professional in their counterfeiting activities, as almost four million counterfeit cassette labels

were seized during the first half of this year--more than three times the number seized during the first six months of 1987--and more than the total seized all of last year.

The number of arrests and indictments rose by 105% during the first six months of 1988. There were 74 arrests and indictments at the mid-year point in 1988 as compared to 36 during the same time period last year. The number of search warrants and consent searches also rose, up by 158% this year. There were 83 sight seizures during the first half of 1988, an increase over last year by 75%. And bootleg seizures more than doubled to 7,966, as compared to 3,560 during the first half of last year.

Two record rental cases also were completed during the first half of 1988, both in favor of RIAA member companies. [Sept. 1988] [ELR 10:4:17]

Paris television station is restrained, pending trial, from broadcasting colorized version of "Asphalt Jungle" and of other John Huston films

A court in Paris has barred, pending trial, the telecasting of colorized versions of any of the films of the late director John Huston. According to news accounts (the Entertainment Law Reporter has not yet obtained a copy of the decision), the court found that broadcasting a colorized version of the film "Asphalt Jungle" might cause irreparable harm to the integrity of the film and to Huston's reputation. Further proceedings have been scheduled for the fall of 1988. [Sept. 1988] [ELR 10:4:17]

Stanford University will not be required to test student athletes under the NCAA drug test program

Stanford University athletes may compete in events sponsored by the National Collegiate Athletic Association without having to submit to the NCAA drug testing program, a Santa Clara County court has ruled. Judge Conrad Rushing found that the drug testing program violated the students' right of privacy, and that Stanford was not required to administer the testing. [Sept. 1988] [ELR 10:4:17]

Boxing champion Mike Tyson settles dispute with manager William Cayton

Heavyweight boxing champion Mike Tyson has settled a lawsuit against manager William Cayton and Real Sports, Inc. According to news reports, Real Sports' share of Tyson's fight earnings has been reduced from one-third to 16 2/3 percent, and the company's share of

the fighter's endorsements has been reduced to ten percent. Tyson has regained the right to participate in selecting his future boxing matches. [Sept. 1988] [ELR 10:4:17]

DEPARTMENTS

Book Notes:

Law and Business of the Entertainment Industries, by Donald E. Biederman, Robert C. Berry, Edward P. Pierson, Martin E. Silfen, and Jeanne A. Glasser

The most difficult thing about teaching Entertainment Law is finding suitable reading materials. The subject of course is huge, encompassing as it does, many separate legal subjects from defamation and privacy, to

copyright, contracts, remedies, labor, antitrust, and securities law. One way to deal with the enormity of the topic is to focus on a slice of it for the entire semester. I have taught, for example, semester-long courses on the law of the music business, and on the law of the movie business. This gives a course focus, but will always disappoint at least some students in the class. When I taught music law, for example, several students complained that they had enrolled because they were interested in the movie business. And of course, when I taught movie business law, several students volunteered that they had really hoped to learn music law.

Law and Business of the Entertainment Industries addresses this problem head-on. It is comprehensive and includes cases and other materials covering all segments of the entertainment industry, including literary publishing, music publishing, recordings, the theater, movies, television, and the advancing technologies of cable and

direct broadcast TV, VCR's, video games and the like. It also covers the important topic of the law concerning agents, managers, attorneys and promoters. (It does not however cover sports law, and--predictably--one of my students last semester suggested that sports be included next year, even though my law school offers a separate course devoted exclusively to sports law!)

The book is able to cover so much ground for two reasons. First, the cases are extremely well edited to emphasize the particular issues of interest to entertainment lawyers. Second, the book is printed on high-quality light weight paper, so that its almost 700 pages are only 1 and 1/4 inches thick. With two columns to a page, there is an enormous amount of material between the book's covers. The book is indeed a portable library of the major and recent cases in the entertainment law field--so much so, that it could well double for a handy

"deskbook" for practitioners whose law school days are well behind them.

The book's organization allows readers and teachers to approach it in two ways. As written, it begins with a chapter on principles of contract law especially relevant in the entertainment industry, and then it proceeds chapter-by-chapter in a business-by-business fashion through literary publishing, music publishing, and the rest, to the chapter on agents, etc., and a concluding chapter on privacy, publicity, and defamation. Thus, it is possible to read and teach through the book in that order, omitting material here and there to the extent time requires. The difficulty with a straight read-through is that certain issues come up time and again in that fashion, in a way that may make the book seem repetitive. For example, materials on the protection of literary ideas appears both in the Motion Picture chapter and in the Television chapter, and similar issues of contract

interpretation reappear throughout the book. There is of course a simple reason for this: all segments of the entertainment industry operate under similar legal principles. Indeed, for some teachers and students, the reoccurrence of similar issues in the different chapters may itself be interesting and instructive.

Given enough advance preparation time, it also is possible to approach the book by rearranging its material to pull together, from separate chapters, all of those cases that address particular issues, and then to read the material issue-by-issue. In my own class, I created a hypothetical that was intended to follow the evolution of a non-fiction magazine article into a book, movie, and television series. The book then became, almost literally, a portable research library, some of which the students read by jumping around from issue-to- issue, and other segments of which the students read straight through.

The book's author's are a distinguished group. Don Biederman is Vice President of Warner Bros. Music and an adjunct at Southwestern and Pepperdine in Los Angeles. Bob Berry is a professor at Boston College Law School. Ed Pierson is in private practice in Denver and an adjunct at the University of Denver College of Law. And Marty Silfen and Janna Glasser are partners in private practice in New York City and adjuncts at New York Law School and Pace University Law School respectively.

Law and Business of the Entertainment Industries is published by Auburn House Publishing Company, 14 Dedham Street, Dover, MA 02030-0658; phone (617) 785-2220. Its retail price is $50 (but if you're going to be using the book to teach a class, call Auburn House to negotiate a reduced price for your students).

Lon Sobel
[ELR 10:4:18]

Essentials of Amateur Sports Law by Glenn M. Wong

When I first taught Sports Law in 1974, it was possible to cover, in a single semester, virtually every sports law case ever decided, amateur or professional. Today, the volume of available material would make that impossible in a year-long course, let alone in a single semester. One way to deal with the ever- growing body of case and statutory law is to break it down into professional sports material on the one hand, and amateur sports material on the other. There are of course many issues in common between the two which makes this approach somewhat artificial. But it would be equally artificial to combine the two hemispheres of organized sports and

then omit certain topics altogether because of time or space constraints.

Glenn Wong, the author of Essentials of Amateur Sports Law, is an attorney and the head of the Sports Management Program at the University of Massachusetts, Amherst. He also is a prolific author in the field of sports law; and as the title of his latest book indicates, he has opted to deal with the growing bulk of his chosen topic by addressing amateur sports law separately from the law professional sports. This 720-page book was written to address a wide audience--athletic directors and coaches as well as lawyers and law students. As a result, it assumes no prior knowledge of the organization of amateur sports in America, nor any prior knowledge of the American court and legal system. The first two chapters provide whatever background in these areas a reader may require. And then the book canvasses a wide range of issues from contract and tort issues in amateur

sports, to sex discrimination, broadcasting, trademark law, drug testing, and even a smattering of tax, antitrust and gambling law.

The book is not a casebook. Instead, it is a cross between a textbook and an anthology, combining and interweaving Professor Wong's own writing with excerpts from documents, reports, articles and the like (much of which is not generally available elsewhere). The book also includes case and law review citations, making it a helpful research tool as well as an instructive text.

Essentials of Amateur Sports Law is published by Auburn House Publishing Company, 14 Dedham Street, Dover, MA 02030- 0658; phone (617) 785-2220. It retails for $35.

Lon Sobel
[ELR 10:4:19]

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