LEGAL AFFAIRS

International Movement of Basketball Players

by Lewis Kurlantzick

A notable, novel feature of the pro basketball scene this season is the international movement of players. While the occasional American player in Western Europe--usually an older, former NBA performer nearing the end of his career or a young athlete unable to secure an NBA roster place--has been a commonplace for some time, we are now witness to an influx of Eastern European stars to NBA teams, accompanied by the exodus of first-rate U.S. players--e.g. Danny Ferry and Brian Shaw--to foreign clubs. This development is likely to continue, if not accelerate, as the sport's popularity

and hence its profitability increase on both continents and Eastern European athletes become free to work in the West. Legal problems, perhaps inevitably, have followed, particularly disputes over players' services.

Thus, the NBA debut of Yugoslavian star, Dino Radia, was delayed when his home club, Jugoplastika, successfully sued to bar his play with the Boston Celtics. (Jugoplastika Basketball v. Boston CA-89-1889-WD (D. Mass 1989).) The Celtics had drafted and signed Radja. Jugoplastika, however, contended that he was contractually obligated to them and, apparently to the Celtics' surprise, the federal district court in Massachusetts agreed, enjoining Radja from competing here, and chastising the Celtics for their behavior as well. (As a result of the court's decision, Radja's Celtic initiation will occur next season.) Since American courts, state and federal, are open to suits by foreign enterprises and since a contract valid under foreign law will often measure up to American standards, similar requests for judicial intervention can be expected in future comparable cases.

However, the lack of a published opinion in the Radja case makes it difficult to gauge the validity and reach of the decision. (My comments are based on a stenotype transcription of the proceedings of a preliminary injunction hearing before District Judge Woodlock on September 26, 1989.) The Celtics, and the NBA, generally do not seek revenue in the same market as the Yugoslavian team, and this lack of economic competition weakens the case. While the federal court appropriately recognized the uniqueness of Radja's talents, it failed to attend to the lack of the important element of competitive advantage in this situation. Radja's defection would not change the relative competitive positions of his new and old employers. In the absence of this kind of harm, many courts have been unwilling to restrain player

movement. (League expansion into foreign markets would, of course, alter this analysis.)

The central conflict is between the teams' interest in protecting themselves from raids of their personnel and the interest of individual players in maximum mobility, especially significant to athletes with short high-earning periods. The advent of opportunities abroad complicates the legal dilemma. Domestically the problem is controlled by league rules, whose legality and efficacy are enhanced by player agreement through collective bargaining, at least with respect to player movement within the same professional association. But rights between teams in different leagues and different countries normally are governed only by contract law; and contract law is a bit tricky with respect to the enforcement of employment agreements, reflecting judicial reluctance to coerce the performance of personal services and to impede employee shifts.

A potential replay of the Radja dispute, in reverse, hung over Rick Mahorn's wanderings this fall. Chosen by the Minnesota Timberwolves in the expansion draft and unhappy with efforts to renegotiate his multi-year contract with them, Mahorn began serious discussions with Verano, an Italian team. Minnesota's subsequent threat of suit, however, put a severe crimp in the international negotiations. (Mahorn then decided to play for the 76ers to whom the Wolves had traded him.)

What were Minnesota's legal options? They could have sued Mahorn, and perhaps the Italian club, in an American court. Since the team's interest is in Mahorn's services, it will normally look to the court for an injunction to secure his performance. Violation of an injunction constitutes contempt of court and risks fine or imprisonment. Despite Mahorn's distinctive abilities and the practical impossibility of measuring the monetary damage his breach would cause the team, a court, though

sympathetic to the team, would not exercise its discretion to order him to play for the Wolves. This refusal is based, in part, on the undesirability of causing the continuation of personal association after disputes have arisen and confidence has eroded, particularly in a small group context where cooperation and trust are central to team success. In addition, courts are reluctant to undertake potential enforcement and supervision difficulties. Imagine the messy task of a judge faced with the question, perhaps repeatedly, of whether a player's subpar performance represents an off night or two or deliberate noncompliance with the court's order to perform.

The court, however, might issue a negative injunction forbidding Mahorn to play for any other team. Were Mahorn to disregard this order by playing abroad, he could be cited for contempt upon his return to the United States. Again, though, the case is weakened by the lack of economic competition between Minnesota

and the Italian club. In addition, even a negative injunction is of limited effectiveness, as highly skilled performance requires motivation which can rarely be legally coerced. The restricted potency of remedies against players who contemplate switching employers suggests that teams might be wise to target instead, or in addition, the raiding team via suits for inducing breach of contract.

Alternatively, Minnesota might sue Mahorn and the Italian club in Italy. While the foreign court would have to answer questions of jurisdiction and whose law applies, a contract valid under American law will usually meet European requirements and courts there are generally at least as sympathetic to injunctive relief. But it is not clear what the Italian court would make of the lack of economic competition between the teams nor how it would respond to a claim questioning the legitimacy of the NBA's expansion process whereby a claim to an

employee's services is transferred to a new employer without his explicit consent.

These legal problems are apt to recur. At issue is the ability of organized sports to improve their status beyond that provided by contract law. Committed to the cultivation of international interest in the sport and of good relations with basketball authorities abroad, the NBA has pursued discussions with foreign organizations and has entered an agreement with the Spanish Basketball Federation, Asociacion Clubs de Baloncesto (A.C.B.), under which each promises to use its best efforts to discourage members' pursuit of players under contract. Such steps to strengthen the security of player contracts pose a dilemma. On the one hand, do they offer more aid than existing legal remedies? In this respect, the NBA's regulatory authority may provide some additional reinforcement; e.g. the league's requirement that it approve any contract between team and player

before he can participate in games could be utilized to disapprove signings of players obligated to a foreign club. (The international organization of soccer operates in this fashion.) On the other hand, steps to do more shift--in a way detrimental to players--the line implicitly drawn by existing contract law between constraint and freedom to pursue employment opportunities. More particularly, such steps run a serious risk of violating antitrust law. There is no doubt that American antitrust law reaches cooperative arrangements with foreign leagues which limit competition for American basketball players' services and which--via restraint on U.S. pursuit of foreign players--affect the quality of the product available to American basketball consumers, as well. Accordingly, while the NBA's present "best efforts" approach involves little risk, more restrictive agreements, such as a list of players placed off limits to pursuit by the other league or an "anti-tampering" rule which inhibits

negotiations by a foreign club during the tenure of a player's contract, would be illegal. A related example helps make the point: imagine a similar agreement between several newspaper chains limiting competition for their most popular columnists. Thus, it is doubtful that the NBA in collaboration with foreign leagues, can legally do much more than it is now doing. (The lack of organized authorities to deal with in some countries also poses a practical obstacle to effective international cooperation.)

However, the NBA and the Players' Association can helpfully construct and clarify the framework within which international movement of players occurs, and they have already done so to some extent. The present collective bargaining agreement, for example, addresses one element of the scene--the status on their return of NBA draftees or players who have journeyed abroad to play. Hence, we know that if Brian Shaw returned after

this Italian season the Celtics can retain his services by signing him or matching another team's offer; on the other hand, if he plays abroad another season, he will return as an unrestricted free agent.

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RECENT CASES

Performers in 1960's "girl groups" may bring New York Civil Rights law claim against HBO and MGM/UA for distributing film retrospective, but copyright law preempts remaining claims

The 1983 film, "Girl Groups - The Story of a Sound," produced by Delilah Films, Inc., included, in part, previously published film footage of several 1960's performing groups. In 1984 and 1985, Home Box Office and MGM/UA Home Entertainment showed the film on cable television, and distributed a video of the film.

Fanita James and several other performers sued HBO and MGM/UA, claiming, among other causes of action, that the companies' activities violated sections 50 and 51 of the New York Civil Rights Law.

A New York trial court has ruled that several of the performers' causes of action, such as those for misappropriation and unjust enrichment, were preempted by section 301 of the Copyright Act. Judge Herman Cahn observed that the performances were not, as argued by James, "sound recordings fixed before February 15, 1972;" rather, although sound recordings were used in conjunction with the video portions of the film footage,

the performances were properly defined as " audiovisual works." Since the film at issue was within the subject matter of copyright and the claims were brought after the 1978 cutoff date, the conditions of preemption were met.

The performers had argued that the pre-recorded film was owned by various third parties who might not have copyrighted the footage, and that a finding of preemption thus would deny the performers a remedy. Judge Cahn, while expressing sympathy with the performers "who may or may not have been justly compensated for their original work," dismissed the preempted claims.

However, the performers, but not their successors-ininterest, stated the court, were entitled to proceed with their causes of action under the New York Civil Rights Law arising from the allegedly unauthorized use of their likenesses for marketing or advertising purposes. The causes of action for invasion of privacy brought on behalf of several deceased performers therefore were dismissed.

The question of whether HBO and MGM/UA's use of the film footage was protected by the First Amendment must be resolved at trial, ruled Judge Cahn. And the court refused to dismiss a cause of action alleging that the performers, as third party beneficiaries, were damaged by HBO and MGM/UA's purported breach of contract agreements under the Screen Actors Guild and/or the American Federation of Television and Radio Artists.

James v. Delilah Films, Inc., 544 N.Y.S.2d 447 (N.Y.Cnty. 1989) [ELR 11:10:5]

Twentieth Century Fox's criminal contempt conviction for violating block booking prohibition of Paramount consent decree is upheld, but court vacates \$500,000 fine

Twentieth Century Fox Film Corporation was entitled to a jury trial in a proceeding for criminal contempt resulting in a \$500,000 fine. The late Federal District Court Judge Edmund L. Palmieri found that the company, along with Leila Goldstein, the former manager of Fox's Midwest theatrical distribution office, "flagrantly and repeatedly" violated a 1951 consent decree prohibiting the block booking of films. Goldstein was fined \$5,000 (see ELR 10:10:21).

A Federal Court of Appeals has ruled that although there was "ample evidence" to support Judge Palmieri's conclusion that Fox and Goldstein violated the decree, the District Court did not have the power to impose a \$500,000 fine on Fox after denying the company's demand for a jury trial. Judge Palmieri had ruled that a corporation, facing only a fine, was not entitled to a jury trial, regardless of the amount of the fine. But Judge Jon 0. Newman stated that since the fine exceeded \$100,000, Fox had a constitutional right to a jury trial. The court affirmed Goldstein's conviction.

Judge Newman, among other conclusions, determined that the record demonstrated that Goldstein, a managerial employee of Fox, "willfully violated the consent decree while acting within the scope of her authority;" that Fox's compliance program did not immunize the corporation from liability when employees, acting within the scope of their authority, failed to comply with the law and the consent decree; and that all corporation and other organizations, regardless of financial resources, would be entitled to a jury trial for charges of criminal contempt when the fine imposed exceeded \$100,000, for

"no matter how prosperous a corporation may be, a large fine is a punishment of significance." Courts considering fines below the \$100,000 amount still may evaluate whether such a fine would have a significant financial impact upon a particular organization so as to indicate that the punishment involves a serious offense, thus requiring a jury trial.

Judge Newman vacated the penalty imposed on Fox and remanded the matter for further proceedings.

The United States Supreme Court has denied Fox's petition for a hearing.

United States v. Twentieth Century Fox Film Corporation, 700 F.Supp. 1242 (S.D.N.Y. 1988); 882 F.2d 656 (2d Cir. 1989) [ELR 11:10:5]

Howard Cosell's book "I Never Played the Game" does not libel World Boxing Council

Howard Cosell's book "I Never Played the Game," cowritten with Peter Bonventre, discussed certain aspects of the sport of boxing. Cosell criticized the conduct of the World Boxing Council and the World Boxing Association, stating, in part, that the organizations were "basically instruments of extortion ... easily manipulated by the gifts and favors of promoters and managers who are seeking special consideration for their fighters."

The World Boxing Council claimed that Cosell accused the organization of the crimes of conspiracy, extortion, and bribery, and sued him for libel.

A Federal District Court in New York has granted Cosell's motion for summary judgment on the ground that the Council did not establish actual malice.

Judge William C. Conner first declined to characterize the challenged statements, even in the context of professional sports, as mere opinion. However, even if Cosell's comments were statements of fact, the Council did not raise an issue of fact concerning the author's "subjective state of mind." Cosell presented substantial, uncontested evidence that he believed that the challenged statements were true.

Judge Conner rejected, among other claims, the World Boxing Council's argument that because the contested language was altered in a subsequent paperback edition of Cosell's book, Cosell must have known that he was unable to support the challenged statements when he wrote the original edition, and that actual malice thus was shown. Evidence of a subsequent change in an allegedly libelous text is inadmissible for the purpose of proving actual malice, declared the court. In all, none of the grounds raised by the World Boxing Council

supported a finding that Cosell wrote the challenged passage with actual malice, and, stated Judge Conner, "acting as the third man in the ring, the Court rules that low or not, Cosell's blow was struck in good faith, and raises his arm in victory."

World Boxing Council v. Cosell, 715 F.Supp. 1259 (S.D.N.Y. 1989) [ELR 11:10:6]

Record company's RICO claims against CBS are dismissed

In 1980, CBS, a creditor of the record company Creed Taylor, Inc., provided funding that permitted the company to emerge from bankruptcy. CBS received certain rights to Creed Taylor's catalog of master recordings.

In 1981, in order to settle various disputes between the parties, Creed Taylor agreed to pay CBS \$400,000 in order to regain control of the masters; the obligation, was secured by the masters.

Creed Taylor paid CBS only \$68,000. When CBS sued the record company, a New York trial court granted CBS's motion for summary judgment on a cause of action seeking a judgment of foreclosure and sale of the masters. The court rejected Creed Taylor's defense of economic duress, and ordered the company to turn over the masters to CBS to be sold in accordance with the provisions of the Uniform Commercial Code.

CBS decided to retain, rather than auction, the masters. Creed Taylor did not object within the time period allowed a debtor, under the applicable UCC section, to force a sale of the collateral. However, in 1988, Creed Taylor not only brought the instant action against CBS alleging the violation of the Racketeer Influenced and

Corrupt Organizations Act, but also moved in state court that CBS be held in contempt for failing to sell the masters in compliance with the trial court's order; the state court denied the motion on the ground of laches.

Federal District Court Judge Robert L. Carter found that the initial trial court decision "definitively disposed of the claims that CTI advanced in an effort to prevent foreclosure on the masters in satisfaction of CTI's debt to CBS." The subsequent state court ruling also rejected Creed Taylor's claims, and the company thus was barred, stated Judge Carter, on grounds of res judicata, from relitigating any and all claims arising out of the transactions at issue in those proceedings.

Creed Taylor's cause of action for breach of the settlement agreement was precluded, as were claims for replevin, conversion, unjust enrichment, and interference with business relationships, because, noted Judge Carter, the claims would involve relitigating matters that either were advanced or could have been advanced in the state court litigation.

Creed Taylor also was precluded from seeking to establish, under the company's RICO claim, that CBS exerted undue economic influence in negotiating the settlement agreement or acted in bad faith in seeking to enforce the agreement. The fact that the trial court decided these issues upon a motion for partial summary judgment, rather than after a trial, did not alter the preclusive effect of the decision.

Judge Carter next found that Creed Taylor was entitled to relitigate, in the context of the company's RICO claims, the argument that CBS improperly retained the masters - the second trial court decision dismissing Creed Taylor's motion on the ground of laches, had not determined this issue.

After reviewing the RICO claims, Judge Carter first found that Creed Taylor did not allege the existence of a legally appropriate enterprise for purposes of its statutory claims. The enterprise which the CBS parties allegedly acquired in violation of 18 U.S.C. section 1962(b), and whose activities they allegedly conducted through a pattern of racketeering activity in violation of section 1962(c) purportedly was the "CTI Masters Catalogue Program." Inanimate objects may not constitute a RICO enterprise, stated the court.

Assuming that Creed Taylor might correct this pleading defect, Judge Carter considered the predicate criminal acts alleged by Creed Taylor, and found that the purported acts of mail and wire fraud were not pleaded with the required particularity. The court therefore dismissed the RICO claim, both for failing to allege a proper RICO enterprise and for failing to allege fraud with particularity.

The court denied CBS's motion seeking to impose Rule 11 sanctions on Creed Taylor.

Creed Taylor, Inc. v. CBS, Inc., 718 F.Supp. 1171 (S.D.N.Y. 1989) [ELR 11:10:6]

Claim alleging false attribution of editorial credit in connection with accounting firm's publication of book is denied

When Robert M. Feerick was employed as a general partner of Arthur Young & Co., he was involved in producing a book entitled "A CEO's Guide to Developing the Successful Acquisition Program." The company discharged Feerick in March 1988, but continued to prepare the book for publication. However, Arthur Young deleted Feerick's introduction and chapter; changed the book's title to "The Arthur Young Guide to Mergers and

Acquisitions;" and named another individual as the editor of the work, although acknowledging Feerick, within the book, for his contributions.

Feerick sued the company, alleging trademark and copyright infringement and common law claims of misappropriation, conversion, unfair competition and breach of contract.

A Federal District Court in New York denied Feerick's request for preliminary injunctive relief. Subsequently, the court granted Arthur Young's motion for summary judgment.

Judge Kevin Thomas Duffy noted that Feerick's activities during his employment at Arthur Young were subject to the company's articles of partnership, which Feerick signed. The partnership document provided, in part, that the company retained all rights to any works produced by any of the partners. Judge Duffy had found that Feerick's work on the book was undertaken as an

employee of Arthur Young, and, on this basis as well as other factors, had determined that the company held all ownership rights to the book.

Feerick's claim of false attribution of editorial credit in violation of section 43(a) of the Lanham Act was rejected. It was observed that Arthur Young had replaced Feerick's introduction to the book, that extensive revisions were made by other parties, that Feerick's concept of the book was not novel, and that Feerick did not send a draft of his chapter to the company. Feerick's contribution to the work was accurately described in the acknowledgement passage, stated Judge Duffy, and there was no showing that the parties had entered an agreement to describe Feerick as the editor of the book. The court, while dismissing Feerick's complaint, denied Arthur Young's motion for Rule 11 sanctions.

Feerick v. Arthur Young & Company, 715 F.Supp. 1234 (S.D.N.Y. 1989) [ELR 11:10:7]

Author, rather than secured creditor of novel's hardcover publisher, is entitled to paperback royal-ties upon publisher's bankruptcy

In December 1984, S&L Enterprises granted Stein & Day, Inc. the United States publication rights for the hardcover edition of the novel "Confessional." Harry Patterson, who wrote the novel under the pseudonym "Jack Higgins," owned S&L. In October 1985, Septembertide Publishing, also owned by Patterson, took over S&L's rights in the Stein & Day contract, including the right to receive an advance against future royalties of \$375,000 in three equal installments of \$125,000, and the right to receive two-thirds of sublicensing income.

Stein & Day, also in December 1984, granted New American Library the right to publish the paperback edition of "Confessional" in return for an advance of \$750,000, payable in five installments.

In November 1985, Stein & Day entered into a security agreement with Bookcrafters U.S.A., Inc. In order to receive a loan of about \$1.2 million, Stein & Day delivered a mortgage on certain of its real property, and granted a security interest in its tangible and intangible collateral, including all of its contract rights, to Bookcrafters. Apparently, Bookcrafters' UCC search did not reveal Septembertide's interest in the payments due from New American Library to Stein & Day.

Stein & Day did not make the payment due to Septembertide in January 1986. In March 1986, Septembertide terminated Stein & Day's rights in the December 1984 contract, and asked New American Library to forward to Septembertide all future payments due Stein & Day

under the paperback contract. New American Library's refusal to comply with this request prompted Septembertide's lawsuit for breach of contract and injunctive relief.

Bookcrafters intervened in the lawsuit, alleging a prior and superior right to the proceeds of the paperback contract pursuant to the security agreement with Stein & Day.

A Federal District Court in New York stayed Septembertide's claim for the missing final payment of \$125,000 because of Stein & Day's bankruptcy. The District Court denied Septembertide's claims that the hardcover contract was terminated by Stein & Day's failure to make the payment, and that New American Library was liable for anticipatory breach of the paperback contract. However, Septembertide was a third party beneficiary of the contract between Stein & Day and New American Library, ruled the court, and as such,

Septembertide's right to two-thirds of the paperback payments was superior to Bookcrafters' secured creditor rights (subject to a determination that Stein & Day had recouped its advance). The court awarded Bookcrafters the remaining one-third of the paperback payment.

In accordance with a magistrate's report, the court recognized Septembertide's right to two- thirds of the New American Library payment, and Bookcrafters' right to one-third of the payment; granted Stein & Day a \$3300 recoupment payment; and awarded costs and attorney fees to New American Library totalling about \$15,000.

A Federal Court of Appeals has affirmed the District Court decision, except with respect to that part of the decision awarding a recoupment payment to Stein & Day; the court, instead, found that the \$3300 amount belonged to Bookcrafters.

Judge Cardamone first determined that although Stein & Day's expectation that "successful launch of

'Confessional' would alleviate its cash flow problems ... may have been careless wishful thinking, it was not willful," for the publisher's failure to pay the final one-third of the amount owed Septembertide was "a far cry" from a total failure to pay.

The court next concluded that Septembertide was an intended beneficiary of the paperback contract between Stein & Day and New American Library. The timing, language and financial obligations created by the hardcover and paperback contracts indicated that Stein & Day intended to use the payments due from New American Library to satisfy Stein & Day's obligation under the hardcover contract with Septembertide. The hardcover contract referred to the paperback contract; Stein & Day used the first New American Library advance installment to satisfy the first two \$125,000 payments due to Septembertide; and, as found by the District Court, Stein & Day had agreed that when the

company's advance was recouped, it would pay twothirds of the paperback proceeds to Septembertide.

Judge Cardamone also found that it was reasonable for Septembertide to believe that New American Library had some knowledge of the fact that Septembertide would benefit from the contract with Stein & Day.

With respect to Bookcrafters' claim that the company obtained a valid security interest in all of the New American Library payments, Judge Cardamone found most significant the fact that Stein & Day assigned to Bookcrafters "all of [its] contract rights." Stein & Day, stated the court, could not assign to Bookcrafters the rights to funds previously transferred to Septembertide; Bookcrafters' security interest thus was subject to Septembertide's third-party interest in two-thirds of the paperback royalties.

The court concluded by affirming the District Court ruling granting costs and attorneys fees, taxed against Septembertide, to New American Library, and by again declaring that Bookcrafters, rather than Stein & Day, was entitled to the \$3300 recoupment payment.

Septembertide Publishing, B.V. v. Stein & Day Inc., 884 F.2d 675 (2d Cir. 1989) [ELR 11:10:8]

Damages are recalculated in fraud and breach of contract action by foreign sublicensee against feature Rim licensor; award of attorneys' fees is remanded for further consideration

After a series of proceedings (see ELR 10:11:13; 8:4:18), a Federal District Court in New York ordered Telewide Systems, Inc. to pay damages for breach of contract to Ostano Commerzanstalt and affiliated parties in the amount of about \$3.6 million, plus about \$2.4

million in prejudgment interest, and additional damages, payable by Bernard L. Schubert, Telewide's president and sole shareholder, of about \$500,000 (including prejudgment interest) for fraud, as well as \$500,000 in punitive damages. The court also entered an award of about \$150,000 in attorneys' fees, jointly and severally against the Telewide parties and their law firm.

Federal Court of Appeals Chief Judge Oakes, after reviewing the factual background of the dispute over the parties' distribution contract for certain feature films in Europe and Africa, found that the District Court erred in its award of benefit of the bargain damages. On the basis of the evidence, Judge Oakes stated that the price of \$136,000 per film "would seem a fair price in relation to most of the twenty-six films involved," and arrived at a preliminary calculation of benefit of the bargain damages of \$3,536,000, as opposed to the District Court's figure of \$3,831,000 for the twenty-six film package.

Judge Oakes then found that a fifteen percent package discount was appropriate, thereby reducing the total damages to the "reasonable" figure of \$3,005,600. After adding a \$45,000 premium for one of the films, and subtracting the net revenues that the Ostano parties managed to earn by marketing a few films, the court set the damage award at \$2,873,100.91, stating that any award beyond these figures would be "speculative." The amount of prejudgment interest would be reduced accordingly.

In turning to Ostano's recovery of out of pocket damages, the court noted that Ostano paid about \$512,000 for the Telewide films, and incurred additional expenses of about \$87,000. After subtracting the gross revenues obtained by Ostano in marketing the films, the net recoverable out of pocket expenses were correctly set by the District Court at \$334,472.66, stated Judge Oakes.

In order to prevent the double recovery of compensatory damages, Judge Oakes set forth detailed specifications for the payment of the damage awards.

Judge Oakes concluded by finding that the District Court did not err in awarding punitive damages on the basis of its finding that Schubert entered the transaction "with the clear and blatant intent to defraud." However, the court remanded for further consideration, along with the recalculation of prejudgment interest, the proportion of Ostano's attorney fees attributable to certain "offensive" conduct on the part of Telewide and its law firm with respect to the presentation of an allegedly fabricated document and meritless defense.

Ostano Commerzanstalt v. Telewide Systems, Inc., 880 F.2d 642 (2d Cir. 1989) [ELR 11:10:9]

Television station's remedies are limited in copyright infringement action based on unauthorized sale of copies of news segment

In a decision issued in December 1988, but only recently published, a Federal District Court in Colorado has rejected the claims of NBC Subsidiary (KCNC-TV) for statutory damages and legal fees in a copyright infringement action brought against Broadcast Information Services, Inc. KCNC claimed that Broadcast Information Services sold an unauthorized videotape copy of a KCNC news segment entitled "Wednesday's Child."

The court concluded that KCNC did not raise a genuine issue of fact as to whether "Wednesday's Child" was published. Judge Arraj pointed out, among other factors, that the television station's certificate of copyright registration for the segment failed to specify the date and nation of first publication, "indicating that the work was not published."

Furthermore, KCNC did not provide evidence or even assert" that the station offered copies of the segment to any group of persons for the purposes of further distribution, public performance, or public display. Accordingly, the court granted partial summary judgment to Broadcast Information Services on KCNC's claim for statutory damages and attorneys fees.

KCNC also sought statutory damages and attorney's fees under section 411(b) of the Copyright Act. But Judge Arraj held that section 411(b) did not apply because "Wednesday's Child" was not simultaneously transmitted and fixed, but was pretaped; the fact that there was a live lead-in did not transform the pretaped segment into a live performance, and extraordinary damages thus were denied.

The court concluded by pointing out that KCNC still might be entitled to other remedies available in infringement actions, such as injunctive relief and actual damages plus any applicable profits not used as a measure of damages.

NBC Subsidiary (KCNC-TV), Inc. v. Broadcast Information Services, Inc., 717 F.Supp. 1449 (D.Colo. 1988) [ELR 11:10:9]

Delaware Supreme Court rules on behalf of Robert Maxwell in action involving control of Macmillan, Inc.

When Mills Acquisition Co. and its affiliates Tendclass Limited and Maxwell Communications Corp. sought control of Macmillan, Inc., Macmillan's board of directors granted an asset option agreement, known as a "lockup," to the investment firm of Kohlberg Kravis Roberts & Co. The Kohlberg investment company was the purported high bidder in an "auction" for control of Macmillan.

A Delaware trial court found that although the conduct of the Macmillan board during the auction was not "evenhanded or neutral," the Maxwell parties were not entitled to an injunction barring the lockup agreement because the misconduct of the Macmillan parties did not mislead Maxwell or deter his companies from submitting a higher bid.

The Delaware Supreme Court, in a ruling announced in November 1988 and in a written opinion issued in May 1989, reversed the trial court's decision. Judge Moore noted that the record before the trial court indicated breaches of the duties of loyalty and care by various corporate fiduciaries which adversely affected the

general interest of the company's stockholders. It was not shown that the directors met the standard of intrinsic fairness; the trial court erred in not applying this standard; and the auction in issue thus was found insupportable under Delaware law.

Judge Moore, after setting forth in detail the activities of Macmillan's board in 1987 and 1988, stated that not only did "self-interested corporate fiduciaries" engage in the "illicit manipulation of a board's deliberative processes," but that the board's "own lack of oversight in structuring and directing the auction afforded management the opportunity to indulge in the misconduct which occurred." Recalling the utmost good faith and "most scrupulous inherent fairness" required of directors in connection with transactions in which they possess a financial, business or other personal interest, the court emphasized that such directors must establish the entire fairness of any such transaction. However, the record before the court disclosed conduct that fail[ed] all basic standards of fairness."

While observing that conducting a corporate auction is a complex matter and that the court did not intend to limit the broad negotiating authority of the directors to achieve the best price available to stockholders, Judge Moore cautioned that any action which might benefit one bidder over another must serve the objective of furthering the interests of the stockholders. The judgment denying Maxwell's motion for a preliminary injunction was reversed accordingly.

Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989) [ELR 11:10:10]

Single showing of adult film does not violate Long Beach zoning ordinance, but cities may regulate theaters exhibiting adult films on a "regular and substantial" basis, rules California Supreme Court

A Long Beach zoning ordinance prohibits the location of "adult entertainment businesses" within 500 feet of residential areas, or 1,000 feet of public school or churches. Jose Ronillo Abogado Lucero, Walnut Properties, Inc. and Jimmie Johnson, the operators of the Lakewood Theater, were charged in separate misdemeanor complaints of unlawfully establishing an adult entertainment business in violation of the ordinance by exhibiting an X-rated movie on a certain date within the proscribed distances. The theater parties argued that the exhibition of a single adult film did not make the Lakewood Theater an adult entertainment business.

The California Supreme Court reviewed the history of Walnut Properties' encounters with the city of Long Beach, and federal and state cases dealing with the constitutionality of adult entertainment zoning. Chief Judge Malcolm M. Lucas concluded that the appropriate standard would allow cities to zone the location of theaters "that show, on a regular basis, films characterized by an emphasis on the 'specified sexual activities' or 'specified anatomical areas' identified in the ordinance, where such films constitute a substantial portion of the films shown or account for a substantial part of the revenues derived from the exhibition of films (hereafter 'the regular and substantial course of conduct' standard)."

Judge Lucas pointed out that the Long Beach ordinance's statement of purpose did not set forth any "significant deleterious effects on the community" which would occur upon the single showing of an adult film. The court rejected a standard set forth in Pringle v. City

of Covina, 115 Cal.App.3d 151 (1981; ELR 2:20:6) which permitted the zoning of adult theaters only if a preponderance of the films shown had as their dominant theme the depiction of the ordinance's enumerated sexual activities. Judge Lucas stated that a preponderance standard would violate the spirit of the United States Supreme Court decisions which recognize a state's legitiinterest in regulating adult entertainment establishments. However, the "regular and substantial course of conduct" standard would enable Long Beach to achieve its asserted purpose of preventing neighborhood blight without allowing the city to use "the power to zone as a pretext for suppressing expression."

The city, accordingly, was not entitled to proceed with its action as pleaded.

Judge Stanley Mosk concurred in the judgment, but disagreed with the court's abandonment of the "preponderance" standard. The "regular and substantial course of conduct" standard would interfere both with maintaining access to protected speech and with the efforts of local governments to regulate the secondary effects of adult businesses, stated Judge Mosk, who described the majority's "incursion" into the legislative realm as being " as unnecessary as it is mischievous." For Judge Mosk, Pringle should not have been interpreted as preventing a city from conducting factual studies and enacting an ordinance containing a more precise definition of "adult motion picture theater." Although expressing some concern that the preponderance test might result in too high a standard, Judge Mosk emphasized that the choice of such a definition was a legislative policy decision, and that the majority erred in announcing a "regular and substantial course of conduct" standard, "of dubious context and unsupported by legislative findings."

Judge Joyce L. Kennard, joined by Judge Allen E. Broussard, also concurred in the conclusion that the

Long Beach ordinance could not properly be interpreted to classify a theater as an "adult motion picture theater" within the meaning of the ordinance solely on the basis of a single showing of a sexually explicit film. However, Judge Kennard noted that courts have upheld local ordinances adopting an alternative to the preponderance standard, and that the majority, in "discarding" the Pringle standard, did not give "adequate deference to the city's legislative prerogative." Furthermore, the majority's proposed standard, in Judge Kennard's view, most likely will generate controversy as to how many films must be shown over what period of time to satisfy the "regular and substantial course of conduct" test. Local legislative bodies would be better equipped than the court to determine, in light of local conditions, how to best identify those theaters which might become a "blight" on the local community and to arrive at a more suitable definition, concluded Judge Kennard.

People v. Superior Court (Lucero), 259 Cal.Rptr. 740, 774 P.2d 769 (Ca. 1989) [ELR 11:10:10]

University of North Carolina must present evidence regarding likelihood of confusion as to source of origin of goods bearing university's marks, but obtains summary judgment on retailers' Sherman Act and First Amendment claims

The University of North Carolina alleged that Charles Helpingstine, the owner of a retail shop in Chapel Hill, engaged in the unauthorized distribution of merchandise bearing the university's name, symbols and insignia. Helpingstine responded that the university parties abandoned their trademark rights by allowing, prior to

instituting a licensing program in 1982, the widespread, uncontrolled use of the marks.

A Federal District Court in North Carolina, in a decision issued in January 1989 but only recently published, first found that the retail parties did not establish abandonment which involves, in part, the loss of all significance as an indication of origin. It was observed that the public would regard the marks in issue as having originated with the university, and that the university never discontinued its use of the marks.

The court next found the record insufficient to grant summary judgment to either party on the issue of the likelihood of confusion as to the source, sponsorship or endorsement of the subject goods. Judge Bullock pointed out that non-competitive goods were involved, and also rejected the position that "intent to capitalize on popularity is sufficient to establish infringement," expressing skepticism that "those individuals who

purchase unlicensed tee-shirts bearing UNC-CH's marks care one way or the other whether the University sponsors or endorses such products or whether the products are officially licensed ... it is equally likely that individuals buy the shirts to show their support for the University." The university thus will be required to show more than simply the identity of the marks in issue in order to establish likelihood of confusion, i.e., by providing evidence that individuals make the critical distinction as to sponsorship or endorsement, or direct evidence of actual confusion.

The retail parties' claim that the university engaged in restraint of trade in violation of state law was rejected on the ground that sovereign immunity protected the university from suit. The court also found that the university parties were sovereign representatives who were acting as the sovereign in instituting the trademark

licensing program, and thus were immune from the retailers' Sherman Act claims.

Judge Bullock concluded by rejecting the retailers' argument that their use of the names and symbols of the university was a constitutionally protected form of non-commercial speech under the First Amendment; the retailers did not establish that their activities involved protected expression.

Board of Governors of the University of North Carolina v. Helpingstine, 714 F.Supp. 167 (M.D.N.C. 1989) [ELR 11:10:11]

United States Supreme Court lets stand Vermont decision prohibiting city from regulating cable television company basic service rates

In November 1988, the Supreme Court of Vermont affirmed a ruling denying a motion by the city of Burlington to enjoin Mountain Cable Company from increasing its basic cable television service rates prior to December 29, 1987. The United States Supreme Court, without comment, has let stand the Vermont court's ruling.

Burlington and Mountain Cable entered a contract in June 1985 concerning the provision of cable television service to the city's residents. Mountain eventually sought to raise its rates as of January 1, 1987; the city argued that the company was not entitled to a rate increase until December 29, 1987.

The trial court found, after raising the issue sua sponte, that the Cable Communications Policy Act of 1984 preempted the city's attempt to regulate rates.

Vermont Supreme Court Chief Judge Allen stated that the city's attempt to enforce the rate regulation provision of the contract with Mountain Cable was an attempt to regulate and was prohibited by the Act. The contract with Mountain Cable was an authorization for the construction and operation of a cable system; the city was a franchising authority subject to the provisions of the Act; and the contract's rate regulation provisions were preempted by the Act.

City of Burlington v. Mountain Cable Company, 559 A.2d 153 (Vt. 1988) [ELR 11:10:12]

New York Court of Appeals upholds trainer's suspension arising from horse's positive post-race drug test

In December 1984, post-race testing performed upon the horse Ryan's Choice revealed the presence of the drug prednisolone, the administration of which is prohibited within 48 hours of race time. The New York State Racing & Wagering Board notified trainer Gary Mosher that his license to participate in racing was suspended for 60 days.

At a subsequent hearing, Mosher, along with the horse's veterinarian and groom, claimed that the last administration of prednisolone occurred about 55 hours before the race. The hearing officer, accepting the opinion of the Board's expert witness, determined that Mosher had violated the Board's rules; the Board then adopted the hearing officer's report and confirmed the original 60 day suspension.

When Mosher challenged his suspension, a New York appellate court annulled the Board's determination on the ground that Mosher had presented substantial evidence establishing that the drug was administered more than 48 hours prior to the race.

The New York Court of Appeals has reversed the appellate court's decision, stating that the statute known as the "trainer's responsibility rule" places strict responsibility on a trainer "to ensure that a horse in his or her care and custody does not receive any drug or other restricted substance within specified periods before a race." The evidence presented by Mosher did not rebut the state's substantial evidence of drug administration within the proscribed period, stated the court, or the presumption of the trainer's responsibility for that infraction. Mosher offered no proof that the horse was not in his care, control or custody during the critical period.

Mosher v. New York State Racing and Wagering Board, 543 N.Y.S.2d (N.Y. 1989) [ELR 11:10:12]

Thoroughbred stallion syndication agreement's ban on sale of shares or nominations at auction does not violate antitrust laws

The Shareef Dancer syndication agreement was composed of forty shares (initially valued at \$1 million each) of undivided ownership interests. Each share entitled a member of the syndicate to breed a mare with Shareef Dancer, a thoroughbred stallion, every season over the stallion's life. The agreement allowed members to sell either shares or breeding rights for a single season (also known as a "nomination"), subject to the provision that "At no time shall any share or nomination be sold at auction."

Robert D. Stratmore purchased, for \$102,000, a Shareef Dancer nomination for the 1986 season. When Stratmore notified the syndicate of his plan to auction the nomination, he was informed that this violated the

syndication agreement. Stratmore eventually sold the nomination for \$90,000.

In his lawsuit against the syndicate, Stratmore alleged, among other claims, the violation of section 1 of the Sherman Act. A Federal District Court granted summary judgment to the syndicate, and a Federal Court of Appeals has agreed that Stratmore did not present a cause of action for price fixing or price stabilization, and that the "no auction" clause did not have an unlawful purpose or anticompetitive effect under a rule of reason analysis. It was noted that Stratmore failed to show injury even under a per se analysis. And the ban on auction sales served the "important purpose" of insuring that the syndicate had control over the quality of mares chosen to breed with Shareef Dancer.

The District Court's decision to grant summary judgment to the syndicate on Stratmore's Kentucky law tort claims of interference with contractual relations and

interference with prospective advantage also was affirmed.

Stratmore v. Goodbody, 866 F.2d 189 (6th Cir. 1989) [ELR 11:10:13]

"G.I. Joe" action figures are properly classified as "dolls" by United States Customs Service

Hasbro Industries' "G.I. Joe Action Figures" were properly classified by the United States Customs Service as "dolls," a Federal Court of Appeals has ruled.

Judge Paul R. Michel, in affirming the decision of the Court of International Trade, set forth the court's description of the three and 1/2 inch figure, noting, in particular, the lifelike appearance of the plastic soldiers and their "impressive range of movement." Furthermore,

Hasbro packaged each figure singly and provided specific biographical information and specialized accessories for each soldier.

Hasbro argued that the toy soldiers, which the company imported from Hong Kong during 1982 and 1983, were not subject to an import tariff (a twelve percent duty, amounting to millions of dollars, according to a news report) because they were within the classification: "Toy figures of animate objects (except dolls): Not having a spring mechanism: Not stuffed: Other"

The Court of International Trade had relied on a general dictionary definition of the word "doll" as "a representation of a human being used as a child's plaything." Although cautioning that the definition was not an "allinclusive" definition of the word "doll," Judge Michel found it suitable in the instant case and concluded that the classification of the G.I.Joe figure was not clearly erroneous.

Hasbro's claim that the long established practice of the Customs Service was to exclude traditional toy soldiers from the tariff provision for dolls also was rejected; the very personable G.I. Joe figures were not comparable to the "immobile faceless toy soldiers of yesteryear that were sold in groups of a dozen or so in bags," and, again, were within the common meaning of the term "doll."

Hasbro Industries, Inc. v. United States, 879 F.2d 838 (Fed.Cir. 1989) [ELR 11:10:13]

Three antique violins are not depreciable property; taxpayers' claims for deductions and investment tax credit is denied When musician Louis Browning and his wife claimed a deduction on tax returns filed in the early 1980s for the depreciation of three antique violins, including a Stradivarius, the couple stated that the instruments had remaining useful lives of twelve years. The Brownings also claimed a tax investment credit on a Gabrielli violin, and a deduction for expenses incurred in maintaining a practice room in their home.

The Commissioner of Internal Revenue disallowed all of the deductions. The Tax Court upheld the Commissioner's decision and a Federal Court of Appeals has agreed with the Tax Court that the antique violins were not depreciable property and that the Brownings did not regularly use the music practice room as their principal place of business.

Federal Court of Appeals Judge Fernandez noted that the Brownings never established an exact salvage value for any of the violins, and that the Tax Court did not err in finding that the couple did not present sufficient evidence to refute the Commissioner's ruling that the violins actually would appreciate in value over time rather than depreciate.

The court also was not persuaded that the violins constituted "recreational assets" subject to a useful life of twelve years under regulatory guidelines. The violins "have a value independent of their tonal qualities," noted Judge Fernandez, and that value may extend their useful lives, making the violins, which already "have withstood the ravages of time and use for well over two centuries," more like pieces of art rather than items which would be worthless in twelve years.

Browning v. Commissioner of Internal Revenue, 890 F.2d 1084 (9th Cir. 1989) [ELR 11:10:14]

United States Supreme Court lets stand award of \$5.5 million in attorneys fees to United States Football League in antitrust action against National Football League

The United States Supreme Court has let stand a Federal Court of Appeals decision ordering the National Football League to pay \$5.5 million in attorneys fees to the defunct United States Football League.

In upholding the Federal District Court decision (ELR 11:5:18) setting the attorneys fee award, Judge Thomas J. Meskill briefly reviewed the background of the USFL's antitrust action against the NFL (see ELR 10:3:9). After a lengthy trial, a jury found that the NFL had willfully acquired or maintained monopoly power in the United States major league professional football market. The jury further found that the NFL's actual monopolization of the major league professional football

market had caused injury to the USFL's business or property in violation of section 2 of the Sherman Act. The jury awarded the USFL damages of \$1.00, trebled by the court to \$3.00.

Judge Meskill noted that upon a jury finding that the USFL was injured, the award of attorneys fees to the USFL was compulsory under the Clayton Act. The fact that only nominal damages were awarded to the USFL did not affect the league's right to attorneys fees.

The court disagreed with the NFL's assertion that because the USFL was unsuccessful on many of its claims, the USFL was not the prevailing party and thus was not entitled to an award of attorneys fees. Judge Meskill pointed out that section 4 of the Clayton Act does not require that a party bringing an antitrust action be a "prevailing party" to recover attorneys fees.

In all, Judge Meskill concluded that the District Court acted within its discretion in reducing the amount of the award and in determining the reasonableness of the attorneys fees.

United States Football League v. National Football League, 887 F.2d 408 (2d Cir. 1989) [ELR 11:10:14]

United States Supreme Court lets stand ruling upholding Federal Communications Commission's decision to repeal fairness doctrine

In February 1989, a Federal Court of Appeals held that the Federal Communications Commission's determination that the fairness doctrine no longer served the public interest was neither arbitrary nor capricious. The United States Supreme Court has declined to review the decision of the Court of Appeals. The lengthy proceeding originated in 1982 when television station WTVH of Syracuse, New York, licensed to Meredith Corporation, broadcast several advertisements sponsored by the Energy Association of New York. A complaint to the Federal Communications Commission by the Syracuse Peace Council prompted a series of rulings, as set forth at ELR 9:1:16.

In agreeing to uphold the Commission's decision, Federal Court of Appeals Judge Stephen F. Williams pointed out that the court did not reach any constitutional issues. Although the Commission "somewhat entangled its public interest and constitutional findings," stated Judge Williams, the public interest determination was an independent basis for the Commission's decision and was supported by the record.

In a decision concurring in part and dissenting in part, Chief Judge Patricia M. Wald stated that she would not have sustained the Commission's decision to eliminate that part of the fairness doctrine requiring broadcasters to "provide coverage of vitally important controversial issues of interest in the community served by the licensees."

Judge Kenneth W. Staff concurred only in the court's judgment, and would have addressed the "most profound" First Amendment issues raised by the case. It appeared to Judge Staff that the Commission's policy judgment was "wholly driven" by its constitutional reasoning and conclusions, and that the court therefore was obligated to analyze the case in those terms. After conducting such an analysis, Judge Starr declared that the Commission's order was based on reasonable factual findings and correctly set forth applicable constitutional principles.

Syracuse Peace Council v. Federal Communications Commission, 867 F.2d 654 (D.C.Cir. 1989) [ELR 11:10:14]

Phil Spector establishes diversity jurisdiction in action against songwriters Lieber and Stoller over rights to 1960s songs

In a dispute concerning the rights to about twenty-five classic songs written in the 1960s, including "Chapel of Love" and "Da Doo Ron Ron," Mother Bertha Music, Inc., a corporation owned by producer Phil Spector sued Trio Music Co., owned by songwriters Jerry Leiber and Mike Stoller. Mother Bertha claimed that Trio withheld royalty payments due under a 1972 co-publishing contract and sought a declaratory judgment terminating the 1972 contract as well as actual and punitive damages.

Federal District Court Judge Walker first reviewed the history of Mother Bertha Music. Spector formed the corporation in 1963, but, as of May 1969, dissolved Mother Bertha as a New York corporation. The corporation's assets became vested in Spector, a California citizen, and in 1970, Spector conveyed his rights to the assets to a trust. However, as described by Judge Walker, during the 1970s, Spector continued to do business occasionally under the name of Mother Bertha Music.

In 1972, Trio, Spector and an entity known as Mother Bertha Music, Inc. agreed that certain disputed copyrights would be registered in the joint names of Trio and Mother Bertha; that Trio would administer the copyrights; and that Trio would pay royalties to Mother Bertha.

In 1980, the California trust expired; Spector transferred his rights to a successor short-term trust. In 1988,

Spector formed Mother Bertha Music, Inc., a California corporation and assigned his rights to various works, including the twenty-five songs covered by the 1972 contract, to Mother Bertha.

Trio responded to Mother Bertha's 1988 lawsuit by claiming that the California corporation was created solely to create federal diversity jurisdiction and that the corporation had no right to sue since it was not a party, third party beneficiary, or even successor-in-interest to a party to the 1972 contract.

Judge Walker found that Spector incorporated Mother Bertha in California for business reasons other than the creation of diversity jurisdiction. If it is shown during discovery that the California corporation was created solely to achieve diversity jurisdiction, the court declared that it would dismiss the corporation's claim for lack of subject matter jurisdiction. Trio's argument that Mother Bertha continued as a de facto New York corporation since the 1969 dissolution, and that this corporation was a party to the 1972 contract was not supported by the evidence, ruled Judge Walker, who concluded that sanctions under Rule 11 were unwarranted against either party.

Mother Bertha Music, Inc. v. Trio Music Co., Inc., 717 F.Supp. 157 (S.D.N.Y. 1989) [ELR 11:10:15]

University of Iowa and purchaser of broadcast rights to intercollegiate athletic events are not required to disclose bid proposals by local stations

The Supreme Court of Iowa has upheld a trial court's decision rejecting KMEG Television's attempt to compel the disclosure of the bids presented by competing

television stations for a one year contract to telecast University of Iowa athletic events.

The university had hired Rasmussen Communications Management Corporation to provide marketing and broadcast production services for the school's intercollegiate athletic program during the 1987-1988 academic year. Rasmussen agreed, in part, to establish a network of stations, known as the Hawkeye Sports Network, to broadcast those football and basetball games not televised by other entities. When KMEG's bid was rejected, the company requested the disclosure of all bid documents; University officials and Rasmussen denied the request.

KMEG, citing Iowa's examination of public records statute, brought suit to compel the disclosure of the documents. The trial court concluded that the bids at issue were neither public records nor in the control of a public body.

In agreeing with the trial court, Judge Neuman noted that the bid proposals were not in the possession of the university; that Rasmussen's private negotiations with its " subcontractors" were not necessarily a proper subject of public scrutiny; and that the marketing and production of intercollegiate sports television broadcasts was an undertaking not "reasonable embraced by the statutory duty of the University. Nor does the record suggest that it is a function capable of performance by the school." Thus, KMEG's claim that the university delegated its duties or functions to a private company in order to avoid the disclosure of what would otherwise be a public record also was rejected.

KMEG Television, Inc. v. Iowa State Board of Regents, 440 N.W. 2nd 382 (Iowa 1989) [ELR 11:10:15]

Federal District Court jury rejects former Indian prime minister's libel action against journalist Seymour Hersh

A Federal District Court jury has found that journalist Seymour Hersh did not libel former Indian prime minister Morarji Desai.

Desai, who was India's prime minister from 1977 to 1979, sought \$3.5 million in damages, claiming that he was libeled by a statement in Hersh's 1983 book "The Price of Power: Kissinger in the Nixon White House." Hersh asserted, apparently on the basis of information provided by several government sources, that Desai, while an official in the government of India, was a paid CIA informant who was considered a valuable "asset" to the United States during the Johnson and Nixon administrations.

In a ruling issued in July 1989, but only recently published, the court, upon determining that Desai was a public figure, dismissed a claim for negligent defamation.

Judge Norgle then concluded that for purposes of lawsuits brought in United States courts, First Amendment protections do not necessarily apply to all extraterritorial publications of allegedly offending material. If Hersh had published his book only in India and had discussed activities of Desai which were not of significant public concern in the United States, the need for the protection of First Amendment interests would have been greatly lessened, "if not entirely absent," stated Judge Norgle, and foreign law therefore could be applied in the United States without offending the Constitution. However, the subject of Hersh's book presented a "compelling illustration," for the court of great public concern value.

The question of whether the challenged speech was of public concern thus would serve as the threshold inquiry in determining whether First Amendment protections apply extraterritorially, declared the court. And, as a general rule, whether the First Amendment applies to extraterritorial publication where the speech is a matter of public concern would depend upon whether a party intentionally published the speech in the foreign country "in a manner sufficient to indicate abandonment of First Amendment protection."

Judge Norgle, in a supplemental opinion, granted the parties time to submit affidavits concerning the issue of Hersh's intent to abandon his First Amendment rights in connection with the publication in India of "The Price of Power."

Desai v. Hersh, 719 F.Supp. 670 (N.D.Ill. 1989) [ELR 11:10:16]

Metromedia's withdrawal of right of first refusal offer is upheld

Metromedia, Inc., in the course of negotiating the sale of certain assets to Southwestern Bell Corporation, notified LIN Broadcasting of the proposed sale. Metromedia and LIN had formed two partnerships to provide cellular telephone service to New York City and Philadelphia; the companies agreed that they each would have a right of first refusal to buy the other party's interest before the other party could sell to a third party. After complying with the first refusal clauses, Metromedia decided to keep its interests in the cellular telephone businesses. However, when Metromedia notified LIN that the first refusal offers no longer were valid, LIN responded by advising Metromedia of its intent to exercise its first refusal rights under the New York contract and to proceed with the appraisal process set forth in the Philadelphia contract.

LIN brought an action for specific performance to compel Metromedia to sell to LIN its New York interests, and a proceeding to expedite the appraisal of Metromedia's Philadelphia interests.

A trial court decision denying Metromedia's motions to dismiss the actions was reversed on the ground that neither the New York nor Philadelphia contracts contained a provision conferring an irrevocable right to compel a sale, and that, in the absence of such language there was, as stated by the appellate court, "nothing to prohibit a partner or shareholder from in good faith changing its mind about selling at any time prior to the invocation of the right of first refusal."

New York Court of Appeals Judge Stewart F. Hancock Jr., in agreeing with the appellate court, noted that a

right of first refusal, as distinguished from an option, "is a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency: the owner's decision to sell to a third party."

The court rejected LIN's argument that a first refusal offer, once made, is irrevocable for the period specified in the first refusal clause. Because Metromedia's first refusal offers were withdrawn before acceptance, the appellate court properly dismissed LIN's complaint, concluded Judge Hancock.

LIN Broadcasting Corporation v. Metromedia, Inc., 544 N.Y.S.2d 316 (N.Y. 1989) [ELR 11:10:16]

Briefly Noted:

Libel/Jackie Mason.

A New York trial court judge has denied Jackie Mason's motion for reargument in the comedian's libel action against real estate developer Abe Hirschfeld. When Mason and his manager, Jyll Rosenfeld, challenged Hirschfeld's published comments concerning the comedian's career, Judge Harold Baer Jr. granted Hirschfeld's motion for summary judgment (ELR 11:2:15). In considering the motion for reargument, Judge Baer found that Mason did not show that any factual error or misunderstanding or misapplication of law would provide a basis for granting the motion.

Mason v. Hirschfeld, New York Law Journal, p. 24, col. 2 (N.Y. Cnty., Jan. 25, 1990) [ELR 11:10:17]

Contracts/Photographs.

In December 1982, photographer Peter Paz delivered to the Singer Company the undeveloped rolls of film he had taken at the company's Far East facilities. When Singer subsequently refused to return the negatives to Paz, the photographer sued the company claiming a violation of New York's Arts and Cultural Affairs Law and conversion. A trial court granted summary judgment to Singer, finding that the statute did not apply and that the claim for conversion was barred by the statute of limitations. In dismissing the complaint, the court granted Paz leave to replead an action for breach of contract. A New York appellate court has upheld the trial court's decision. It was noted that the written contract between the parties did not assign title to the negatives. Paz, upon repleading a cause of action for breach of contract, would have the burden of establishing that he was entitled to

possession of the negatives by operation of law or "by virtue of the implicit understanding of the parties' with respect to the custom and usage of the trade."

Paz v. Singer Company, 542 N.Y.S.2d 10 (N.Y.App. 1989) [ELR 11:10:17]

Copyright Infringement/Music.

In a decision issued in December 1988 but only recently published, a Federal District Court in North Carolina has granted summary judgment to Jobete Music, Inc. and several other music publishers and songwriters in a copyright infringement action against Media Broadcasting Corporation. Media Broadcasting operated radio station WAAA in Winston-Salem; the sole shareholder of Media was Evans Broadcasting, and Mutter D. Evans

was the president and sole shareholder of Evans Broadcasting, as well as WAAA's president, owner, and general manager. The court found that the elements of copyright infringement were established as a matter of law; that Evans had both the right and the ability to supervise the activities of the station and also had a direct financial interest in the station's operations; and that Evans thus was jointly and severally liable for the infringing activity. Evans Broadcasting also was held jointly and severally liable.

The court granted the Jobete parties a permanent injunction prohibiting the Evans parties from continuing to infringe the copyrighted musical works in issue. Upon finding that the conduct of the Evans parties was willful, the court determined that an award of \$2,500 per infringement, for a total of \$20,000 would be sufficient to serve as a deterrent to future infringing conduct. Costs

and fees totalling about \$2400 also were awarded to the Jobete parties.

Jobete Music Co. v. Media Broadcasting Corporation, 713 F.Supp. 174 (M.D.N.C. 1988) [ELR 11:10:17]

Cable Television.

A Federal District Court in Florida has granted a cable television operator's emergency motion for preliminary injunctive relief which would allow the cable company access to a real estate development at the time electrical and telephone facilities were being installed. In a decision issued in September 1988, but only recently published, the court found that Centel Cable Television Company of Florida, the holder of a non-exclusive franchise to provide cable television service to the town of

Jupiter in Palm Beach County, was entitled to access to the public rights-of-way and express easements within the development in order to install its cable system. The court, noting that there was no evidence of scheduling, safety or insurance problems, declared that it appeared that the denial of access was "an attempt to prevent Centel from temporarily competing with Jupiter Cablevision," a company controlled by the property developers. The court further observed that since all utilities in the development were underground, delaying access would involve additional expense to Centel and inconvenience to the homeowners. Requiring Centel to execute a right-of-entry agreement as a condition to access violated section 621 of the Cable Communications Policy Act of 1984, stated the court, and the developers also improperly granted access to one cable operator while denying it to another. In all, Centel established that the company would suffer irreparable harm, demonstrated the likelihood that it would prevail on the merits, and, having posted a performance bond, was entitled to access to install its cable system using public rights-of-way and easements dedicated for compatible uses.

Centel Cable Television Company of Florida v. Burg & Divosta Corporation, 712 F.Supp. 176 (S.D.Fla. 1988) [ELR 11:10:18]

Art/Andy Warhol Works.

A New York trial court has declined to issue an order of seizure sought by an art collector who claimed that certain Andy Warhol paintings in the possession of three individuals, identified only as Kahn, Brassner and Pearlman, were stolen. In 1977, the collector, identified

only as Weisman, had commissioned Warhol to prepare a series of acrylic portraits of prominent athletes. In 1987, Weisman discovered that some of the portraits he had believed were in storage had been stolen.

The court observed that many questions were raised concerning the provenance of the paintings and declined to conclude that the collector's right to possession was clear and that he probably would succeed on the merits. The circumstances of the alleged disappearance of the paintings from storage was "shrouded in mystery," stated Judge Greenfield. Furthermore, although Warhol allegedly had agreed to produce a limited number of portraits, the artist may have made extra copies; good title to such works could have been passed on by Warhol, even if the copies were made in violation of the artist's contract with Weisman, noted the court. Although denying the motion for an order of seizure, the court continued that part of the temporary restraining order enjoining Kahn, Brassner and Pearlman from transferring, or otherwise disposing of the portraits in issue.

Weisman v. Kahn, New York Law Journal, p.21, col.5 (N.Y.Cnty., Nov. 28, 1989) [ELR 11:10:18]

Football Stadium Seat Agreement.

A Florida appellate court has affirmed a decision granting declaratory relief sought by Miami Dolphin season ticket holders for tickets which were not used when a scheduled game was played with replacement players during the 1987 National Football League Players Union strike. The trial court's decree properly provided, in part, that the ticket holders would be entitled to a full, rather than partial, credit in the amount of \$80 per seat

per ticket to be applied toward the next year's payment under their ten year club seat license agreement.

Miami Dolphins, Ltd. v. Genden & Bach, 545 S.2d 294 (Fla.App. 1989) [ELR 11:10:18]

Student Athlete Eligibility.

In a decision issued in July 1988, but not published until late 1989, a Federal District Court in Ohio upheld the constitutionality of the Ohio High School Athletic Association's eligibility regulations for students participating in interscholastic soccer. The court, among other findings, concluded that the student-athletes did not have a constitutionally protected right to participate in interscholastic athletics, or to associate with others to

participate in independent spring soccer and out-ofseason instruction.

Burrows v. Ohio High School Athletic Association, 712 F. Supp. 620 (S.D. Ohio 1988) [ELR 11:10:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Barris Industries, Inc. v. Worldvision Enterprises, Inc., 875 F. 2d 1446 (11:6:15); Hal Roach Studios, Inc. v. Richard Feiner and Company, 883 F.2d 1429 (11:6:15); United States v. Syufy Enterprises, 712 F. Supp. 1386 (11:1:13), Mercury Bay Boating Club Inc. v. San Diego Yacht Club, 545 N.Y.S. 2d 693 (11:6:19); Nurmi v. Peterson, 10 USPQ 2d 1775

(11:2:10); Paramount Pictures Corporation v. Video Broadcasting Systems, Inc., 724 F. Supp. 808 (11:8:8).

The California Supreme Court has denied a petition for review in the case of Robert Cortes Productions, Inc. v. Sandollar Productions, Inc. (ELR 11:6:14), and has directed the Reporter of Decisions not to publish in the Official Appellate Reports the Court of Appeal opinion which appears at 262 Cal. Rptr. 478.

The California Supreme Court has transferred the case of Welch v. Metro-Goldwyn-Mayer (10:12:7) to the Court of Appeal, with directions to vacate its opinion and to reconsider the matter in light of Foley v. Interactive Data Corporation, 47 Cal. 3d 654 and Newman v. Emerson Radio Corporation, 48 Cal. 3d 973.

The United States Supreme Court has declined to review the following cases: Nelson v. PRN Productions, Inc. (11:6:21), dismissing a copyright infringement action against Prince involving the song "U Got the Look;"

Charles Woods Television Corp. v. Capital Cities/ABC, Inc. (11:7:19), overturning a jury award of \$3.5 million to a television station owner in connection with the termination of an affiliation agreement; and Dworkin v. Hustler Magazine, Inc. (11:7:15), dismissing an antipornography activist's libel claim against the magazine.

The Board of the Writers Guild of America, according to news reports, will not appeal a National Labor Relations Board ruling that ordered the Guild to change certain provisions in its constitution. The Board apparently acted in response to an Administrative Law Judge's recommendation (ELR 11:2:16) with respect to the Guild's restrictions on members who resign during a strike; several Guild members had challenged the restrictions.

A District Court judge in Toronto has upheld Dino Ciccarelli's conviction (ELR 10:5:19) for assault against Toronto Maple Leaf player Luke Richardson. Ciccarelli, a player for the Minnesota North Stars, was sentenced

to one day in jail and fined \$1,000 for using his hockey stick in an on-ice attack against Richardson during a National Hockey League game on January 6, 1988. Richardson was wearing a helmet and was not injured. [ELR 11:10:19]

IN THE NEWS

Adam West loses claims involving advertiser's use of another actor to portray "Batman" in television commercial

A Los Angeles trial court judge has rejected actor Adam West's claim against a group of advertising agencies alleging invasion of privacy, unfair competition and the unauthorized use of an endorsement. West, who portrayed Batman in the 1960s network television series, alleged that Ian Leech and Associates of North Hollywood, along with the agencies of Ingalls, Quinn and Johnson of Boston, and BBDO New York, produced a television commercial in which an actor impersonated West's portrayal of the character by copying West's mannerisms, voice inflection and style.

The court, according to news reports, stated (there has been no written ruling) that the agencies obtained permission from DC Comics to use the character in the commercial; that West did not create the character; and that West, in a 1965 contract with the producer of the television series, gave up all rights to his portrayal of Batman. [Mar. 1990] [ELR 11:10:20]

Actor Lloyd Bridges settles lawsuit alleging misrepresentation of "investment products"

A Federal Bankruptcy Court in Illinois has approved the settlement of claims brought by investors in A.J. Obie & Associates and Diamond Mortgage Corp. alleging that actor Lloyd Bridges misrepresented the companies' "investment products." Bridges appeared in television commercials for Obie. The companies declared bankruptcy in 1986 and executives of the companies were sentenced to prison in Michigan in 1988, according to news reports, after pleading either guilty or no contest to fraud charges.

The terms of the settlement have not been made public, but Bridges has denied that he agreed to assume any financial liability. [Mar. 1990] [ELR 11:10:20]

Writers Guild and Directors Guild approve "creative rights understanding"

The Boards of Directors of the Directors Guild of America and the Writers Guild of America have approved a "creative rights understanding" designed to promote cooperation between the organizations on this issue.

The guilds agreed to prepare guidelines setting forth the appropriate roles for directors and writers in film and television; to refrain from making collective bargaining proposals in the area of creative rights, which proposals might contravene the other's agreements or interfere with the authority of the writer or director in the creative process; and to share each other's collective bargaining proposals before submitting the proposals to production companies. [Mar. 1990] [ELR 11:10:20]

Musician Don Dokken may not use the name "Dokken" on solo projects, rules Los Angeles trial court

Musician Don Dokken may not use his last name or the name "Dokken 11" in connection with his solo performances or future recordings, a trial court judge in Los Angeles has ruled.

Three former members of the now-defunct heavy metal rock group Dokken obtained a preliminary injunction on the basis of their claim that the band had entered a contract prohibiting any of the band members from using the band name if Dokken left the group. Don Dokken was preparing to release an album on Geffen Records under the name Dokken II. [Mar. 1990] [ELR 11:10:20]

Broadcaster obtains jury award of almost \$700,000 in defamation and invasion of privacy action against "shock radio" disc jockeys

A jury in Pittsburgh has awarded broadcaster Liz Randolph damages totalling almost \$700,000 in a defamation and invasion of privacy action against two "shock radio" disc jockeys. Randolph claimed that Jim Quinn and Donald Jefferson of WBZZ-FM referred to her in risque jokes which implied that Randolph, the station's news director, was promiscuous and mentally unstable.

According to news reports, the jury ordered Quinn and Jefferson and EZ Communications, the owner of the station, to pay Randolph about \$260,000. Randolph was awarded an additional \$390,000, to be paid by the disc jockeys, for infliction of emotional distress, as well as about \$30,000 for medical bills and \$13,500 for lost wages. [Mar. 1990] [ELR 11:10:21]

HandMade Films' contract claims against the Cannon Group are referred to English courts

A Los Angeles trial court has dismissed a lawsuit brought by HandMade Films against the Cannon Group. Pathe Communications, which acquired the Cannon Group, agreed to honor any judgment rendered in the matter by courts in England.

The dispute between HandMade and Cannon involved advances and guarantees allegedly due from Cannon under a contract for home video rights for several films.

The London High Court, as reported at ELR 10:9:19, dismissed HandMade's contract claims. However, in July 1989, the court granted HandMade an injunction freezing the United States assets of Cannon Screen Entertainment, an English subsidiary of Pathe.

According to news reports, Handmade has claimed that Cannon's theaters in the United Kingdom have refused to play the HandMade films in issue pending the resolution of the dispute concerning video rights.

HandMade will be allowed to proceed with its defamation claim against Pathe Communications, which is based in Los Angeles, and Yoram Globus, copresident of Pathe, ruled Los Angeles Superior Court Judge Dion Morrow. [Mar. 1990] [ELR 11:10:21]

Chicago jury awards damages to youth injured by foul ball during Chicago Cubs game

A Chicago trial court jury has ordered the Chicago Cubs to pay \$67,500 to Delbert Yates, Jr., who was ten years old when he was hit in the eye by a foul ball hit by former Cubs player Leon Durham during a game against

the Atlanta Braves. Yates was seated behind home plate at Wrigley Field, about twenty-five rows above the playing field, when the foul ball struck the left side of his face and injured his eye socket. [Mar. 1990] [ELR 11:10:21]

Record companies receive damage awards in several actions against parallel importers

The Recording Industry Association of America has announced that Coltrade International, Inc. has agreed to pay a total of \$200,000 to BMG Music and CBS Records to settle a lawsuit alleging that Coltrade engaged in the unauthorized importation and distribution of Hispanic records and cassettes.

Coltrade also agreed to stop its "parallel imports," i.e., importing and distributing records that are lawfully

manufactured outside the United States, but imported into the country without the authorization of the party who owns the United States copyrights or exclusive distribution rights.

In a separate proceeding in Los Angeles involving a copyright infringement claim, a Federal District Court has ordered La Feria del Disco and Edmundo Perez to pay damages of about \$170,000 to A & M Records, BMG Music and CBS Records.

The RIAA also has announced that police in Grand Prairie, Texas made the first seizures of counterfeit audiocassettes under a new state law providing that the piracy of legitimate sound recordings is a felony. The police seized, among other items, over 20,000 allegedly counterfeit audio tapes. [Mar. 1990] [ELR 11:10:21]

DEPARTMENTS

In the Law Reviews:

Cardozo Arts and Entertainment Law Journal has published Volume 8, Number 1 with a Symposium on the Fundamentals of International Copyright: The Impact of Berne and other articles as follows:

The Framework of International Copyright by Lionel S. Sobel, 8 Cardozo Arts & Entertainment Law Journal 1 (1989)

The Impact of Berne on United States Copyright Law by David Nimmer, 8 Cardozo Arts & Entertainment Law Journal 27 (1989) A Garland of Reflections on Three International Copyright Topics by Peter Jaszi, 8 Cardozo Arts & Entertainment Law Journal 47 (1989)

Symposium Appendix: Berne Convention Implementation Act, 8 Cardozo Arts & Entertainment Law Journal 73 (1989)

Athlete Agent Regulation: Proposed Legislative Revisions and the Need for Reforms Beyond Legislation by Kenneth L. Shropshire, 8 Cardozo Arts & Entertainment Law Journal 85 (1989)

The Full Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric by Irwin R. Kramer, 8 Cardozo Arts & Entertainment Law Journal 113 (1989)

No Film at 11: The Inadequacy of Legal Protection and Relief for Sexually Harassed Broadcast Journalism by Anne P. Pomerantz, 8 Cardozo Arts & Entertainment Law Journal 137 (1989)

The Conflict Between Fair Use and the Lanham Act on the Second Circuit by Elana C. Jacobson, 8 Cardozo Arts & Entertainment Law Journal 167 (1989)

Whose Voice Is It Anyway?: Midler v. Ford Motor Company by Elaine Windholz, 8 Cardozo Arts & Entertainment Law Journal 201 (1989)

"Do You Want to Dance" Around the Law? Learn the Latest Steps from the Ninth Circuit in Midler v. Ford Motor Company by Kimberly Lehman Turner, 23 Loyola of Los Angeles Law Review 601 (1990)

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Columbia-VLA Journal of Law & the Arts Volume 13, Number 3 has been jointly published by Columbia University School of Law and Volunteer Lawyers for the Arts with the following articles:

State "Moral Rights" Statutes: An Analysis and Critique by Edward J. Damich, 13 Columbia-VLA Journal of Law & the Arts 291 (1989)

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China's Protection of Foreign Books, Video Tapes and Sound Recordings by Yuanyuan Shen, 12 Loyola of Los Angeles International and Comparative Law Journal 78 (1989)

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Competitive Necessity and Pricing in Telecommunications Regulation by Alexander C. Larson, Calvin S. Monson & Patricia J. Nobles, 42 Federal Communications Law Journal 1 (1989)

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Reregulating Children's TV by Patricia Aufderheide, 42 Federal Communications Law Journal 87 (1989)

The Regulation of Spillover Transmissions from Direct Broadcast Satellites in Europe by Steven Ruth, 42 Federal Communications Law Journal 107 (1989)

Remedies for Copyright Infringement: Respecting the First Amendment by Tiffany D. Trunko, 89 Columbia Law Review 1940 (1989)

Regulating Violent Pornography by Deana Pollard, 43 Vanderbilt Law Review 125 (1990)

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International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Accession by Japan, Communications by Norway, 23 Copyright Bulletin 6 (1989)

Sport and Restraint of Trade by S and L Owen-Conway, 5 Australian Bar Review 208 (1989)

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Scenic and Costume Designs, 40 Syracuse Law Review 1089 (1989)

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[ELR 11:10:23]